

The “War on Terror” and the Principle of Distinction in International Humanitarian Law

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Resumen: Las nuevas amenazas a la seguridad que han surgido en los últimos años están poniendo seriamente en juego la importancia y la implementación del derecho internacional humanitario. Este artículo investiga el impacto de la guerra del terror en el principio de distinción en el derecho internacional humanitario. Examina, de forma específica, prácticas estatales, por ejemplo, de los Estados Unidos, que han cedido frente al surgimiento de nuevas reglas relativas al principio de distinción. Para esto, se hace un análisis de dicho principio bajo dos perspectivas: blancos concretos y captura.

Palabras clave: Principio de distinción, derecho internacional humanitario, guerra del terror, detención, combates.

Abstract: New security threats, which have surfaced in the past few years, are seriously jeopardizing the relevance and implementation of international humanitarian law. This paper investigates the impact of the war on terror on the principle of distinction in international humanitarian law, examining

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in particular whether the practices of some States, notably the US, have led to the emergence of new rules in relation to the principle of distinction. For this it looks at the principle from two separate, yet correlated, perspectives: a targeting and a detention perspective.

Keywords: Principle of distinction, international humanitarian law, war on terror, detention, combatancy.

1. Introduction

There can be little doubt that international humanitarian law (IHL) currently faces a number of formidable challenges. Whereas previously the focus was on the question of the implementation of IHL, it is now on the law itself and the adequacy thereof. Indeed, new actors and new activities are seriously shaking the foundations of IHL by contesting its core values, in particular the distinction between combatants and civilians. Non-state actors and transnational armed groups engaged in international terrorism pay scant attention to core IHL principles.¹ Despite the fact that there are convincing arguments to regard terrorism primarily as a criminal activity,² many States perceived terrorist activities, such as September 11th, to be acts of war³ potentially triggering the applicability of IHL.⁴ Although generally the “war on terror” does not qualify as an armed conflict, some of the operations fought as part thereof might be characterised as armed conflicts. Hence this paper is based on the idea that IHL is applicable to such conflicts.

1 “The attacks [of 11 September 2001] themselves were a frontal assault on established humanitarian principles, being a form of total war that disdained universally endorsed norms against attacking civilians”. Forsythe, D. *The Humanitarians. The International Committee of the Red Cross*. 2005, 129.

2 See literature referred to in Quéniévet, N. The applicability of international humanitarian law to situations of a (counter-)terrorist nature. In: Arnold, R. & Hildbrand, P.-A. (eds). *International humanitarian law and the 21st century’s conflicts. Changes and challenges*. 2005, at 25-59.

3 Rowland, K. Cheney Hits Obama’s Terrorism Policy. *Washington Times*, 16 March 2009.

4 It is however the author’s position that most terrorist activities do not fall within the definition of an armed conflict.

Simultaneously, as it was claimed that a new conflict paradigm⁵ was emerging, some saw a growing need to revise IHL.⁶ In previous armed conflicts States whose actions seemed *prima facie* unlawful tried to justify their actions as falling within the purview of legality. Yet, at the inception of the “war on terror”⁷ some States refused to place themselves in an IHL framework and insisted that overreliance on IHL “could hinder their military efforts”.⁸ Under the Bush administration, doubts on the relevance of IHL norms came not only from action on the ground. The US also claimed that IHL and its core principles were not pertinent in the new context.⁹ This stance was even more noteworthy as the International Committee of the Red Cross (ICRC) published at the same time its long awaited study on customary international humanitarian law.¹⁰ The ICRC Study came as a consecration of the principles of IHL, with its identification of the *opinio juris* and practice forming a customary norm to be applied in both international and non-international armed conflicts.¹¹ Unfortunately, the statements of

5 “The war on terrorism ushers in a new paradigm, one in which groups with broad, international reach commit horrific acts against innocent civilians, sometimes with the direct support of States. Our Nation recognizes that this new paradigm –ushered in not by us but by terrorists– requires new thinking in the law of war, but thinking that should nevertheless be consistent with Geneva”. The White House, Memorandum from the President for the Vice-President, the Secretary of State, the Secretary of Defense, The Attorney General, Chief of Staff to the President, Director of CIA, Assistant to the President for National Security Affairs, Chairman of the Joint Chiefs of Staff, regarding Humane Treatment of al Qaeda and Taleban Detainees, 7 February 2002.

6 As the European Parliament observed IHL must “be revised to respond to the new situations created by the development of international terrorism”. European Parliament, Resolution B5-0066/2002, 7 February 2002. A similar call was made by former British Minister of Defence Reid in 2006. See Reid, J. Twenty-first century warfare. Twentieth century rules. *Royal United Services Institute Journal*, 2006, 151.3, available at: <<http://www.rusi.org/downloads/assets/Reid.pdf>> (8 April 2009).

7 For a discussion on this expression and its relevance in an IHL context, see Quénivet, *supra* note 2.

8 As Belz explains there is a “group of states, led by the US, which [was] involved in military activities against international terrorism. This group [held] that ‘excessive’ endorsement of humanitarian law could hinder their own military efforts, and therefore oppose[d] it”. Belz, D. Is international humanitarian law lapsing into irrelevance in the war on international terror? 2006, 7 *TIL* 97, at 99.

9 See discussion *infra*.

10 Henckaerts, J.-M. & Doswald-Beck, L. *Customary International Humanitarian Law*. 2005.

11 As MacLaren and Schwendimann pinpoint “[a] contemporary example of [the] effect [of

several States conveyed the impression that the *opinio juris* gathered during this study, mainly prior to September 11, had disappeared. Following the US example, some States began even to express their opposition to such rules.¹² The question thus arises, are the practices of some States violating the existing standards or are these developments indicating the emergence of new ones?¹³

If, as seems the case, such States deny the applicability of IHL to a particular situation or they declare that its principles are outdated there is a case for reform that must be urgently addressed. The pertinence of some of the core principles of IHL needs to be re-examined.

A cardinal tenet of IHL that has suffered from the “war on terror” is the principle of distinction¹⁴ as it has been criticised for giving “terrorists” an unfair advantage. Indisputably, terrorism violates this tenet as it strikes at innocent civilians.¹⁵ Likewise, counter-terrorism is likely to reduce the

the ICRC study] regards the US administration’s interpretation of the Geneva Conventions and its treatment of detainees at Guantanamo Bay. By virtue of the Study, the ICRC will be able to press its argument even more forcefully that these persons, whom the administration refuses to accord the status of prisoners of war (POW), may not according to customary IHL be tortured or otherwise mistreated”. MacLaren, M. & Schwendimann, F. An exercise in the development of International Law: the New ICRC Study on Customary International Humanitarian Law. 2005, 6.9 *German Law Journal* 1217, at 1222, fn. 22.

12 Israel adopts an approach that is similar to that of the US. See Dinstein, Y. The ICRC Customary International Humanitarian Law Study. In: Helm, A. (ed.). *The Law of War in the 21st Century. Weaponry and the use of force*. 2006, 99, at 99.

