

Mastergradsoppgave

JUS399



## Consequences under International Humanitarian Law for Civilians Who Take a Direct Part in Hostilities

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## Abbreviations

API	Additional Protocol to the Geneva Conventions (Protocol I)
APII	Additional Protocol to the Geneva Conventions (Protocol II)
APs	The Additional Protocols to the Geneva Conventions
Celebrici Case	The Prosecutor v. Delalic, Mucic, Delic and Landzo
CIL Study	The ICRC Study on Customary International Humanitarian Law
CJIL	Chicago Journal of International Law
DPH	Direct Participation in Hostilities
ECHR	The European Court of Human Rights
GC III	Convention (III) relative to the Treatment of Prisoners of War
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War
GCs	The Geneva Conventions
Hague Regulations	Regulations Concerning the Laws and Customs of War on Land annexed to Hague Convention IV
HNSJ	Harvard National Security Journal
HPCR	Program on Humanitarian Policy and Conflict Research at Harvard University
IAC	International Armed Conflict
ICJ	The International Court of Justice
ICTY	International Criminal Court for the Former Yugoslavia
ICRC	The international Committee for the Red Cross
IED	Improvised Explosive Device
IHL	International Humanitarian Law
Interpretive Guidance	The ICRC Interpretive Guidance on the Notion of Direct Participation in Hostilities
IRRC	International Review of the Red Cross
Is.LR	Israel Law Review

JICL	Journal of International Criminal Justice
JPL	Journal of Politics and Law
LOAC	The Law of Armed Conflict
NIAC	Non-International Armed Conflict
Nicaragua Case	Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)
Nuclear Weapons case	Legality of the Threat or Use of Nuclear Weapons
POW	Prisoner of War
St. Petersburg Declaration	The Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight
Targeted Killings Case	The Public Committee against Torture in Israel v. Government of Israel et al.
UNGA	The United Nations General Assembly
VCLT	The Vienna Convention on the Law of Treaties

## 1. Introduction

### 1.1. Statement of Thesis

International humanitarian law (IHL) regulates and limits the conduct of parties to, and the treatment of victims of armed conflict, whether civilian or hors de combat<sup>1</sup>, in addition to the means and methods of warfare.<sup>2</sup> A current issue within IHL is the treatment and protection of civilians who have taken a direct part in hostilities.<sup>3</sup>

There are multiple provisions within IHL concerning DPH.<sup>4</sup> However, neither of the provisions in The Hague Conventions<sup>5</sup>, its Annexed Regulations<sup>6</sup>, the Geneva Conventions, nor its Additional Protocols defines which actions amounts to DPH. One of the reasons is that the drafters of the Geneva Conventions and its Additional Protocols could not agree on a comprehensive definition.

DPH has been one of the components of discussions within IHL since 1977.<sup>7</sup> Legal experts from all over the world have tried to agree on a definition of which actions amount to DPH, and its scope of application.<sup>8</sup> In 2009 the International Committee for the Red Cross<sup>9</sup> published its “Interpretive Guidance on the Notion of Direct Participation in Hostilities”.<sup>10</sup> Therein, the ICRC provides a definition of DPH. However, this definition was not a product of unanimous consensus or agreement, and it therefore solely reflects the ICRC’s interpretation of DPH.<sup>11</sup>

The consequences for these civilians have not been at the center of the discussions regarding DPH. However, the consequences are an important aspect of DPH and might in turn shed some light on

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<sup>1</sup> Hors de combat is defined in Protocol Additional to the Geneva Conventions of 12 August 1949 - Relating to the Protection of Victims of International Armed Conflicts (adopted 8 June 1977) Article 41(2). Combatant status is a prerequisite for becoming “hors de combat”; see Henckaerts, Jean-Marie, Doswald-Beck, Louise: *Customary International Humanitarian Law: Volume I: Rules* (Cambridge University Press, 2009) Rule 47 at 164-170. See also Dinstein, Yoram; *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge University Press, 2010) at 159. Persons rendered “hors de combat” are protected from attack according to customary international law; see API Article 41(1), CIL Study Rule 47 at 164

<sup>2</sup> Fleck, Dieter: *The Handbook of International Humanitarian Law* (Oxford University Press, 2008) at 11. International Humanitarian Law is also referred to as the law of armed conflicts.

<sup>3</sup> Hereafter DPH

<sup>4</sup> See Article 3 in Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (adopted 12 August 1949), Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea (adopted 12 August 1949), Convention (III) relative to the Treatment of Prisoners of War (adopted 12 August 1949), and Convention (IV) relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1946), API Article 51(3), 77(2) and (3). See also Protocol Additional to the Geneva Conventions of 12 August 1949 – Relating to the Victims of Non-International Armed Conflicts (adopted 8 June 1977) Article 13(3).

<sup>5</sup> Hague Convention IV respecting the Laws and Customs of War on Land of 1907 (adopted 18 October 1910) is the only one still in force.

<sup>6</sup> Regulations Concerning the Laws and Customs of War on Land annexed to Hague Convention IV (adopted 18 October 1907).

<sup>7</sup> In 1977, DPH was codified in the two Additional Protocols to the Geneva Conventions. However, the first appearance of direct participation was in 1949, in Common Article 3 to the Geneva Conventions.

<sup>8</sup> See the International Committee for the Red Cross study on DPH from 2003-2009.

<sup>9</sup> Hereafter the ICRC

<sup>10</sup> ICRC: *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Geneva, 2009). Hereafter Interpretive Guidance.

<sup>11</sup> Interpretive Guidance at 10, Melzer, Nils: *The Interpretive Guidance on the Notion of Direct Participation in Hostilities* (IRRC, Volume 90, Number 872, December 2008 pp 991-1047)

the suggested interpretation of DPH.<sup>12</sup> This thesis will focus on the consequences of direct participation in hostilities applicable throughout the duration of the engagement, as a response to previous and future engagement, and in the event of capture or detainment by the adverse party during armed conflicts.

## 1.2. The Geneva Conventions: A Brief Background

The protection awarded to certain people under specific circumstances by the law of armed conflict, can generally be traced back to past atrocities.<sup>13</sup> The goal of codification is to prevent such atrocities from occurring in the future. However, the rapid evolution of modern warfare and the unwillingness of some States to ratify these codifications, make it nearly impossible to achieve a complete codification of the conduct of hostilities.<sup>14</sup>

There have been multiple attempts to codify the IHL. The initial treaties such as the St. Petersburg Declaration of 1898<sup>15</sup>, the Hague Conventions of 1899 and 1907, along with the annexed Hague Regulations<sup>16</sup> are all based on the principle of distinction, and expressly state that the conduct of hostilities is not unlimited.<sup>17</sup> The next step of codification was the four Geneva Conventions in 1949.<sup>18</sup> These focus on the protection of war victims.<sup>19</sup> The GCs have been universally accepted, and are ratified by nearly every State in the world.<sup>20</sup> They apply to all international armed conflicts between the parties to the Conventions.<sup>21</sup> However, the application is not contingent upon the adversary being a party to the Conventions, if the adversary accepts and applies the provisions therein.<sup>22</sup>

In 1968 the UNGA invited the ICRC to study the need for additional humanitarian conventions or other legal instruments to ensure better protection of civilians, prisoners and combatants during armed conflicts.<sup>23</sup> This indicates that the UNGA viewed the protection awarded by the existing Conventions as insufficient or entailed insufficient limitations on the conduct of hostilities.

The four GCs were supplemented by two Additional Protocols in 1977.<sup>24</sup> The Protocols address issues that arise due to direct and actual conduct of hostilities in armed conflicts. API contains codifications such as the principle of distinction (Articles 48 and 43(2)), provisions regarding the general protection awarded to the civilian population (Part IV), as well as precautions in attack (Articles 57 and 58). APII

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<sup>12</sup> Interpretive Guidance at 43-60

<sup>13</sup> Quenivet, Noelle, Sha-Davis, Shilan(eds): *International Law and Armed Conflict: Challenges in the 21<sup>st</sup> Century* (T.M.C. Asser Press, 2010) at 3-4

<sup>14</sup> Cassese, Antonio: *On Some Merits of the Israeli Judgment on Targeted Killings* (JICL, Volume 5, 2007) at 341

<sup>15</sup> The Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, of 29 November 1898.

<sup>16</sup> The purpose of the Hague Regulations was to protect prisoners of war, civilians and neutral persons.

<sup>17</sup> The Preamble to the St. Petersburg Declaration, Hague Regulations Articles 22 and 25, and Preamble to the Hague Convention IV of 1907

<sup>18</sup> Hereafter GC I, GC II, GC III, GC IV and the GCs

<sup>19</sup> This is apparent from the names and content of the GCs, see also Dinstein: Hostilities at 16

<sup>20</sup> GC I-IV each has 194 contracting State parties, API has 171 State Parties and 4 Signatories, and APII has 166 State Parties and 3 Signatories: <<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>>, accessed 14.10.2011

<sup>21</sup> GC I-IV Common Article 2(1) and (2)

<sup>22</sup> Ibid (3)

<sup>23</sup> United Nations General Assembly Resolution 2444 of 19 December 1968, Tehran, Section 2, litra (b)

<sup>24</sup> API concerns international armed conflicts (IACs), and APII concerns non-international armed conflicts (NIACs). These Protocols do not supersede the GCs; see API Article 49(4), Dinstein: Hostilities at 16.

does not contain the same elaborate protection of the civilians. The scope of protection under API is therefore wider than the protection awarded by the GCs and APII.<sup>25</sup>

### 1.3. The Challenges of Modern Warfare

Some of the challenges which arise during armed conflicts relate to the protection of the civilian population, and how to deal with civilians who engage in DPH. There has been an increased trend of civilians engaging in DPH in modern armed conflicts. Some of the reasons for this can be found in the historical and technological developments of warfare, which I will explore in the following.

Historically wars have been fought between the armed forces of the sovereign parties to an armed conflict, with clearly defined strategic objectives.<sup>26</sup> During these conflicts only a small minority of civilians participated in the conduct of military operations.<sup>27</sup> These conflicts therefore had a relatively clear distinction between combatants and civilians. The members of the adversary's armed forces could in most cases be identified through their uniform.

After the Cold War the characteristics of warfare changed as a result of the downsizing of defence budgets and consequently of the armed forces.<sup>28</sup> This led to an increased outsourcing of previously almost exclusively military tasks.<sup>29</sup> By outsourcing such tasks to private contractors, governments were able to cut its military expenses. The government neither has to invest the same time nor money, to train and educate private contractors, as they would should the task be performed by members of their own armed forces.<sup>30</sup> Hence, the use of private contractors enables a higher number armed forces personnel to participate in combat missions and other combat related functions.<sup>31</sup> And in turn, contributes to the increased number of civilians engaged in DPH during military operations.

In modern warfare the adversary may be the armed forces of a sovereign state, an organized armed group or another non-governmental party.<sup>32</sup> Recently armed conflicts seems to be fought between the armed forces of a sovereign state and organized armed groups not representing the armed forces of a state, i.e. the war on terror between the US and Al-Qaeda. These members are typically not entitled to combatant status. The issue of whether they are engaged in DPH and the temporal scope in which they may be targeted is crucial in relation to the legality of directly attacking them. Now more than ever, the ability to distinguish enemy from civilian, is an important prerequisite for the success of the attack.<sup>33</sup>

Modern warfare has taken a step away from the traditional battlefield, into urban landscapes, i.e. cities and small towns. This development has resulted in increased encounters with the civilian

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<sup>25</sup> Solis, Gary: *The Law of Armed Conflict – International Humanitarian law in War* (Cambridge University Press, 2010) at 122.

