

CHARLES UNIVERSITY

Faculty of Law

Adam Lev

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Humanitarian Law**

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Master's thesis supervisor: JUDr. Milan Lipovský, Ph.D.

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Adam Lev

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Introduction

The principle of distinction stands as one of the cornerstones of international humanitarian law (hereinafter „IHL“), embodying the ethical and legal efforts to mitigate the damages of war by protecting those who are not participating in hostilities and civilian objects. As enshrined in various treaties and as a part of customary international law, this principle mandates a clear distinction between combatants and non-combatants, as well as between military and civilian objects. The effectiveness of such customary international rule depends heavily on the proper practical implementation of this principle, which seeks to ensure that military operations are conducted with humanity, and even though this principle is not completely capable of constraining the number of casualties, it enshrines protection for the ones most affected by the effects of an armed conflict, that being the civilian population. Not absolutely but without such, there would be most certainly more atrocities.

At its core, the principle of distinction serves to limit the effects of armed conflict by safeguarding civilian populations and civilian infrastructure. The principle is deeply embedded in the Geneva Conventions of 1949 (hereinafter „GCs“ or „Conventions“)¹ and their Additional Protocols (hereinafter „Protocols“)², which form the bedrock of IHL.

The nature of armed conflict, however, has evolved significantly since 1864, which is considered the year in which the IHL was born, presenting new challenges to applying this principle. Modern conflicts often involve the participation of a complex mix of state and non-state actors, asymmetric warfare, and technologically advanced weaponry, all of which complicate the implementation of IHL. Further complicating the landscape are the advancements in technology and the advent of cyber warfare, autonomous weapons systems, and the increased use of drones. These developments raise questions about how to effectively apply the principle of distinction in contexts where the battlefield is not always clearly defined, and where the lines between military and civilian infrastructure can be easily obscured. Moreover, urban warfare has become more

¹ namely the Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 970.(hereinafter „GC I“); Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 971.(hereinafter „GC II“); Convention (III) relative to the Treatment of Prisoners of War, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 972.(hereinafter „GC III“) and Convention (IV) relative to the Protection of Civilian Persons in Time of War, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 973.(hereinafter „GC IV“)

² namely the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), concluded on 8 June 1977, entered into force 7 December 1978, UNTS 17512. (hereinafter „API“) and Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), concluded on 8 June 1977, entered into force 7 December 1978, UNTS 17513. (hereinafter „APII“)

prevalent, resulting in higher risks to civilian populations and greater challenges in distinguishing military targets from civilian areas.

In light of the evolving nature of warfare, this thesis aims to contribute to the ongoing discourse on the relevance and application of the principle of distinction in the face of modern warfare's challenges. It will provide a nuanced analysis of the current state of IHL with respect to the principle of distinction.

This thesis aims to explore the principle of distinction in some aspects of modern warfare. This thesis aims to find answers to the question of the legality of civilian direct participation in hostilities in cyberspace via the use of mobile applications (hereinafter „apps“) and of the classification of dual-use objects in relation to objects essential for the civilian population.

The thesis focuses on more general questions first. Firstly, an introduction to the hostilities is made, exploring various types of armed conflicts, and a new domain of warfare is explored. The second part creates a base for understanding the intricacies of modern warfare, with a focus on the status of persons under the norms of the IHL, and who and what is protected during armed conflict. With gaining momentum the principle of distinction, alongside other rules of targeting is explored. In the final part, the knowledge from the previous chapters is applied and used to explore the problematic application of the principle of distinction in chosen topics.

This thesis primarily draws upon foreign literature, Czech sources not excluded. The choice of language for this thesis aligns with that of the predominant sources. The methodology employed in this research is diverse. The initial sections, particularly chapters 1 through 2, primarily utilize a descriptive method. In the concluding chapter, insights gleaned from the preceding sections are applied to specific case studies, predominantly employing the method of analysis.

The research question is the assessment of the legality of civilian direct participation in hostilities by civilians via cyber means and of the classification of dual-use objects.

1. Spectrum of Hostilities

Before we can analyze and discuss variables of the application of the principle of distinction, it is necessary to understand the landscape in which IHL applies. Generally speaking, IHL regulates the conduct of war, more precisely it regulates activities during hostilities in conflicts between two or more actors, either state or nonstate. In this chapter, we will delve into what is war, discuss the absence of this term in the codifications of IHL, and with that said explain what an armed conflict is and how it's divided.

