

## **Principle of Distinction in Armed Conflict: An Analysis of the Legitimacy of ‘Combatants and Military Objectives’ As a Military Target**

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**ABSTRACT :** During armed conflict parties thereto are required to abide by the principle of distinction. They are to strike a clear distinction between combatants and civilians and between military objectives and civilian objects during the conduct of hostilities. The principle emphasizes the protection of civilian and their objects so long as they do not actively participate in hostilities. Belligerents must therefore have a perimeter for determining legitimate military target out of the general population. However, modern armed conflict poses challenges to this principle as a result of civilianization of conflicts. This principle is not always observed during armed conflict as civilian objects that should enjoy protection are sometimes used for military purpose. This renders the civilian objects a legitimate military target and exposes them to attack despite the civilian nature of the objects. This article therefore discusses the concept of the principle of distinction. It examines combatants, civilians alongside the principle of distinction and the protection of civilian and their objects, while military objectives are the only legitimate target.

**KEY WORDS:** Civilian, Protection, Conduct of Hostilities, Military Objectives, Civilian Object.

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### **I. INTRODUCTION**

Right from antiquity, humanitarian norms were integrated into conduct of hostilities in different forms.<sup>1</sup> One of the rules set out to guide the conduct of belligerents in their military operations for the purpose of sparing civilians and their objects is the principle of distinction. The principle simply requires parties to an armed conflict to always have at the back of their minds that during conduct of hostilities the population is made up of persons, who are combatants and civilians, and it is only the combatants that constitute legitimate military target. The civilian shall be spared against the effects of hostilities. The principle further requires the extension of the protection to civilian objects, but where a civilian has taken an active part in hostilities or where a civilian object is used for military purpose, such civilian or civilian object has become a legitimate military target and thereby loses immunity against direct attack. It is against this background that the article will begin by discussing the general concept of the principle of distinction as an essential mechanism for the protection of civilians in time of armed conflict. It will also examine combatant as a legitimate target without necessarily looking at the issue of combatant status. The article equally discusses civilian immunity against direct attack, and civilian objects as protected categories. It finally examines military objectives as the legitimate military target during the conduct of hostilities.

### **II. THE CONCEPT OF PRINCIPLE OF DISTINCTION**

At the heart of international humanitarian law lies the principle of distinction between the armed forces who conduct the hostilities on behalf of the parties to an armed conflict and civilians who are presumed not to

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<sup>1</sup> Herczegh, G., *Development of International humanitarian Law* (Akademiai Kiado, Budapest, 1984) P13

directly participate in hostilities and must be spared against the dangers arising from military operations.<sup>2</sup> State Practice has established principle of distinction as a norm of Customary International Law applicable to both classes of conflicts (international and non-international armed conflicts).<sup>3</sup> It is the continuing respect for the principle that makes it possible for humanitarian law to fulfill its aim in protecting the civilian population from the consequences of armed conflict<sup>4</sup>. The Principle imposes an obligation on parties to armed conflict to always distinguish between the civilian population and combatants and between civilian objects and military objectives, and accordingly military operations should be directed only against the military objectives<sup>5</sup>. Distinction as a principle is one of the most fundamental protections afforded to the civilian population in time of hostilities<sup>6</sup>. The need to distinguish between combatants and civilians is an important aspect of warfare that has been recognised for long as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war<sup>7</sup>. The International Court of Justice (ICJ) in its Advisory Opinion in the *Nuclear Weapons* case has reiterated that the distinction between combatants and non-combatants is one of the cardinal principles that constitute the fabric of humanitarian law<sup>8</sup>. Similarly, in the case of *Prosecutor Vs Martić*<sup>9</sup>, the International Criminal Tribunal for the former Yugoslavia (ICTY) stresses the rule that the civilian population as well as individual civilians shall not be the object of attack, as a fundamental rule of international humanitarian law applicable to all armed conflicts. The reason underlying the principle of distinction is that combatants have the right to participate in hostilities and consequently may be the object of attack for the enemy. While civilians lack the right to directly participate in hostilities therefore they are to be protected from the effects of military operations.<sup>10</sup>

Under international armed conflict, Article 48 of the Additional Protocol I provides for the need to distinguish between civilian population and combatants and between civilian objects and military objectives.<sup>11</sup> A civilian who is immune loses the protection accorded to him under the principle of distinction when he takes a direct part in the hostilities<sup>12</sup>. This provision of the law has been fashioned as a result of the desire to restrict warfare to acts of violence against the enemy combatants, which is strictly necessary from a military standpoint.

