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# The Principle of Distinction in Modern Warfare

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# **Summary**

The principle of distinction is one of the cardinal principles of international humanitarian law. The principle of distinction originated in the St. Petersburg Declaration in 1868, aiming to limit the civilian casualties in warfare. The principle is now codified in article 48, 51(2), 52(2) of the 1977 Additional Protocol I to the Geneva Convention. The principle is most prominent in article 48. The article states that 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”, in order to “ensure respect for and protection of the civilian population and civilian objects”.

The essay presents the legislative development of the principle in order to provide the reader enough material to understand the phrasing and purpose behind the principle, before introducing the contemporary challenges the principle is faced with in modern times. The essay introduces the reader to intra-state conflicts, new warfare technology, civilianization of the military and the trouble of categorizing the population into the correct role on the battlefield. The problematization chapter of the essay is providing the material to answer the essays main research questions, “Are the rules that regulate the principle of distinction efficient in modern warfare?” and “Is the early lawmakers purpose of the regulations still fulfilled in modern warfare?”.

In conclusion, the essay holds the opinion that the regulations regarding the principle of distinction is dated and is not efficient in modern warfare. The increase of intra-state conflicts, insurgent groups and civilians taking part in hostilities creates a situation where it is no longer easy to distinguish who is a civilian and who is a combatant. Further, the essay claims that the purpose of the principle still not fulfilled. The battlefield situation is still better off with the regulations that exist, even though they are challenged in many ways. The principle can be upheld if more established organizations and states keep

revising the regulations and write further general directions and recommendations on how to use the regulations in contemporary armed conflicts.

# Sammanfattning

Distinktionsprincipen är en av de mest fundamentala principerna i internationell humanitär rätt. Distinktionsprincipen grundades i St. Petersburgdeklarationen från 1868 och syftade till att minska det dödliga våldet mot civila i väpnade konflikter. Principen är nu kodifierad i artikel 48, 51(2) och 52(2) i det första tilläggsprotokollet till Genevekonventionen. Det är lättast att utläsa principen i artikel 48, som lyder ”I syfte att tillse att civilbefolkningen och civil egendom respekteras och skyddas skall de stridande parterna alltid göra åtskillnad mellan civilbefolkning och kombattanter samt mellan civil egendom och militära mål samt följdaktligen rikta sina operationer enbart mot militära mål.”

Uppsatsen presenterar principens rättsutveckling i syfte att ge läsaren tillräcklig information för att förstå definitionen och syftet bakom principen, innan principens kontemporära problem introduceras. Läsaren blir introducerad till ”intra-state”-konflikter, ny militärteknik, ”civilianization” av militären och korrekt kategorisering av befolkningen. Avsnittet som innehåller problematisering av principens moderna tillämpning ger grund till svaren på uppsatsens huvudsakliga frågeställningar. Frågorna som ställs och besvaras är ”Är reglerna kring distinktionsprincipen effektiva i modern krigföring?” och ”Är lagstiftarnas syfte med reglerna rörande principen uppfyllt i modern krigföring?”

Sammanfattningsvis framhåller uppsatsen att reglerna inte är effektiva i modern krigföring. Ökningen av ”intra-state”-konflikter, rebellgrupper och civila som direkt deltar i stridigheter (direct participation in hostilities) har försvårat distinktionen mellan civila och kombattanter. Uppsatsen menar vidare att syftet bakom principen inte är uppfyllt. Trots detta gynnas modern krigföring fortfarande av principens existens. Principen kan upprätthållas i modern tid, så länge som stater och större organisationer fortsätter se över

reglerna, samt skriva rekommendationer över hur reglerna bör appliceras i moderna väpnade konflikter.

# **Abbreviations**

API	Additional Protocol I
APII	Additional Protocol II
DPH	Direct Participation in Hostilities
GC	Geneva Convention
IAC	International Armed Conflict
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflict
POW	Prisoner of War
UN	the United Nations

# **1 Introduction**

## **1.1 Little about the subject**

Ever since armed conflicts became a subject of regulation, protecting the civilian population has been a major focal point for lawmakers. Regulations strive for keeping civilians out of harm's way, but also making sure combatants distinguish themselves from civilians. In the postmodern world, fighting parties in wars were mostly represented by national armies in uniforms. Regulations that were made at this time suited this, and only this, type of warfare. Today, the principle of keeping civilians and combatants apart, the principle of distinction, is as important. The regulations, however, are challenged when facing modern warfare. It has become difficult to visually separate a combatant from a civilian. Combatant parties are rarely national armies in uniforms anymore, but insurgent groups, local tribes or other armed forces. Not only are these groups disregarding the principle of distinction by not distinguishing themselves as combatants but are commonly using this as a strategy of war. By posing as a civilian, or hiding amongst them, armed forces can take advantage of the civilian immunity under international humanitarian law. Taking these changes into consideration, as well as acknowledging that warfare technology has advanced immensely, it is no longer sure to say that the welfare of civilians can be guaranteed in armed conflicts.

