

Exploring the “continuous combat function” concept in armed conflicts: Time for an extended application?

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Abstract

This paper focuses on the “continuous combat function” concept and proposes to extend its application. First, the article will demonstrate that the continuous combat function concept should be extended to certain members of organized armed groups in cases where those groups do not belong to any of the parties to an international armed conflict and whose actions do not reach the level of intensity required for a separate non-international armed conflict (NIAC) to exist. Secondly, the paper will look at the extension of this concept in order to determine individual membership in State armed forces in the context of a NIAC, while arguing that the notion of “armed forces” should be interpreted differently depending of the nature of the conflict, be it international or non-international.

* The author would like to give a special thanks to Professor Marco Sassòli for all his guidance during the drafting of this thesis, as well as her classmate and partner Samit D’Cunha for his fantastic support in producing this article.

Keywords: continuous combat function, direct participation in hostilities, organized armed groups, international humanitarian law, state armed forces.

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Introduction

The principle of distinction, a cardinal principle of international humanitarian law (IHL),¹ applies in the conduct of hostilities and determines who is a legitimate target under IHL, with a view to protecting civilians against the effects of hostilities. This principle, which is recognized in both international armed conflict (IAC) and non-international armed conflict (NIAC), establishes that the parties to a conflict must distinguish between combatants and civilians who are not taking a direct part in hostilities and direct their operations only against combatants.² In establishing the meaning of this principle, the drafters of the Geneva Conventions and their Additional Protocols chose to define “civilians” negatively, adopting articles that only define the terms “combatants” and “military objectives”.³ Although this principle is recognized in both IAC and NIAC, its interpretation differs slightly on account of the nature of the parties involved. This difference arises largely from the fact that combatant status does not exist in NIAC. In order to ensure that the principle is effectively implemented, a precise definition is required in the two types of conflicts, given that only certain categories of people are legitimate targets under IHL.⁴ Civilians are entitled to protection as long as they do not take a direct part in hostilities.⁵

For the purposes of the principle of distinction in IAC, Additional Protocol I (AP I) indicates that civilians are defined by default as “all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en*

1 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996, para. 78.

2 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I), Art. 48; Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (ICRC Customary Law Study), Rule 1.

3 See Geneva Convention (III) relative to the Treatment of Prisoners of War of 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) (GC III), Art. 4A; AP I, Arts 43, 52(2).

4 Under the law of IAC, only combatants and civilians who take a direct part in hostilities are legitimate targets (see GC III, Art. 4; AP I, Art. 51(3)). Under the law of NIAC, members of State armed forces, members of armed groups performing a continuous combat function (CCF) and civilians taking a direct part in hostilities are legitimate targets (see Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 UNTS 609, 8 June 1977 (entered into force 7 December 1978) (AP II), Art. 13(3); ICRC Customary Law Study, above note 2, Rules 1, 4).

5 AP I, Art. 51(3); AP II, Art. 13(3); ICRC Customary Law Study, above note 2, Rule 6.

masse”.⁶ Reference must be made to Article 4 of Geneva Convention III (GC III) to determine who is deemed to belong to the armed forces. This article makes a distinction between the regular members of State armed forces mentioned in Article 4A(1) and the irregular members referred to in Article 4A(2), who must meet four cumulative requirements to qualify as combatants.⁷ Article 43 of AP I, however, abolishes this distinction between regular and irregular armed forces.⁸ Knowing whether an individual qualifies as a combatant under IHL is vital, because only combatants have the right to take a direct part in hostilities.⁹

In the case of NIAC, the law does not provide an actual definition of the term “civilians”, but both State practice and the terminology used in Article 3 common to the four Geneva Conventions and in Additional Protocol II (AP II) indicate that “civilians” and the “armed forces” of the parties to the conflict are mutually exclusive concepts. As both States and organized armed groups are considered to have “armed forces”, common Article 3 can be said to implicitly establish a concept of “civilian” that comprises only those who do not bear arms on behalf of a party to the conflict.¹⁰ The *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (ICRC Interpretive Guidance) has, however, clarified the meaning of this term, specifying that for the purposes of the principle of distinction in NIAC, “all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians”.¹¹ In both NIAC and IAC, civilians are protected against direct attacks unless they take a direct part in hostilities, in which case they lose this protection, but only for the duration of their participation.¹²

As already mentioned, the principle of distinction in NIAC is somewhat ambiguous because of the lack of definition of the terms “civilian” and “armed group”. For the purpose of clarifying this principle, the ICRC produced its Interpretive Guidance following five informal meetings with experts on the subject.¹³ This paper will focus, in particular, on the “continuous combat function” (CCF) – a concept developed in the ICRC Interpretive Guidance as a means of establishing which individuals can be considered civilians for the

6 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (ICRC Interpretive Guidance), p. 20. See also GC III, Art. 4; AP I, Arts 43, 50(1).

7 See GC III, Art. 4. The four requirements listed in Article 4A(2) of GC III are: being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly; and conducting their operations in accordance with the laws and customs of war. It is implicitly assumed that the requirements set out in this section are met by the members of regular armed forces.

8 ICRC Interpretive Guidance, above note 6, p. 21. Article 43 of AP I specifies that “[t]he 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”.

9 AP I, Art. 43(2).

10 ICRC Expert Meeting, *Fourth Expert Meeting on the Notion of “Direct Participation in Hostilities under IHL”*, Background Document, Geneva, 27–28 November 2006, p. 12.

