



ICRC

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Direct Participation in Hostilities**

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**Direct Participation in Hostilities
in Non-International Armed Conflict**

Expert Paper submitted by

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1. Background and problem

The complexity of international humanitarian law is *inter alia* due to the fact that the legal status or the legal regime to which a person is subject varies among certain categories or sub-categories. In other words: in contradistinction to human rights law,¹ international humanitarian law does not provide for a single set of rights and duties to which every person is subject. Quite to the contrary, international humanitarian law provides for different rights or duties for different categories of persons. In international armed conflicts, the central dichotomy of categories is that between the civilian population and the “military”, which consist of a number of categories listed in article 50 para. 1 Prot. I. Most of the members of the military are “combatants”, i.e. persons who may take direct part in hostilities and are, on the other hand, the legitimate object of (individualised) attacks. The other category are the civilians, i.e. all persons who are not members of the military. As a matter of principle, they enjoy a status of “immunity”.

The distinction between the first and the second category, thus, is a negative one: all persons who are not combatants² are civilians (art. 50 (1) Prot. I). The essential point, thus, is the definition of “combatant” (art. 43 (1) Prot. I).

The legal situation is complicated by the fact that in either category, there are sub-categories which have a different status. Civilians lose their immunity if and for the time that “they take a direct part in hostilities” (unprotected civilians, art. 51 (3) Prot. I). Like combatants, they may be the object of (individualised) attacks. But there is a major difference between combatants and unprotected civilians: The status of combatant is a permanent one, while the loss of protection as civilian is a temporary one (“for such time as”). On the other hand, a combatant who falls into the hands of an adverse party becomes a prisoner of war and may not be punished for taking part in the hostilities (the so-called combatant privilege), provided that this participation was in conformity with the laws of war, and in particular that he or she has not forfeited

¹ As to this distinction, see *R. Provost*, *International Human Rights and Humanitarian Law*, 2002, p. 34 *et seq.*

² Neglecting for the purpose of simplification the non-combatant members of the military.

that status by not respecting the basic rules of distinction (article 44 (3) Prot. I). It is for the latter sub-category that the term “unlawful combatants” is used correctly.³ On the other hand, also combatants may under certain circumstances enjoy immunity from attacks, i.e. if they are *hors de combat* or wounded and sick. Unprotected civilians obviously do not enjoy any “combatant privilege” and may be punished for participating in hostilities, subject to the procedural protection of art. 45 Prot. I.

Thus, both the definition of “combatants” and the notion of “direct participation in hostilities” are crucial for the determination how a specific person may be treated by an adversary.

In non-international armed conflicts, the situation appears to be different. Neither article 3 common to the Geneva Conventions nor Prot. II use the term “combatant”. There is a reference to the “members of armed forces”, but only in a specific connection, namely that of being *hors de combat*. It is the purpose of this paper to elucidate the question whether the various categories of persons having a different status in the law relating to international armed conflict exist in a comparable manner in the law relating to non-international armed conflicts, and how they are to be distinguished.

2. Civilians and “fighters” under the law of non-international armed conflict

2.1 The development of the law of non-international conflicts

The absence of the notion of “combatant” in the treaty law relating to non-international armed conflict can be explained by the fact that States are loath to grant

³ *Ex parte Quirin*, 317 U.S. 1 (1942). It must be stressed that there is no additional category of “unlawful combatants” which are neither combatants nor civilians. The case *Ex parte Quirin* dealt with members of the German Armed Forces (i.e. combatants) which had forfeited their combatant privilege, see *J.J. Paust*, War and Enemy Status after 9/11: Attacks on the Laws of War, 28 *Yale Journal of International Law* 325 (2003), at 331. The defendant in the case *State of Israel v. Marwan Barghouti* before the District Court of Tel Aviv and Jaffa, 12 December 2002, also could not claim the combatant privilege as he was accused of acts which were clear violations of the laws of war, whether he was a civilian or a combatant. The construction of a special category of “unlawful combatants” was not necessary to deny the defendant POW status with the ensuing combatant privilege. There can of course be controversy as to whether a particular combatant has or has not forfeited his or her combatant privilege, see *Y. Dinstein*, Unlawful Combatancy, 32 *Israel Yearbook of Human Rights* 247 (2002).

the privilege of the combatant just described to insurgents. That being so, it might appear that the negative definition of the civilian also cannot stand, for lack of a point of reference. As a consequence, art. 3 common to the Geneva Conventions indeed does not use the term “civilian” or “civilian population”. It protects “persons taking no active part in the hostilities” and gives a non-exhaustive list of examples of such persons. They include “members of armed forces having laid down their arms”. In addition, the wounded and sick enjoy a special protection (art. 3 (1) sub-para. 2).

