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## Defining and recognizing prisoners of war in contemporary armed conflicts

Sandra Fabijanić Gagro

*J.S.D. Sandra Fabijanić Gagro, Assistant Professor, Department of International Law, Faculty of Law University of Rijeka, Croatia. Email: sandra.fabijanic.gagro@pravri.hr*

### Abstract

Contemporary international humanitarian law classifies all armed conflicts into two basic groups – international and non-international. In international armed conflict is clear distinguishing between civilians and combatants. The civilian has right on immunity of the attack, unless is joined to the armed forces, by what he loses the civilian's rights, and gains the combatant's rights. The combatant's right is to participate in the hostilities, with no criminal charges for this action. Captured combatant in international armed conflict becomes prisoner of war. Unlike the recognized prisoner of war status in international armed conflict, in non-international armed conflict there is no person called combatant, and captured insurgent has no right and is not considered as prisoner of war. That is because the state does not recognize possibility to any person to attack from inside their armed forces. Despite the fact they are not entitled to prisoner of war status, the recommendation of the ICRC is to approve certain rights to the members of insurgent's groups, which are inherent to "regular" combatant's rights.

**Keywords:** prisoners of war, international armed conflict, non-international armed conflict, 1949 Geneva Convention relative to the Treatment of Prisoners of War, 1977 Additional Protocols to 1949 Geneva Conventions

*"The purpose of war being to destroy the enemy state, its defenders may rightfully be killed so long as they are carrying arms; but as soon as they lay them down and surrender, ceasing to be enemies or agents of the enemy, they become simply man again, and there is no longer any right over their lives."*

J.J. Rousseau, The Social Contract, Book I, Chapter IV

## 1. Introduction

Until the end of the 2<sup>nd</sup> World War, the concept of war was understood as an international armed conflict only – the situation of war between two or more states. Contemporary international humanitarian law (hereinafter: IHL) established after the 2<sup>nd</sup> World War by four 1949 Geneva Conventions<sup>1</sup> and refined, supplemented and developed by two 1977 Additional Protocols<sup>2</sup> distinguishes two major categories of armed conflicts: international and non-international.

The first one may arise between two or more states; the second one occurs on the territory of one state, within its border. The significance of this division mirrors in the fact that the most contemporary armed conflicts of nowadays wage within border of particular state, and international legal frame is quite different for each type of conflict, following by different rights, obligations and position of protected person.

What reasons could justify such differentiations?

Firstly, international armed conflicts are covered by four 1949 Geneva conventions and Additional Protocol relating to the Protection of Victims of International Armed Conflicts (hereinafter: Additional Protocol I). Under their provisions, the term “international armed conflict” refers on several forms of armed conflicts. It covers all cases of declared war or of any other armed conflict, which may arise between two or more states, even if the state of war is not recognized by one of them. It also covers all cases of partial or total occupation of the territory, even if that occupation meets no armed resistance. (1949 Geneva Conventions, Common Article 2; Additional Protocol I, Article 1(3)) Furthermore, since 1977 and the adoption of Additional Protocol I, conflicts in which peoples are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right of self-determination have been considered as international armed conflicts, too. (Additional Protocol I, Article 1(4))

In international armed conflict is clear distinguishing between civilian and combatant. The civilian has right on immunity of the attack, unless is joined to the armed forces, by what he loses the civilian's rights, and gains the combatant's rights. The combatant's right is to participate in the hostilities, with no criminal charges for this action. Captured combatant in international armed conflict becomes prisoner of war and must be given humane treatment from the time he falls into the power of the enemy until final release and repatriation.

On the other side, the course of non-international armed conflict is covered by only few legal provisions – Article 3 Common to all 1949 Geneva Conventions and 1977 Additional Protocol relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter: Additional Protocol II).

For a long time states have been reluctant to comply with and consent to international regulations of non-international armed conflicts, by referring to their own sovereignty. That type of conflict was considered to be as exclusive matter of the state concerned, regulated by internal legislation exclusively. Such position was based on the attitude that there is no government which would renounce in advance the right to punish its citizens for the cooperation and activities in rebellion against the state concerned.

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<sup>1</sup> Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 75 United Nation Treaty Series (hereinafter: UNTS) 970; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Member of Armed Forces at Sea, 75 UNTS 971; Convention relative to the Treatment of Prisoners of War, 75 UNTS 972; Convention relative to the Protection of Civilian Persons in Time of War, 75 UNTS 973.

<sup>2</sup> Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3; Protocol Additional to the Geneva Conventions of 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609.

That renunciation precisely represents the core of combatant status, prescribed by the law of international armed conflicts.

The situation at the 1949 Geneva Conference during the adoption of the Common Article 3 was quite complicated. On one hand, the idea of the International Committee of the Red Cross (hereinafter: ICRC) to apply all four 1949 Geneva Conventions to both international and non-international armed conflicts was not supported by many countries. Interference in the internal disturbances and domestic affairs, what non-international conflicts were supposed to be, was considered as unfriendly attack on state sovereignty. On the other hand, the new concept of human rights protection has been arising after the 2<sup>nd</sup> World War and the international community of those days had expressed the general understanding of necessity to protect the victims of non-international conflicts as well. The Common Article 3 represents the result of these confrontations; it is an “umbrella” which merely demands respect of certain rules of human treatment and non-discrimination in situation of non-international armed conflict.

Adopted almost thirty years later, in the era of expanded development of human rights protection, Additional Protocol II develops and supplements the short provision of the Common Article 3. Unlike the Article 3, it contains a definition of non-international armed conflicts and applies only to the conflicts which meet a number of given material conditions. It refers to a conflict which takes place in the territory of a state, between its armed forces and dissident armed forces or other organized armed groups. Those groups has to act under responsible command, and exercise such control over a part of its territory, as to enable them to carry out sustained and concerted military operations and to implement the provisions of Additional Protocol II.

But, in accordance to the relevant international instruments, those insurgent groups which fight in non-international conflict are not entitled to the status of combatants, nor prisoners of war.

If they are not combatants, how do we call them? What rights do they have (if any)?

The answer to that question mirrors in the fact that it is not always clear whether the conflict is international or non-international; the practice shows many situations of overlapping the conflicts. For example, former Yugoslav conflict in 1990s was both – international and/or non-international. When the Statute of International Criminal Tribunal for the Former Yugoslavia (hereinafter: ICTY) was drafted in 1993, the conflicts in the area could have been characterized as both – international and non-international, or alternatively, as non-international conflict alongside an international, or as non-international conflict that had become international because of external support, or as an international conflict that had subsequently been replaced by one or more internal conflicts, or some combination thereof.<sup>3</sup> Therefore, a question arise: how could we explain and justify the fact that in the same area in different times some do have a status of combatants and prisoners of war, and others do not?