11 ICRC Interpretive Guidance, above note 6, p. 27.

12 AP I, Art. 51(3); AP II, Art. 13(3); ICRC Customary Law Study, above note 2, Rule 6.

13 ICRC Interpretive Guidance, above note 6, p. 9.

purposes of the principle of distinction – and will look at the point at which those individuals become legitimate targets under IHL and the duration of the loss of protection against direct attack.¹⁴ As there is no real incentive for members of armed groups to distinguish themselves, it is necessary to look at patterns of conduct in order to determine whether an individual can be considered to belong to an armed group under the principle of distinction in NIAC.¹⁵

While it seems that the ICRC uses the CCF concept to strengthen the principle of distinction in NIAC, the Interpretive Guidance does not rule out its use in IAC.¹⁶ Indeed, this concept is extended, for the purposes of the conduct of hostilities, to some individuals engaged by private military and security companies (PMSCs) and to irregular members of the armed forces. Contemporary armed conflicts involve actors whose participation was never envisaged by the drafters of the Geneva Conventions and their Additional Protocols. The first part of this paper will demonstrate why the CCF concept, developed by the ICRC Interpretive Guidance, should be extended to certain members of organized armed groups who are involved in an IAC without belonging to any of the parties to an IAC while their actions do not reach the level of intensity required for a separate NIAC to be deemed to exist.

The second part of the paper proposes that the application of this concept should also be used to determine individual membership in all State armed forces operating in the context of a NIAC, a possibility that is not envisaged in the ICRC Interpretive Guidance. It will be shown that the notion of “armed forces” should be interpreted differently in a NIAC than it is in an IAC, mainly because the parties to a NIAC are fundamentally different in nature from the parties involved in an IAC. The principle of equality of belligerents is invoked to support this argument, as the principle of distinction, used to determine who is a legitimate target in NIAC, should be applied in the same way for State armed forces as it is for organized armed groups. A brief analysis of the concept of CCF will first be provided, as this concept is the main focus of this paper.

The “continuous combat function” concept

Treaty IHL refers to the terms “armed forces”, “civilians” and “armed groups” without providing a definition of these terms. Knowing the exact meaning of these terms is essential for understanding the concrete application of the principle

¹⁴ *Ibid.*, p. 13.

¹⁵ Geoffrey Corn and Chris Jenks, “Two Sides of the Combatant Coin: Untangling Direct Participation in Hostilities from Belligerent Status in Non-International Armed Conflicts”, *University of Pennsylvania Journal of International Law*, Vol. 33, No. 2, 2011, p. 338.

¹⁶ See ICRC Interpretive Guidance, above note 6, p. 25. Without explicitly stating that the CCF concept also applies in IAC, the ICRC specifies that “[m]embership in irregular armed forces, such as militias, volunteer corps, or resistance movements belonging to a party to the conflict, generally is not regulated by domestic law and can only be reliably determined on the basis of functional criteria, such as those applying to organized armed groups in non-international armed conflict”.

of distinction.¹⁷ As mentioned above, in order to clarify how this principle should be implemented, the ICRC published its Interpretive Guidance in 2009. The Guidance, which addresses the constituent elements of the notion of direct participation in hostilities (DPH), also makes reference to a category of individuals not covered by it, who may be attacked even if they are not taking a direct part in hostilities – that is, members of “organized armed groups”, a notion that lies at the heart of this paper. The principle of distinction may be relatively easy to understand in relation to IAC because the Geneva Conventions and AP I indicate who can be qualified as a member of State armed forces. In the case of NIAC, however, the interpretation of the principle of distinction is more ambiguous because treaty law provides no guidance as to who can be qualified as a member of an organized armed group.¹⁸ As the notion of membership in State armed forces cannot be extended to armed groups, the ICRC Interpretive Guidance clarifies this point, indicating that “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’)”.¹⁹ CCF is a concept that helps to determine the circumstances in which individual members of an armed group are deemed legitimate targets in NIAC even if they are not directly participating in hostilities at the moment of attack. The test is based on the individual’s membership in the group as well as the function performed by that individual within the group, and is not solely based on their individual conduct for a specific action, as is the case for the DPH test.²⁰

The ICRC Interpretive Guidance interprets the term “organized armed group” as referring exclusively to the armed or military wing of a non-State party.²¹ This means that the determination of membership of an armed group does not depend, as it does for members of State armed forces, on domestic legislation or the wearing of uniforms or distinctive signs, but is rather expressed through the performance of a certain function within the group.²² In order to strengthen the principle of distinction, membership in such groups must be based on a functional criterion and not on abstract affiliation or family ties. To reduce the risk of error, the Interpretive Guidance holds that “the decisive criterion for individual membership in an organized armed group is whether a person assumes a continuous function for the group involving his or her direct participation in hostilities”.²³ This distinction in the law of NIAC is critical as it allows us to differentiate between members of the fighting force of a non-State

17 *Ibid.*, p. 27.

18 For more information on the notion of organized armed groups, see International Criminal Tribunal for the former Yugoslavia (ICTY), *Haradinaj et al.*, Judgment (Trial Chamber I), 3 April 2008, para. 60; ICTY, *Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Judgment (Trial Chamber II), 10 July 2008, paras 195–205.

19 *Ibid.*, p. 27.

20 G. Corn and C. Jenks, above note 15, p. 332.

21 ICRC Interpretive Guidance, above note 6, p. 32.

22 *Ibid.*, pp. 32–33.

23 *Ibid.*, p. 33.

party, civilians who perform a non-combatant function in an armed group, and civilians who take a direct part in hostilities on a spontaneous and sporadic basis.²⁴ In its Interpretive Guidance, the ICRC states that CCF requires lasting integration into an armed group acting as the armed forces of a non-State party to an armed conflict.²⁵ This notion also encompasses individuals who are recruited, trained and equipped by such a group to continuously and directly participate in hostilities on its behalf.²⁶ The Interpretive Guidance considers that people who accompany or support an organized armed group but whose function does not involve direct participation in hostilities must be considered civilians and, as such, are entitled to protection from attacks unless they start to directly participate in hostilities.²⁷