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<sup>2</sup> Melzer, N., *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law*, (ICRC, Geneva, 2009) P11

<sup>3</sup> In *Prosecutor Vs Martić*, ICTY, IT-95-11-I, 1996. The applicability of these rules to all armed conflicts has been corroborated by General Assembly Resolution 2444 (XXXIII) and 2675 (XXV), both adopted unanimously in 1968 and 1970 respectively. These resolutions are considered as declaratory of customary international law in this field. The customary prohibition on attacks against civilians in armed conflicts is supported by its having been incorporated into both Additional Protocols. Article 51 of Additional Protocol I and Article 13 of Additional protocol II, both Protocols mentioned above, prohibit attacks against the civilian population as such, as well as individual civilians. Both provisions explicitly state that these rules shall be observed in all circumstances. The Appeal Chamber reaffirmed that both articles constitute customary international law. See also Henckaerts, J., et al, *Customary International Humanitarian Law*, Vol. 1 Rules, (Cambridge University Press, Cambridge, 2005) P3

<sup>4</sup> McDonald, A., 'The Challenges to International Humanitarian Law and the Principles of Distinction and Protection from the Increased Participation of Civilians in Hostilities' (April 2004) A Paper Presented at the University of Teheran at a Round Table on the Interplay Between International Humanitarian Law and International Human Rights Law.

<sup>5</sup> Article 48 (1), Additional Protocol I

<sup>6</sup> McCoubrey, H., *International Humanitarian Law: The Regulation of Armed Conflict*, (Dartmouth Publishing Company Limited, Aldershot, 1990) P114

<sup>7</sup> Watkin, K., 'Warriors Without Rights? Combatants, Unprivileged Belligerents, and the Struggle Over Legitimacy' (Winter 2005) N0. 2, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, P9. Prior to the codification of Geneva Conventions and their Additional Protocols, the Principle of distinction was first set forth in the St. Petersburg Declaration in 1868 which states- the only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy. Kalshoven, F., et al, *Constraint in Waging of War: An Introduction to International Humanitarian Law*, (ICRC, Geneva, 2001) P102

<sup>8</sup> International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Report 1996, Para 76

<sup>9</sup> Op cit

<sup>10</sup> Kalshoven, F., et al, Op cit, P99

<sup>11</sup> Krill, F., 'The Protection of Women in International Humanitarian Law' (November-December (1985)

Extract From the International Review of the Red Cross, Pp13-14

<sup>12</sup> Article 51 (3), Additional Protocol I

The provision is considered as a cardinal rule and principle not only of the Additional Protocol, but also of the entire body of International Humanitarian Law<sup>13</sup>. In international armed conflict, civilians are persons who belong to neither members of the armed forces of a party to the conflict nor participants in *levee en masse*.<sup>14</sup> Thus, civilians are not to be attacked as long as they are not incorporated into the armed forces, private contractors or directly participate in hostilities. Civilian employees who accompany the armed forces do not cease to be civilians simply because they are with the armed forces and assume functions other than the conduct of hostilities that would traditionally have been performed by the military personnel.<sup>15</sup>

Unlike the Additional Protocol I, Additional Protocol II does not contain specific rules and definitions in respect of the principle of distinction. However, the short fall in the provision of the Protocol II have been largely filled through State Practice, it now forms the basic rules that are applicable as customary law to non-international armed conflict<sup>16</sup>. The Protocol II provides that 'civilian population as well as individual civilians shall not be the object of attack and they shall enjoy protection against direct attack unless and for such time as they take a direct part in hostilities.'<sup>17</sup> Common Article 3 also provides that High Contracting Parties shall accord protection to persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed *hors de combat*.

### III. COMBATANTS AND THE PRINCIPLE OF DISTINCTION

Combatants are members of armed forces belonging to a party to the conflict. According to the third Geneva Convention, combatants are 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>18</sup> It further provides that combatants include members of other militias and members of other volunteer corps including those of organised resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied provided that such militias or volunteer corps, including such organised resistance movements, who fulfill the following conditions: that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; And that of conducting their operations in accordance with the laws and customs of war<sup>19</sup>. The convention has extended prisoners of war status to the members of regular armed forces who profess allegiance to a government or authority not recognised by the detaining power.<sup>20</sup> Another category of combatants are persons who accompany the armed forces without actually being members thereof such as civilian members of military aircraft crew, war correspondents, supply contractors, members of labour units of services responsible for the warfare of the armed forces, provided that they have received authorization from the armed forces which they accompany who shall provide them for that purpose with an identity card are recognised as combatants. Similarly, members of crew, including masters, pilots and apprentices of the merchant marine and the crews of

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<sup>13</sup> Pfanner, T., 'Military Uniforms and the Law of War' (2004) Vol. 86, No.853, International Committee of the Red Cross, P104

<sup>14</sup> Solis, G.D., *The Law of Armed Conflict: International Humanitarian Law in War*, (Cambridge University Press, New York, 2010) P202. *Levee en masse* as is contained in Article 4A(6) of the Geneva Convention III means 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>15</sup> Melzer, N., Op cit, P39

<sup>16</sup> Henckaerts, J., 'Study on Customary International Humanitarian Law: Contribution to the Understanding and Respect for the Rule of Law in Armed Conflict' (2005) Vol.87, No 857, International Review of the Red Cross, P189

