

Who is a civilian in Afghanistan?

Ioanna Voudouri*

Ioanna Voudouri is Head of the Legal Department at the International Committee of the Red Cross in Afghanistan. She holds an LLM from the Geneva Academy and a law degree from the University of Athens.

Abstract

Despite the existence of a definition of civilian status in international humanitarian law (IHL), differences in the application of this definition – both in theory and in practice – continue to be observed. One of the contexts where these differences remain palpable (and do so for various fighting parties) is Afghanistan, a country where civilian harm has remained high for several years. This article explores the legal concepts of civilian and civilian population, including how they have been formed and interpreted and, ultimately, what protection they afford to persons who belong in these categories. The second part of the article brings these questions into the Afghan context, one that is complex and where cultural and religious implications should not be overlooked. Public statements, reports and codes of fighting parties in the country which touch upon civilian status are presented, followed by the civilian experience in Afghanistan, particularly focusing on the reported harm. Ultimately, it is proposed that despite the factual and contextual confusion, the existing legal rules and interpretations, when applied in good faith, suffice to ensure both that those who are civilians under IHL are protected and

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that the threats which some civilians' behaviour might pose can be effectively addressed without a status change.

Keywords: international humanitarian law, Afghanistan, definition of civilian, principle of distinction, Interpretative Guidance on Direct Participation In Hostilities, protection of civilians, religion, culture, military necessity, good-faith interpretation.

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Introduction

It might be easiest to begin and conclude this article by stating that a civilian is anyone who is not a combatant – i.e., anyone who is not a member of the State armed forces or organized armed groups that are party to the conflict. This is probably the most succinct, precise and direct answer to the question of who is a civilian in Afghanistan for the purposes of protection under international humanitarian law (IHL), particularly the principle of distinction, which dictates that civilians and civilian objects may not become the object of an attack. This, however, does not address why the question needs to be asked to begin with. In a conflict as protracted and complex as the one in Afghanistan, the protection afforded to civilians has been a key tenet of all discourse – military, political and humanitarian. However, the number of civilian casualties, reported by various sources, has consistently remained high. While that factor alone represents a worrying trend, its persistence may lead to an additional question: are the fighting parties engaging in combat with a clear idea of who is a civilian or of when civilians lose their immunity from attack?¹ And, is there a way that is consistent with IHL to reconcile any possible misunderstandings? These are the questions that this article will attempt to explore,² even though at times it may not be possible to offer straightforward answers.

The structure of the article will be as follows. First a presentation and analysis of the concepts of civilian and civilian population will be made, followed by how they have been developed and interpreted. One of the key questions this article will ask is whether the definition of civilian under IHL relies on conduct. The definition will also be analyzed in terms of the protection it affords. The second part of the article will bring this question into the Afghan context and summarize some parameters about the country that influence the answer. In

1 The same issue has been raised by the United Nations Assistance Mission in Afghanistan (UNAMA) in its 2020 Annual Report, but also in annual and thematic reports from previous years. See UNAMA, *Afghanistan: Protection of Civilians in Armed Conflict: Annual Report 2020*, February 2021, p. 124, available at: https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_report_2020_revs3.pdf (all internet references were accessed in November 2021).

2 This article will examine the notion of civilian within the framework of the armed conflict(s) that have existed in Afghanistan, and with the assumption that IHL is applicable, in particular with regard to, as parties to armed conflict, the Afghan government, the NATO forces (which include the United States) and the Islamic Emirate of Afghanistan (IEA), which is often referred to as the Taliban. For the entirety of this article, the acronym IEA will be used, unless the term “Taliban” is quoted directly from another source.

further developing the answer, the article will move on to the perception of civilian status as encapsulated in public statements of the fighting parties, followed by the civilian experience in Afghanistan, particularly focusing on the reported harm. The article will conclude with the proposition that the existing legal rules and interpretations, when applied in good faith, suffice to ensure both that those who are civilians under IHL are protected and that the threats which some civilians' behaviour might pose can be effectively addressed without status change. Finally, it is important to add that this article was written before the 15 August 2021 regime change in Afghanistan, though in the author's view, this does not affect the content of the analysis provided herein.

The concept of civilian under IHL

The definition of civilian

“Civilian” is a term that is defined negatively—by contrast. During wartime, a civilian is anyone who is neither a member of the armed forces of a party to the conflict, nor a participant in a *levée en masse*.³ The International Criminal Tribunal for the former Yugoslavia (ICTY) Trial Chamber, in the *Galić* judgment of 2003, reaffirmed this definition by deciding that “for the purpose of the protection of victims of armed conflict, the term ‘civilian’ is defined negatively as anyone who is not a member of the armed forces or of an organized military group belonging to a party to the conflict”.⁴

A crucial element in the definition of civilian is the development of this meaning within international armed conflict (IAC) and non-international armed conflict (NIAC), considering the space that each of these frameworks has created for development of the law. There, one is confronted with two important affirmations: first, that NIACs form the overwhelming majority of armed conflicts nowadays, and second, that NIACs face the challenge of doubts about the sufficiency of the existing legal framework regulating them.⁵

In IAC, States have agreed on rules (including individuals' status definitions) from within the relative security of their mutually sovereign power. As a result, they have expressly granted each other's fighters immunity from prosecution for participation in hostilities and prisoner of war status-related rights. This has made a global agreement on “combatancy” versus “civilianness”⁶

3 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. 50; 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 5, available at: <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1>.

4 International Criminal Tribunal for the former Yugoslavia (ICTY), *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgment (Trial Chamber), 5 December 2003, para. 47.

5 Jelena Pejic, “The Protective Scope of Common Article 3: More than Meets the Eye”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, pp. 189–190.

6 These “unconventional” terms conveniently fill a linguistic gap and will be used throughout this article. The author thanks Rebecca Sutton for their use in academic scholarship. See Rebecca Sutton, *The*

easier, but only when State armed forces confront each other. According to Additional Protocol I to the Geneva Conventions (AP I), the armed forces of a party to the conflict comprise all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates.⁷

The above provides us with a wide definition, whereby the only criterion that needs to be established is whether an individual is a combatant. If not, they are a civilian. For NIACs, things are not as straightforward. There is no binding definition of the construct of “civilians” (individually) or “the civilian population” (collectively) in NIACs.⁸ Since the definition of civilian is made *a contrario* to that of a combatant, the difficulty lies in agreeing upon who is a combatant in NIACs.

Additional Protocol II (AP II) foresees the protection of civilians (including the cessation of such protection when civilians take direct part in hostilities).⁹ The *travaux préparatoires* of AP II reveal that the omission of a definition of civilian was a deliberate choice rather than an accident. States’ concern not to create an equivalence between non-State armed groups and State armed forces¹⁰—and thus “legitimize” the former—is perhaps the main reason behind this choice. The contemplated definition, which appeared in the States’ deliberations, foresaw a civilian as being “anyone who is not a member of the armed forces or of an organized armed group”.¹¹

In case of doubt about a person’s status, they shall be presumed to be a civilian.¹² This rule further underlines the protective scope of the definition but also that the burden of proof lies on establishing combatant status. Indeed, Article 50 of AP I concerns persons who may have not committed hostile acts, but whose status seems doubtful because of the circumstances. Such persons should be considered to be civilians until further information is available and should therefore not be attacked.¹³

Different scenarios have been considered wherein someone’s civilian status would not be as obvious. For instance, within organized operations of a larger scale (such as multinational operations), the International Committee of the Red Cross (ICRC) has provided that

Humanitarian Civilian: How the Idea of Distinction Circulates Within and Beyond International Humanitarian Law, Oxford University Press, Oxford, 2021.

7 AP I, Art. 43(1); ICRC Customary Law Study, above note 3, Rule 4.

8 Yoram Dinstein, “Fighters, Civilians and LONIAC”, in Y. Dinstein (ed.), *Non-International Armed Conflicts in International Law*, 2nd ed., Cambridge University Press, Cambridge, 2021, p. 79.

9 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.

10 Camille Marquis Bissonnette, “The Definition of Civilians in Non-International Armed Conflicts”, *Journal of International Humanitarian Legal Studies*, Vol. 7, No. 1, 2016, p. 131.

11 ICRC Customary Law Study, above note 3, Rule 5.

12 AP I, Art. 50(1); ICRC Customary Law Study, above note 3, Rule 6.

13 Yves Sandoz, Christophe Swinarski and Bruno Zimmermann (eds), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987 (ICRC Commentary on the APs), para. 1920.

civilian personnel involved in economic/political governance, the promotion/protection of human rights or humanitarian assistance must be regarded as civilians for the purpose of IHL, irrespective of the fact that the multinational operation qualifies as a party to the armed conflict. The civilian component of a multinational operation must be distinguished from its military component.¹⁴

Personnel accompanying the armed forces but without being incorporated therein (such as war correspondents and contractors) equally maintain their civilian status.¹⁵

Incorporation into the armed forces as a cause for change of status has been examined by the ICRC. Contractors (in the form of private military and security companies) may no longer qualify as civilians if they become incorporated into military forces. Police forces may be mistaken for losing their civilian status (or not even having one in the first place), even when they carry out normal law enforcement activities.

Even civilians who take direct part in hostilities remain civilians – they might lose immunity from direct attack while they do so, but they remain civilians nonetheless.¹⁶ The ICTY has highlighted that “the definition of a ‘civilian’ is expansive and includes individuals who at one time performed acts of resistance”.¹⁷

Persons protected by IHL (a category which includes civilians) are entitled to humane treatment once in the hands of a party to the conflict. However, the connotation of civilian status goes beyond that entitlement, as noted by the ICTY Appeals Chamber in the *Galić* case, which explained (and, in so doing, corrected the Trials Chamber decision¹⁸) that when fighters become *hors de combat*, they are entitled to humane treatment but do not thereby assume civilian status.¹⁹

The definition of the civilian population

The definition provided in Article 50 of AP I explains that the civilian population comprises all persons who are civilians.

