



IHL- Lecture note 2

Chapter 2



Combatant v civilian





Combatants v civilian



- Respect for IHL depends on distinguishing between combatants & civilian
- Challenge- rising NIAC, increasing civilian participation in hostilities





...cont'd



- Who is a combatant?
- **Art 43(2) AP I: Combatant is :**

“Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities.”





...cont'd



☐ Who are the armed forces??

Art 43(1) AP I: Armed force:

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

- Have to respect IHL rules in conducting operations
- Not necessary for the adverse party to have recognized the authority they represent
- Commanded by a person responsible for his subordinates
- Medical & religious personnel are not combatant
- Have fixed distinctive symbol
- Carry arms openly





...cont'd



- *A levee en mass*: Art 4(6) GC III-
 - a short-term requisition of all able-bodied men to defend the nation
 - “Persons who are inhabitants of a territory w/h hasn’t been occupied, who, on the approach of enemy spontaneously take up arms to resist the invading troops without having had time to organize themselves if they carry their arms openly & respect IHL.” i.e.
 - ✓ spontaneous resistance to defend **unoccupied territory**;
 - ✓ Spontaneously take up arms against invading troops- initiated by the population, not organized in advance by the state;
 - ✓ Carry weapons openly
 - ✓ Respect IHL



..cont'd



ART 44 AP I:

- Combatants & *levee en mass* entitled to POWs status
- Combatant – duty to obey IHL. Violation of IHL doesn't affect his status as combatant
- combatants –duty to distinguish themselves from the civilian population while they are engaged in an attack
- owing to the nature of the hostilities if a combatant cannot so distinguish himself (guerilla fighting):
 - ✓ he should carry arms openly during military engagement &
 - ✓ he is visible to the adversary while he is engaged in a military deployment

Failing to obey this rule- loss POW status (Art 44())



...cont'd



- 1907 Hague Regulations: combatants are:
 - ✓ Members of armed forces
 - ✓ Militia
 - ✓ Volunteer corps
- But they should fulfill the aforementioned conditions!
- Combatant/POWs is not called to account for participating in lawful operations.
- But if he violated IHL rules during operation, he may be **prosecuted** under the laws of the detaining power!



...cont'd



Q who is non-combatant?

- **Art 50 AP I:**

“A civilian is any person who isn’t a combatant”

- In NIAC, combatant status isn’t recognized!!
- ICRC noted that members of state armed forces are combatant in both IAC & NIAC!
- Non state actors: members of armed groups & civilian who take part in hostilities w/t being a member
- Members of armed groups don’t enjoy the privilege of combatant- but he isn’t a civilian!!!!



..cont'd



- Civilian v combatant
- The principle of distinguishing combatant & civilian is “one of the “cardinal Principles” of IHL & one of the “intransgressible principles of ICL.” (ICJ -Nuclear Weapon case, par 79)





...cont'd



❖ Protection of civilian (Art 51 AP I):

- Military operations against civilians are prohibited!
- The civilian population must not be involved in fighting!
- civilians who are not taking part in hostilities are protected (Art 51(3) AP I)
- Intentionally directing attack against civilian population not taking part in hostilities is war crime (Rome Statute Art 2(b)(i))
- **Indiscriminate attack is prohibited!!! (Art 51(4) AP I)**
 - ✓ those which are not directed at a specific military objective
 - ✓ those which employ a method or means of combat the effects of which cannot be limited &
 - ✓ striking military objectives & civilian without distinction!



..cont'd



- **Indiscriminate attack: Ex:**
 - ✓ Bombardment of civilian objects in cities, town/are containing similar concentration of civilian or civilian objects;
 - ✓ an attack causing incidental loss of civilian life, injury to civilians, damage to civilian objects, which would be excessive in relation to the military advantage anticipated;
- Attacks against the civilian population or civilians by way of reprisals are prohibited!!