## **1.2 Purpose**

The purpose of this essay is to present the current regulations regarding the distinction between civilians and combatants, as well as how the rules have been created, and for what reason. Presenting the legislative development is of major importance in understanding how and why the rules are critiqued for being dated and not applicable on the contemporary battlefield.

Additionally, the essay will introduce and discuss the challenges these regulations face in the modern warfare setting. Armed conflicts, in which combatant parties have difficulty making the distinction between civilians and other combatants, pose a great threat to the civilian population in combat zones. Civilians are at risk of becoming victims of arbitrary attacks, while combatants face an increased risk of being victims themselves, due to being attacked by persons they were unable to distinguish from civilians.

Lastly, the essay will debate whether a solution to the problem is possible, and in that case what a solution could look like.

### **1.3 Research questions**

The essay will be answering the following questions:

- Are the rules that regulate the principle of distinction efficient in modern warfare?
- Is the early lawmakers' purpose of the regulations still fulfilled in modern warfare?

Some sub questions will be answered, in order to answer the main research question:

- How was the principle of distinction created, and for what reason?
- What has the legislative development of the principle looked like throughout history?
- Who is a civilian and who is a combatant?
- What challenges do the regulations concerning the principle face in modern warfare?

## **1.4 Scope and delimitations**

The essay will try to somewhat define and give structure to the undefined topic that is International Humanitarian Law. Not only is this topic difficult to give clarity, but it is also a very political subject. The essay will strive to keep a politically neutral tone throughout, but will present various argumentative opinions in the problematizing part of the essay.

International humanitarian law includes many rules and principles, all of which cannot be discussed in this essay, due to the enormity of subject matter. The essay will focus on the principle of distinction, and the rules created in order to make sure combatant parties are complying with the rule. The essay will present another topic closely related to the principle of distinction, the term “direct participation in hostilities.” This matter can be discussed in great detail but will be merely presented in this essay. This would apply for the subject of international armed conflicts and non-international armed conflicts. The essay will not further discuss the difference between the two terms. The principle of distinction is also closely related to the topic of Targeted killings and military objectives, however, the essay’s main purpose is to discuss the principle of distinction.

As for the problematizing part of the essay, examples will be presented and discussed. There are many more that exist, but due to the lack of space it is impossible to mention all examples where the issues are applicable. The examples have been selected because they illustrate the challenges the regulations face, very clear.

The regulations themselves have been limited to the most relevant and important items, starting with the St. Petersburg declaration. There are many smaller conventions and national legislation that will not be addressed in this essay.

## **1.5 Methodology and material**

The essay is a legal examination that aims to define and evaluate the regulations regarding the international humanitarian law fundamental principle of distinction. The essay uses the legal dogmatic method by compiling multiple international humanitarian law sources in order to answer the research questions. The usage of this method is motivated by the ambiguity of the topic, that requires further clarity and discussion. A critical perspective will be applied to this essay. The essay will critically review and discuss the contemporary challenges for legislation written in the late 1940's. Secondly, a legislative development perspective is applied to give the reader necessary information to comprehend the critique that is presented in the essay.

The essay is mainly using recognized legal sources of international humanitarian law. These include international treaties, conventions, case law and legal doctrine. Most material is gathered from the ICRC casebook, that compiles the legislative documents in question, as well as opinionated articles in the area of matter. It allows easy access to many case studies and legal sources the ICRC has recognized as legitimate contributions to the area. The Geneva Conventions and its additional protocols are the main basis documents that provide definition to the regulations in question.

## **1.6 Previous research**

The principle of distinction stems from various legislative efforts, mainly starting from the end of the second world war. It is a key principle in International Humanitarian Law and is mostly discussed on international and global platforms. One of the most important documents that presents the principle is the Geneva Conventions and its additional protocols. Another crucial source to the definition and debate regarding the principle is the International Commission of the Red Cross, also known as ICRC. International Humanitarian Law as a whole, including the principle of

distinction is a very political subject, that has been greatly debated over the last decades. The essay will bring all the sources of the legislation together with various argumentative opinions, in hope to illustrate both the background of the principle, as well as its contemporary challenges.

## 1.7 Structure

First, the essay will present a description of the principle of distinction. It will clarify the meaning of the principle and how it is used. Second, another descriptive part follows. The definitions on who is a civilian and who is a combatant will be presented in order to understand the principle further. Thereafter, the essay will introduce the history of the principle in short terms, and show a list of regulations created to enforce the principle, chronologically through history, since the beginning of the principle. After the legislative development, the essay will present the modern warfare setting to the reader. The essay will ensure that the reader understands what the contemporary armed conflicts are like, in order for the reader to realize what issues can arise when older rules are applied in a modern setting. Lastly, the essay will discuss possible solutions to the complicated situations surrounding and using the dated legislation on the modern battlefield.