13 Lietzau, who was at that time Staff Judge Advocate to U.S. European Command, answers that “the United States is operating in areas not addressed by applicable treaties and thus is participating in the development of customary international law”. Lietzau, W. K. Combating terrorism: the consequences of moving from law enforcement to war. In: Wippman, D. H. & Evangelista, M. (eds.). *New wars, new laws? Applying laws of war in 21st century conflicts*. 2005, 31 at 46.

14 As Dorman explains, “in combat situations, the entire body of international humanitarian law can be reduced to the obligation to observe the principle of distinction”. Dorman, K. Proportionality and distinction in the International Criminal Tribunal for the Former Yugoslavia. 2005, 12 *Austl. Int’ L.J.* 83, at 84.

15 September 11 “destroyed the naive notion that there is a bright legal line that neatly divides a combat zone into innocent civilians (who of course are legally protected from deliberate hostilities) and combatants who may awfully be targeted and killed”. Newton, M. Unlawful belligerency after September 11: history revisited and law revisited. In: Wippman & Evangelista, *supra* note 13, at 82.

general level of protection offered by IHL,¹⁶ notably to civilians and civilian objects. While the validity of the principle has not been challenged, calls for reform have focused on redefining the categories that are central to the principle of distinction.

It is nevertheless not the first time in history that we are confronted with this definitional issue. Indeed, Matheson recalls that “in the mid-1970s, when the negotiations on the Additional Protocols to the Geneva Conventions were in full swing, the primary issues with respect to detainees were ones that are relevant today: how to deal with unconventional conflicts, how to deal with non-state entities, and how to treat irregular fighters and terrorists”.¹⁷ The same questions are being asked again.

Furthermore one must consider whether these categories exist for targeting or detention purposes.¹⁸ Here, targeting is understood as the lawful killing of an individual while detention refers to the legal regime applicable to an individual detained by the enemy.

This paper investigates the impact of the “war on terror” on the principle of distinction. In this light, the principle will be briefly introduced, its status in international law explained, and some of the problems raised by its application in the context of terrorism highlighted. In further sections, issues relating to the definition of the principle will be addressed in details and the principle examined from a targeting and detention perspectives.

16 Sandoz, Y. Prospects for future developments in international humanitarian law. In: Lijnzaad, L.; Van Sambeek, J. & Tahzid-Lie, B. (eds.). *Making the voice of humanity heard. Essays on humanitarian assistance and international humanitarian law in honour of HRH Princess Margriet of the Netherlands*. 2004, 339 at 342.

17 Matheson, M. J. Continuity and Change in the Law of War: 1975 to 2005: Detainees and POWs. 2006, 28 *Geo. Wash. Int'l L. Rev.*, 545-6.

18 As Akande explains “[I]here is a distinction between the rules relating to the targeting, rules relating to detention and those relating to prosecution. A person may be classified differently depending on the purposes for which classification is being made”. Akande, D. Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities. 2010, 59 *ICLQ* 180, at 184.

2. The principle of distinction

The principle of distinction specifies that combatants must distinguish themselves from civilians.¹⁹ As a result, combatants must neither deliberately target nor indiscriminately or disproportionately harm civilians.²⁰ The definition of who falls within the categories of combatants or civilians is therefore of crucial importance in IHL. The concept of “civilian” is “defined in contra-distinction to combatants: civilians are those who are not combatants”.²¹ In essence, whoever does not fulfil the criteria of a combatant is considered as a civilian.

The principle of distinction stems from the Preamble to the 1868 Declaration of St Petersburg²² and was later incorporated into the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land.²³ In contemporary treaties, the principle is enshrined in Articles 48, 51 and 52 of Additional Protocol I²⁴ in relation to international armed conflicts and in Article 13 of Additional Protocol II in relation to non-international armed conflicts.²⁵

19 Rule 1 of the Study on CIHL. See Henckaerts, J.-M. Study on customary international humanitarian law: a contribution to the understanding and respect for the Rule of Law in Armed Conflict. 2005, 857 *IRRC* 198; see also Protection of Civilian Populations against the Dangers of Indiscriminate Warfare, Res. XXVIII, adopted by the XXth International Conference of the Red Cross, Vienna, 1965. While the principle of distinction is equally applicable in international and non-international armed conflicts, this discussion focuses on international armed conflicts. Indeed in non-international armed conflict the concept of combatant does not exist.

20 Rule 1 of the Study on CIHL. See Henckaerts, *supra* note 19, at 198.

21 Kleffner, J. K. From “belligerents” to “fighters” and civilians directly participating in hostilities. On the principle of distinction in non-international armed conflicts one hundred years after the Second Hague Peace Conference. 2007, *LIV NILR* 315, at 321.

22 “[T]he only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”. 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight in Roberts, A. & Guelff, R. (eds.). *Documents on the Laws of War*. 2nd ed., 1995, at 30.

23 Regulations Respecting the Laws and Customs of War on Land annexed to The Hague Convention (IV) Respecting the Laws and Customs of war on Land, 18 October 1907 in Roberts & Guelff, *supra* note 22, at 44.

24 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) 1977, 1125 UNTS 3.

25 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (AP II) 1977, 1125 UNTS 609.

Besides being firmly anchored in various treaties, the principle of distinction is also established in customary law.²⁶ Further it is applicable in international and non-international armed conflicts.²⁷

What is more, in its *Nuclear Weapons Advisory Opinion* the International Court of Justice described the principle as “intransgressible”,²⁸ without though explaining what this adjective means. Quéguiner argues that the ICJ thereby meant “to indicate the *jus cogens* character of the [principle of distinction]”.²⁹ There is no doubt that the very principle of distinction cannot be changed as it has reached the status of a *jus cogens* norm. That being said, what can clearly be modified is the definition of combatancy and this is where the problem lies. Indeed “the uncertainty within the principle of distinction emerges when probing the critical delineation between what constitutes a civilian and what constitutes a combatant”.³⁰ This paper argues that despite perceptible changes in the reality on the ground and calls for reform proposals, IHL has not been affected by these changes.

3. The definitional issue

The definitional issue³¹ presents not only legal experts with a vast ground for debate but also States with a wide margin of apprecia-

26 See, e.g., *Prosecutor v. Tadić*, Case N° IT-9-1-AR72, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 87; *Prosecutor v. Martić*, Case N° IT-95-11-I, Trial Chamber, 8 March 1996, para. 10. Rule 1 of the Study on CIHL declares: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians”. See Henckaerts, *supra* note 19, at 198.

27 “[T]he rule that civilian population as such, as well as individual civilians, shall not be object of attack, is a fundamental rule of international humanitarian law applicable to all armed conflicts”. Martić, *ibid.*, para. 10.

28 Threat of Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep. 226, paras. 78-79.

29 Quéguiner, J.-F. The Principle of Distinction: Beyond an Obligation of Customary International Humanitarian Law. In: Hensel, H. M. (ed.). *The legitimate use of military force. The just war tradition and the customary law of armed conflict*. 2008, 161, at 171.

30 Maxwell, M. D. & Meyer, R. V. The principle of distinction: probing the limits of its customariness. 2007 *Army Law*. 1, at 3.