1.1. War

For most of human history, war was a common part of human existence. However modern IHL does not operate with the term war.

War was understood to be a conflict between two states, and therefore, the earliest treaties applied only to hostilities between states.³ Many instruments, and some of them very successfully, tried to limit the occurrence of war and/or minimize its effects. These regulations however must be distinguished, and this thesis is only concerned with evolution of one of them, the *ius in bello*.

When texts of the Conventions, after the horrors of the Second World War, were being finalized, states took into account experiences of the war and implemented such into the Conventions.⁴ For example, once a condition for the applicability of the laws of the armed conflict, it was necessary to formally declare war. The Conventions changed that, and since then apply not only to „*all cases of declared war*“ but also to „*any other armed conflict which may arise between two or more of the high contracting parties, even if the state of war is not recognized by one of them*“.⁵ Such wording ensures the continued application of the Conventions subsequent to any declaration of war, even in instances where hostilities have yet to commence, and extends to all armed conflicts between States, irrespective of the formal acknowledgment or declaration of war. Similarly, the Conventions elaborate on the principle of distinction to prevent occurrence of horrors similar to those of the Second World War.

1.2. Armed Conflict

³ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, concluded on 29 July 1899, entered into force on 4 September 1900. (hereinafter „**Hague II**“), Art. 2.

⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. 1st ed. Cambridge: Cambridge University Press. 2016. ISBN 978-1-107-17010-0.

⁵ GC I-IV, Art. 2.

The term armed conflict has wider application as parties to the conflict often tend not to recognize the state of war, making the term “armed conflict” of utmost importance in the landscape of IHL.⁶

According to a widely accepted general definition, stated by the International Criminal Tribunal for the Former Yugoslavia (hereinafter „ICTY“) Appeals Chamber „*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State*“.⁷

The case law distinguishes between international armed conflicts (hereinafter “IAC”) and armed conflicts not of an international character (hereinafter “NIAC”).

It is important to state that the border incidents do not constitute an armed conflict given that it is over quickly and that neither party intends to engage in armed conflict.⁸ Because the principle of distinction applies to both IAC and NIAC, they are first elaborated upon.

1.2.1. International Armed conflict

The term international armed conflict is not defined in any treaty. The closest regulation to a definition can be found in the common article 2 to the GCs, which is as follows „*Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance*“⁹

From the wording of common article 2 and Tadic decision, it is clear that IAC may take place only between two or more of the high contracting parties, meaning two or more states. Commentary to GC states more on the topic: „*any difference arising between States and leading to the intervention of members of the armed forces is an armed conflict.*”¹⁰

⁶ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*. 1st ed. Cambridge: Cambridge University Press. 2015. ISBN 978-1-107-11617-7, p. 93.

⁷ ICTY, *The Prosecutor v. Dusko Tadić a/k/a 'DULE'*. IT-94-1-AR72. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction from 2 October 1995, para. 70.

⁸ DINSTEIN, Yoram. *War, Aggression and Self-Defence*. 5th ed. Cambridge: Cambridge University Press. 2011. ISBN 978-1-107-00899-1, p. 151–152; SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*. 1st ed. Cambridge: Cambridge University Press. 2010. ISBN 978-0-521-87088-7, p. 151-2.

⁹ GG I, Art. 2.

¹⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the First Geneva Convention*, *op. cit.*, p. 31.

Furthermore, API¹¹ builds upon common article 2 in its Article 1(4) and spreads the applicability of the Conventions and the AP I not only to conflicts as described in that article (further discussed below).

Another definition of an IAC can be found in a Commentary to the GC I which explains that an armed conflict is „any difference arising between two States and leading to the intervention of armed forces [regardless of] how long the conflict lasts, or how much slaughter takes place.”¹²

According to the International Committee of the Red Cross (hereinafter “ICRC”), an armed conflict exists as soon as one State uses armed force against another, and the duration and intensity of the conflict are irrelevant.¹³

IHL applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached. Until that moment, IHL continues to apply in the whole territory of the warring States.¹⁴

1.2.2. Occupation

Territory is considered occupied when it is actually placed under the authority of a hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.¹⁵

There are three requirements for an occupation to take place. Firstly, the state must effectively control part of another State’s territory. Second, the territorial State must have lost effective control over that territory. Thirdly, the territorial State does not consent to the enemy State’s presence in its territory.¹⁶

All four GCs apply to any territory occupied during international hostilities.¹⁷ Whenever there is a belligerent occupation, the regulation of conflict is governed by the provisions regulating

¹¹ API, Art. 1(4).