<sup>17</sup> Article 13, Additional Protocol II. See also Article 3 (7), Protocol II to the Convention on Certain Conventional Weapons which is also applicable in non international armed conflicts. It is worthy of note that 'principle of distinction is derived from the principles of humanity, no self-respecting state would challenge the applicability of such principles in both international and non-international armed conflict.' Meron, T., *Human Rights and Humanitarian Norms as Customary Law*, (Clarendon Press, Oxford, 1989) P74. Therefore, the limitations set by 'the principle on the use of violence in war seek to achieve a reasonable balance between the necessary destruction of the military resources of the enemy in time of war and the equally compelling need not to cause the unnecessary suffering, destruction and loss of life which confer no clear military advantage.' Baxter, R.R., 'The Duties of Combatants and the Conduct of Hostilities (Law of the Hague)' in *International Dimensions of Humanitarian Law*, (UNESCO, Paris, 1988) P103

<sup>18</sup> Article 4A (1), Third Geneva Convention

<sup>19</sup> Ibid, Article 4A (2)

<sup>20</sup> Ibid, Article 4A (3)

civil aircraft of the parties to the conflict are equally granted combatant status.<sup>21</sup> The above category of persons identified as combatants under the provision of third Geneva Convention are basically for the purpose of the requirements for the post-capture entitlement of armed forces to combatant privilege and prisoner of war status. The entitlements are only available in international armed conflicts and they form the essential privileges of the armed forces of a party to a conflict<sup>22</sup>. The privilege status entails the right to attack the enemy and have the privilege of benefiting from immunity of prosecution for having participated in hostilities.<sup>23</sup> However, for the purpose of distinction, the word “combatant” is used in its generic meaning which does not imply a right to combatant status or prisoner of status, but indicates persons who do not enjoy the protection accorded to civilians against direct attack.<sup>24</sup>

Since combatants are members of armed forces belonging to a party to the conflict, Additional Protocol I made provision for membership of armed forces. It states that the armed forces of a party to a 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 an internal disciplinary system which inter alia, shall enforce compliance with the rules of international law applicable in armed conflict<sup>25</sup>. With the stated qualification for armed forces of a party to a conflict, the Protocol further provides for the rights of combatant relevant to principle of distinction. It states that members of the armed forces of a party to a conflict (other than medical personnel and chaplains) are combatant, that is to say, they have the right to participate directly in hostilities. In other words, their participation in conduct of hostilities is lawful and they cannot be prosecuted for simply taking up arms against the military forces of a party to the conflict either *de facto* or *de jure*.

By virtue of the right of combatants to directly participate in hostilities, they are consequently a legitimate target for the enemy forces<sup>26</sup>. They may lawfully be attacked without restriction in any place, at any time and under any circumstances except when they are rendered *hors de combat*<sup>27</sup>. Combatants are recognised as part of the military potential of the enemy and logically, it is therefore always lawful to attack them for the purpose of weakening that potential<sup>28</sup>. It is worthy of note that medical personnel and chaplains though they belong to armed forces of a party to the conflict, nevertheless they are non-combatants for the purpose of principle of distinction i.e. they are not legitimate target<sup>29</sup>. In essence, medical personnel and chaplains enjoy combatant status if they are captured but they are not combatants for the purpose of conduct of hostilities, which invariably means they are not legitimate military target. This category of armed forces should be protected and spared against the dangers of attack during military operations. Likewise, a member of armed forces who is disengaged from active duty and re-integrate into civilian life whether due to a full discharge from duty or as a deactivated reservist ceased to be a combatant and is not a legitimate target.<sup>30</sup> Therefore, the qualification of a combatant as a lawful target has become crucial due to the fact that it is embodied in principle of distinction which is one of the major principles of International Humanitarian Law.<sup>31</sup> One of the significant aspects of the principle of distinction is the obligation it places on the part of combatants to distinguish themselves from the civilian population in order to promote protection of the civilian population from the effect of hostilities. Additional Protocol I emphasizes that combatants are obliged to distinguish themselves from the civilian

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<sup>21</sup> Ibid, Article 4A (4) and (5). Likewise, persons who participate in *levee en masse* are armed actors who are excluded from the civilian population although they lack sufficient organisation and command to qualify as members of the armed forces. Thus the participants in *levee en masse* are considered to be combatants. Article 4A (6), Third Geneva Convention. See also Melzer, N., Op cit, P25

<sup>22</sup> Melzer, N., Op cit, P22

<sup>23</sup> Bellal, A., et al, ‘The Concept of Combatant under International Humanitarian Law’ In Doswald-Beck, L., et al, *International Humanitarian law-An Anthology* ( LexisNexis, India, 2009) P57

<sup>24</sup> Henkaerts, J., Op cit, P3

<sup>25</sup> Article 43 (1), Additional Protocol I

<sup>26</sup> Kalshoven, F., et al, Op cit, P99

<sup>27</sup> Ladan, M.T., *Introduction to International Human Rights and Humanitarian Laws* (Ahmadu Bello University Press, Zaria, 1999) P147

