



FACULTY OF LAW
University of Lund

Fredrik Petersson

Legitimate Targets of Attack
The Principles of Distinction and Proportionality
in IHL

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Professor Göran Melander

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Abstract

International Humanitarian Law aims at mitigate the suffering from hostilities. All treaties regulating the conduct of hostilities, as well as international customary law which binds all states, are based on two connected fundamental principles, namely, humanity and military necessity. Taken together this mean that only action necessary for the defeat of the opposing side is allowed, whereas those, which cause needless suffering or losses, are forbidden. The focus of IHL have changed over the course of time, from the early conventions that was aimed to prevent superfluous injuries among combatants, to modern conventions that seek to protect the civilian population from the dangers of hostilities.

According to an uncontroversial principle in IHL parties to an armed conflict must distinguish between civilians and combatants as well as between civilian and military objects. Imperative for this principle to be effective the imperative terms, civilians and combatants as well as civilian and military objects, must be clearly defined in order to make a distinction effective. However, due to the lack of precise and clear definitions on these imperative terms as well as the lack of a overall connected protective system the principle as such remained vaguely defined and sparsely regulated through out the majority of the 20th century. As a consequence the protection of the civilian populations were from a humanitarian perspective to a large extent left to the good faith of the belligerent parties of an armed conflict.

Not until the adoption of the two Additional Protocols to the 1949 Geneva Conventions in 1977 the civilian population in general was provided with a protective system in IHL. According to Additional Protocol I, applicable to international armed conflicts, the first rule regarding attacks is that the intended target must be a military objective. Once that is decided the attack may nevertheless become illegal if excessive collateral damage affecting civilians or civilian objects is to be expected. These are the principles of distinction and proportionality. Furthermore, even when attacking a lawful target, precautionary measures to spare civilians have to be taken. These principles are the fundament in the protection of the civilian population and the very essence of contemporary IHL. This protection is based on the philosophy that persons and objects not necessary to the military effort should be spared the effects of hostilities. From a military perspective this protective regime not only restrains and limits a military commander in his free choice of means and methods but it also provide him with a definition of what constitutes military objectives. Further it also clarifies under what circumstances it is legitimate to attack such targets in respect of the protection of the civilian population.

Abbreviations

ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
IHL	International Humanitarian Law
LOAC	Law Of Armed Combat
Protocol I	Protocol Additional to the Geneva Convention of the 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), of 8 June 1977
Protocol II	Protocol Additional to the Geneva Convention of the 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol II), of 8 June 1977
ROE	Rules Of Engagement
UN	United Nations
UNGA	United Nations General Assembly
UNHCR	United Nations High Commissioner for Refugees
WWI	First World War
WWII	Second World War

1 Introduction

International Humanitarian Law¹(hereinafter IHL) aims at mitigate the suffering from hostilities. All treaties regulating the conduct of hostilities, as well as international customary law which binds all states, are based on two connected fundamental principles, namely, humanity and military necessity, which together mean that only actions necessary for the defeat of the opposing side are allowed, whereas those which cause needless suffering or losses are forbidden. The focus of IHL have changed over the course of time, from the early conventions that was aimed to prevent superfluous injuries among combatants, to modern conventions that seek to protect the civilian population from the dangers of hostilities.

According to an uncontroversial principle in IHL parties to an armed conflict must distinguish between the civilian population and combatants and between civilian objects and military objects. The first rule regarding attacks is that the intended target must be a military objective. Once that is decided the attack may nevertheless become illegal if excessive collateral damage affecting civilians or civilian objects is to be expected. These are the principles of distinction and proportionality. Furthermore, even when attacking a lawful target, precautionary measures to spare civilians have to be taken. These principles are the fundament of the protection of the civilian population and the very essence of contemporary IHL. This protection is based on the philosophy that persons and objects not necessary to the military effort should be spared the effects of hostilities. From a military perspective these principles limits the conduct of warfare and restrains the military commander in his² free choice of means and methods.

From a humanitarian perspective these principles must be clearly elaborated, and the categories, which the parties shall distinguish between, must be clearly defined in order to serve as effective protection for the civilian population. However, also from a military perspective it is imperative for a military commander to have clear and precise provisions in order for him to comply with the obligations that IHL refers on him.

In this thesis the principles of distinction and proportionality as the fundament of the civilian protection in IHL as well as their role as major limits and restrains on the conduct of warfare will be examined.

¹ The term International Humanitarian Law or IHL, laws of war, laws of armed conflicts, rules of war etc., are, generally speaking, synonymous and interchangeable. Lawyers, human rights groups, relief organisations, the International Committee of the Red Cross (ICRC) and most states favour International Humanitarian Law whereas militaries typically prefer the term laws of war, or some variations. In this thesis the term IHL will primarily be used.

² When the word he, his or him is used it should be understood as to include also the feminine form of the word, hence, he/she, his/hers and him/her.

1.1 Purpose

The purpose of this thesis is to examine the principles of distinction and proportionality and the part they have in the protection of the civilian population, as well as the restraints they impose on the conduct of warfare. The principles will be examined from a general perspective, i.e. the role they have in overall IHL, the evolution of the principles as well as the underlying philosophy. However, the focus will be on the effect that the protection of the civilian population and the principles of distinction and proportionality have on commanders conducting military operations. Since these principles restrain the free choice of targets to attack in the military targeting process³ is of importance. Hence, the way in which these principles are implemented and elaborated into provisions applicable in armed conflict will be the focus of this thesis.

Given the concept that the primary concern for a commander is to defeat his adversary and when accomplishing this objective being interested in what is permissible and impermissible according to IHL, the overall question that a commander seeks to determine during military operation is: What is a legitimate military target? In order to answer this question the following questions have to be answered: How are military objectives defined in IHL; What other restraints does IHL impose on a commander when conducting attacks on military objectives; Who is to make the assessment on what constitutes a legitimate military target? This thesis will examine the principles of distinction and proportionality from a general perspective as well as answer the above raised questions.

1.2 Method and Material

To examine the principles and the part they have in contemporary IHL and to answer the questions raised, the deductive method is used, hence, extracting facts from sources relevant to the subject. The Hague Convention, the Geneva Conventions from 1949 and the two Additional Protocols from 1977, are the starting point from which the subject is examined. Furthermore, authoritative commentaries on these conventions and the works of scholars are examined for background facts as well as answers on the application of the relevant provisions.

In regard to customary IHL different commentaries, the work of scholars as well as practise and *opino juris* of states is examined, in order to determine the status of these principles as well as the provisions that develop and elaborate these. To some extent recent conflicts, such as the 1991 Gulf War, are used to provide examples of application as well as problems connected with these principles.

³ For the purpose of this thesis the term **military targeting process** or **military targeting** refers to the whole procedure of attacking a specific target, from the initial planning, the preparation, to the strike.

1.3 Disposition and Delimitation

The thesis is divided into 6 chapters and after this introductory chapter the principles as the major restraints in IHL on the free conduct of military targeting as well as the part they have in the overall concept of warfare is examined. Hence, the second chapter will put the principles into the context of warfare and the overall system of IHL as well as examine the balance between military necessity and humanity, the fundament of IHL. The third chapter looks into the principles of distinction and proportionality from a general point of view, hence, the background, and the philosophy behind these principles as well as their status in contemporary IHL are examined. The fourth chapter covers Additional Protocol I as the primary convention covering the protection of the civilian population, and the first convention codifying these principles. The provision for the protection of the civilian population, the scope of application of these provisions as well as the customary status of the protocol are examined in this chapter which also will clarify some imperative terms used in the protocol. The fifth chapter defines the different categories of targets in IHL in order to determine what, according to IHL, constitutes military objectives. In the sixth chapter other restraints referred on military commanders, in their conduct of military targeting, by the provisions of Protocol I are examined. Here the general protection of the civilian population, precautionary measures to be taken for the protection of the civilian population as well as special protected objects are examined. The thesis is summarised in chapter seven with additional conclusions.

Even though the difference between means and methods of warfare might be relative and not always easy to maintain, means of warfare are primary thought to be different types of weapons. Methods should be understood as the way a party uses its means i.e. weapons, which might be permissible or impermissible. This thesis primary focus on the methods of warfare opposite to that of means. Hence, rules and principles concerning the illegal use of certain weapons are out of the scope of this thesis. Other provisions in IHL may restrain military commanders in the conduct of warfare, such as specific provisions for the protection of combatants. However, these are left outside this thesis as they are not based on the principle of distinction and proportionality. Moreover, the principles examined in this thesis are of little or no value to the categories that are to benefit from them if there is no effective enforcement system or if individuals violating the provisions face no punitive measures when violating them. However intimately connected this is to the subject examined this aspect of IHL is not dealt with in this thesis due to the lack of space.

Furthermore, the thesis is limited to the examination of the subject as a part of international conflicts. Hence, how these principles should be applied in non-international conflicts is out of the scope of this thesis.

2 Armed Conflict

Warfare or armed conflict⁴ is a complex phenomenon, consisting of several elements. To understand the concept of warfare it is essential to recognise these various elements, that is to say, the role that they play in the overall concept and how they interact. In this chapter the role military targeting have in the overall concept of warfare as well as how IHL limits and restrains the conduct of warfare in general and the military targeting process in particular will be examined. In order to do so armed conflict will be defined and the balance between the two concerns involved, military necessity and humanity, examined.

2.1 The Concept of Armed Conflict

War or armed conflict is usually described as an act of force to compel an adversary to comply with specific requirements. According to Carl von Clausewitz⁵ war is an act "to compel our enemy to do our will", a will which a state does not voluntarily comply with. This is the motive, the answer to why war is waged. In respect to the function of war, he argued, "war is merely a continuation of politics".⁶ If true, this means that foreign policy cannot be implemented without the supplementary help of forceful means.⁷

When states resolve to armed conflict the political requirements are transformed into military objectives. Whatever the military objectives of an armed conflict are, they are achieved through military operations, on the ground, in the air and on the sea. Modern technology has come forward with highly advanced system which, today, makes it possible to attack an adversary not only directly but also with means and methods that in an indirect way can achieve the objectives. By using indirect means the attacking party aims at avoiding costly battles between the main forces of the parties to the armed conflict. Other "battle fields" have evolved during recent decades, which enable us to talk about information warfare, computer network attacks and attacks against economic warfare. Regardless of what means and methods the parties to the conflict choose, the primary way to defeat an en-

⁴ The term **war** in relation to that of **armed conflict** indicates that there are some differences. Even though these terms are often used to describe the same phenomena, that of conflict situations, both internal conflicts as well as more traditional inter-state wars. On the other hand it is possible to separate the terms, thus, the term armed conflict refers to that of internal conflicts while war indicates traditional inter-state conflicts since traditionally only states could wage war. This notion is no longer valid since contemporary international law prohibits wars of aggression through the UN Charter. In, Dettner, I., THE LAW OF WAR, 2000, 17-19. In this thesis the term armed conflict will primarily be used. However, to describe the general notion of violence the term **warfare** is used.

⁵ Carl von Clausewitz (1780-1831). Prussian military, widely acknowledged as the most important of the major strategic theorists.

⁶ Clausewitz, C. von, On war, (ed.) Howard M. & P. Paret, 1976, Bk.I, Ch.I, 75.

⁷ Dettner, 6-9.

emy, is still through different kind of attacks on objectives, personnel or objects.⁸

The commander is the one who makes the decisions on what to target, and in what order, to accomplish the overall military objectives of the armed conflict. His primary concern will be a swift accomplishing of the military objectives set out for him, however, in achieving this he has to take into account different factors, such as available assets, accurate intelligence, logistics, the nature and the restraints that IHL refers upon him. All these factors will have an impact on the possibility to succeed with the military operation.⁹

2.2 International Humanitarian Law

IHL comprises of rules and principles applicable in armed conflict with the primary purpose to regulate the conduct of warfare and protect certain categories from the effects of hostilities. In effect these regulations impose restraints and limitations on the choice of means and method to be used in armed conflict. The effect of IHL can and always have been discussed, since it is an obligation that just exist in theory, and which according to some is ill suited for the realms of war. Other factors are more immediate and do not seldom possess a greater threat than the theoretical threat of conviction for breaches against IHL.¹⁰

The exact contents of IHL have always been argued and the will to comply with the rules and principles of IHL have varied in the course of history. However, today IHL is clearly considered as a part of international law.¹¹ This is foremost confirmed through practice and statements made by states, recently demonstrated in the 1991 Gulf War where the parties to the conflict, at least to some extent, acknowledged and respected IHL.¹²

IHL consist of two main branches, Hague Law and Geneva Law. Hague Law establishes limits to the conduct of military operations and is primary found in the Hague Conventions adopted between 1899 and 1907. Geneva Law, which aims at protecting the defenceless and other categories of per-

⁸ Schmitt, M., Edited transcript of remarks, January 2002 Carnegie Council workshop on European and North American perspectives on ethics and the use of force, www.carnegiecouncil.org, 2003-05-20.