14 ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, October 2015, p. 25, available at: www.icrc.org/en/document/international-humanitarian-law-and-challenges-contemporary-armed-conflicts.

15 AP I, Art. 79; 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. 4(A)(4); ICRC Customary Law Study, above note 3, Rules 4 and 24.

16 The same position was upheld in the famous (and in equal part criticized) *Targeted Killings* case in Israel, which stated: “A civilian who . . . commits acts of combat does not lose his status as a civilian.” Supreme Court of Israel, *Public Committee against Torture in Israel v. Government of Israel (Targeted Killings)*, Case No. HCJ 769/02, 13 December 2006, para. 31.

17 ICTY, *Galić*, above note 4, para. 143.

18 The Trial Chamber held, when considering the *chapeau* requirement of a civilian population, that the definition of a civilian is expansive and includes individuals who at one time performed acts of resistance, as well as persons *hors de combat* when the crime was perpetrated.

19 ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-A, Judgment (Appeals Chamber), 30 November 2006, para. 144.

The ICTY's jurisprudence has dealt with the definition of the civilian population prior to *Galić*, maintaining that "the presence within a population of members of resistance groups, or former combatants, who have laid down their arms, does not alter its civilian characteristic".²⁰ Likewise, the presence of soldiers does not necessarily deprive a civilian population of its civilian character,²¹ nor does the presence of persons *hors de combat*. The ICTY Appeals Chamber, in the *Kordić and Čerkez* appeals judgment, stated that "the civilian population comprises all persons who are civilians and the presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character".²²

This "zoom out" from the definition of the individual civilian to that of the civilian population accentuates the preference given to maintaining the civilian status of a group, even when non-civilian elements may be found amongst it. While this does not change the definition of who is to be considered a civilian, it is illustrative of the protective "bias" favoured for the non-fighting part of the population. The 1987 Commentary on AP I adds that in protecting the civilian population, it is understood that "innocent civilians must be kept outside hostilities as far as possible and enjoy general protection against danger arising from hostilities".²³ The treaty and customary provisions²⁴ for passive precautions – i.e., the obligation to "take necessary precautions to protect the civilian population ... against the dangers resulting from military operations" – further support this point. Through these provisions, the ordinary meaning of "civilian population", which equates to the need for protection for a group, is made explicit.

The ICRC Interpretive Guidance

When examining the concept of a civilian in both IACs and NIACs, the ICRC acknowledged and addressed the lacuna found in NIACs regarding civilian status and what it exists in contrast to. In its *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* (Interpretive Guidance), the ICRC affirmed the existence of a distinction between fighter and civilian for NIACs, explaining that both Article 3 common to the four Geneva Conventions and AP II use language which supports the existence of these two mutually exclusive categories.²⁵

20 ICTY, *Prosecutor v. Tihomir Blaskić*, Case No. IT-95-14-A, Judgment (Appeals Chamber), 29 July 2004, para. 113.

21 ICRC Commentary on the APs, above note 13, para. 1922; ICTY, *Blaskić*, above note 20, para. 115: "[I]n order to determine whether the presence of soldiers within a civilian population deprives the population of its civilian character, the number of soldiers, as well as whether they are on leave, must be examined."

22 ICTY, *Prosecutor v. Dario Kordić and Mario Cerkez*, Case No. IT-95-14/2-A, Judgment (Appeals Chamber), 17 December 2004, para. 50.

23 ICRC Commentary on the APs, above note 13, para. 615. The word "innocent" was not defined when it was used, and indeed, *all* civilians are protected against attack. This will be discussed in more detail later in the article.

24 AP I, Art. 58; ICRC Customary Law Study, above note 3, Rule 22.

25 Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, ICRC, Geneva, 2009 (Interpretive Guidance), pp. 27–29.

In the view of the ICRC—a view which emerged after contentious discussions and still remains criticized²⁶—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”).²⁷

According to the Interpretive Guidance, a good-faith interpretation of IHL²⁸ leads to the conclusion that fighters do exist in NIACs and that deciding what makes a fighter requires examining their behaviour. In light of the increasing trend of civilian participation in armed conflict, and with a view to strengthening the implementation of the principle of distinction, the Interpretive Guidance looked at conduct for the purposes of the conduct of hostilities in only two ways: conduct determinant of one’s status in terms of membership of an organized armed group (as a fighter with a continuous combat function), and conduct determinant of a civilian’s “targetability” (taking direct part in hostilities).²⁹

What the Interpretive Guidance established was that a civilian remains a civilian unless they assume a continuous combat function. If, as a civilian, they take direct part in hostilities,³⁰ they maintain their status but lose immunity from attack while that participation lasts—and in any event may be prosecuted for taking up arms (as is also the case for persons with a continuous combat function).

The Interpretive Guidance summarizes a threefold test³¹ to determine if an individual’s conduct amounts to direct participation in hostilities. Firstly, an act constitutes direct participation in hostilities when it is likely to—and specifically aims to—directly harm the enemy by inflicting damage to military objects or legitimate targets, or to cause destruction or harm to protected persons or property. Secondly, there must be a direct causation between the act and the expected harm, and thirdly, there must be a belligerent nexus between the act and the hostilities conducted between the parties to the armed conflict. By clarifying the constituents of such conduct, the Interpretive Guidance leaves no space for doubt about a person’s status for the purposes of the conduct of hostilities.

The notion of direct participation in hostilities as a determinant for who may be a target has been suggested as a reliable method for distinguishing civilians from

26 See Michael N. Schmitt, “The Interpretive Guidance on the Notion of Direct Participation in Hostilities: A Critical Analysis”, *Harvard Law School National Security Journal*, Vol. 1, No. 1, 2010.

27 Interpretive Guidance, above note 25, p. 16.

28 Marco Sassòli, Antoine Bouvier and Anne Quintin (eds), *How Does Law Protect in War?*, 3rd ed., ICRC, Geneva, 2011, Chap. 5.1.

29 The Interpretive Guidance states: “The present text interprets the notion of direct participation in hostilities for the purposes of the conduct of hostilities only. Thus, apart from providing guidance on when and for how long a person is considered to have lost protection from direct attack, it does not address the consequences of direct participation in hostilities once he or she finds himself or herself in the adversary’s hands. Other rules of international humanitarian law then govern, foremost among them being the already mentioned principle of humane treatment.” Interpretive Guidance, above note 25, p.7.

30 The Commentary on AP I uses the term “armed combat”: see ICRC Commentary on the APs, above note 13, para. 1942.

31 Interpretive Guidance, above note 25, p. 46.

the “rest”.³² Appraising the practicality of the Interpretive Guidance, Dapo Akande examined the following example. The Israeli Supreme Court opined that if a civilian

has joined a terrorist organization which has become his “home”, and in the framework of his role in that organization he commits a chain of hostilities, with short periods of rest between them, [he] loses his immunity from attack “for such time” as he is committing the chain of acts. Indeed, regarding such a civilian, the rest between hostilities is nothing other than preparation for the next hostility.³³

Akande concludes that by applying the ICRC’s analysis, the conclusion would be similar, with the only difference being that on the ICRC’s analysis, the person would not be a civilian but rather a member of an organized armed group.³⁴

A different conclusion would be reached with regard to civilians who directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis, or who assume exclusively political, administrative or other non-combat functions. Examples would include recruiters, trainers, financiers and propagandists who continuously contribute to the general war effort of a non-State party while not performing a continuous combat function.³⁵

Finally, it is worth examining what has been proposed as the starting period for a person’s direct participation in hostilities, as well as when membership of an organized armed group begins and ends. According to the Interpretive Guidance, “[a]s the concept of direct participation in hostilities refers to specific hostile acts, IHL restores the civilian’s protection against direct attack each time his or her engagement in a hostile act ends”, and this, according to the Guidance, “remains necessary to protect the civilian population from erroneous or arbitrary attack and must be acceptable for the operating forces or groups as long as such participation occurs on a merely spontaneous, unorganized or sporadic basis”.³⁶ Conversely, “membership in an organized armed group begins in the moment when a civilian starts *de facto* to assume a continuous combat function for the group, and lasts until he or she ceases to assume such function”.³⁷

The definition of civilian through treaty interpretation

In an additional effort to understand the constituents of the civilian definition, the article will now examine the term “civilian” as found in the Geneva Conventions and discuss how treaty interpretation rules may help in this effort. Articles 31 and 32 of the Vienna Convention on the Law of Treaties set forth the basic rules

32 Sandesh Sivakumaran, *The Law of Non-International Armed Conflict*, Oxford University Press, Oxford, 2012, p. 359.

33 Supreme Court of Israel, *Targeted Killings*, above note 16, para. 39.

34 Dapo Akande, “Clearing the Fog of War? The ICRC’s Interpretive Guidance on Direct Participation in Hostilities”, *EJIL: Talk!*, 4 August 2009, available at: www.ejiltalk.org/clearing-the-fog-of-war-the-icrcs-interpretive-guidance-on-direct-participation-in-hostilities/.

35 Interpretive Guidance, above note 25, p. 54, fn. 53.

36 *Ibid.*, p. 71.

37 *Ibid.*, p. 72.

of treaty interpretation. According to these articles, “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose”.³⁸ In the case of the Geneva Conventions, the ICRC has underlined that “the whole text of the Conventions, including the titles and annexes, has to be taken into account in ascertaining their object and purpose”.³⁹ Here, the article will look at how the notion of civilian is understood through a good-faith interpretation of the Geneva Conventions as well as supplementary means of interpretation through the preparatory work of the relevant rules.

