UNIT 8 WHO ARE THE PARTICIPANTS IN WAR?

Structure
8.1 Introduction
8.2 Objectives
8.3 Combatant Status Before Protocol I of 1977
  8.3.1 Combatants and Non-Combatants
  8.3.2 Members of Armed Forces
  8.3.3 Irregular Forces
8.4 Third Geneva Convention of 1949
  8.4.1 Guerillas and Mercenaries
8.5 Combatant Status after Protocol I
  8.5.1 Combatants and Non-Combatants
  8.5.2 The Armed Forces
8.6 Loss of Combatant Status
8.7 Special Exception to the Rule of Distinction
8.8 Spies
8.9 Mercenaries
8.10 Trial and Punishment of Unlawful Combatants
8.11 Summary
8.12 Terminal Questions
8.13 Answers and Hints
8.14 References and Suggested Readings

8.1 INTRODUCTION

Warfare being one of the oldest collective activities of mankind, it is no surprise that it has attracted a considerable body of law governing its conduct. The purpose of international humanitarian law is to limit the suffering caused by war by protecting and assisting its victims as far as possible. The law therefore addresses the reality of a conflict without considering the reasons for or legality of resorting to force. It regulates only those aspects of the conflict which are humanitarian concern. It is known as jus in bello (law in war). Its provisions apply to the warring parties irrespective of the reasons for the conflict and whether or not the cause upheld by either party is just. In the case of international armed conflict, it is often harder to determine which state is guilty of violating the United Nations Charter. The application of humanitarian law does not involve the denunciation of guilty parties as that would be bound to arouse controversy and paralyse implementation of the law, since each adversary would

claim to be a victim of aggression. Moreover, IHL is intended to protect war victims and their fundamental right, no matter to which party they belong.

Until the end of the First World War, resorting to armed force was regarded not as an illegal act but as an acceptable way of setting differences.

Inseparable from one another in the history and practice of IHL are its very important categories: combatant and non-combatants and prisoners. They are inseparable because they are the law regarding prisoners of war, which for many war-involved persons has long been and perhaps still is the part of IHL that most moves them, could only develop and harden on the basis of a clear understanding as to which persons were entitled to its privileges and protections, and which were not. The matter was put on its modern footing by the Fourth Geneva Convention (1907).

In this unit the main objective is to understand the concept of the participants in the war and how can be protected under the Geneva Convention.

8.2 OBJECTIVES

After reading this unit, you should be able to:

- explain the meaning of Combatants and Non Combatants;
- discuss how Combatant Status can be lost?
- discuss whether Spies are given Protection under the Geneva Conventions and Additional Protocol?; and
- describe who are the Participants in War?

8.3 COMBATANT STATUS BEFORE PROTOCOL I OF 1977

8.3.1 Combatants and Non-Combatants

Perhaps one of the most basic distinctions in the law of armed conflict is that between combatant and non-combatant. Acts of hostility cannot be committed by just anybody. The matter can be described as:

‘Private individuals who take up armed and commit hostilities against the enemy do not enjoy has, according to a customary rule of international law, the right to treat such individuals if they organise themselves in a manner which, according to the Hague Convention, confers upon them the status of members of regular forces.

Thus war is a matter for states and their armies. If private individuals commit acts of hostility they are liable to trial as war criminals not because what they do necessarily infringes the laws governing the conduct of hostilities, but because the waging of war by private individual is itself unlawful.

The law therefore, recognizes two classes, the combatants, who:

- Can wage war
What are the Basic Concepts of IHL?

- Can themselves be attacked by the enemy,
- But who on capture are not liable to be tried as ordinary criminals but are accorded the special status of Prisoners of War.
- And the non-combatant:
  - Who can lawfully be attacked,
  - But who cannot themselves commit acts of hostility or if they do will be liable to trial as war criminals.