31 It must be borne in mind that this discussion can only take place in the framework of an international armed conflict as there is no combatant status in the context of non-international armed conflict. Neither Common Article to the Geneva Conventions nor Additional

tion.³² This is linked to the fact that there are different sources of law to define the concept of combatancy and, as claimed by some commentators, gaps in this definition that allow for a third category of individuals, who are neither combatants nor civilians, to emerge. In the context of the “war on terror” this definitional issue has gained even more traction.

3.1. Different sources to define combatancy

The Geneva Conventions,³³ API,³⁴ and customary international law offer discrete definitions of combatancy. Considering the interpretation tenets “*lex posterior derogat priori*” and “*lex specialis derogat generali*” API should reflect the most detailed and latest position.

However, the definition indicated in API was not of customary nature at the time of its drafting. States such as the United Kingdom and France took a considerable amount of time before ratifying the protocol, mainly because they considered that API did not reflect customary law with regards to the concept of combatancy. Also, the US has consistently refused to ratify it or abide by the provisions relating to combatancy.³⁵

Nonetheless, the Study on Customary International Humanitarian Law suggests that API encapsulates the current status of the law on combatancy: “[c]ombatants must distinguish themselves from the civilian

Protocol II refer to the status of combatant. See also Rules 3 and 106 of the Study on CIHL. See Henckaerts, *supra* note 19, at 198 and 207.

32 In reality, the armed forces make an *ante facto* determination of status (when conducting military operations) while tribunals may in exceptional cases have the opportunity to gauge one’s determination *post facto* (when deciding whether a particular attack was in conformity with IHL). Consequently, the determination of status is essentially left in the hands of the State and little international jurisprudence is available on this issue.

33 See art. 4 GC III which, despite its focus on prisoners of war, determines to a great extent combatant status. *Geneva Convention relative to the Treatment of Prisoners of War* (GC III), 1949, 75 UNTS 135.

34 Arts. 43 and 44 AP I, *supra* note 24.

35 See Newton, *supra* note 15, at 103. This is also the position of Israel, see Dinstein, *supra* note 12, at 105-6. See discussion in Rosen, R. D. Targeting enemy forces in the war on terror: preserving civilian immunity. 2009, 42 *Vand. J. Transnat’l L.* 683, at 688, and Maxwell & Meyer, *supra* note 30, at 4. Other States such as Turkey, India, Iran and Iraq have not ratified the Protocol either.

population while they are engaged in an attack or in a military operation preparatory to an attack”.³⁶

Another reason that accounts for the complexity of the issue is that combatancy can be viewed from two different angles. A first usage is linked to The Hague law that is based on the conduct of an individual, i.e. his/her right to fight.³⁷ This is also the position adopted in API. A second usage is presented in the Geneva law that is based on the status and protection of an individual who was fighting in the conflict.³⁸ The US position is based on The Hague law. Since API adopts the same approach as the one espoused by The Hague law, one expects the US to uphold the standard expounded in API. However, the US fundamentally disagrees with the interpretation of the definition of a combatant as adopted by the drafters of API and, hence, has consistently challenged this interpretation. Indeed while The Hague law mentions four criteria for an individual to qualify as a combatant,³⁹ API imparts in article 44(3) more relaxed requirements for combatants to distinguish themselves.

This is undoubtedly problematic as “acceptance of the definition of civilian and military objectives is crucial to compliance with the principle of distinction”.⁴⁰ This means that the way certain individuals are viewed and categorised hinges upon which source of law is used. For example, people offering food and shelter to fighters,⁴¹ who are civilians, may lose their protection owing to their involvement in the conflict or support for a party to the conflict. Some individuals may fall victims of this legal indeterminacy.⁴²

36 Rule 106 of the Study on CIHL. See Henckaerts, *supra* note 16, at 207. “The ICRC Study has been criticized for concluding that at least parts of articles 43 and 44 of Additional Protocol I reflect customary IHL”. Quéguiner, *supra* note 29, at 165.

37 Acquiring the status of combatant means that one is immune from prosecution under criminal law for having taken part in the hostilities.

38 Once captured, combatants have to the right to POW status which entitles them to a series of rights according to GC III.

39 Arts. 1-2 of the Hague Regulations, *supra* note 23.

40 Dorman, *supra* note 14, at 86.

41 Parties to conflicts interviewed in the framework of the ICRC People on War Report asserted that “[i]f [civilians] provide the combatants with food, then they become part of war and are no longer civilians” and “[t]hey are enemy logistics, and it is only natural to attack them”. *People on War Report*, Report by Greenberg Research, Inc., Geneva, International Committee of the Red Cross, October 1999, at 30-1.

42 Equally, there is the more modern version of collaboration, namely financial assistance

Even more problematic is the fact that “IHL will be unable to perform one of its primary purposes, the protection of those who do not take part in conflict, unless it is relatively clear who falls within the class of protected persons and who does not”.⁴³

Despite the nascent customary nature of the pertinent provision entrenched in API it seems that some States such as the US still refuse to apply it. One may therefore envisage considering them as persistent objectors to an emerging customary rule relating to the definition of combatancy.⁴⁴ Indeed, since the US has consistently and vehemently opposed the norm before it became, according to the ICRC Study,⁴⁵ crystallised into law, it is possible to maintain that the definition of combatancy, as expounded in API, is not applicable to the US. However, the opposition to a rule does not stop the rule from gaining customary status.⁴⁶ Thus, the definition of a combatant encapsulated in API may have reached that status despite the US opposition.

It is clear from the discussion that the US has never called for the abrogation of the distinction between combatants and civilians. It opposes the definition of combatancy as enshrined in API but not the principle of

and the provision of contacts by narco-traffickers as well as other channels offered to terrorist groups to finance and sponsor the activities of their cells. For example, the Bush administration argued in a federal district court case brought up in December 2004 that “where an elderly Swiss lady sends money to a charitable organization and the money ends up with Al-Qaeda, she could also qualify as a combatant”. O’Connell, M. E. “Terrorism on Trial”: The Legal Case against the Global War on Terror. 2004, *36 Case W. Res. J. Int’l L.* 349, at 351. O’Connell refers to a newspaper article that mentions the oral arguments in *In re Guantanamo Detainee*, Cases N° 02-CV-0299CKK, 2005 WL 195356 (D.D.C. Jan 31, 2005).

43 Akande, *supra* note 18, at 181.

44 For jurisprudence on the notion of a persistent objector, see *Anglo Norwegian Fisheries Case (U.K. v. Norway)*, [1951] ICJ Rep. 116. See also Stein, T. The approach of the different drummer: the principle of the persistent objector in International Law. 1985, *26 Harv. Int’l L.J.* 457.

45 A note of caution must be rung here as the results of the ICRC study can be taken for granted. Crawford explains that “despite the fact that the study is extensively researched, and makes some persuasive arguments, it should be kept in mind that it is an academic work, and not a declaration of the law to which states are bound”. Crawford, E. Unequal before the Law: the case for the elimination of the distinction between international and non-international armed conflicts. 2007, *20 LJIL* 441, at 457.