## **2. International armed conflicts**

### ***2.1. Distinction between combatants and civilians in international armed conflicts***

The fact is that the development of aviation and the use of new arms have almost wiped out the fundamental distinction between combatants and civilians during the 2<sup>nd</sup> World War. But, respecting a specific position of civilian population in particular – distinction must be made. At all times persons taking part in the hostilities should be distinct from the civilian population, to the effect that the later be spared as much as possible.

Distinguishing between civilians and combatants in international armed conflict is clear-cut. The right of a person is changing when he changes the civilian or combatant status.

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<sup>3</sup> The Prosecutor v. Dusko Tadic, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-AR72, IT-94-1-AR72, 2 October 1995 (hereinafter: Tadic Jurisdiction Decision), para. 72.

The combatant has the right to participate in the hostilities. During this participation combatants are subject of being targeted as legitimate military objectives; targeting members of the opposing armed forces is an integral part of waging war. Combatants also receive immunity for the unintended collateral deaths of civilians (Additional protocol I, Article 51), as long as these deaths are not excessive in relation to the concrete and direct military advantage anticipated. (Additional protocol I, Article 51(5b)) This principle of combatant immunity is reflected in customary international law and judicial decisions, and is codified in Article 43 of Additional Protocol I.

Captured combatant in international armed conflict becomes a prisoner of war. He has the immunity from being punished for the taking of arms, which is the main purpose of distinguishing in international armed conflicts. Prisoner of war must at all times be treated humanely. (1949 Geneva Convention (3<sup>rd</sup>) relative to the Treatment of Prisoners of War (hereinafter: Geneva Convention III), Article 13(1)) It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis. (Additional Protocol I, Article 40) Once the enemy soldier laid down the arms, no one has any right to take his life. Measures of reprisal against prisoners of war are prohibited (Geneva Convention III, Article 13(3)), as well as collective disciplinary measures affecting food. (Geneva Convention III, Article 26(6)) Prisoner of war must also be protected against the dangers of battle by being evacuated to the rear as soon as circumstances allow, and until then must not be unnecessarily exposed to danger. (Geneva Convention III, Article 19) We will elaborate later who is entitled to the prisoner of war status, because this is a category that has been changed through the years.

On the other side, the civilian is anyone who is not the combatant. In accordance to the Additional Protocol I, any person who does not belong to the categories included under the armed forces must be considered as a civilian. (Additional Protocol I, Article 50)

Civilians have the right to immunity from the attack, unless and for such time as they take a direct part in hostilities (Additional Protocol I, Article 51(2) and (3)). Thus, the meaning “direct participation in hostilities” has to be considered as a main distinguishing element with respect to targeting.

The notion of direct participation in hostilities refers to specific hostile acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict. It must be interpreted synonymously in situations of international and non-international armed conflict. The treaty terms of “direct” and “active” indicate the same quality and degree of individual participation in hostilities. (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1015)

This changed status is limited temporally by the words “for such time” and these words definitely raise serious queries as to their scope. Unfortunately, there has been little attempt to determine what does it actually mean. Interestingly, where these words “for such time” has been analysed in relation to the temporal limitation, “direct participation” for civilians is most closely associated with acting like a combatant. Therefore, civilians who present an immediate threat are liable to be attacked to the same extent as combatants. Similarly, civilian immunity is subject to very stringent conditions of not participating directly in hostilities. It is therefore possible, based on such linkage to combatancy, to conclude that as long as civilians perform the functions of combatants, such as planning, command, and the actual conduct of operation, they remain liable to attack. (Watkin, 2005, p. 156)

In *Watkin's* opinion, there is a danger that the term “for such time” will lead to an interpretation that civilians are only combatants while they carry a weapon and revert to civilian status once they throw down a rifle or return home from a day in the trenches. This has been referred to as a “revolving door” of protection for certain civilians. Taken to its extreme, such a narrow interpretation appears not only to protect civilians who might be confused with participants in hostilities, but also indirectly to provide cover for the actual participants themselves, despite their prior and possible future hostile acts. However, such an interpretation also appears to be

inconsistent with the view that hostilities include preparations for combat and the return from combat. Further, like a combatant, a civilian participating in hostilities does not need to carry a weapon to facilitate the carrying out of hostile acts. (Watkin, 2005, p. 157) In *Schmitt's* opinion, this approach flies in the face of military common sense and accordingly represents a distortion of military advantage/humanitarian considerations balance. This is especially so in the context of irregular warfare, where clandestine activities by insurgent groups are common. (Schmitt, 2012, p. 136)

In *Dinstein's* opinion, the concept of direct participation in hostilities is far narrower than of making a contribution to the war effort. We have to keep in mind that the armed forces may legitimately incorporate units of reservists, who are called up for a prescribed period of time, and afterword they are released from military service. They are civilians who don the uniform of a combatant – acquiring that status – but only for a while. When the term of service ends, he doffs the uniform and returns to civilian life, as well as to protection. Surely, for such time as he is combatant, a reservist can be attacked. Yet, before and after, as a civilian, he is exempt from attack. The same consideration should apply to other types of civilians who become involved in hostilities. (Dinstein, 2009, p. 1002-1003)

But, not everyone who participates directly in hostilities wears uniforms or otherwise maintains a clear separation from the civilians. However, if the principle of distinction is to remain an effective and credible tenet of the IHL, the definition of when a person directly participates in hostilities should be the same whether the person is a member of an armed force or purporting to be an innocent civilian. By *Watkin*, no participant in hostilities should be able to use civilian status as a humanitarian shield from behind which to conduct military operations. At the same time, IHL should reinforce the moral and legal prohibition on targeting those who are not directly participating in hostilities. This includes civilians who accompany the armed force or otherwise are in the vicinity of hostilities, but who remain uninvolved. (Watkin, 2005, p. 178-179)

The question is: how to define and recognize a person entitled to the status of combatant and consequently to be treated as prisoner of war, especially with regard to the status of civilian engaged in direct participation in hostilities? Answer to this question demands short analysis of the historic development of this status and changes that has been made from The Hague documents in 1899 and 1907, through the IHL documents of 1949 and 1977 to the latest efforts and achievements of the ICRC.

## ***2.2. The development of prisoner of war status in early documents of the Hague conferences 1899 and 1907***

In ancient times the concept of prisoner of war was unknown. Captured enemies were the “chattels” of their victors who could kill them or reduce them to bondage. They were held responsible for the suffering of the civilian population, and punished for having served an unjust cause. They had been defeated. History indeed records countless occasions on which they were massacred, sold as slaves and they could hardly hope for clemency. The chroniclers report rare examples of magnanimous treatment of prisoners, although they have invariably remarked that such generosity was in stark contrast to the customs of the time. (Bugnion, 2003, p. 545)

But, situation had been changed for better throughout the centuries, and military commanders have been known to ordain their troops to show respect and humanely treat the enemy soldiers. The first attempt to codify such good practice and confirm it as a general applicable rule of international law had occurred at the end of the 19<sup>th</sup> and the beginning of the 20<sup>th</sup> century. At that moment states were ready to limit their respective sovereignty in relation to the treatment of prisoners of war, by protecting them from arbitrary treatment.