*Good faith*⁴⁰

To say that the object and purpose of the Geneva Conventions and Additional Protocols is to reduce human suffering during armed conflicts would appear almost trite, but it begs recalling when one examines the application of each rule, including that relating to the definition of a civilian. “Interpreting a treaty in good faith means that even when the words of the treaty are clear, they must be interpreted in a way that would not render the meaning manifestly absurd or unreasonable.”⁴¹ Several preliminary statements to international treaties—even preceding the Geneva Conventions—recite the desire to “diminish, as far as depends on them, the inevitable evils of war”.⁴² It would follow that all “evils” that can be avoided should be avoided, which includes widening the protection afforded to civilians as widely as possible and acknowledging that much of the harm can, indeed, be evitable. Then again, an analysis of what would constitute “evitable” harm could be the subject of disagreement, but this author submits that at the very least, a thorough due diligence approach⁴³ would require those implementing the law to seek actions that avoid civilian harm, including by offering the benefit of the doubt for civilian status (this is further affirmed by the

38 When a treaty is open to two interpretations, one of which enables the treaty to have appropriate effects and the other does not, good faith and the objects and purposes of the treaty demand that the former interpretation be adopted. See 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, 12 August 1949 (ICRC Commentary on GC I), paras 28–32, quoting International Law Commission, *Yearbook of the International Law Commission*, Vol. 2, 1966, p. 219, para. 6.

39 ICRC Commentary on GC I, above note 38, para. 29.

40 Good faith is defined as that which “requires the parties to a treaty, contract, or any other kind of international transaction to deal honestly and fairly with each other. Each party shall act reasonably, taking into account the just expectations of the other party/parties, truthfully disclosing all relevant motives and purposes. Each party shall finally refrain from taking unfair advantage due to a literal interpretation, if the mere focus on the wording would fall short of respecting the objects, purposes, and spirit of the agreement”. Markus Kotzur, “Good Faith (Bona Fide)”, *Max Planck Encyclopedia of Public International Law*, Oxford University Press, Oxford, January 2009.

41 Michael W. Meier, “The Updated CGIII Commentary: A Flawed Methodology?”, *Articles of War*, 3 February 2021, available at: <https://lieber.westpoint.edu/updated-gcii-commentary-flawed-methodology/>.

42 Convention (X) for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention, The Hague, 18 October 1907, Preamble.

43 Marco Longobardo, “The Relevance of the Concept of Due Diligence for International Humanitarian Law”, *Wisconsin International Law Journal*, Vol. 37, No. 1, 2019.

law later developing into assuming civilian status in case of doubt). Even though there is no consensus amongst scholars and practitioners regarding the precise scope of the object and purpose of the Geneva Conventions which is to be interpreted in good faith,⁴⁴ the “balance between humanitarian considerations, on the one hand, and military necessity, on the other, is a hallmark of international humanitarian law”.⁴⁵ Further to that, it has been submitted that the core of the Conventions was written “to protect individuals”.⁴⁶

Voices underlining the value of good-faith interpretation have not ceased doing so,⁴⁷ and this should come as no surprise given the fundamental role of this principle in treaty interpretation. This may be partly due to the high number of civilian casualties and grave humanitarian consequences seen in today’s conflicts. Some of those voices are replicated here, to underline not so much the legal principle but the need to be more conscious of it in legal interpretation, as well as to reconcile the “naiveté” that is at times attributed to “good faith humanitarian arguments”⁴⁸ with the very core of the values that these rules were created to protect.

In a famous dissenting opinion to the International Court of Justice’s (ICJ) Nuclear Weapons Advisory Opinion, Judge Higgins wrote: “The judicial lodestar, whether in difficult questions of interpretation of humanitarian law, or in resolving claimed tensions between competing norms, must be those values that international law seeks to promote and protect.”⁴⁹ More recently, Craig Jones wrote: “Good faith interpretations of IHL rules on the conduct of hostilities are needed all day, every day if civilians and others are to be spared the worst of urban warfare’s all-too-familiar ravages.”⁵⁰

Drafting history

Tracking the entire history of how IHL’s understanding of a “civilian” developed is not a straightforward task. While “civilian” is a word with an admittedly “simple” ordinary meaning, discussions, in some shape or form, have spanned decades and various instruments and fora.

To examine what preceded the adoption of a written definition in AP I, the deliberations of 1971 shed light on the concerns existing at the time. The impact of

44 M. W. Meier, above note 41.

45 ICRC, *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*, 2nd ed., Geneva, 2020, para. 32.

46 US Supreme Court, *Salim Ahmed Hamdan v. Donald H. Rumsfeld et al.*, 548 U.S. 557 (2006), No. 05.184, 29 June 2006.

47 Michael P. Van Alstine, “The Death of Good Faith in Treaty Jurisprudence and a Call for Resurrection”, *Georgetown Law Journal*, Vol. 93, No. 6, 2005.

48 Especially outside strictly legal discussions and amongst field and operational practitioners.

49 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996*, p. 226, para. 591.

50 Craig Jones, “In Good Faith: Legal Advice during Aerial Targeting in Urban Areas”, *Humanitarian Law and Policy Blog*, 4 May 2021, available at: <https://blogs.icrc.org/law-and-policy/2021/05/04/in-good-faith/>.

context on defining civilians was carefully considered, and it was pointed out that the definition would make sense if associated with a particular protection offered.⁵¹ Agreement was reached to codify such a definition in a subsequent document. The ICRC—which was submitting the initial definition proposal—stated: “It would be erroneous to think that persons linked to the military effort could be the objective of an attack mounted directly against them.”⁵² The ICRC later submitted that

[t]he word “directly” ... has the essential merit of drawing the distinction – and how difficult it is! – between combatants who do not fulfil the conditions and civilians linked to the military effort; it includes persons linked to the military effort within the civilian population and combatants who do not fulfil the conditions within military objectives. Indeed, “directly” establishes the relationship of “adequate causality” between the act of participation and its immediate result in military operations. According to this theory of “adequate causality”, a person is only a “combatant” – and thus a possible military objective – to the extent that his act, or activity, is a direct cause of damage inflicted on the adversary, on the military level; that is to say, when his act or activity is such as to cause damage of this nature in the ordinary course of events and according to experience of armed conflicts.

Conversely, a person remains a civilian as long as his act or activity is not responsible for immediate damage suffered by the adversary, on the military level. Thus, a legal solution is found to the problem of “civilians linked to the military effort”, who would not constitute a separate and distinct category of the civilian population, for the reasons already given.⁵³

The ICRC discussions in 1977 reveal an overall consensus over the definition of a civilian and that of a civilian population, supported by the absence of reservations made thereon. It has been stated that the reason the definition of civilian was omitted from the final text of AP II at the last moment was a “package aimed at the adoption of a simplified text”.⁵⁴

Some of the arguments presented (uncontested) in the deliberations above indicate that concern existed for the civilian population to be protected from “superficial” association with military efforts—even though the degree of these associations did not and still does not enjoy equal consensus. The discussions reveal that protection of the general civilian population was indeed the predominant concern in the drafting process.

51 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts: Report on the Work of the Conference*, Geneva, August 1971, pp. 73–77.

52 ICRC, *Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Vol. 3, Geneva, January 1971, p. 39.

53 ICRC, above note 51, p. 28.

54 ICRC Customary Law Study, above note 3, Rule 5.

How much does the definition of civilian rely on conduct?

The definition of civilian itself does not leave room for relying on conduct in determining status. Being a combatant, and by extension, being a civilian, is determined by looking at categories—in other words, status. This is further evidenced by the fact that members of the armed forces who might not have a fighting role remain combatants, and conversely, civilians remain civilians if they take direct part in hostilities (but then lose protection against attack).

Be that as it may, looking at conduct to determine a person's status and afforded protection is far from being a new question. Oppenheim famously wrote: "Those private subjects of the belligerents who do not directly or indirectly belong to the armed forces do not take part in it; they do not attack and defend; and no attack ought therefore to be made upon them."⁵⁵ The very essence of our shared, ordinary understanding regarding who is a civilian is, to some extent, shaped by one's conduct. The ICRC Commentary on AP I explains that "in protecting civilians against the dangers of war, the important aspect is not so much their nationality as the inoffensive character of the persons to be spared and the situation in which they find themselves".⁵⁶ This approach also finds support in the Trial Chamber judgment of the ICTY in *Blagojević and Jokić*, which reads: "The term 'civilian' refers to persons not taking part in hostilities."⁵⁷

The term "civilian" was meant to embody "innocence" (hence why it remains extremely common to encounter the phrase "innocent civilian"⁵⁸), distance from the military activities and, overall, absence of threat. Sutton summarized this by saying that civilianness equals "innocence", while combatancy equals "complicity" and "participation".⁵⁹ In reality, categories are never so neatly arranged. Besides, a legal definition needs to be concrete and to serve as a "label" that provides protection in combat.

In modern warfare, the whole population may be perceived to be participating in the war effort to some extent, albeit indirectly, and persons may slip into a "grey area"⁶⁰ between being so-called "innocent civilians" and civilians who support the hostilities, take direct part in hostilities or, some might submit, cross the line into combatant status. Navigating this divergence requires us to understand why those who are civilians have that status.

55 Lassa Oppenheim, *International Law*, Vol. 2: *Disputes, War and Neutrality*, ed. Hersch Lauterpacht, 7th ed., Longmans, London, 1952, para. 57.

56 ICRC Commentary on the APs, above note 13, para.1909.

57 ICTY, *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-T, Judgment (Trial Chamber), 17 January 2005, para. 544. See also ICTY, *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgment (Trial Chamber), 31 January 2005, para. 282.

58 Ryan Goodman, "The Detention of Civilians in Armed Conflict", *American Journal of International Law*, Vol. 103, No. 1, 2009, p. 53.