<sup>28</sup> Sassoli, M., et al, ‘The Relationship Between International Humanitarian and Human Rights Law Where it Matters: Admissible killing and Internment of Fighters in Non-International Armed Conflicts’ (2008) Vol. 90, No871, *International Review of the Red Cross*, P606

<sup>29</sup> Henkaerts, J., et al, Op cit., P13

<sup>30</sup> Melzer, N., Op cit, P31

<sup>31</sup> Bellal, A., et al, Op cit, P59

population while they are engaged in an attack or in a military operation preparatory to an attack.<sup>32</sup> However, in situations of armed conflict where owing to the nature of the hostilities an armed combatant cannot distinguish himself, he is nevertheless required to carry his arms openly during each military engagement and during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.<sup>33</sup> Usually, members of armed forces distinguish themselves from civilian population by wearing uniform or other distinctive sign visible and recognizable at a distance or by carrying their arms openly while taking part in a military operation.<sup>34</sup> It has been observed that the wearing of uniform by a combatant may significantly facilitate the distinction, but not necessarily conclusive to recognise such person as a combatant.<sup>35</sup> In fact, within the armed forces of a party to an armed conflict, there are certain categories of persons who wear uniform but they are not combatants for the purpose of qualifying as a legitimate military target. For instance, medical personnel and chaplains of armed forces of a party to a conflict wear military uniform during belligerency, but for the purpose of conduct of military operations, they are considered as non-combatants and thereby not legitimate military target.

Another area of concern is the position of mercenaries<sup>36</sup> who also take up arms on behalf of belligerent and participate in hostilities. They are treated as unprivileged belligerents or unlawful combatants who do not enjoy prisoner of war status and they are to be considered as non-combatants who have taken part in hostilities<sup>37</sup>. Therefore, any individual who acts in favor of a belligerent by taking up arms as a mercenary or private military contractor can not avail himself of his neutrality<sup>38</sup>. Such mercenaries are treated as civilian, if they engage in activities that amount to direct participation in hostilities they lose immunity from direct attack for the duration of their participation. This serves as a significant difference between mercenaries and combatants who can be targeted at any time but enjoy combatant status and its corresponding benefits<sup>39</sup>.

#### **IV. CIVILIANS AS PROTECTED PERSONS**

The definition of civilian as contained in the Additional Protocol I was not assertive as it merely defines civilian by way of exclusion, meaning if you are not a member of armed forces then you are a civilian. This shows that civilian is negatively defined with respect to combatants and armed forces.<sup>40</sup> In an elaborate language, a civilian is any person who is not a member of the belligerent armed forces whether or not the authority upon which such a force depends is recognised by the adverse party or of associated militia, incorporated paramilitary police or volunteer corps, including organised resistance units, or of a *levee en masse*

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<sup>32</sup> The need for combatants to distinguish themselves by wearing uniform is not compulsory, but failure to do so may have devastating effect on the individuals when captured by the forces of an adverse party. Anwo, S., 'Critical Analysis of Humane Principles in Armed Conflicts and the Integrity of Humane Principles, United Nations Additional Protocol as the Basis of the Legal Position of Child Soldiers' [2010] 1 EBSU J. Int'l L. & Jur. Rev. (Ebsu J.I.L.J.R) P10

<sup>33</sup> Article 44 (3), Additional Protocol I

<sup>34</sup> Krill, F., Op cit, P17

<sup>35</sup> Bellal, A., Op cit, P62

<sup>36</sup> A person is a mercenary when he satisfied the cumulative requirements set out in Additional Protocol I. It states that a mercenary is a person who: (a) is specially recruited locally or abroad in order to fight in an armed conflict; (b) does, in fact, take a direct part in the hostilities; (c) is motivated to take a direct part in the hostilities essentially by the desire for private gain and, in fact, is promised, by or on behalf of a party to the conflict, material compensation substantially in excess of that promised or paid to combatants of similar rank and functions in the armed forces of that party; (d) is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict; (e) is not a member of the armed forces of a party to the conflict; (f) and has not been sent by a state which is not a party to the conflict on official duty as a member of its armed forces. Article 47 (2), Additional Protocol I

<sup>37</sup> Fallah, K., 'Corporate Actors: The Legal Status of Mercenaries in Armed Conflict' (2006) Vol. 88, No 863, International Review of the Red Cross, P606

<sup>38</sup> Ibid, P604

<sup>39</sup> Gillard, E., 'Business Goes to War: Private Military/Security Companies and International Humanitarian Law' (2006) Vol. 88, No. 863, International Review of the Red Cross, P539