Members of armed groups performing a CCF cease to be civilians and lose protection for as long as they continue to carry out that function.²⁸ The temporal scope of this loss of protection cannot be the same for members of armed groups carrying out a CCF as it is for civilians taking a direct part in hostilities – indeed, it would be absurd for members of armed groups to lose and regain protection as civilians each time they participate in a hostile act. Allowing members of armed groups to benefit from this “revolving door” of protection would give them a significant operational advantage over members of State armed forces who can be targeted on a continuous basis.²⁹ The notion of CCF therefore establishes a balance in the conduct of hostilities between State armed forces and members of armed groups.³⁰ The idea behind the CCF concept is that members of armed groups pose a continuing threat comparable to that posed by the State armed forces against which they are fighting. Given that members of armed groups participate in hostilities on a continuous basis, it must be permitted for them to be targeted in the same way as State armed forces are.³¹ The Interpretive Guidance specifies that they can regain protection as civilians when they stop performing a CCF.³² As explained by the Interpretive Guidance, “disengagement from an organized armed group need not be openly declared; it can also be expressed through conclusive behaviour, such as a physical distancing from the

24 *Ibid.*, pp. 71–72. The restriction of loss of protection to the duration of specific hostile acts was designed to respond to spontaneous, sporadic or unorganized hostile acts by civilians. This notion of DPH cannot therefore be applied to organized armed groups.

25 *Ibid.*, p. 34.

26 *Ibid.*, p. 34.

27 *Ibid.*, p. 34. For a civilian to be considered as directly participating in hostilities – and therefore lose his/her protection – three criteria need to be fulfilled: threshold of harm, direct causation and belligerent nexus. For more information, see *ibid.*, p. 46.

28 *Ibid.*, p. 72.

29 *Ibid.*, p. 72.

30 ICRC Expert Meeting, *Second Expert Meeting: Direct Participation in Hostilities under IHL*, Background Document, Geneva, 25–26 October 2004, p. 11.

31 ICRC Expert Meeting, *Third Expert Meeting on the Notion of Direct Participation in Hostilities*, Summary Report, Geneva, 23–25 October 2005, p. 64.

32 ICRC Interpretive Guidance, above note 6, p. 72.

group and reintegration into civilian life”.³³ If there is any doubt on the status, the person must be presumed to be entitled to civilian protection.³⁴

The “continuous combat function” concept in international armed conflicts

As already mentioned, the concept of CCF helps to clarify the principle of distinction and, more specifically, the concept of “civilian” in NIACs.³⁵ With a view to providing guidance on identifying individuals who are legitimate targets in NIAC under IHL, the ICRC Interpretive Guidance specifies that “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’)”.³⁶ According to this author, the CCF concept was developed *a priori* by the Interpretive Guidance for the explicit purpose of regulating the practical reality of NIAC.³⁷ However, the Guidance does not rule out the application of this concept in IAC and seems even to propose its application to PMSCs and “irregular members” of the armed forces.³⁸ The following sections will examine these two cases in which the Interpretive Guidance suggests the application of the CCF concept in IAC and will explore the possibility of extending the concept to other categories of actors, such as groups operating in an IAC without belonging to any of the parties to the conflict.

Private military and security companies

Recourse to PMSCs by the parties to a conflict is an increasingly common practice in contemporary armed conflicts. As the status of such companies is not specifically addressed in IHL, it has to be determined on a case-by-case basis. PMSCs are used to perform a variety of functions traditionally carried out by military personnel.³⁹ It is therefore necessary to distinguish between persons engaged by PMSCs to carry out non-combat functions, such as building infrastructure for the

33 *Ibid.*, p. 72. Also see ICRC, *Commentary on the Second Geneva Convention: Convention (II) for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 2nd ed., 2017 (ICRC Commentary on GC II), Art. 3, para. 543.

34 AP I, Art. 50(1).

35 ICRC Interpretive Guidance, above note 6, p. 16.

36 *Ibid.*, p. 16.

37 *Ibid.*, pp. 5–6: “In examining the notion of direct participation in hostilities the ICRC not only had to face longstanding dilemmas that had surrounded its practical application (e.g., can a person be a protected farmer by day and a targetable fighter at night?), but also had to grapple with more recent trends that further underlined the need for clarity. One such trend has been a marked shift in the conduct of hostilities into civilian population centers, including cases of urban warfare, characterized by an unprecedented intermingling of civilians and armed actors.”

38 *Ibid.*, p. 25, 39.

39 *Ibid.*, p. 37. For more information on PMSCs and their involvement in armed conflicts, see *Proceedings of the Bruges Colloquium: Private Military/Security Companies Operating in Situations of Armed Conflict*, 7th Bruges Colloquium, 19–20 October 2006; Alexandre Faite, “Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law”, *Defence Studies*, Vol. 4, No. 2, 2004.

armed forces, and those performing military activities, such as protecting military objectives.⁴⁰ Non-combat functions would not normally entail loss of civilian status, although the personnel performing them could be exposed to greater risks of incidental death or injury because of the type of activity they carry out or their location.⁴¹ On the other hand, PMSC personnel performing military activities must be categorized differently in view of the nature of the activities they undertake.

The question of the status of PMSC employees would be rapidly resolved if they were all formally incorporated into the armed forces of a party to the conflict or belonged to one of them.⁴² In that case, they would have combatant status under Article 4A(1) or (2) of GC III or Article 43 of AP I. However, incorporating such personnel into the armed forces would defeat the object of using PMSCs, an assumption confirmed by State practice.⁴³ The majority of PMSC employees would be considered civilians under IHL and would only lose their civilian immunity from attack when their conduct qualified as direct participation in hostilities, and only for the duration of their participation.⁴⁴ It is also argued by some that PMSC employees could be qualified as mercenaries within the meaning of Article 47 of AP I.⁴⁵ However, this question will not be addressed in this paper.⁴⁶ In its Interpretive Guidance, the ICRC does not explicitly clarify the status of PMSCs, but simply states that persons engaged by such companies are civilians unless they have been “incorporated into the armed forces of a party to the conflict, whether through a formal procedure under national law or *de facto* by *being given a continuous combat function*”.⁴⁷ Kenneth Watkin highlights the ambiguity of the language used by the Interpretive Guidance, pointing out that this wording does not specify whether these persons would, in such cases, qualify as members of the armed forces or as members of an organized armed group.⁴⁸

40 ICRC Expert Meeting, *First Expert Meeting: Direct Participation in Hostilities under IHL*, Background Paper, 2 June 2003, p. 18.