59 Rebecca Sutton, "The Humanitarian Civilian: A Book Launch with Dr. Rebecca Sutton", Oxford Institute for Ethics, Law and Armed Conflict, Edinburgh Centre for International and Global Law, and Political Settlements Research Programme, virtual event, 5 May 2021.

60 ICRC Commentary on the APs, above note 13, para. 1944. See also Antonio Cassese, "Merits of the Israeli Judgment on Targeted Killing", *Journal of International Criminal Justice*, Vol. 5, No. 2, 2007, p. 343.

There is little if any doubt that civilians may indeed undertake acts which support the political or military effort of one of the parties to the conflict.⁶¹ The Inter-American Commission on Human Rights has very clearly opined that

civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties, expressing sympathy for the cause of one of the parties or, even more clearly, failing to act to prevent an incursion by one of the armed parties, does not involve acts of violence which pose an immediate threat of actual harm to the adverse party.⁶²

Civilians who support the armed forces (or armed groups) "by supplying labour, transporting supplies, serving as messengers or disseminating propaganda may not be subject to direct individualized attack, but they remain amenable to domestic legislation against giving aid and comfort to domestic enemies".⁶³

On account of the above, it stands to reason that civilians may indeed provide some form of support in the "war effort", but this does not affect their status. Looking back at the initial definition, we note that a civilian is a person who is not a combatant/fighter. Consequently, conduct is relevant, because the assessment for a continuous combat function is fundamentally conduct-based. Having said that, while "conduct" may describe a different set of elements than "function", it can also be argued that conduct is a *sine qua non* of the notion of function.

Persons with a continuous combat function are those who continuously take part in hostilities. To assume that function requires lasting integration into an organized armed group. Membership of the group cannot depend on abstract affiliation, family ties or other criteria prone to error, arbitrariness or abuse. Instead, membership must depend on whether the continuous function assumed by an individual corresponds to that collectively exercised by the group as a whole – namely, the conduct of hostilities on behalf of a non-State party to the conflict.⁶⁴

To conclude on this point, the elements presented above illustrate that the risk which may be posed by an individual who is a civilian does not factor in the civilian definition. The "status" test only requires that a person meets the criteria for a fighter. Should that not be the case, the individual remains a civilian.

61 Michael Bothe, Karl Josef Partsch and Waldemar A. Solf, *New Rules for Victims of Armed Conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*, Martinus Nijhoff, Leiden and Boston, MA, 1982, p. 303.

62 Inter-American Commission on Human Rights, *Third Report on the Human Rights Situation in Colombia*, Doc. OEA/Ser.L/V/II.102 Doc. 9 rev. 1, 26 February 1999, Chap. 4, para. 56.

63 M. Bothe, K. J. Partsch and W. A. Solf, above note 61, p. 303.

64 Interpretive Guidance, above note 25, at p.33.

What protection is afforded to a civilian?

“What’s in a name? That which we call a [civilian] by any other name would [sound] as sweet.”⁶⁵ With all due respect to Shakespeare, names matter in IHL. A name and its definition constitute the compass for determining whether a person may be the object of attack, may benefit from combatant immunity if captured, etc.

Conduct of hostilities

Most frequently, civilian status is associated with immunity from attack during hostilities, encapsulated within the principle of distinction: a civilian shall not become the object of an attack unless and for such time as they take direct part in hostilities. This fundamental privilege of “civilianness” is embodied in the principle of distinction.⁶⁶ Among its many accolades, the principle of distinction has been described as “the foundation of the whole system of IHL”.⁶⁷

The defining criterion for determining the rules governing the use of force against a particular individual under IHL is whether the person is a lawful target under the rules governing the conduct of hostilities. A person may be a lawful target because of their status (he or she is a member of regular State armed forces, as generally defined by domestic law), function (he or she is a member of irregular State forces or of a non-State armed group, by virtue of the continuous combat function performed) or conduct (he or she is a civilian directly participating in hostilities).⁶⁸

Civilians and civilian objects also become the yardstick for the harm that may be caused even when attacks are directed towards military targets, by anchoring the proportionality assessment, but also in the precautions to be taken. In other words, civilian status often represents the “humanity” counterpart to military necessity in the “balancing act” of fighting.

Lastly, if there is an incorrect assumption about an individual’s status, and that individual were to make use of an object (e.g. a building), then that could influence that object’s classification and in rendering it a military target, expose it to attack.⁶⁹

65 Paraphrased from Shakespeare’s *Romeo and Juliet*, in Blakemore Evans *et al.* (eds), *The Riverside Shakespeare*, Vol. 2, Houghton Mifflin, Boston, MA, 1974.

66 API, Art. 48.

67 Alejandro Lorite Escorihuela, “Humanitarian Law and Human Rights Law: The Politics of Distinction”, *Michigan State Journal of International Law*, Vol. 19, No. 2, 2013, p. 319.

68 ICRC, “Glossary: Use of Force”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/glossary/use-force>.

69 Military objectives are those objects “which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage”. See AP I, Art.52(2– (3); ICRC Commentary on the APs, above note 13, paras 2022–2023.

Investigations and compensation

Being a civilian who has sustained harm⁷⁰ appears to be a frequent trigger for investigating an event for any violation—but also for considering some form of redress. IHL would require equal amounts of care and measures to be taken to investigate⁷¹ violations against other protected categories of persons (such as those placed *hors de combat*), but the fact remains that being a civilian makes the initiation of this process considerably more likely.

Given that these processes are mostly context-specific, the inquiry options presented below are relevant to the Afghan context, which will be the context that the theoretical analysis presented so far will be filtered through. Certain practices of redress have been put in place by some actors which concern incidental harm during combat but which are distinct from compensation, since they do not require a confirmed breach of applicable law. They, too, refer to civilian harm as a prerequisite for entitlement.

The United States, in its annual assessment on civilian casualties, explains that the Department of Defense (DoD) investigates allegations of civilian casualties resulting from US military operations and that in the case of harm caused by an operation to a civilian, any *ex gratia* payment or other assistance is provided to the civilian or the family of the civilian—even though this might, at times, exclude individuals who are not considered “friendly” to the United States. It then clarifies that “[f]or the purposes of such assessments, DoD does not include members of the civilian population who have forfeited the protections of civilian status by engaging in hostilities”.⁷²

Civilians who have suffered conflict-related harm may claim monetary payment from the Afghan government. One of the options is a one-time payment through emergency budget Code 91 or Code 92, and monthly financial assistance to conflict-affected families of victims through the State Ministry for Martyrs and Disabled Affairs. However, it has been reported that over half of the civilian victims in Afghanistan “do not receive any payments or are unaware of programs to apply for assistance”,⁷³ or, at times, enforcement of redress requires additional efforts.⁷⁴

One of the main challenges identified in this process is a requirement that asks the applicant to secure a signature from the Afghan National Directorate of Security in order to receive assistance. The signature is required to make sure the

70 In many cases, this holds true even when the civilian harm is lawful, e.g. when it is proportional to the expected military advantage.

71 AP I, Art. 85; ICRC Customary Law Study, above note 3, Rule 158.

72 DoD, *Annual Report on Civilian Casualties in Connection with United States Military Operations in 2020*, 2 June 2021, available at: <https://tinyurl.com/xerptz5n>. It is worth noting that the use of the term “engaging in hostilities” risks excluding a wider category of persons than those identified in the ICRC’s Interpretive Guidance.

73 Center for Civilians in Conflict (CIVIC), *Unacknowledged Harm: Hurdles to Receiving Victims’ Assistance in Afghanistan*, December 2020, pp. 9–10.

74 Antonio De Lauri and Astri Suhrke, “Armed Governance: The Case of the CIA-Supported Afghan Militias”, *Small Wars & Insurgencies*, Vol. 32, No. 3, 2021, p. 499.

applicant is not a member of an organized armed group. Persons living in areas controlled by armed opposition groups could face difficulties in securing this requirement.⁷⁵

Similar requirements exist for the Conflict Mitigation Assistance for Civilians (COMAC) project, a USAID-funded programme assisting civilians harmed during the conflict. Civilians who apply for COMAC are told that they must obtain two signatures for their applications: “the first from the local police commander and a second from a village elder confirming the incident, as well as confirming that the applicant is not a member of any armed group and is not employed by the government.”⁷⁶

Who is a civilian in Afghanistan?

In order to answer this question, we must first acknowledge and examine who is *considered* to be a civilian in Afghanistan.⁷⁷ Bissonnette writes: “The meaning of the notion of ‘civilian’ cannot be defined in the abstract: any attempt to simplify it and to improve compliance towards it has to be based on reality and practice.”⁷⁸

Particularities of the Afghan context

In considering the views expressed in Afghanistan, one can overlook neither the country’s history nor its religious and cultural intricacies. William Maley, in his article for the *Review* presenting a historical and geographical appraisal of Afghanistan, refers to the country as one that has been a victim of “decades of trauma”.⁷⁹ Instability and turmoil run deep, both in intensity and in duration, while the causes of the conflict range from politics and ethnicity to culture and religion. All these elements show that classifying someone as a combatant may at times be too hasty a conclusion if these factors are not considered.⁸⁰

This article does not intend to delve into a sociological, religious or political examination of the Afghan context. Nevertheless, when attempting to answer the

75 CIVIC, above note 73, p. 17.

76 *Ibid.*, p. 21.

77 This section will examine the notion of civilian as enshrined in IHL, as opposed to violence against the life of civilians under law enforcement operations and international human rights law. Targeted killings are also considered within the IHL framework, albeit noting that those targeted are, at times, geographically far removed from hostilities, and/or not necessarily directly participating in hostilities at the time they are targeted.

78 C. Marquis Bissonnette, above note 10, p. 131.

79 William Maley, “Afghanistan: An Historical and Geographical Appraisal”, *International Review of the Red Cross*, Vol. 92, No. 880, 2010.