The reference to the members of armed forces applies to specific individuals and provides for their protection as individuals, it does not refer to the armed forces as an organisation.⁴ It implies that those members of armed forces (a notion which is not defined) who have not laid down their arms and are not *hors de combat* are not protected by the specific rules of humane treatment which art. 3 provides. This is how far the provision goes. It does not purport to say anything on the question of the status of persons not so protected. In particular, it does not resolve the question of combatant status or the like. That lacuna can be explained by the fact that the Geneva Conventions of 1949 anyway do not address questions of methods and means of warfare. Thus, it is a consistent approach not to deal with civilian immunity or related problems in the provision relating to non-international armed conflicts. As will be shown below, customary law rules relating to these problem were already emerging at the time common article 3 was drafted.

Twenty years later, these questions were indeed addressed in drafting Prot. II. The following discussion deals, first, with the interpretation of the relevant provisions of Prot. II in the light of the negotiating history. There are, however, many current conflicts which are not covered by Prot. II, be it because the State concerned is not a party thereto, be it because the conflict does not fall within the scope of application defined in art. 1 para. 1 Prot. II. In these cases, the basic rules of art. 3 common to the Conventions are still relevant. But in addition, the question arises whether and to what extent customary international law has developed beyond these basic rules.

⁴ *Pictet*, Commentaire, vol. I p. 56 *et seq.*

In this respect, one has to note that the case law of a number of courts, in particular that of the two *ad hoc* criminal tribunals for the former Yugoslavia and for Rwanda, has led to a development of the customary law relating to non-international armed conflicts which has brought this body of law much closer to the law relating to international armed conflicts.

In its *Nicaragua* Judgment, the ICJ held that the principles enshrined in article 3 common to the Conventions are part of customary international law.⁵ The ICTY, while confirming this point of departure, went beyond this holding by adapting the law relating to non-international armed conflicts to that of international ones. It did so on the basis of article 3 of its Statute, which grants to the tribunal “the power to prosecute persons violating the laws or customs of war”:

“The Trial Chamber concludes that article 3 of the Statute provides a non-exhaustive list of acts which fit within the rubric of “laws or customs of war”. The offences it may consider are not limited to those contained in the Hague Convention and may arise during an armed conflict regardless of whether it is international or internal.”⁶

The Appeal chamber fully confirmed this view:

“Since the 1930s, ... the ... distinction (between “belligerency and insurgency”, i.e. between international and internal conflicts) became more and more blurred and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflict. ... If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”⁷

The Appeal Chamber goes on to elaborate some of the principles applicable in non-international conflicts, too, to which we will revert below.

⁵ ICJ Rep. 1986, p. 113 et seq (paras. 218 et seq. of the Judgement).

⁶ *Prosecutor v. Tadić*, Trial Chamber, 10 August 1995, para. 64.

⁷ *Prosecutor v. Tadić*, Appeal Chamber, 2 October 1995, para. 97.

That development of the case law of the ICTY was confirmed by the Statute of the ICTR, which expressly gives to the tribunal the power to prosecute violations of article 3 common to the Geneva Conventions, a major step towards assimilating the law relating to non-international armed conflicts to that of international armed conflicts. That assimilation was confirmed and extended by the Statute of the International Criminal Court adopted in 1998. It contains a long list of war crimes committed in times of non-international armed conflict (art. 8 paras. 2 (c) to (f) and (3)). The inclusion of secondary norms of criminal law in the Statute can only be explained on the basis of the assumption that the corresponding primary norms (prohibitions) constitute rules of customary international law relating to non-international armed conflict.⁸

2.2 Protocol II and its drafting history

It was one of the major purposes of the effort to develop IHL which was undertaken in the late 60ies and early 70ies of the last century to bring the law relating to non-international conflict closer to that relating to international conflicts.⁹ In this sense, the ICRC Draft of Prot. II indeed used the term “combatant”, bringing the regulation closer to that applying in international conflicts. To quote the relevant provisions of the 1973 Draft:

Article 24 (1)

In order to ensure respect for the civilian population, the parties to the conflict shall confine their operations to the destruction or weakening of the military resources of the adversary and shall make a distinction between the civilian population and combatants, and between civilian objects and military objectives.