<sup>26</sup> Supra note 13 at 3,10

<sup>27</sup> Interpretive Guidance at 11-12

<sup>28</sup> Fleck: Handbook at 107-108,

<sup>29</sup> Schmitt, Michael N: *"Direct Participation in Hostilities" and 21<sup>st</sup> Century Armed Conflict* (Crisis Management and Humanitarian Protection, Festschrift fur Dieter Fleck, 2004) at 513.

Schmitt, Michael N: *Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees* (CJIL, Volume 5, Number 2, 2005) at 512-514.

<sup>30</sup> Schmitt: 21<sup>st</sup> century at 513, Fleck: Handbook at 107-108

<sup>31</sup> Schmitt; IHL and DPH at 517-518

<sup>32</sup> Supra note 13 at 3

<sup>33</sup> Williams, Dewi: *The Often-Vexed Question of Direct Participation in Hostilities: A Possible Solution to a fraught Legal Position* (JPL, Volume 2, Number 1, March 2009) at 3 -6

population. The increased presence of civilians accompanying the armed forces, civilians who participate in the conduct of military operation, as well as civilians who engage in DPH wearing civilian attire, makes it challenging to distinguish the adversary's combatants from members of the civilian population. The inability to distinguish these from the rest of the civilian population puts the armed forces at risk of being targeted by an adversary they cannot identify.<sup>34</sup> Warfare in urban settings therefore makes it difficult to fulfil the obligation to protect civilians from the effects of military operations.<sup>35</sup> Furthermore, the outsourcing of traditionally military functions to private contractors has caused some confusion as to who is entitled to protection from direct attack.<sup>36</sup> These factors have made it increasingly difficult to distinguish between legitimate military targets, and persons protected from direct attack.<sup>37</sup> Consequently, the vast majority of casualties in armed conflicts are civilians.<sup>38</sup>

This is further complicated should the adversary fails to comply with the obligation to distinguish themselves from the civilian population.<sup>39</sup> Add to those distinguishing civilians who engage in DPH from the rest of the civilian population, acting in compliance with the fundamental principle of distinction is not easy. All these elements can lead to erroneous or arbitrary targeting of civilians.<sup>40</sup>

Due to the recent leap in technological advances modern warfare is reliant on weapon systems, and hence on private contractors and civilian employees.<sup>41</sup> The technology is highly advanced and the acquiring of weapons system may include civilians responsible for maintenance, training, and even system operators.<sup>42</sup> These weapons systems have made it possible to locate and target specific objects and persons with great precision.<sup>43</sup> As a result wars are fought with the assistance of civilian employees, located on another continent, or at a safe distance from the hostilities, i.e. the predator unmanned aerial vehicle, and computer network attack.<sup>44</sup>

The use of precision guided weapons has the potential to spare lives, both civilian and combatant.<sup>45</sup> However, these systems are highly reliant on accurate intelligence in order to effectively take out the desired military objective.<sup>46</sup> This reliance is both a strength and a weakness. If the intelligence is bad, there is an inherent risk that the attack may have caused injury or death to members of the civilian population instead of the desired military objective.

#### 1.4. Sources and Method

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<sup>34</sup> Interpretive Guidance at 12

<sup>35</sup> API Article 51(1)

<sup>36</sup> GC IV Part II, API Articles 48, 51, APII Article 13, and Interpretive Guidance at 11-12

<sup>37</sup> API Articles 48, 51(1) and (2), APII Article 13(1) and (2), Schmitt: 21<sup>st</sup> Century at 515-516, Dinstein: Hostilities at 121-126(- 155)

<sup>38</sup> S/RES/1296(2000): Civilians are increasingly being targeted by or suffer from violence directed against them. See also Rowe, Peter: *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, 2006) at 1-5

<sup>39</sup> API Article 44(3)

<sup>40</sup> Interpretive Guidance at 11-12

<sup>41</sup> Schmitt: 21<sup>st</sup> Century at 511, 512

<sup>42</sup> Ibid at 513, Schmitt: IHL and DPH at 544-545

<sup>43</sup> Primoratz, Igor(eds): *Civilian Immunity in War* (Oxford University Press,2007) at 185

<sup>44</sup> Schmitt:21<sup>st</sup> Century at 525-528

<sup>45</sup> Primoratz: Civilian Immunity at 184

<sup>46</sup> Schmitt: 21<sup>st</sup> century at 517-518



The sources used to determine a rule of international law are listed in the Statute of the International Court of Justice Article 38(1).<sup>47</sup> The primary sources are international conventions, establishing rules expressly recognized by the contracting states (a), international custom, as evidence of a general practice accepted as law (b), and general principles of law (c). Judicial decisions and the teachings of the most highly qualified publicists are secondary sources (d). Despite their secondary status, they may provide guidance and be persuasive when establishing the content of a rule under international law.<sup>48</sup>

I will apply these sources within the context and parameters of IHL.

The primary sources for the purpose of this thesis are the Geneva Conventions of 1949 and their Additional Protocols. However, the focus will be on GC III, IV, API and APII. They will be interpreted “in good faith in accordance with the ordinary meaning” of the terms in their context, and in light of the object and purpose of the treaty in question.<sup>49</sup> The secondary sources entail publications of highly qualified experts within IHL. In addition the Targeted Killings Case from the Israeli High Court<sup>50</sup> provides an illustration of the application of DPH. The case concerned the legality of Israel’s employment of a policy of preventive strikes against terrorists, which could also involve killing innocent civilians.

The ICRC is an independent, impartial and neutral organization, with an exclusive humanitarian mission.<sup>51</sup> Their main purpose is to protect the lives and dignity of victims of armed conflict. It seeks to prevent suffering by promoting and strengthening IHL and universal humanitarian principles. For instance, it promotes a faithful application of the Geneva Conventions and the Additional Protocols.<sup>52</sup> The weight of ICRC publications can therefore be placed in the category of “highly qualified publicists” as a secondary source within IHL.<sup>53</sup> The CIL Study will be used to illustrate existing customary state practice. However, this study is not in itself a binding expression of rules of customary international law.

The Interpretive Guidance provides guidance to some of the consequences of DPH. It examines DPH in relation to the conduct of hostilities, but it did not address issues in the event of capture or detainment by the adverse party.<sup>54</sup> Some of the positions taken therein are controversial and have been subject to critique.<sup>55</sup> Furthermore, the Interpretive Guidance is not a binding expression of the

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<sup>47</sup> The Statute of the International Court of Justice of 17 July 1998, The Rome Statute.

<sup>48</sup> Currie, Forcese, Oosterveld: *International Law: Doctrine, Practice and Theory* (Irwin Law, 2007) at 145

<sup>49</sup> Vienna Convention on the Law of Treaties of 23 May 1969, Article 31(1), VCLT

<sup>50</sup> The Government of Israel et al v The Public Committee against Torture in Israel et al (Supreme Court of Israel, Judgment of 11 December 2005)

<sup>51</sup> Statute of the ICRC, Article 1,

< <http://www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm>>

<sup>52</sup> Mission Statement of 19.06.2008, accessed 09.09.2011.

< <http://www.icrc.org/eng/resources/documents/misc/icrc-mission-190608.htm>>

<sup>53</sup> ICRC publications are not legally binding on states. Treaties and customary international law are binding on states, see Currie, Forcese, Oosterveld: *International Law* at 40, 79, Interpretive Guidance at 6. See also VCLT Article 34 and 38.

<sup>54</sup> Interpretive Guidance at 11

<sup>55</sup> Some of the critiques: Boothby, Bill: “*And for such time as*”: *The Time Dimension to Direct Participation in Hostilities* (International Law and Politics, 2010, Volume 41), Schmitt, Michael N: *The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis* (HNSJ, May 2010, Volume 1), Schmitt, Michael N: *Deconstructing Direct Participation in Hostilities; The Constitutive Elements* (International Law and Politics,

interpretation and application of DPH. This weakens the weight and impact of the views on the consequences of DPH. However, it does illustrate some challenges in relation to applying DPH to actions in armed conflict.

### 1.5. Scope of the Thesis

This thesis will neither provide a definition of the requirements for an act to amount to DPH, nor engage in an analysis of which activities amounts to DPH. However, in order to analyse the consequences of DPH, it is necessary with a working definition for the purpose of this thesis.

Direct participation in hostilities is “acts of war which by their nature or purpose are likely to cause [or contribute to] actual harm to the personnel, equipment [or military operations] of the enemy armed forces.”<sup>56</sup> Such preparatory activities may amount to DPH. Contribution to the general war effort is not sufficient, and there must be a causal relationship to specific activities amounting to DPH.<sup>57</sup> Activities with too weak a connection to the conduct of hostilities, falls outside the scope of DPH.

The second section presents the different categories of persons under IHL, and hence who the notion of DPH applies to. I will therein illustrate some of the many challenges combatants face during modern armed conflicts. An analysis of the consequences of DPH is provided in section 3. The different consequences relates to those applicable during the actual engagement in DPH, and those applicable as a reaction to previous engagement in DPH. The loss of protection from direct attack and hence becoming a legitimate military target are consequences applicable during the actual engagement in DPH. Whereas the standards of treatment and protection upon detention or capture and subjection to prosecution and punishment as consequences applicable as a reaction to previous engagement in DPH.

Some practical implications of applying DPH during actual armed conflicts will be presented in section 4. Whether there exists a presumption of DPH in situations of doubt, and if combatants are obligated to respond with the least harmful means available, are questions closely connected to the consequences of DPH.

## 2. Who Has Directly Participated in Hostilities?

### 2.1. The Principle of Distinction

One of the fundamental principles underlying IHL is the principle of distinction.<sup>58</sup> The Preamble to the St. Petersburg Declaration states that “the military forces of the enemy” are “the only legitimate” targets for attack. Consequently, those who do not belong to enemy’s military forces are not

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2010, Volume 42), Van der Toorn, Damien; *Direct Participation in Hostilities: A Legal and Practical Evaluation of the ICRC Guidance* (Attorney General’s Department, Commonwealth of Australia, 2009), Watkin, Kenneth; *Opportunity Lost: Organized Armed Groups and the ICRC “Direct Participation in Hostilities Interpretive Guidance* (International Law and Politics, 2010, Volume 42)

<sup>56</sup> Commentary to API Article 51(3) paragraph 1944, Fleck; Handbook at 261-262

<sup>57</sup> Commentary to API Article 43(2) paragraph 1679, Article 51(3) paragraph 1945, Fleck; Handbook at 262

<sup>58</sup> Solis: LOAC at 251 (-253), Dinstein: Hostilities at 8, 89, Fleck: Handbook at 238. The principle of distinction is codified in API Article 48, 51(1) and (2) and APII Article 13(1) and (2). The ICJ stated that the principle of distinction is a “cardinal principle” of IHL, see Advisory Opinion on Legality of the Threat or Use of Nuclear Weapons of 8 July 1996 paragraph 78

legitimate targets, and may not be targeted.<sup>59</sup> This illustrates the longstanding limitation on the right to adopt means and methods of injuring the enemy during armed conflicts.