¹² INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the First Geneva Convention*, op. cit., p. 32.

¹³ International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report* [online]. Geneva: International Committee of the Red Cross, 2015, [cit. 2024-12-03]. Accessed from: https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf, p. 7-8.

¹⁴ ICTY, *The Prosecutor v. Dusko Tadić a/k/a 'DULE'*. IT-94-1-AR72. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction from 2 October 1995, para. 70.

¹⁵ GC IV, art 36, 42; ICTY, *Prosecutor v M. Naletilić and V. Martinović*. IT-98-34-T. Judgment from 31 March 2003, para. 214-218; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, I.C.J. Reports 2004, p. 136, para. 78.

¹⁶ STRAUSS, Michael J. *Territorial Leasing in Diplomacy and International Law*. Leiden: Brill. 2015. ISBN 978-90-04-29361-8, p. 202.

¹⁷ GC IV, Art. 2.

armed conflict of an international character.¹⁸, thus triggering the regulation of the principle of distinction as well. An armed conflict between the Occupying Power and a rebel or insurgent group in the occupied territory amounts to an international armed conflict¹⁹ because of the GC IV applicable to an international armed conflict (though partially also to a non-international armed conflict) regulates belligerent occupation as well.²⁰

1.2.3. Non-international Armed Conflict

Even though there is no detailed definition of the NIAC in the GCs, Common Article 3 sets minimum requirements of conduct in an armed conflict, not of an international character, namely the humane and non-discriminatory treatment for persons not taking an active part in hostilities or persons who have laid down their arms or persons incapable no more to take an active part in hostilities²¹. More on this topic will be described in the next chapter.

As set forth by the ICTY Appeals Chamber in the Tadić case: „*an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*“²²

Thus, a NIAC exists when there is protracted (time aspect as opposed to the definition of IAC) violence between

- a) governmental forces and an organized armed group (an aspect of organization) within a state (an aspect of territorial limitation), or
- b) organized armed groups within a state.

1.2.3.1. To which APII applies

AP II relates to all armed conflicts that are not covered by Article 1 of API, such situations include „*armed conflicts in which people are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination*“²³, and

¹⁸ MILANOVIĆ, Marko, 2024. Lessons for human rights and humanitarian law in the war on terror: Comparing Hamdan and the Israeli Targeted Killings case. *International Review of the Red Cross*. 2024, Vol. 89, No. 866, p. 373-393; ICJ, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *Judgment*, I.C.J. Reports 2005, p. 168, para. 172; ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *Advisory Opinion*, I.C.J. Reports 2004, p. 136, para. 78.

¹⁹ CLAPHAM, Andres; GAETA, Paola (ed.). *The Oxford Handbook of International Law in Armed Conflict*. Oxford: Oxford University Press. 2014. ISBN 978-0-19-955969-5, p. 185.

²⁰ LUBELL, N. The ICJ Advisory Opinion and the Separation Barrier: a Troublesome Route. IN DINSTEIN, Yoram; DOMB, Fania (ed.). *Israel Yearbook on Human Rights, Volume 35 (2005)*. 35th ed. Leiden: Martinus Nijhoff Publishers. 2005. ISBN 978-90-04-14782-9, p. 296-7.

²¹ GC I-IV, Art. 3.

²² ICTY, *The Prosecutor v. Dusko Tadić a/k/a 'DULE'*. IT-94-1-AR72. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction from 2 October 1995, para. 70.

²³ API, Art. 1(4).

that “takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups that, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations”²⁴.

Thus, for AP II to become applicable, three main requirements on the insurgent armed group or dissident armed forces must be fulfilled.

Firstly, there must be a degree of organization of the group fulfilled, not *stricto sensu* meaning the existence of a hierarchical system of military organization similar to regular armed forces, but an organization capable of planning and carrying out sustained and concerted military operations and secondly of imposing discipline in the name of a *de facto* authority.²⁵

Secondly, the armed group of the opposition must be able to exercise “such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement APII.”²⁶ For example, caring for the wounded and sick, or detaining prisoners and treating them decently.

Thirdly, there must be an existence of an armed conflict. Paragraph 2 of Article 1 of the APII expressly excludes situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of similar nature from the Protocol’s field of application. Such is not considered as armed conflict.²⁷ The armed conflict (NIAC) therefore must achieve a specific level of intensity. The intensity factor not only measures the level of violence but also considers how prolonged and widespread it is, as well as the nature of military involvement. Simply using military force within a state to uphold law and order does not constitute an armed conflict. For a situation to be classified as a NIAC, there must be a higher level of intensity and sustained violence; isolated incidents are insufficient.