Article 25 (1)

⁸ See *M. Bothe*, War Crimes, in : A. Cassese/P. Gaeta/J.R.W.D. Jones (eds.), *The Rome Statute of the International Criminal Court*, 2002, vol. 1 p. 417.

⁹ ICRC Commentary, marg. note 4360 *et seq.*

Any person who is not a member of the armed forces is considered to be a civilian.

Article 26

1. The civilian population as such, as well as individual civilians, shall not be made the object of attack. ...
2. Civilians shall enjoy the protection afforded by this article unless and for such time they take a direct part in hostilities.

According to this draft, there is no significant difference to the legal situation provided for in Prot. I. In the text which was submitted to the final plenary sessions of the Diplomatic Conference in 1977, these provisions remained essentially identical. In article 24, the word “combatant” was retained, in article 25, the words “or of an organized armed group” were added in order to align the text with the new version of article 1 adopted by the Conference.

It was in the final plenary debate, in the process of adopting a “simplified” version of Protocol II,¹⁰ that articles 24 and 25 disappeared from the text and only the text of article 26 remained, which is now article 13 paragraphs 2 and 3. That process of “simplifying” Protocol II drew its inspiration from the fear voiced by a number of developing countries (and silently shared by others?) that the application of Protocol II might undermine the ability of States to deal with internal upheavals, *inter alia* by enhancing the status of rebels. Thus, terms like “parties to the conflict”, which seemed to signal a kind of equality between the governmental and the non-governmental side, were to be avoided. In this context, also the word “combatant” became objectionable. The latter objection is probably justified, as the use of the word combatant in the drafts of Prot. II was never meant to entail the privileged prisoner of war treatment combatants enjoy in international armed conflict.

The Protocol, however, still uses the terms “civilian population” and “civilian”, and also provides for a loss of their protection if “they take a direct part in hostilities”. This suggests that also in non-international conflicts, two categories of persons (and

¹⁰ See on that development *K.J. Partsch in Bothe/Partsch/Solf, New Rules for Victims of Armed Conflicts*, 1982, p. 606 *et seq.*

the sub-category of unprotected civilians) whose treatment is different under IHL exist, similar to the situation in international armed conflict. It is a matter of legal logic: If there are civilians who may not be attacked, there must be non-civilians who may be attacked. The question, thus, is how to define these “non-civilians”.

Before addressing this question, one has to dismiss the argument that by deleting articles 24 (1) and 25 (1) of the Draft Protocol, the Conference would have re-established the legal situation which existed under common article 3 which, as already indicated, only distinguishes between persons taking part in hostilities and those who do not. There is no indication in the debates of the conference that this was the intention. Quite to the contrary, the use of the words “civilian” and “civilian population” (which do not appear in article 3) strongly suggests that as a matter of substance (not of terminology) those deletions did not involve a change in the regulatory content of what has become Part IV of Protocol II. Current attempts to codify the law of non-international armed conflict undertaken within the framework of the San Remo Institute of International Humanitarian Law¹¹ therefore rightly retain the notion of a specific group which as such takes part in hostilities in an organised form and may always be the object of attacks. In order to avoid the notion of “combatant”, this category is called “fighters” – a terminology which correctly reflects the remaining difference between international and non-international conflicts.

A textual analysis of article 13 paragraph 3 suggests the same result. The loss of protection under this provision clearly is temporary (“for such time as”). If the only status distinction between categories of persons would be based on that formula, there would be no permanent “non-civilians”. Even the government armed forces would become protected civilians as long as they did not fight – certainly an odd conclusion.

We can thus conclude: As in the case of international armed conflict, there exist, under the law of non-international armed conflict, two categories of persons: fighters

¹¹ San Remo Manual on the Protection of Victims of Non-International Armed Conflicts prepared by international lawyers convened by the International Institute of Humanitarian Law co-ordinated by Dieter Fleck, available with the co-ordinator, DieterFleck@t-online.de

and civilians - unprotected civilians being the subgroup of the latter which does not enjoy civilian immunity.