Thus the two classes have distinct privileges, duties and disabilities. The 1929 edition of the British Manual of Military Law Commented:

"it is one of the purpose of the law of war to ensure that an individual must definitely choose to belong to one class or the other, and shall not be permitted to enjoy the privileges of both; in particular that an individual shall not be allowed to kill or wound members of the army of the opposing nation and subsequently, if captured or in danger of life, pretend to a peaceful citizen." It is interesting that the distinction between combatant and non-combatant has become increasingly blurred.

Self Assessment Question

1) What do you mean by Combatant?

8.3.2 Members of Armed Forces

In considering first who is in fact entitled to combatant status it might be better to begin with the most obvious, and probably the most numerous group in this category that begins members of the armed forces themselves. They are, of course, usually referred to as regular combatants.

It would seem to be generally accepted that a State has the exclusive right to determine the method of recruitment of its armed forces whether by conscription or voluntary enlistment. Further a State is also at liberty to determine the composition of its armed forces, whether they be regular, part time volunteer or militia troops. This follows from Article 1 of the Hague Rules of 1907 which provides that in countries where militia or volunteer corps constitute the army or part of it they are included in the denomination "army".

It is important to note that the granting of the prisoner of War status is not synonymous with combatant status. At least since the Hague Rules the law has accorded the right to PoW status to certain persons who are non-combatants, for example the civilians accompanying armed forces, the so called “followers” and war correspondents. Also a state is of course at liberty to grant PoW status as a matter of good w-will. Thus there will be more persons entitled to or granted PoW status than the combatants themselves.
However, returning to regular armies, the question of colonial troops and colonies is now something of the past. A more modern problem arises from the inclusion in a State’s armed forces of persons who are not nationals of the State concerned. In this regard a distinction must be drawn between volunteers and conscripts.

Individual volunteers in regular armies, in themselves, present no real problem. The concept of foreign “volunteers,” and, in the ranks of the armies of the more wealthy nations is not a new one. It is perhaps interesting that the Swiss, who we now think of as the classic neutrals, formed a large part of the French Army from about 1480-1884, and indeed Napoleonic’s Grand Army of 700,000 men consisted of 300,000 Frenchmen and 400,000 foreigners. In more modern times the existence of the French Foreign Legion or the British Brigade of Gurkhas would seem to be accepted internationally. Nor would the participation by its nationals in someone else’s war seem to affect the neutral status of the country concerned. For example, the participation numerous British volunteers in the Spanish Civil War did not affect the United Kingdom’s neutrality in regard to the two sides of that particular conflict.

Here one is referring to individual volunteer in the true sense; that is those individuals who, motivated by conscience or whatever travel abroad to join a foreign army. The organisation or recruitment in one State of so called “volunteer” corps for the benefit of another State would be a violation of Article 4 of the Vth Hague Convention of 1907 dealing with neutrality. Many states had in any event, before 1907, banned by domestic legislation this practice of recruitment of foreign armed within their own territory, for example, the Swiss law of 30th June 1859 and the English Foreign Enlistment Act of 1870.

The individual volunteer foreigners are not a problem. The same however cannot be said of conscription, which involves the different consideration of the enforced participation in national defence by foreigners already resident in the state concerned. Recently, particular during the Vietnam War, States appear to have abandoned this practice. Whist this action may have been more diplomatic than legal, it would seem to have led to the practice becoming moribund, if not dead.

In summary therefore, members of the armed forces of belligerents, who will in most cases form the great majority of combatant, will have combatant status. Further it seems that states have effective control over combatant status because they are generally omnipotent in the recruitment and composition of their armed forces. The one exception is the conscription of resident aliens who are subsequently sent into battle, but this is a relatively minor problem.