<sup>40</sup> Article 50 (1), Additional Protocol I. See also Henkaert, J., et al, Op cit, P19. Article 50 (1), Addition Protocol I defined civilian as any person who does not belong to one of the categories of persons referred to in Article 4A (1),(2),(3) and (6) of the third Geneva Convention and in Article 43of Protocol I. Black's law dictionary also defined civilian as a person who is not serving in military. Garner, B. A., *Black's Law Dictionary*, (Thomson West, United States of America, 2004) P262

acting in immediate resistance to invasion.<sup>41</sup> Meanwhile, the civilian population comprises of all persons who are civilians.<sup>42</sup> Since the general population is made up of civilians, a mere presence of certain military personnel within the civilian population does not deprive the population of its immune civilian character.<sup>43</sup> It is virtually inevitable that during armed conflict individual members of the armed forces will be intermingled with the civilian population, and their presence shall not therefore deprive the civilian population of its character as such or of the protection to which it is entitled. Hence the presence of members of armed forces on leave amidst a large number of civilians does not mean that the group of civilians may be attacked because of the presence of military personnel.<sup>44</sup> In a situation where the civilian nature of a person is in doubt, that person shall be considered and treated as a civilian.<sup>45</sup> In practice, this means that a combatant may not open fire on persons of uncertain status or who find themselves in a location which puts their status into doubt, such as a terrain where civilians are not expected. In such a situation, the combatant must be convinced that they are indeed enemy combatants, or civilian who loses protection as a result of direct participation in hostilities.<sup>46</sup>

The reason underlying principle of distinction is that civilians lack the right to directly participate in hostilities and civilians lose their entitlement to protection against direct attack for such period as they take a direct part in hostilities.<sup>47</sup> Under International Humanitarian Law, not only do civilians who directly participate in hostilities become legitimate target, but they may also face prosecution under the national law of the state that captures them for simply taking up arms against legitimate constituted authority.<sup>48</sup> Therefore, in the absence of rules protecting civilians, any individual who participates in hostilities in any way does it at his own risk.<sup>49</sup> In fact, the reasons for the safeguards the law extends to civilians are premised upon their refraining from participation in belligerent activities, and upon their personality as non-combatants.<sup>50</sup> On the contrary, there are contending views that civilians do not require certain extreme protection if it is a just war. One view is that where the war is just, collateral killing of civilians in connection with legitimate military operations is to be condoned.<sup>51</sup> The other view is that the extent to which civilians are responsible for the actions of their government helps to determine what foreigners can do to the civilians, as in either targeting or not targeting them during a war against aggression, and what foreigners can do on behalf of the civilians, as in a humanitarian intervention.<sup>52</sup> The rationale behind this view is that people bear the responsibility of their governance, thus for their government's action, whether or not the state is a free state. In other words, the guilt of joining the aggression should not be limited to the decision makers in the government or political and military leaders who

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<sup>41</sup> McCobrey, H., Op cit, Pp13-14. A civilian is a person who is neither member of the armed forces of a state nor member of non state parties (dissident armed forces/organised armed group) and who have taking no active part in hostilities. Thus in non international armed conflict armed forces of a state and dissident armed forces or other organised armed group are quite distinct from the civilian and civilian population. Melzer, N., Op cit, P28. Any civilian who assumed a continuous military function which corresponds to that collectively exercised by an armed group as a whole for the purpose of conduct of hostilities on behalf of the non state party to the conflict would certainly lose protection accorded to civilian. Boothy, W.H., 'Direct Participation in Hostilities- A Discussion of the ICRC Interpretive Guidance' (2010) International Humanitarian Legal Studies 1, P153. It is observed that the traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of combatant is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities. Watkin, K., Op cit, P9

<sup>42</sup> Article 50 (2), Additional Protocol I

<sup>43</sup> Ibid, Article 50 (3)

<sup>44</sup> Baxter, R.R., Op cit., P113

<sup>45</sup> Ladan, M.T., Op cit, P137

<sup>46</sup> Kalshoven, F., et al, Op cit, P99

<sup>47</sup> Ibid, P99

<sup>48</sup> Bellal, A., et al, Op cit, P57

<sup>49</sup> Carmines, E., 'The Past as Prologue: The Development of the Direct Participation Exception to Civilian Immunity' (2008) Vol. 90, No. 872, International Review of the Red Cross, P865

<sup>50</sup> Baxter, R.R., *Law and Responsibility in Warfare: The Vietnam Experience* (the University of North Carolina Press, United States of America, 1975) P64

<sup>51</sup> Maiese, M., Jus in Bello. "' Beyond Intractability' in Burgess, G., and Burgess, H., Conflict Research Consortium, (June 2003) University of Colorado, Boulder. Available at <[http://www.beyondintractability.org/essay/jus\\_in\\_bello/](http://www.beyondintractability.org/essay/jus_in_bello/)> (accessed 3<sup>rd</sup> June, 2009)

<sup>52</sup> Cornwell, W., 'The Burden of Autonomy: Non Combatant Immunity and Humanitarian Intervention' Available at <http://www.ethical-perspectives.be/viewpic.php?LAW=E&TABLE=EP&ID=933> (visited 10<sup>th</sup> March 2011)

approved the war alone since the war is for the interest of the state<sup>53</sup>. However, these views seem to negate the principle of distinction. The views failed to take cognizance of the difference between *jus ad bellum* and *jus in bello* in the sense that the reason for going to war or the justness of the war does not absolve a party to a conflict from limiting its military operation within the provisions of the law of war. Therefore, whether the war is just or not, or the civilians are responsible for the actions of their government or not, once there is an outbreak of war, it is an obligation and responsibility of parties to the conflict to accord the civilian and civilian population the necessary protection available within the purview of the law.<sup>54</sup> The preamble to the Additional Protocol I reaffirmed that the provisions of the Geneva Conventions and of the Protocol must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the parties to the conflict.