46 *Military and paramilitary activities in and against Nicaragua (Nicaragua v. US)*, Merits, 1986, *ICJ Rep.* 14, para. 186; see discussion in Paust, J. The complex nature, sources and evidences of customary human rights. 1995, *25 Ga. J. Int’l & Comp. L.* 147, at 152.

distinction as such.⁴⁷ On the contrary, it has constantly argued in favour of its preservation.

3.2. Two or three categories?

This “combatant”/“civilian” distinction must be borne in mind inasmuch as several States and an increasing number of legal experts assert that there are in fact three categories: “combatants”, “unlawful combatants”,⁴⁸ and “civilians”.⁴⁹ As Watkin explains, there is “a lack of consensus that ‘people’ fall solely into one of the two groups: ‘lawful combatants’ and ‘civilians’”.⁵⁰ In other words, the relationship is no longer mutually exclusive, taking on the characteristics of a tripartite division.

But, it turns out that a historical interpretation of the norm shows that undoubtedly a third status always existed,⁵¹ albeit persistently denied by the ICRC that believes in the sanctity of a combatant/civilian division. The ICRC commentary to the Geneva Conventions clearly spells out “every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. *There is no intermediate status*; nobody in enemy hands can fall outside the law”.⁵²

47 As Henckaerts explains “while the United States has not supported the principle of distinction, the prohibition of indiscriminate attacks and the principle of proportionality through the ratification of Additional Protocol I, it has supported these rules *inter alia* through the ratification of Amended Protocol II to the CCW, which applies to both international and non-international armed conflicts”. Henckaerts, J.-M. Customary international humanitarian law: a response to US Comments. 2007, 89 *IRRC* 473, at 481.

48 The concept of “unlawful combatant” is usually understood as “all persons taking a direct part in hostilities without being entitled to do so and who therefore cannot be classified as prisoners of war on falling into the power of the enemy”. See Quéguinet, *supra* note 29, at 166.

49 It is contended that a literal interpretation of the Geneva Conventions reveals a gap between the GCIII and GCIV. Rosas, A. *The legal status of prisoners of war: a study in international humanitarian law applicable in armed conflicts*. 1976, at 411-2.

50 Watkin, K. Assessing proportionality: moral complexity and legal rules. 2005, 8 *YIHL* 3, at 11.

51 Newton, *supra* note 15, at 100.

52 Pictet, J. *Commentary of the Geneva Conventions, Fourth Geneva Convention* (1958) 51 (emphasis

In contrast, the US asserts that there are individuals who fall outside the strict remit of IHL: they can be targeted since they are not civilians and, once detained, they do not benefit from protection offered to “protected persons” since they are neither combatants nor civilians.⁵³

In the circumstances we may legitimately ask whether we are not simply returning to the old standards inasmuch as Newton contends that “[t]he Bush Administration neither invented the phrase ‘unlawful combatants’ nor created an entirely new legal category of participants in international armed conflict”.⁵⁴ This position is based on an interpretation of article 45(3) API that arguably foresees a third category. Indeed, the article imparts that “[a]ny person who has taken part in hostilities, who is not entitled to prisoner of war status and who does not benefit from more favourable treatment in accordance with the Fourth Convention shall have the right at all times to the protection of article 75 of this Protocol”.

Nonetheless, this paper claims that the correct view is that there are two categories, combatants and civilians, and the latter is comprised of two sub-categories, civilians and civilians losing their protection because they are taking a direct part in the hostilities.⁵⁵ The DPH Guidelines certainly confirm this position.⁵⁶

The notions of combatants/civilians take different colours depending on the sources of law used. This definitely does not simplify the determination of status. The ambiguity concerning the status of individuals in times of armed conflict has led countless States and legal scholars to call for revision of these provisions.⁵⁷ Yet, as Ratner rightly points out, they are often unable to elucidate whether they wish combatants and civilians to be more or less protected.⁵⁸ In some cases literature is confused as authors ar-

in original). See also Sassoli, M. The status of persons held in Guantanamo under international humanitarian law. 2004, 2 *JICJ* 99.

53 See Kolb, R. & Hyde, R. *An introduction to the International Law of armed conflicts*. 2008, at 205. Israel espouses a similar position, see discussion in Ben-Naftali, O. & Michaeli, K. Public Committee against Torture in Israel v. Government of Israel. 2007, 101 *AJIL* 459, at 464-465.

54 Newton, *supra* note 15, at 85.

55 See *Prosecutor v. Brjanin*, Case N° IT-99-36-T, Trial Judgment, 1 September 2004, para. 125; Goodman, R. The detention of civilians in armed conflict. 2009, 103.1 *AJIL* 48, at 51.

56 ICRC. *Interpretative guidance on the notion of direct participation in hostilities under international humanitarian law*. Geneva, 2009 (DPH Guidelines).

57 See discussions *infra* and *supra*.

58 Ratner, S. R. Are the Geneva Conventions out of Date? 2005, *Law Quad Notes* 66, at 67.

gue in favour of both the under- and overprotection depending on whether the individual is viewed from a targeting or a detention perspective. This, to some extent, conveys the impression that there might be some validity in proposing a system based on three categories of individuals, a proposition that is examined and finally rejected in the subsequent sections.

4. The targeting perspective

While combatants may be targeted at all times⁵⁹ civilians are protected against direct military attacks as long as they do not take direct part in the hostilities.⁶⁰ Immunity from attack is predicated on civilians being unarmed and harmless.⁶¹ Should they participate in the military operations they can only be targeted for such time as they are engaged in military action.⁶² Once they stop carrying out military operations they can only be arrested.⁶³

The main question relating to individuals viewed from a targeting perspective is whether civilians are underprotected as “collateral damage” in journalistic jargon⁶⁴ or overprotected when they are in reality heads or members of terrorist cells engaged in military activities.⁶⁵ It is in fact impos-

59 *Prosecutor v. Kordić and Cerkez*, Case N° IT-95-14/2, Judgment, 26 February 2001, para 51.

60 It must be noted that civilians may still be subject of incidental loss within the proportionality principle.

61 Camins, E. The past as prologue: the development of the ‘direct participation’ exception to civilian immunity. 2008, *90.872 IRRC* 853, at 879.

62 Arts. 51(3) API, *supra* note 24 and 13(3) APII, *supra* note 25. There is clear disagreement as to what “for such time” represents and as to the scope of the term “direct participation in hostilities” and the length of time for which immunity is lost. See Turner, L. I. & Norton, L. G. Civilians at the Tip of the Spear. 2001, *51 AFLR* 1, at 28-30; Sassoli, M. Use and abuse of the laws of wars in “The War on Terrorism”. 2004, *22 LAI* 195, at 211-2; and Dinstein, *supra* note 12, at 107-8. The DPH Guidelines have sought to clarify this issue. DPH Guidelines, *supra* note 56, Part VII entitled “Temporal Scope of Loss of Protection”.

63 Sassoli, *supra* note 62, at 208-9.

64 Although it is true that more and more civilians fall prey to hostilities it must be underlined that in the war on terror the possibility to use precision guided ammunition minimises the amount of civilian casualties. “This is especially true if the destructive capability of modern weapons systems and the number of missions carried out is taken into account”. Gill, T. *The 11th of September and the International Law of Military Operations*, Inaugural Lecture, Vossiuspers UvA, 20 September 2002, at 26.