At the 1899 and 1907 Peace Conferences held in The Hague, the lengthiest and most important discussions were centred on the provisions relating to belligerent status. Once one is accorded the status of a belligerent, one is bound by the obligations of the laws of war, and entitled to the rights which they confer. The most important of these is the right of captured to be recognized as a prisoner of war and to be treated accordingly. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 45-47)

The belligerent status is not reserved only for the members of the armies. In countries where militia or volunteer corps constitutes the army, or form part of it, they are included under the denomination "army". The laws, rights and duties of war also apply to militia and volunteer corps, if they fulfil prescribed conditions. These conditions are: a) to be commanded by a person responsible for his subordinates; b) to wear a fixed distinctive emblem recognizable at a distance; c) to carry arms openly; and d) to conduct their operations in accordance with the laws and customs of war. (The Hague regulations, Article 1) These conditions will be repeated in the further IHL documents, and also are mentioned as conditions for allowing similar rights to the participants in non-international armed conflicts, which will be elaborated later.

The Hague regulation of 1907 also contains very important provision of giving some specific rights to the inhabitants of non-occupied areas, who spontaneously took up arms to resist their invaders, without having time to organize them. According to its provision, those civilians shall be regarded as belligerents. The conditions they have to fulfil are to carry arms openly and respect the laws and customs of war. (The Hague regulations, Article 2) Also, the right to be recognized and treated as prisoner of war is warranted to non-combatants of the armed forces (The Hague regulations, Article 3) According to that rule, the armed forces of the belligerent parties may consist of combatants and non-combatants, and in the cases of capture, all of them will enjoy the right to be treated as prisoners of war.

### ***2.3. The adoption of 1949 Geneva Convention relative to the Treatment of Prisoners of War (Geneva Convention III)***

The horror and bestiality of the 2<sup>nd</sup> World War had shown the need to reaffirm and expand the protection of human beings through the international humanitarian instruments, and thereby to provide the civilians and combatant with more appropriate and more adequate protection. Four humanitarian conventions (revised or completely new) were adopted in August of 1949. The binding force of the Geneva Conventions stems primarily from the fact that the contracting parties undertake to respect the Conventions "in all circumstances". (All 1949 Geneva Conventions, Article 1) Sixty five year after their adoption, they represent one of the most outspread ratified international treaties.<sup>4</sup>

The treatment and protection of prisoners of war protection in international armed conflict (only) is covered by the Geneva Convention III, a comprehensive code centred upon the requirement of humane treatment in all circumstances. The definition of prisoners of war, contained in Article 4, is of particular importance, since it has been regarded as the elaboration of combatant status. According to this provision, prisoner of war is person who belongs to one of the enumerated categories, who have fallen into the power of the enemy. (Geneva Convention III, Article 4.A)

Firstly, that status is recognized to the members of the armed forces of a party to the conflict. (Geneva Convention III, Article 4.A.1) It covers all military personnel, whether they belong to the land, sea or air forces.

Prisoner of war status is also recognized to the members of other militias and of other volunteer corps, including those of organized resistance movements, belonging to a party to the conflict and

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<sup>4</sup> By accession of South Sudan in 2013, these Conventions now (April 2014) have 195 states parties. Retrieved from: [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=375](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=375)

operating in or outside their own territory, even if this territory is occupied, if they fulfil four conditions (previously mentioned in the Hague regulations). (Geneva Convention III, Article 4.A.2)

First of all, they have to be commanded by a person responsible for his subordinates. (Geneva Convention III, Article 4.A.2a) Such person is responsible for the action taken on his order, as well as for the action which he was unable to prevent. The competence of the commander must be considered in the same way as that of a military commander. Respect for this rule is moreover in itself a guarantee of the discipline, which must prevail in volunteer corps, providing therefore reasonable assurance that the other conditions will be observed. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 59)

Second condition required by the Geneva Convention III, is that of having a fixed distinctive sign recognizable at a distance. (Geneva Convention III, Article 4.A.2b) In this case a distinctive emblem or sign replaces a uniform and therefore is considered as an essential factor of loyalty in the struggle and must be worn constantly, in all circumstances. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 59)

Third condition is one of carrying arms openly. (Geneva Convention III, Article 4.A.2c) This provision is intended to guarantee the loyalty of the fighting, it is not an attempt to prescribe that a hand-grenade or a pistol must be carried at belt or shoulder rather than in pocket or under a coat. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 61)

Finally, fourth condition, and an essential provision, is that of conducting their operations in accordance with the laws and customs of war. (Geneva Convention III, Article 4.A.2d) Combatants are nevertheless required to respect the Geneva Conventions to the fullest extent possible. They must be guided by the moral criteria in the absence of written provisions; must not cause violence and suffering disproportionate to the military result which they may reasonably hope to achieve. They must not attack civilians or disarmed persons, and must respect the principles of honour and loyalty as they expect their enemies to do. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 61)

Resistance movements must be fighting on behalf of a “party to the conflict” in the sense of Common Article 2 of Geneva Conventions; otherwise the provisions of Common Article 3 relating to non-international armed conflicts are applicable.

Article 4 reflected the experience of the 2<sup>nd</sup> World War, although the extent to which resistance personnel were covered was constrained by the need to comply with four conditions. Later development, as we shall see, after the 1949 Geneva Conventions were adopted, led to the expansion of the definition of combatants entitled to prisoner of war status.

#### ***2.4. New perspectives from 1977 Additional Protocol I***

While the Geneva Conventions did offer effective protection for the victims of armed conflict when they were applied in good faith, the fact remains that they were often flagrantly violated. Moreover, modern conflicts in the period from early 1950s to early 1970s were generally very different in form from those in which the laws and customs of war had developed over the century. Some kinds of these “new wars” were ones of national liberation; then non-international conflict which were in reality proxy wars between the superpowers, fuelled by their overt or covert intervention; armed subversion or revolutionary wars; or straightforward conflicts between two or more factions within divided nations. (Bugnion, 2003, p. 320)

The Diplomatic conference for the reaffirmation and development of the IHL applicable in armed conflict met in Geneva in four sessions, from 1974 to 1977. Two additional protocols were adopted; one relates to the protection of victims of international armed conflict (Additional Protocol I), the other one relates to the protection of victims of non-international armed conflicts (Additional Protocol II).



Significance of the Additional Protocol I in a subject of protection of prisoners of war reflects in introduction of the new concept. Anyone whose status of member of organized armed forces of a party to a conflict is recognized, is considered to be a combatant, entitled to participate directly in hostilities. (Additional Protocol I, Article 43(2)) Therefore, such person is entitled to be treated as prisoner of war.