It is further important to note that not all members of regular forces are combatants. This has been evident at least since 1907 when Article 3 of the Hague Rules recognized that the armed forces of belligerents could consist of combatants and non combatants. The vast majority of course will be combatants but it will be recalled that in modern times the Geneva Conventions of 1949 accorded a special non combatants standing which is restricted to medical personnel and champions. Thus like civilians they cannot take an offensive part in battle, are not themselves legitimate objectives and have a special standing on capture they are in effect “retained” rather than being PoW, and thus must be repatriated if they are superfluous to the religious or medical needs of PoW also held. The term incidentally, includes not only doctors and nurses but also embraces a wide range of specialist technicians, maintenance staff, drivers, cooks and administrators, providing that are exclusively assigned to medical units.
8.3.3 Irregular Forces

Non-regular combatants, that is those combatants who are not members of the regular armed forces, are usually called “irregular combatants”.

Historically these fall into two groups, the leee en massee and the franc-tireur.

The origin of the term leee en massee would seem to lie in France and related to the related to the requirement for the whole population to join the army, in fact conscription or mobilisation of everybody irrespective of age. The term was so understood by Cornot’s decree of 1793.

The expression is more generally understood to mean the taking up of arms by the population of a territory to resist or repel occupation, such action occurring before the occupation is accomplished and whether such rising happens spontaneously or possibly also at the call of the authorities of the country to be occupied.

This interpretation is certainly the connotation given to the term by Article 2 of the Hague Rules of 1907. This provides that:

“The inhabitant of a territory which has not been occupied, who, on the approach of the enemy, spontaneously take up arms to resist the invading troops without having had time to organize themselves in accordance with Article 1 shall be regarded as belligerents if they carry arms openly and if they respect the laws and customs of war.”

So it is clear that irregular troops in these circumstances forming a leee en massee would be accorded combatant status if they complied with the two conditions namely the overt carrying of arms and respect for the laws of war. No such recognition has however been accorded to the second category of irregular combatant, the franc-tireur. This term has never been precisely defined but would seem to signify every individual who, without being a part in wartime operations, whether by patriotic motives or otherwise. “True, and we can see the trees on which you hanged them.”

The term was certainly so understood by the Prussians who rose as irregulars against Napoleon’s army. However in their turn the Prussian Government in 1870, when faced with franc-tireurs acting on behalf of France executed them. When it was pointed out that the franc-tireurs were only doing what the Prussians had done in the previous war, Bismarck is reported to have replied, “True, and we can see the trees on which you hanged them.”

So the golden rule, at least in those days, was if you are going to be an irregular combatants make sure you fall into the relatively restricted category of leee en massee and not that of franc-tireur.

8.4 THIRD GENEVA CONVENTION OF 1949

Article 4A(2) of the 1949 Convention as follows:

“Members of other militias and members of other voluntary corps, including those of organised resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organised resistance movements, fulfil the following conditions.”
Then follow the four conditions in Article I of the Hague Rules applying to militia and volunteer forces that they must:

i) be commanded by a person responsible for his subordinates

ii) have a fixed distinctive sign recognisable at a distance.

iii) carry arms openly and

iv) conduct their operations in accordance with the laws of the war.

Some believe that the last of these conditions, which with the requirement to carry arms openly is one of the two requirements for combatant status as a *levée en masse*, has made it reasonably clear that those specified in Article 4A(2) as entitled to PoW status have in fact been accorded combatant status. Whether or not this is correct, there would certainly seem to be a tendency in more modern times, not soundly supported in law, of identifying PoW with lawful combatant status. This tendency would seem to date from the 1949 Convention. If so this would mean that the Geneva Conventions have amended and extended the class of lawful combatants in The Hague rules. The real practical difficulty of this new provisions is however obvious. Most resistance fighters in occupied territory are unlikely to be able to distinguish themselves so as to take advantage of the provision without risking almost certain discovery and capture, which for practical purposes will put an end to the resistance.

8.4.1 Guerillas and Mercenaries

However, the Conventions of 1949, to that extent at least, had attempted to sort out problems which had arisen in World War II. But the law of armed conflict seems to be something akin to the Sorcerer's Apprentice; no sooner is one problem since 1959 have included those of guerrillas, mercenaries and freedom fighters, generally involved in armed conflicts, or more usually liberation struggles of one sort or another in the third world, even if the international character of such conflicts has not been evident.