65 See discussion in Stephens, D. & Lewis, M. W. The Law of Armed Conflict. A contemporary critique. 2005, *6 MJIL* 55, part F.

sible to offer more and at the same time less protection to civilians unless a third category of individuals is created: those who can be subject to attacks.

If, for the sake of argument, we were to acquiesce that in terms of targeting there are three categories,⁶⁶ then, first, a definition of each group must be indicated; second, certain yardsticks relating to when and how members of such a group can be the subject of attack must be spelled out. Further, defining whether a person falls within a third category very much hinges upon the level of information one possesses concerning the activities of this person.⁶⁷ No doubt, if he/she is the head of an enemy organisation⁶⁸ but what about “little fish”? How is their status determined? As Schmitt acknowledges, “applying humanitarian law [...] on leadership targeting can prove difficult in practice”.⁶⁹

A solution, which would be in accordance with the two status theory, could be to attack such individuals only when they are carrying out an operation, in which case we are adopting the same position as that spelt out in API. Civilians directly participating in the hostilities become legitimate targets but are not classed as combatants. This clearly buttresses the idea that there are combatants on the one side and civilians (whether or not directly taking part in the hostilities) on the other.

That being said, article 51(3) API must be read in conjunction with article 44(3) API in order to define the concept of a “civilian” and the result is that some individuals, who participate in an international armed conflict, can only be targeted under certain circumstances. In a different context, they retain civilian status and thus civilian immunity.⁷⁰ Newton argues that “[t]his on/off combatant status would effectively erode the law of unlawful combatancy to its vanishing point. The United States refused to accept Protocol I in part on the basis that article 44(3) contributed to the ‘essence of terrorist

66 See discussion *supra*.

67 Surveillance and reconnaissance capabilities will play a great deal in locating potential targets. Schmitt, M. N. *Bellum Americanum: the U.S. view of twenty-first century of war and its possible implications for the Law of Armed Conflict*. 1998, *19 Mich. J. Int'l L.* 1079.

68 During the conflict in Afghanistan, the US targeted on several occasions places where the Taliban and al-Qaeda leadership was housed. Roscini, M. *Targeting and contemporary aerial bombardment*. 2005, *54 ICLQ* 411, at 417.

69 Schmitt, M. N. *Targeting and humanitarian law: current issues*. 2004, *34 IYHR* 59, at 80.

70 This is called the revolving door theory. See e.g. McKeogh, C. *Innocent civilians: the morality of killings in war*. 2002, at 140.

criminality' by its 'obliteration of the distinction between combatants and non-combatants'".⁷¹

The ICRC Study espouses the API approach inasmuch as it proclaims that "[c]ombatants must distinguish themselves from the civilian population while they are engaged in an attack [...]"⁷² and "[c]ivilians are protected against attack unless and for such time as they take a direct part in hostilities".⁷³ The Supreme Court of Israel has also acknowledged that the latter provision reflects customary international law.⁷⁴ The DPH Guidelines take an analogous approach as they assert that civilians are "entitled to protection against direct attack unless and for such time as they take a direct part in hostilities"⁷⁵ and "lose protection against direct attack for the duration of each specific act amounting to direct participation in hostilities".⁷⁶

As a result it appears that for targeting purposes there are two categories: combatants (as defined in AP I) and civilians taking a direct part in hostilities on the one side and civilians not taking a direct part in hostilities on the other.⁷⁷ In line with Watkin, one may question whether the title of "civilian" for those participating in conflict does not carry "significant potential for the erosion of the protected status of other uninvolved civilians. It also represents a not so subtle weakening of the prohibition that all 'civilians' cannot be targeted".⁷⁸

A further essential point that must be considered is that nowadays States are not interested in targeting these individuals while they are attacking, but rather *before* they carry out military operations.⁷⁹ Owing to the revolving

71 Newton, *supra* note 15, at 103. Schmitt argues that "[a] much more logical and practical standard provides that once an individual has opted into the hostilities; he or she remains a valid military objective until unambiguously opting out". Schmitt, *supra* note 69, at 79.

72 Rule 106 of the Study on CIHL. See Henckaerts, *supra* note 19, at 207.

73 Rule 6 of the Study on CIHL. See Henckaerts, *supra* note 19, at 198.

74 See *Public Committee against Torture in Israel v. Government of Israel*, Supreme Court of Israel, HCJ 769/02, 2 December 2006, para. 30 (*Targeted killings case*).

75 DPH Guidelines, *supra* note 56, Part I entitled "The concept of civilian in international armed conflict".

76 DPH Guidelines, *supra* note 56, Part VII entitled "Temporal scope of loss of protection".

77 Watkin, K. Assessing proportionality: moral complexity and legal rules. 2005, 8 *YIHL* 3, at 10.

78 *Ibid.*, at 11.

79 The US clearly stated that "it may target suspected terrorists anywhere in the world". O'Connell, *supra* note 42, at 407.

door situation, it is claimed that API allows certain individuals “respite from violence not enjoyed by any other soldiers on the battlefield”,⁸⁰ i.e. protection from attack when not engaged in hostilities.

Yet, IHL envisages to some extent the possibility for attacks to be carried out before military operations take place. As Rule 106 of the ICRC Study emphasises “[c]ombatants must distinguish themselves from the civilian population while they are engaged [...] in a military operation preparatory to an attack”.⁸¹ However, in this context, IHL foresees attacks made during preparations undertaken *shortly prior* to the launching of a specific attack and not general preparations or preparations that extend over a long period of time.⁸² The DPH Guidelines also refer to the possibility to attack individuals while they are engaged in “[m]easures preparatory to the execution of a specific act of direct participation in hostilities, as well as the deployment to and the return from the location of its execution”.⁸³ The explanatory text to this assertion nevertheless circumscribes the options to attack such individuals to situations when they are involved in acts of a military nature and such acts are “closely linked to the subsequent execution of a specific hostile act”.⁸⁴

Prevention has become the key word in counter-terrorism activities. As Waxman explains “fighting terrorism requires stopping suspects before they act”.⁸⁵ However, IHL does not know of the notion of prevention.⁸⁶ Such a concept, on the other hand, is the foundation of police enforcement activities. The examples imparted in the DPH Guidelines clearly illustrate

80 Rosen, *supra* note 35, at 737.

81 Rule 106 of the Study on CIHL. See Henckaerts, *supra* note 19, at 207 (emphasis added).

82 See discussion in Kalshoven, F. & Zegveld, L. *Constraints on the waging of war: an introduction to international humanitarian law*. 2001, at 88-9.

83 See Part VI entitled “Beginning and end of direct participation in hostilities”. DPH Guidelines, *supra* note 56.

84 *Ibid.*, at 66.

85 Waxman, M. C. Administrative detention of terrorists: *why* detain, and detain *whom*? 2009, 3.1 *J. Nat'l Sec. L.* 1, at 11.