⁹ Ibid.

¹⁰ Kalshoven, F., CONSTRAINTS ON THE WAGING OF WAR, 2001, 12-14; Best, G.: War and Law Since 1945, 1994, 11-12.

¹¹ Malanczuk, P., Akehurst's, Modern Introduction to International Law, 1997, 1-7.

¹² Even though the U.S. lead coalition on the whole respected the rules and principles of IHL there were reports of breaches on their account. On the other hand there were several accounts of severe misconduct by the Iraqi government and the Iraqi armed forces in respect to the rules and principles of IHL. In, Ahlström, C., GULFKRIGET OCH DEN HUMANITÄRA FOLKRÄTTEN, 1992, 90-91.

sons and objects, is as the name indicates, found in the Geneva Conventions from 1949 and in the two Additional Protocols from 1977. However, these two protocols not only represent the most recent development in IHL they also marks the end of the separation between Geneva Law and Hague Law, since they include rules of conduct of warfare, protection of special objects as well as rules for the general protection of the civilian population.

More specific conventions have been adopted and they are usually aimed at regulating certain areas of importance left outside the major conventions, for example the 1954 Hague Convention¹³ which lays down extensive rules concerning the protection of objects especially valuable from a cultural aspect, and the more recent 1980 Weapons Convention which together with its additional protocols aims at limit the use of certain types of weapon.¹⁴

International law, which includes IHL, binds states either through different treaties or through customary law. Treaty law binds states through ratification of the relevant treaty, which may be a convention, a declaration or some other instrument, whereas customary law consist of generally accepted rules that bind all states even without their consent. Even though the major part of IHL comprises of rules recognised both in conventions and as customary, certain rules and principles have not acquired customary status. This creates problem especially in international armed conflicts involving several states where different conventions could be applicable in relations to different states.¹⁵ Hence, it is imperative in an armed conflict to determine which conventions are applicable. For example Additional Protocol I was not applicable in the Gulf War, since none of the major parties to the conflict had ratified the protocol in 1991. However, the protocol to a large extent comprises of provisions generally accepted as customary, hence, in effect the protocol was applicable.¹⁶ This will be further examined in chapter 4 in relation to the relevant provisions of Protocol I.

2.3 Military Necessity and Humanity

For the parties to an armed conflict the effective and successful conduct of military operations will be the primary concern. On the other hand, IHL tries to balance the conduct of warfare and as such the overall or the actual military interest will be weighed against the interest of humanity. Military necessity has been defined as authorising “such destruction, and only such

¹³ The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, reprinted in Roberts, A. & R., Guelff, DOCUMENTS ON THE LAWS OF WAR, 2000, 371.

¹⁴ The 1980 UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, reprinted in Roberts & Guelff, p 515. The Additional Protocols to the Weapons Convention see 527-560.

¹⁵ Malanczuk, 35-60.

¹⁶ Ahlström, 10-11.

destruction as is necessary, relevant and proportionate to the prompt realisation of legitimate belligerent objectives”¹⁷. As a concept, military necessity may be used as a legal justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects. It means that military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning.¹⁸

But it would be overly simplistic to say that military necessity gives armed forces a free hand to take action that would otherwise be impermissible, for it is always balanced against other humanitarian requirements of IHL. The balance between military necessity and humanity is reflected in the various conventions of IHL. The preamble to the 1899 Hague Convention on Land Warfare, reaffirmed in 1907, stipulates that the convention “has been inspired by the desire to diminish the evils of war, as far as military requirements permit”. Thus, the drafters recognised the conflict between military necessity and strict application of humanitarian rules and admitted certain exceptions to the conventions when explicitly stated. This is clearly demonstrated in Article 23(g) of the 1907 Hague Convention, which prohibits the parties “to destroy or seize the enemy’s property, unless such destruction or seizure be imperative demanded by the necessities of war”. Derogation due to military necessity is also found in the Geneva Conventions from 1949 where several articles express reservations for military necessity.¹⁹ However, Article 1, common to all four Geneva Conventions, indicates that these provisions are exceptions since parties to the Conventions are obligated “to respect and ensure respect for the Conventions in all circumstances”. Additional Protocol I, Article 1(1) obligates the states party to the convention to respect the Convention in all circumstances, hence, deviations from the rules cannot be justified with an appeal to military necessity unless expressly stated in the protocol. However, few such provisions are included in the protocol indicating that there was a reluctance to create loopholes allowing states to make free assessment on the use of military means and methods.²⁰

Not only treaties may be suspended in their application by claims of military necessity but also general principles of customary IHL. However, it is not left to the subjective assessment of states to deviate from these principles, a notion confirmed by various official statements. For example U.S.A., which has not ratified the two Additional Protocols, defines military necessity in the U.S. Field Manual as a principle that “justifies those measures not forbidden by international law which are indispensable for securing the com-

¹⁷ McDougal & Feliciano: *International Coercion and World Public Order* in *Studies in World public Order* 237, reprinted in Kwakwa, E., *The International Law of Armed Conflict: Personal and Material Fields of Application*, 1992, 36.

¹⁸ Kalshoven, 37; Detter, 393-398.

¹⁹ Geneva Convention I, Art. 12 on wounded and sick, Art. 42 on emblems on medical units; Convention III, Art. 8(3) on duty of protecting power; Convention IV, Art. 49 on mass forcible transports.

²⁰ Kalshoven, 37-38; Detter, 397-398.

plete submission of the enemy as soon as possible”²¹ This indicates that military necessity shall not prevail over the requirements of humanity reflected in customary IHL.²²

The contemporary view on military necessity appears to be that this kind of exception can only be claimed in specific situations, those being the ones specifically stated in the humanitarian conventions. Hence, military necessity does not prevail over neither conventional IHL nor customary principles of IHL.²³ This is of importance for the application of IHL in general and particular in relation to the protection in Protocol I where these two interests are balanced in order to avoid situations where states deviate from the rules by claiming military necessity.

²¹ Reprinted in Kwakwa, 36.

²² Detter, 393-398; Kwakwa, 35-38.

²³ Kalshoven, 37-38; Detter, 397-398; Kwakwa, 38.

3 Principles of Distinction and Proportionality

In order to understand the principles and the role they have in IHL this chapter examines the evolution of these principles, the underlying philosophy as well as how they are implemented and elaborated into conventional IHL.

3.1 Historical Background

The principle of distinction was already implicitly recognised in the St Petersburg Declarations from 1868²⁴, which aimed at mitigate superfluous injury and unnecessary suffering to combatants. However, the preamble stipulates that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”, thereby implicitly prohibiting direct attacks on non-combatants. This statement has since been considered as the fundament upon which the protective regime of civilians has been built.²⁵

Up to the First World War (WWI) there was however little need for the practical implementation of this customary rule as the populations barely suffered from the acts of hostilities.²⁶ The Hague Regulations adequately provided minimal restraints in respect to civilians located in the vicinity of the area where hostile armies were in immediate contact. Thus, they prohibited attacks or bombardment against undefended places which were up to seizure by advancing ground forces, required notice of bombardment primarily by artillery, prescribing precautions to spare religious, cultural and medical buildings in sieges, and prohibited pillage.²⁷

During WWI the situations for the civilian population radically changed as a result of increased range of artillery, and the arrival of bombardment from aircraft. This development continued during the Second World War (WWII), and proved that military air power, long-range missiles, airborne troops and highly mobile armoured combat vehicles vastly extended the depth of the ground battle areas. Strategic bombardment and guerrilla warfare had virtually obliterated the distinction between the ground battle area

²⁴ The 1868 St Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes of Weight, reprinted in Robert & Guelff, 53-58.

²⁵ Gardam, J., Non-Combatant Immunity as a Norm of International Humanitarian Law, 1993, 19-18.

²⁶ Ibid.; Bothe, 274-278.

²⁷ The Hague Regulations to the IV Hague Convention of 1907, Arts. 23, 25-28; Hague Convention IX of 1907, Arts. 1, 2, 4, 5-7.

and the more stable rear areas, where in 1907, the civilians were generally considered to be relatively secure from the effects of the battle action.²⁸

Although WWII dramatically demonstrated that civilians are frequently in great danger from the effects of air and long-range missile bombardment, the four Geneva Conventions from 1949 was primarily concerned with the protection of “protected persons” in the hand of the hostile powers. The Fourth Geneva Convention provides a few, but tentative and modest, provisions for the protection of the whole population of countries in conflict against the effects of hostilities.²⁹ Only civilians, wounded and sick, civilian hospitals, their personnel and medical transports were explicitly protected against direct attack.³⁰ At the time it was generally accepted that the civilian population should not be made the object of direct attacks, however, there were no provisions to give effect to this prohibition and the principle of distinction continued to be a vague customary principle in IHL.³¹

During WWII military operations, on land and in the air, caused massive suffering to the civilian population. Even though the general notion was that armed forces should not attack the civilian population the evolution of arms technology and the fact that armed conflict no longer was something contained, fought between armies on carefully selected battlefield, made the separation between military objectives and the civilian population almost impossible. This problem was recognised during WWI but it was not until after WWII that the international community deemed it necessary to regulate the protection of the civilian population. However, as far as the world was concerned total prohibition of civilian casualties was not a realistic one and as a result the four Geneva Conventions sparsely regulated the protection of the civilian population as a whole.³²

The need to broaden existing legal norms governing the protection of the civilian population was recognised by ICRC, which in 1956 drew up the “Draft Rules for The Limitations of Danger Incurred by the Civilian Population in Time of War”³³. This draft did not result in any actions by governments to consider it as a basis for negotiations for a new convention or a protocol to existing ones. According to Bothe the primary cause for this lack of interest was an explicit proposal in the draft to prohibit the use of nuclear, bacteriological and chemical weapons.³⁴ This seemed to have been an unrealistic idea at the time since the Cold War and the nuclear arms race had already begun.³⁵

²⁸ UNHCHR, Fact Sheet No.13, International Humanitarian Law and Human Rights, www.unhchr.ch; Bothe, 269; Gardam, 19-25.

²⁹ Geneva Convention IV, Arts. 13-26.

³⁰ Ibid. Arts. 16, 18, 20-22.

³¹ Gardam, 25-26.

³² UNHCHR, Fact Sheet No.13; Bothe, 269-270.

³³ Reprinted in Bothe, 268.

³⁴ Bothe, 269.

³⁵ UNHCHR, Fact Sheet No.13; Bothe, 269-270.

With the impact of liberation and colonial wars on the civilian population³⁶ the subject once again came on the agenda. Thus, the need to modernise the protection of civilians was subsequently pressed with greater urgency in 1969 when the United Nations General Assembly (UNGA), in Resolution 2444³⁷, called for the study of additional humanitarian international conventions to insure better protection for civilians and restrictions on the use of certain methods and means of warfare.³⁸

The issue of regulating armed conflicts was considered opposite to the whole purpose of United Nations (UN), since its creation was based on the need for a worldwide organisation promoting security and preventing armed conflicts. As a consequence, the UN had refrained from dealing with issues concerning humanitarian law leaving it, primarily, to the ICRC. However, the development in the area of armed conflict and the increasing numbers of civilian casualties made the issue something that UN could not longer overlook. The resolution reaffirmed certain basic principles related to the conduct of hostilities and provide in part:

That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; That it is prohibited to launch attacks against the civilian population as such; That distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible [...]