Not that there is anything new about guerrillas, of course. This phenomenon dates back to ancient times and made a modern re-appearance in the popular Spanish uprising against Napoleon's armies. In recent years however guerrilla fighting would seem to have been characterised by:

i) the fact that the activities of guerrillas are generally coordinated with a regular army.

ii) the diversity of training of the fighters.

iii) the mixed nature of the composition of forces used, whether made up of nationals or foreigners, or even renegades and deserters.

iv) the diversity of their methods of combat going from clandestine actions to open fighting, with very often every success imaginable for example sabotage, assassination, the taking of hostages and attacks against the civilian population.

In all, therefore, this amounts to a form of non conventional warfare which corresponds neither to the classic forms of war not the framework of the Hague Regulations and the Geneva Conventions.
Mercenaries too have many of the characteristics of guerrillas. They are not new either, making a modern reappearance in liberation struggles in such places as Angola, Biafra and Katanga after a relative eclipse in the 19th Century. It is perhaps a sad note to that the United Kingdom seems to have been something of a recruiting ground for mercenaries, leading to the Diplock Commission which reported on 3rd August 1976 and pointed to the incapability of the Foreign Enlistment Acts of 1819 and 1870 to civil wars.

It was of course with a view to regulating these new problems, and others, that the Diplomatic Conference was arranged in Geneva from 1974-1977.

**Self Assessment Question**

2) Explain the concept of Armed Forces under Third Geneva Conventions? Do the ‘Mercenaries’ Comes under the definition of Armed Forces?

---

**8.5 COMBATANT STATUS AFTER PROTOCOL I**

The distinction between members of the armed forces and civilians, combatants and non-combatants, has become increasingly blurred in recent conflicts through the participation of civilians as part time combatants. Nevertheless it remains one of the purposes of the law of armed conflict to ensure that an individual who belongs to one class or the other shall not be permitted to enjoy the privileges of both. The necessity to draw a distinction between civilians and combatants has been reaffirmed by Protocol I.

**8.5.1 Combatants and Non-Combatants**

In the past the expression combatant has been used in several senses but the expression has now acquired a technical meaning under protocol I which defines combatants as being those who have the right to participate directly in his hostilities. Persons who do not have this right are non-combatants. It is as simple as that- or perhaps it is not so simple.

The Hague rules method of allowing states to decide which members of its armed forces should be treated as non combatants was thought likely to cause confusion under modern conditions of warfare and has been abolished.

Protocol I provides that all members of the armed forces of a party to a conflict are combatants with the exception only of medical personnel and chaplains. Members of the armed forces who are permanently assigned and exclusively devoted to civil defence organizations are prohibited from participating directly in hostilities and accordingly must be also considered as being non combatant. However, if they fall into the power of an adverse party, they are entitled to POW status.

A civilian, a person who does not belong to the armed forces is always a non-combatant. He has no right to participate directly in hostilities unless taking part in a *levee en masse*. Any civilian who does participate by committing hostilities, are
medical personnel and chaplains and other members of the armed forces who have lost their combatant status, such as personnel permanently assigned to civil defence duties. However, non-combatants members of the armed forces are legally permitted to defend themselves against acts of violence directed at themselves personally and for this purpose the use of firearms may be justified. Indeed medical personnel specifically do not lose their protection by being armed and by using arms in their own defence and in the defence of the wounded and sick in their charge.

8.5.2 The Armed Forces

Under the Hague Rules and Geneva Conventions, distinctions were made between forces. Any such distinction in international law has now been abolished by Protocol I. Membership of the armed forces is unaffected by gender, race, manner of joining or nationality. Essential pre-requisites for recognition of an armed force are that it must be:

a) an organized armed forces, group or unit; and

b) under a command responsible to a party to the conflict for the conduct of its subordinates, even if that Party is represented by a government or authority not recognised by an adverse party, and

c) Subject to an internal disciplinary system which inter alia, enforces compliance with the rules of international law applicable in armed conflict.