Addition Protocol I also has simplified the legal position by defining armed forces as all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates. Such armed forces shall be subject to an internal disciplinary system which shall enforce compliance with the rules of international law applicable in armed conflict. (Additional Protocol I, Article 43(1))

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. (Additional Protocol I, Article 43(3)) Although, in *Schmitt's* opinion, customary law incorporation is solely a factual matter and failure to so notify the enemy does not preclude such groups' treatment as members of the armed forces for purposes of targeting and detention. (Schmitt, 2012, 125) The notion of "party to the conflict" is considered to be fairly wide. It involves not only resistance movements representing a pre-existing subject of international law and governments in exile, but also those fighting for conflicts of self-determination or national liberation. (Additional Protocols Commentary, 1987, p. 507)

Any combatant, as defined in Article 43, who falls into the power of an adverse party shall be prisoner of war. (Additional Protocol I, Article 44(1)) The basic rule remains the obligation of combatants to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. (Additional Protocol I, Article 44(3)) In practice and merely, member of the armed forces differ from the civilian population in wearing a uniform. However, the uniform is not a compulsory and essential attribute of combatants. Additional Protocol I merely require members of the armed forces to distinguish themselves from civilian in order to promote the protection of the civilian population from the effects of hostilities.

It has been suggested that activities falling within the meaning of a "military operation preparatory to an attack" should be construed broadly enough to include administrative and logistic preparatory to an attack. (Bothe et al., 1982, p. 252) Military operations also include intelligence gathering, recruiting, training, general administration, law enforcement, aid to underground political authorities, collection of contributions and dissemination of propaganda. By *Bothe et al.*, during these military operations combatants would not have to distinguish themselves from the civilian population. None of these actions necessarily requires the use of weapons; however, the individual performing those tasks would remain part of a combatant force and therefore liable to being targeted. (Watkin, 2005, p. 150) The targeting of combatants, based on their status as members of a group representing a state or other legitimate authority is well established under IHL.

Members of the armed forces are released from the obligation of distinguishing from civilians only in situations where, owing to the nature of hostilities an armed combatant cannot do so. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly: a) during each military engagement; and b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate. (Additional Protocol I, Article 44(3)) The Protocol exceptionally allows a guerrilla combatant to wear purely civilian dress, if the nature of the hostilities requires it. However, it does not allow this combatant to have the status of a combatant while he is in action, and the status of a civilian at other times. It does not recognize combatant status "on demand". On the other hand, it puts all combatants on an equal legal footing, in accordance with a desire expressed long ago. (Additional Protocols Commentary, 1987, p. 515-516) Such combatant remains a legitimate object of attack.

It could be assumed that the exceptional situation is only that of belligerent occupation and wars of national liberation. In such circumstances, combatants are permitted to “go underground” and hide among civilians. (Gasser, 1993, p. 542) The question of identification of combatants and of participation directly in hostilities is great challenge, since a member of the “armed forces” can live among the civilians. Acts which comply with the requirement of distinguishing, shall not be considered as perfidious. This sentence of the Article 44(3) represents a safeguard clause intended to prevent acts from being considered as acts of perfidy if they comply with the provided requirements. Thus combatants are obliged to distinguish themselves from the civilian population, albeit not in all circumstances. According to some ideas, this distinction should be clearly recognizable, as in Article 4A2b of the Geneva Convention III, and throughout military operations. (Additional Protocols Commentary, 1987, p. 527)

Traditional law requires that the members of armed forces should have a distinctive emblem recognizable at a distance and should carry arms openly. Further, the combatant must be associated with a state or a “national liberation movement”, acts under a responsible command and be subject to a disciplinary system that enforces compliance with the IHL. By *Watkin*, there is a danger that the reference to “armed” combatants carrying arms openly may lead to the interpretation that a combatant can only be targeted while carrying a weapon during an attack or a deployment. This is neither the intent nor the effect of the provision of Article 44. The temporal limit and the other criteria from that Article, such as “owing to the nature of hostilities”, set out the minimum conditions by which a combatant can retain that status while conducting hostilities. A failure of a person taking a direct part in hostilities to meet those conditions does not mean they cannot be targeted. It simply means they will not have the status of a combatant, or if captured, a prisoner of war. (Watkin, 2005, p. 150)

Article 44 of the Additional Protocol I is mainly concerned with guerrilla combatants. On the modern battlefield guerrilla warfare is a phenomenon which exists for various reasons, all equally valid. The word “guerrilla” itself is used in two different ways: as a synonym for guerrilla warfare, or for a guerrilla fighter. Guerrilla warfare is usually understood to mean the type of armed conflict on land in which guerrilla fighters are involved in the hostilities at the side of at least one of the parties to the conflict. The term guerrilla fighters is used in more than one way, but according to a fairly widely accepted view it embraces all irregular combatants. (Kalshoven, 2007, p 467)

It cannot be denied that guerrilla movements do not have the same characteristics as so-called regular forces, but this is not a new problem. It already existed in 1949 with regard to resistance movements, whose members are equally required to comply with the “laws and customs of war”. When Article 4A(2d) of the 1949 Geneva Convention III states that members of militias, volunteer corps and resistance movements should conduct their operation in accordance with the laws and customs of war, this means that they must have been directed against resort to perfidy, ill-treatment of prisoners, wounded or dead, improper use of the flag of truce, and unnecessary violence or destruction. Thus the requirement of assuring the respect of the rules of IHL is not asking the impossible for those guerrilla groups who wish to benefit from international instruments of the IHL. (Additional Protocols Commentary, 1987, p. 523)

But this new text from Additional Protocol I, which in some extent legitimizes guerrilla warfare, was severely criticized. It was feared, for instance, that relaxation of the obligation for combatants to be distinguished at all times from the civilian population would encourage acts of terrorism. This fear is based, at least partly, on a misunderstanding, since the new rule applies only to members of the armed forces of a state involved in an international armed conflict (or, in strictly circumscribed conditions, of a recognized nation liberation movement). Groups or gangs of terrorists or individual terrorists are not covered by this provision, as they do not belong to any official armed forces. (Gasser, 1993, p. 543) This is quite significant conclusion for the further development of the IHL, especially in the time of fight against terrorism, when many new questions of warfare arise.

Article 45 of the Additional Protocol I lists the cases in which doubt regarding the status of a person who takes part in hostilities give way to a presumption of prisoner of war status in three cases: a) if he claims that status (a simple statement of claims suffices); b) if he appears to be entitled to such status (a uniformed soldier, captured on the battlefield is automatically considered to be a prisoner of war); c) if the party on which he depend claims such status (even though the best guarantee lays in the prisoner's own statement, the confirmation of "his" party may be decisive in the case of doubt).