The resolution for the first time states the principle of distinction as it is known in contemporary IHL. Although the resolution as such was of a non-binding character, the fact that the subject was raised in the General Assembly and the resolution was adopted by an unanimous vote confirms the will among the member states that the time was ready to further clarify and regulate the protection of civilians affected by armed conflict.³⁹

In response the International Red Cross at its 1969 Conference in Istanbul, requested the ICRC to undertake studies and consultations to develop concrete proposals that would supplement, but not replace, existing international humanitarian law for the considerations of governments at a diplomatic conference.⁴⁰ This led to the convening of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law, held in Geneva from 1974 to 1977. The result of the conference was

³⁶ Even though the increasing numbers of civilian casualties can not be explained solely by the difficulties of distinction between combatants and civilians and between military and civilian objects, history shows that despite an increasing protective regime the civilian casualties have increased from WWI with some 5 percent to 48 percent in WWII. In the Korean War 84 percent of the casualties were civilians and in the Vietnam War that figure had increased to 90 per cent. In, Wulff, T., *Handbok i folkrätt*, 1980, 102.

³⁷ UNGA Resolution 2444 (XXIII), *Respect for Human rights in armed conflicts*, 1968.

³⁸ Bothe, 270-271.

³⁹ UNHCHR, *Fact Sheet No.13*; Bothe, 270-271.

⁴⁰ Resolution XIII, *Reaffirmation and Development of the Laws and Customs in Armed Conflict*, XXIst International Conference of the Red Cross, Istanbul, September 1969. Reprinted in Bothe, 270.

the adoption of the two Additional Protocols to the Geneva Conventions from 1949. These protocols represent the most recent and extensive development of the protection of the civilian population. In the protocols the generally accepted principle of distinction is for the first time codified as well as elaborated (see chapter 4).⁴¹

Since the adoption of the Additional Protocols the area of IHL have stayed in focus due to the ever-increasing numbers of armed conflicts. The world have seen further initiatives in the area of IHL, some of which have improved the civilian protection, for example the Weapons Conventions from 1980 and the additional protocols to it. During this period the status of the Additional Protocols have grown stronger and some of the provisions that were considered new to IHL and without customary status in 1977 have now become generally accepted as customary.⁴²

3.2 Philosophy

The principle that only military objectives may be attacked is based on the notion that, while the aim of a conflict is to prevail politically, an act of violence for that purpose may only aim at overcoming the military forces of the enemy. Act of violence against persons or objects of political, economic or psychological importance may sometimes be more efficient in order to overcome the enemy, but are never necessary, because every enemy can be overcome by weakening sufficiently its military forces. Once its military forces are neutralised, even the politically, psychological or economically strongest enemy can no longer resist. As seen this principle was already stipulated in the preamble to the St Petersburg Declaration, which has since then been the fundamental principle on which the protective regime in IHL has been built upon.⁴³

This view is based on the notion that the importance of avoiding civilian casualties is twofold. There is simply the humanitarian ground that it is good i.e. ethically admirable, humanly worthy, and, “natural”, not to hurt fellow human beings unless you absolutely have to, and with the same qualifications, good also to avoid damaging civilian property. And there is the utilitarian ground that hurting the civilians and their property is pointless. Civilians are in theory of no importance in the military contest between armed forces.⁴⁴

According to Best the philosophy of avoiding civilian casualties has become so deeply embedded in the unspoken assumption of IHL that this statement

⁴¹ UNHCHR, Fact Sheet No.13; Bothe, 271.

⁴² UNHCHR, Fact Sheet No.13; Greenwood, C., A Critique of the Additional Protocols to the Geneva Conventions of 1949, in, *The Changing Face of Conflict and the Efficacy of International Humanitarian Law*, (ed.) Durham, H & T McCormack, 1999, 4-5.

⁴³ Best, 263-272; Sassóli, M., *Legitimate Targets of Attacks Under International Humanitarian law*, HPCR Policy Brief, 2003, www.ihlresearch.org, 3.

⁴⁴ Best, 267-272.

is nowhere to be found in IHL since the mid 19th century.⁴⁵ He further means that one has to turn to national military manuals to find this approach in contemporary regulations. These manuals frequently states that the overall purpose of military actions is the submission of the enemy, thus, the purpose of protecting civilians is not explicitly based on the humanitarian ground but on the ground that civilians simply is of no value in the overall military operation.⁴⁶

However, the civilian population in contemporary armed conflicts, perhaps more than ever before, is involved in the overall war effort. Materially by working in industries leaving contribution to the military operations, or physically by supporting the conflict morally, hence, making them desirable objectives to attack. Thus, what at first seemed perfectly obvious, innocent civilians should be spared, become more complicated when taken into account the role they may play in the overall warfare. This creates problems in connection with the application of the provisions of IHL (see chapter 5).⁴⁷

3.3 Contemporary IHL

The fundamental provisions governing the means and methods of warfare is found in the 1899-1907 Hague Conventions. In 56 short articles the enormous legal terrain on the conduct of warfare is covered, including surrender and flag of truce, obligations to wear uniforms, treatment of prisoners of war, sieges and bombardments, protection of cultural property, prohibitions against pillage and terms of occupation. However, these conventions include few provisions for the protection of the civilian population. To find codified provisions for the protection of the civilian populations one have to turn to more recent conventions, like the Geneva Conventions from 1949 and its Additional Protocols.

The Geneva Conventions from 1949 deals with the protection of certain categories of victims in armed conflict. The first covering the wounded or sick soldiers; the second, shipwrecked sailors; the third, prisoners of war; and the fourth, civilians and occupation. The first three conventions comprise of extensive rule on the care and the protection of combatants in certain situation. Despite the significant advance for the protection of civilians in occupied territories and certain categories of protected persons in the 1949 Conventions, the title of the Fourth Convention, the Geneva Convention relative to the protection of civilian persons in time of war, is misleading. The provisions of the convention protect a strictly defined category of civilians from arbitrary actions by the enemy, not against the dangers of military operations themselves.⁴⁸

⁴⁵ Best, 270.

⁴⁶ Ibid., 271.

⁴⁷ Ibid., 267-272.

⁴⁸ Gardam, 25-26.

General protection covering the whole civilian population is a recent concept in IHL and is codified in the Additional Protocols from 1977. For the purpose of examining the principles of distinction and proportionality in international armed conflict Protocol I is of interest here, since its provisions are applicable in international armed conflicts, whereas Protocol II covers non-international armed conflicts. Protocol I lays out an extensive set of articles for the protection of the civilian population as a whole, hence, these provisions will be the focus of the following study of the subject.

4 Additional Protocol I

So far the principle of distinction and proportionality have been examined from a general perspective. This has led to the conclusion that the most recent major developments on the protection of the civilian population is found in Protocol I. Hence, from here on the focus will be set on Protocol I, in order to examine how the principles subject to this thesis are elaborated into applicable provisions and also in order to determine in what way they impose restraints on a military commander in the conduct of military targeting.

4.1 General Protection Against Effects of Hostilities

Part IV of Protocol I comprises of thirty-one articles, all devoted to the protection of the civilian population. Nineteen of these are concerned with the protection against the direct effect of hostilities. These articles are designed to reaffirm, strengthen and clarify the principles already established for the protection of the civilian population and civilian property. The most important, as it contains the general principle, is Article 48 and it stipulates:

In order to ensure the respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

The following articles found in Section I to Part IV serve to develop and elaborate this general principle. The articles in this section can be divided into two main lines of protection. First, the civilian population and civilian objects should not be objects of direct attack. Second, constant care shall be taken to spare the civilian population and civilian objects from the effects of hostilities.

In Article 50 the terms “civilian” and “civilian population” are defined. The general protection of the civilian population is extensively laid out in Article 51, which prohibits direct attacks on the civilian populations, indiscriminate attacks and reprisals. This article together with the basic principle in Article 48 codifies for the first time the principle of distinction. Article 52 is equally imperative for the protection of the civilian population as it prohibits direct attacks on civilian objects and defines military and civilian objects. Article 57 and 58 prescribes precautionary measures to be taken to further avoid or minimise incidental casualties and damage to civilians and civilian objects as a result of attack on legitimate military objectives.

The section further prohibits attacks on objects important for the survival of the civilian population as well as provisions covering zones and localities under special protection.⁴⁹ The section also lays out provisions regarding the use of civil defence organisations during armed conflicts.⁵⁰

4.2 Customary Status

Even though the Additional Protocols from 1977 are not as widely accepted as the Geneva Conventions from 1949, they are the most recent development in Geneva Law and have now achieved majority acceptance in the international community.⁵¹ Majority acceptance, however, is still far from universal acceptance. By 1999 the Geneva Conventions had 188 state parties. Whereas Protocol I had 153 state parties and Protocol II 145. Even more serious is the fact that the forty or so that still has avoided to become party to Protocol I include some of the major military powers, such as France, United States, Israel, Pakistan, India, Indonesia and Iran. The Additional Protocols have now been tested in a number of major conflicts. Although Protocol I has been recognised as formally applicable in only one conflict⁵², it was probably applicable in parts of the armed conflicts in former Yugoslavia. Many of its most important provisions were also applied as rules of customary IHL in the 1991 Gulf War.⁵³

Since Protocol I has not yet been ratified by all significant states, the only provisions of the protocols which may be deemed binding on these non party states, are those that at the same time are declaratory of custom, or which subsequently will become custom.⁵⁴

According to the ICJ Statute one of the primary sources of international law is “international custom, as evidence of general practice accepted as law”.⁵⁵ Thus, the definition of custom includes two criteria, first, it must be a practice or habit. Second, a conviction by states that the conduct is legally required. The latter is often referred to as the *opinio iuris* of the state. However, both these criteria may be very difficult to determine in the context of armed conflict. The verbal practice of a state might be carried out for public relations and the practice on the battle field is often very difficult for a third party to control.⁵⁶ To determine if a conventional provision is part of customary IHL one has to examine the specific provision in the light of the above mentioned criteria. The fact that a rule is codified in one or more conventions by it self does not constitute it as customary. However, if a gener-

⁴⁹ Protocol I, Arts. 53-56.

⁵⁰ Ibid., Arts. 59-67.

⁵¹ Ahlström, 10-11.

⁵² Between Peru and Ecuador in the mid 1990's.

⁵³ Greenwood, 4-5.

⁵⁴ U.S.A. is perhaps the most important example of the states that by the summer of 2003 had not ratified Protocol I.

⁵⁵ ICJ Statute, Article 38(1)(b).

⁵⁶ Kwakwa, 30-31.

generally accepted convention includes the specific provision this may serve as evidence of its status as customary.⁵⁷

The four Geneva Conventions are generally deemed by states and scholars to be declaratory of custom.⁵⁸ The status of Protocol I is, however, less certain. To some degree the protocol codify pre-existing and accepted customs but other provisions in the protocol have not yet been accepted by a widespread number of states. As seen in the light of history, the principle of distinction has been considered as a customary principle even though its precise definition and application has been argued. Article 48, which codify the principle of distinction, is considered to reflect customary IHL since states that have not ratified Protocol I consider them self bound by the basic rule in the article. The elaborate provisions to this article, primary found in Section I, is often concerned as part of customary IHL. States like U.S.A. consider themselves bound by the vast majority of these provisions⁵⁹, which is confirmed by statements made by U.S. officials.⁶⁰ Also military manuals and ROE⁶¹ issued by the U.S. armed forces confirm this.⁶² Thus the contemporary view of states and scholars are that the provisions for the protection of the civilian population as found in Section I are reflecting customary IHL.⁶³

Also the customary status of the term “combatant” is imperative to establish. There are two definitions found in IHL, the first found in the Third Geneva Convention. Since the Geneva Conventions are deemed to have required customary status this definition offers no problem and is accepted as customary. The second definition is rather new to IHL and is found in Protocol I and was one of the issues, which were up for discussion during the Diplomatic Conference. As a consequence of the adoption of this new definition some of the major military powers did not ratify the protocol and accordingly the status of the definition have been somewhat uncertain. However, the definition has since become generally accepted as customary.⁶⁴

This leads to the conclusion that the general protection of the civilian population as found in Section I is generally accepted as part of customary IHL and as such is applicable in all international armed conflicts.

⁵⁷ Malanczuk, 39.

⁵⁸ Ibid., 18; Roberts & Guelff, 196.