86 Melzer maintains that the concept of military necessity has a restrictive function that obliges States to use police enforcement measures (whenever possible). In particular he draws a parallel to the use of force in a human rights law context. See e.g. Melzer, N. *Targeted killing in International Law*. 2008, 278ff. and Melzer, N. Targeted killing or less harmful means? Israel's High Court Judgment on Targeted Killing and the Restrictive Function of Military Necessity. 2006, 9 *YIHL* 87, at 108-111. His view is supported by the *Targeted Killings Case* (*supra* note 74, para. 40) and the DPH Guidelines (*supra* note 56, Part IX).

IHL's failure to satisfy the "demands" of some States willing to strike when individuals are involved in general preparatory measures.⁸⁷ By expressing their wish to launch preventive attacks, States in fact reveal their desire to fall back onto a law-enforcement rather than an IHL regime that seems inappropriate in this context. Again this reinforces the idea that terrorism should not be considered as an armed conflict but as a criminal activity that requires the use of police enforcement methods.⁸⁸

Yet, if the US and other States persist in viewing terrorist acts through the IHL prism,⁸⁹ they must obey by its norms, that is they must acknowledge that there are only two and not three categories of individuals and they cannot claim that they are entitled to attack them in a preventive manner.

5. The detention perspective

The principle of distinction can also be viewed from a different angle; that is the protection offered to individuals in detention. The touchstone is that a captured combatant is entitled to be treated as prisoner of war. However, combatants are not the only individuals who can lawfully be detained in relation to the armed conflict. Three categories of individuals can be detained: combatants, civilians taking a direct part in the hostilities and civilians taking an indirect part in the hostilities.

After succinctly presenting the US detention policy which tends to favour the application of a single regime of detention, this paper investigates and compares the norms relating to the treatment offered to detainees and to the duration of their confinement bearing in mind scholarly proposals to unify the regime governing the treatment of detainees.

87 "For example, the loading of bombs onto an airplane for a direct attack on military objectives in an area of hostilities constitutes a measure preparatory to a specific hostile act and, therefore, qualifies as direct participation in hostilities. This is the case even if the operation will not be carried out until the next day, if the target will be selected only during the operation, and if great distance separates the preparatory measure from the location of the subsequent attack. Conversely, transporting bombs from a factory to an airfield storage place and then to an airplane for shipment to another storehouse in the conflict zone for unspecified use in the future would constitute a general preparatory measure qualifying as mere indirect participation". DPH Guidelines, *supra* note 56, at 66.

88 See discussion in Quénivet, *supra* note 2, at 25-59.

89 As Sloane explains, "it is clear that for better or worse, some states, especially the United States, now conceive of terrorism within the rubric of armed conflict". Sloane, R. D. Prologue to a Voluntarist War Convention. 2007, *106 Mich. L. Rev.* 443, at 472-3.

5.1. The US detention policy

In the context of the war on terror, the US initially denied prisoner of war status to those captured in relation to the war as it believed that this would allow the US to offer less protection to such captives and, furthermore, allow the US to subject prisoners to tougher interrogation.⁹⁰ After all, the US agreed to treat Taliban but not Al Qaeda detainees according to the Geneva Conventions, albeit without according them prisoners of war status.⁹¹ As this policy choice was severely criticised by States and the ICRC alike it is doubtful that the US (mis)application of IHL⁹² has changed the customary nature of the principle of distinction.

What is more, the US conflated three classes of individuals under the category of “enemy combatants”: combatants, civilians taking a direct part and civilians taking an indirect part in the hostilities.⁹³ The only ones who “escaped” detention were those deemed “totally” innocent and harmless.

In March 2009 the US dropped the concept of “enemy combatant” altogether,⁹⁴ claiming that it could detain those who offer “substantial support”⁹⁵ to Al Qaeda, the Taliban, and associated forces, i.e. not only

90 See in particular Memorandum from White House Counsel Alberto Gonzales to president George W. Bush, Decision Re Application of the Geneva Conventions on Prisoners of War to the Conflict with Al Qaeda and the Taliban, 25 January 2002. Undoubtedly “information-gathering was at the forefront of the Bush administration’s detention policies”. Waxman, *supra* note 85, at 15. The fact that a person is granted prisoner of war status does not automatically mean that this person cannot be charged for war crimes or other violations of national law. Moreover, the Geneva Conventions does not preclude interrogation; art. 17 GCIII only relieves prisoners of war of the *duty* to respond.

91 See White House Memorandum, Humane Treatment of al Qaeda and Taliban Detainees, 7 February 2002. For a discussion, see Mintz, J. On Detainees, US Faces Legal Quandary. *Washington Post*, 27 January 2002, A22; Ross, J. Black Letter Abuse: The US Legal Response to Torture since 9/11. 2007, 89 *IRRC* 561, at 571.

92 In fact, as Jackson explains, the US “didn’t necessarily get it right in this challenging and difficult area of the law the first time, as [it] struggled to identify the appropriate legal standards for detention”. Jackson, D. Application of the Law of War to the Global War on Terror. 2009, 23 *St. John’s J.L. Comm.* 979, at 985.

93 See Military Commissions Act of 2006, 10 U.S.C. (2006). See discussion in Goodman, *supra* note 55, at 60–63.

94 The concept was replaced by “persons detainable pursuant to the AUMF”. *In Re Guantanamo Bay Detainee Litigation*, Respondents’ Memorandum regarding the Government’s Detention Authority Relative to Detainees Held at Guantanamo Bay, N° 08-0442, 13 March 2009.

95 The content of the concept of “substantial support” has been explained in the leading

members of these groups but also those who support them without being associated to them.⁹⁶ In fact, “[t]his definitional standard is largely similar to that used by the Bush Administration to detain terrorist suspects as ‘enemy combatants’”.⁹⁷

Much has been written on whether the US stand complies with IHL and the author will not repeat the arguments exposed elsewhere.⁹⁸ However, for the sake of argument, it might be possible to adopt the following approach: Instead of arguing which individual taking part in the hostilities benefits from which rights, it might be easier to apply a single set of standards for all those detained in the course of an armed conflict. Two reasons militate for such an approach. First, the US has created virtually a single regime of detention that covers combatants, civilians taking a direct part in hostilities and civilians taking an indirect part in the hostilities. Second, some scholars advocate in favour of a single regime governing the treatment of detainees. For instance, MacLaren and Schwendimann maintain, based on the ICRC study, that “[t]he basic humane treatment to be afforded persons [sic] deprived of their liberty is the same for both types of armed conflicts according to customary IHL, but their release is regulated differently”.⁹⁹

5.2. The treatment offered to detainees

Applying a single regime to all those detained in relation to the armed conflict, after all, reflects the idea that the fighting stops upon detention.¹⁰⁰

case of *Hamlily v. Obama*, 616 F. Supp. 2d 63, 70-78 (D.D.C.) 22 May 2009, and followed in *Anam v. Obama*, 653 F. Supp. 2d 62 (D.D.C.) 14 September 2009; *Anad v. Obama*, 646 F. Supp. 2d 20, 23 (D.D.C.) 12 August 2009; *Mattan v. Obama*, 618 F. Supp. 2d 24, 26 (D.D.C.) 21 May 2009. A stricter test was however established in *Hatim v. Obama*, N° 05-1429, slip op. at 19-20 (D.D.C.) 16 December 2009 and, possibly, a distinct one in *Gherebi v. Obama*, 609 F. Supp. 2d 43, 70-71 (D.D.C.) 22 April 2009.

