Principle of distinction

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CHAPTER bibliography


Introductory text

Qualified as “cardinal” and “intransgressible”,[1] the principle of distinction is the cornerstone of International Humanitarian Law (IHL). One must know who and what may be targeted and who and what may not, and what protection to afford depending on the category which a person belongs to. Indeed, the basic axiom underlying IHL, i.e. that even in an armed conflict the only acceptable action is to weaken the military potential of the enemy, implies that IHL has to define who that potential is deemed to comprise and who, therefore, may be attacked and participate directly in the hostilities, but may not be punished for such participation under ordinary domestic law. Under the principle of distinction, all involved in the armed conflict must distinguish between the persons thus defined (the combatants) and civilians. Combatants must distinguish themselves (i.e., allow their enemies to identify them) from all other persons (civilians), who may not be attacked nor directly participate in the hostilities.

The dividing line between the two categories has developed over time, reflecting the conflicting interests between, on the one hand, powerful, well-equipped States that wanted a strict definition of clearly identified combatants, and, on the other, weaker States that wanted to retain the option to use additional human resources flexibly and thereby continue the hostilities even when their territory was under enemy control, which is practically impossible if combatants have to identify themselves permanently. The IHL of non-international armed conflicts does not even refer explicitly to the concept of combatants, mainly because States do not want to confer on anyone the right to fight government forces. Nevertheless, in such conflicts as well, a distinction must exist if IHL is to be respected: civilians can and will only be respected if government soldiers and rebel fighters can expect those looking like civilians not to attack them.[2] In this respect, we are of the view that if IHL applicable in NIACs fails to define ‘civilians’, the latter should be defined by opposition to individuals who engage in acts of hostility.

Today, the axiom itself is challenged by reality on the ground, in particular by the increasing “civilianization of armed conflicts”, a notion that is discussed in more detail below. If everyone who is not a combatant is a civilian, in many asymmetric conflicts the enemy consists exclusively of civilians. Even if, in non-international armed conflicts, members of an armed group with a “continuous combat function”, according to the terminology proposed by the ICRC, are not to be considered as civilians,[3] it is in practice very difficult to distinguish them from the civilian population. Furthermore, private military and security companies, whose members are usually not combatants, are increasingly present in conflict areas. On all these issues of “civilianization”, the concept of direct participation in hostilities is crucial, because civilians lose their protection against attacks while they so participate and may therefore be treated in this respect like combatants. The ICRC has issued an interpretive guidance to clarify this concept,[4] but some elements in it have sparked controversy.

“Civilization” is not the only phenomenon challenging the principle of distinction. First, everyone - without any distinction - in the power of a party benefits from fundamental guarantees of human treatment. Second, some States have adopted the concept of ‘unlawful combatants’, according to which these persons who directly participate in hostilities, when they have no right to do so, are neither civilians, and therefore are not protected by Geneva Convention IV, neither combatants, and therefore not protected by Geneva Convention III (see relevant chapter). Third, there is a tendency in an increasing number of asymmetric IACs, and even more in NIACs, for members of armed groups not to distinguish themselves from the civilian population. This leads some authors to even contend that the principle of distinction cannot realistically be applied in NIACs because in such conflicts non-State armed groups in particular rely on ordinary civilians for certain tasks. Fourth, if the aim of the conflict is “ethnic cleansing”, the parties will logically and of necessity attack civilians and not combatants. If some fighters’ aim is no longer to achieve victory, but rather to earn a living – by looting or controlling certain economic sectors – they will logically attack defenceless civilians instead of combatants. Finally, if the aim of a party is to change the enemy country’s regime without defeating its army or occupying its territory, it may be tempted to pressure the enemy civilian population into overthrowing its own government. If the pressure takes the form of attacks or starvation tactics, it constitutes a violation of IHL. In any event, the effectiveness of such methods is doubtful. Indeed, experience shows that, when confronted with such constraints, the population tends to support its government rather than foment rebellion.