- Atomic bombing of Heroshima (06 Aug 1945) & Negasaki (09 AuG 1945)
- Estimated death: Up to 226,000 people



- Heroshima



- Heroshima



Protection of civilian object- Art 52 AP I:

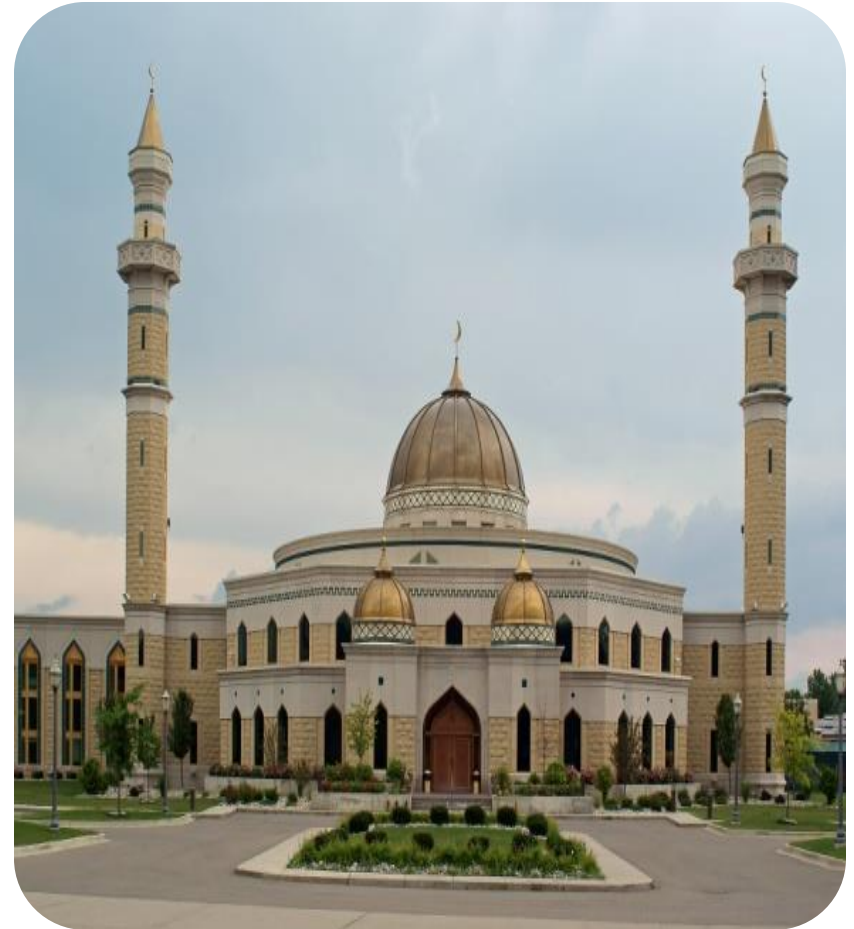
- Schools



Medical centers-hospitals



Religious institutions



Residential areas



...cont'd





...cont'd



- **Concept of direct participation in hostilities:**

- To engage in specific attack/s on enemy combatant or military objectives in armed conflict
- Art 49(1) AP I: “attack” means:
“acts of violence against the adversary, whether in **offence** or in **defense**”
- **Casual proximity:**
Acts causing death & injury to military personnel & physical or functional damage of military objectives
- **Belligerent nexus:**
Civilian taking part in hostilities **should not be necessarily members of armed group**- no nexus to such group is required!



...cont'd



- Direct involvement in armed attack constitutes **direct participation!**
- Supply of foodstuffs to combatant, working in ammunition factory, transport of food or humanitarian supplies, civilian scientists working for the military, etc **can't be seen as direct participation as it lack casual proximity!!**
 - ✓ It is participation in war effort! –indirect!
 - ✓ they are not quasi-combatant!
 - ✓ Injuries or death caused to such civilian is considered incidental!
- Civilian who takes **direct participation** in hostilities may be prosecuted by his states for his unlawful participation!



Protected persons



1. Wounded, sick & shipwrecked (***Art 3 com. to GCs***)
2. Civilian (Art 51 AP I)
3. *Hors de combat* (Art 41 AP I)
4. Medical & religious personnel- GC I & II

Horse de combat





...cont'd

Art 41 AP I: Hors de combat:

2. A person is *hors de combat* if:

- a) *he is in the power of an adverse Party;*
- b) *he clearly expresses an intention to surrender;*
- c) *he has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defending himself;*

provided that in any of these cases **he abstains from any hostile act** and **does not attempt to escape**

❖ ***Hors de combat***: *out of the fight; disabled; no longer able to fight!! He shouldn't be target of attack- (Art 41(1) AP I), Art 3 common to GCs)*



...cont'd



- Duty of combatant to distinguish himself from civilian (Art 44(3) AP I):
 - ✓ It is CIL rule
 - ✓ **Swarka case (1974)**: an Israeli Military Court found that members of the Egyptian armed forces who had infiltrated in to Israeli territory and launched an attack in civilian attire were not entitled to POW and could be prosecuted as saboteurs.
 - ✓ combatants are expected to wear a uniform or a distinctive sign and must carry arms openly