96 *Hamlily et al. v. Obama*, Government’s Response to the Court’s Order of January 22, 2009 regarding the Definition of Enemy Combatant, 9 February 2009.

97 Elesa, J. K.; Thomas, K. R. & Garcia, M. J. *Enemy combatant detainees: habeas corpus challenges in Federal Court*. Congressional Research Service, 15 September 2009, at 39.

98 Ross, *supra* note 91, and Stewart, J. G. The Military Commissions Act’s Inconsistency with the Geneva Conventions: an overview. 2007, 5 *JICJ* 26.

99 MacLaren & Schwendimann, *supra* note 11, at 1229. MacLaren and Schwendimann go on to conclude that “[a]rguments for a complete unification of the law application to armed conflict seem as convincing as ever”. at 1230.

100 Forsythe, *supra* note 1, at 151.

Attractive though this proposal is, it must nevertheless be rejected on the basis that the distinction between these two groups of detainees, POWs and civilians, mainly resides in the grounds for the detention. While combatants are detained in order to ensure that they are *hors de combat*, that is, unable to carry on the hostilities,¹⁰¹ civilians can only be detained if they are a threat to the occupying/warring power. In circumstances other than occupation and on a State’s own territory in international armed conflict (and only for the aforementioned reasons) civilians cannot be detained.¹⁰²

Another reason for espousing the single regime approach can be advanced. First, IHL acknowledges that civilians, whether they are direct or indirect participants in the hostilities,¹⁰³ can be detained provided they pose a security threat and it is “absolutely necessary” to do so.¹⁰⁴ Second, once both combatants and civilians are detained they are to be viewed as “protected persons” under the Geneva Conventions and are, thereby, at least nominally covered by the same denomination.¹⁰⁵ Jurists assert that a close examination of the Geneva Conventions demonstrates that IHL admits that in similar situations similar treatment should be offered.¹⁰⁶ For example, the regime governing the detention of civilians in occupied territories and on a State’s own territory¹⁰⁷

101 “The purpose of captivity is to exclude enemy soldiers from further military operations. Since soldiers are permitted to participate in lawful military operations, prisoners of war shall only be considered as captives detained for reasons of security, not as criminals”. Fischer, H. Protection of prisoners of war. In: Fleck, D. (ed.). *Handbook of humanitarian law in armed conflict*. 1995, 321 at 326.

102 An exception to this rule is when an individual is detained in the framework of a criminal procedure.

103 The ICRC Commentary accepts that States can define the expression “security of the State” in a broad manner. Pictet, *supra* note 52, at 257-8; see also Gehring, R. W. Loss of civilian protections under the Fourth Geneva Convention and Protocol I. 1980, *90 Mil. L. Rev.* 49, at 85.

104 Arts. 5, 27, 41-43 and 78 GC IV allows for the detention/internment of civilians under occupation. *Geneva Convention relative to the Protection of Civilian Persons in Time of War* (GC IV), 1949, 75 UNTS 287.

105 Rodriguez-Villasante y Prieto, J. L. Terrorist acts, armed conflicts and international humanitarian law. In: Fernandez-Sanchez, P. A. (ed.). *The new challenges of humanitarian law in armed conflicts. In honour of professor Juan Antonio Carrillo-Salcedo*. 2005, 13 at 23.

106 See discussion in e.g. Crawford, *supra* note 45, at 458-9.

107 Art. 79 GC IV (*supra* note 104) clarifies that the detailed rules of arts. 80-135 apply as well to protected civilians interned, according to arts. 41 and 42 on the own territory of a belligerent.

is analogous to that offered to POWs in camps.¹⁰⁸ Third, a captured person taking part in hostilities who fails to satisfy the minimum requirements spelled out in API benefits from protections equivalent to those afforded to a prisoner of war, without yet acquiring this status.¹⁰⁹ Fourth, Jinks adds that the significance of POW status is mainly symbolic as combatants, regular and irregular, are treated similarly.¹¹⁰ In other words, once a person is arrested, his/her treatment should not depend on whether he/she is a combatant or a civilian.

Nevertheless, there remains an essential difference between civilians and combatants: while civilians may be tried for having directly participated in the hostilities, combatants are immune from such prosecution. The status of combatant entails the so-called combatant-privilege, i.e. despite the fact that he/she breaches national law he/she cannot be prosecuted for lawful acts of war.¹¹¹ Civilians who *directly* participate in hostilities may be prosecuted under national laws for e.g. murder, assault and comparable acts since they are not entitled to lawfully participate.¹¹² This is clearly a customary rule that can be traced back to the 1863 Lieber Code.¹¹³

Since the US stance does not comply with IHL standards and its opposition to the rule has materialised after the formation of the norm, it cannot be said that a new norm of customary nature has been created.

5.3. Duration of the detention

A further comparison must be drawn with regards to the duration of the detention of such individuals. While article 118 GCIII stipulates that “[p]risoners of war shall be released and repatriated without delay after the cessation of active hostilities”, article 132 GCIV requires that “[e]ach

108 That being said, it must be highlighted that this regime only applies for civilians held in administrative detention, i.e. those civilians who pose a security threat, but not to civilians waiting for trial or sentenced.

109 Arts. 44(4) and 45 API, *supra* note 24. See also Crawford, *supra* note 45, at 460.

110 See Jinks, D. The declining significance of POW status. 2004, *45 Harv. Int’l L. J.* 367, at 375. See also Jinks, D. Protective parity and the laws of war. 2004, *79 Notre Dame L. Rev.* 1493.

111 Kleffner, *supra* note 21, at 321.

112 See discussion in Camins, *supra* note 61, at 854.

113 See e.g. art. 57 of the Lieber Instructions: “So soon as a man is armed by a sovereign government and takes the soldier’s oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offenses”.

interned person shall be released by the Detaining Power as soon as the reasons which necessitated his internment no longer exist”. In the “war on terror” (in the sense used by the US) these two categories meet.¹¹⁴ First, if the detainees are POWs they will only be released once the hostilities come to a close,¹¹⁵ that is when the “war on terror” is over. Second, if they are interned civilians, they will be detained until the conflict ceases since the reason for their detention is to prevent them from joining it. As a result, the duration of their detention is similar. Both groups remain in detention until the cessation of the conflict.

The real problem of applying this position lies in the duration of the detention. Since release of such detainees is conditioned upon the end of the war¹¹⁶ (on terror) and the latter depended¹¹⁷ on a decision taken by the US administration,¹¹⁸ the legality of the length of their detention period being in essence open ended.