2.3 The development of relevant jurisprudence and customary law

This categorisation is also reflected in the relevant case law which can be taken as a proof of a corresponding rule of customary law.

The ICTY has consistently held the principle of distinction as reflected in articles 50 and 51 Prot. I to constitute customary law:

“Article 50 of Additional Protocol I ... contains a definition of civilians and civilian populations, and the provisions in this article may largely be viewed as reflecting customary law.”¹²

In a lengthy analysis of the practice, the Appeal Chamber, in the *Tadić* case, holds these principles also to be part of the customary law relating to non-international armed conflicts:¹³

“The first rules that evolved in this area were aimed at protecting the civilian population from the hostilities. ... “

The Chamber finds a confirmation of this rule in State practice during the Spanish Civil War and a number of non-international armed conflict that occurred after World War II. It also refers to the rules the General Assembly of the United Nations formulated in relation to all types of armed conflict¹⁴ which enshrines, inter alia, the principle

That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population ...”

¹² *Prosecutor v. Blaskić*, Appeal Chamber, 29 July 2004, para 110; see also *Prosecutor v. Galić*, Trial Chamber, 5 December 2003, para. 45.

¹³ *Prosecutor v. Tadić*, Appeal Chamber, 2 October 1995, paras. 100 et seq.

¹⁴ Resolution 2444 of 1968.

The Chamber concludes:¹⁵

“...customary rules have developed to govern internal strife. These rules, as specifically identified in the preceding discussion, cover such areas as protection of civilians from hostilities, in particular from indiscriminate attacks, protection of civilian objects ... , protection of all those who do not (or no longer) take active part in hostilities ...”

The same distinction underlies the relevant criminal law provision of the Rome Statute (Art. 8 (2)(e)(i)) which, as already indicated, reflects a rule of customary law:

“Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;”

The existence of the categories mentioned before is implied in this provision: (1) non-civilians, i.e. fighters, who may be attacked, (2) civilians, who may not be attacked, (3) unprotected civilians who take direct part in hostilities and may therefore be attacked.

This is explicitly spelled out in the San Remo Manual (provisional version)¹⁶ which purports to codify customary law:

“115. Certain general principles of conduct underpin all military operations, regardless of their nature. They are

- distinction between fighters and civilians ...

202. *Distinction*. A distinction must always be made in the conduct of military operations between fighters and civilians ...

205. *General Rule*. Attacks must be directed only against fighters or military objectives.”

¹⁵ *Loc.cit.* at para. 127.

¹⁶ See above note 11.

We must now turn to the question how to define the category of fighters.

3. The notion of armed forces and armed groups – a comparison to article 43 (1) Protocol I

The solution to the problem of determining who are the “fighters”, a category presupposed by article 13 Prot. II, lies in a systematic interpretation of the Protocol. The key provision in this respect is article 1 paragraph 1. This is clearly indicated by the text of the deleted provision of article 25 paragraph 1 of Draft Prot. II which, for the purpose of defining the term “civilian”, referred to the terminology used in article 1: “armed forces” and other “organized armed groups”. By defining the type of conflict to which Protocol II applies, the provision also describes the possible parties to that conflict (without calling them parties): On the one hand, the High Contracting Party and its “armed forces”, on the other hand “dissident armed forces or other organized armed groups” which have to fulfil certain criteria. In particular, they have to be “under a responsible command”. They have to be able to carry out “military operations”. In other words, the article presupposes as parties, on the one hand, the State with its military organisation (the armed forces) and, on the other hand, an entity which also possesses a high degree of administrative organisation, including its own military organisation. Fighting is supposed to take place between these military organisations, and only between them.

The use of the term “armed forces” raises the question whether it is to be defined in a way similar to the same term in article 43 paragraph 1 Prot. I.:

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates ...

This presupposes an organisational link to the State concerned.¹⁷ What is implied in this definition is that the organisation thus described is dedicated, by the Party in question, to fighting purposes, to fight as combatants. There has to be some clarity or transparency as to this dedication, which is reflected in the third paragraph of article 43:

Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.¹⁸

3.1 The government side

During the Diplomatic Conference, it was discussed whether the same definition applied to the “armed forces” of the governmental side under Prot. II. The issue is addressed in the following explanatory note in the relevant report of Committee I of the Conference:¹⁹

In this Protocol, so far as the armed forces of a High Contracting Party are concerned, the expression armed forces means *all* the armed forces – including those which under some national systems might not be called regular forces – constituted in accordance with national legislation under some national systems; according to the views stated by a number of delegations, the expression would not include other governmental agencies the members of which may be armed; examples of such agencies are the police, customs and other similar organizations.