The requirement that an armed forces should be under a command responsible to a party to the conflict for the conduct of its subordinate is clearly satisfied if the commander is properly commissioned as an officer, or is otherwise recognized as a commander by the Party concerned. However, particular in the case of resistance movements in occupied territory, formal state recognition is not necessary and an organization may be formed spontaneously and appoint its own officers. The essential feature of this requirement is that the commander should accept both responsibility for the acts of his subordinates and equally his responsibility to, and his duty to obedience to, the orders of the power upon which he depends. Partisans acting on their own individual responsibility do not comply with this requirement, so they are not member of an armed force. In the case of national liberation movements there must be both recognition by the appropriation regional inter governmental organisation and a declaration to be bound by the Geneva Conventions and Protocol I.

To ensure that armed forces comply with the international law of armed conflict, they must be subject to an effective disciplinary system which enables compliance to be enforced. Any force, groups or unit which in the course of its operations, regularly fails to obey the law would clearly be regarded as not being subject to an effective disciplinary system and it would not be a legally recognisable armed force under international law. The members of such a force would not be entitled to combatant status and would be liable to the trial and punishment in the same way as other non-combatants who participate in hostilities.

8.6 LOSS OF COMBATANT STATUS

Persons who do not belong to the armed forces as defined in Protocol I and who are not part of a le to the war, can never acquire combatant status. On the other hand, combatant members of armed forces, cannot as a general rule lose their combatant status. Protocol I makes it clear that this status is retained even if the individual concerned violates the rules of international law applicable in armed conflict.
Article 44(3) of Protocol I provides both a general rule and an exception. Under the general rule and in order to effects of hostilities, combatants are obliged to distinguish themselves from the civilian population from the themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. This rule superseded the condition contained in the Hague Rules and in the third Geneva Conventions which require the carrying of arms openly and having a fixed Protocol I considered that the observance of those stringent conditions was impracticable in certain circumstances of modern warfare. Nevertheless, the need for combatants to be distinguish themselves from civilians will be taken to be combatants. While that might benefit some irregular fighters, it gravely adds to the dangers of war for civilians.

Protocol I does not specify the manner in which combatants should distinguish themselves. Certainly there is no difficulty in the case of regular troops whose uniform should in itself provide sufficient distinction. Irregular non-uniformed forces must, however, take some positive steps to identify themselves as being combatants rather than civilians. The open carrying of arms and the wearing of a fixed distinctive sign visible at a distance would clearly suffice but on occasion something less than this might be acceptable the criterion is whether members of the adversary forces are able to recognize that the persons concerned is in fact a combatant, and therefore a legitimate target, rather than a civilian who is protected under international law. So, essentially the question of whether adequate distinction has been made is a matter of fact which may have to be determined by the tribunal before whom a person accused of violating the rule of distinction is brought.

8.7 SPECIAL EXCEPTION TO THE RULE OF DISTINCTION

However, Protocol I, in Article 44(3), recognizes that there are situation in armed conflicts where, owing to the nature of the hostilities, an armed combatant cannot so distinguish himself. This is the “special exception” mentioned above. In such situations, a special rule applies and status as a combatant is retained provided that the person concerned carries his arms openly:

During each military engagement, and

During such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.

This, in such situations there is no obligation for a combatant to distinguish himself from the civilian population and thereby seek to obtain the protection from attack given to the latter.

Self Assessment Question

3) Explain the Combatant Status and How Combatant Status can be Lost?
8.8 SPIES

The obtaining of information through the employment of spies is lawful but that does not prevent the punishment, under certain conditions, of individuals captured while procuring intelligence in other than an open manner. Under the Hague Rules as amplified by Protocol I, a spy is any person who, when acting clandestinely on or false pretences, obtains or endeavours to obtain information in the zone of operations of a belligerent or in territory controlled by a belligerent with the intention of communicating it to a hostile party. A person so acting is engaged in espionage. Civilians in occupied territory, even outside the zone of operations, who furnish information to the enemy, while not being 'spies' nevertheless usually contravene security laws introduced by the occupying power and may be tried and punished accordingly.