Later, the US set up a status review system as a means of ensuring that captives be released as soon as the circumstances justifying their detention have ceased to exist.¹¹⁹ In fact, in March/May 2004, the US established two types of review processes: a system of Combatant Status Review Tribunals

114 “Because the United States was in an armed conflict with al Qaida and the Taliban, it was proper for the United States and its allies to detain individuals who were fighting in that conflict. One of the basic precepts in the law of armed conflict is that states may detain enemy combatants until the cessation of hostilities”. Bellinger, J. B. Legal Adviser, US Department of State, Address at the London School of Economics, *Legal Issues in the War on Terrorism*, 31 October 2006, available at: <http://www.lse.ac.uk/collections/LSEPublicLecturesAndEvents/pdf/20061031_JohnBellinger.pdf>, 8 April 2009.

115 “A preventive purpose underlies the law of war’s detention rules, in that those rules aim to block captured soldiers from returning to an ongoing fight”. Waxman, *supra* note 85, at 14.

116 In *Hamdi v. Rumsfeld* the Supreme Court stated that “it is a clearly established principle of the law of war that detention may last no longer than active hostilities”. *Hamdi v. Rumsfeld*, US Supreme Court, 542 U.S. 507 (2004), 9 March 2004, at 520.

117 See Executive Order 13,491 – Ensuring Lawful Interrogations, 74 Fed. Reg. 4893, 22 January 2009; Executive Order 13,492 – Review and Disposition of Individuals Detained at the Guantanamo Bay Naval Base and Closure of Detention Facilities, 74 Fed. Reg. 4897, 22 January 2009; Executive Order 13,493 – Review of Detention Policy Options, 74 Fed. Reg. 4901, 22 January 2009.

118 Memorandum by William J. Haynes II, General Counsel of the Department of Defense to Members of the ASIL-CFR Roundtable, 12 December 2002, available at: <http://www.cfr.org/publication/5312/enemy_combatants.html>, 7 June 2009.

119 Matheson, *supra* note 17, at 548-9.

to determine whether detainees were properly classified as “combatants”¹²⁰ and an annual review process allowing the US to determine whether a specific individual linked to the “war on terror” continued to pose a threat to the US or its allies, or whether he should be released.¹²¹ The latter system appears to be in conformity with the interpretation of article 75(3) API since it explains that if a person is considered dangerous, the detention may continue but only as long as the person is viewed as dangerous.¹²²

It should be noted that, as of November 2009, the US administration held “persons designated as enemy combatants who have been placed in preventative detention to stop them from returning to the battlefield. Preventative detention of captured belligerents is non-penal in nature, and must be ended upon the cessation of hostilities”.¹²³ The US is in the process of establishing yet another review mechanism to determine the future of such detainees.¹²⁴ The US will first explore possibilities regarding their transfer or release. Then, should that not be possible, “the Review will consider whether they can be prosecuted for criminal conduct”.¹²⁵ In cases where an individual does not fall within any of the above categories, the US will have to seek another solution consistent with “the national security and foreign policy interests of the United States, and [...] the interests of justice”.¹²⁶

120 Deputy Secretary of Defense, to the Secretary of the Navy, Order Establishing Combatant Status Review Tribunal 1, 7 July 2004.

121 Deputy Secretary of Defense, Order, Administrative Review Procedures for Enemy Combatants in the Control of the Department of Defense at Guantanamo Bay Naval Base, Cuba 1, 11 May 2004. For an appraisal of the system, see Ross, *supra* note 91, at 581-2 and Stewart, *supra* note 98, at 26-38.

122 Sandoz, Y. *et al.* (eds.). *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. 1987, para. 3075. However, it must be noted that the Combatant Status Review Tribunals have been widely criticised. See e.g. *Boumediene v. Bush*, US Supreme Court, 128 S.Ct. 2229, 2269, 12 June 2008.

123 García, M. J. *et al.* *Closing the Guantanamo Detention Center: legal issues*. Congressional Research Service, 22 January 2009, at 1.

124 Section 4 of Executive Order 13,492, *supra* note 117. See also United States Commission on Security and Cooperation in Europe. *Senator Cardin Briefs European Parliamentarians on U.S. Detainee and Torture Policy Changes*. Press Release 202.225.1901, 19 February 2009.

125 *Hamlihy et al. v. Obama*, Government’s Response, *supra* note 96.

126 Executive Order 13,492, *supra* note 117, paras. 2(d); 4.

6. Conclusion

Inexorably, any proposal for a new regime should not touch upon the general principle of distinction; rather, it must assure its existence and reinforce the necessity of its existence. Accepting that individuals should be treated alike when detained may have immense repercussions on the regime governing targeting. As we saw above the principle of distinction must be viewed from two correlated perspectives, a targeting and a detention perspective. Any alteration in one of the regimes is bound to have serious impact on the other regime:¹²⁷ no-one wishes for a regime where combatants and civilians can be targeted alike!

Undoubtedly, “[l]ike all law, the inevitable imprecision in the rules presents opportunities for governments to exploit gray areas so as to augment governmental authority and to avoid sensible interpretations that will protect individuals from overreaching governmental power”.¹²⁸ As exposed, IHL is no exception to that rule. While some contend that “it is more a matter of clarifying issues than of actually changing the existing rules”,¹²⁹ others prefer to develop new models, yet firmly grounded in IHL tenets. The paper professes that a clear set of IHL norms pertaining to the principle of distinction exist and need to be obeyed, albeit with a bit of creativity.¹³⁰ After all, these are rules of a customary nature that can still be altered by practice and *opinio juris*. The ICRC correctly notes that “the formation of customary international law is an ongoing process”.¹³¹ However, as of now it does not

127 As Goodman notes, “the [US] government’s expansive definition of ‘unlawful combatants’ may spill into the targeting domain”. Goodman, *supra* note 55, at 72.

128 Murphy, S. D. Enemy combatants after *Hamdan v. Rumsfeld*: evolving Geneva Convention paradigms in the “War on Terrorism”: applying the core rules to the Release of persons deemed “unprivileged combatants”. 2007, 75 *Geo. Wash. L. Rev.* 1105.

129 Sandoz, *supra* note 16, at 353.

130 As Fleck notes “[w]here there are gaps in existing positive law, states should be encouraged to use the ICRC Study with a view to closing such gaps, rather than criticising progressive statements made in the *Study*, or taking advantage of legal lacunae in a spirit of advocating freedom of operations and even drawing short-sighted unilateral advantage at the expense of victims of armed conflicts”. Fleck, D. International accountability for violations of the *ius in bello*: the impact of the ICRC Study on Customary International Humanitarian Law. 2006, 11 *JCSL* 179, at 181.

131 International Committee of the Red Cross. *Study on customary international law*: Document prepared by the ICRC for the 30th International Conference of the Red Cross and Red Crescent, 30IC/07/8.3, 26-30 November 2007, at 3.

appear that new norms of customary nature have emerged. Unquestionably, there seems to be a shift in practice and, for some issues, also in *opinio juris*, but these changes have not yet been able to amend or deny the applicability of the former standards and certainly not of the principle of distinction.

When the former US president Bush declared the “war on terror”, it was impossible to predict the long-term effect of this statement on IHL. The main question was whether the doubts as to the validity of IHL norms, as expressed by the Bush administration, would, in the mid- and long-term, lead to a lawful modification of or repudiate these principles. The answer is clear: no, the “war on terror” has not amended or abrogated the principle of distinction.

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