41 ICRC Interpretive Guidance, above note 6, p. 37.

42 In addition to belonging to a party to the conflict, they must also meet the four requirements listed in Article 4A(2) of GC III. See Lindsey Cameron, “Private Military Companies: Their Status under International Humanitarian Law and Its Impact on Their Regulation”, *International Review of the Red Cross*, Vol. 88, No. 863, 2006, p. 585. It is noted in this article that, in the majority of cases, such persons do not wear distinctive signs or uniforms. It is therefore very rare for PMSC employees to qualify as combatants. Also see P. R. Kalidhass, “Determining the Status of Private Military Companies under International Law: A Quest to Solve Accountability Issues in Armed Conflicts”, *Amsterdam Law Forum*, Vol. 6, No. 2, 2014.

43 ICRC Interpretive Guidance, above note 6, p. 38. See also L. Cameron, above note 42, p. 582.

44 ICRC Interpretive Guidance, above note 6, p. 38. See also L. Cameron, above note 42, p. 582.

45 L. Cameron, above note 42, p. 577. Such persons may therefore be prosecuted for the mere fact of their participation in hostilities.

46 For more information on this issue, see Françoise Hampson, “Mercenaries: Diagnosis before Prescription”, *Netherlands Yearbook of International Law*, Vol. 3, 1991, pp. 14–16; George Aldrich, “Guerrilla Combatants and Prisoner-of-War Status”, *American University International Law Review*, Vol. 31, 1982, p. 881. It should also be noted that Article 47 of AP I provides that mercenaries cannot be considered combatants. It might therefore be relevant to consider the possibility of applying the CCF test in the context of IAC. This question will not, however, be further addressed here.

47 ICRC Interpretive Guidance, above note 6, p. 39 (emphasis added).

48 Kenneth Watkin, “Opportunity Lost: Organized Armed Groups and the ICRC ‘Direct Participation in Hostilities’ Interpretive Guidance”, *New York University Journal of International Law and Politics*, Vol. 42, 2010, p. 657.

Stating that membership in the armed forces of a party to the conflict can be determined, in the case of PMSC employees, by the assignment of a continuous combat function, the Interpretive Guidance does not rule out application of the CCF concept in IAC.⁴⁹

Irregular members of the armed forces

As established above, for the purposes of the principle of distinction in IAC, persons falling into one of the categories included in Article 4A(1) or (2) of GC III or Article 43 of AP I qualify as combatants and are therefore legitimate targets. Article 4A(2) provides that “[m]embers of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict”⁵⁰ shall be deemed to belong to the State armed forces if the group fulfils the following four cumulative conditions: (1) being commanded by a person responsible for his subordinates; (2) having a fixed distinctive sign recognizable at a distance; (3) carrying arms openly; and (4) conducting their operations in accordance with the laws and customs of war. Members of militias and volunteer corps other than the regular armed forces, including those of organized resistance movements, that meet these conditions are considered the “irregular” armed forces of a party to an IAC.⁵¹ It should be noted that these conditions do not apply to the “regular” armed forces, as they are recognized as such in domestic law.⁵²

The requirements listed in Article 4A(2) are, *a priori*, conditions that must be met by “irregular armed forces” if they are to be entitled to combatant privilege and prisoner-of-war status when captured. However, failure to qualify as a combatant and prisoner of war does not mean that they do not belong to the armed forces or that they are regarded as civilians for the purposes of the conduct of hostilities.⁵³ According to the ICRC Interpretive Guidance, such a conclusion would contradict the logic of the principle of distinction by placing irregular armed forces under the more protective legal regime afforded to civilians.⁵⁴ The ICRC therefore takes the view that “all armed actors showing a *sufficient degree of military organization and belonging to a party* to the conflict must be regarded as part of the armed forces of that party”.⁵⁵

In the case of regular armed forces, the determination of individual membership is generally regulated by the State’s domestic law⁵⁶ and usually

49 ICRC Interpretive Guidance, above note 6, p. 39.

50 GC III, Art. 4A(2).

51 See *ibid.*, Art. 4(2); ICRC Interpretive Guidance, above note 6, p. 22.

52 ICRC Interpretive Guidance, above note 6, p. 22.

53 *Ibid.*, p. 22.

54 *Ibid.*, p. 22.

55 *Ibid.*, p. 23 (emphasis added). According to the Interpretive Guidance, “[t]he concept of ‘belonging to’ requires at least a *de facto* relationship between an organized armed group and a party to the conflict. This relationship may be officially declared, but may also be expressed through tacit agreement or conclusive behaviour that makes clear for which party the group is fighting”.

56 *Ibid.*, p. 25.

expressed through “formal integration into permanent units distinguishable by uniforms, insignia, and equipment”.⁵⁷ The same logic does not, however, apply to irregular armed forces because this category is not regulated by domestic law. The ICRC therefore proposes that membership in irregular armed forces be “reliably determined on the basis of *functional criteria, such as those applying to organized armed groups in non-international armed conflict*”.⁵⁸ In its Interpretive Guidance, the ICRC suggests using the concept of CCF – that is, the continuous function performed by an individual for the group involving his/her direct participation in hostilities – to determine individual membership in an organized armed group in IAC.⁵⁹ Here again, it seems that the Interpretive Guidance envisages the extension of the CCF concept to certain actors operating in an IAC.