⁵⁹ U.S.A. does not consider itself bound by the prohibition of reprisals to the civilian population, however, this does not mean that the provision as such is not part of customary law and that U.S.A. are not bound by the prohibition if put to a test.

⁶⁰ Kwakwa, 25-26.

⁶¹ Rules of Engagement (ROE) are specific instructions, based on the LOAC, and instructs commanders and soldiers on how to conduct during a specific military operation.

⁶² The U.S. ROE issued during the 1991 Gulf War confirms some of the major principles found in Section I, such as the principle of distinction found in Art. 48, principle of proportionality found in Arts. 51 and 57. Reprinted in Roberts & Guelff, p 561-564.

⁶³ Bothe, 317.

⁶⁴ Gardam, 100-104.

4.3 Scope of Application

According to Article 1(3) of Protocol I the articles of the protocol shall apply in the situations referred to in Article 2 common to the Four Geneva Conventions from 1949. Common Article 2 as such stipulates that the “present Conventions shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties”. In Article 1(4) of Protocol I this is extended to situation where people fight for the right to self-determination i.e. liberation wars.

Article 49(2) extends the protective categories by specifying that the provisions relating to attacks “apply to attacks in whatever territory, including the national territory”. Hence, the provisions apply to the whole of the civilian population of states engaged in hostilities, including those situated in the national territory. This extends the protection found in the Fourth Geneva Convention, which mainly refers to enemy nationals in the territory of a belligerent party and the inhabitants of an occupied territory.⁶⁵ Furthermore, in regard to the articles in Part IV, Article 49(3) of Protocol I states that these are applicable to any warfare which may effect the civil population on land, In addition they are also applicable on any attack, from the sea or air on objects on land. However the provisions are not applicable in armed conflict at sea or in air, and as a consequence rules already applicable in the protocol and its provisions do not affect these areas.⁶⁶ Finally, according to Article 49(4) the provisions of Section I are additional to other humanitarian rules concerning the protection of civilians, regardless of its status as conventional or customary IHL. Consequently, and as seen in chapter 3, rules for the protection of the civilian population may be found elsewhere in IHL.

4.4 Terminology in the Protocol

An imperative term in the application of the provisions in Section I is that of “attack”. The distinction between military and civilian objectives must be respected when conducting an attack, thus, the term “attack” must initially be defined to clarify the area of application. The usual meaning of the word “attack” indicates some kind of initiative such as a first strike. The same goes for the military meaning where an attack is understood as an act of initiative by engaging first. The opposite term to “attack” is “defence”, which in military situations mean that a unit is defending itself against an attack. However, defensive actions are not necessarily carried out in a passive way, and can include active measures for the purpose of defending oneself against attacks.⁶⁷ For the purpose of Protocol I the term “attack” is de-

⁶⁵ Sandoz, Y & C. Swinarski & B. Zimmerman (ed.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, 1987* (hereinafter *ICRC Commentary*), 602; Bothe, 289; Kalshoven, 98.

⁶⁶ Geneva Convention II, concern conflicts at sea, thus, shipwrecked and wounded at sea are still governed by this convention and do not fall under the application of Protocol I.

⁶⁷ *ICRC Commentary*, 602.

defined in Article 49(1) and includes all violence against the adversary, either in offence or in defence. Thus, the definition in Protocol I have a wider scope as it covers all military operations involving force. This is justified since both offensive as well as defensive actions can effect the civilian population and civilian objects. However, the provision in Section I does not effect military movement and manoeuvre, it just refers to combat action between the armed forces.⁶⁸

Attack as it is defined in Protocol I refers only to the use of armed force and should not be confused with that of aggression. The rules and principles of IHL are not affected by the question of legitimate use of force, thus, all parties to an armed conflict is obligated to follow the applicable provisions irrespectively of who is considered the aggressor.⁶⁹ The question of aggression or *jus ad bellum* is a totally different aspect of international law than that of IHL or *jus in bello* and is not the scope of this thesis.⁷⁰

The term “military objectives” as used in the text of Protocol I is somewhat ambiguous when compared with everyday language or with military terminology. The term has a twofold meaning and may indicate the overall or a specific purpose of the military operation, to take a certain area, to reach a river, or to seize a bridge. On the other hand, and in a more narrow way, it means all potential targets i.e. buildings, military vehicles and personnel.⁷¹ In Protocol I the term means different objects whether it is property or individuals. Only a material tangible thing can be targeted, immaterial objectives e.g. victory are left out of the scope since they can only be achieved.⁷² Hence, both the terms “objects” and “objectives” can be used to describe tangible things. For the purpose of clarity the term “military object” will describe material things whereas “military objectives” will be used to describe both material things as well as combatants.

The protocol use the term “military operations” and according to the ICRC Commentary this term includes all movements and activities carried out by the armed forces related to hostilities.⁷³

⁶⁸ ICRC Commentary, 602-603; Bothe, 289.

⁶⁹ Protocol I, Art. 1(1) “The High contracting Parties undertake to respect and to ensure respect for this Protocol in all circumstances”; Art. 1(3) refer to Art. 2 Common to the Geneva Conventions which stipulates that the conventions should apply to an armed conflict between state parties even if a state of war is not recognised by one of them.

⁷⁰ ICRC Commentary, 603; Malanczuk, 306; Bothe, 288.

⁷¹ ICRC Commentary, 603.

⁷² Ibid.; Sassóli, 2.

⁷³ ICRC Commentary, 617.

5 Military Targets

Imperative for the distinction between civilians and combatants and military and civilian objects to be effective, these categories must be clearly defined. In order to determine what constitutes a legitimate target in the following chapter the definition of these categories are examined as they are laid down in Section I.

5.1 Military and Civilian Objects

Article 52 of Protocol I provides general protection for civilian objects against being made the target of attack and against reprisals of any kind. According to the article:

1. Civilian objects shall not be the object of attack or of reprisals. Civilian objects are all objects which are not military as defined in paragraph 2.
2. Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to 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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage.
3. In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house of dwelling or a school, being used to make an effective contribution to military action, it shall be presumed not to be so used.

The article prohibits direct attacks on civilian objects but does not deal with the often-occurring problem with collateral damage due to military attacks on perfectly legitimate objectives. This problem is dealt with in Article 51 on the protection of the civilian population and in Article 57 and 58 in relation to precautionary measures.

In Article 52(2) civilian objects are defined by *a contrario* definition as it defines military objects instead of civilian objects. Consequently, any object that does not meet the criteria that constitutes a military object is a civilian object. Traditionally, IHL has been a system of prohibitions and restrictions specifying what was to be spared, not what was legitimate to attack.⁷⁴ From this point of view it would have been more satisfactory to define civilian objects. However, as it is not due to its natural character, but according to its use by the enemy or potential use for the attacker that an object becomes military, hence, military objects have to be defined. This is also justified by

⁷⁴ Bothe, 322; Sassóli, 1-2.

the fact that there are far more civilian objects than military objectives, which would make a definition of civilian objects more complicated.⁷⁵

The term “military objects”, as defined in Article 52(2), includes more than strictly military objects such as military vehicles, weapons, stores of fuel and munitions. Instead an object is classified as military if it meets the two-pronged test under the circumstances ruling at the time. Even though it is clear that members of the armed forces, combatants, are military objectives, for the purpose of this article the definition is limited to material objects such as buildings, bridges and vehicles.⁷⁶

Under the definition in article 52(2) an object must cumulatively fulfil two criteria to be a military object:

1. The objective must contribute effectively to the military action of the enemy, and;
2. The destruction, capture, or neutralisation of the object has to offer a definite military advantage.

Effective contribution in the first criteria is exemplified by an object’s “nature, location, purpose or use”, which clarifies that not only objects of military nature are military objectives.

The first element refers to objects, which by their very “nature” make an effective contribution to the military action. These are all the objects that are directly used by the armed forces such as, weapons, equipment, transports, and command headquarters. The second element of this criteria is concerned with the “location” of the objects. Since there clearly are objects, which by their nature have no military function but which, by virtue of their location, make an effective contribution to the military action. This may for example be, bridges, railway lines or buildings located in the combat zone. Also sites or areas of special importance for military operations are included, either because they must be seized or it is important to prevent the enemy from seizing or using them. However, such areas or sites must be limited in size.⁷⁷ The third element, that of “purpose”, is concerned with the intended future use of an object, while the fourth, that of “use”, is concerned with its present function. It is the intended, not the potential future use that should be established. This should be based on a realistic estimation, otherwise every civilian object could constitute a future military object, and thus, rendering the protection useless since in theory every object could at some point fulfil the above mentioned criteria. The object must also make an effective contribution to the military action of the adversary at the time of attack owing to its estimated intended use, not because of a general potential estimation. This fact is further stressed by the phrase “circumstances ruling

⁷⁵ ICRC Commentary, 634-637.

⁷⁶ *Ibid.*, 634; Bothe, 284, 322-323.

⁷⁷ ICRC Commentary, 636-637; Bothe, 325.

at the time“, which directly refers to the above-mentioned criteria and elements being fulfilled at the time of the attack.⁷⁸

The second criteria, which is that of the object’s “destruction, capture or neutralisation”, has to offer a “definite military advantage” for the attacking party. According to the ICRC Commentary it is the anticipated advantage that is relevant, thus, the actual effect in hindsight is not relevant.⁷⁹ However, the assessment of the potential effect should be made on realistic estimations.⁸⁰ In addition to destruction, where the purpose clearly is to destroy the object, neutralisation and capture deals with an attack for the purpose of denying the adversary the use of the object. As mentioned above a specific area of land may be a military object because of its location, if the capture or the neutralisation offers a definite military advantage. For example, a minefield may neutralise a specific area as well as destruction of roads indirectly will deny the enemy the usage of the area in question.⁸¹

Hence, objects could be divided into two categories: military and civilian objects. Unlike objects, which by their very nature are presumed to be military such as tanks, arms depot, artillery emplacements and command centres, civilian objects cannot be classified as civilian by the virtue of their nature. Civilian objects are all objects, which are not military objectives. However, in case of doubt on the status of an object it is to be considered civilian according to Article 52(3). This article, which provides a non-exhaustive list of objects normally dedicated to civilian use establishes a presumption of civilian use in favour of such objects.⁸²

Thus, there remain all sorts of objects, which fall under neither presumption. Such objects, for example railways, roads, bridges, power generating facilities or industrial plant, may serve civilian and/or military purposes. These, so-called dual-use objects, are by far the most complicated to categorise which, as a consequence constitutes a significant problem in IHL. Nonetheless, these object are not a third category of objects, instead they may or may not fall within the term of military objectives, and they will do so when they meet the dual criteria in Article 52(2) that they not only make “an effective contribution to military action” but that their “total or partial destruction, capture or neutralisation, in the circumstance ruling at the time, offers a definite military advantage”.

⁷⁸ ICRC Commentary, 635-636; Sassóli, 2-3.

⁷⁹ ICRC Commentary, 635-636.

⁸⁰ ICRC Commentary, 635; Bothe, 325-326.

⁸¹ ICRC Commentary, 636-637; Bothe, 325.

⁸² ICRC Commentary, 637-638.

5.1.1 Effective Contribution to the Military Action

The nature of these dual-use objects is not the imperative factor. Instead the way in which the specific object contributes to the military action is the important factor. In theory every object could contribute to the outcome of an armed conflict. This could, if taken to the extreme, legitimise attacks on hospitals and other typically civilian objects, which could be said to contribute to the armed conflict, at least from a moral perspective.⁸³

Here it is important to distinguish between military action or military operation and the overall war effort. Military action or military operation is the actual combat between the armed forces of the belligerent parties, and includes all the movement and activities carried out by the armed forces related to hostilities.⁸⁴ The overall war effort on the other hand includes not only the military operation but also all other feasible acts or objects that make contributions to the conflict, such as war time production, political decisions as well as the positive opinion of the citizens.⁸⁵

The term “effective contribution to the military action” in Article 52(2) indicates that only objects that are directly involved in the military action, could qualify as military objects. However, the contribution does not require a direct connection with the combat operation, instead a civilian object may become a military object through use which only indirectly relates to the actual combat action as long as it provides an effective contribution to the military action as such. Thus, the destruction of a bridge should for instance affect the armed forces possibility to move, or the strike against a public communication net affect the possibility to lead the military operation. Imperative here is that the contribution must be effective, leaving out potential effects and vaguely estimations on contribution.⁸⁶

Consequently, an arms factory even though not involved in the actual combat, could qualify as a military object as it contributes to the military action by providing munitions to the armed forces. Other objects are not that easy to qualify and it will to some extent be left to the subjective assessment of the attacker to decide what amounts to an “effective contribution”. As we have seen not only the present contribution but also future contributions may constitute objects as military. However this must be a realistic estimation on the future use based on realistic estimations and available information at the time of attack.⁸⁷

⁸³ Sassóli, 3-6.