The note is not as clear as one would like it to be. It is open to doubt whether it really constitutes an agreed interpretation. Some doubts have also been expressed as to whether the note excludes all law enforcement agencies from the scope of the notion

¹⁷ Solf, in *Bothe/Partsch/Solf, op.cit.* p. 237.

¹⁸ This prompted France to make a declaration, on the occasion of her accession to Protocol I, to the effect that the *Gendarmerie nationale* belonged to the armed forces.

¹⁹ CDDH/I/238/Rev.1 = X OR 93 *et seq.*

of armed forces,²⁰ in particular those possessing a military organisation.²¹ It is submitted here that once a conflict has reached the relatively high threshold of Prot. II, it is appropriate to uphold the distinction between law enforcement and military action which applies under Prot. I also for the purpose of Prot. II, subject to national legislation which expressly makes certain law enforcement agencies part of the armed forces.

3.2 The non-governmental side

Where the non-governmental side also employs a military organisation rightly styled “armed forces”, similar considerations apply. As to the notion of “organized armed groups”, the ICRC delivered the following statement during the negotiations of Working Group B of Committee I:²²

The expression does not mean any armed band acting under a leader. Such armed groups must be structured and possess organs, and must therefore have a system for allocating authority and responsibility; they must also be subject to rules of internal discipline. Consequently, the expression “organized armed groups” does not imply any appreciable difference in degree of organisation from that of regular armed forces.

It is this necessity of an organisation which gives some permanence to the status of a “fighter” under the law relating to non-international armed conflict. It is the membership in that organisation which is the necessary prerequisite for a person to be considered as “fighter”. This principle also underlies the *Tadić* Judgment of the ICTY:

²⁰ *K.J. Partsch*, in *Bothe/Partsch/Solf*, *New Rules for Victims of Armed Conflicts*, p. 626;

²¹ The view expressed in the ICRC Commentary (marg. note 4462) that the notion covered all armed forces “y compris celles que certaines législations nationales n’incluraient pas dans la notion d’armée (garde nationale, douane, force de police ou tout autre organisme similaire)” goes too far and is clearly incompatible with the text of the note.

²² *Partsch*, *loc.cit.*

“... an individual who cannot be considered a traditional ‘non-combatant’ because he is actively involved in the conduct of hostilities *by membership* in some kind of resistance group ...”²³

This does not solve the question of transparency. As will be shown below, a certain degree of transparency is required by the very principle of distinction.

The requirement of an organisation will as a rule imply some type of documentation as to who belongs to the organisation. But this is not necessarily so in every case, and even when this documentation exists, it can well be clandestine. Under the law relating to international armed conflict, wearing a distinctive sign and carrying arms openly is required only during a military engagement and the time immediately preceding that engagement (article 44 paragraph 3 Prot. I). In non-international armed conflict, the requirements of transparency could not possibly be any stricter.

Thus, a fighter may wear civilian cloth while not engaged in actual fighting, but he or she remains a legitimate target during that time. This creates a major problem for the other side. We will revert to after having discussed in more detail the beginning and the end of the status of a fighter.

4. Beginning, end and consequences of the status of “fighter”

As explained above, the necessary prerequisite for a person to be considered as a fighter is that he or she belongs to an organisation which constitutes the “armed forces” or another “organized armed group”. A person acquires the membership with this organisation by some kind of constitutive act on the part of the organisation. It takes both the will of the person and that of the organisation to establish a membership. There is no self-appointed member of the armed forces. In the case of the armed forces of a State, this is usually some kind of governmental act, appointment, commission or the like. It can also be a contract. The same applies

²³ *Prosecutor v. Tadić*, Trial Chamber, 7 May 1997, para. 689 (emphasis added).

mutates mutandis to the non-governmental side. It is this act establishing the membership with the organisation which creates the status of a fighter.