80 The Interpretive Guidance states: “In practice, civilian participation in hostilities occurs in various forms and degrees of intensity and in a wide variety of geographical, cultural, political, and military contexts. Therefore, in determining whether a particular conduct amounts to direct participation in hostilities, due consideration must be given to the circumstances prevailing at the relevant time and place.” Interpretive Guidance, above note 25, pp. 41–42.

question of who is a civilian in Afghanistan, it is important to underscore certain elements which simply cannot be ignored.

Religion

Drawing together the Afghan understanding on laws which regulate Afghans' conduct without considering religion would be a tremendous oversight. Various Afghan governments, as well as the armed opposition groups operating in the territory, apply Islamic law – albeit complemented by other man-made laws and regulations, all of which ultimately refer to and must not contradict divine laws.⁸¹ Arguably, for some of these laws, religion is the most important element in the interpretation of targetability.

Under Islamic rules of warfare, non-combatants were designated as protected and not to be harmed.⁸² Al-Dawoody writes that *al-muqātilīn* (combatants) are understood as follows: “They must be taking part in the fighting; anyone who is willing or prepared to fight cannot be described as a combatant, except in metaphor, until they enter into combat.” He further explains that Islamic law indicates some protected categories of persons (e.g. women, children, the elderly, and monks or religious hermits), and concludes with the inference that “Muslims must fight those who attack them, but not those who do not attack them”.⁸³

In order not to surpass this article's insufficient capacity to deal with religious law, this point will not be elaborated further. As a final remark, Ken Guest, in his very comprehensive review of the interplay between religion and armed conflict in Afghanistan, wrote that “the arenas of both religion and armed conflict are primarily battles for perception”.⁸⁴ Respect for the faith and the instructions provided about the protected status of those who are non-combatants are an important factor of the conflict in Afghanistan.

Culture

Khushhal Khan Khattak is regarded as the national poet of the Pashtuns. One of the verses attributed to him reads: “I despise the man who does not guide his life by honour.”⁸⁵

81 Guest makes an interesting remark regarding the adaptation of pre-Islamic fighting patterns to the new, divine rules which “went into uncomfortable nitty-gritty detail”. He describes the initial implementing process as “embracing the broad concept but cherry-picking the details”. See Ken Guest, “Dynamic Interplay between Religion and Armed Conflict in Afghanistan”, *International Review of the Red Cross*, Vol. 92, No. 880, 2010, pp. 887–888.

82 Ahmed Al-Dawoody, “Islamic Law and International Humanitarian Law: An Introduction to the Main Principles”, *International Review of the Red Cross*, Vol. 99, No. 906, 2017, p. 1002.

83 *Ibid.*, p. 1002.

84 K. Guest, above note 81, p. 896.

85 Akbar Ahmed, *Pukhtun Economy and Society: Traditional Structure and Economic Development in a Tribal Society*, Routledge, London, 2013, p. 92.

Tradition, customs and culture – including poetry – shape the communal architecture of Afghanistan, which also varies according to region, ethnicity and tribe. An illuminating example is that of the Pashtun, who follow a centuries-old customary code called *Pashtunwali*⁸⁶ which sets out values and rules of behaviour. Tribal loyalty, family honour, hospitality towards strangers, courage in battle and revenge for unjust incursions form the foundations of this code.⁸⁷ Defending the values enshrined therein is categorically important – failing to do so leads to dishonour and shame. Male members of the family are particularly singled out as being those who must contend with the insults, lest they lose their honour.

Loyalty and kinship amongst the Pashtun may materialize in various manners. For instance, women are expected to support the men in their families, including when they are engaged in combat – *Pashtunwali* specifies that this support could include the provision of “food, water and other necessities to the trenches”.⁸⁸

Equity and reciprocity as dictated in *Pashtunwali* are not unique to that group – indeed, Guest describes Afghanistan as “a ‘reciprocal’ society in which exchanged favours and barter practice are the norm between communities that must compete and co-operate with each other”.⁸⁹ Solidarity among persons linked by kinship and tribe is another characteristic of Afghan society. In a sense, the solidarity and reciprocity expressed by Afghans fuel both the kinship which an honourable act is asked to defend and the retaliatory spirit which governs that defensive action.

Solidarity and kinship find essence in the concept of *badal*; this concept conveys the demand for compensation without condition, which is intrinsic to dignity and honour. It is often interpreted as “compensation and retaliation”, but as Lutz Rzehak points out, *badal* also embodies the obligation to thank others for the provision of help and to provide compensation as soon as possible.⁹⁰ This belief may lead to the creation of “pending” acts of reciprocation.

Why is it important to consider these factors? Because it will allow for a different reading of certain acts which may be perceived by parties to the conflict as hostile, even to the point of being interpreted as depriving an individual of their civilian status.⁹¹ For instance, hosting a fighter at someone’s home might equally be a sign of hospitality or the return of a favour, or some act otherwise

86 An extensive analysis may be found in Lutz Rzehak, “Doing Pashto: Pashtunwali as the Ideal of Honourable Behaviour and Tribal Life among the Pashtuns”, Afghan Analysts Network, 21 March 2011, available at: www.afghanistan-analysts.org/wp-content/uploads/downloads/2012/10/20110321LR-Pashtunwali-FINAL.pdf.

87 Guest explains that the social concept of honour (*nang*) is shared by non-Pashtuns, as is *melmastya* (hospitality). See K. Guest, above note 81, p. 886.

88 Qiyamuddin Khadim, *Pashhtunwali*, Kabul, 1331/1952, p. 29.

89 K. Guest, above note 81, p. 880.

90 L. Rzehak, above note 86, p. 14.

91 Similar examples of how interpersonal rivalries factor in target selection are presented in Bette Dam, “How Flawed Information Created a ‘Taliban’ Threat”, *The Australian*, 29 January 2021, available at: <https://tinyurl.com/wvj5yjkw>.

motivated by the desire to preserve one's honour. Further, certain violent acts may be a result of *badal*, intended to defend the potential insult and loss of honour, rather than having a link to the ongoing conflict. Research has also highlighted the risks in intelligence-gathering resulting from cultural factors, suggesting that “vetting intelligence to mitigate tribal, familial and other biases from informants is essential to ensuring the right military target is engaged and civilians are not targeted”.⁹²

Protracted conflict and arms proliferation

It would be next to impossible, and in any event beyond the scope of this article, to enumerate all the ways in which decades of conflict in Afghanistan have shaped common conscience, lack of trust, the instinct for survival, and the permeation of security concerns into daily life.⁹³ But certain facts stand out as being closely linked with the war legacy, such as the proliferation of weapons in Afghan households. An anecdote that the author experienced in Kabul in April 2021 is revealing – on the evening of 11 April, loud gunfire sounds erupted all over the city. The sounds indicated intense fighting, with the use of various types of firearms, and could be heard coming from all parts of town. The revelation that the firing was celebratory, marking the occasion of an Afghan martial arts match victory, while reassuring, also acted as a stark demonstration of how heavily armed Kabul's houses (including civilian houses) really are.

Armed persons often raise valuable grounds for security concerns, but arms possession alone should not lead to the illation of combatant status or even of the intention to participate in hostilities beyond self-defence, in line with the requirements for conduct to amount to direct participation in hostilities, as explained above. To quote Guest, “Afghan pragmatism is the lifeline that enables them to survive. In their harsh and unforgiving natural environment, Afghans endure with fortitude whatever the world has to throw at them.”⁹⁴ The harsh and unforgiving Afghan mountains have also given way to harsh and unforgiving urban centres. The behaviour of a person who might resort to a violent act which does amount to belligerent nexus could – given what we have seen about the specificities of the Afghan context – be merely motivated by individual self-defence.

Finally, another undisputable remnant of the perdurable conflict is what Maley refers to as “patronage and alliances”. This, he claims, is a way to frame the influence exercised, to various degrees, on the fighting parties by elements of the global community, both at a collective and individual level. External influences underline the “politics of struggle”.⁹⁵

92 CIVIC, *Afghan Airstrikes: Good Practices and Challenges to Protect Civilians*, August 2020, p. 16, available at: <https://civiliansinconflict.org/wp-content/uploads/2020/08/PB-on-Airstrike-Final.pdf>.

93 A good analysis of the humanitarian, political, societal and economic dimensions that make the protracted conflict in Afghanistan intractable and precarious for civilian populations is presented in Emmanuel Tronc and Anaïde Nahikian, *Fragile Future: The Human Cost of Conflict in Afghanistan*, Humanitarian Action at the Frontlines: Field Analysis Series, Harvard Humanitarian Initiative, 1 December 2018.

94 K. Guest, above note 81, p. 881.

95 W. Maley, above note 79, p. 875.

Fighting in proximity to civilian settings

Various commentators have described the conflict in Afghanistan as being “asymmetric” – i.e., “characterized by the imbalance between the military capacity of the warring parties (e.g. in terms of weapon technology, equipment, intelligence information and number of troops)”.⁹⁶ This imbalance, at least at the early stages of the conflict, affected the choice of methods of warfare. As a consequence, fighting drew nearer civilian settings, often densely populated. The evolution of the conflict followed this pattern; several fighting parties adapted to this proximity,⁹⁷ leading to the current prevalence of areas with civilians and fighters in close coexistence. This follows a more generalized trend of increasingly involving civilian actors in conflicts.⁹⁸ Finally, the coexistence of civilians and fighters creates a high risk of association of non-civilian status to individuals due to proximity.⁹⁹

How do fighting parties¹⁰⁰ in Afghanistan perceive civilian status?

Fighting parties – the ones with whom the responsibility to respect IHL lies – merit examination in our efforts to decipher the perception of civilian status in Afghanistan. The factual fluidity with which status can be assigned to individuals calls for a closer look.