## 2 The principle of distinction

The International Committee of the Red Cross (ICRC) began working on the study “Customary International Humanitarian Law” in 1996.<sup>1</sup> The study was aimed to identify the customary law in the area of International Humanitarian Law (IHL). The previous rules were made up mostly by various treaties but left significant gaps in the law. The ICRC could, with a clarified catalogue of rules, strengthen the legal protection of victims of war.<sup>2</sup> The first rule of this catalogue showcases the principle of distinction. The first part of rule 1 emphasizes the principle of distinction. It states “parties to a conflict must at all times distinguish between combatants.” Further parts of rule 1, protects civilians from attacks by stating “attacks may only be directed against combatants” and “attacks must not be directed at civilians.”

Further, combatants are obligated to, by appearance, distinguish themselves from civilians. Parties to the conflicts must also distinguish between military objects, and civilian objects.<sup>3</sup>

The principle has taken many forms throughout its history but is currently and most recently codified in the additional protocols to the Geneva Convention of 1949. The rule is codified both for international armed conflicts, and non-international armed conflicts.<sup>4</sup>

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<sup>1</sup> Customary International Humanitarian Law , 2005.

<sup>2</sup> Customary International Humanitarian Law , 2005.

<sup>3</sup> “Rule 1”.

<sup>4</sup> GC AP I&II.

## **2.1 Regulations**

### **2.1.1 International Armed conflicts:**

Article 48, 51(2), 52(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949 regulate the civilian protection and the principle of distinction in international armed conflicts. Article 48 is a “basic rule”. The basic rules in the Geneva Convention and its additional protocols can also be described as the fundamental rules of IHL.<sup>5</sup> Article 48 states that 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”, this in order to “ensure respect for and protection of the civilian population and civilian objects.”<sup>6</sup>

Article 51(2) specifies the rule that civilians shall not be the object of military attacks. The rule goes for both the civilian population, and individual civilians. It also prohibits acts or threats of violence with the primary purpose which is to spread terror to the named groups.<sup>7</sup>

Article 52(2) repeats the rule that attacks shall be strictly limited to military objectives. It also specifies what military objectives are.<sup>8</sup>

### **2.1.2 Non-International Armed Conflicts:**

Article 13(2) of Additional Protocol II to the Geneva Conventions of 1949 regulates the rule of civilian protection in terms of non-international armed conflict. Just like article 51(2) in the API, it states that the civilian population, as well as individual civilians, shall not be the object of attack, and that threats

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<sup>5</sup> “Basic Rules of the Geneva Conventions and their Additional Protocols”, 2015.

<sup>6</sup> GC AP I, Art. 48.

<sup>7</sup> GC AP I, Art. 51(2).

<sup>8</sup> GC AP I, Art. 52(2).

or acts of violence with a primary purpose to spread terror amongst these groups is prohibited.<sup>9</sup>

## 2.2 Who is a civilian and who is a combatant?

Returning to the ICRC's catalogue of rules of customary international law, rule 3 and 5 defines who is a civilian and who is a combatant. They both refer back to the Geneva Convention and its additional protocols.

### 2.2.1 Combatant

Rule 3 in the ICRC catalogue of customary law rules states, "All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel."<sup>10</sup>

The rule is now codified in Article 43(2) of the Additional Protocol I to the Geneva Convention, but originated in the Hague Regulations.<sup>11</sup> According to which, "the armed forces of the belligerent parties may consist of combatants and non-combatants". The definition is found in multiple military manuals, as well as supported by official statements and used in practice.<sup>12</sup>

The terms "armed forces" and "dissident armed forces and other organized armed groups," are used in both the Geneva Convention and its additional protocol II. However, the terms are not further defined in non-international armed conflicts practice. Therefore, it is easy to see how State armed forces are considered combatants in the eyes of the first rule, the principle of distinction, while the situation of members of armed opposition groups is not as clear in practice. Persons who take direct part in hostilities do not enjoy the protection against attack like a civilian does. This is stated in the catalogue of customary rules, rule 6.<sup>13</sup>

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<sup>9</sup> GC AP II, Art. 13(2).

<sup>10</sup> "Rule 3".

<sup>11</sup> Hague Regulations, 1907, Art. 23(g) and Art. 25.

<sup>12</sup> Melzer, N. (2014) p. 303.

<sup>13</sup> "Rule 6".

## **2.2.2 Civilian**

Rule 5 of the ICRC catalogue of rules states, “Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians.”<sup>14</sup>

This rule originates in article 50 of the additional protocol I to the Geneva Convention. Article 50 states, “A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention...”<sup>15</sup> The article (Article 4) from the GCIII talks about prisoners of war, and states that prisoners of war are persons belonging to one of the following categories, who have fallen into the power of the enemy.<sup>16</sup>

The first category is “Members of the armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.”<sup>17</sup>

The second category is “Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements”. In order to be included in this category, the members have to fulfill certain requirements, all stated in the article.<sup>18</sup>

The third category is “Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.”<sup>19</sup>

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<sup>14</sup> “Rule 5”.

<sup>15</sup> GC API, Art. 50.