This provision takes an additional step forward in eliminating in the great majority of cases the possibility of a fatal doubt, and its consequences in criminal law. It achieves this by means of a system of presumptions which operate automatically in favour of the prisoner. Where doubt remains notwithstanding the presumption of prisoner of war status, the question then goes to the competent tribunal. (Additional Protocol I, Article 45(1))

A person who fails the tests laid down in Articles 43 and 44 of the Additional Protocol I, after due determination of status, and who would not be entitled to the status of prisoner of war under the IHL, would thus be civilians. They would be protected by the basic humanitarian guarantees laid down in Articles 45(3) and 75 of the Additional Protocol I, and by general principles of international human rights law in terms of his treatment upon capture. However, by *Shaw*, since such a person would not have the status of a prisoner of war, he would not benefit from the protection afforded by such status and would thus be liable to prosecution under national criminal law. (Shaw, 2008, p. 1174)

### 3. Non-international armed conflicts

#### 3.1. Legal regulation of non-international conflict and question of its defining and recognizing

Legal regulation of non-international armed conflicts has continued to grow in importance at the middle of the 20<sup>th</sup> century. As mentioned before, the adoption of Common Article 3 in 1949 was the great step forward in the IHL relations. The binding force of Common Article 3, the first international norm which covers the situation of non-international armed conflict in history, derives from the fundamental nature of the rules it contains and from their recognition by the entire international community as being the absolute minimum needed to safeguard vital humanitarian interests. These rules are core standards that neither government nor insurgent movements can possibly ignore without thereby exposing their own criminal nature and putting themselves totally beyond the pale of civilization. (Bugnion, 2003, p. 336)

The Common Article 3 was later recognized simply as elementary consideration of humanity,<sup>5</sup> a rule intended to protect any person who does not take active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause. They all shall be treated humanely in all circumstances, without any adverse distinction, and remain protected from: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

This short provision must be applicable as wide as possible. There can be no drawback in this, since in its reduced form it does not increase the authority of the rebel party, nor in any way limits the

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<sup>5</sup> That expression was mentioned for the first time in the *Corfu Channel case (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Judgement, International Court of Justice Reports, 9 April 1949, para. 215; and was later repeated in the *Nicaragua case (Case Concerning Military and Paramilitary Activities In and Against Nicaragua)*, Judgement, International Court of Justice Reports, 27 July 1986, para. 218.

right of a state to put down rebellion within its borders. The fact is that there is no government which would aloud the right to rebellion against itself; state is most concerned about its sovereignty when it feels it is threatened. Any state withholds the right to implement power and force in its own territory.

But, on the other hand, would any government dare to claim before the world, in a case of civil disturbances, that Common Article 3 is not applicable? Could the claim on state sovereignty be justification for any state to leave the wounded uncared or to torture and mutilate insurgents? The authors of Commentary of Geneva Convention III emphasized that no government can object to observing, in its dealings with enemies, whatever the nature of the conflict between it and them, a few essential rules which in fact observes daily, under its own laws. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 37)

Although the Common Article 3 represents the regulation-base of non-international armed conflicts, the term of this conflict remains non-explained in that Article – it does not contain a definition of non-international armed conflicts and generally refers to a conflict “not of international character”.

There are different notions about the absence of the definition. On one hand, the absence of strict definition of conflict interpretation may not be such a problem; contrary, it could be seen as “blessing in disguise”. Such non-defining may cover all possible forms of the conflict, unlike the “narrow” definition (like the one from the Additional Protocol II) of preciously assigned elements, which may be more restrictive. (Moir, 2003, p. 32) The ICRC has used this ambiguity in an effort to push the threshold of application as low as possible, seeking to take action in all situations of civil unrest, particularly as regards access to prisoners and detainees to ensure humane treatment. (Abi-Saab, 1988, p. 224)

However, the lack of an authoritative definition of interpretation may be a problem. In an environment of non-international conflict, it is necessarily more difficult to determine when an armed conflict has come into being. By *Kalshoven and Zegveld* qualification of a situation as non-international armed conflict is left first and foremost to the discretion of the state concerned. Much will therefore depend on its policy and authorities, and – as the case may be – on such pressure as the outside world may be able and willing to bring to bear. (Kalshoven and Zegveld, 2011, p. 143)

By some authors, reluctance of the states concerned to bind themselves to rules which could be perceived as favouring political opponents, states can therefore hide behind the lack of a definition to prevent the application of the IHL by denying the existence of armed conflict. (Moir, 2003, p. 34; Kalshoven, 2007, p. 469) By *Shaw*, since non-international conflicts could range from full-scale civil wars to relatively minor disturbances, the state concerned may not appreciate the political implications of the 1949 Geneva Conventions application. (Shaw, 2008, p. 1194) However, international judicial bodies are empowered to make their own determination about the application of international instrument relating to the non-international armed conflict. (Kalshoven and Zegveld, 2011, p. 143)

But, in practice, a government cannot deny the existence of an armed conflict, within the meaning of Common Article 3, when faced by collective armed action, which cannot be suppressed by ordinary means, such as the police and the enforcement of ordinary criminal legislation. The duration and intensity of the conflict, the degree of insecurity, the existence of victims, the use of military forces, would, in the large majority of cases, be conclusive evidence that the situation in question is indeed non-international armed conflict. (Bugnion, 2003, p. 333; Kalshoven, 2007, p. 469)

As opposed to Common Article 3, Additional Protocol II contains the definition of the non-international armed conflict. It refers to a conflict which takes place in the territory of a state (High Contracting Party), between its armed forces and dissident armed forces or other organized armed groups, who, under responsible command, exercise such control over a part of its territory, as to enable them to carry out sustained and concerted military operations and to implement Additional

Protocol II. (Additional Protocol II, Article 1(1)) These conditions on the side of the insurgents restrict the applicability of the Additional Protocol II to conflicts off a certain degree of intensity. The existence of a responsible command implies some degree of organization on the insurgent's side. It means an organization capable to plan and carry out sustained and concerted military operations, i.e., the operations that are kept going continuously, and are being planned and done in agreement according to a plan.

That narrow definition from the Additional Protocol II and its demand that hostilities has to be wage between armed forces of the state on one side, and dissident groups or other organized armed groups, is basically one of the significant oversights of the Additional Protocol II. That means that not all cases of non-international armed conflict are covered, as is the case of Common Article 3. By that demand, the Additional Protocol II is not applicable in a conflict between parties where no one represents "armed forces of the state", even if that is a very logical and possible practical situation. For instance, in the collapse of the state government, the intervention of the "armed forces of the state" into the conflict between dissident groups (two or more), may become impossible. The most important, recent history has shown that the significant number of non-international armed conflicts has been carried out between the dissident's forces without government interference.

In connection with this issue, it is interesting to mention that the ICTY's case-law expanded that narrow definition, and reaffirmed the conclusion that has been made in *Tadic* case – the armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. (*Tadic* Jurisdiction Decision, para. 70) The significance of that definition is confirmed later – it was accepted in the Article 8.2.f) of the Statute of the International Criminal Court.

Specific context of the Former Yugoslavia's conflict was quite unclear whether an international or a non-international armed conflict or some kind of mixture of the two was involved. This was very important since it would have had an effect upon the relevant applicable law. Since such conflicts could be classified differently according to time and place, a particularly complex situation was created.