SPECIFIC BIBLIOGRAPHY

Suggested reading:
DEFINITION AND CHARACTERISTICS OF CIVILIANS AND COMBATANTS

<table>
<thead>
<tr>
<th>Civilians</th>
<th>Combatants</th>
</tr>
</thead>
<tbody>
<tr>
<td>= all persons other than combatants</td>
<td>= members of armed forces lato sensu (for a definition, see infra, Combatants and POWs, I. Who is a combatant?)</td>
</tr>
</tbody>
</table>

I. Activities

Do not take a direct part in hostilities

Take a direct part in hostilities

II. Rights

Do not have the right to take a direct part in hostilities (but have the right to be respected)

Have the right to take a direct part in hostilities (but have the obligation to observe IHL)

III. Punishable

May be punished for their mere participation in hostilities

May not be punished for their mere participation in hostilities (See infra Combatants and POWs, III. Treatment of prisoners of war)

IV. Protection

(A Relativity of the difference: everyone in enemy hands is protected.)

Are protected because they do not participate:

– as civilians in the hands of the enemy (See infra Civilian Population, II. Protection of civilians against arbitrary treatment and IV. Special rules on occupied territories)

– against attacks and effects of hostilities (See infra, Conduct of Hostilities, II. The protection of the civilian population against the effects of hostilities)

Are protected when they no longer participate:

– if they have fallen into the power of the enemy (See infra Combatants and POWs, III. Treatment of prisoners of war)

– if wounded, sick or shipwrecked (See infra Wounded and Sick)

– if parachuting out of an aircraft in distress (See P I, Art. 42)

– are protected against some means and methods of warfare even while fighting (See infra Conduct of Hostilities, III. Means and methods of warfare)

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Suggested reading:

Further reading:


Cases and Documents

II. Rights

• United States, Ex Parte Quirin et al.
• Amnesty International, Breach of the Principle of Distinction
• United States, The Schlesinger Report
• United States, Status and Treatment of Detainees Held in Guantanamo Naval Base

III. Punishable

• Convention on the Safety of UN Personnel
• United States, Ex Parte Quirin et al.
• Nigeria, Pius Nwaoga v. The State
• South Africa, S. v. Petane
• United States, Military Commissions

IV. Protection

• United States, United States v. William L. Calley, Jr

SPECIAL BIBLIOGRAPHY

I. Activities
Suggested reading:


II. Rights
Suggested reading:


IV. Protection
Suggested reading:


V. Full complementarity

Is everyone who is not a combatant a civilian (or is there an intermediate category of “unlawful combatant")?

• in the conduct of hostilities?
• in enemy hands?

Cases and Documents

• ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
• ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities
• ECHR, Korbely v. Hungary
• Israel, The Targeted Killings Case
• Israel, Detention of Unlawful Combatants [Part A., paras 11-17; Part B.]
• United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
VI. The fundamental obligation of combatants to distinguish themselves from the civilian population

P I, Art. 44(3) [CIHL, Rule 106]

Cases and Documents

- France, Accession to Protocol I [Part B., para. 8]
- Malaysia, Osman v. Prosecutor
- Nigeria, Pius Nwaoga v. The State
- ICRC Appeals on the Near East [Part B.]
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- Syria, Syrian rebels treat captured Filipino soldiers as 'guests'

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VII. Relativity of the distinction in modern conflicts

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1. Guerrilla warfare

Cases and Documents

- United States, President Rejects Protocol I
- Case Study, Armed Conflicts in the former Yugoslavia [Para. 35]
- Sri Lanka, Naval War against Tamil Tigers

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2. Wars of extermination

Cases and Documents

- UN, Resolutions and Conference on Respect for the Fourth Convention [Part G.II.2]
- Bosnia and Herzegovina, Constitution of Safe Areas in 1992-1993
- Case Study, Armed Conflicts in the Great Lakes Region [Parts I.A and III.C]

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Suggested reading:


3. Situations where structures of authority have disintegrated

Cases and Documents

- Colombia, Response of armed groups to COVID-19
- ICRC, Disintegration of State Structures
- First Periodical Meeting, Chairman’s Report [Part II.2]
- Case Study, Armed Conflicts in the Great Lakes Region [Part II.A and III.C]
- Case Study, Armed Conflicts in Sierra Leone, Liberia and Guinea [Parts 1 and 2]
- Mali, Conduct of Hostilities
- Somalia, the fate of Children in the conflict

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Suggested reading:

Further reading:

4. Conflicts aimed at overthrowing a regime or a government

5. Terrorism, the “war on terror”, and in particular the status of “unlawful combatants”

i.e. persons who belong to an armed group, but do not fulfil the (collective or individual) requirements for combatant status

[See also Fundamentals of IHL, III. 1. C. e) The global war on terror]

Cases and Documents

• ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
• Israel, The Targeted Killings Case [Paras 24-40]
• Israel, Detention of Unlawful Combatants
• United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
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• General Assembly, The use of drones in counter-terrorism operations
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  Ukraine Conflict” in International Law Studies, Vol. 91, p. 361, 2015

• TIGROUDJA Hélène, “Quel(s) droit(s) applicable(s) à la ‘guerre au terrorisme’ ?”, inAFDI, Vol. 48, 2002, pp. 81-102.

a. In the conduct of hostilities

Can they be attacked until they are “hors de combat” (like combatants) or only while they directly participate in hostilities (like civilians)?

Cases and Documents

• Australia/Afghanistan, Inquiry into the Conduct of Australian Defence Forces
• ICRC, Interpretive Guidance on the Notion of Direct Participation in Hostilities
• Iraq/Syria/UK, Drone Operations against ISIS

b. Once in enemy hands

Are they protected civilians or can they be detained like combatants without any individual decision, but not benefit from POW status?

Cases and Documents

• Israel, Detention of Unlawful Combatants
• United States, Status and Treatment of Detainees Held in Guantanamo Naval Base
• United States, Military Commission
• United States, Habeas Corpus for Guantanamo Detainees
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Suggested reading:

This is undisputed if they defend combatants or military objectives against the adverse party. On the other extreme, it is
have only defensive functions. The performance of such functions may nevertheless constitute direct participation in hostilities.
As civilians, PMSC staff may not directly participate in hostilities. PMSCs and major contracting States often stress that PMSCs
system. countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement
the UN Human Rights Council which established in 2017 an open-ended intergovernmental working group tasked to elaborate
protection, governing and overseeing the implementation of the ICoC. To go beyond soft law, a process is also ongoing within
uncontroversial when a PMSC constitutes an armed group that is a party to a NIAC, there may be other controversial situations
that raise the general problem of what constitutes international legal personality and whether companies possess it. But beyond
that, a PMSC may nonetheless become an addressee of IHL rules through self-regulation, either in codes of conduct or by the
provisions of its contract with its client (common Article 1 may even oblige a State hiring a PMSC to include in the contract a
clause requiring respect for IHL). In respect of self-regulation, it exists an International Code of Conduct for Private Security
Providers (ICoC). This code is the only text that specifically enumerates obligations of PMSCs. The ICoC has created an
association (the International Code of Conduct Association – ICoCA) which is a multi-stakeholder mechanism that aims at
promoting, governing and overseeing the implementation of the ICoC. To go beyond soft law, a process is also ongoing within
the UN Human Rights Council which established in 2017 an open-ended intergovernmental working group tasked to elaborate
an international regulatory framework - the nature of which has yet to be defined - "to protect human rights and ensure
accountability for violations and abuses relating to the activities of [PMSCs]".7

PMSC staff normally do not fall under the very restrictive definition of mercenaries in IHL8 Most of them are not de jure or de
facto incorporated into the armed forces of a party and are therefore not combatants but civilians. As such, their conduct linked
to an armed conflict is governed at least by the rules of IHL criminalizing certain types of conduct. The main problem is that they
often benefit from de facto or de jure immunity in the country where they work and that criminal jurisdiction over them in third
countries is not as clearly regulated as for members of armed forces and often not backed up by an efficient law enforcement
system.