⁸⁴ ICRC Commentary, 617.

⁸⁵ Kalshoven, 99-100.

⁸⁶ *Ibid.*; Bothe, 324; ICRC Commentary, 636-637.

⁸⁷ Kalshoven, 100-101.

5.1.2 Definite Military Advantage

Apart from the requirement in Article 52(2) that the object shall effectively contribute to the military action of the enemy, the destruction, capture or neutralisation of the objects shall offer a definite military advantage for the attacker.

One important aspect to remember is that a target is not critical in and of itself. Rather its importance is derived from its potential contribution to achieving the commander's military objectives. Thus, targets of no importance would attract little or no attention. However, military considerations may very well affect the civilian population in an adverse way if left to the subjective assessment of the belligerent parties. Hence, from a humanitarian aspect it is imperative to restrict the free assessment on what constitutes a military advantage. Article 52(2) stipulates that the advantage has to be "definite", indicating that attacking the object has to be of some relevance to the specific military operation or the overall military objectives. It is, however, not necessary that the contribution made by the object attacked to the party attacked has to be related to the advantage anticipated by the attacker from the destruction, capture or neutralisation of the object. Thus, the advantage expected from certain attacks does not have to relate to the value to the adverse party.⁸⁸

With the term "definite" the drafters of the provisions in Protocol I tried to avoid an extensive interpretation of what constitutes a military target, in effect excluding "possible" advantages. This adjective was extensively discussed during the drafting of the protocol. Bothe concludes the drafting discussion and states that "this adjective is a word of limitation denoting in this context a concrete and perceptible military advantage rather than a hypothetical and speculative one".⁸⁹ In other words it is not legitimate to launch an attack, which only offers potential or indeterminate advantages. In respect to the extent of attacks as part of wider military operations the advantage anticipated is intended to refer to the attack as a whole, and not necessarily from isolated or particular parts of the overall military operation. However, overall military operation is not intended to refer to the armed conflict as a whole but must be a limited military operation.⁹⁰ The anticipated advantage should be decided on normal military grounds and has to be assessed in the planning stage of the attack. It refers to the advantage being fulfilled at the time of the attack, which is stressed by the phrase "circumstances ruling at the time" in the article.⁹¹

The term "a definite military advantage" used in Article 52(2) is similar to the ones used in Article 51 concerning protection of civilians and in Article 57 concerning precautions in attack. In these articles the term "concrete and

⁸⁸ Bothe, 325.

⁸⁹ *Ibid.*, 326.

⁹⁰ *Ibid.*, 325.; ICRC Commentary, 636-637.

⁹¹ Bothe, 324-326; ICRC Commentary, 636-638; Sassóli, 3.

direct military advantage anticipated” is used. There is no answer in the documents of the Diplomatic Conference why different expressions were used, hence, leaving room for interpretations on the application of the different provisions. According to the ICRC commentary, in the case of article 52, there must be a military advantage for every military objective that is attacked. Whereas in article 57, apart from this condition being fulfilled, the military advantage must be weighed against the civilian losses and damage, which could result from an attack (see chapter 6).⁹²

5.1.3 Summary

For an object to be defined as military the two criteria in Article 52(2) must be fulfilled. Does this however mean that an object which by nature is considered military, such as a tank, is not to be regarded as military according to IHL if it does not fulfil these two criteria? However unlikely this argument is, there could in theory be situations where these criteria are not fulfilled by typically military objects. This would, as a consequence, render otherwise perfectly legitimate military targets immune and make the separation between civilian and military objects even harder to uphold.

It does not look like this problem has been the object of the discussion during the Diplomatic Conference. Neither the ICRC Commentary deals with this problem. However, not only is the view that typically military objects should be able to seek protection behind ambiguous provisions contradictory to the whole purpose of IHL, it also goes against the primary military concerns, to weakening the adversary’s armed forces. This notion found in the St Petersburg Declaration explicitly states that the armed forces of the belligerent parties are legitimate targets. Furthermore, there is no general principle of proportionality in regard to combatants, thus, military objects may be freely targeted as long as other provisions of IHL are respected. However, the matter may be somewhat uncertain and leave space for interpretations due to the definition of military objects found in Article 52(2).

Even though this may be somewhat of an academic question, it serves to demonstrate some of the problems with the definition of military objects. Hence, it leaves us with ambiguities on the exact application of the principle as objects can change from military to civilian and vice versa during the conflict. Consequently, the parties to an armed conflict are left to make subjective assessments on what constitute an “effective contribution” and what amounts to a “definite military advantage”. However, on the other hand this flexible definition duly takes into account the flexible nature of warfare and the military concerns connected with it, thus, leaving the parties to an armed conflict with realistic and applicable provisions on how to define military objects.

⁹² ICRC Commentary, 637.

5.2 Civilians and Combatants

In this chapter the definitions of civilians and the civilian population as well as the definition of combatants will be examined.

5.2.1 Civilians

Civilians are defined in Article 50 and according to paragraph 1:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1), (2) and (6) of the Third Convention and in Article 43 of this Protocol.

Furthermore, paragraph 2 defines the civilian population as comprising of all persons defined as civilians by paragraph 1. Hence, Article 50 uses the same negative way of defining civilians as Article 52(2) in respect to civilian objects. However, if one examine the articles referred to above the term civilians does not only include the “normal” population but also the following categories:

- (a) Persons linked to the armed forces without being members thereof, such as civilian contractors, crews of the merchant marine and others accompanying the armed forces;⁹³
- (b) Released prisoners of war, reservists and retired members of the armed forces in occupied territory;⁹⁴
- (c) Civilians employed in the production, distribution and storage of munitions of war;⁹⁵
- (d) Civilians who are taking part, or have taking part in hostilities without combatant status.⁹⁶

Hence, the definition of “civilians” includes categories of persons that may be difficult to define. Thus, the effectiveness of this article depends on a clear and precise definition of the term “combatant” as well as an effective compliance by all combatants to distinguish themselves. Still, those left to decide on the status of a person must base their decisions on reliable information and not on mere speculations.⁹⁷ Still there may be numerous situations in an armed conflict where the status of a person might be in doubt. To avoid the risk of commanders considering everyone not clearly civilians as a combatant, and as a consequence legitimate targets to attack, Article 51(2)

⁹³ Geneva Convention III, Arts. 4A(4), (5).

⁹⁴ *Ibid.*, Art. 4B(1).

⁹⁵ These civilian workers and their status are further examined in chapter 6.

⁹⁶ Protocol I, Art. 51(3), these however losses there protection while they take direct part in hostilities, this will be further examined in the chapter 6.

⁹⁷ Bothe, 293-295.

states that if there is doubt on the status of a person he should be considered to be civilian until his status can be determined.

5.2.2 Combatants

There are several reasons why it is important to determine combatant status. Foremost, a person's status determines whether he is a legitimate target, since both combatants and those engaged in the fight not complying with the combatant requirements may be directly attacked.⁹⁸ Others not may.

The term "combatant" is extensively defined in conventional IHL. It was first found in the Hague Regulations from 1907⁹⁹ and later developed and elaborated in both the Third Geneva Convention¹⁰⁰ and in Protocol I¹⁰¹. Since the definition in Protocol I is the most recent, and have by today acquired customary status, as well as it serves as a complement to the general protection of the civilian population the term "combatant" will be examined by taking the starting point in Article 43 of Protocol I. According to the first paragraph of this article:

The armed forces of a party to the conflict consist of all organised 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 recognised by an adverse Party. Such armed forces shall be subject to internal disciplinary system which, *inter alia*, shall enforce compliance with the rules of international law applicable in armed conflict.

The definitions in Protocol I of "armed forces" and "combatants" is in many ways entirely new compared to the older definitions of combatants found in the Hague Regulations and in the Third Geneva Convention, since it does not make any distinction between regular forces belonging to the state and irregular forces of resistance or liberation movements. This reflects the new reality of armed conflict, with increasing numbers of conflicts including irregular forces and resistance movements. Hence, the standard for combat status has been lowered.¹⁰² The requirement for all armed forces could be summed up as, a measure organisation, a responsible command, and an internal disciplinary system.

The qualification is no longer dependent on its members to have a uniform or to carry arms openly at all times, as a mean to distinguish the member of the armed forces from the civilian population.¹⁰³ In the older definition the

⁹⁸ Protocol I, Art 51(3). These civilians do not only losses their protection during the attack but are also considered performing an illegal act, hence, punitive measures may be taken. See section 6.3.

⁹⁹ Hague Regulation 1907, Art. 1.

¹⁰⁰ Geneva Convention III, Arts. 4A(1), (2), (3), (6).

¹⁰¹ Protocol I, Art. 43.

¹⁰² Gardam, 100-104.

¹⁰³ Hague Regulation 1907, Art. 1.

rights and obligations of a combatant was referred through the notion “armed forces”, whereas Protocol I solves this in a different way. Thus, according to Article 43(2):

Members of the armed forces of a Party to a conflict [...] are combatants, that is to say, they have the right to participate directly in the hostilities.

Furthermore, Article 44(3) states individual obligation for individuals participating in combat:

[...] 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.

The text closely resembles the one found in Article 48, which addresses the parties to the armed conflict, whereas this text addresses the individual combatants involved in the hostilities between the belligerent parties. Another different feature compared to the older definition is that a combatant does not need to distinguish himself at all times, only when he is engaged in “an attack or a military operation preparatory to an attack”. Imperative here is to determine the time period during which he has to distinguish himself, which according to the article is not only during the actual attack, but also in the preparatory phase to an attack. However, this time period is difficult to establish and neither the protocol nor the ICRC Commentary provides us with answers on this imperative matter. During the Diplomatic Conference the issue was widely discussed, and the following interpretation of the term was widely accepted, “preparatory to an attack” should refer to “any movement towards a place from which an attack is launched”¹⁰⁴. However, preparation can include more than movement, and Kalshoven suggests that based on military logic, this phrase should not only include the approach of the target but also the time when the attacker prepare the attack.¹⁰⁵ Still, there remains some uncertainty on the extent of the provision. Equally important are the provisions in Article 44(3), which states that if a combatant due to the nature of the conflict cannot distinguish himself he is still entitled to his status as combatant if he carries his arms openly during each military operation and during the time prior to a military operation.¹⁰⁶

The conclusion of the new definition of combatants is that it will cover persons involved in resistance movements and liberation organisations, which use to have a somewhat uncertain status. However, it also makes it harder to clearly determine if a person have combatant status, since there may not be any distinctive signs indicating that he has this status, hence, making the distinction between civilians and combatants more complicated.

¹⁰⁴ Gardam, 104.

¹⁰⁵ Kalshoven, 99.

¹⁰⁶ *Ibid.*, 99-100; ICRC Commentary, 611-612.

6 The Elaborate Provisions to Article 48

So far the fundamental principle in Article 48 have been examined, which together with Article 51 clearly prohibits direct attacks on civilians. To give effect to this fundamental protection of the civilian population the protocol defines military objectives. This includes both military objects as well as combatants. Hence, everyone and everything not fulfilling the definition are immune and should not be directly attacked. However, there may still be civilian losses and injuries and damage on civilian objects due to attacks on legitimate military objectives. Section I lays down further provisions to elaborate the basic protection. These articles both prohibits certain types of attacks as well as obligates the belligerent parties to take constant care to avoid and minimise civilian casualties as well as collateral damage on civilian objects. This chapter will examine how these articles further restrains a military commander when conducting attacks on military objectives.

6.1 The Protection of the Civilian Population

Provisions for the protection of the civilian population and individual civilians are primary found in article 51. According to paragraph 1:

The civilian population and individual civilians should enjoy the general protection against dangers arising from military operations.

