

Historical overview of the concept of combatant

21 september 2010

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Basic principles of IHL

- proportionality
- discrimination
 - a distinction has to be made between combatants and non-combatants (civilians)
 - combatants : military, participants in hostilities
 - non-combatants : civilians, non participants in h.



Customarily law

- Study of ICRC (Jean-Marie Henckaerts)
 - all members of armed forces except medical and religious personnel (rule 3)
 - including groups under responsible command to that party (rule 4)
 - civilians are non-members of the armed forces (rule 5)



Civilians - Combatants

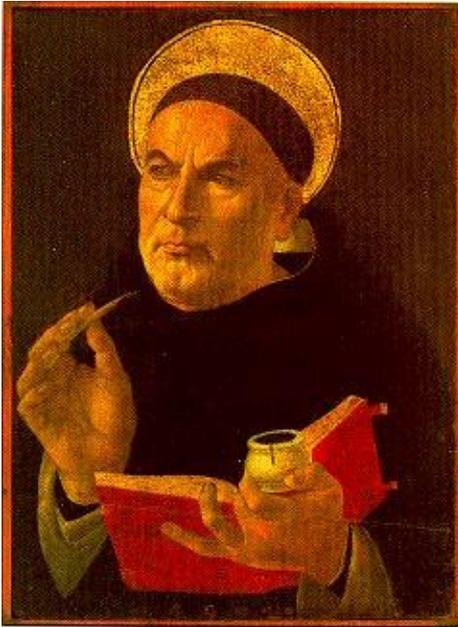
■ civilians

- do not take a direct part in hostilities
- no right to take part in hostilities
- right to be respected
- may be punished for taking part in host.

■ combatants

- do take a direct part in hostilities
- right to take part in hostilities
- must respect IHL
- may not be punished for participation

Early ages



- Bible : Do violence to no men ... and be content with your pay. Lk. 3:14
- Used by St Augustine and St Thomas of Aquino to justify war, under conditions of Just War
- fighting outside legitimate authority : bandits



Grotius 1625

- Upcoming of nation-state
- The law of war and peace, 1625
- A public war is “declared at the same time ... upon all a sovereign’s subjects”
 - ‘right to kill’ which arises in war extended ‘not only to those who actually bear arms, or are subjects of him that stirs up the war, but in addition to all persons who are in the enemy’s territory’
 - ‘One must take care, so far as is possible, to prevent the death of innocent persons, even by accident.’
- In footsteps of Gentili, Suarez, Vitoria



17th – 18th century

- war became very much a game between professionals (expensive)
- almost no involvement of civilian population
- military professionalism : mastering armed opponents, not on civilian population



Revolutionary wars

- end 17th, beginning 18th Century
- transition from dynastic wars of Kings to war of Nation-at-arms
- increasing participation of civilians (food, hiding, guerilla, information, ...)
- response : ferocious, no distinction between non-violent political opposition and violent resistance



Lieber code

- legal status of guerrilla warfare ?
- enemies included civilians
- ‘The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit.’
- when guerrilla parties aid the main army of the belligerent in ‘fair fight and open warfare’, they should be treated as regular partisans. If, however, they resort to ‘occasional fighting and the occasional assuming of peaceful habits, and to brigandage’, they should not be protected by the laws of war



19th century

- St Petersburg declaration : The only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy
- The Hague declaration art 25 prohibits “the attack or bombardment, by whatever means of towns, villages, dwellings, or buildings which are undefended” 1868



19th, General declarations

- Oxford manual 1881
- Brussels declaration
- Brussels protocol 1874
- Wheaton, Elements of International Law 1886

All go in the same sense of protecting civilians who do not take part in hostilities, although the definition of “not taking part” could wildly differ



20th century – Total war

- No positive law protecting civilians
- No positive definition of civilian
- Contribution of population to military effort is increasing
- More involved in supplying arms
- Great debate about ammunition workers
- Intermediate position between combatants proper and non-combatants
- Quasi-combatants



20th century – Total war

- Rolland, Revue de Droit International
 - armament workers...occupy a position intermediate between the combatants proper and the non-combatants who are still employed on their peacetime trades and professions.
- Spaight
 - ‘the old clear-cut division of enemy individuals into combatants and non-combatants is no longer tenable without some qualification’



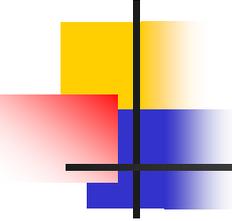
WW II

- war had come to be viewed as a totalitarian affair to which all a nation's citizens contributed through industry and morale
- states initially sought to avoid the direct targeting of civilians
- the area and extent of aerial bombardment continually expanded during the WW II



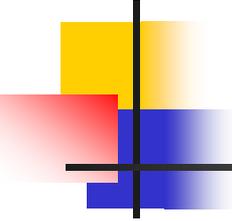
Nurick

- *At first, the bombing was confined to military objectives in the actual theater of operations. Then bombing was extended to military objectives, such as factories, communications, and the like in the rear of the enemy's lines, with some regard for the civilian population. Finally, it was extended in many instances to the bombing of cities in order to affect the morale of the civilians.*



Geneva Conventions 1949

- Revision of 1929 conventions not of The Hague Conventions
- Addition of resistance groups to combatants
- Common art 3 protecting ‘persons taking no active part in the hostilities’



Additional protocol I

- 2 major concerns
 - increase the protection afforded to the civilian population
 - protection of civilians and guerrilla fighters in the context of wars of national liberation
- Civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities (Art 51 (3))