As civilians, PMSC staff may not directly participate in hostilities. PMSCs and major contracting States often stress that PMSCs
have only defensive functions. The performance of such functions may nevertheless constitute direct participation in hostilities.
This is undisputed if they defend combatants or military objectives against the adverse party. On the other extreme, it is
uncontroversial that the defence of military targets against common criminals or the defence of civilians and civilian objects against unlawful attacks does not constitute direct participation in hostilities. The most critical, difficult and frequent situation is when PMSC staff guard objects, transports or persons. If those objects, transports or persons are not protected against attacks under IHL, that is if they are combatants, civilians directly participating in hostilities or military objectives, guarding or defending them against attacks constitutes direct participation in hostilities and not an act falling under the legal regime of criminal law defence of others. In our view, in a case like this one, guarding or defending them always amounts to a direct participation in hostilities when the attacker is a person belonging to a party to the conflict, and this even if the attacker does not benefit from (or has lost) combatant status. In other words, the unlawful status of the attacker does not give rise to self-defence. If the person guarded by PMSC staff – and under the domestic legislation of some countries even in the case of an object – is civilian, criminal law self-defence may justify the use of force, even against combatants. The analysis is complicated by the absence of an international law standard of self-defence and defence of others and by doubts whether the criminal law defence of self-defence which avoids conviction may be used ex ante as a legal basis for an entire business activity. It must in addition be stressed that self-defence may only be exercised against attacks, not against arrests or the seizure of objects. Indeed the criteria determining when a civilian may be arrested or objects may be requisitioned are too complicated under IHL to enable PMSC staff to determine when they have been met. In our view, self-defence, as an exception to the classification of certain conduct as direct participation in hostilities, must be construed very narrowly. In addition, PMSC staff providing security for an object will often not be able to know whether that object constitutes a military objective (which excludes self-defence, because the attack would be lawful and self-defence is only admissible against unlawful attacks) and whether the attackers do not belong to a party (which would not classify resistance against such attackers as direct participation in hostilities, even when the object attacked is a military objective). At the same time, it is difficult for the enemy to distinguish between combatants, PMSC staff who directly participate in hostilities and PMSC staff who do not directly participate in hostilities. To maintain a clear distinction between civilians and combatants and to ensure that PMSC staff do not lose their protection as civilians, they should therefore not be put in ambiguous situations. In sum, both self-defence and defence of others are lawful for PMSC staff, and neither makes them legitimate targets of attacks. Direct participation in hostilities, in contrast, makes the staff of PMSCs targetable, and it is also arguably unlawful for States to delegate such participation to PMSCs. Indeed, while IHL does not prohibit civilians from directly participating in hostilities, if a State wants to respect the principle of distinction in good faith, it may not entrust civilians with conduct that constitutes direct participation in hostilities.

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- Montreux Document on Private Military and Security Companies
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b. the increasing number of civilians (i.e. persons who are not combatants) directly and indirectly participating in hostilities

(See infra Conduct of Hostilities II. The protection of the civilian population against the effects of hostilities, 7. Loss of protection: The concept of direct participation in hostilities and its consequences)

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- ICRC, The Challenges of Contemporary Armed Conflicts [Part B.]
- ICRC, Interpretative Guidance on the Notion of Direct Participation in Hostilities
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Footnotes

- [1] See ICJ, Nuclear Weapon Advisory Opinion
- [2] See Non-international Armed Conflict
- [3] See infra, Conduct of Hostilities II. The protection of the civilian population against the effects of hostilities, 7. Loss of protection: The concept of direct participation in hostilities and its consequences
- [6] See e.g. GC III, Art. 39, on who may exercise the power of responsible officer of a POW camp
- [8] See P.I, Art. 47, and infra