Together with paragraph 2, stating that the civilian population as a whole as well individual civilians shall not be the object of attack, the article explicitly prohibits attacks on the civilian population, hence, elaborating the basic principle in Article 48. The article further elaborates the general protection and states different rules to give effect to the overall general protection.

However, for a distinction to be effectively conducted and to apply to the provisions found in article 51 in practice, combatants and civilians must be clearly separated. This is rarely the case in armed conflicts as the civilian population often gets intermingled with military units which makes the distinction everything but easy.¹⁰⁷ The solution to this problem is of course very hard to reach through the rules and principle of IHL, nevertheless, Protocol I presents a solution in Article 50(3) by stating that:

The presence within the civilian populations of individuals who does not come within the definition of civilians does not deprive the population of its civilian character.

¹⁰⁷ The increasing numbers of civilian casualties indicates that the separation have been harder to uphold during recent armed conflicts, see supra note 36.

Presence for the purpose of this article should be understood as individual soldiers, presumably on their way to or from their units, not regular military units as such.¹⁰⁸

Still, what effect has a significant presence of combatants among the civilian population? A military unit or a combatant is a legitimate target, however, an attack on such objects will jeopardise the safety of the civilian population and may as a consequence inflict casualties on civilians and civilian objects. Article 51, 57 and 58 aims at avoiding or minimising collaborate damage due to attacks on legitimate military objectives.

Article 51 addresses the belligerent parties and prohibits certain types of attacks, which is considered especially threatening to the civilian population. According to the second sentence of paragraph 2 “acts or threats of violence with the primary purpose of which are to spread terror among the civilian population is prohibited”. Interesting here is that not only acts are prohibited but also threats. The word “primary” indicates that “normal” attacks are not prohibited even if they as a consequence have a terrorising effect. The purpose of this provision is to put an end to attacks aimed at breaking the morale of the civilian population, a method frequently used during WWII as well as in more recent conflicts. Not only is this method deemed ineffective but it is also goes against the fundamental principle, found in the St Petersburg Declaration, that the only legitimate objective of war is to weaken the enemy’s armed forces.¹⁰⁹

As seen above (chapter 5.2.2) an individual may be attacked when he fulfils the criteria for combatant status. However, civilians may participate or contribute to the direct military action or the overall war effort without fulfilling these criteria. According to IHL these individuals should still be regarded as civilians and according to Article 51(3) lose their right to protection, and may be attacked “for such time as they take direct part in hostilities”. This criteria is fulfilled when civilians perform hostile acts, which by their nature or purpose are designed to strike at the enemy i.e. attacking a military unit or performing sabotages on military installations.¹¹⁰ The term “hostilities” is not defined in Protocol I but is consistent with the interpretation in Article 44(3), hence, the term should be interpreted as including preparation prior to combat as well as the return from combat. The article also indicates that once a civilian withdraws from further hostile acts his is to be considered a civilian and benefits from the general protection of IHL. However, if captured during such activities or at a later stage, the capturing authority may take preventive or punitive measures in accordance with the provisions in Article 45.¹¹¹

¹⁰⁸ ICRC Commentary, 612.

¹⁰⁹ Ibid., 618; Kalshoven, 102-103.

¹¹⁰ Kalshoven, 99.

¹¹¹ ICRC Commentary, 618; Bothe, 302.

According to Article 52(2) a production facility could be classified as a military object if it effectively contributes to the military action and if its destruction, capture or neutralisation offers a definite military advantage. But should the workers in such facilities be considered to take a direct participation in the hostilities? Furthermore, another interesting category is the political leadership of a state, as they are the ones that set the overall military objectives of the conflict. It could be argued that the governing of the state, and in effect leading the armed conflict, could amount to a participation in the hostilities.

Without doubt these categories, both worker in the arms industry and the leadership, as well as other similar categories, contribute to the war effort, a contribution that may be very imperative for the outcome of the armed conflict. However, the concept of “making contribution to the war effort” is a very wide concept and even under the narrowest interpretation it includes for example, public transportation, water purification plants and industrial production that in some way may contribute to the military forces. Hence, all civilians working in these facilities contribute to the war effort through their labour, but they only provide an indirect support to their own armed forces and do not pose an immediate threat to the adversary’s armed forces.¹¹²

According to IHL and Protocol I only combatants and civilian who unlawfully take direct part in hostilities may be targeted. However, the concept of “direct participation in hostilities”, used in Article 51(3), is much more narrow than that of making a contribution to the war effort. According to Sassóli there is no such thing as “quasi-combatants”, a category like dual-use objects that does not fall under any of the definitions but still contributes to the war effort in a way that would make them legitimate targets. He argues that if the protection should be effective in IHL only one distinction is realistic, that between the ones taking a direct part in the hostilities and all other. Attacks on workers, scientists or politicians, however essential these may be, would violate the principle of military necessity since victory could be achieved through other means, for instance the targeting of the factories or the command facilities. Hence, there is consequently no military necessity in the individual targeting of workers, politicians or other non-combatants.¹¹³

The contemporary view in IHL is that workers in munitions industries or in other imperative facilities, as well as other categories of civilians contributing to the war effort, are immune and should not be directly attacked. Regardless of this prohibition they may nevertheless be affected by legitimate attacks against their places of work, running the risk of getting killed or injured by such attacks.¹¹⁴

¹¹² ICRC Commentary, 618-619; Bothe, 303-304.

¹¹³ Sassóli, 9-10.

¹¹⁴ ICRC Commentary, 618-619; Bothe, 303; Kalshoven, 99-100.

To further give effect to the prohibition against targeting civilians Article 51(4) prohibits attacks that are considered indiscriminate. This provision is important from the aspect of military targeting as it prohibits attacks carried out against populated areas believed to contain military objects with means and methods that does not make any distinction between civilian and military objectives. According to this paragraph indiscriminate attacks are:

- (a) Those which are not directed against a specific military objective;
- (b) Those which employs a method or means of combat which cannot be directed at a specific military objective;
- (c) Those which employ a method or means of combat the effect which cannot be limited as required by this Protocol;

And consequently, in each such, case, are of a nature to strike military objectives and civilians or civilian objects without distinction.

These type of attacks are exemplified in Article 51(5) which defines two types of attacks considered indiscriminate, the first concerns area bombardment:

An attack by bombardment by any method or means which treats as a single military objectives a number of clearly separates and distinct military objectives located in a city, town village or other area containing a similar concentration of civilians or civilian objects.

The other types of attack considered indiscriminate are those, which may be expected to cause excessive damage and according to the paragraph includes:

An attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete military advantage anticipated.

This text represents the first concrete codification of the principle of distinction as it applies to collateral civilian casualties. This provision can be said to belong to the second main line of protection, that constant care should be taken to spare the civilian population. Hence, it is intimately connected with the precautionary measures that shall be taken according to Article 57 and 58. The principle of proportionality clearly requires that those who plan and decide upon an attack must take into account the effects of the attack on the civilian population and civilian objects when planning it. They must determine whether those effects are excessive in relation to the concrete and direct military advantage anticipated. Hence, there will be a balancing between the:

- (1) Predictable extent of incidental or collateral civilian casualties or damage, and;

(2) The relative importance of the military objective as a target.

Both sides are variables and they cannot be quantified since they involve different values. Hence, this will be a subjective assessment left to the good faith of the attacker. However, the assessment must be based on the available information at the time of the assessment and not on the basis of hindsight.¹¹⁵

The term “concrete and definite military advantage” will be further examined in relation to the precautionary measures. However, some points should be mentioned in relation to Article 51(5)b. The provision in the article should not be interpreted as authorising any type of attack, as long as the result in civilian lives and damage does not exceed the military advantage. The attack must be directed against a military objective with means that are not disproportionate in relation to that objective.¹¹⁶ The fact that an attack does not cause excessive damage to the civilian population, and, hence, is not “indiscriminate” according to the article, is not enough to justify the conclusion that the attack meets all the requirements laid down in Protocol I. Thus, military objectives defined according to the provisions of IHL could, nevertheless, be illegitimate targets, according to the precautionary measures that are stipulated in Article 57.¹¹⁷

Article 51(6) prohibits attacks against the civilian population as a way of reprisal and Article 51(7) prohibits the belligerent parties to use the civilian population to render certain points or areas immune from military operation i.e. to use the civilian population as shields. The final paragraph in article 51 is concerned with the situation when other provisions of the protocol are not complied with. According to the provision it is compulsory to comply with this requirement even if the adversary violates this obligation.

6.2 Precautionary Measures

The obligation to take precautionary measures is a complementary one, shared by both sides to an armed conflict. Article 57 codifies the principles and rules of pre-existing conventional and customary IHL, as to the precautions which are required of the attacking party in order to avoid or minimise loss of civilian life or damage to civilian property collateral to attacks on military objectives. The article provides combatants with guidance as to their responsibility to civilian and civilian objects when carrying out attacks against military objectives. The systematic provision is a significant development, especially in regard to the codification of the principle of proportionality. The precautionary measures of article 57 are subject to the substantive restraints and prohibitions imposed by article 51 to 56 and other

¹¹⁵ ICRC Commentary, 625-626; Kalshoven, 103-104; Bothe, 309-311.

¹¹⁶ Kalshoven, 103-104.

¹¹⁷ Ibid., 102-104; ICRC Commentary, 625-626.

articles in Protocol I. Thus, they impose additional restraints on attacks directed against military objectives. Article 58 imposes obligations on the parties in regard to the protection of the civilian population under their control, regardless if it is the party's own population or the population of the adversary currently under its control.

6.2.1 Precautions in Attack

Article 57(1) lays down the principle that "In the conduct of military operations, constant care shall be taken to spare the civilian population, civilians and civilian objects". The term "feasible" is used in several of the provisions found in Article 57. According to the ICRC Commentary the drafters of the protocol used this term to indicate that the obligations set forth in this article are qualified ("take all reasonable steps to ensure") obligations instead of absolute ("ensure"). When the article was adopted some states understood the word "feasible" to mean everything that was practicable or practically possible, and as such including all circumstances at the time of the attack, including those relevant to the success of the overall military operation. Clearly such a definition would be too wide, as the reference to the general success of the military operation as a whole would undermine the humanitarian requirements.¹¹⁸ According to the ICRC Commentary the application of the obligations will come down to a matter of common sense and good faith.¹¹⁹

Article 57(2)a concerns the planning and the decision on an attack. Three clauses to the article stipulates that those who plan or decide upon an attack:

- (i) Must "do everything feasible to verify" that the chosen objects is military and not civilians or a civilian object;
- (ii) Must take "all feasible precautions in the choice of means and methods of attack" in order to avoid or in any event minimising incidental losses to civilian life and objects;
- (iii) Must "refrain from deciding to launch" a decided or a planned attack whenever it "may be expected to cause" such loss, injury or damage in a measure "which would excessive in relations to the concrete and direct military advantage anticipated".

The first clause (i) in Article 57(2)a is devoted to the identification of military objectives. The provision in the clause explicitly obligates a party to examine the objective before the attack, to determine the status of the specific objective. Not only the status as civilian or military is of interest here. The provision also obligates the party to determine if the objective is subject

¹¹⁸ ICRC Commentary, 681-682.

¹¹⁹ Ibid., 682; Bothe, 362.

to special protection in IHL.¹²⁰ The provision implies that a careful examination should be conducted before deciding on an attack. Those who plan or decide upon an attack will base their decision on the available intelligence given to them and they cannot be expected to have personal knowledge of the specific target. This becomes especially apparent when planning long-range artillery bombardments, air strikes or missile attacks, where the information often comes from satellite surveillance, aerial reconnaissance or indirectly through reconnaissance units. According to the ICRC Commentary the evaluation of the intelligence obtained must include a serious check of its accuracy and in case of doubt they must call for additional intelligence to verify the objective.¹²¹ The targeting procedure in close combat on land will often be based on more direct sources of intelligence since the commander will get the information from his own troops who are in combat with the adversary. He also may have at his disposal more direct methods, which enables him to collect the specific information required to make the correct assessment.¹²²

The second clause (ii) is devoted to the choice of means and methods of attack. The provision does not imply any prohibitions of specific weapons, rules and principles. Prohibition or restriction of certain weapons is found elsewhere in IHL.¹²³ The primary obligation is total avoidance of civilian casualties and damage and only if that is not possible, the goal of minimising comes into play.