<sup>16</sup> GC APIII, Art. 4.

<sup>17</sup> GC APIII, Art. 4 (A) (1).

<sup>18</sup> GC APIII, Art. 4 (A) (2).

<sup>19</sup> GC APIII, Art. 4 (A) (3).

The sixth category is “Inhabitants of a non-occupied territory, who on the approach of the enemy, spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.”<sup>20</sup>

Article 50 continues with “...and in Article 43 of this Protocol.” (See above).

Lastly the article states, “In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.”<sup>21</sup>

The definitions, that "any person who is not a member of armed forces is considered to be a civilian" and that "the civilian population comprises all persons who are civilians", originated in the draft of APII. The first definition was amended to “a civilian is anyone who is not a member of the armed forces or of an organized armed group,” but was shortly after discarded due to wanting to simplify the text. Therefore, there are no further definitions of what a civilian, or a civilian population is in the APII, even though many provisions use these terms.<sup>22</sup>

## **2.3 Legislative development**

### **2.3.1 Brief History**

Throughout history, knights of the middle ages and early modern time jurists have all tried to limit the destruction of war. It has not only been a western concern throughout history, but a global one. Various rules has been created during many decades, in many different places. In the 19<sup>th</sup> century the codifying movement formed the basis of IHL.<sup>23</sup>

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<sup>20</sup> GC APIII, Art. 4 (A) (6).

<sup>21</sup> GC APIII, Art. 4.

<sup>22</sup> “Rule 1”.

<sup>23</sup> Alexander A. (2015) p. 111-112.

In 1938, the Assembly of the League of Nations took a stance by claiming, “the intentional bombing of civilian populations is illegal.” This was one of the first steps of the long journey of protecting civilians in warfare. In 1965, the 20<sup>th</sup> International Conference of the Red Cross took place. It declared that all responsible parties in armed conflicts have to respect to the prohibition of attacking civilians. The principle of distinction is declared in the “resolution on respect for human rights in armed conflicts”, by the UN General Assembly adopted in 1968. The principle was to be applicable in all armed conflicts. In 1999, the prohibition of attacking civilians is restated in the Plan of Action for the years 2000-2003, adopted by the 27<sup>th</sup> International Conference of the Red Cross and Red Crescent. The plan required all parties involved in the armed conflict to conform to “the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities.”<sup>24</sup> Lastly, the UN Security Council reaffirmed its strong condemnation of attacking civilians in armed conflict, in a resolution adopted in 2000.<sup>25</sup>

Today, the ICRC describes IHL in the following manner, providing a purpose with the regulations: “It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.”<sup>26</sup>

### **2.3.2 Cases**

The Tadic case, Martic case and Kupresic constitutes jurisprudence of the International Court of Justice in the Nuclear Weapons case, of the International Criminal Tribunal for the former Yugoslavia. Together, the cases reaffirm the fact that it is customary in both international and non-international armed conflicts to make a distinction between civilians and combatants.<sup>27</sup>

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<sup>24</sup> “Rule 1”.

<sup>25</sup> “Rule 1”.

<sup>26</sup> Alexander A. (2015) p. 110-111.

<sup>27</sup> “Rule 1”.

### **Tadic case**

The third article in the ICTY Statute does not explicitly prohibit direct targeting of civilians, but it contains a non-exhaustive list of violations of laws of war. Article 3 is based on the Hague Law, specifically means and methods of warfare.<sup>28</sup> In the Tadic decision on Jurisdiction, it was emphasized that Article 3 covers all violations of IHL and is not limited to just the violations of Hague Law.<sup>29</sup>

### **Martic case**

The Martic case proves further evidence that indiscriminate attacks are also included in the principle of distinction. An indiscriminate attack is defined by the attacker not specifically targeting any person in particular, but random or larger groups of people. These can be both civilians and combatants. This case in particular was in regard to a non-guided rocket attack directed at the city of Zagreb, a densely populated civilian area. This showed an indiscriminate attack due to the indifference showed by the attacker as to whether the attack would cause damage to civilians or not.<sup>30</sup>

### **Kupreskic**

The Kupreskic case confirmed that the term “civilians” might also include resistance movements. It stated that "the presence of those actively involved in the conflict should not prevent the characterization of a population as civilian and those actively involved in a resistance movement can qualify as victims of crimes against humanity."<sup>31</sup>

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<sup>28</sup> ICTY Statute, Art. 3.

<sup>29</sup> Prosecutor v. Dusko Tadic 1999.

<sup>30</sup> Prosecutor v. Milan Martic 2007.

<sup>31</sup> Prosecutor v. Kupreskic et al. 2000, para. 549.