The principle imposes an obligation on the parties to an armed conflict to distinguish between combatants and civilians at all times. This obligation is two folded.<sup>60</sup> Firstly, the parties must only direct their attacks and military operations against legitimate military targets. Civilians and the civilian population are protected from attack<sup>61</sup>, because such attacks would be of little to no military advantage.<sup>62</sup> This part of the obligation is considered a rule of customary international law.<sup>63</sup>

API Article 48 must be read in conjunction with Article 49 which provides a definition of attacks. Regardless of whether a party to the conflict is attacking or the party under attack, all violent acts in relation to the adversary are considered attacks.<sup>64</sup>

The second part is the obligation of combatants to distinguish themselves from civilians, by wearing a distinctive emblem that is recognizable at a distance. This obligation applies when they engage “in an attack or in a military operation preparatory to an attack.”<sup>65</sup> Without such means of distinguishing combatants from civilians, there is a presumption of civilian status until otherwise can be confirmed.<sup>66</sup>

Another element of the principle of distinction is determining whether or not an individual is a legitimate military target through all feasible steps.<sup>67</sup> If combatants are unable to distinguish between combatants and civilians, any person they encounter would have to be considered a possible threat and this would represent a great risk to the protected civilian population.

According to the principle of distinction there is a fundamental difference between combatants and civilians. In order to determine who the concept of DPH applies to, one must first eliminate those who qualify as combatants.

## 2.2. Combatant and Civilian Status

Members of the armed forces of a Party to a conflict are combatants, regardless of their conduct and function therein.<sup>68</sup> Combatants “have the right to participate directly in hostilities”.<sup>69</sup> An antithetical

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<sup>59</sup> Supra note 15, Solis: LOAC at 50

<sup>60</sup> Solis: LOAC at 250-258, Melzer: Targeted Killings at 301-304, 311-314

<sup>61</sup> API Article 50(2) states that individual civilians and the civilian population “shall not be the object of attack”. In addition they “enjoy general protection against dangers arising from military operations, see (1). See also the equivalent APII Article 13(1) and (2)

<sup>62</sup> Dahl, Arne Willy; *Håndbok i Militær Folkerett* (Cappelen Akademiske Forlag, 2008) at 132

<sup>63</sup> Dinstein: Hostilities at 89, 124, Prosecutor vs. Blackic, ICTY Judgment of 29 July 2004 paragraph 109, CIL Study Rule 1 at 3-8, Solis: LOAC at 251-252, Commentary to API Article 48 paragraph 598

<sup>64</sup> API Article 49(1). Regarding its territorial application see (2).

<sup>65</sup> Ibid Article 44(3)

<sup>66</sup> Ibid Article 50(1)

<sup>67</sup> The precautions in attack API Article 57 and 58, See Solis at 254, Dinstein: Hostilities at 138-146, Melzer, Nils: *Targeted Killings in International Law* (Oxford University Press, 2009) at 354-357, 363-366.

<sup>68</sup> API Article 43(1) and (2), Interpretive Guidance at 25, Watkin: Opportunities Lost at 651, Solis: LOAC at 188

<sup>69</sup> API Article 43(2) in conjunction with (1), see also Hague Regulations Article 3.

interpretation indicates that civilians are not entitled to engage in DPH. However, not all members of the armed forces are combatants. Medical and religious personnel are non-combatants.<sup>70</sup>

API Article 43(1) provides a definition of the armed forces. These do not consist of a group of individuals carrying out single acts in order to achieve personal goals. They are entitled to engage directly in hostilities on behalf of a Party to the conflict, in order to achieve the goal of said Party.<sup>71</sup> Accordingly the right to engage in DPH is a consequence of combatant status.<sup>72</sup> The criteria for combatant status are further contained in GC III Article 4A, which directly regulates entitlement to prisoner of war status.<sup>73</sup> Members of other militias, volunteer corps, or organized resistance movements must fulfil four cumulative conditions in order to be entitled to prisoner of war status:<sup>74</sup>

- (a) being commanded by a person responsible for his subordinates;
- (b) having a fixed distinctive sign recognizable at a distance;
- (c) carrying arms openly;
- (d) conducting their operations in accordance with the laws and customs of war

These conditions do not seem to apply to members of the regular armed forces. However, they are presumed to meet these conditions collectively, and are therefore combatants.<sup>76</sup>

Furthermore, the conditions in *litra b* and *c* are not as clear as the wording implies. These conditions are modified by API Article 44(3).<sup>77</sup> The obligation to carry arms openly is restricted in situations where “an armed combatant cannot” distinguish himself from the civilian population, to the duration of “each military engagement” (a), and the engagement “in a military deployment preceding the launching of an attack in which he is to participate” when he is “visible to the adversary” (b).

The cumulative criteria of POW status make it difficult for members of organized armed groups who do not belong to a party to the conflict, to gain combatant status.<sup>78</sup> These groups typically do not have a “fixed distinctive sign” which identifies and separates them from the civilian population. The purpose of this requirement is not to impose an obligation of visibility, but to distinguish them from the civilian population if they are seen.<sup>79</sup>

Furthermore, it is not unusual for members of such organized armed groups to conceal their weapons until the time immediately prior to an attack. This enables them to take advantage of the presumption of civilian status<sup>80</sup>, and may allow them to get closer to their target without being

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<sup>70</sup> API Article 43(2) in conjunction with GC III Article 33. This is a rule of customary international law applicable during IACs; CIL Study Rule 3 at 11.

<sup>71</sup> Dahl Håndbok at 73, Queguiner, Jean Francois: *Direct Participation in Hostilities under International Humanitarian Law* (HPCR, November 2003) at 2

<sup>72</sup> Ibid Queguiner

<sup>73</sup> See also Hague Regulations Articles 1-3. For a more detailed presentation, Dinstein: *Hostilities* at 39-51, Solis *LOAC* at 195-201.

<sup>74</sup> Hereafter POW

<sup>75</sup> GC III Article 4A(1) and (2). Dinstein: *Hostilities* at 47, Solis: *LOAC* at 195

<sup>76</sup> Article 43(2) in conjunction with (1), Dinstein: *Hostilities* at 42-43, 49

<sup>77</sup> Solis: *LOAC* at 195, Dinstein: *Hostilities* at 53, Fleck: *Handbook* at 89-93, Dahl: *Håndbok* at 159-161

<sup>78</sup> Dinstein: *Hostilities* at 47

<sup>79</sup> This criteria has its basis in the principle of distinction, see Dinstein: *Hostilities* at 44, Solis: *LOAC* at 196, Kolb, Robert: *Jus In Bellio: Le Droit International des Conflits Armes, Precis* (Helbing Lichtenhan, 2009) at 327.

<sup>80</sup> API Article 50(1)

targeted themselves.<sup>81</sup> Should a combatant fail to comply with the obligation to distinguish himself from the civilian population, and identify himself as a combatant<sup>82</sup>, he will no longer be entitled to the privileges of a POW upon capture or detention.<sup>83</sup>

If the individual does not fall into the categories listed in GC III Article 4A(1)-(3), or (6) nor API Article 43, that individual is a civilian.<sup>84</sup> Civilians are negatively defined, which indicates that the category is exhaustive, including all those who do not qualify for combatant status during IACs. The purpose of distinguishing between combatants and civilians is to ensure protection of the innocent, non participating civilian.<sup>85</sup> There is no equivalent definition of civilians during NIACs.<sup>86</sup> Hence, the distinction between combatants and protected civilians is not as clear, which in turn puts the concept of DPH in a different light. However, a distinction is made between civilians who engage in DPH and civilians who remain protected during NIACs.<sup>87</sup>

### 2.3. Who is engaged in DPH?

Those who engage in DPH without being entitled to do so are civilians. DPH can be divided into four types of engagements. It may be a civilian who sporadically engages in activities amounting to DPH on his or her own initiative, or a civilian who repeatedly and continuously engages in DPH.<sup>88</sup> The civilian may be a member of an organized armed group or s/he may be accompanying the armed forces without being a member thereof, i.e. private contractors and civilian employees.<sup>89</sup>

#### 2.3.1. Direct Participation in Hostilities – The Limitation on the Right to Civilian Protection

The principle of distinction gives the impression that there exists a clear cut distinction between combatants and civilians. However, the protection from direct attack is neither unconditional nor absolute. API Article 51(3) and APII Article 13(3) limit the protection of civilians. They are protected as civilians “unless and for such time as they take a direct part in hostilities”.<sup>90</sup> During this time the civilian “loses his immunity and becomes a legitimate military target. Once he ceases to participate, [s/he] regains [the] right to protection”.<sup>91</sup> This is a rule of customary international law.<sup>92</sup>

This limitation is without a clear cut content, due to the lack of definition of which actions amount to DPH. This poses a great challenge for commanders and soldiers who are attacked by civilians engaged in DPH.

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<sup>81</sup> Dinstein: Hostilities at 45

<sup>82</sup> API Article 44(3)

<sup>83</sup> Dinstein: Hostilities at 35

<sup>84</sup> API Article 50(1), CIL Study Rule 5 at 17-19

<sup>85</sup> This purpose is part of the underlying reasoning of the principle of distinction, Dahl: Håndbok at 73

<sup>86</sup> APII does not provide a definition of civilians, but applies the concept in Articles 13-15 and 17-18, see also CIL Study Rule 5 at 19

<sup>87</sup> Common Article 3, APII Article 13(3), and Watkin, Kenneth: *Combatants, Unprivileged belligerents and conflicts in the 21<sup>st</sup> Century* (background paper, HPCR, 2003) at 14-15, Dahl; Håndbok at 297, Melzer: Targeted Killings at 311-314

<sup>88</sup> Fleck: Handbook at 261, Interpretive Guidance at 23-24

<sup>89</sup> Fleck: Handbook at 107-108, 261, Interpretive Guidance at 37-40

<sup>90</sup> API Article 51(3) is located in Section 1 concerning “General Protection against the Effects of Hostilities”. See also UK Military Manual at 5.3. at 53-54

<sup>91</sup> Commentary to API Article 51(3) paragraph 1944

<sup>92</sup> CIL Study at 20-22, Dinstein: Hostilities at 146

The loss of entitlement to civilian protection illustrates the balance between the principle of distinction and the principle of military necessity. Such civilians pose a risk to combatants and it is reasonable that protection as a civilian is contingent upon them not engaging in DPH.<sup>93</sup> Civilians who lose their protection due to DPH, are legitimate military targets, and may be targeted as such.<sup>94</sup>

The wording “for such time as” provides little guidance as to the temporal application of DPH. This raises questions as to when and for how long such civilians lose the protection against direct attack, how long they remain a legitimate military target, and when they may be targeted as such. These concerns will be addressed in section 3.2.