1.2.4. Internationalized armed conflict

Internationalization of an armed conflict is complicated in itself. In *Tadić* case, Appeals Chamber stated that „*in a case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict*

²⁴ APII, Art. 1(1).

²⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers. 1987. ISBN 90-247-3460-6, p. 4463.

²⁶ *Ibid*, p. 4464-4467.

²⁷ *Ibid*, p. 4471.

through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State.”²⁸ Upon closer inspection, we can deduce that Tadić judgment declares automatic application of all humanitarian law applicable to IACs once an armed conflict becomes internationalized.

However, the International Court of Justice (hereinafter „**ICJ**“) chose a different approach, thus leaving the issue of internationalization of an armed conflict divided. The ICJ operates with a so-called mixed regime. The ICJ’s approach being that if a state supports an armed group fighting another state’s government, in a single internationalized conflict, the applicable law between the supporting government and the government fighting the organized armed group becomes IAC law, however between the rebels and the government fighting them, NIAC law applies.²⁹

1.3. Modern Warfare Issues

In this brief introductory chapter, it remains to briefly mention that there is a relatively new domain of warfare, the existence of which may influence even the details of applicability of the principle of distinction, that being cyberspace with cybernetic operations conducted within.

1.3.1. Kinetic Operations

Kinetic operations, or in other words conventional lethal force, stand in opposition to later discussed cyber operations. Kinetic operations include targeting on land, air, sea, and theoretically outer space. They can be defined as the use of force via conventional weaponry which uses the kinetic force derived from the firing process to achieve its designed or intended damage effect.³⁰

Some conventional weapons have been banned by the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects of 1980³¹. Such would include e.g.,

²⁸ ICTY, *Prosecutor v. Dusko Tadić*. IT-94-1-A. Judgment from 15 July 1999, para. 84.

²⁹ LIPOVSKÝ, Milan. The classification of armed conflicts - internationalized, transnational, and cyber conflicts. In: ŠTURMA, Pavel (ed.). *Czech Yearbook of Public & Private International Law* Vol. 11. 2020. ISBN 978-80-87488-38-6; ICJ, *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, *Judgment*, I.C.J. Reports 1986, p. 14, para 219.

³⁰ BOOTHBY, William H. *Weapons and the Law of Armed Conflict*. 2nd ed. Oxford: Oxford University Press. 2016. ISBN 978-0-19-872850-4, p.133.

³¹ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects (with Protocols I, II and III), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495 (hereinafter „**CCW**“).

weapons with non-detectable fragments³², booby traps³³, incendiary weapons³⁴, and blinding laser weapons³⁵.

1.3.2. Cyber operations

Cyber space is defined as „*the notional environment in which communication over computer networks occurs*”³⁶ The ICRC defines cyberspace simply as „*a virtual space that provides worldwide interconnectivity*”³⁷.

This thesis will work with the definition created by the Doctor Kriangsak Kittichaisaree who defines the cyber space as „*the man-made environment or space where electronic communication over interconnected networks of information and communications infrastructure, including the Internet, telecommunications networks, and computer systems, occurs*.”³⁸

There are additionally, so-called cybernetic operations, which have much broader meaning than cyberattack. Cyber operations are defined in the Tallinn Manual³⁹ as „*the employment of cyber capabilities with the primary purpose of achieving objectives in or by the use of cyberspace*”.⁴⁰

Last but not least, there are cyber weapons defined as „*cyber means of warfare that are by design, use, or intended use capable of causing either (i) injury to, or death of, persons; or (ii) damage to, or destruction of, objects, that is, causing the consequences required for qualification*

³² Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol I, entitled Protocol on Non-Detectable Fragments), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495. (hereinafter „**Protocol I to the CCW**“).

³³ Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol II, entitled Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495. (hereinafter „**Protocol II to the CCW**“), Art. 7.

³⁴ Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol III, entitled Prohibitions or Restrictions on the Use of Incendiary Weapons), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495. (hereinafter „**Protocol III to the CCW**“), Art. 2.

³⁵ Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons), concluded on 13 October 1995, entered into force 30 July 1998, UNTS 22495. (hereinafter „**Protocol IV to the CCW**“), Art. 1.