Before anything else, it is important to acknowledge that there is no (known) statement from any of those who fight in Afghanistan which questions the fact that civilians ought to be protected. Indeed, many Afghan fighters promote the protection of civilians and condemn incidents that cause civilian harm (albeit usually those brought about by enemy forces).¹⁰¹ What is less clear is who they mean by that term – and, by extension, who they exclude. Although

96 ICRC, “Glossary: Asymmetric Warfare”, *How Does Law Protect in War?*, available at: <https://casebook.icrc.org/glossary/asymmetric-warfare>. See also ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, September 2003, Section IV.

97 Robin Geiss and Michael Siegrist, “Has the Armed Conflict in Afghanistan Affected the Rules on the Conduct of Hostilities?”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 12.

98 Alessandro Silvestri, “The ‘Revolving Door’ of Direct Participation in Hostilities: A Way Forward?”, *Journal of International Humanitarian Legal Studies*, Vol. 11, No. 2, 2020, pp. 415–416.

99 Further, Section 81 of the Layeha provides that fighters should keep their “hair style, clothing, shoes and other things just like the local people [because] this will allow the mujahideen to protect the local people and will enable them to move freely in any direction”.

100 This refers to actors who have been publicly known to participate, in some form or another, in fighting in Afghanistan.

101 For instance, the IEA condemned a bombardment in Helmand in June 2021, stating: “The base, located on the side of the road, was visited by motorists, passengers and other locals on the Herat-Kandahar highway, who were bombed by the enemy.” Statement by the Spokesman of the Islamic Emirate of Afghanistan, Zabihullah Mujahid, 4 June 2021, available at: https://twitter.com/Zabehulah_M33/status/1400837761070866437. The US 2020 Report to Congress on Afghanistan states: “The [Resolute Support] Tactical Guidance emphasizes that civilian casualties are the single greatest threat to the [Resolute Support] mission.” DoD, *Enhancing Security and Stability in Afghanistan: Report to Congress*, June 2020, available at: https://media.defense.gov/2020/Jul/01/2002348001/-1/-1/1/ENHANCING_SECURITY_AND_STABILITY_IN_AFGHANISTAN.PDF.

the examples mentioned below cannot claim to be exhaustive, they are nevertheless indicative of key perceptions expressed.

Reports

The Inspector-General of the Australian Defence Force's (ADF) *Afghanistan Inquiry Report* (Brereton Report)¹⁰² sought to understand the applicable rules of engagement of the Australian forces in Afghanistan in order to assess their conduct. It provided that “[i]n Afghanistan, the Taliban’s military forces were one of the ADF’s designated enemy forces”, adding that someone’s membership in the enemy fighting force—Islamic Emirate of Afghanistan (IEA) fighters—would suffice to render them targetable.¹⁰³

In trying to diversify the practical examples that a soldier might encounter and to help clarify who should be considered a civilian, the report explained:

[The ADF Force Element] may have been deployed to assist ANSF [Afghan National Security Forces] to apprehend a “drug baron” who was not a member of the Taliban, but simply a criminal. The reason for apprehending that individual or for carrying out an operation to shut down that drug baron’s facilities may still have been linked to the armed conflict—for example, the drug trade was in general financing Taliban operations. However, the drug baron in question had no links to the Taliban or to the hostilities against the ADF. ... In this case, that person—although clearly a criminal—is for LOAC purposes a “civilian” who cannot be made the target of attack.¹⁰⁴

The Brereton Report proceeds to explain the criteria that would render an individual a legitimate target due to status (as opposed to conduct/direct participation in hostilities). Referring to “requirements for satisfaction of the OAG [organized armed group] test”, the Report lists the need to identify those organized armed groups that are taking part in the hostilities against the ADF and friendly forces, and then to check whether a proposed target is a member of one of those groups and whether they have a targetable role (for example, planning, commanding, or taking part in military operations are targetable roles; being a political spokesperson or propagandist for an organized armed group, who never takes part in planning, conducting or facilitating military operations, may not be a targetable role). The exhaustiveness of the examples stops there, with the

102 Inspector-General of the Australian Defence Force, *Report of Inquiry under Division 4A of Part 4 of the Inspector-General of the Australian Defence Force Regulation 2016 into Questions of Unlawful Conduct Concerning the Special Operations Task Group in Afghanistan*, Public Release Version, November 2020, (Brereton Report), available at: <https://afghanistaninquiry.defence.gov.au/sites/default/files/2020-11/IGADF-Afghanistan-Inquiry-Public-Release-Version.pdf>.

103 *Ibid.*, p. 290.

104 *Ibid.*, p. 290, paras 16–17. The acronym LOAC stands for law of armed conflict and is interchangeable with IHL for the purposes of this article.

statement that “there are a range of factors and indicia that can be used to assist in this identification process”.¹⁰⁵

Codes, instructions and manuals

The examples in this category are perhaps some of the strongest indications of the parties’ understanding of the definition of a civilian, since they constitute the compass for action. The code of conduct for IEA fighters, known as the Layeha,¹⁰⁶ highlights avoiding civilian casualties: “care should be taken to prevent the deaths and casualties of common people”.¹⁰⁷

In the Layeha, the representatives of the Islamic Republic of Afghanistan, its army, police and workers are referred to as “the opposition”, while foreigners are referred to as “infidels”. “Drivers and contractors whose guilt is well-known to the mujahedin can also be attacked directly”,¹⁰⁸ although the Layeha suggests that they may be legitimate targets only while working. Interestingly, for the same category persons, if not “well-known”, punishment is foreseen only if they are captured and found guilty by the provincial judge. Further to the categories of persons who, according to the Layeha, would fall outside the protective scope of “common people” would be organizations that are close to the enemies of the IEA. For example, in May 2019 an attack on the offices of the US NGO Counterpart was justified *inter alia* on the basis that the NGO was funded by USAID to implement the aims of the “invaders” in Afghanistan, that it had an active involvement in the election process, that it trained ANSF fighters, and that it encouraged gender-mixing and promoted “moral corruption in Afghanistan”.¹⁰⁹

Although not a written code designed for combat, *Pashtunwali* provides essential guidance regarding the status that certain categories of people attain. It embraces the protected civilian status of

women, children, as well as members of castes with a socially inferior status, like barbers or musicians. Mullahs as well as Sayyids, i.e. males who are accepted as descendants of the Islamic prophet Muhammad, Hajjis, i.e. persons who have successfully completed the pilgrimage to Mecca, spiritual leaders of Sufi

¹⁰⁵ *Ibid.*, p. 292, para. 27.

¹⁰⁶ On the various editions of the Layeha, see Muhammad Munir, “The Layha for the Mujahideen: An Analysis of the Code of Conduct for the Taliban Fighters under Islamic Law”, *International Review of the Red Cross*, Vol. 93, No. 881, 2011, p. 82, fn. 1. Regarding the Layeha’s applicability, the 2017 Guidance to the Mujahideen explains that “[a]ll of the necessary orders which the mujahideen require have been published by the Islamic Emirate in the general Layeha.” *Mujahideeno ta da Emir-ul-Momineen Larshawoney (The Emir-ul-Momineen’s Guidance to the Mujahideen)*, p. 7, Pashto original available at: <https://web.archive.org/web/20200202172848/http://www.mujali.net/?p=878>.

¹⁰⁷ Layeha, Art. 57(3). “Common people” is one of the ways in which civilians are referred to. Other terms include: Art. 2: *aam kas* (common person); Art. 48: *wolosi khalk* (normal people), *aam wagrey* (normal citizens), *walis* (the populous); Art. 65: *aam khalk* (common people), *mulki khalq* (people); Arts 72, 73: *khalk* (of the people); Art. 81: *mahali khalk* (the local people).

¹⁰⁸ Layeha, Arts 23–25.

¹⁰⁹ IEA, “Updated Information regarding the Martyrdom Attack in Kabul”, 8 May 2019, available at: <https://web.archive.org/web/20190511195113/http://shahamat1.net/?p=157721>.

brotherhoods and other dignitaries should be excluded from military actions due to their holiness.¹¹⁰

The United States, in the DoD *Law of War Manual*, presents the term “non-combatant” to mean military medical and religious personnel, but this term can also include those combatants placed *hors de combat*.¹¹¹ The Manual follows the *a contrario* definition of a civilian, by offering a detailed description of categories of combatants. Other than those who are clearly members of the armed forces, the Manual includes the category of so-called “unprivileged belligerents”.¹¹² Unprivileged belligerents generally are “subject to the liabilities of both combatant and civilian status, and include: persons engaging in spying, sabotage, and similar acts behind enemy lines; and private persons engaging in hostilities”.¹¹³ The latter is explained to refer to “private persons” instead of “civilians” *inter alia* “because private persons who engage in hostilities are liable to treatment in one or more respects as combatants”, and also because “non-military personnel belonging to a State (e.g., persons authorized to accompany the armed forces), who are often called ‘civilians,’ raise a different set of issues that merit special consideration as opposed to the general case of a private person who decides to engage in hostilities”.¹¹⁴

Statements

Beyond the codified guidance, *ad hoc* statements by fighting parties, either issuing orders or reacting to the occurrence of an attack, can also be enlightening sources. Various such statements have been made publicly, either aimed at the fighters directly or as questions posed by various enquirers (media, researchers, etc.).

In 2019, the IEA issued a Weekly Commentary identifying those individuals and groups considered to be legitimate targets by its fighters:

[T]he IEA always endeavours only to aim at those targets which are directly linked to the invaders or the hiring administration and are considered enemies according to Shariah: community facilities, the staff of those facilities, health centres, educational facilities and international charitable humanitarian organisations, all come within those benefactors which the IEA not only does not permit attacks upon but also assists in their provision of services to society. ... Overall, all of those individuals and organisations

110 L. Rzehak, above note 86, p. 11.

111 DoD, *Law of War Manual*, Office of General Counsel, June 2015 (updated December 2016), p. 98, para. 4.1.1.1, p.98. available at: <https://tinyurl.com/38mwxkux>.