#### 2.3.1.1. State Practice and Statements

Unlike the GCs, API is not universally accepted.<sup>95</sup> The United States have issued a formal statement rejecting API:

“[T]his agreement has certain meritorious elements. But Protocol I is fundamentally and irreconcilably flawed. It contains provisions that would undermine humanitarian law and endanger civilians in war [...] These problems are so fundamental in character that they cannot be remedied through reservations. [...] Finally, [...] a number of the provisions of the Protocol are militarily unacceptable. [...]”<sup>96</sup>

It is particularly the protection of civilians within Articles 48 to 67 the US finds fundamentally flawed. The US also objects to Article 47 concerning mercenaries, who are neither considered combatants nor POWs. The United States has previously stated that no combatants should be denied a battlefield status.<sup>97</sup> However, it is debatable whether this position is still in effect considering the situation of the detainees incarcerated at Guantanamo Bay, Cuba.<sup>98</sup>

However, none of the ratifying States made any reservations to API Article 51. On the contrary, the United Kingdom stated that the exception in Article 51(3) was a “valuable reaffirmation” of an existing rule of customary international law.<sup>99</sup> Mexico further stated that it “cannot be subject to any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.<sup>100</sup>

#### 2.3.2. The Process Towards the Interpretive Guidance

The Interpretive Guidance was the product of five informal expert meetings held by the ICRC between 2003 and 2008, in addition to further research and analysis.<sup>101</sup> The meetings were

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<sup>93</sup> Primoratz: Civilian Immunity at 90, Dinstein: Hostilities at 146

<sup>94</sup> Primoratz: Civilian Immunity at 94, Commentary to API Article 51(3) paragraph 1944, Commentary to API Article 13(3) paragraph 4789, Fleck: Handbook at 261-263

<sup>95</sup> See <[www.icrc.org/ihl.nsf/CONVPRES?OpenView](http://www.icrc.org/ihl.nsf/CONVPRES?OpenView)> site accessed 14.09.2011, Dinstein: Hostilities at 16, Solis: LOAC at 123

<sup>96</sup> Message from the President of the US to the Senate, 1987, at 3-4

<sup>97</sup> Solis: LOAC at 123

<sup>98</sup> The United States distinguishes between Taliban fighters and members of Al-Qaeda. Only the former is granted combatant status and entitled to POW status. See Solis: LOAC at 211-219, Aldrich; Georg H: *The Taliban, al Qaeda, and the Determination of Illegal Combatants* (Hum.V., Number 4, 2004) at 202-206, Dinstein: Hostilities at 55-57

<sup>99</sup> Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols § 800 in CIL Study, Rule 6 at 20

<sup>100</sup> Ibid § 803

<sup>101</sup> Supra note 10

composed of 40 to 50 legal experts, with experience from the military, governments, academia, international and non-governmental organizations.<sup>102</sup>

The object was to reflect the ICRC's institutional position on the interpretation of the existing IHL, in light of the prevailing circumstances of contemporary armed conflicts. The intention was not to change binding rules of customary or treaty law.<sup>103</sup> The goal was to ensure a clear and coherent interpretation of DPH in relation to the conduct of hostilities, consistent with the purpose and principles of IHL.<sup>104</sup> However, the Interpretive Guidance was not the product of unanimous consent among the participating experts.

The Interpretive Guidance has been subject to critique on several grounds, by scholars and military personnel.<sup>105</sup> But one of its strengths is that it provides guidance to combatants in applying the concept of DPH to civilians on the battlefield.<sup>106</sup> I will in the following comment the critique as it relates to the consequences of DPH.

### 3. The Consequences of Direct Participation in Hostilities

#### 3.1. The Concept of Unlawful Combatant

The concept of unlawful combatant is controversial. IHL has traditionally operated with two categories of persons; combatants and civilians.<sup>107</sup> This is evident in the GCs as well as their APs, supplemented by the principle of distinction. GC III concerns the treatment of prisoners of war, awarded to combatants, and GC IV concerns the protection of civilians in time of war. By defining combatants, and making the rest civilians, the categories seem to be exhaustive.<sup>108</sup> This indicates that unlawful combatants are civilians, but they are not entitled to all the rights and protections awarded civilians who have not engaged in DPH.<sup>109</sup>

API contains two examples of unlawful combatants, spies<sup>110</sup> and mercenaries.<sup>111</sup> Neither spies nor mercenaries are combatants nor are they entitled to POW status upon capture by the adversary.<sup>112</sup> However, neither of the GCs nor its APs operate with a third category of unlawful combatants. IHL regulates the conduct of hostilities, and states the conditions for combatant status and consequently

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<sup>102</sup> Overview of the process at 3-4

< <http://www.icrc.org/eng/assets/files/other/overview-of-the-icrcs-expert-process-icrc.pdf> > Accessed 17.08.2011

<sup>103</sup> Interpretive Guidance at 9. Watkin claims that the it does not provide a reflection of existing IHL, see Opportunities Lost at 693

<sup>104</sup> Interpretive Guidance at 10-11

<sup>105</sup> Supra note 54. A general response was that the suggested definition of DPH provided a good basis for further discussion, and this was an important step towards a final definition.

<sup>106</sup> Schmitt; Constitutive Elements at 738

<sup>107</sup> See Section 2.

<sup>108</sup> API Articles 43, 50(1)

<sup>109</sup> Dormann, Knut: *The Legal Situation of "unlawful/unprivileged combatants"* (IRRC, Vol. 85, No 849, 2008) at 46-48, Solis: LOAC at 207-208, Primoratz: *Civilian Immunity* at 90, Watkin; Kenneth: *Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle over Legitimacy* (HPCR, Occasional Paper Series, 2005) at 12-67

<sup>110</sup> API Article 46(1)

<sup>111</sup> Ibid Article 47(1)

<sup>112</sup> See Baxter, Richard R: *The Duties of Combatants and the Conduct of Hostilities* at 111-114 for more information.

entitlement to POW status. The exceptions concerning mercenaries and spies simply state that they are not combatants.<sup>113</sup>

Combatants are entitled to engage in DPH<sup>114</sup>, and are consequently legitimate targets that can be attacked.<sup>115</sup> They are presumed to have POW status upon capture by the adversary.<sup>116</sup> Combatants are furthermore, immune from domestic prosecution for their commitment of lawful acts of war, even though these constitute crimes under the national criminal code, i.e. murder, assault and battery.<sup>117</sup> They can only be prosecuted for grave violations of IHL, such as i.e. war crimes.<sup>118</sup> This is referred to as the combatant's privilege, and is a consequence of their right to engage in DPH.<sup>119</sup> The background for this immunity is the fact that armed conflicts consists of a multitude of violent acts which are penalized by domestic criminal legislation.

Based on the principle of distinction and the definition of combatants, the right to engage in DPH seems to be limited to those who fulfil the requirements of combatant status. Unlawful combatants have been defined as civilians taking DPH who are not entitled to do so, and may be targeted due to their DPH.<sup>120</sup>

The Ex Parte Quirin case concerned the legality of the detention of eight German soldiers who entered and committed acts of war while wearing civilian attire within US territory. The US Supreme Court concluded that by "passing our boundaries for such purposes without uniform or other emblem signifying their belligerent status, such enemies become unlawful belligerents subject to trial and punishment".<sup>121</sup> The Court stated that:

"By universal agreement and practice, the law of war draws a distinction between the armed forces and the peaceful populations of belligerent nations and also between those who are lawful and unlawful combatants. Lawful combatants are subject to capture and detention as [POWs] by opposing military forces. Unlawful combatants are likewise subject to capture and detention, but in addition they are subject to trial and punishment by military tribunals for acts which render their belligerency unlawful."<sup>122</sup>

This statement is considered an accurate reflection of customary international law concerning unlawful combatants, except for the last part.<sup>123</sup> Whether unlawful combatants can be prosecuted for merely having engaged in DPH, or only for their commitment of acts in violation of the domestic criminal legislation will be addressed in section 3.4.

### 3.2. Loss of Protection From Direct Attack

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<sup>113</sup> Solis: LOAC at 206-207, Fleck: Handbook at 83-84

<sup>114</sup> API Article 43(2). Combatants are "entitled to attack enemy combatants and military objectives, causing death, injury and destruction". This is also referred to as a licence to kill other combatants, Dinstein: Hostilities at 33

<sup>115</sup> Supra note 13 at 10, Dahl: Håndbok at 73

<sup>116</sup> API Article 44(1)

<sup>117</sup> Interpretive Guidance at 83

<sup>118</sup> Ibid at 84, Dinstein: Hostilities at 37, Rome Statute Article 8.

<sup>119</sup> API Article 43(2). The combatant's privilege is contingent upon the combatant acting in accordance with the laws and customs of IHL.

<sup>120</sup> Dormann: Legal Situation at 46-48, Solis: LOAC at 207-208, Primoratz; Civilian Immunity at 90, The Targeted Killings case paragraph 27-28

<sup>121</sup> Ex Parte Quirin et al, 317 U.S.1 (1942) at 37

<sup>122</sup> Ibid at 30-31

<sup>123</sup> Dinstein: Hostilities at 36-37



According to API Article 51(3) and APII Article 13(3) loss of protection from direct attack is a consequence of DPH. It is considered a rule of customary international law during IACs and NIACs.<sup>124</sup> As a result, civilians engaged in DPH become legitimate military targets, and may be attacked as such for the duration of their engagement.<sup>125</sup>

### 3.2.1. Not Considered Civilians in the Proportionality Evaluation

When determining whether the operation is in accordance with the principle of proportionality, commanders are obligated to consider the extent of possible injury or death of civilians, as well as the expected military advantage of taking out the objective.<sup>126</sup> The military advantage must be viewed in light of the possible collateral damage.<sup>127</sup> Only excessive collateral damage is a violation of the principle of proportionality. The risk of any collateral damage is not enough. If an attack causes excessive collateral damage, it is indiscriminate and prohibited.<sup>128</sup>

Commanders must take feasible precautions to spare the civilian population, and to minimize the unavoidable harm.<sup>129</sup> APII does not contain similar obligations of precautions, but the precautions contained in API are rules of customary international law which applies in both IACs and NIACs.<sup>130</sup>

The injury or deaths of civilians who engage in DPH, who are legitimate military targets, are not viewed as collateral damage of the military operation.<sup>131</sup> Civilians, who engage in DPH, are accordingly not considered civilians in the proportionality evaluation of the attack.

### 3.2.2. The Temporal Scope of the Loss of Protection

The civilian loses protection from direct attack “for such time as” s/he engages in DPH. The wording “for such time as” is at best vague and ambiguous. It raises more questions than it answers in regards to the specific duration of the loss of protection. Furthermore, there are no guidelines as to the beginning or end in any provision in the GCs or its APs. Neither legal literature nor case-law agrees on the conditions of the temporal scope. The lack of such guidelines is unfortunate, and can contribute to differential interpretations and State practice regarding the consequences for civilians engaged in DPH.

The Targeted Killings case stated that the temporal scope must be determined on a case by case basis.<sup>132</sup> To illustrate the different approaches the Court looked to two opposite situations. The

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<sup>124</sup> CIL Study Rule 6, at 20-22, The Targeted Killings case stated that it “reflects customary international law, including the time requirement”, paragraph 38. However, it is worth noting that Israel is not a Party to API.

<sup>125</sup> Primoratz: Civilian Immunity at 94, Solis: LOAC: 202, Interpretive Guidance at 70-73, Melzer: Targeted Killings at 346-353, Dinstejn: Hostilities at 89, 130-133, 135-138, 146

<sup>126</sup> API Article 57(2)(a)(iii)

<sup>127</sup> Collateral damage contains “non-combatants who are incidentally killed in attacking a lawful military objective”. Collateral damage is “acceptable to the extent that precautions are taken so that the civilian casualties are not disproportionate to the anticipated military advantage”, Solis: LOAC at 233, 276.

<sup>128</sup> API Articles 51(5)(b) and 57(2)(a)(iii). See Article 51(7) in regards to human shields. Civilians will most likely be injured or killed during armed conflicts, Dinstejn: Hostilities at 130-135, 138.

For a thorough presentation see Schmitt: *Fault Lines* at 293-306 and Melzer: Targeted Killings at 357-363, 403-406

<sup>129</sup> API Article 51, 57 and 58, CIL Study Rule 15 and 17 at 51-55, 56-58, Interpretive Guidance at 74-76, Solis: LOAC at 275.