Furthermore, where the elements of different types of conflict are mingled, like were those in former Yugoslavia, there can be found very specific situations relating to the combatant/insurgent's status. It is possible that the person is an insurgent in non-international armed conflicts for one day, and the combatant in international armed conflicts (with all its rights) for another.

### **3.2. *Insurgent's status in contemporary non-international armed conflicts***

The beginning of the 2<sup>nd</sup> World War was a time of immense changes in the political system all over the world. In that state of collapse many national groups continued to take an effective part in hostilities, although not recognized as belligerents by their enemies and members of groups. They have been fighting in more or less disciplined formations in occupied territory or outside of their own country, but they have been denied the status of combatants and regarded as common criminals and, in consequence, subjected to repressive measures. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 52) They were known by different notion: as rebels, partisans, insurgents, terrorists, dissidents, anti-governmental forces, resistance forces, plotters, guerrilla, armed groups, liberation armies, etc. The aim of their action may be a fight for power between a group of individuals, a change of existing political system, a separation of a territory for annexation to another state, or creation of a new state.

Insurgent might be, but are not necessary, all criminals. It sometimes happens in non-international conflicts that those who are regarded as rebels are actually patriots struggling for the independence or the dignity of the state. But, no matter what they are, in accordance to international instruments covering non-international armed conflict, they are not combatants, nor prisoners of war.

During the 1949 Geneva Conference the fear existed of giving the status of belligerent, and possibly even a certain degree of legal recognition to the handful of rebels. During the Conference the Soviet Union's proposal on the part of Common Article 3, which could give a better position to the insurgents, was rejected. It was written as follows: *"In the case of armed conflict not of an international character occurring in the territory of one of the state parties to the present Convention, each party to the conflict shall apply all the provisions of the present Convention guaranteeing: humane treatment for prisoners of war; compliance with all established rules connected with the prisoners of war regime; prohibition of all discriminatory treatment of prisoners of war practiced on the basis of differences of race, colour, religion, sex, birth or fortune."*

There was also a risk of ordinary criminals being encouraged to give themselves a semblance of organization as a pretext for claiming the benefit of the 1949 Geneva Conventions, representing their crimes as "acts of war" in order to escape punishment for them. Moreover, it was asked, would not *de jure* government be compelled to release captured rebels as soon as order was re-established, since the application of the 1949 Geneva Convention III would place them on the same footing as prisoners of war? There was a fear that any such proposal giving insurgents a legal status, and consequently support, would hamper the government in its measures of legitimate repression. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 32)

But, one of the significant provisions of Geneva Convention in Common Article 3 determines that the "application of that provision shall not affect the legal status of the parties to the conflict". This clause is considered to be essential. Without it Common Article 3 would probably never have been adopted. It makes absolutely clear that the object of the clause is a purely humanitarian one, that it is in no way concerned with the internal affairs of the states, and that it merely ensures respect for the few essential rules of humanity, which all civilized nations consider as valid everywhere and in all circumstances. The adverse party obeying provisions of Common Article 3 is not entitled on any right to any new international status, whatever it may be, and whatever title it may give itself or claim. On the other hand, governments are not limited in right to suppress a rebellion by all the means (including arms), or to prosecute, try and sentence its adversaries, according to its own law. (3<sup>rd</sup> Geneva Convention Commentary, 1960, p. 43-44)

Following the example of Common Article 3, Additional Protocol II does not establish any special category of protected person, nor does it allow for any special legal status. It does not entertain the issue of the political position of the insurgent power, and their recognition as a party to a conflict. Additional Protocol II has a purely humanitarian purpose and principles, and is aimed at securing fundamental guarantees for individuals under all circumstances.

Furthermore, it leaves intact the right of every state and its government to prosecute and convict members of the armed forces and civilians who committed an offence related to the armed conflict. Nothing in international law prevents the authorities from putting captured insurgents on trial, on the basis of national criminal law. Punishment on the governmental side is often for the hostile act themselves or direct participation in the hostilities, which may for instance be considered as treason, rather than for violations of the IHL. Article 6 of the Additional Protocol provides for such criminal prosecution and punishment for criminal acts in an armed conflict, with basic guarantees for the accused persons, as a minimum that has to be respected, in order for a fair trial to be provided, in a regular and independent court. It applies equally to civilians and combatants who have fallen in the power of the adverse party. Moreover, if they violate norms of the IHL, they can be prosecuted by international criminal tribunals on the basis of individual criminal liability.

The acquirement of a certain legal status under international law may be an incentive for non-state actors to comply with the law even though they have never ratified any treaty. Although Article 5 of the ICRC's draft included a provision relating to the rights and duties of parties of a conflict in words: *„The rights and duties of the parties to the conflict under the present Protocol are equally valid for all of them“*, the Diplomatic Conference rejected that draft, along with all the other provisions which would have established identical rights and obligations for both governments and

insurgents. Although this issue has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested. (Additional Protocols Commentary, 1987, p. 1345) While possible hesitations on this score might be strengthened by the (regrettable) absence of any procedure, its drafting history leaves no doubt that the negotiating parties intended both side to be bound by provisions of Additional Protocol II. (Kalshoven and Zegveld, 2011, p. 144) We could say that insurgents are bound by the obligation of the state even when they are trying to bring down the government, but they are on the other hand protected by the rules of the IHL. (Von Heintschel; Epping (eds.), 2007, p. 165) It may therefore be appropriate to recall here the explanation given in 1949: the commitment made by a state not only applies to the government, but also to any established authorities and private individuals within the national territory of that state and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the state.

The question is how to recognize a person belongs to an insurgent's party? In non-international armed conflict, organized armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities ("continuous combat function"). (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1009) In accordance to the provision of the Additional Protocol II, organized armed groups belonging to an insurgent party include both dissident armed forces and other organized armed groups. Dissident armed forces essentially constitute part of a state's armed forces that have turned against the government. Other organized armed groups recruit their members primarily from the civilian population, but develop a sufficient degree of military organization to conduct hostilities on behalf of a party to the conflict, albeit not always with the same means, intensity and level of sophistication as state armed forces. In both cases, it is crucial for the protection of the civilian population to distinguish a non-state party to a conflict from its armed forces. As with state parties to armed conflicts, non-state parties comprise both fighting forces and supportive segments of the civilian population, such as political and humanitarian wings. The term organized armed group, however, refers exclusively to the armed or military wing of a non-state party: its armed forces in a functional sense. This distinction has important consequences for the determination of membership in an organized armed group as opposed to other forms of affiliation with, or support for, a non-state party to the conflict. (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1006)

Although members of dissident armed forces are no longer members of state armed forces, they do not become civilians merely because they have turned against their government. At least to the extent, and for as long as, they remain organized under the structures of the state armed forces to which they formerly belonged, these structures should continue to determine individual membership in dissident armed forces as well. (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1006) On the other side, individuals who continuously accompany or support an organized armed group, but whose function does not involve direct participation in hostilities, are not members of that group within the meaning of IHL. Instead, they remain civilians assuming support functions, similar to private contractors and civilian employees accompanying state armed forces. (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1008)

The civilians shall enjoy general protection against the danger arising from military operations, and shall not be the object of the attack. (Additional Protocol II, Article 13(1) and (2)) But, civilians lose their right to protection if they take a direct part in hostilities and throughout the duration of that participation. (Additional Protocol II, Article 13(3)) The term "direct part in hostilities" is taken from Common Article 3, where it was used for the first time. It implies that there is a sufficient causal relationship between the act of participation and its immediate consequences. Those who belong to armed forces or armed groups may be attacked at any time. If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts, and consequently – he may be attacked. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.