Even if the casualties are minimised an attack may still be excessive and clause (iii) restates the principle of proportionality as a precaution to be taken in attacks. As we have seen a proportionality assessment is conducted in Article 52(2) when defining military objects, thus, limiting the discretion of a military commander when deciding whether an object is military or not. Article 51 prohibits indiscriminate attacks, for example cases where the expected civilian losses and damage are excessive in relation to the military advantage. Clause (iii) obligates the attacker to refrain from deciding on or launching attacks on legitimate military objectives if the attack could result in excessive civilian losses and damages in relation to the direct and concrete military advantage. Thus, the provision complements and elaborates article 51 and also covers attacks that are not considered indiscriminate.

The provisions in Article 57 provide guidance to military personnel when planning, deciding and conducting attacks. However, to what levels are these obligations addressed? According to Bothe these obligations are limited to commanders and staff officers at levels where attacks are planned and decided upon.¹²⁴ In conventional conflicts between major military units, these functions are normally performed on higher levels of command. None-

¹²⁰ Protocol I, Arts. 53-56.

¹²¹ ICRC Commentary, 681.

¹²² *Ibid.*; Bothe, 363.

¹²³ The most fundamental one being the 1980 Weapons Convention, see *supra* note 14.

¹²⁴ Bothe, 362.

theless, in conflicts involving resistance movements such functions may be performed on lower levels. The term “those who plan and decide upon an attack” indicates that all military personnel performing such functions should respect these obligations. Hence, all military personnel with the mandate to plan and conduct military operations, which may effect the civilian population, should respect these precautionary measures. As a consequence, persons with low or no rank may be left to make serious decision on the safety of the civilian population.¹²⁵ To give effect to these provisions it is the duty of high commanders to instruct subordinates so they can act correctly in the anticipated situations.¹²⁶

The status of military objectives may change in the time between the planning phase and the actual attack, or the civilian situation in the vicinity of the objective may change. Furthermore, the ones conducting the attack may come to another conclusion regarding the target than those who planned or decided upon the attack. According to Article 57(2)b, when the attack is decided and planned but not carried out, it shall be cancelled or suspended if it becomes apparent that the object is not military or the attack may be expected to cause incidental loss of civilian life or damage on civilian objects which would be excessive in relation to the concrete and direct military advantage anticipated. This actuates the principle of proportionality once again and obligates the attacker to make continuing assessments in regard to expected civilian casualties and the military advantage.¹²⁷

Articles 51(5)b, 57(2)a(iii) and 2(b) use the words “concrete and direct”, in relation to the military advantage, whereas the word “direct” is used in Article 52(2). This indicates that there might be a difference in the application of the principle of proportionality. There is, however, no answer in Protocol I nor in the documents of the Diplomatic Conference to why different terms were used or guidance to the exact content of this difference.¹²⁸ According to the ICRC Commentary the term “concrete and direct” intends to show that the advantage concerned should be “substantial and relatively close, and that advantages which are hardly perceptible and those which only appear in the long term should be disregarded”.¹²⁹ According to Bothe “concrete” means specific, not general, which is equivalent to the adjective “definite” used in article 52(2), “direct” on the other hand, should mean “without intervening conditions of agency”.¹³⁰ Taken together the two words raise the standards set by article 52(2) where civilians may be affected by the attack. This is confirmed by the ICRC Commentary, which argues that the words “concrete and direct” impose stricter conditions on the attacker than the criteria defining military objects in Article 52(2).¹³¹

¹²⁵ Kalshoven, 107-108.

¹²⁶ Bothe, 362; ICRC Commentary, 681.

¹²⁷ Kalshoven, 108; ICRC Commentary, 686-687.

¹²⁸ ICRC Commentary, 637.

¹²⁹ *Ibid.*, 684.

¹³⁰ Bothe, 370.

¹³¹ Bothe, 305.

The concrete and direct military advantage should then be weighed against the expected civilian casualties and damage to civilian objects. As seen above (chapter 6.1) this will be a subjective assessment left to the good faith of the attacker. However, according to Kalshoven “decisive is whether a normally alert attacker who is reasonably well informed and who, moreover, makes reasonable use of the available information could have expected the excessive damage among the civilian population”.¹³² Hence, the attacker must refrain from the attack if the disproportion between civilian casualties and the military advantage becomes “apparent”.¹³³

According to Article 57(2)c effective warning shall be given of attacks.¹³⁴ For an attack to be successful it may depend on the element of surprise and in other situations it may be impossible to give warning prior to an attack, hence, the article allows for derogation and states that a warning should be given “unless circumstances do not permit”.¹³⁵ According to Article 57(3) the attacker shall select among several military objects offering similar military advantage the object on which an attack “may be expected to cause the least danger to civilian lives and to civilian objects”.

The articles in Part IV of Protocol I are in general not applicable in armed conflict at sea or in air unless attacks are directed against objects at land.¹³⁶ Article 57(4) is one of few provisions in Protocol I concerning “conduct of military operations at sea or in the air”. Each party “shall” in such events in conformity with its rights and duties under the rules of IHL applicable in armed conflicts take “all reasonable precaution to avoid losses of civilian lives and damage to civilian objects”. This provision concentrates on the protection of the civilian population and civilian objects. The expression “all reasonable precaution” is comparable to the term “all feasible measures” used in Article 57(2), even though the ICRC Commentary suggests that the term is less far reaching. The extent of the provision is, however, somewhat uncertain.¹³⁷

The provisions in Article 57 are somewhat subtly and some of the provisions take into account military necessity, hence, there may be misunderstandings on the correct application of the provisions. To further clarify the application of these provisions Article 57(5) stipulates that “no provision in this article may be constructed as authorising any attacks against the civilian population, civilians or civilian objects”. This further stress the underlying philosophy of a system built on prohibitions and restrictions.¹³⁸

¹³² Kalshoven, 109.

¹³³ *Ibid.*, 109-110.

¹³⁴ The article repeats the rules found in Article 26 of the Hague Regulations from 1907.

¹³⁵ ICRC Commentary, 686-687.

¹³⁶ Protocol I, Art. 49.

¹³⁷ ICRC Commentary, 687-688; Kalshoven, 110.

¹³⁸ Kalshoven, 108-109; ICRC Commentary, 689-670.

6.2.2 Precautions Against the Effects of Attacks

The precautions parties to armed conflicts shall take against the effects of attacks are found in article 58. The obligations in the article cover the civilian population as well as civilian objects located in their own territory or in territories under their control. According to Article 58 the parties “shall to maximum extent feasible”:

- (a) Endeavour to remove the civilian population, individual civilians and civilian objects under their control from the vicinity of military objects. This is without prejudice to Article 49 of the Fourth Geneva Convention¹³⁹;
- (b) Avoid locating military within or near densely populated areas;
- (c) Take other necessary precautions to protect the civilian, individual civilians and civilian objects under their control against the dangers resulting from military operations.

This brings us back to the problem with effective separation between civilians and civilian objects from combatants and military objects. Even though this is probably very difficult to realise, if not impossible, the parties shall with maximum extent make an effort to bring about and keep a separation. The term “feasible” should be interpreted in the same way as in Article 58, hence, it obligates the parties to take measures that from an objective perspective are practically possible. Thus, the obligations imposed in this article, on the parties are not absolute in the meaning that civilian and military objects always must be separated without any exceptions.¹⁴⁰

According to Article 58(a) the belligerent parties may move their own population away from areas of military objectives. However, if a party is an occupying power it has only limited freedom in respect to the civilian population in the occupied territory. Only in case of imperative military necessity or in regard to the security of the population may the occupying power transfer the civilian population. Furthermore, the occupying power must respect the other provisions in Article 49 of the Fourth Geneva Convention.

The problem with feasible measures becomes apparent in Article 58(b), which obligates the belligerent parties to avoid locating military objectives in or in the vicinity of densely populated areas. For obvious reasons this could be very hard to achieve, especially in respect to countries that are densely populated where in effect an effective separation could be hard to

¹³⁹ Geneva Convention IV, Art. 49 prohibits “individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not”. The article permits as an exception the Occupying Power to undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demands.

¹⁴⁰ ICRC Commentary, 670.

obtain. However, the parties are only obligated to do what is feasible i.e. practically possible, to comply with these provisions.¹⁴¹

Finally, Article 58(c) prescribes that other measures should be taken to protect the civilian population against the dangers of armed conflict. These measures are not specified but could include an effective civil defence organisation and shelters for the civilian population. In respect to the civilian defence organisation Protocol I lays down extensive provisions for the effective conduct of such operations in Article 61 to 67. Certain military objects are moveable and could therefore be separated from the civilian population at the start of the hostilities. However, military facilities, such as barracks, command bunkers and other permanent facilities must be located outside populated areas to give effect to this provision. Hence, the provisions in Article 58, which strictly speaking only applies to parties in an ongoing armed conflict, must be considered in peacetime to have a realistic effect during hostilities.¹⁴² This provision further stresses the prohibition in Article 51 on the use of the belligerent parties own civilian population as a shield against attacks on military objectives. In regards to an occupying power this prohibition is found in Article 28 of the Fourth Geneva Convention.

6.3 Other Restraints in Protocol I

In the following the other articles in Section I, which serves as to protect the civilian population and civilian objects from the effects of hostilities, will be briefly mentioned. These articles put down further restraints on the military commander in the military targeting process. However, these are specific provisions elaborating the general principles. Even though some of these articles include new provisions they, to a large extent, restates provisions found elsewhere in IHL. It was however deemed necessary to include these in order to provide the civilian population with an adequate and complete protection. It is also necessary since some of these provisions are found in other conventions of IHL, which had not acquired general acceptance at the time of the adoption of Protocol I, hence, by restating them making sure that they would be part of the new protective system of the civilian population.¹⁴³

In short Article 53 prohibits any acts of hostilities against historic monuments, works of art or places of worship that constitute the cultural or spiritual heritage of peoples. This article is without prejudice to the provisions of the 1954 Hague Convention for the protection of cultural property and other relevant conventions such as certain provisions found in the Hague Regulations, rather it reaffirms these conventions.

¹⁴¹ ICRC Commentary, 693-694; Bothe, 313.

¹⁴² ICRC Commentary, 692-694.

¹⁴³ Bothe, 328, 336.

Article 54 prohibits starvation of civilians as a method of warfare. It is also prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. This category of objects includes foodstuff, agricultural areas, crops, drinking water, installations etc. However, this prohibition is not applicable against objects, which directly and solely exist for the purpose of the member of the armed force or even if not solely, makes a direct contribution to the armed forces. In the latter case destruction or removal of such objects should, however, not leave the civilian population without adequate resources for their survival.¹⁴⁴ The method of starvation has been considered as a lawful method of warfare, applicable not only against the adversary's armed forces, but also against the civilian population of the enemy. The Hague Regulations provide that the imperative demands of necessities can justify these methods. The provision was not altered in any substantially way in the Fourth Geneva Convention, hence, the belligerent parties' own populations were not protected against their own governments if they ever chose to use this method. Before the adoption of Protocol I the protection of the parties' own populations was sparsely regulated and the population were left to the good faith of their government. Thus, Article 54 establishes a substantial new rule in IHL by prohibiting the starvation of the civilian population as a method of warfare.¹⁴⁵

Article 55 covers the effect of armed conflict on the environment. It complements and reinforces the implication of Article 35 of Protocol I that care must be taken to avoid widespread, long-term and severe damage on the environment as a collateral effect or from intentional attacks on the environment.

Article 56 provides protection for a limited category of objects, such as dams, dykes and nuclear electric generating facilities, against attacks which may cause the release of dangerous forces without regarding whether the effect is excessive in relation to the concrete and direct military advantage anticipated. Hence, the provision provides these objects with an additional set of rules, thus, making them virtual immune against attacks. However, the article recognises the military necessity of taking counter measures against the abuse of the immunity, and if the object loses its immunity the normal precautionary measures in Article 57 as well as the limitations against direct attacks on objects in Article 52 should still remain in force.¹⁴⁶

Finally the commander have to take into consideration the provisions found in Article 59 and 60, which cover localities and zones under special protection. These provisions have already been codified in the Hague Regulations from 1907.¹⁴⁷ In short, Article 59 prohibits attack by any means whatsoever on non-defended zones. For this protection to come into force it requires

¹⁴⁴ Bothe, 336-342.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., 348-356; Kalshoven, 107-108.

