

# Combatants

# Importance of Status

---

- IHL places different people in different categories.
- Different rights and duties associated with each category.
- Distinction between civilians and combatants is a cardinal principle of IHL.
  
- Combatants are lawful military targets and targetable.
- Combatants defined in Article 4 of the Third Geneva Convention.
  
- Only applies in international armed conflicts (IACs) and not in non-international armed conflicts (NIACs).

# Article 4, Third Geneva Convention

---

- Combatants given POW status upon capture.
- Combatants enjoy immunity against prosecution for crimes that would otherwise be common criminal offences in times of peace unless these crimes amount to war crimes.
- Criteria
  - Responsible command
  - Fixed distinctive sign reconisable at a distance
  - Carrying arms openly
  - Conduct of operations in accordance with the laws of war
  - Belonging to a Party to the conflict
  - Allegiance (possibly)

# Criteria

---

- Fixed, distinctive emblem - must be the same for all the members of any one organization, and must be used only by that organisation. Recognisable by a person at a distance not too great to permit a uniform to be recognised. Must also be shown on vehicles such as tanks, aeroplanes or boats.
- Carry arms openly - does not mean 'visibly' or 'ostensibly', i.e., that weapons have to be visible at all times, given that surprise is a factor in any war operation.
- Denial of POW status?
  - Ex Parte Quirin case (1942) - the spy who secretly and without uniform passes the military lines of a belligerent in time of war, seeking to gather military information and communicate it to the enemy, or an enemy combatant who without uniform comes secretly through the lines for the purpose of waging war by destruction of life or property, are familiar examples of belligerents who are generally deemed not to be entitled to the status of prisoners of war but to be offenders against the law of war subject to trial and punishment by military tribunals.
  - Mohamed Ali v Public Prosecutor (1968) - regular members of the armed forces who are caught as spies are not entitled to be treated as prisoners of war.

# Criteria

---

- Obligation to comply with the laws of war - applies at the group level, rather than at an individual level.
  - Article 85, Third Geneva Convention - Detaining Power can prosecute POWs for crimes committed prior to capture if the conduct is equally prescribed for its own armed forces.
- Article 5(2), Third Geneva Convention - Should any doubt arise as to whether persons, having committed a belligerent act and having fallen into the hands of the enemy, belong to any of the categories enumerated in Article 4, such persons shall enjoy the protection of the present Convention until such time as their status has been determined by a competent tribunal.'

# Combatant Status in API

---

- Article 43(1), API

The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict.

# Article 44, API

---

1. Any combatant, as defined in Article 43, who falls into the power of an adverse Party shall be a prisoner of war.
2. While all combatants are obliged to comply with the rules of international law applicable in armed conflict, violations of these rules shall not deprive a combatant of his right to be a combatant or, if he falls into the power of an adverse Party, of his right to be a prisoner of war, except as provided in paragraphs 3 and 4.
3. In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:
  - a) during each military engagement, and
  - b) 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.
4. Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1 c). A combatant who falls into the power of an adverse Party while failing to meet the requirements set forth in the second sentence of paragraph 3 shall forfeit his right to be a prisoner of war, but he shall, nevertheless, be given protections equivalent in all respects to those accorded to prisoners of war by the Third Convention and by this Protocol. This protection includes protections equivalent to those accorded to prisoners of war by the Third Convention in the case where such a person is tried and punished for any offences he has committed.

# Comparison

---

<u>API</u>	<u>GC3</u>
Membership in the organised armed forces of a State Party to the conflict an indispensable prerequisite to combatant status and POW status under Article 44.	Condition of 'belonging to a Party' in the chapeau of Article 4A(2), as well as 4A(1) and 4A(3).
Command structure involving responsibility for subordinates. Applies to both regular and irregular armed forces.	Similar condition under Article 4A(2)(a)
In case of breach of principle of distinction, neither combatant status nor POW status affected.	In case of breach of principle of distinction, combatant status not affected but POW status affected.

Rule 106 of ICRC **Customary IHL**: Combatants must distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. If they fail to do so, they do not have the right to prisoner-of-war status



# Prisoner of War Protections

---

- Every POW, when questioned at the beginning of captivity, is bound to give only his or her surname, first names, rank, date of birth, and army, regimental, personal or serial number.
- A POW's ID card, personal effects, military protective equipment and clothing, badges of ranks, decorations; money and valuables cannot be taken from him.
- POWs can be detained for the duration of the conflict but not as punitive detention.
- Persons participating in hostilities and captured are presumed to be POWs on capture if they claim the status of POW, it appears that they are entitled to POW status, or if the State Party to the conflict on which the person depends has claimed POW status on his behalf.
- In case of doubt over whether a person is entitled to POW status, they shall be given the protections of the Third Geneva Convention until such time as their status is determined by a competent tribunal.
- POWs are also be evacuated, as soon as possible after their capture, to safe permanent camps away from combat zones. The evacuation shall be effectuated humanely and in conditions similar to those which would exist for the soldiers of the Detaining Power. They must have sufficient food and potable water + necessary clothing and medical attention during evacuation.

# Prisoner of War Protections

---

- POWs must be treated humanely at all times. Cannot be subjected to medical or scientific experiments.
- POWs are entitled to respect for their persons and honour, and must be protected against acts of violence or intimidation, and against insults and public curiosity.
- Only required to give name, rank, date of birth and serial number when interrogated.
- Can be prosecuted under laws applicable to the Detaining Power's own armed forces, even for acts committed prior to capture.
- Trial by military courts unless Detaining Power's armed forces are subject to the jurisdiction of civil courts. Minimum standards of independence and impartiality, along with basic procedural rights.

# Lack of POW Status in NIACs

---

- Distinction between civilians and combatants only applicable in IACs. Therefore, POW status does not exist in NIACs.
- Members of a State's armed forces have combatant privilege, while 'fighters' in an organised non-State armed group (NSAG) or civilians directly participating in hostilities do not.
  - Fighters and civilians DPIH can be prosecuted for lawful acts committed during hostilities.
- Article 6(5), API - authorities in power should 'endeavour to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained [with the exception of persons suspected of, accused of or sentenced for war crimes].
  - Some argue this may incentivise non-State actors to take up arms against the State.