### **2.3.3 The principle of distinction – In depth legislative development**

#### **2.3.3.1 International armed conflicts (IACs)**

The principle of distinction was first created in the St. Petersburg Declaration in 1868, along with the principle of proportionality and the prohibition of unnecessary suffering. The principles are closely related and were necessary due to the evolving technology of weapons. This declaration was the first formal agreement to prohibit certain weapons in war, and also show the need for a more humane warfare.<sup>32</sup> The declaration states “That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy,” as well as encouraging combatant parties to “yield to the requirements of humanity.”<sup>33</sup>

Also pleading to the interests of humanity, is the Hague Regulations from 1907. The regulations are “inspired by the desire to diminish the evils of war so far as military necessities permit.” Based on the statements and principles from the St. Petersburg Declaration, the Hague Regulations once again enforces the protection of civilians. The principle of distinction is not defined in the regulations, but Article 25 is clearly based off the principle of distinction by prohibiting “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.”<sup>34</sup>

The principle of distinction takes its final form in Article 48, 51(2), 52(2) of the 1977 Additional Protocol I to the Geneva Conventions of 1949, previously mentioned in chapter 2.1. The first additional protocol to the Geneva Convention of 1949, strived towards expanding the protection for civilians in international armed conflicts.<sup>35</sup>

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<sup>32</sup> St. Petersburg Declaration, 1868.

<sup>33</sup> St. Petersburg Declaration, 1868.

<sup>34</sup> Hague Regulations, 1907, Art. 25.

<sup>35</sup> “The Geneva Conventions of 1949 and their Additional Protocols”, 2014.

After the Geneva Convention and its additional protocols, the principle has been used in several other statutes and formal agreements, among them the 1996 Advisory Opinion on Nuclear Weapons. It contains two cardinal IHL principles, the first one being the principle of distinction. It is aimed “at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets.”<sup>36</sup>

Further, the opinion holds that the use of nuclear weapons could never be compatible with the principle of distinction, among other principles, and is therefore prohibited. When used, combatant parties are, under all circumstances, unable to make the distinction between the civilian population and military target, due to the almost uncontrollable forces behind a nuclear attack. The attack would be an indiscriminate attack. Based on this view, the opinion holds that nuclear weapons are by nature illegal under IHL.<sup>37</sup>

The Rome Statute of the International Criminal Court of 1998 is another document that aims to protect the civilian population and bases parts of Article 8 on the principle of distinction. The article defines the following acts relating to the protection of civilians as war crimes: “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities,” “intentionally directing attacks against civilian object, that is, objects which are not military objectives” and “Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects...” Article 8 also contains a definition similar to the Hague Regulations, by stating, “Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives; ” is a war crime.<sup>38</sup>

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<sup>36</sup> Nuclear Weapons, Advisory Opinion 1996 para. 78.

<sup>37</sup> Nuclear Weapons, Advisory Opinion 1996 para. 78.

<sup>38</sup> Rome Statute, ICC, 1998.

Apart from these bigger and more important documents, various national military manuals contain the principle of distinction, or parts based on the principle, in order to ensure civilian protection.<sup>39</sup>

### **2.3.3.2 Non-International conflicts (NIACs)**

Article 13(2) of Additional Protocol II has been mentioned earlier in chapter 2.1 - Non-International Conflicts. It is the most current definition of the principle, in terms of NIACs.

The Protocol III to the Convention on Certain Conventional Weapons and Amended Protocol II to the Convention on Certain Conventional Weapons is a treaty that regulates armed conflicts. It is built around customary IHL and its principles, including the principle of distinction.<sup>40</sup>

The Statute of the International Criminal Court and military manuals applies to NIACs the same way as in previous chapter.<sup>41</sup>

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<sup>39</sup> “Rule 1”.

<sup>40</sup> United Nations, Conventional Weapons, October 1980 and protocols.

<sup>41</sup> “Rule 1”.

# **3 Problematization – modern perspective applied to the old rules**

Most regulations that have been presented in this essay were created in a time where most conflicts were international, one country against another. The times have changed, battlefields are multi-dimensional and asymmetrical. The principle of distinction is one of the most fundamental principles in IHL, but faces contemporary challenges.<sup>42</sup> In this chapter, these challenges will be presented.

## **3.1 Modern warfare – NIACs**

Starting off this chapter, the acknowledgment that the conflicts themselves are different, is crucial. What used to be international armed conflicts have since the end of the cold war, mostly shifted into non-international, intra-state armed conflicts, multiplying in the 1960's. Some estimates show that roughly 90% of conflict casualties in the wars of the early 20<sup>th</sup> century, were combatants. At the end of the century, these casualties were nearly 90% civilians.<sup>43</sup> This process was given momentum partly by the collapse of colonialism and created modern conflicts such as “state-based conflicts,” “non-state-based armed conflicts” and “one-sided violence.”<sup>44</sup> State-based conflicts are fought between one governmental party, and one formally organized armed group. In a non-state-based conflict, no combatant party is a government of a state. Lastly, a one-sided violence conflict is violence directed towards the civilian population, by a governmental state or organized armed group.<sup>45</sup>

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<sup>42</sup> Wenger A and Mason S.J.A (2008) p. 835.

<sup>43</sup> Wood, R. (2016), summary.