In non-international armed conflict, Common Article 3 and Additional Protocol II did not contain a definition of civilians or of the civilian population even though Additional Protocol II in particular, used the term in several areas. Other subsequent treaties applicable in non-international armed conflict such as Amended Protocol II to the Convention on Certain Conventional Weapons, Protocol III to the Convention on Certain Conventional Weapons, etc used the terms 'civilian' and 'civilian population' without providing their definitions.<sup>55</sup> The definition of civilian and civilian population in Additional Protocol I may be quite acceptable in non-international armed conflict, despite the short comings of the definition. The International Criminal Tribunal for the former Yugoslavia (ICTY) has established that the rules on the conduct of hostilities in international armed conflicts have been widely accepted as being very similar to those applicable to internal armed conflicts.<sup>56</sup> However, if the definition contained in Additional Protocol I is adopted, the status of members of organised armed group would be problematic. This is in view of the fact that, neither Common Article 3 nor Additional Protocol II refers to members of an armed group as combatants so that they can easily be excluded from the civilian and civilian population. The genesis of this problem is associated with the fact that states do not want to confer the right to participate in hostilities and its corresponding combatant immunity on anyone in non-international armed conflicts.<sup>57</sup> In addition, the absence of positive definition of a civilian has largely contributed to the problem of determining the status of members of armed group in non-international armed conflict.

## **V. PROTECTION OF CIVILIAN OBJECTS IN HOSTILITIES**

The underlying element of the principle of distinction is the distinction between civilians and combatants and between civilian objects and military objectives and accordingly attack shall only be targeted at military objectives. However, recent trend has shown that there is an increase in the involvement of civilian objects in military operations. It results from the increase in the use of civilian objects in military operations especially in where non-state actors are involved, and continues civilianization of modern armed conflicts. Hence, there is need in conduct of hostilities not to only protect the lives and well-being of individual civilians and civilian population, but there is also a compelling need to protect objects that are civilian in nature as long as they are not used for military purpose.<sup>58</sup> This raises a question as to the meaning of civilian objects. The definition of civilian objects as contained in the Additional Protocol I has to be read along with the definition of military objectives. This is because as civilians are defined as those who do not belong to the armed forces, civilian objects are also defined as those objects which are not military objectives.<sup>59</sup> In a more comprehensive words, civilian objects are objects that do not by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time does not offer a definite military advantage.<sup>60</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) has interpreted civilian property to cover any property that could not be legitimately considered a military objective.<sup>61</sup> Thus, only objects that qualify as military objectives may be

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<sup>53</sup> Ibid

<sup>54</sup> Bouvier, A.A., 'International Humanitarian Law and the Law of Armed Conflict' (2012) Peace Operations Training Institute, Williamsburg, 13 available at [peaceopstraining.org](http://peaceopstraining.org) (accessed 20th February, 2013)

<sup>55</sup> Henkaert, J., Op cit, P190

<sup>56</sup> *Prosecutor Vs Tadic*, IT-94-1-AR72, ICTY Appeal Chamber, Decision of October 1995 on the Defense Motion for Interlocutory Appeal on Jurisdiction, Para 118.

<sup>57</sup> Sassoli, M., et al, Op cit, P606

<sup>58</sup> Baxter, R.R., Op cit, note 49, P119

<sup>59</sup> Article 52, Additional Protocol I

<sup>60</sup> Kalshoven, F., Op cit, P100

<sup>61</sup> *Prosecutor Vs Tihomir Blaskic*, IT-95-14-T, ICTY, Trial Chamber I, Judgment of 3<sup>rd</sup> March 2000, Para 180

attacked, other objects other than military objectives are generally protected against attack.<sup>62</sup> This rule protecting civilian objects from direct attack has been established by state practice as a customary norm of international law, thus applicable to both international and non-international armed conflicts.<sup>63</sup> In recent time, the challenging and complex circumstances of contemporary phases of warfare and the increasing involvement of civilian objects in military operations, objects which are by their nature normally civilian objects have however become military objectives and thus a target for an attacker.<sup>64</sup> Although, Additional Protocol I provides that in cases of doubt whether an object which is normally dedicated to civilian purposes, such as place of worship, a house or other dwelling, market places or a school is being used to make an effective contribution to military action, it shall be presumed not to be so used.<sup>65</sup> The jurisprudence of ICTY has really stressed the application of this principle of treating civilian objects which identity is in doubt as immune from attack is significant in practice. For instance, in the case of the *Prosecutor Vs Tihomir Blaskic*<sup>66</sup> the Trial Chamber held that the houses that were torched belonged to civilians and could not in any circumstances be construed as military targets as there was no military installation, fortification or trench in the town on the day of the attack, there were no reports of any military victims or of the presence of soldiers from the Bosnia-Herzegovina army, and the Muslim military did not put up any defense.<sup>67</sup> The Trial Chamber went further to clarify the case of doubt of civilian objects thus:

*"In case of doubt as to whether an object which is normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed no to be so used. The trial chamber understands that such an object shall not be attacked when it is not reasonable to believe, in the circumstances of the person contemplating the attack, including the information available to the later, that the object is being used to make an effective contribution to military action."*<sup>68</sup>

Therefore, the presumption of civilian character of an object and its corresponding immunity obviously applies only in a case of doubt. So that where an object is actually used in such a way as military quarters, command post or munitions depot, it contributes effectively to military operation and it yields military advantage. In such circumstances, the object would be regarded as a military objective, provided always that the condition requiring that its destruction offers a definite military advantage in the circumstances ruling at the time is met.<sup>69</sup> In addition to cases of doubt, the law has made certain provisions protecting specific objects by the prohibition of attack against historic monuments, works of art or places of worship which constitute the cultural or spiritual heritage of the people.<sup>70</sup> The prohibition of attack on objects that are indispensable to survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works for the specific purpose of denying them their sustenance value to the civilian population or to the adverse party or whatever the motive may be.<sup>71</sup> Attacks against works or installations containing dangerous forces namely dams, dykes, nuclear electrical generating stations and military objectives located at or in the vicinity of the works or installations even where these objects are military objectives is totally prohibited provided that such attack may cause the release of

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<sup>62</sup> Wuerzner, C., 'Mission Impossible? Bringing Charges for the Crime of Attacking Civilians or Civilian Objects Before International Criminal Tribunals' (2008) Vol. 90, No. 872, International Review of the Red Cross, P909

<sup>63</sup> Henkaerts, J., et al, Op cit, P32

<sup>64</sup> Ladan, M.T., Op cit, P138. For instance, schools and hospitals are civilian object by their nature but where these objects are used for military purposes such as launching attacks the objects would automatically be treated as military objectives hence subject to attack.

<sup>65</sup> Article 52 (3), Additional Protocol I. The presumption of civilian object in case of doubt is also used in Article 3 (8) (a), Protocol II to the Convention on Certain Conventional Weapons. However, US Department of Defense in 1992 submitted a report to the congress on the conduct of the Persian Gulf War, states that the rule is not customary and is contrary to the traditional law of war because it shifts the burden of determining the precise use of an object from the defender to the attacker i.e. from the party controlling that object to the party lacking such control. And the imbalance would ignore the realities of war in demanding a degree of certainty of the attacker that seldom exist in combat. See Henkaerts, J., et al, Op cit, Pp35-6

<sup>66</sup> Op cit

<sup>67</sup> Wuerzner, C., Op cit, P917

<sup>68</sup> *Prosecutor Vs Stanislav Galic*, IT-98-29, ICTY, Trial Chamber Judgment of 5<sup>th</sup> December 2003, Para 51

<sup>69</sup> Kalshoven, F., et al, Op cit, Pp100-1

<sup>70</sup> Article 53, Additional Protocol I. See also Article 16, Additional Protocol II

<sup>71</sup> Article 54, Additional Protocol I. See also Article 14, Additional Protocol II and Kalshoven, F., et al, Op cit, Pp105-6



dangerous forces and consequent severe losses among the civilian population.<sup>72</sup> Finally, any attack against the natural environment that causes widespread, long term and severe damage is prohibited.<sup>73</sup> All these prohibitions are only effective if the objects are used for purposes other than military function except in the case of prohibition against attack on objects that are likely to cause the release of dangerous forces and consequent severe losses among the civilian population. The prohibition of attack on objects that may release dangerous forces is an absolute bar, the fact that the object is used for military purpose does not absolve belligerents from their obligation to respect the immunity of such object.

## **VI. MILITARY OBJECTIVES AS A LEGITIMATE TARGET**

There was an attempt in the 1950s proposing the enlistment of objects that constitute Military objectives. The International Committee of the Red Cross (ICRC) suggested that governments accept a list enumerating the categories of objects that could be regarded as military objectives which may be subjected to periodical adjustment when necessary, but the ICRC's attempt has remained unsuccessful.<sup>74</sup> Thus, lack of an agreed clear-cut dividing line between lawful military objectives and other objects would lead to each and every object to be regarded as a military objective if in the circumstances its elimination might be expected to weaken the military forces of the enemy and representing a clear military advantage to the attacker<sup>75</sup>. Therefore, since it is not militarily feasible to draw up a full and precise list of what constitutes military objectives, Additional Protocol I provides a general description of what constitutes military objectives as

*“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 neutralization in the circumstances ruling at the time, offers a definite military advantage”<sup>76</sup>.*