<sup>130</sup> CIL Study Rule 15 at 51, Rule 17 at 57

<sup>131</sup> Solis: LOAC at 233, 276

<sup>132</sup> Targeted Killings case paragraph 39

civilian who engages in DPH once, or sporadically, who “later detaches himself from that activity is entitled to protection”. But a civilian member of a terrorist organization, who “commits a chain of hostilities”, has lost his protection from direct attack “for such time” as he is committing such acts.<sup>133</sup>

The Commentaries to the APs indicate that the restoration of civilian protection corresponds with the end of DPH. When they cease to engage in DPH, they regain the protection awarded to civilians, and are hence protected from direct attack.<sup>134</sup> The immunity awarded to civilians is contingent upon them refraining “from all hostile acts”<sup>135</sup> and that they do not engage in DPH.<sup>136</sup> The Commentaries assumes that once the act of DPH is completed, the civilian no longer poses a risk to the adversary.<sup>137</sup> This approach seems reasonable in relation to civilians who engage in a single, isolated act of DPH. In relation to civilians who repeatedly engage in DPH, such an interpretation would give the adversary a very small window in which these civilians may be attacked. This in turn, would grant such civilians an unfair advantage compared to the combatants of the adversary.

It might be both reasonable and logical to include the time when the civilian is undertaking preparations, as well as the deployment and return within the temporal scope of DPH. However, civilians are as a rule protected from direct attack.<sup>138</sup> The loss of protection due to DPH is temporary, and one should therefore be careful with expanding its temporal application.

#### 3.2.2.1. The Preparation of, Deployment and Retreat From Activities Amounting to DPH

The ICRC takes a different approach to the duration of the loss of protection in its Interpretive Guidance. It claims that the determining factors for the duration are the beginning and end of the civilian’s specific acts amounting to DPH.<sup>139</sup> These may include preparatory measures to the execution of the specific act of DPH, the deployment to and return from the location where the act was executed.<sup>140</sup> This approach is consistent with that found in the Commentaries.

Preparatory measures cause loss of protection, when they are of a “specific military nature and so closely linked to the subsequent execution of a specific hostile act that they already constitute an integral part of that act.”<sup>141</sup> A general preparatory measure relating to an unspecified operation would not be sufficient. Distinguishing between direct and indirect participation in hostilities is crucial, as only the direct participation would cause loss of protection.<sup>142</sup>

An example of a preparatory measure amounting to DPH is loading bombs onto an airplane. This would cause the civilian to lose protection from direct attack.<sup>143</sup> Whether or not this is a task contracted out in another question. Even though there has been an increased outsourcing of

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<sup>133</sup> Ibid

<sup>134</sup> Commentary to API Article 51(3) paragraph 1943 and 1944, Commentary to APII Article 13(3) paragraph 4787 and 4789, Dinstein: Hostilities at 83, 121

<sup>135</sup> Ibid Commentaries

<sup>136</sup> Ibid

<sup>137</sup> Ibid

<sup>138</sup> API Article 51(1) and (2), APII Article 13(1) and (2)

<sup>139</sup> Interpretive Guidance at 65-68

<sup>140</sup> Ibid, Dinstein: Hostilities at 148-149

<sup>141</sup> Interpretive Guidance at 65-66

<sup>142</sup> Ibid at 66

<sup>143</sup> Ibid

previously exclusive military tasks, the trend have thus far been to employ civilians in regards to sophisticated weapons systems and non-combat essential tasks.<sup>144</sup>

The civilian will also lose protection from direct attack during the deployment to another location, where the specific act amounting to DPH will take place, if the deployment is undertaken to enable the execution of this act.<sup>145</sup> However, the Interpretive Guidance claims that it is neither necessary nor sufficient that the preparation takes place immediately before or in close geographical proximity to the execution of the specific act of DPH, nor that it is indispensable for its execution.<sup>146</sup>

Where the civilian carries out the specific act of DPH in his or her current location, the temporal scope is confined to the preparatory measures meeting the mentioned requirements, and the immediate execution of that act.<sup>147</sup> This is, in my opinion, one of the few instances where the wording and application of “for such time as” leaves little doubt.

Boothby critiques the interpretation of the temporal scope in the Interpretive Guidance, and finds the explanation therein flawed.<sup>148</sup> He claims that the scope of preparatory acts which amount to DPH, and hence cause loss of protection from direct attack, is limited.<sup>149</sup> This limitation consists of a narrow interpretation of the concepts of preparation, deployment and return.<sup>150</sup>

In regards to preparation he claims that when a preparatory act in itself amounts to DPH, the deployment to the location where those preparatory measures are to be undertaken, will also amount to direct participation. Although, there is a limit as to how far such an approach is acceptable.<sup>151</sup> Accordingly, Boothby expands the temporal scope compared to the already controversial understanding within the Interpretive Guidance. I find it doubtful whether such an expansion will be accepted as an accurate understanding of the temporal loss of protection.

Boothby further claims that the loss of protection endures for the entire deployment, and not just until the civilian has separated himself from the hostilities.<sup>152</sup> This understanding of is considerably wider than that found in the Interpretive Guidance.

In a response to this critique, Melzer<sup>153</sup> states that neither deployment nor preparatory measures are independent acts of direct participation, which in turn has its own deployment and preparatory measures.<sup>154</sup> Instead, the former may be an integral part of an act or an operation which amounts to

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<sup>144</sup> See section 1.3

<sup>145</sup> Interpretive Guidance at 67

<sup>146</sup> Ibid at 66

<sup>147</sup> Ibid at 68

<sup>148</sup> Boothby: Time Dimension at 742

<sup>149</sup> Ibid at 764

<sup>150</sup> Ibid at 742. Melzer disagrees and claims that this understanding “lacks clarity and precision, and seems to be rooted in a misperception of the Interpretive Guidance’s approach rather than in fundamental divergence of opinion”. He claims that Boothby simply reformulates the position of the Interpretive Guidance, and does not understand how Boothby can conclude that it narrows the scope of DPH in an unrealistic manner, see Melzer, Nils: *Keeping the Balance Between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities* (International Law and Politics, 2010, Volume 42) at 879-880, 887.

<sup>151</sup> Boothby: Time Dimension at 750

<sup>152</sup> Ibid at 751. The latter solution is contained in the Interpretive Guidance at 67-68

<sup>153</sup> Melzer was the main architect behind and the author of the Interpretive Guidance.

<sup>154</sup> Melzer: Response at 882-883

DPH. Preparatory measures preceding deployment may amount to DPH provided they are an integral part of an act amounting to DPH. However, if the preparation or deployment is not an integral part, such actions will not amount to DPH.<sup>155</sup>

By including deployment with the purpose of taking preparatory measures as an act of direct participation, it is my view that Boothby interprets the duration of the loss of protection too widely. The views expressed by Melzer and by extension the Interpretive Guidance, draw a line which can be employed during actual armed conflicts. I find it highly important to keep in mind that the duration of the loss of protection, is of great importance to combatants who might be targeted by such civilians. If the duration is stretched too far, there is an increased risk that civilians entitled to protection from direct attack, may be erroneously targeted.

The concept of DPH is essential in order to ensure the protection of civilians. Boothby therefore claims that the temporal scope must allow for the targeting of those who on a recurring or persistent basis engage in DPH.<sup>156</sup> If DPH is interpreted in another manner, it would pose an increased risk to the innocent and protected civilian.<sup>157</sup> In my opinion the Interpretive Guidance provides a workable guidance for combatants when distinguishing protected civilians from those who engaged in DPH. Granted the Interpretive Guidance does not contain a complete review of the consequences of DPH, it attempts to provide guidance as to the duration of the loss of protection for civilians who engage in DPH.

#### 3.2.2.2. The Revolving Door Phenomenon

The revolving door describes the situation where a civilian loses and regains protection against direct attack due to DPH, with brief periods of non-participation in between these activities.<sup>158</sup> Accordingly it relates to civilians who repeatedly or persistently engage in DPH.<sup>159</sup> Such civilians pose a threat to combatants. It might seem unfair to combatants that once the civilians' engagement in DPH is over, at least for the time being, s/he is protected from direct attack. The temporal scope of their loss of protection has been subject to critique partly because it gives such civilians an advantage compared to combatants, who are legitimate targets regardless of the task they are performing.<sup>160</sup>

The Interpretive Guidance distinguishes between individual civilians and members of organized armed groups.<sup>161</sup> This is because the loss of protection for civilians is a temporary result of individual actions amounting to DPH, whereas combatants not enjoy such protection due to their continuous status.<sup>162</sup> If a civilian who repeatedly engage in DPH, would lose his or her protection from direct

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<sup>155</sup> Ibid

<sup>156</sup> Boothby: Time Dimension at 766-767

<sup>157</sup> Ibid at 767

<sup>158</sup> Ibid 753-754, Interpretive Guidance at 70-71, Dinstein: Hostilities at 148

<sup>159</sup> Dinstein: Hostilities at 148-149

<sup>160</sup> Boothby: Time Dimension at 754-758, Watkin: Unprivileged Belligerents - background paper at 11-12, Watkin: Opportunities Lost at 686-690, Solis: LOAC at 188

<sup>161</sup> Interpretive Guidance at 70-73

<sup>162</sup> Melzer Response at 887

attack beyond the execution of specific acts or operations, the loss of protection would not temporary, but continuous.<sup>163</sup>

The individual civilian regains his or her protection when s/he is no longer engaged in specific hostile activities amounting to DPH as s/he no longer represents a threat.<sup>164</sup> Due to the difficulties associated with predicting or anticipating the behaviour of individual civilians, it is argued that the revolving door prevents attacks on civilians who do not pose a threat to combatants or military objectives.<sup>165</sup> Even though the civilian has repeatedly engaged in DPH, this fact is not considered a reliable prediction of the civilian's future conduct in hostilities.<sup>166</sup>

This application of the revolving door may cause difficulties for the adverse party's ability to effectively respond to the threat posed by civilians who engages in DPH. However, the Interpretive Guidance states that this is an acceptable price to pay to protect the civilian population from erroneous or arbitrary attacks, provided that the DPH occurs on a merely spontaneous, sporadic and unorganized basis.<sup>167</sup>

There is some disagreement whether there exists a "revolving door" of protection under customary international law.<sup>168</sup> Some of this disagreement relates to the example of the farmer by day, soldier by night. Boothby argues that the periods between the persistent participants engagement in DPH, are preparation for the next act of DPH. These individuals therefore continuously lose their protection from direct attack for the duration of the persistent or repeated engagement in DPH.<sup>169</sup> Schmitt states that such civilians remain a legitimate military targeted until s/he has unambiguously opted out, through extended non-participation or an affirmative withdrawal, even though that engagement in DPH is over. This approach contains an incentive for civilians to refrain from engaging DPH, which is practical in combat operations. As civilians are not entitled to engage in DPH, it is reasonable that they may be targeted, if the adversary is unaware of their withdrawal.<sup>170</sup> Accordingly, these civilians should not benefit from a revolving door of protection.<sup>171</sup>

Melzer argues that that the revolving door seems more controversial than it actually is. It is more likely that civilians, who regularly and consistently engage in DPH, are members of an organized armed group, and have a continuous combat function therein.<sup>172</sup> Accordingly, it is very unlikely that a civilian who engages in DPH on a recurring and persistent basis, without an affiliation with an

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<sup>163</sup> Ibid, Cassese, Antonio: Expert Opinion on Whether Israel's Targeted Killing of Palestinian Terrorist is Consistent with International Humanitarian Law (<<http://www.stoptorture.org.il/files/cassese.pdf>> Retrieved 04.092011) at 6

<sup>164</sup> Interpretive Guidance at 70-71

<sup>165</sup> Ibid at 70, Melzer: Response at 890

<sup>166</sup> Interpretive Guidance at 70-71, Melzer Response at 890

<sup>167</sup> Interpretive Guidance at 71

<sup>168</sup> Boothby claims that there is no revolving door, see Time Dimension at 767. Dinstein takes a similar position; see Hostilities at 148-149, which is reality, is the same position as Schmitt: 21<sup>st</sup> Century at 510. Watkin further states that the Interpretive Guidance is unclear in relation to how many times a civilian can pass through, and regain protection from direct attack after engaging in activities amounting to DPH, see Opportunities Lost at 661.