In 2003, the ICRC mounted an effort to provide guidance on the question of when civilians lose their immunity from attack in both international and non-international armed conflict. With regard to the concept of direct participation, two questions arise: a) what acts qualify a civilian as a direct participant in hostilities; b) when is civilian participating? (Schmitt, 2012, p. 135) In case of doubt regarding the status of an individual, he is presumed to be civilian.

The Interpretive Guidance enumerates several criteria in order to qualify as direct participation in hostilities. Acts amounting to direct participation in hostilities must meet three cumulative requirements:

- 1) a threshold regarding the harm likely to result from the act – the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack (threshold of harm);
- 2) a relationship of direct causation between the act and the expected harm – there must be a direct causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation);
- 3) a belligerent nexus between the act and the hostilities conducted between the parties to an armed conflict – the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (*belligerent nexus*). (Guidance on the Notion of Direct Participation in Hostilities, 2008, p. 1016)

In *Schmitt's* opinion, these criteria generally capture the essence of direct participation, although there is some disagreement with the standards around the margins. For instance, the first criterion could be expanded to encompass acts that enhance one's own military capacity, rather than merely negatively affecting the enemy. Further, the causal link as explained in the Guidance is overly restrictive. As an example, it excludes assembly of an improvised explosive device on the basis that such participation is indirect. This assertion flies in the face of common sense; no state that engages in combat could reasonably accept it. The Guidance also labels voluntary human shielding as indirect, a position that is likewise highly questionable. Despite such concerns, the three elements fairly capture what is generally understood to be direct participation – acts that militarily affect the parties in a fairly direct manner and that are related to the ongoing armed conflict. Much more problematic is the question of when may direct participation be said to be happening, for a civilian only loses immunity from attack during that period. At issue is the “for such time” verbiage in the direct participation norm, which is properly characterized as customary in nature. (Schmitt, 2012, p. 136)

Additional protocol II confirms fundamental guarantees inherent to all persons who do not take a direct part or who have ceased to take part in hostilities. Those persons, whether or not their liberty has been restricted, are entitled to respect for their person, honour, convictions and religious practices, and shall in all circumstances be treated humanely, without any adverse distinction. (Additional Protocol II, Article 4(1)) *Ratione personae* it covers all persons affected by armed conflict when they do not, or no longer, participate directly in hostilities. *Ratione temporis* combatants are protected as soon as they are *hors de combat*. (Additional Protocols Commentary, 1987, p. 1370)

They must be treated humanely. The further list of treatments that shall remain prohibited “at any time and in any place whatsoever” leaves no possible loophole; this provision has to be respected with no excuse, and no attenuating circumstances. This list includes further actions: a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; b) taking of hostages; c) outrages upon personal dignity, in particular humiliating and degrading treatment; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (Additional Protocol II, Article 4(2))



The important thing is that the man in question will be taking no further part in the fighting.

#### **4. Possible convergence between international and non-international armed conflicts in the future?**

The question arise – is it possible to enlarge the concept of prisoner of war, relating to the position of non-international armed conflict insurgents in contemporary IHL relations? One could envisage for instance that certain detainees in non-international armed conflicts could be entitled to the full protection of the Geneva Convention III, but not to the status of lawful combatants, or conversely, that they could be entitled to the later status but not to the full protection of the Convention. It could be said that their behaviour in the battle field would show the answer whether they are mere felons, or real combatants deserved to “enjoy” the protection of 1949 Geneva Convention III. If insurgents apply humanitarian provisions and obey the IHL in general, so much the better for the victims of both sides. Furthermore, if they are complied with humanitarian principles, it could be hard enough to speak of “anarchy” or “terrorism”. On the other side, if they do not apply it, it will prove that those who regard its actions as mere acts of anarchy of terrorism are right. The concept of prisoners of war could be enlarged so as to encompass, for instance, all military prisoners captured in an armed conflict, whatever its legal nature and whether or not the Geneva Convention III is applicable.

However, this attitude has not been widely accepted so far.

The scope of the concept of existing IHL may be changed (and has been changed so as to encompass wars of national liberation), but at the same time the concept contains a certain basic essence, which is not susceptible to significant modification in the present historical stage. (Rosas, 2005, p. 292)

Despite the fact that insurgents in non-international armed conflicts are not combatants, the recommendation of the ICRC is (as a mean of after-war national reconciliation) to approve certain rights to the members of dissident groups, which are inherent to “regular” combatant’s rights. That “unification” tendency demands that a member of the armed forces in the power of adverse party, and civilian deprived of his liberty for reasons related to the conflict enjoy the same legal protection, under the conditions of complying with the principle of distinguishing from civilians, and by respecting and undertaking the principles of IHL. In general, it is a specific modification of the principle from the Geneva Convention III, which recognizes the war prisoner status to members of other militias and members of other volunteer corps, including those of organized resistance movements, if they fulfil the prescribed conditions.

The ICRC, for its part, applying its long-established method of work, combines advocacy with supervision in today’s internal armed conflicts as well. (Kalshoven and Zegveld, 2011, p. 223) It has contributed to the improvement of the status of insurgents. In effort to maintain human dignity during the non-international armed conflict, or even during the internal tensions and rebellions, the ICRC play a part of conciliator in humanitarian issues, and, with the agreement of the government, visit the places where the person deprived of their liberty in non-international conflicts are settled, and, to the extent necessary, take all steps to improve their position during deprivations. It always made every effort to secure such insurgent captured by their adversaries the benefit of treatment as prisoner of war.