Any member of the armed forces of a party to the conflict, who falls into the power of an adverse party while actually engaging in espionage may be treated as a spy and is not then entitled to the status of PoW.

He is nevertheless to be treated humanely and his trial is to respect established judicial safeguards. A spy may not be punished without first having been tried and convicted.

On the other hand a member of the armed forces of a party to the conflict who gather information in territory controlled by an adverse party while wearing the uniform of his own armed forces is not to be regarded as spy. In wearing uniform, he would not be "acting clandestinely or on false pretence."

Similarly where a member of an armed force who is resident of territory occupied by an adverse power, gathers or attempts to gather military intelligence for his own side within that territory, he is not to be treated as a spy unless:

a) he acts through false pretences or deliberately in a clandestine manner, and
b) he is captured while actually engaging in espionage.

From this it follows that a spy who is resident of occupied territory who has been identified as such but not captured at the time and who is subsequently captured, does not then forfeit any entitlement to POW status on account of his earlier activities.

A member of the armed forces of a party to the conflict who has engaged in espionage and who is resident of the territory occupied by an adverse party, will not be treated as a spy unless he is captured before he has rejoined the armed forces to which he belongs.

8.9 MERCENARIES

Within the definition contained in Protocol I, mercenaries are not entitled as of right to be combatants or PoW but could be accorded POW status if the party to the conflict capturing them so desired. A mercenary is any person who:

a) is specially recruited locally or abroad in order to fight in an armed conflict;
b) does, in fact, take a direct part in the hostilities;
What are the Basic Concepts of IHL?

c) is motivated to take part in the hostilities essentially be the desire for private gain, and in fact is promised by or on behalf of a Party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar ranks and functions in the armed forces of that party;

d) is neither a national of a Party to the conflict nor a resident of territory controlled by a Party to the conflict;

e) is not a member of armed forces of a party to the conflict; and

e) has not been sent by a State which is not a Party to the conflict on official duty as a member of its armed force. Thus, any member of the armed forces of a State Party to the conflict or any member of the armed forces of any other State who is sent by that first State, is not a mercenary. For example, observers or advisers who are members of the armed forces of States other than those engaged in hostilities are not mercenaries.

Self Assessment Question

4) What type of protections are given to the Spies if they participate in the war?

-----------------------------
-----------------------------
-----------------------------
-----------------------------
-----------------------------

8.10 TRIAL AND PUNISHMENT OF UNLAWFUL COMBATANTS

Persons who participate directly on hostilities when they have no right so to do, for example non-combatants, mercenaries and members of armed forces, are under international law liable to trial. Until their trial, these persons although not PoWs are nevertheless to be given equivalent protection.

The death penalty may be imposed although a lesser penalty may be provided by the regulations establishing the court of trial. Under no circumstances may punishment be imposed without trial and the recognized principles of judicial procedures must in all cases be followed.

8.11 SUMMARY

- In this unit, we discussed the meaning of the Combatants and the Non Combatants Status. Moreover we analyzed who can Participant in the war under Geneva Conventions and Additional Protocol I.

- We further discussed the participants in the war other than the Armed Forces and protection available to them under the Geneva Conventions.

- We also discussed the role of Spies and under which conditions then can be treated as Prisoner of War.
8.12 TERMINAL QUESTIONS

1) Can a person who does not belong to the armed forces as defined in Protocol I and who are not part of a *levee en masse* acquire combatant status?

2) Who are the Participants in the War? Write a short note on it.

8.13 ANSWERS AND HINTS

Self Assessment Questions

1) Refer to Section 8.3

2) Refer to Sub-section 8.3.2 and 8.4

3) Refer to Section 8.5 and 8.6

4) Refer to Section 8.8

Terminal Questions

1) Refer to Section 8.3, 8.4 and 8.5

2) Refer to Section 8.6

8.14 REFERENCES AND SUGGESTED READINGS