<sup>44</sup> Bosetti, Einsiedel (2015) p. 2.

<sup>45</sup> Bosetti, Einsiedel (2015) p. 3.

Modern conflicts are related to disagreement over power, wealth and economy with increasing dialogue of identity, security and sovereignty. Human rights violations, natural resources and bad governance are other frequent sources of modern conflicts. Lastly, topics that divides many populations and creates large conflicts are ethnicity and religion.<sup>46</sup>

### **3.2 Modern warfare – technology and asymmetrical battlefields**

A second factor that has highly impacted warfare is the fast-paced evolvement of technology. The modern battlefield can no longer be defined by a central dividing line between combatant parties in the heart of the battle, but rather the conflict takes place in several places at the same time, in various ways. An example of this is Operation Iraqi Freedom (OIF). The attack was not first started by crossing the Iraqi border, moving in ground forces, but extensive wide spread attacks by Tomahawk cruise missiles.<sup>47</sup>

Conflict is no longer hindered by terrain, weather or night. The battlefield has become transparent in the sense that most forces have access to modern technology that exposes what has traditionally masked enemy activity. To offset the asymmetrical technological disadvantages, combatant parties are forced to employ new techniques. Going back to the example of OIF, a commonly used technique was using civilian objects as shields, called “counter-targeting.” Iraqi forces created bases in civilian populated areas and would even use civilian objects as physical shields in their operations. Passive or active human shielding is a direct violation of international humanitarian law, under Article 51(7) of Protocol Additional I.<sup>48</sup>

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<sup>46</sup> Abazi E. (2016) p. 2.

<sup>47</sup> Wenger A and Mason S.J.A (2008) p. 838.

<sup>48</sup> Schmitt, M. (2005) p. 465.

Michael N. Schmitt points to fact that asymmetry on the battlefield brings temptations for the disadvantaged side. In order to balance out the conflict and get more advantage, a combatant party could potentially want to heighten the collateral damage by placing its forces in areas of civilian populations, to protect their own forces.<sup>49</sup>

### **3.3 “Civilianization” of the military**

A third factor that has heavily affected the nature of war, is what can best be described with the term, “civilianization.” The role of the civilian is no longer what it used to be. The rules mentioned in this essay are based on the terms of civilians, and soldiers, or combatants. The line between civilian and combatant has been blurred in many ways. Today, a plethora of new terms have been proposed. A few of these terms are “civilian augmentees,” “farmer by day, fighter by night” and “part-time terrorists.” Most of the terms refer to the somewhat recent categorization of civilians getting involved in the actual warfare, direct participation in hostilities.<sup>50</sup>

There are two trends that explain the growing involvement of civilians in the conduct of both international and intra-state armed conflicts. The first one is the decline of the international wars and the growing civilian involvement in high-technology warfare. The evolving high-technology military force affects the relationship between the civilian population and the combatant sphere. When the complexity of the modern weapons increased, more civilian personnel are used to maintain the everyday operation of those systems. Due to the advanced technology, the systems can be operated from places geographically distant from the actual battlefield, which creates the opportunity for civilians to operate them. These civilians have become a highly specialized part of modern armed forces. The support of these

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<sup>49</sup> Schmitt, M. (2008) p. 48.

<sup>50</sup> Wenger A and Mason S.J.A (2008) p. 836.

administrative civilian employees supplements the military capabilities in the area of conflict and are today a natural part of modern warfare.<sup>51</sup>

The second trend is the increased relevance of the intra-state conflicts, and the blurred lines between the civilian population and military objects, which the next chapter will discuss.<sup>52</sup>

### 3.4 Categorizing the population

Who is a civilian, who is a combatant? Can you be both, from time to time? These questions are harder to answer today, than previously, when the rules were created.

The regulations in question, note and define the terms, “civilian” and “combatant,” as the two categories a person can belong to in war. Today, many legal experts, organizations and States assert that there are in fact more categories one can belong to in modern warfare. When civilians are both victims and perpetrators the situation gets complex. This change can depend on either manipulation by armed elites, such as governments or rebel forces, to further their respective interests in the conflicts, or simply an active response to the extended violence in the combat zone. This dynamic relationship between the civilian population and combatants makes it hard to distinguish who belongs to which/what group.<sup>53</sup>

Except for the civilian and combatant distinction, a new debated term has been introduced as, “unlawful combatants.” This is where opinions differ. Some parties claim that there are more than two categories. Quénivet explains in an article, that there is “a lack of consensus that ‘people’ fall solely into one of the two groups: ‘lawful combatants’ and ‘civilians’.” The United States

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<sup>51</sup> Wenger A and Mason S.J.A (2008) p. 846.

<sup>52</sup> Wenger A and Mason S.J.A (2008) p. 841.