It has to emphasized that in non-international armed conflicts the parties are not obliged to accept the ICRC’s offers of services or to allow its delegates access to the “prisoners” they hold. But, in many conflicts after the 2<sup>nd</sup> World War the ICRC has drawn attention to the fundamental obligation to respect and protect any persons falling into enemy hands. In *Bugnion’s* opinion, whenever a conflict has broken out, the ICRC has reminded all concerned that an enemy who surrenders must

be spared and that any prisoners must be humanely treated. In that respect, there is no possible distinction between international and non-international armed conflicts. (Bugnion, 2003, p. 550)

Furthermore, the request from the Additional Protocol II has to be considered significant as well. At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict. (Additional Protocol II, Article 6(5)) The object of this provision is to encourage gestures of reconciliation which can contribute to re-establishing normal relations in the life of a nation which has been divided. (Additional Protocols Commentary, 1987, p. 1402)

The government very often reacts by force and repression in relation to organized armed group, and by punishing the members of the group, even if they act in accordance to rules of IHL. It could be exact reason of reluctance of rebels to apply IHL provisions; if they failed in their intention, sooner or later they will be confronted to the punishment because of the disobedience. The possibility of rebel's immunity for participating in armed conflict or possibility of amnesty is not very often executed, and there are no guaranties for such persons. Even the provision of the broadest possible amnesty to persons who have participated in the conflict from 1977 Additional Protocol II is only the proposal to the state. This proposition has without a doubt contributed to improving the status and the perceptions of the rebellion group, which surely is the interest of all parties to the armed conflict. This amnesty does not refer to persons who committed general criminal offenses that have no relation to the conflict or crimes against the international criminal law.

By *Kalshoven and Zegveld*, this particular provision on amnesty although broadly worded, should not lead to a situation where even the worse offences against IHL (as against human rights) go unpunished, as this may in turn entail deep dissatisfaction with the manner by which the conflict has been brought to an end. To avoid this long-term effect requires a careful balance between the requirements of justice and peace. Past history as well as current experience shows that this balance usually is difficult to find. (Kalshoven and Zegveld, 2011, p. 164)

## 5. Conclusion

By supporting the "unification view", one could say that the time has come to approach to an entirely new concept of more efficient humanitarian protection in general, including the expansion of "frame" of individuals entitled to prisoners of war status. The development of international law, international human rights law and international criminal law, as well as the ICRC humanitarian activities, encourage the unification of the legal regimes in a way that necessarily influences the IHL, too. One could say it will not be easy to maintain the differences between international and non-international aspects of armed conflicts, especially in situations where the elements of both conflicts are mingled. Considering that the human rights law is primarily concerned with behaviour within a state, it is possible that further resistance to unification tendency will be eroded by human rights pressure.

In that sense we must agree with *Kalshoven* who says that it seems surely a reasonable expectation that the law of armed conflict applicable in non-international armed conflict and human rights law will continue to influence each other beneficially and thus will contribute to the reaffirmation and development of that standard of civilization which provides at least a modicum of protection for the human being in time of all armed conflicts. (Kalshoven, 2007, p. 145)

By *Bugnion*, despite the fact that it would be unrealistic to expect any significant changes of the conflicts that are ravaging the world, the situation is certainly changing. There will be a proliferation of conflicts of a dual nature, internal in some respect and international in others. In his opinion, contemporary international law, based as it is on the dichotomy between international and

non-international armed conflict, is not easily adaptable to hybrid situation of this kind. (Bugnion, 2003, p. 1013)

On the other hand, one has to agree with the view that the manifold expression of dissatisfaction with the dichotomy between international and non-international conflicts does not yet meet the standards required for the formation of the new customary rule. We are still far away from the total unification of the different types of conflicts. The establishing of the International Criminal Court and the adoption of the Rome Statute in 1998 confirm that there is considerable resistance on the international legal level against lifting the separation between international and non-international armed conflicts. (Boelaert-Suominen, 2000, p. 102)

As far as the law relating to non-international armed conflicts is concerned, the concepts of “combatant” and “prisoner of war” simply are not feasible in the near future. State practice pertaining to the application of IHL standards to non-international armed conflicts, which would form the first building block of new customary international law, is far from being general or uniform to any substantial degree.

## 6. References:

- Abi-Saab, Georges, Non-international Armed Conflicts, in UNESCO, International Dimensions of Humanitarian Law, Henry Dunant Institute, Martinus Nijhoff, Dordrecht, 1988
- Boelaert-Suominen, S. (2000). Grave Breaches, Universal Jurisdiction and Internal Armed Conflict: Is Customary Law Moving Towards a Uniform Enforcement Mechanism for All Armed Conflicts, *Journal of Conflict and Security Law*, 5(1), p. 63-103
- Bothe, Michael et al., New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949, 1982
- Bugnion, François, The International Committee of the Red Cross and the Protection of War Victims, International Committee of the Red Cross, 2003
- Commentary on the Additional Protocols of 8 June to the Geneva Conventions of 12 August 1949, (eds. Y. Sandoz, C. Swinarski & B. Zimmerman), Geneva: Martinus Nijhoff Publishers, 1987
- The Geneva Conventions of 12 August 1949, Commentary, III Geneva Convention Relative to the Treatment of Prisoners of War (J.S. Pictet ed.), International Committee of the Red Cross, Geneva, 1960
- Dinstein, Yoram, The International Law of Belligerent Occupation, Cambridge University Press, New York, 2009
- Gasser, Hans-Peter, International Humanitarian Law, Humanity for All (H. Haug ed.), Henry Dunant Institute, Berne-Stuttgart-Wien, 1993
- International Humanitarian Law Facing New Challenges (ed. By Von Heintschel, Wolff; Epping, Volker), Springer/Verlag, Berlin, Heidelberg, 2007
- Interpretative Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law, *International Review of the Red Cross*, Vol. 90, Nr. 872, 2008, p. 991-1047
- Kalshoven Frits; Zegveld, Liesbeth, Constraints on the Waging of War, An Introduction to International Humanitarian Law, Cambridge University Press, 2011
- Kalshoven, Frits, Reflections on the Law of War, Collected Essays, Martinus Nijhoff Publishers, Leiden-Boston, 2007
- Moir, Lindsay, The Law of Internal Armed Conflict, Cambridge Studies in International and Comparative Law, Cambridge, 2003

Pomper, Stephen, Toward a Limited Consensus on the Loss of Civilian Immunity in Non-International Armed Conflict: Making Progress through Practice, in: Non-International Armed Conflict in the Twenty-First Century (eds. Watkin, Kenneth & Norris, Andrew J.), International Law Studies, Naval War College, Newport, Rhode Island, Vol. 88., 2012, p. 181-193

Schmitt, Michael N., The Status of Opposition Fighters in a Non-International Armed Conflict, in: Non-International Armed Conflict in the Twenty-First Century (eds. Watkin, Kenneth & Norris, Andrew J.), International Law Studies, Naval War College, Newport, Rhode Island, Vol. 88., 2012, p. 120-144

Rosas, Allan, The legal Status of the Prisoners of War, Institute for Human Rights, Åbo Akademi University, 2005

Shaw, Malcolm N., International Law, Cambridge University Press, 2008

Watkin, Keneth, Humans in the Cross-Hairs: Targeting, Assassination and Extra-Legal Killing in Contemporary Armed Conflict, New Wars, New Laws? Applying the Laws of War in 21<sup>st</sup> Century Conflicts (ed. Wippman, David & Evangelista, Matthew), Transnational Publishers, Ardsley, New York, 2005