<sup>169</sup> Boothby: Time Dimension at 757-758. The same position is taken in the Targeted Killings Case regarding terrorists, paragraph 39.

<sup>170</sup> Schmitt: 21<sup>st</sup> Century at 510

<sup>171</sup> Dinstein: Hostilities at 148-149

<sup>172</sup> Interpretive Guidance at 70-71, Melzer: Response at 890. Since Melzer was the main architect behind, and wrote the Interpretive Guidance, it is natural that he later defends and explains its positions.

organized armed group, would be a major problem.<sup>173</sup> Considering the characteristics of modern armed conflicts, I would agree with this statement. Resent issues concerning DPH include suicide bombers and those assembling and placing IED's. Such individuals are typically affiliated with an organized armed group.

Members of organized armed groups, belonging to a non-state party to the conflict, lose the protection awarded to civilians, for as long as they have a continuous combat function within the group.<sup>174</sup> These members are not considered to participate in hostilities in a spontaneous, sporadic or unorganized manner. It is therefore argued that the standard for determining the loss of protection from direct attack for individual civilians and members of organized armed groups cannot be the same.<sup>175</sup> If the same standard was applied, these members would only be legitimate targets during their actual engagement in DPH. The revolving door would then provide these groups with a significant operational advantage compared to the regular armed forces.<sup>176</sup>

Members of the regular armed forces are combatants as a consequence of their membership therein.<sup>177</sup> Furthermore, they are legitimate targets regardless of whether they are engaged in an act of DPH at that time or not.<sup>178</sup> An application of the same standard for civilians and members of an organized armed group would cause an imbalance which could encourage these groups to operate as farmers by day, and fighters by night.

However, the application of "continuous combat function" as criterion for the loss of protection is not without problems. It can be argued that it grants these groups a unique status, which makes it difficult to identify and successfully target its members.<sup>179</sup> Members without a continuous combat function remain protected and cannot be targeted.<sup>180</sup> An example is a civilian engaged in support functions on behalf of the organized armed group, regardless of whether that function is substantial or integrated to the continuous combat function of other members or not.<sup>181</sup> If the same support functions are performed by a member of the regular armed forces, that individual would be a legitimate target.<sup>182</sup> Members of the regular armed forces are not civilians, regardless of their function and individual conduct.<sup>183</sup>

The Targeted Killings case stated that the revolving door, would grant civilians who join a terrorist organization immunity from attack, when they "return in order to rest and prepare" for the next attack, and that was to be avoided.<sup>184</sup> For these terrorist the "rest between hostilities is [...]"

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<sup>173</sup> Melzer: Response at 890-891

<sup>174</sup> Interpretive Guidance at 71-72

<sup>175</sup> Ibid

<sup>176</sup> Watkin: Opportunities Lost at 652, 693

<sup>177</sup> API Article 43, except for religious and medical personnel, (2) in conjunction with GC III Article 33

<sup>178</sup> Ibid, see also Interpretive Guidance at 71-72. Dinstein claims they lose protection awarded to civilians for the duration of their membership. His understanding is even wider than that found in the Interpretive Guidance, see Hostilities at 149.

<sup>179</sup> Watkin argues that the Interpretive Guidance fails to recognize how these groups are organized, and how they fight, see Opportunities Lost at 643-644, 648.

<sup>180</sup> Ibid at 652, 693

<sup>181</sup> Ibid at 644

<sup>182</sup> Ibid at 644, 693, Boothby expresses the same views, and state that this grants an unbalanced, and unjustified protection to these civilians, see Time Dimension at 743

<sup>183</sup> Supra note 68

<sup>184</sup> The Targeted Killings Case paragraph 40 at 28

preparation for the next hostility.” These members therefore lose their immunity from attack “for such time as” they are committing a “chain of hostilities with short periods of rest between them”.<sup>185</sup>

The concept of a continuous combat function cannot be found in the treaty body. The term was a creation of the Interpretive Guidance.<sup>186</sup> This indicates that there is no legal standing for the application of a different standard to members of an organized armed group, and other civilians.<sup>187</sup>

However, the concept illustrates the evolution and continued interpretation of the GCs and the APs.<sup>188</sup> The continuous combat function is a necessary response to the developments of terrorism and weapons in the 21<sup>st</sup> century.<sup>189</sup> It would contradict the treaties and customary international law, if the loss of protection was tied to “a function further removed from the conduct of hostilities.”<sup>190</sup> Therefore the determining factor for loss of protection must be “whether the person assumes a continuous function for the [organized armed] group involving his or her” DPH.<sup>191</sup> This criterion will contribute to the protection of the civilian population, and hence to the respect for IHL.

The Interpretive Guidance operates with an additional criterion for loss of protection from direct attack. The civilian must be a member of the organized armed group.<sup>192</sup> However, it may be difficult to decisively determine such membership. This is due to the secret and informal structures of these groups, as well as differing criteria for membership.<sup>193</sup> Membership has no basis in domestic law, which is usually the case with membership in the regular armed forces. Furthermore, membership is “rarely formalized through an act of integration other than taking up a certain function for the group”, nor is it “consistently expressed through uniforms [or] fixed distinctive signs.”<sup>194</sup>

The protection from direct attack is resumed when the individual no longer holds a continuous combat function. A positive declaration of disengagement, conclusive behaviour, reintegration into civilian life or permanently switching to an exclusively non-combat function are examples of how this can be achieved.<sup>195</sup> Whether or not the individual holds a continuous combat function must be determined in good faith, according to a reasonable assessment of the prevailing circumstances.<sup>196</sup>

The treatment and protections of civilians, who have engaged in DPH, will be further explored in section 3.4. and 3.5.

### 3.3. Not Entitled to Prisoner of War Status Upon Capture

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<sup>185</sup> Ibid at paragraph 39

<sup>186</sup> Solis: LOAC at 205, Boothby: Time Dimension at 655

<sup>187</sup> Boothby: Time Dimension at 654, 693, Interpretive Guidance at 25, 71-72

<sup>188</sup> Unlike Boothby and Watkin, Solis accepts and welcomes this concept, LOAC at 206. Melzer states that continuous combat function is a necessary criterion, Response at 846-856

<sup>189</sup> Solis: LOAC at 205

<sup>190</sup> Melzer: Response at 846

<sup>191</sup> Melzer: Response at 846 (846-856)

<sup>192</sup> The revolving door “starts to operate based on membership”, Interpretive Guidance at 70-72 see, Melzer: Response at 890. The continuous combat function is explained in the Interpretive Guidance at 31-36

<sup>193</sup> Interpretive Guidance at 32-35

<sup>194</sup> Ibid at 31-32

<sup>195</sup> Ibid at 72

<sup>196</sup> Ibid at 73

Historically, POW status has been granted to those who are allowed to engage in DPH, due to their combatant status. An example is the Lieber Code<sup>197</sup> Article 82, which denies those who are not entitled to “commit hostilities”, yet “do so with intermitting returns to their homes [...] with the occasional assumption of the semblance of peaceful pursuits, divesting themselves of the character of appearance of soldiers[...]”, the privileges of POWs.

POW status upon capture or detainment by the adverse party is awarded to those who fulfil the requirements contained in GC III Article 4A.<sup>198</sup> Accordingly, members of the regular armed forces of a party to the conflict, members of militias and other volunteer corps part of such armed forces are entitled to POW status. Members of other militias, volunteer corps or organized resistance movements who do not fulfil the four cumulative criteria are not entitled to POW status. They are civilians who have engaged in DPH, without being entitled to do so.<sup>199</sup>

GC III Article 4A(4) extends the scope of persons entitled to POW status beyond combatants. POW status is granted to persons accompanying the armed forces without being members thereof.<sup>200</sup> This refers to private contractors, who i.e. perform service or support functions to the armed forces.<sup>201</sup> If they engage in DPH, they lose their entitlement to treatment and protection as a POW if captured or detained.<sup>202</sup> Another extension is found in (6) where civilian participants of a levee en masse are granted POW status upon capture.<sup>203</sup>

POWs are entitled to humane treatment, as they do not pose a threat to the lives of the adversary, once they are captured.<sup>204</sup> The purpose of keeping them detained or captured is to exclude them from further participation in military operations. It is not a punishment for their previous participation.<sup>205</sup> The combatant’s privilege protects them from punishment for their previous participation in hostilities.

Civilians who have been captured or detained by the adverse party after having engaged in DPH, who do not fall within the mentioned extensions<sup>206</sup>, are not entitled to the treatment and protection awarded to POWs.<sup>207</sup> If there is doubt whether the individual meets the prerequisites, GC III Article 5 grants the individual such protection and treatment, “until such time as [the] status has been determined by a competent tribunal”.<sup>208</sup> Hence, until the tribunal has determined the status, there is a presumption of POW status if there is “any doubt”.

As a result, a great number of civilians who have engaged in DPH will not be entitled to POW status in the event of capture or detainment. This raises the question of whether these civilians are rendered

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<sup>197</sup> The Lieber Code of 24 April 1863 <[http://avalon.law.yale.edu/19th\\_century/lieber.asp](http://avalon.law.yale.edu/19th_century/lieber.asp)> Accessed 29.10.2011, See also Hague Regulations Article 22

<sup>198</sup> These are the requirements for combatant status, see Section 2.2.

<sup>199</sup> API Article 43(2)

<sup>200</sup> Hague Regulations Article 13 contains a similar extension.

<sup>201</sup> For further illustration see Solis LOAC 198-199

<sup>202</sup> Dinstein at 49,121 (-124), See also Montreux Document on Pertinent International Legal Obligations and Good Practices for States Related to Operations of Private Military and Security Companies during Armed Conflicts, 2008, Commentary to Statement 25, at 37.

<sup>203</sup> The same extension is found in the Hague Regulations Article 2, see Solis at 200-201, Dinstein: Hostilities at 48.

<sup>204</sup> Fleck: Handbook at 367, Kolb: Jus in Bellio at 340

<sup>205</sup> Fleck: Handbook at 372-372, Dinstein: Hostilities at 35, Dahl: Håndbok at 156

<sup>206</sup> See the cumulative criteria in GC III Article 4A(1) litra a-d, and the extensions in (4) and (6).

<sup>207</sup> Dinstein: Hostilities at 49

<sup>208</sup> API Article 45(1) 3rd sentence contains the same presumption, see Solis LOAC at 228



at the grace of their captors. The treatment of civilians who are not entitled to POW status will be examined in section 3.5.

#### 3.4. Subject to Domestic Prosecution and Punishment

Civilians who have engaged in DPH do not benefit from the combatant's privilege.<sup>209</sup> Unlike combatants and participants in a *levee en masse*, civilians are not entitled to engage in a DPH.<sup>210</sup> Hence, they are subject to prosecution and punishment in accordance with the national criminal code for any and all crimes they have committed.<sup>211</sup> The same applies to members of organized armed groups belonging to a non-State party to an armed conflict.<sup>212</sup> There is some disagreement whether civilians who have taken a DPH can be prosecuted for merely engaging in DPH<sup>213</sup> or whether there is an additional requirement of commitment of a crime under the domestic criminal legislation or international law.<sup>214</sup>

The Interpretive Guidance states that the absence "of an express right for civilians to" engage in DPH does not imply that such participation is prohibited under IHL.<sup>215</sup> However, they may be prosecuted and punished to the extent that their activities or membership is a crime under the domestic criminal legislation.<sup>216</sup> This statement is unfortunate. The foundation of the protection awarded to civilians is that they are not a threat to combatants as they generally do not engage in DPH.<sup>217</sup> This indicates that they can be prosecuted for merely engaging in DPH.