<sup>53</sup> Quénivet N. (2010) p. 165.

holds the opinion of more than two categories. They claim that there are individuals that fall outside of the strict regulations of IHL. The individuals are not civilians, and can therefore be targeted, but are not combatants either, and therefore do not benefit from the protection or immunity that the civilian/combatant groups are offered in IHL.<sup>54</sup>

In contrast, the ICRC denies this third category, and always has. The ICRC believes strongly in the sanctity of the civilian/combatant division. In the ICRC commentary to the GC, they claim that “every person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, [or] a member of the medical personnel of the armed forces who is covered by the First Convention. There is no intermediate status; nobody in enemy hands can fall outside the law.” This would mean that there cannot be a third category, that is not protected under IHL.<sup>55</sup>

The categorization is argued, but most parties agree to a sub division of the civilian category. One being protected civilians, the other being civilians losing their protection because of their direct participation in hostilities. This division is relatively new and has called for countless revisions. The ambiguity of determining the status of some individuals, is not a simple task, and is not regulated. The ICRCs Interpretive Guidance on the Notion of Direct Participation in Hostilities from 2009<sup>56</sup> aims to clarify the meaning of direct participation in hostilities.<sup>57</sup> This term is not mentioned in the Geneva Convention, or any of its additional protocols. The guiding document is the official recommendation from the ICRC, on how to interpret categorization in modern warfare.<sup>58</sup>

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<sup>54</sup> Quénivet N. (2010) p. 166.

<sup>55</sup> Quénivet N. (2010) p. 165.

<sup>56</sup> Interpretive guidance on the notion of direct participation in hostilities, 2009.

<sup>57</sup> “Clarifying the notion of Direct Participation in Hostilities”, (2009).

<sup>58</sup> “Clarifying the notion of Direct Participation in Hostilities”, (2009).

The principle of distinction does encounter difficulty in the case of extending the amounts of categories. For example, returning the OIF, Iraqi forces repeatedly wore civilian clothing, when coalition forces otherwise might have identified them. This is without a doubt, a practice that undermines the purpose of the principle of distinction, which in many ways endangers the civilian population. The problem is, the failure to distinguish oneself from a civilian is not a violation of IHL, instead, combatants who do not distinguish themselves will lose their lawful combatant status and the protection it offers.<sup>59</sup>

Further, it is difficult to define the line between a civilian who is directly participating in hostilities and a member of an organized armed group. Individuals who are balancing on this fine line, and who might be one or the other from time to time, caused “the revolving door phenomenon.” On one side of the door you are a civilian object, protected under IHL, enjoying the immunity from being directly attacked. On the other side of the door, you are a belligerent combatant. This creates a very asymmetrical categorization, where some individuals can sporadically attack and then be protected as civilians as soon as they put their weapons down. While actual combatants, such as infantry, or even a cook, are at all times a target of direct attack. It is not hard to imagine why the principle of distinction will encounter challenges in this complex situation.<sup>60</sup>

Another way to categorize the population is by the relatively new term Continuous Combatant Function, which defines individuals who repeatedly keeps directly participating in hostilities.<sup>61</sup>

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<sup>59</sup> Melzer, N. (2014) p. 332.

<sup>60</sup> Bosch, S. (2014) p. 1023.

<sup>61</sup> Interpretive guidance on the notion of direct participation in hostilities, 2009.

### **3.5 An example - conflicts in Africa**

There are many intra-state conflicts in various countries in Africa that depicts the contemporary challenges with the current IHL regulations.

Between 1983 and 2002, 2 million people were killed in the civil war in Sudan. The war was fought between the north and the south of the country. Out of these 2 million, only an estimate of 55.500 were killed in direct battle. In Rwanda, during the 1994 genocide, an estimate of 800.000 people were killed in one-sided violence. Lastly, between 1998 and 2001, there were 2.5 million war deaths in the Democratic Republic of Congo, of which only 350.000 of them were killed on the battlefield. These examples illustrate, that on the modern battlefield, the casualties of war are mostly civilians. Battle deaths directly resulted from hostilities of war (this entails both civilians and combatants) account for only about 10% of the total war deaths. Other deaths are caused by spreading of disease and starvation, typical to battle field zones.<sup>62</sup>

Another aspect of civilian participation is “civilian self-defense”. This was also seen in Rwanda during the genocide. In many contemporary conflicts, the civilian population is not necessarily passive victims, and receivers of propaganda, but might get mobilized, and create a cohesive self-defense force.<sup>63</sup>

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<sup>62</sup> Wenger A and Mason S.J.A (2008) p. 836.

<sup>63</sup> Wenger A and Mason S.J.A (2008) p. 846.

### **3.6 Insurgents and guerilla forces**

The intra-state conflicts are commonly fought by not only state government forces, but many insurgent or guerilla groups. Many groups do not consider the principle of distinction and might not distinguish themselves from the civilian population. In some cases, the groups might even be civilian self-defense forces as previously mentioned above. Some individuals may also be “farmers by day, warriors at night,” enjoying the revolving door phenomenon to their advantage. It is under great debate on how the insurgent groups, and certain individuals, should be categorized and whether they are protected or not. The principle of distinction is a valuable principle that needs to be strengthened, now more than ever, in this dynamic and difficult situation.<sup>64</sup>

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<sup>64</sup> Melzer, N. (2014) p. 332.