112 The ICRC believes that loss of entitlement to combatant privilege or prisoner-of-war status does not necessarily lead to loss of membership in the armed forces: see Interpretive Guidance, above note 25, p.22.

113 DoD, above note 111, p. 101, para. 4.2.3.3.

114 Ibid., p. 155, para. 4.18.1.

which do not have political or military affiliation and do not harm society, are at peace [i.e., protected].¹¹⁵

The IEA, addressing one of United Nations Assistance Mission in Afghanistan's (UNAMA) civilian casualty reports, declared:

[A]ttacks on key [Afghan] regime targets by the Mujahideen have been labeled as attacks on civilians in the UNAMA report and their numbers inflated. For example, if off-duty officers and security personnel were targeted by the Mujahideen, these were called civilian fatalities Targeting government workers involved in martyring, harassing, detention, passing prison terms on Mujahideen and even adjudicating death sentences upon them were labelled as attacks on civilians in the UNAMA report.¹¹⁶

In statements, the IEA has acknowledged various groups of persons as those who should not be attacked, such as religious students, health workers,¹¹⁷ and common villagers.¹¹⁸ It has also explained that it refrains from attacking non-military and unarmed personnel but only targets “enem[ies] that [are] actively engaged in fighting or carrying out espionage activities”.¹¹⁹ One more statement that helps complete the image of the notion of civilian applied by the IEA, its response to the 2020 UNAMA Annual Report, reads: “We are against those who do not behave as civilians, who are armed or have armed persons with them. According to your definition, if the mentioned persons – who you refer to as civilians – are armed, then they cannot be called civilians.”¹²⁰

Turning to government or pro-government forces, operational planning officers at the Operations Directorate of the Ministry of Defense were interviewed and revealed that they conduct “collateral damage estimates” and “pattern of life” analyses in order to identify civilians in the area in the hours or days prior to planned attacks. Dynamic targeting, however, would take place over a one- or two-hour period, during which identification, intelligence vetting and risk assessments for civilians must happen in real time, which increases the likelihood of mistakes.¹²¹

115 IEA, “Weekly Commentary: It Is Not the Policy of the IEA to Strike Civilian Targets”, 20 May 2019, available at: <https://web.archive.org/web/20190528143144/http://shahamat1.net/?p=158956>.

116 IEA, “Remarks by Spokesman of Islamic Emirate concerning Civilian Casualty Report by UNAMA”, 6 February 2017, available at: <https://activist1.blog/2017/02/08/remarks-by-spokesman-of-islamic-emirate-concerning-civilian-casualty-report-by-unama/>.

117 “Raid on Seminary and Airstrike on Clinic”, *Voice of Jihad*, 16 March 2021, available at: <https://piazzadcara.wordpress.com/2021/03/20/afghanistan-war-crime-updates-enemy-bombs-health-center-in-faryab/>.

118 “Dead Consciences and Arghandab Tragedy”, *Voice of Jihad*, 14 December 2020, available at: <https://piazzadcara.wordpress.com/2020/12/17/afghanistan-hypocritical-silence-in-the-face-of-brutality/>.

119 IEA, “Remarks by the Spokesman of Islamic Emirate regarding Targeted Killings of Scholars, Journalists and Political Figures”, 7 January 2021, available at: https://twitter.com/Zabehulah_M33/status/1347023574423515137/photo/1.

120 UNAMA, above note 1.

121 CIVIC, above note 92, p. 13

The United States has explained that it imputes the “hostile intent”¹²² of a non-State organized armed group to all of the group’s members, regardless of whether they are performing a combat function. US Forces Afghanistan (USFOR-A) considered all personnel inside some alleged drug-processing labs to be targetable on the basis of their purported membership.¹²³ According to the United States,¹²⁴ indications that someone is a member of a non-State organized armed group include “following directions issued by the group’s leaders, [and] performing tasks on behalf of the group similar to those provided in a combat, combat support, or combat service support role”.¹²⁵

What is the civilian experience in Afghanistan?

Much ink has been spilled over the civilian harm experienced in Afghanistan. Even though there are as many opinions on the data as there are sources,¹²⁶ there is a commonly agreed conclusion that civilians experience high levels of harm as a result of the conflict. Interestingly, despite the plethora of civilian casualty reporting, there is no *expressis verbis* clarification of how said civilians are defined, with the exception of those reports that explicitly refer to IHL.¹²⁷ A fair assumption would be that these clarifications are absent due to a likely assumption over who civilians are.

UNAMA is probably the most widely cited source for numbers of civilian casualties.¹²⁸ In its first-quarter report for 2021, UNAMA found that “extraordinary levels of harm inflicted on civilians in the Afghan conflict [continue] unabated, with UNAMA finding that the number of civilians killed and injured during the first three months of 2021 [was] significantly higher than a year ago”.¹²⁹ UNAMA identifies ground engagements and non-suicide improvised explosive devices as

122 Note that “hostile intent” is not a term found in IHL. For more on this topic, see Erica Gaston, *When Looks Could Kill: Emerging State Practice on Self-Defense and Hostile Intent*, Global Public Policy Institute, June 2017.

123 USFOR-A, “Response to United Nations Mission in Afghanistan’s (UNAMA) Objections to U.S. Strikes on Taliban Methamphetamine Laboratories”, prepared by the Office of the Staff Judge Advocate, 15 July 2019 (on file with UNAMA).

124 Email communications between UNAMA and a USFOR-A Legal Adviser on 5 August 2019 (on file with UNAMA).

125 UNAMA, *Afghanistan: Protection of Civilians Special Report: Airstrikes on Alleged Drug-Processing Facilities*, October 2019, p. 15, available at: www.ohchr.org/Documents/Countries/AF/SpecialReportUSforAirstrikesBakwa.pdf.

126 The *New York Times* publishes a monthly “Afghan War Casualty Report”, available at: www.nytimes.com/spotlight/afghan-war-casualty-reports.

127 For example, UNAMA explains that “[i]nternational humanitarian law defines ‘civilians’ as those persons who are not members of military or paramilitary forces or fighters of organized armed groups of a party to a conflict. Civilians may lose protection against attacks for such time as they take direct part in hostilities.” UNAMA, “Frequently Asked Questions”, available at: <https://unama.unmissions.org/poc>.

128 However, UNAMA states that it does not document casualties where the civilian was directly participating in hostilities at the time of death or injury.

129 UNAMA, “Need for Violence to End in Order to Stop Thousands of Afghan Civilians Being Killed and Injured in 2021 – UN Report”, 14 April 2021, available at: <https://unama.unmissions.org/need-violence-end-order-stop-thousands-afghan-civilians-being-killed-and-injured-2021-un-report>.

the leading causes of civilian harm, followed by complex attacks, targeted killings, explosive remnants of war, aerial operations, summary executions and shelling.

The bleak list of victims of the Afghan conflict includes members of the media,¹³⁰ educational facilities,¹³¹ civil society activists, members of the judiciary and members of the civilian government administration.¹³² The UN Security Council has further highlighted “healthcare and humanitarian workers, including women in prominent positions, those who protect and promote human rights, and ethnic and religious minorities”.¹³³

UNAMA, when explaining who is a civilian, underlines that it documents attacks against categories of people whose regular activities do not amount to direct participation in hostilities, including public servants and government workers, teachers, health clinic workers, election workers and others involved in public service delivery, political figures and office-holders, and employees of NGOs, as well as civilian police personnel who are not directly participating in hostilities and are not involved in counter-insurgency operations.¹³⁴

A few attacks have received particular attention due to their impact on what appeared to be civilians; no one has assumed responsibility for these attacks. One such attack was the 12 May 2020 attack against a Médecins Sans Frontières (MSF)-supported maternity clinic in Kabul,¹³⁵ which led MSF to cease its support to the clinic. Twenty-four women, children and babies were reported to have lost their lives in that incident.¹³⁶ Another attack which attracted much attention due to its grim *bilan* was the 8 May 2021 attack against a primary school,¹³⁷ which reportedly caused some ninety casualties,¹³⁸ predominantly children.

130 Afghan Journalists Safety Committee, *Annual Report 2020*, Kabul, 2021, available at: <https://ajsc.af/211/ajsc-2020-annual-report>; UNAMA, “Joint Statement of Support for Afghan Journalists and Media”, 3 May 2021, available at: <https://unama.unmissions.org/joint-statement-support-afghan-journalists-and-media>.

131 UNAMA, *Afghanistan: Protection of Civilians in Armed Conflict: Annual Report 2019*, February 2020, p. 27, available at: https://unama.unmissions.org/sites/default/files/afghanistan_protection_of_civilians_annual_report_2019_-_22_february.pdf.

132 UNAMA, “Afghanistan: Protection of Civilians in Armed Conflict, First Quarter Update: 1 January to 31 March 2021”, April 2021, p. 3, available at: https://unama.unmissions.org/sites/default/files/unama_protection_of_civilians_in_armed_conflict_1st_quarter_2021_2_0.pdf.

133 UNAMA, “Security Council Press Statement on Targeted Attacks against Civilians in Afghanistan”, 12 March 2021, available at: <https://unama.unmissions.org/security-council-press-statement-targeted-attacks-against-civilians-afghanistan>.

134 UNAMA, above note 127.

135 MSF, “‘They Came to Kill the Mothers’ in Kabul Maternity Hospital Attack”, 14 May 2020, available at: www.msf.org/they-came-kill-mothers-kabul-maternity-hospital-attack.