Civilians, who have engaged in DPH, may be subject to the severe penal consequences under the domestic criminal legislation, provided the trial ensures due process and respects the guarantees within IHL.<sup>218</sup>

Regardless of the combatant's privilege any individual may be held responsible for his or her commitment of a war crime.<sup>219</sup> Engaging in DPH is not in itself a war crime punishable under international criminal law.<sup>220</sup> Therefore, leaving the prosecution of civilian engagement in DPH to domestic criminal legislation might be the best approach. If IHL was to deal with all the specific acts of DPH it would become a legal maze, which could weaken its standing during armed conflicts.

#### 3.5. A Minimum Standard of Treatment and Protection

Civilians who engage in DPH are neither combatants, nor entitled to POW status upon capture. Are they entitled to treatment as protected persons in accordance with GC IV, or do they fall outside the

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<sup>209</sup> See section 3.1.

<sup>210</sup> API Article 43(2) antithetically. The exception of *levee en masse* is very limited. It is a spur of the moment reaction, and does not apply after the territory has been occupied, GC III Article 4A(4).

<sup>211</sup> Interpretive Guidance at 83-84, Dormann: Legal Situation at 70, Primoratz: Civilian Immunity at 90, Schmitt: IHL and DPH at 7

<sup>212</sup> Interpretive Guidance at 83-84

<sup>213</sup> This view is expressed in the *Ex Parte Quirin* case at 30-31, and Dinstein: Hostilities at 36-37: The activities amounting to DPH may not be a crime per se, but it can expose the individual to penal sanctions for the commitment of other hostile acts.

<sup>214</sup> This view is held by Dormann: Legal Situation at 70, and Fleck: Handbook at 261-262.

<sup>215</sup> Interpretive Guidance at 83

<sup>216</sup> Interpretive Guidance at 84

<sup>217</sup> Primoratz: Civilian Immunity at 90, *Supra* note 132

<sup>218</sup> Cassese: Expert Opinion at 14

<sup>219</sup> Interpretive Guidance at 85, Dormann: Legal Situation at 71, The Rome Statute Article 8

<sup>220</sup> Rome Statute Article 8 does not include DPH in the definition of a war crime.

protection awarded to victims of armed conflict by the GCs and their APs? This question relates to whether there exists a gap of protection for those who are not entitled to POW status under GC III and at the same time not entitled to protection under GC IV.<sup>221</sup>

In the *Celebrici* case, ICTY stated that there is no such gap of protection.<sup>222</sup> The Conventions were intended to be complementary.<sup>223</sup> Accordingly, an individual who is neither entitled to POW status after GC III, nor entitled to protection by GC I or II, is a “protected person” under GC IV.<sup>224</sup> The official interpretation is that there is no gap in the protection between GC III and GC IV.

The protections awarded to civilians who have engaged in DPH will be explored in the following.

### 3.5.1. Protection Under GC IV

GC IV Article 4(1) defines the scope of “protected persons” as those who find themselves “in the hands of a Party to the conflict or an Occupying Power of which they are not nationals”.<sup>225</sup> Accordingly, the individual’s nationality is the determining criterion for protection.<sup>226</sup>

However, the right to protection is not unlimited. A civilian in the territory of a party to the conflict who is “definitely suspected of or engaged in activities hostile to the security of the State” is not entitled to the rights and privileges under GC IV, if the exercise of such would be “prejudicial to the security of such State”.<sup>227</sup> If a spy, saboteur or others “under definite suspicion of activity hostile to the security of the Occupying Power”, is detained in occupied territory, these individuals are deemed to have “forfeited [the] rights of communication under” GC IV, if required by “absolute military security”.<sup>228</sup>

Regardless of these limitations, they shall be treated humanely and are entitled to the prescribed “rights of [a] fair and regular trial”.<sup>229</sup> In addition they “shall be granted the full rights and privileges of a protected person “at the earliest date consistent with the security of the State or Occupying Power”.<sup>230</sup>

This provision relates to serious allegations, and such activities will most likely amount to DPH.<sup>231</sup> However, it is highly unlikely that this provision regulates the situation of all activities amounting to DPH. Those who have engaged in DPH, but who are not subject to the derogations Article 5, remain

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<sup>221</sup> For a detailed presentation see Shlomy, Zachary; “Between the Geneva Conventions: Where does the Unlawful Combatant Belong? (Is.LR, Volume 38, Number 1-2, 2005)

<sup>222</sup> Prosecutor v. Delalic et al, ICTY Judgment of 16 November 1996, paragraph 271, 276

<sup>223</sup> Commentary to GC IV Article 4(4): There is not intermediate status; nobody in enemy hands can be outside the law.

<sup>224</sup> Shlomy: Between the GCs at 838, 834, Cassese: Expert Opinion at 5, 12.

<sup>225</sup> GC IV applies to those detained or captured with a different nationality from their captors. For an examination of specific exceptions to its application, see Dormann: Legal Situation at 48-66, Solis: LOAC at 234-236

<sup>226</sup> Dinstein: Hostilities at 48, 48-51, 67-68, Solis: LOAC at 234-237

<sup>227</sup> GC IV Article 5(1)

<sup>228</sup> Ibid Article 5(2). The criterion “absolute military necessity” indicates that not just any activities are sufficiently severe to cause loss of rights of communication.

<sup>229</sup> Article 5(3) does not allow for a complete derogation from the rights and protections contained in GC IV, Dormann: Legal Situation at 71

<sup>230</sup> GC IV Article 5(3)

<sup>231</sup> Dormann: Legal Situation at 50

entitled to the treatment and protections awarded by GC IV, provided they fulfill the nationality requirements of Article 4.<sup>232</sup>

The question then arises as to the treatment of those subject to the derogations of Article 5, and those who do not fulfill the nationality criterion of Article 4. Are these individuals rendered unprotected by the GCs, or are they entitled to protection under the provisions of API?

### 3.5.2. A Minimum Standard of Protection Under API

According to Article 45(3) an individual “who has taken part in hostilities”, who “is not entitled to” POW status and “does not benefit from more favourable treatment in accordance with” GC IV shall at all times have the right to the protections of API Article 75. Article 45(3) must therefore be read in conjunction with Article 75.

The wording of Article 75 indicates that the protections contained therein are minimum standards which apply to those who are considered unlawful combatants.<sup>233</sup> The reference to GC IV further indicates that they are protected under GC IV as long as the nationality requirements of Article 4 are fulfilled.<sup>234</sup>

Should Article 75 grant a wider or better protection than the GCs, the individual will be subject to protections awarded by the former, as it applies to those who “do not benefit from more favourable treatment”. The rights and protections therein reflect a minimum standard for those captured or detained during IACs, which applies to civilians who have engaged in DPH. Accordingly, these individuals are not rendered unprotected in the event of capture or detention by the adverse party, merely due to their DPH.<sup>235</sup> They “shall be treated humanely in all circumstances”, and “shall as a minimum [...] without adverse distinction” enjoy respect for their “person, honour, convictions, and religious practices”.<sup>236</sup> The 2<sup>nd</sup> paragraph lists acts that are prohibited at any time and in any place. The 3<sup>rd</sup> paragraph contains rights in relations to arrest, detainment or internment. Finally, the 4<sup>th</sup> paragraph contains minimum judicial and procedural guarantees. These are fundamental human rights guarantees which are rules of customary international law.<sup>237</sup>

### 3.5.3. Equal Application of a Minimum Standard in Non-International Armed Conflicts?

APII applies to NIACs.<sup>238</sup> It does not apply to “situations of internal disturbances and tensions” as these are not armed conflicts.<sup>239</sup> The protection awarded to civilians is contained in Article 13.<sup>240</sup> APII does not contain any provisions regarding a minimum standard of treatment, but Article 4 contains fundamental guarantees of humane treatment to all who do not engage in, or have ceased to engage in DPH.

Additionally Common Article 3 to the GCs contains an obligation to ensure a minimum of humane treatment to “persons taking no active part in hostilities” and those rendered hors de combat during NIACs. The wording in the French version is “participant directement”. The use of “active” vs

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<sup>232</sup> Shlomy: Between the GCs at 383

<sup>233</sup> Dormann: Legal Situation at 67, Dinstein: Hostilities at 37, Solis: LOAC at 237

<sup>234</sup> Ibid Dormann at 50-51, Solis: LOAC at 235

<sup>235</sup> Ibid Dormann at 67-68, Dinstein: Hostilities at 147

<sup>236</sup> API Article 75(1)

<sup>237</sup> Solis: LOAC 237, CIL Study Rule 87 at 306-308

<sup>238</sup> APII Article 1(1)

<sup>239</sup> APII Article 1(2)

<sup>240</sup> This protection is neither unlimited nor absolute, see Article 13(3)

“directement” does not affect the meaning of the provision, as the authentic texts are presumed to “have the same meaning”.<sup>241</sup> The wording implies that it does not apply to those who have engaged in DPH. It is argued that these civilians have forfeited the protections contained in therein.<sup>242</sup>

The wording further indicates that Article 3 does not apply to IACs. However, it contains a minimum standard, which suggest that these apply during all armed conflicts. Hence, no person should be subject to a lesser treatment than the minimum.<sup>243</sup> In the Nicaragua Case the ICJ stated that Common Article 3 contained “minimum rules applicable to international and non-international conflicts”.<sup>244</sup> This statement does not seem compatible with Common Article 3. However, the minimum standard of treatment prohibits “outrages upon personal dignity, in particular humiliating and degrading treatment”. It also contains “judicial guarantees which are recognized as indispensable by civilized people” during trial.<sup>245</sup> The treatment shall be “without any adverse distinction”.<sup>246</sup> The provision also lists acts which are prohibited at any time, in any place.<sup>247</sup> The drafters of the GCs wanted to ensure that there was a minimum standard of humanitarian protections for the victims of internal armed conflicts.<sup>248</sup>

Nevertheless, customary international law contains minimum standards of treatment and protection applicable in IACS and NIACs.<sup>249</sup> These standards apply independently from the application of Common Article 3. Accordingly, no individual is rendered outside the protections awarded to victims of armed conflicts.

#### 4. Practical Implications of DPH

##### 4.1. Is There a Presumption of Engagement in DPH?

There is some disagreement whether there exists a presumption that the civilian is or is not engaged in DPH, in case of doubt whether the activities amount to DPH. This question is important when determining the status and protections awarded to civilians who pose a threat during military operations.