That status can then be ended only by some kind of contrary act, a discharge, a dissolution of the contract or the like, but not simply by the end of actual fighting. Where a fighter leaves the area of military activities, goes home and puts on civilian clothes, this does not end the membership in the organisation and, consequently, does not lead to the loss of the status of a fighter.

The question of visibility remains. Where fighters wear civilian cloth and engage exclusively in harmless civilian activities by day they nevertheless remain a legitimate target during this time. But how does the other side know?

Does a person who appears to be a civilian have the benefit of the doubt? This is a principle which applies in international armed conflict (article 50 paragraph 1, last sentence). The ICRC draft of Protocol II did not contain such a provision, but it was included in the draft which was the result of the negotiations at Committee level (article 25 paragraph 4/paragraph 1 last sentence). As already pointed out, that entire provision was not accepted in the plenary. In the light of the importance which this rule has for the possibilities of a government to lawfully attack insurgents, it is not possible to interpret Prot. II in a way as if that rejected provision were still part of it. Nevertheless, the principle of distinction would become absolutely meaningless if an attacker were free to assume that persons appearing like civilians were in reality fighters which constituted a legitimate target. Thus, an interpretation of the rule of distinction based on the principle of *effet utile* requires that precautions like those provided for in article 57 paragraph 2 of Prot. I are taken – although no similar provision is contained in the actual text of Prot. II nor in any of the preceding drafts. It means that persons who plan or decide upon an attack shall “do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects ...”

5. Loss of protection for civilians: taking “a direct part in hostilities”

It has to be re-emphasised that this rule of loss of protection only applies to persons which are not members of the armed forces or of another organised armed group. In an international armed conflict, this puts the civilian in a position which in a certain respect is worse than that of a combatant. A combatant becomes a prisoner of war who may not be punished for its participation in the hostilities, an unprotected civilian does not have that benefit. On the other hand, in a non-international armed conflict, neither the fighter²⁴ nor the unprotected civilian have that benefit. Thus, the unprotected civilian finds itself in the same position as the fighter. The essential difference between fighters and unprotected civilians is, however, that the latter regain their protected status if they cease to take a direct part in hostilities, while fighters remain subject to individualised attacks even if they cease fighting (unless they become a person *hors de combat*). This principle has been upheld by a number of judicial and quasi-judicial decisions. In relation to the non-international conflict in Colombia, the Inter-American Commission on Human Rights holds:²⁵

“It is important to understand that while these persons forfeit their immunity from direct attack while participating in hostilities, they, nonetheless, retain their status as civilians. Unlike ordinary combatants, once they cease their hostile acts, they can no longer be attacked, although they may be tried and punished for all their belligerent acts.”

Article 13 paragraph 3 Prot. II is a textual copy of article 51 paragraph 3 Prot. I. Having clarified the scope of application of article 13 paragraph 3, we can conclude that the difficult problems involved in the actual meaning of the expression “taking a direct part in hostilities” are essentially the same as in an international armed conflict. They are not the object of the present paper.

6. Conclusions

²⁴ See *M.H. Hoffman*, *Quelling Unlawful Belligerency: the Juridical Status and Treatment of Terrorists Covered by the Laws of war*, 31 *Israel Yearbook on Human Rights* 161 (2002), at 163.

²⁵ Third Report on the Human rights Situation in Columbia, 26 February 1999, available at <http://www.cidh.org/countryrep/colom99en/table%20of%20contents.htm>, at para. 54.

- a. In a non-international conflict, there are two categories of persons possessing a different status under IHL: fighters and civilians – both according to Prot. II and according to customary international law if there is an armed conflict involving protracted fighting.
- b. Civilians enjoy protection, but civilians taking a direct part in hostilities are temporarily unprotected – both according to Prot. II and according to customary international law if there is an armed conflict involving protracted fighting.
- c. Both fighters and unprotected civilians constitute legitimate military objectives
- d. Fighters are persons who belong to that part of the administrative organisation of a party to a conflict which constitute its armed forces or other organised armed groups.
- e. Fighters have this status for the entire duration of their membership with the said organisation.
- f. Persons who are not fighters are civilians and lose their corresponding protection only during such time as they are actually involved in fighting.
- g. The meaning of the expression “take a direct part in hostilities” is essentially the same in international and non-international conflicts.

Frankfurt, October 5, 2004