136 “MSF Afghan Maternity Ward to Close after Deadly Gun Attack”, *BBC News*, 16 June 2020, available at: www.bbc.com/news/world-asia-53059022.

137 “Blast Kills Dozens Near School in Afghan Capital Kabul”, *Al Jazeera*, 8 May 2021 (updated 11 May 2021), available at: www.aljazeera.com/news/2021/5/8/blasts-kill-dozens-near-school-in-afghan-capital-kabul.

138 “Bombing Outside Afghan School Kills at Least 90, with Girls as Targets”, *New York Times*, 8 May 2021 (updated 16 May 2021), available at: www.nytimes.com/2021/05/08/world/asia/bombing-school-afghanistan.html.

The case of the police remains complex. Police have been described as civilians,¹³⁹ but at the same time, in many of the reports counting and assessing the loss of life in Afghanistan, police casualties are set apart from “other” civilian casualties.¹⁴⁰

At times it could also be said that civilians become the object of attack because they have been liable to some “ethical”¹⁴¹ harm, in accordance with revisionist just war theory.¹⁴² There is no known statement which would demonstrate that such practices indicate a perception of fighter status.

Undoubtedly, it is very difficult to ascertain all the facts regarding a person’s exact conduct at the time of an attack, such as whether the person was taking direct part in hostilities at the time of the attack, whether they were considered to be victims of lawful incidental harm in an attack with a legitimate military target, or whether they were a member of an organized armed group by virtue of their continuous combat function. Nevertheless, one point to be made here is that, absent of incorporation into armed forces or membership of the armed wing of an armed group, civilian status is to be assumed. However, this does not preclude addressing the various other forms of threats or criminal activity that these persons might engage in (and which, sometimes, targeting aims to address).

Reconciling the definition

The numbers of civilian casualties, as explained above, have traditionally shown disparities between different sources. One of the main reasons for this is that those who are keeping track of civilian casualties in Afghanistan¹⁴³ use “different methodologies to track civilian harm and differ on legal interpretations of who is a civilian under IHL”.¹⁴⁴

The analysis of the Afghan context and the opinions expressed by fighting parties regarding said legal interpretations are telling. If one conclusion is to be drawn from all the different parameters, it is the following: the parties tend to consider as civilians those who in no direct or indirect way would support,

139 A. De Lauri and A. Shurke, above note 74, p. 503.

140 See, for example, the *New York Times* “Afghan War Casualty Reports”, above note 126.

141 Founded on religion, culture or otherwise.

142 Contemporary just war theory is divided into two broad camps: revisionists and traditionalists. Traditionalists seek to provide moral foundations for something close to current international law, and in particular the laws of armed conflict. Revisionists argue that international law is at best a pragmatic fiction—it lacks deeper moral foundations. Philosopher Seth Lazar believes that “killing civilians typically involves an especially objectionable mode of harmful agency—their suffering is used as a means to compel their compatriots and leaders to end their war. Combatants, by contrast, are typically killed in order to avert the threat that they themselves pose.” Seth Lazar, “Just War Theory: Revisionists Versus Traditionalists”, *Annual Review of Political Science*, Vol. 20, 2017, p. 51.

143 Notably the NATO Resolute Support mission, the Afghan Independent Human Rights Commission and UNAMA.

144 Sahr Muhammedally and Marc Garlasco, “Reduction of Civilian Harm in Afghanistan: A Way Forward”, *Just Security*, 25 February 2020, available at: www.justsecurity.org/68810/reduction-of-civilian-harm-in-afghanistan-a-way-forward/.

endorse or be involved in the enemy's "war efforts". Things start getting more complicated when one's behaviour is perceived as supporting, endorsing or being involved in such efforts – essentially, that person's conduct is labelled as hostile and, in the eyes of the fighting parties, that changes the person's status.

The ultimate aim of parties to an armed conflict is to prevail over the enemy's armed forces. For this reason, the parties to a conflict are allowed to attack (or at least are not prohibited from attacking) each other's military objectives or individuals not entitled to protection against direct attacks.¹⁴⁵ The general war effort and war-sustaining activities also include activities that merely maintain or build up the capacity to cause such harm – as opposed to the actual conduct of hostilities, which is designed to bring about harm.¹⁴⁶

But then, if causing harm is allowed, what is wrong with a person's status changing due to their support for the war effort? IHL cannot stop the fighting – but its aim is to limit the destruction and suffering. The Commentary on AP I provides the sentiment that permeates IHL's application: "There is no doubt that armed conflicts entail dangers for the civilian population, but these should be reduced to a minimum."¹⁴⁷ That minimum is defined with the help of military necessity.¹⁴⁸ Civilian casualties, in the form of death and injury, have long been considered one of the main causes of suffering. It would then follow that practices resulting in death and injury should be reduced to a minimum. Civilian populations have been known to be attacked on the pretext of claimed military necessity.¹⁴⁹

IHL does not see "innocent" or "guilty" civilians, but rather a uniform category which is distinct from that of combatants/fighters. If an individual's behaviour would not render them a fighter (under the continuous combat function test) or a civilian taking a direct part in hostilities, but that person might have committed a crime under applicable rules or in some way poses a security threat, then there are still other appropriate, non-lethal ways to address the risk. These could include detention and conferral of a fair trial.¹⁵⁰

145 ICRC, above note 14, p. 13.

146 Interpretive Guidance, above note 25, p. 52.

147 ICRC Commentary on the APs, above note 13, para. 1936.

148 The principle of military necessity permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise prohibited by IHL. The notion of military necessity has been understood to require that the measure be taken primarily for some specific military purpose, that it is materially relevant for the attainment of the military purpose, that it is the least injurious of those that were reasonably available, and that the injury that it would cause is proportionate to the gain it would achieve. Finally, the military purpose for which the measure is taken, as well as the measure itself, need to be in conformity with IHL. See Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law", *Boston University International Law Journal*, Vol. 28, No. 1, 2010, pp. 62–93, 120–121.

149 Emily E. Camins, "The Past as Prologue: The Development of the 'Direct Participation' Exception to Civilian Immunity", *International Review of the Red Cross*, Vol. 90, No. 872, 2008, p. 868.

150 The argument has already been made that there is an obligation in IHL to use the least harmful means in conducting hostilities, and in particular in targeting persons, when possible and when such means will achieve the same military advantage. See Ryan Goodman, "The Power to Kill or Capture Enemy Combatants", *European Journal of International Law*, Vol. 24, No. 3, 2013, quoted in Anne Quintin, *The Nature of International Humanitarian Law: A Permissive or Restrictive Regime?*, Edward Elgar, Cheltenham, 2020, p. 263.

An alternative option is to let fighting parties decide *ad hoc* on the basis of conduct who is a target, for some abstract military purpose, but this could lead to a dangerous slippery slope.¹⁵¹

A moral and humanitarian argument can be added to the legal aspect: “just as the dissemination of humanitarian law contributes to the promotion of humanitarian ideals and of a spirit of peace among nations, the faithful application of such law can contribute to reestablishing peace, by limiting the effects of hostilities”.¹⁵² It has been posited that IHL functions as an overall restrictive regime,¹⁵³ supported by opinions such as that “the law of war does not confer rights upon states but only places limitations on their actions in the interest of humanity”.¹⁵⁴

Conclusion

In the first half of 2021, the UN claimed that civilian casualties in Afghanistan had reached unprecedented highs.¹⁵⁵ The so-called “fog of war”, among other reasons, could be blamed for this concerning record – as well as, at times, disregard for IHL in favour of perceived military gains. In the author’s experience, perceptions of civilian status in Afghanistan are often fluid, and this is one of the contributing factors to the sad reality. What this article has aimed to do is to stir reflection on this topic in the hopes that the parties engaged in conflict in Afghanistan will adopt an approach to determining civilian status with more consideration for IHL and its more humane interpretation.

The fact of belonging or not to the armed forces or an organized armed group attributes status to an individual: combatant or civilian. In case of doubt, an individual is to be perceived as a civilian. If their conduct appears hostile, the question needs to be posed as to whether the individual is taking a direct part in hostilities. If they are, they can be attacked, but remain a civilian.

Ultimately, targetability in IHL is not there to adjudicate whether a person is involved in some way in the conflict. Calling someone a civilian does not render them a 100% neutral, politically apathetic entity. Targetability in IHL is also not there to determine whether an individual has committed a crime – under national

151 Bissonnette carried out an analysis on armed groups’ perception of the concept of civilians in NIAC. She found four different approaches: the specific-act approach, the membership approach, the functional non-privileged combatancy approach, and the direct participation in hostilities approach with extended temporal scope in light of the commitments and undertakings of various armed groups. She concluded, however, that all approaches are challenged by their feasibility when transposed into the midst of an armed conflict and their acceptability by the participants thereof. C. Marquis Bissonnette, above note 10.

152 ICRC Commentary on the APs, above note 13, para. 20.

153 A. Quintin, above note 150.

154 Richard Baxter, “The Role of Law in Modern War”, *Proceedings of the American Society of International Law at Its Annual Meeting*, Vol. 47, Cambridge University Press, Cambridge, 1953, referenced in A. Quintin, above note 150, p. 63, fn.18.

155 UNAMA, “Civilian Casualties Set to Hit Unprecedented Highs in 2021, Unless Urgent Action to Stem Violence – UN Report”, 26 July 2021, available at: <https://unama.unmissions.org/civilian-casualties-set-hit-unprecedented-highs-2021-unless-urgent-action-stem-violence-%E2%80%93-un-report>.

or international law – or to determine whether an individual could constitute some form of security threat. These issues can be handled in more humane, non-lethal ways, and still achieve the goal. Status and targetability in IHL are only meant to offer the fighting parties the ability to neutralize a specific, concrete and direct military threat. At the end of the day, the war can be won with few, if any, civilian casualties.