There is a presumption of civilian status in situations of doubt during IACs.<sup>250</sup> This presumption is an important part of the protection of civilians.<sup>251</sup> Despite its importance, the rule of doubt is not a rule of customary international law.<sup>252</sup>

Boothby argues that there is no presumption that civilians are not directly participating.<sup>253</sup> He compares the civilian engaged in repeated DPH to the uninvolved and protected civilian. The object

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<sup>241</sup> VCLT Article 33(3)

<sup>242</sup> Schmitt: IHL and DPH at 521-522

<sup>243</sup> Dinstein: Hostilities at 39

<sup>244</sup> Case Concerning Military and Paramilitary Activities in and Against Nicaragua, ICJ Judgment of 17 June 1986, paragraph 219

<sup>245</sup> Dinstein finds the Courts understanding surprising, but agrees with the applicability of Common Article 3 to both IACs and NIACs, as “the text refers to an irreducible minimum that no belligerent party is allowed to ratchet down even a notch in armed conflict”, Hostilities at 38-39

<sup>246</sup> Common Article 3(1)

<sup>247</sup> Ibid 1)(a)-(d)

<sup>248</sup> Solis: LOAC at 97

<sup>249</sup> CIL Study Rule 87 at 306, Solis: LOAC at 237

<sup>250</sup> API Article 50(1)

<sup>251</sup> Primoratz: Civilian Immunity at 88

<sup>252</sup> CIL Study Rule 6 at 23-24, Melzer: Targeted Killings at 353-354

and purpose of the treaties indicate that they must be interpreted in a manner which avoids a rule of DPH which pose an increased risk to the latter category. The notion of DPH is essential in ensuring the protection of civilians. It must be interpreted in a manner that makes sense on the modern battlefield, and must therefore allow for the targeting of those who engage in DPH on a recurring or persistent basis.<sup>254</sup>

Melzer on the other hand, argues that the treaties leaves no doubt that loss of protection due to DPH is temporary. The civilian loses protection against direct attack as a consequence of an ongoing individual activity, and not as a sanction of previous engagement in DPH.<sup>255</sup> Therefore, “everything reasonable feasible must be done to determine” whether the civilian is engaged in DPH or not before s/he may be attacked.<sup>256</sup> Melzer argues that there is a presumption that civilians are not engaged in a DPH.<sup>257</sup>

Schmitt argues that DPH must be interpreted liberally, in favour of finding DPH in situations of doubt.<sup>258</sup> If the interpretation allows for civilians who are “inextricably involved in the conduct of ongoing hostilities” to remain protected, this could cause disrespect for the protections awarded to civilians by combatants who are endangered by their activities.<sup>259</sup> This approach creates an incentive for civilians not to participate, and keep their distance from armed conflicts. This way, civilians can avoid being directly targeted, as well as criminal charges due to their participation. This broad interpretation might seem counter-intuitive, but encouraging them to stay away from military operations will enhance the protection of the civilian population.<sup>260</sup>

The object and purpose of the GCs and their Additional Protocols is to protect the victims of armed conflict, and regulate the conduct of hostilities. The presumption of civilian status<sup>261</sup> and the protections awarded to civilians is an important aspect of this. The notion of DPH is a limitation on the latter, and allows for the targeting of such civilians.<sup>262</sup> There is an important distinction between status and entitlement to protection. The individual does not lose his or her status as a civilian due to DPH, but loses the protection from direct attack awarded to civilians.<sup>263</sup> Civilians engaged in DPH lose protection from direct attack due to engagement in activities inconsistent with their status as civilians.<sup>264</sup>

The argument that DPH should be interpreted liberally in order to ensure respect for IHL, which in turn would enhance the protection of the civilian population, has its merits. In regards to modern armed conflict, such an interpretation might even be necessary, in enabling the armed forces to take

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<sup>253</sup> Boothby: Time Dimension at 766

<sup>254</sup> Ibid at 767

<sup>255</sup> Melzer: Response at 887, Melzer: Targeted Killings at 353-354

<sup>256</sup> Melzer: Targeted Killings at 353

<sup>257</sup> Gasser takes the same position as Melzer. The civilian must be presumed to be protected if there is doubt whether he is temporarily engaged in DPH or permanently assuming tasks of a military nature, in Fleck: Handbook at 261

<sup>258</sup> Schmitt: IHL and DPH at 519-522, 533-536

<sup>259</sup> Ibid at 535

<sup>260</sup> Ibid

<sup>261</sup> API Article 50(1)

<sup>262</sup> API Article 51(3), APII Article 13(3)

<sup>263</sup> Melzer: Targeted Killings at 354, Cassese: Expert Opinion at 14

<sup>264</sup> Boothby: Time Dimension at 754

out civilians who pose a threat. However, the general rule is that civilians are protected from direct attack, and the dangers arising from military operations.<sup>265</sup> Expanding the scope of DPH might have dire consequences for the civilian in question. The urban setting of modern conflicts puts a great number of civilians at risk of being directly targeted due to DPH. This indicates that one should be careful when applying DPH and its consequences to those who may not have engaged in such activities.

My recommendation is therefore that a strict application of DPH be applied, so that there is a presumption that the civilian is not engaged in DPH in situations of doubt. This interpretation is consistent with the presumption of civilian status<sup>266</sup>, the general protection awarded to civilians<sup>267</sup>, and the overall object and purpose of the GCs and their APs.

#### 4.2. Capture or Kill?

As a consequence of DPH, the civilian becomes a military target, and may be attacked for the duration of his or her engagement. A question then arises as to the means and methods with which these civilians may be targeted. Is there an obligation to, if possible, capture them, or can they be killed regardless of the circumstances? This question illustrates the connection between IHL and international human rights.

IHL applies only during armed conflicts, and not during internal disturbances or tensions, and international human rights law applies both in time of peace and war.<sup>268</sup> However, IHL is considered *lex specialis* where these subsets both regulate the specific circumstances.<sup>269</sup> The human rights provide protection in the legal loopholes of IHL.<sup>270</sup>

Combatants are obligated by IHL to choose means and methods of combat which limits the injury or killing of civilians.<sup>271</sup> In the Targeted Killings case the Court stated that

“... a civilian [engaged in DPH] cannot be attacked at such time as he is doing so, if less harmful means can be employed. [...O]ne must choose the [military means] whose harm to the human rights of the harmed person is smallest. [...] If a terrorist taking a [DPH] can be arrested, interrogated, and tried, those 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 ...”<sup>272</sup>

The Court further stated that even though arrest, investigation or trial may not always be used or even be possible, they “should always be considered”.<sup>273</sup>

In *McCann v. United Kingdom*<sup>274</sup> three IRA terrorists from Northern Ireland were killed in the streets of Gibraltar, by British agents. The ECHR stated that:

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<sup>265</sup> API Articles 48, 51(1), (2) APII Article 13(1), (2)

<sup>266</sup> API Article 50(1)

<sup>267</sup> Supra note 260

<sup>268</sup> Fleck: Handbook at 12-13

<sup>269</sup> Fleck: Handbook at 13, 74-75, Nuclear Weapons case paragraph 25

<sup>270</sup> Melzer: Targeted Killings at 382-384

<sup>271</sup> Preamble to the St. Petersburg Declaration, API Article 57(2)(a)(ii) and (iii), Kolb: *Jus in Bellio* at 265

<sup>272</sup> Targeted Killings case paragraph 40 at 29

<sup>273</sup> *Ibid*

“... the use of lethal force would be rendered disproportionate if the authorities failed, whether deliberately or through lack of proper care, to take steps which would have avoided the deprivation of life of the suspects without putting the lives of others at risk.”<sup>275</sup>

Furthermore, “it is always necessary to take into account whether there are acceptable alternatives to the use of lethal force”.<sup>276</sup> A strict and compelling test of necessity must be employed when determining if lethal force is necessary to fight terrorism in the prevailing circumstances.<sup>277</sup> In addition, the response must be proportional to the received threat.<sup>278</sup>

The “purpose of the conduct of hostilities is not to kill the enemy, but to defeat him, even if it should be necessary to kill him to achieve that goal”.<sup>279</sup> A result of this is the prohibition on denial of quarter.<sup>280</sup> Any order of liquidation, as well as threats and execution of liquidation, with or without orders is prohibited.<sup>281</sup> In addition, a refusal to accept surrender and killing those hors de combat would violate this prohibition.<sup>282</sup> If it is not feasible to capture and evacuate the civilian under the circumstances, s/he “may be disarmed and must be released without further harm.”<sup>283</sup> This indicates that there is an obligation to capture, where civilians engaged in DPH surrender or become hors de combat. If that is not the case, s/he may be killed, provided that the use of lesser means is not required by the principle of military necessity, or principle of proportionality. This is reasonable as civilians engaged in DPH, are legitimate targets and liable to direct attack for the duration of their DPH.<sup>284</sup>

However, it is not lawful to liquidate every civilian due to their engagement in DPH.<sup>285</sup> If there exists an “equivalent non-lethal alternative” which achieves the concrete and direct military advantage, this alternative must be employed.<sup>286</sup> Accordingly, these civilians may be attacked during their engagement in DPH, as they are legitimate military targets. This alternative ceases to be an option when the engagement in DPH is over. At that time, less harmful alternatives such as arrest and prosecution can be applied. Provided that the guarantees of due process are respected, they may be punished for the crimes they committed.<sup>287</sup>

If mere suspicion of DPH, i.e. terrorism, allowed combatants to kill such civilians it would seriously undermine the fundamental principle of distinction.<sup>288</sup> Additionally, attacks against civilians who are not engaged in DPH, may amount to a war crime.<sup>289</sup>

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<sup>274</sup> McCann V. United Kingdom, 21 E.H.R.R 97 (1995) regarding the right to life in the European Convention on the Protection of Human Rights of 4 November 1950, Article 2

<sup>275</sup> McCann case at 148 paragraph 235

<sup>276</sup> Ibid paragraph 205-214

<sup>277</sup> Ibid paragraph 149

<sup>278</sup> Ibid paragraph 156, Cassese: Expert Opinion at 9

<sup>279</sup> Melzer; Targeted Killings at 411

<sup>280</sup> Hague Regulations Article 2(d), API Article 40, APII Article 4(1)

<sup>281</sup> Commentary to API Article 40 paragraph 1595

<sup>282</sup> Melzer: Targeted Killings at 411

<sup>283</sup> Ibid at 412

<sup>284</sup> Ibid at 426-427 for the conditions of lawful targeted killings.

<sup>285</sup> Ibid at 427

<sup>286</sup> Ibid at 426, McCann Case paragraphs 149, 156, 205-214, Targeted Killings Case paragraph 40 at 29.

<sup>287</sup> Cassese: Expert Opinion at 16

<sup>288</sup> Ibid at 20, Melzer: Targeted Killings at 354

Accordingly, there seems to exist an obligation to use the least amount of force possible when responding to civilians who engage in DPH. This view is in accordance with the principle of military necessity, the principle of distinction and the minimum standards of treatment. It is my opinion that civilians engaged in DPH cannot be killed if a less harmful mean is available. The evaluation of available means must take into consideration the danger to the civilian population and the threat posed by the individual. However, killing is only an option when the civilian is actually engaged in DPH, and never an option when the engagement is over. As a reaction to previous DPH, the civilian can be arrested, tried and punished for his or her actions, but not killed on the spot prior to a trial. However, after a fair trial the civilian may be subject to severe punishment, even death.

##### 5. Concluding remarks

As this thesis has shown the application of the consequences of DPH is not without problems. The lack of a recognized definition provides States with a significant freedom in regards to which activities amount to DPH. An equal application of these consequences is contingent upon a coherent definition. The Interpretive Guidance is an important step in the process of clarifying the content of DPH and its suggested definition provides an excellent basis for further discussion. Based on the critiques of the Interpretive Guidance I do not think that this is the last word in regards to codification of a definition. Nevertheless, it is easier said than done to come to an agreement on a coherent definition of DPH.

The Interpretive Guidance provides a workable guidance as to the duration of the temporal scope of loss of protection from direct attack for civilians engaged in DPH. This is important to combatants applying the concept of DPH to civilians during armed conflicts. However, the codification of IHL has not been able to keep up to speed with the developments of modern conflicts. The increasing presence of civilians who accompany the armed forces, as well as civilians engaged in DPH, has contributed to blurring the distinction between combatants and civilians. If IHL is to be respected, future codifications must balance the protection of the civilian population against the principle military necessity. This indicates that the principle of distinction must take into consideration the increased number of civilians participating during armed conflicts as private contractors, civilian employees and civilians engaged in DPH without being entitled to do so.

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<sup>289</sup> Rome Statute Article 8(2)(b)(i) and (2)(e)(i)



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