From this definition, for an object to qualify as military objectives, it has to satisfy two cumulative requirements. Firstly, the object has to contribute effectively to military action of one side and secondly, its destruction, capture or neutralization has to offer a definite military advantage for the other side.<sup>77</sup> Baxter devises a third criterion of the nature, location, purpose or use of the object. He emphasized that it is necessitated by the fact that some military objectives, such as fortifications, military radar installation and munitions factories, have military character inherent, whereas a school building used as a barracks acquires that character only because of its location and temporary use.<sup>78</sup> However, the third criterion added may not be necessary, because regardless of the nature, location, purpose or use of the object, once the object contributes effectively to military action of a party or its destruction, capture or neutralization offers a definite military advantage, it is a military objective. In essence, the nature, location, purpose or use of the object is to be used in the assessment and determination of whether or not the object contributes effectively to military action or its destruction, capture or neutralization offers a definite military advantage. Furthermore, a military objective remains a military objective even if civilian persons are staying or working inside the object.<sup>79</sup> In other words, the presence of civilians within or near military objectives does not render such objectives immune from attack.<sup>80</sup> A good example is where civilians are working in a munitions factory, they do not lose their protection as civilians, but that does not imply that by virtue of their presence, the factory has acquired protection as a civilian object.<sup>81</sup> Therefore, any civilian person within such an object or its immediate surroundings shares the risk to which the object is exposed.<sup>82</sup> Meanwhile, in cases of doubt whether an object is military objectives or

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<sup>72</sup> Article 56, Additional Protocol. See also Article 15, Additional Protocol II

<sup>73</sup> Article 55, Additional Protocol I

<sup>74</sup> Kalshoven, F., et al, Op cit, P45. Although, some states such as Germany, Switzerland and United States are mindful of the need to give clear guidance to their armed forces and have attempted in their manuals to identify with some specificity what constitute military objectives. See Baxter R.R., Op cit, note 13, P119

<sup>75</sup> This standard is synonymous to the same rule as obtainable in the principle of military economy, according to which the objects which qualify first and foremost as targets of military action are those whose destruction may be expected to have the greatest and most immediate effect on the military power of the adversary. See

Kalshoven, F., et al, Op cit, P45

<sup>76</sup> Article 52 (2), Additional Protocol I

<sup>77</sup> Sassoli, M., et al, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (ICRC, Geneva, 1999) P161

<sup>78</sup> Baxter, R.R., Op cit, note 50, P119

<sup>79</sup> Ladan, M.T., Op cit, P138

<sup>80</sup> Henkaerts, J., et al, Op cit, P31

<sup>81</sup> Kalshoven, F., et al, Op cit, P101

<sup>82</sup> Ibid, P101

not, the presumption is that the object is a civilian object.<sup>83</sup> However, there are objects that fall neither within the presumption of military objectives, nor under civilian objects, and they are not categorically addressed in the Additional Protocol I. For instance, objects such as road, bridge or railway-line, a power generating facility, or any industrial plant, may or may not come within the terms of a military objective. Hence, they will be military objectives only when they meet the dual criteria of- their location or use makes an effective contribution to military action and that their total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.<sup>84</sup> Likewise, military personnel and objects involved in peace-keeping mission are also not specifically addressed in Additional Protocol I. However, state practice establishes that such personnel and objects are given protection against attack equivalent to that of civilians and civilian objects. This practice has developed and now included in the statute of the International Criminal Court (ICC) and has formed part of the customary norms of international law applicable in any type of conflict.<sup>85</sup>

## **VII. CONCLUSION**

Principle of distinction is one of the significant humanitarian principles governing the conduct of hostilities in armed conflicts. The effectiveness of the obligation imposed by the principle depends largely on the ability of military personnel carrying out military operations to clearly separate combatants from civilians and military objectives from civilian objects. The combatants have the right to directly participate in conduct of hostilities and consequently, they are legitimate military target subject to attack at all times except when they are rendered *hors de combat*. While civilians on the other hand, have no right to directly participate in conduct of hostilities and, as such, they are not legitimate military target. Similarly, military objectives are legitimate targets in military operations as they make effective contribution in military operations. While civilian object is protected against the risk and effects of hostilities unless the object is used for military purpose in which case, it loses its immunity against attack. Despite the challenges modern armed conflicts pose to principle of distinction, it still remains a significant humanitarian principle which protects civilians and their objects. Thus, parties to an armed conflict must always respect and observe the principle in conduct of hostilities. It is suggested that the International Committee of the Red Cross and member states to Geneva Conventions and their Additional Protocols should work out a legal framework that gives positive definition of the term civilian. This can be done by elaborating the concept as an independent variable without necessary depending on the concept of armed forces. There is equally the compelling need for non-governmental organizations and states department responsible for training armed forces to be organising regular workshops and seminars for the armed forces on the principle of distinction, particularly in this era of challenging modern warfare in order to make them acquainted with the rules. This would go a long way in further protecting civilians and their objects during military confrontations.

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<sup>83</sup> Article 52 (3), Additional Protocol I

<sup>84</sup> Kalshoven, F., et al, Op cit, P101

<sup>85</sup> Henkaerts, J., Op cit, P192