¹⁴⁷ The Hague Regulations, Art. 25.

that one or more of the belligerent parties declare a certain area or place, for instance a town, as non-defended. Furthermore, for a locality to be considered non-defended it must also fulfil other criteria laid down in the article. For example there may not be any military units in the locality. According to Article 60 it is prohibited to conduct military operations in zones that the belligerent parties have agreed to be demilitarised. Hence, this protection depends upon an express agreement between the parties for it to come into effect. Also a demilitarised zone must meet certain criteria in respect to military units and military activities within this area.

Even though these articles have an impact on the decision of a commander they cover objects and situations that are specific and also of a type involving only the highest levels of command. Hence, they may be of lesser importance for a commander on lower level even though he must comply with the provisions laid out in these articles.

7 Summary and Conclusions

The purpose of this thesis has been to examine the principles of distinction and proportionality from a general perspective in order to determine the role these principles play in the overall system of IHL. However, these are general principles and to give effect to the purpose of these, that of protecting the civilian population, they have to be transferred into applicable provisions. Therefore, the thesis has focused on the specific provisions found in IHL that serve as to implement these general principles into clear and applicable provisions, and for the purpose of determine the effect these specific provisions have in armed conflict the subject have been examined from the viewpoint of the military commander as the one to apply these provisions in reality.

In order to examine the subject of this thesis certain questions were raised in the introductory chapter. These questions are essential for a military commander in the conduct of warfare as they serve as to determine the limitations and restrains from the perspective of IHL. The primary question raised was: What constitute a legitimate military target? Furthermore, in order to answer this fundamental question the following questions were also raised: How are military objectives defined in IHL; what other restrains does IHL impose on a commander when conducting attacks on military objectives? The final question raised was: Who is to make the assessment on what constitute a legitimate military target? In this chapter these questions will be answered, furthermore some problems related to the principles subject of this thesis will be discussed. However, initially the general aspect of the principles of distinction and proportionality will be summarised.

Even though the principles of distinction and proportionality can be traced back to the mid 19th century, they did not fully acquire the status of conventional principles until the adoption of the Additional Protocols to the Geneva Conventions in 1977. Since the subject of this thesis primarily focus on international armed conflicts Protocol I is of interest here given that it is applicable to international armed conflicts. Protocol I, does not only restate and reaffirm these already accepted general principles of customary law, it also includes specific provisions to give effect to these principles as well as other provisions new to IHL. Several of these provisions were controversial and as a consequence some of the major states did not ratify Protocol I in 1977. However 25 year have passed since the adoption of Protocol I and even though several of the major military states still has not ratified the protocol, the contemporary view is that the major part of the protocol has acquired customary status. Particularly the provisions for the protection of the civilian population are considered to be part of customary IHL, a fact frequently confirmed through statements and practice by states not party to the protocol.

Part IV of Protocol I introduce a general principle of protection of the civilian population. According to this principle, parties to an armed conflict must

distinguish between the civilian population and combatants and between civilian objects and military objects. The first rule regarding attacks is that the intended target must be a military objective. Once that is decided the attack may nevertheless become illegal if excessive collateral damage affecting civilians or civilian objects is to be expected. Here the principles of distinction and proportionality are codified into applicable provisions. Furthermore, to develop and elaborate the protection, the parties must take precautionary measures to spare civilians while attacking lawfully military objectives. This protection represents the very essence of IHL, based on the philosophy that persons and objects not necessary to the military effort should be spared the effects of hostilities.

This protective system is based on the distinction that must be made between the civilian population and combatants and military and civilian objects. This is explicitly expressed through the basic principle in Article 48, which stipulates that only military objectives shall be attacked. This is furthermore elaborated in article 51, which states that civilians and the civilian population shall not be made targets of attack.

Imperative for a distinction to be effective these categories, civilian and military, must be clearly defined and recognisable. According to Article 52(2) civilian objects are all objects that does not fulfil the definition as military objects in the same article. The definition of military objects is not based on the nature of the object, thus, not only strictly military objects are included. Instead the object must at the circumstance ruling at the time of the attack make an “effective contribution to the military action”. Furthermore, the objects destruction, capture, or neutralisation must offer a “definite military advantage” to the attacker. With the words “effective” and “definite” the article excludes “indirect” contributions and “possible” military advantage, in effect prohibiting attacks that only offers potential and indeterminate advantages.

To conclude the definition on military objects, the advantage of this definition is considerable from a military perspective. By providing a definition on what is permissible to attack instead of the opposite, the definition does not only take into account the flexible and complicated nature of warfare, where the status of objects may change during the conflict, from a military perspective it is also more logical to provide a definition on the objects that are permissible to attack. The opposite approach to the problem that of providing a list or a definition of civilian objects can hardly take into account all the situations that may occur during an armed conflict. However, apart from objects which by nature are military and certain objects that could be presumed to be civilian, such as schools and places of worship the majority of all objects can be used for both civilian and military purposes. These dual-use objects constitute a significant problem in IHL as they must fulfil the above mentioned criteria of making a contribution to the military action as well as its destruction must offer a military advantage to the attacker, in order to be categorised as a military objective.

The second definition of importance is that of “civilian” and the “civilian population”. Article 50(1) gives a negative definition, by stating that civilians are all those persons who are not members of the armed forces, and that the civilian population is all civilians. The civilian protection is further reinforced by Article 51(3), which states that the civilian population shall enjoy the afforded protection of the protocol unless and for such time they take direct part in hostilities. This definition has one major advantage as it puts to rest arguments in favour of “quasi-combatants”, which solves the question if workers in the arms industry or other civilians supporting the war effort are legitimate targets. This kind of contribution to the war effort does not constitute a direct participation, hence, these civilians are not legitimate targets. The definition of combatants in Protocol I is new compared to the one found in the Third Geneva Convention. It reflects the new reality of armed conflict by including irregular units such as liberation and resistance movements. The new qualification is no longer dependent on its members to have a uniform or to carry arms openly at all times, as a means to distinguish the member of the armed forces from the civilian population. In effect this new definition means that irregular groups are given combatant status, hence, affording them with the rights and obligations of IHL. In theory the overall protection is improved by this new definition, not only for the groups that benefit directly from it, but also for civilians since it more clearly separates combatants and civilians. However, since combatants are no longer obligated to distinguish themselves at all times, and as a consequence, may appear in civilian clothes, it may be even more difficult to determine the status of a person. To deal with this problem Protocol I obligates the parties in any situation where there is doubt on the status of a person, to consider that person as a civilian until his status can be determined. Hence, the effectiveness of this new definition is left to the good faith of the combatants, both to distinguish themselves and not intermingle with the civilian population as well as to take proper measures to determine the status of a person and not attack indiscriminately.

From this the conclusion would be that military objectives are all objects that fulfil the criteria in Article 52(2) as well as persons that qualify as combatants. Furthermore, all persons engaged in hostilities, which does not comply with the combatant requirements may also be directly attacked. All other objects and persons are considered civilian and may not be directly targeted. The prohibition to directly attack civilians and civilian objects is an absolute obligation and as such leaves no room for the parties to advocate military necessity to derogate from this prohibition.

However, military objectives are not *per se* legitimate targets but must also fulfil the other provisions laid down in Section I of Part IV in Protocol I. Even if the protocol explicitly prohibits attacks on the civilian population they may be affected by attacks on military objectives. To prohibit all civilian losses or injuries as well as the damage on civilian property would be, not only hard to accomplish practically, but probably impossible. Furthermore, states would probably not accept such prohibitions as it would not take into account the necessity of military concerns, in effect making it very

hard or impossible to conduct effective military operations. This has already been demonstrated by the unwillingness of states, such as U.S.A., to accept certain less far-reaching provisions in Protocol I.

Protocol I solves this problem by obligating the parties to take constant care to spare the civilian population and to avoid and minimise civilian damage during an armed conflict. Thus, imposing further restraints on the military commander conducting military operations. To give effect to this general obligation Article 51 prohibits indiscriminate attacks. Such attacks are defined as those, which are not directed at specific military objectives, as well as the use of means and methods of combat, which cannot be directed against such objects. This recognises that in attacks on military objectives, civilian casualties are frequently unavoidable, but requires that the military commander consider beforehand the extent of casualties to be expected from the attack. He has to make an assessment of the value of the attack compared with the likely civilian losses. If the latter is excessive in this context then it is prohibited. This assessment contains in effect the principle of proportionality.

However, even if the attack is not indiscriminate it may still be illegitimate to attack, and military commanders are obligated to take precautionary measures to further spare the civilian population. These provisions, found in Article 57 and 58, obligate the parties not only to respect the civilian population when conducting their own attacks but also to take measures to protect the civilian populations from the effects of attacks. These provisions serve as guidelines to the military personnel that decide and plan upon as well as the ones conducting attacks. These articles elaborate and develop the principle of distinction and proportionality, found in Article 51, and in effect obligate the military commander to make continuing assessments on expected civilian losses and collateral damage as well as the military advantage anticipated from the attack. If the disproportion is apparent, the military commander is obligated to cancel or suspend the attack. Article 57 and 58 also lays down further provisions for the protection of the civilian population. In respect to the precautions that the parties shall take to spare civilian lives and objects the protocol only obligates the parties to do everything feasible to accomplish the obligations laid down in the protocol. Thus, the obligations referred to the parties are not absolute obligation. This leaves the qualification of objects and persons as well as the collection of intelligence on potential targets to the good faith of the parties and in the end the military commander. Inevitably such assessment will be subjective as it involves values that cannot be quantified and put into a simple formula.

Furthermore, the protocol lays down restrictions in respect to certain objects, which are deemed to be of particular importance. These provisions to a large extent restate principles found elsewhere in conventional IHL but serve as to complement the general protection of civilian objects and to make the overall civilian protection as complete as possible.

The provisions of Protocol I that serves as to protect the civilian population are primary addressed to the parties of an armed conflict. The parties to the conflict are the ones primary responsible for the compliance of the provisions and shall make sure that all officials of that state comply with these rules. However, in the end it will be the military personnel, the combatants conducting military operations, which will have to apply these provisions to give effect to the protection. The precautionary measures in Article 57 and 58 serve as guidelines and are directly addressed to all military commanders, which are left to plan or decide upon an attack irrespectively of rank. In effect these measures could apply to any combatant involved in making such decisions, hence, every combatant should be aware of these obligations and should accordingly respect and follow them during an armed conflict. However, it is important to remember that the assessments required by the provisions of protocol shall only based on the facts he has before him after he has in good faith collected as much intelligence as possible in the circumstance ruling at the time of the decision. Thus, the actual result of an attack shall not be judged on the basis of hindsight. Furthermore, the provisions of IHL are normally derogated into more suitable and practical rules taking into account the situation in the specific conflict. These so called ROE are a valuably help in the aim of compliance with IHL.

To conclude this thesis the principle of distinction and proportionality are the fundamental principles upon which the general protection of the civilian population is based. Even if the provision for the protection of the civilian population does not make the civilian population immune from the effects of hostilities they nevertheless provide the civilian population with an extensive protection. This protective regime also takes the flexible nature of warfare and military concerns into account. Hence, states may as a consequence be more willing to comply with these provisions as it duly takes into account the nature of armed conflict and only reefers obligations that is practically possible to fulfil. However, in the aim of providing provision that takes into account both military and humanitarian concerns, the parties to an armed conflict, and in the end the military commanders are left to apply complicated provisions on the classification of objects and individuals as well as to make assessments on the value of the civilian lives and objects in relations to military advantage. Such assessments are in the end left to the good faith of the parties and in the end the military commander.

This does, however, not deprive the protocol of it status as the most authoritative and extensive set of rules for the protection of the civilian population, and even though it restrains and limits a military commander in the conduct of warfare he will benefit from these provisions. Not only from the punitive perspective i.e. avoid prosecution for war crimes, but also from a military perspective as these provisions in the end defines and give effect to the overall objectives an armed conflict that of defeating the adversary.

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