Irregular members not belonging to a party to an IAC

While the ICRC Interpretive Guidance envisages the use of functional criteria – CCF – to determine individual membership in the case of irregular members, what would be the status of a group engaging in hostile acts against a party to the IAC without belonging to another party to the same conflict? The Interpretive Guidance is of the view that, in such cases, these persons cannot be regarded as members of the armed forces of a party to the conflict.⁶⁰ For the purposes of the conduct of hostilities, they must, then, be considered civilians.⁶¹ According to the Interpretive Guidance, any other view “would discard the dichotomy in all armed conflicts between the armed forces of the parties to the conflict and the civilian population”.⁶² However, if the group meets the two criteria required for a situation to be qualified as a NIAC (intensity and organization),⁶³ it will be regarded as a party to a separate NIAC occurring in parallel to the IAC, in which case the status of the members of the group will be determined in accordance with the law of NIAC.⁶⁴ Referring to situations in which the level of organization

57 *Ibid.*, p. 25.

58 *Ibid.*, p. 25 (emphasis added).

59 *Ibid.*, p. 33.

60 *Ibid.*, pp. 23–24.

61 *Ibid.*, pp. 23–24.

62 *Ibid.*, pp. 23–24.

63 The test for an armed conflict was set out by the ICTY Appeals Chamber in the *Tadić* decision as follows: “An 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.” See ICTY, *Prosecutor v. Dusko Tadić aka DULE*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para. 70. The Trial Chamber in *Tadić* interpreted this test in the case of internal armed conflict as consisting of two criteria, namely (i) the intensity of the conflict and (ii) the organization of the parties to the conflict, as a way to distinguish an armed conflict “from banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”. See ICTY, *Prosecutor v. Dusko Tadić aka DULE*, Opinion and Judgment, 7 May 1997, para. 562. Following this, the ICTY developed factors that could be taken into account in order to assess the intensity and organization criteria. See ICTY, *Prosecutor v. Ljube Boškovski and Johan Tarčulovski*, Judgment (Trial Chamber II), 10 July 2008, paras 195–205.

64 For more information on the two criteria required for violence to qualify as a NIAC, see ICRC Commentary on GC II, above note 33, Art. 3, paras 415–459.

and intensity required to determine the existence of a NIAC is not reached, the Interpretive Guidance states that “organized armed violence failing to qualify as an international or non-international armed conflict *remains an issue of law enforcement*” however the perpetrators are regarded.⁶⁵ This type of scenario is not completely theoretical, as noted by Michael Schmitt:

The prospect of groups appearing in the battlespace that do not belong to any of the parties to an international armed conflict is far from hypothetical. For instance, during the international armed conflict phases in Afghanistan and Iraq, coalition troops regularly faced forces that were not allied with the Taliban or the Baathist regimes. In particular, certain Shia militia groups in Iraq opposed both the coalition forces and those of the Iraqi government in the hope of eventually seizing power themselves.⁶⁶

The author holds the view that, *a priori*, groups operating in an IAC context without belonging to any of the parties to the conflict and without a separate NIAC existing should be governed by the law enforcement paradigm. What happens, though, when the parties to an IAC are unable to exercise their law enforcement powers over the members of such a group? Do they become immune from attack? The following scenario can be used to illustrate this situation: State A is engaged in an IAC against State B in the territory of State B. In the context of this conflict, group C, which is in the territory of State B, does not belong to either of the parties to the IAC (as it is seeking to seize power itself and is therefore opposed to both State A and State B) and is preparing to conduct attacks on the territory of State A. Although the group is organized, its operations do not reach the threshold of intensity required to determine the existence of a separate NIAC. According to the ICRC, the acts of this organized armed group are “an issue of law enforcement”.⁶⁷ State A must respond to the threat posed by group C in accordance with law enforcement standards, but how can it do so outside its territory when it does not have a law enforcement presence in the territory of State B? Furthermore, State A cannot ask State B to use its law enforcement powers and arrest the members of this group, as it is engaged in an armed conflict against State B.⁶⁸ This shows that the application of law enforcement “to the conduct of hostilities ... can be both illogical and operationally debilitating” in some cases.⁶⁹

The author is therefore of the view that, in such a scenario, IHL should apply. As State A is unable to perform its law enforcement functions in the territory of State B and therefore has no control over the organized armed group,

65 ICRC Interpretive Guidance, above note 6, p. 24 (emphasis added).

66 Michael N. Schmitt, “The Status of Opposition Fighters in a Non-International Armed Conflict”, *Naval War College International Law Studies*, Vol. 88, 2012, p. 134.

67 ICRC Interpretive Guidance, above note 6, p. 24.

68 See Geoffrey Corn, “Mixing Apples and Hand Grenades: The Logical Limit of Applying Human Rights Norms to Armed Conflict”, *International Humanitarian Legal Studies*, Vol. 52, No. 94, 2010, p. 83; Samit D’Cunha, “The Notion of External NIACs: Reconsidering the Intensity Threshold in Light of Contemporary Armed Conflicts”, *Yearbook of International Humanitarian Law*, Vol. 20, 2017, pp. 93–94.

69 S. D’Cunha, above note 68, pp. 93–94.

the logical conclusion cannot be to prohibit State A from taking action against group C. The author submits that in this exceptional case in which the State cannot exercise its law enforcement powers to respond to the threat posed by the group, IHL should apply between State A and group C.⁷⁰ If, on the other hand, we follow the Interpretive Guidance's reasoning that the persons involved should be regarded as civilians, the principle of distinction would be diluted, thereby weakening the protection afforded to civilians. The aim of the Interpretive Guidance in developing the CCF concept was to clarify the principle of distinction by shedding light on the distinction that must be made between the members of State armed forces and organized armed groups on the one hand, and civilians on the other.⁷¹ Allowing such persons to be qualified as civilians would blur this distinction. It would also be contrary to the principle of equality of belligerents⁷² because they would benefit from a certain immunity from attack as a result of the State's inability to respond to the threat either through IHL or through law enforcement. In the example above, it would be absurd to conclude that group C could launch an attack against State A – who is involved in an IAC with State B – without State A being able to target those individuals that are part of group C. According to this author, the members of the group assigned a continuous function involving their direct participation in hostilities should be regarded as legitimate targets under IHL applicable to IAC in order to comply with the principle of distinction and the principle of equality of belligerents.⁷³ The idea of applying the CCF test to groups that do not belong to any of the parties to an IAC is not new, as experts raised the question during the preparation of the Interpretive Guidance:

However, to the extent that the other variation of the “membership approach”, which interprets mere “membership” in an organized armed group as a continuous form of “direct participation in hostilities”, was found to be theoretically defensible and practically viable in non-international armed conflict, it should be considered whether the same concept could also apply to organized armed groups failing to qualify for membership in the “armed

70 The problem of determining the intensity threshold in an armed conflict is addressed by Samit D'Cunha using an argument similar to the one presented here in relation to the loss of control by a State over an organized armed group. He uses this argument to show that, in certain cases, when there is a loss of control, the intensity threshold for determining the existence of a NIAC should be reconsidered (or even abolished). See *ibid.*, pp. 102–103. The present article puts forward a similar reasoning, arguing that a State's inability to control an organized armed group and exercise its law enforcement powers to respond to the threat it poses does not mean that the group is immune to action against it; in this case, IHL should apply.

71 ICRC Interpretive Guidance, above note 6, pp. 5–6.

72 Such persons could not be regarded as civilians taking a direct part in hostilities because it would be contrary to the intended purpose of the DPH concept, which was developed by the ICRC to cover spontaneous, sporadic and unorganized hostile acts and could not be applied to organized armed groups. The principle of equality of belligerents will be discussed in greater detail later in this article.

73 For more information on the principle of equality of belligerents, see Jonathan Somer, “Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict”, *International Review of the Red Cross*, Vol. 89, No. 867, 2007; Adam Roberts, “The Equal Application of the Laws of war: A Principle Under Pressure”, *International Review of the Red Cross*, Vol. 90, No. 872, 2008.

forces” in situations of international armed conflict. This would entail that both in international and non-international armed conflict “membership” in an organized armed group would be interpreted as a continuous form of civilian “direct participation in hostilities”, thus resulting in a loss of civilian protection against direct attack for the duration of such membership.⁷⁴

In a judgment delivered in 2006, the Israeli High Court of Justice implicitly supported this theory when it stated that, under the law of IAC, the members of an independent Palestinian armed group who had “made the group their home” and as part of their role in that group had committed “a chain of hostilities, with short periods of rest between them”, lost their immunity from attack for the time they were committing that series of hostile acts, including the breaks between them.⁷⁵ In its reasoning, it seems that the Court echoed in part the idea behind the CCF concept, stating that, under the law applicable in IAC, the members of this armed group lost their immunity for the duration of their involvement in it.⁷⁶

The view presented above is more adapted to the particularities of contemporary armed conflicts, as sometimes groups involved in an IAC do not belong to any of the parties to the conflict, the intensity threshold⁷⁷ required to determine the existence of a parallel NIAC is not met, and States are unable to exercise their law enforcement powers. For this reason, the author maintains that, in some specific cases, the CCF concept should be applicable to this type of actor. The next section will analyze the question of extending it to members of State armed forces involved in a NIAC.

The “continuous combat function” concept applied to State armed forces in a non-international armed conflict

As shown above, for the purposes of the conduct of hostilities in NIAC, a distinction must be made between the members of State armed forces, the members of organized armed groups performing a CCF, civilians who take a direct part in hostilities, and civilians who are entitled to protection. These distinctions are necessary to determine who is a legitimate target under IHL. It has been established above that members of armed groups who perform a continuous function involving their direct participation in hostilities are legitimate targets until they cease to undertake that function for the group. In the case of members of State armed forces, it is relevant to consider whether, for the purposes of the conduct of hostilities, the members of these forces who qualify as legitimate targets in NIAC should be identified in accordance with the same definition used

74 ICRC Expert Meeting, *Working Sessions IV and V – “Direct Participation in Hostilities” and Membership in Organized Armed Groups*, Background Document, Geneva, 23–25 October 2005, pp. 18–19.

75 Israeli High Court of Justice, *The Public Committee against Torture v. The Government of Israel*, HCJ 769/02, Judgment, 13 December 2006, para. 39.

76 *Ibid.*, para. 39.

77 See above note 63.

for IAC in GC III and AP I. The next section will look at common Article 3 and Additional Protocol II (AP II) to determine the meaning of the term “armed forces”, with a view to ascertaining whether the definition of this term should be the same in IAC and NIAC.

The term “armed forces” within the meaning of common Article 3 and Additional Protocol II

Common Article 3 and AP II both use the term “armed forces”. Common Article 3, which applies to “each Party to the conflict”, refers to “members of armed forces who have laid down their arms”. While the ICRC maintains that this article does not govern the conduct of hostilities,⁷⁸ a point still subject to controversy in the literature⁷⁹, its wording implies that the term can be interpreted as meaning that, in a NIAC, the different State and non-State parties to the conflict all have “armed forces”.⁸⁰ The Commentary on common Article 3 confirms this interpretation, indicating that the term refers to both the armed forces of a State and the armed forces of a non-State party.⁸¹ Furthermore, this article uses the expression “members of armed forces” as opposed to “members of *the* armed forces”, which suggests that the term is not limited to State armed forces.⁸² This interpretation of the term “armed forces”, as it appears in common Article 3, is completely different from the wording used in AP II, where the concept is referred to in other terms.

Article 1 of AP II is much more precise in the distinction it makes between the “armed forces” of a High Contracting Party and “dissident armed forces or other organized armed groups”. This distinction, which is absent from common Article 3, shows that AP II uses the term “armed forces” in a much more restrictive way; in this article, it refers only to State armed forces.⁸³ The ICRC Interpretive Guidance therefore maintains that the interpretation chosen for this term in AP II indicates

78 *Commentary on the Geneva Conventions of 12 August 1949*, Vol. 1: *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, ICRC, Geneva, 2016, para. 389.