## 4 Analysis and conclusions

The following chapter contains my own opinion and the answers to the research questions are based on the previous chapters I have written.

Initially, I do not think that the current regulations regarding the principle of distinction are fully working in the modern warfare setting. The regulations face many challenges on the asymmetrical battlefield. They are functional, to an extent. It is crucial to keep this principle in IHL, and to keep trying to fulfill the purpose behind the principle. However, the rules that regulate the principle are without a doubt, out of date. The rules work in a time where a distinction can be made, between civilians and combatants. Today, it is not as simple, which complicates the currents regulations. The rules do not consider individuals who might not belong to either group, or at certain times both. Modern technology throws off the symmetry of the battlefield and creates a situation where a weaker combatant party might use the civilian population as a tool to equal out the unbalance. IHL is premised on the base of a balance between considering humanitarian protection and military necessity, and states and other parties usually are only willing to accept the humanitarian concerns as long as their military operations don't give their opponents an advantage. As soon as the military symmetry is thrown off, the humanitarian issues will no longer be considered.

It is a fact that the principle of distinction is threatened by these contemporary issues. Many legal experts, states and international organizations have reviewed the rules and tried to make revisions. For example, new categories of individuals have been introduced, but not accepted by everyone. With the increase of civilian participation in hostilities, the ICRC published the mentioned guiding document, intending to clarify the situation of direct participation in hostilities. The problem encountered with this solution is the revolving door phenomenon. Trying to expand the protection of the civilian population in the modern combat zone by adding categories, blurs the lines

between them even more. Additionally, by making it possible for insurgents to be farmers by day, and fighters by night, it can almost be interpreted that, what many would call, unlawful combatants, get better protection than a regular combatant. The unlawful combatants could choose whenever they would want to be immune to attacks and when they want to be attacked. However, I think that the general directives and guidelines such as the ICRC interpretive guidance is necessary. I think there are only a few ways the principle of distinction could work in the modern warfare setting. It might be easy to recommend a modernization of the rules, but I believe this is a difficult area to re-regulate, or modernize. No parties are interested in being tied down with further legal standards, when this could possibly be a disadvantage in modern armed conflicts. As a matter of fact, military advantage will in my opinion many times be of greater concern than civilian protection. Combatant parties have the opportunity to make their own interpretations of the vague regulations, to their advantage, and I doubt this is something many parties would not want to change.

One option to keep the principle of distinction active in modern warfare is to keep on writing general directives, like the ICRCs interpretive guidance on civilian DPH. I believe that the principle can be used in modern times as long as it keeps getting interpreted with new circumstances prevailing in contemporary conflicts considered. Authoritative general directives can specify what is legal in modern conflicts and try to shift involved parties into following the guidelines. The directives would not carry any legal power, but could possibly enforce political and moral force. It is also of great importance that involved combatant parties are informed of new interpretations or guidelines, as well as adjusting to them. This is however easier said than done, considering most parties not being willing to give up any military margin for maneuver.

Another option on how to possibly handle the situation created by the out of date legislation is to further encourage the civilian population to exclude and differentiate themselves from combatants, but like the previously mentioned option, that is easier said than done.

A third option that could further strengthen the principle of distinction is enforcing stronger financial sanctions on the states, groups or forces that are deliberately targeting civilians, hiding amongst them or using civilian objects as shields. This financial gain could then be redistributed as a compensation fund for the victims of the conflict, as well as the areas affected by warfare. I think this approach is an appropriate response to the growing problem of deliberate attacks on the civilian population. By sanctioning and financially hurting the groups that use those means of warfare, their wanted advantage would not be realized. It needs to prove useless to use the civilian population, in order to gain military advantages.

The rules were created with a purpose, to protect civilians in armed conflicts. The principle of distinction is meant to expand this protection, to keep the civilian population out of harm's way. The question remains, is this purpose still fulfilled today, in the modern warfare setting? In my opinion, the purpose is not fulfilled, and I don't think it can ever be in modern warfare, or even in conflicts that occurred back when the rules were created. It is however, extremely important to keep striving towards that purpose, and in that sense, I think the principle of distinction fills *a* purpose. The purpose it fills brings us back to one of the earlier regulations mentioned in the essay, the Hague Regulations of 1907. We still have the "desire to diminish the evils of war so far as military necessities permit", and that summarizes the contemporary issues of the principle of distinction. If any kind of legislative tools are to be introduced, it is important that they reflect back on the founding principle and purpose in mainly the Hague Regulations from 1907.

It is possible the principle saw its best days when it was just written and codified and will never be able to adjust to the ever-changing nature of

warfare. However, it is important that it exists, and that it remains a topic that is discussed. The principle protects one of the most valuable subjects of conflict, the civilian population. Without the principle, armed conflicts would cause irreparable damage to the most important subject to protect.

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