79 For views supporting that common Article 3 contains some regulation of the conduct of hostilities see: James E Bond, “Application of the Law of War to Internal Conflict”, *Georgia Journal of International and Comparative Law*, Vol. 3, No. 2, 1973, p. 348; William H. Boothby, *The Law of Targeting*, Oxford University Press, 2012, p. 433 and Rogers, A.P.V., *Law on the Battlefield*, 3rd edition, Manchester University Press, 2012, p. 301.

80 ICRC Interpretive Guidance, above note 6, p. 28. Also see ICRC Commentary on GC II, above note 33, Article 3, paras 525–526.

81 ICRC, *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 2nd ed., Geneva, 2016 (ICRC Commentary on GC I), para. 530.

82 *Ibid.*

83 Jann K. Kleffner, “The Beneficiaries of the Rights Stemming from Common Article 3”, in Andrew Clapham, Paola Gaeta and Marco Sassòli (eds), *The 1949 Geneva Conventions: A Commentary*, Oxford University Press, Oxford, 2015, p. 440. See also Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Geneva, 1987, para. 4462, which, on the subject of Article 1 of AP II, states that the term “armed forces” should be interpreted as covering “all the armed forces, including those not included in the definition of the army in the national legislation of some countries”.

that “comparable to the concept of armed forces in Additional Protocol I, State armed forces under Additional Protocol II include both the regular armed forces and other armed groups or units organized under a command responsible to the State”.⁸⁴ This definition echoes the one given for “combatant” in Article 4A(1) and (2)⁸⁵ of GC III and Article 43 of AP I.⁸⁶

It is observed that the Commentaries and preparatory work for these articles give no reason to assume that the term “armed forces” should be interpreted differently in international and non-international armed conflicts.⁸⁷ Nevertheless, the emphasis should be on the interpretation found in common Article 3, as shown above, which supports the theory presented in this section that the term “armed forces” should be interpreted according to the nature of the armed conflict. By including both State and non-State forces in the expression “armed forces”, common Article 3 shows that the interpretation of the term is different here than in IAC, thus supporting the theory put forward in this paper, which submits that the term “State armed forces” should be interpreted differently in NIAC. It will be shown below that this interpretation found in common Article 3 also bolsters the theory presented in this section, as it is in keeping with the principle of equality of belligerents.

In order to define the term “State armed forces” in NIAC, the ICRC Interpretive Guidance makes a distinction between members of regular and irregular armed forces. It indicates that membership in the regular armed forces of a State must be determined in accordance with the country’s domestic law.⁸⁸ With regard to the irregular armed forces of a State, it is specified that, as their membership in the armed forces is not regulated by domestic law, it can only be reliably determined “on the basis of the same functional criteria that apply to organized armed groups of non-State parties to the conflict”.⁸⁹

The analysis above suggests that in the case of regular armed forces, the criteria for determining who is a legitimate target in NIAC were simply transposed from IAC and applied to NIACs, which present very different realities on the ground.⁹⁰ The main danger with this approach, when it comes to the conduct of hostilities, is that it creates a bias against State armed forces in terms of who can be targeted. As soon as a person joins the regular armed forces of a State, they qualify as a combatant within the meaning of Article 4A(1) of GC III or Article 43 of AP I and are therefore considered legitimate targets under IHL. Hence, all members of the regular armed forces, from soldiers to cooks, are deemed to be military targets in NIACs. This is not the case for members of an organized armed group, as the ICRC Interpretive Guidance indicates that only

84 ICRC Interpretive Guidance, above note 6, pp. 30–31.

85 This article defines who qualifies as a prisoner of war and therefore, indirectly, as a combatant for the purposes of the conduct of hostilities.

86 The ICRC Customary Law Study, above note 2, states that, for the purposes of the principle of distinction in NIAC, the definition of “armed forces” also applies in NIACs (see commentary to Rule 4).

87 ICRC Expert Meeting, above note 10, p. 13.

88 ICRC Interpretive Guidance, above note 6, p. 31.

89 *Ibid.*, p. 31.

90 That is, referring to Article 4A (1) of GC III or Article 43 of AP I.

the military or armed wing of such groups constitutes a legitimate target in NIAC as long as they assume a continuous combat function to directly participate in hostilities.⁹¹ This creates an imbalance between State armed forces and members of an armed group in that those performing a support function in an armed group are considered civilians and are therefore entitled to protection, while members of State armed forces carrying out a similar function would be legitimate targets.⁹²

With regard to the irregular armed forces of a State, the ICRC Interpretive Guidance proposes establishing individual membership on the basis of functional criteria – that is, using the same test employed to determine individual membership in an organized armed group.⁹³ Such a proposal supports the central idea of this section, which is to use the CCF concept to determine who in the armed forces of a State (regular and irregular forces) constitutes a legitimate target in NIAC. This paper submits that in order to prevent the imbalance that would be caused by extending the concept of “armed forces” to NIAC, it should be interpreted differently in this type of conflict – that is, the CCF test should be also used to establish the individuals in regular State armed forces who are legitimate targets. The next section will set out the reasons justifying the use of the CCF concept for members of State armed forces in a NIAC.

Application of the “continuous combat function” concept to determine individual membership in State armed forces

Some authors, such as Kenneth Watkin, have criticized the ICRC Interpretive Guidance, arguing that the notion of CCF should have been more broadly defined to include members of organized armed groups who perform support functions.⁹⁴ In his critique, Watkin proposes righting the imbalance by using a broader definition of the CCF concept to correct the bias against State armed forces, whose members are all legitimate military targets. However, surely a more humanitarian argument would be to interpret the concept of “armed forces” differently in NIAC, rather than interpreting the concept of CCF more broadly? This would eliminate the imbalance between members of State armed forces and members of organized armed groups, as the same test – the CCF test – would be used to determine individual membership in the armed forces of the parties to the conflict in order to determine who is a legitimate target under IHL. Some members of State armed forces, such as cooks, carry out tasks that do not constitute a continuous function involving their direct participation in hostilities,

91 K. Watkin, above note 48, p. 694. They are only considered military targets when they perform a continuous function involving direct participation in hostilities.

92 Nils Melzer, “Keeping the Balance between Military Necessity and Humanity: A Response to Four Critiques of the ICRC’s Interpretive Guidance on the Notion of Direct Participation in Hostilities”, *International Law and Politics*, Vol. 42, No. 831, 2010, p. 851.

93 ICRC Interpretive Guidance, above note 6, p. 25.

94 K. Watkin, above note 48, pp. 675, 691. Also see Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard National Security Journal*, Vol. 1, 2010, pp. 23–24.

and these individuals should therefore not be considered legitimate targets under IHL – unless they start to directly participate in hostilities. Only individuals whose continuous function it is to take a direct part in hostilities as members of the State armed forces or an organized armed group should be legitimate targets in NIAC. The extension of the CCF concept to State armed forces would restrict the interpretation of the term “State armed forces” to those members who participate in hostilities on a continuous basis.⁹⁵

The application of the CCF concept to State armed forces is justified because these forces operate in a completely different type of armed conflict which involves non-State actors. In an IAC, the parties to the conflict are States, and individual membership in State armed forces is defined, for all the parties, by the domestic legislation of each State. This cannot be extended to NIACs because in such conflicts at least one of the parties to the conflict is a non-State actor, and individual membership in an organized armed group is not regulated by domestic law. Such asymmetry between the parties to a NIAC demonstrates why the criteria established in GC III or AP I should not be used to identify the individuals in the armed forces of a State who are legitimate targets in a NIAC. The fundamentally different nature of the parties involved in a NIAC is therefore an argument that supports the use of a similar test to determine who in State and non-State armed forces are legitimate targets according to the principle of distinction.

The equality of belligerents, which is a fundamental principle of IHL, also highlights the importance of interpreting the notion of “armed forces” differently in IAC and NIAC. This principle establishes that all the parties to an armed conflict have the same rights and obligations.⁹⁶ The idea behind the principle is that a party with binding obligations is less likely to fulfil them if the other party to the same conflict is not bound by similar rules. It is important to understand that this principle of equality of belligerents does not mean that the opposing parties must have equal standing, as its name might seem to suggest, but rather that they have equal obligations.⁹⁷ Jonathan Somer observes that the principle of equality of belligerents does not extend to status but establishes that the parties must have equal rights and obligations as far as compliance with IHL is concerned.⁹⁸ The parties to a NIAC are required to comply with the principle of distinction, and the way in which it is implemented – that is, the means used to determine which

95 It should be noted – although it is not addressed in detail in this paper – that in accordance with the theory presented in this section, members of police forces operating in a NIAC could be considered to be performing a CCF if their actions have a nexus with the conflict in question. It is proposed that when such individuals, who are not generally included in the armed forces of a State, are required to perform a continuous function that involves direct participation in hostilities, they should not be regarded as civilians taking a direct part in hostilities. This proposal would have the advantage of making the law of NIAC more realistic for organized armed groups, as it would allow them to target such persons on a continuous basis and not only when they are taking a direct part in hostilities.

96 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 243.

97 *Ibid.*, p. 245.

98 J. Somer, above note 73, p. 663.

individuals are legitimate targets in a NIAC – should be defined in a similar way for State armed forces and organized armed groups in keeping with the principle of equality of belligerents. As mentioned above, the interpretation of the term “armed forces” found in common Article 3 adds weight to this argument based on the principle of equality of belligerents, as no distinction is made in this article between the “armed forces” of the parties to a NIAC, which should have the same rights and obligations under IHL.⁹⁹ It can therefore be said that the principle of equality of belligerents underlies common Article 3, as the term “armed forces” encompasses both State and non-State armed forces, further strengthening the theory that it should be interpreted differently for State armed forces in NIAC.

According to the *lex lata*, a more significant proportion of members of State armed forces can be targeted in the conduct of hostilities because their membership in these forces is determined differently than for organized armed groups in a NIAC. Therefore, if the principle of equality of belligerents is to be respected, membership in the forces of the parties to a NIAC should be determined using a similar test, so that the principle of distinction is implemented in the same way for State armed forces and organized armed groups. Any failure to respect the principle of equality of belligerents could adversely affect the willingness of the parties to the conflict to comply with IHL because their obligations are different. The arguments presented above demonstrate the importance of extending the CCF concept to State armed forces in NIAC, especially in order to ensure equal obligations for all the parties to the conflict, which could be an incentive for those parties to better comply with IHL.

Conclusion

The aim of this paper was to propose the extension of the CCF concept, developed by the ICRC Interpretive Guidance, to specific types of actors in IAC and NIAC. It was first established that the Interpretive Guidance has already envisaged the extension of this concept to two categories of actors specifically: certain individuals engaged by PMSCs and irregular members of the armed forces. This paper argues that the CCF concept should also be extended in certain cases to organized armed groups that do not belong to any of the parties to an IAC. The aim of this proposal is to take into account the realities of contemporary armed conflicts in which such situations can arise. The CCF approach would ensure that the principle of distinction and the principle of equality of belligerents are respected, with the actors involved in an IAC having the same rights and obligations.

The second proposal put forward in this paper was to interpret the term “State armed forces” differently in the context of NIAC. This approach is proposed as a means of ensuring the equality of the parties to a NIAC in order to resolve the imbalance created in terms of the members of the State armed forces

99 ICRC Commentary on GC I, above note 81, para. 530.

and the members of an organized armed group who are legitimate targets under IHL. Based on the wording of common Article 3 and the principle of equality of belligerents, this paper suggests that individual membership in State armed forces should be established in the same way as for organized armed groups – that is, using the CCF test. This approach would allow the principle of distinction to be implemented in a more realistic way for all the parties to a NIAC.