³⁶ Oxford University Press. *Cyberspace* [online]. July 2023. [cit. 2024-12-14]. Accessed from: https://www.oed.com/dictionary/cyberspace_n?tl=true.

³⁷ International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report* [online]. Geneva: International Committee of the Red Cross, 2015, [cit. 2024-12-03]. Accessed from: https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf, p. 39.

³⁸ KITTICHAISAREE, Kriangsak. *Public International Law of Cyberspace*. 2017. ISBN 978-3-319-54656-8, p. 2.

³⁹ SCHMITT, Michael N. (ed.). *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*. 2nd ed. New York: Cambridge University Press. 2017. ISBN 978-1-316-63037-2. (hereinafter „**Tallinn Manual 2.0**“).

⁴⁰ Tallinn Manual 2.0, Rule 15.

of a cyber operation as an attack”.⁴¹ It includes a denial of service attack is a type of cyber attack aimed at making a digital machine or network resource unavailable, usually by saturating the system with external communication requests. Another type of cyber attack is a distributed denial of service (hereinafter „DDoS”), which is a type of denial of service attack involving the use of multiple compromised systems, mostly through a botnet in conducting the attack.⁴²

„No state has ever officially deployed cyber weapons during an armed conflict.”⁴³ writes Nicolo Bussolati in the 2015. With the recent armed conflicts, it seems more and more clear that cyber warfare will become an intricate part of any modern armed conflict.

It is commonly accepted that cyberspace has become another domain in which states conduct military operations.⁴⁴ Such non-kinetic attacks are governed by the law applicable to targeting, whether this applies to all cyber operations remains controversial.⁴⁵

One aspect differentiating cyber operations from kinetic operations is the predictability of the consequences caused by cyber operations⁴⁶, namely unclear may be the area affected as well as expected damage to property and lives. The consequences may be unplanned and have uncontrollable cascading effects.⁴⁷ That having a significant impact on the principle of distinction as will be seen below.

⁴¹ Tallinn Manual 2.0, Rule 41.

⁴² CRAWFORD, Emily. *Identifying the Enemy: Civilian Participation in Armed Conflict*. Oxford: Oxford University Press. 2015. ISBN 978-0199678495, p.140–144.

⁴³ BUSSOLATI, Nicolo. The Rise of Non-State Actors in Cyberwarfare. In OHLIN, Jens David; GOVERN, Kevin; FINKELSTEIN, Claire (ed.). *Cyber War: Law and Ethics for Virtual Conflicts*. Oxford: Oxford University Press. 2015. ISBN 9780198717492, p. 102.

⁴⁴ VON HEINEGG, Wolff Heintschel. Territorial Sovereignty and Neutrality in Cyberspace. *International Law Studies*. 2013, Vol. 89, p. 123-156.

⁴⁵ GILL, Terry D.; DIETER, Fleck (ed.). *The Handbook of the International Law of Military Operations*. 2nd Ed. Oxford: Oxford University Press. 2015. ISBN 9780198744627, p. 246.

⁴⁶ NGUYEN, Reese. Navigating Jus Ad Bellum in the Age of Cyber Warfare. *California Law Review*. 2013, Vol. 101, No. 3, p. 1099, 1122.

⁴⁷ SPÁČIL, Jakub. Animus Aggressionis: The Role of Intent in the Analysis of Armed Attack in Cyberspace. In ŠTURMA, Pavel (ed.). *Czech Yearbook of Public & Private International Law Vol. 11*. 2020. ISBN 978-80-87488-38-6.

2. Fundamental Rules of Targeting

Targeting is an essential part of every warfare, and therefore, the law of targeting belongs deeply in the *ius in bello*. The law of targeting consists of rules that outline what targets may be legally attacked and how based on a careful balance between military necessity and humanity. The ‘basic’ rule of targeting and also the topic of this thesis is the principle of distinction. Additional rules of targeting are the rule of prohibiting indiscriminate attacks, the principle of proportionality, and the precautionary measures rule. All of these rules are interrelated and intertwined, and the practice of each of them reinforces the validity of the others.⁴⁸

The first half of this chapter comprises of the origin and applicability of the principle of distinction, defining what are and what are not targetable objectives, and explores the protected persons and objects in an armed conflict. The second half explores the additional rules of targeting.

2.1. Principle of Distinction

2.1.1. Definition and origin

The origin of the principle of distinction can be found in Article 22 of the 1863 Lieber Code.⁴⁹ Furthermore, later the principle of distinction was recognized in the St. Petersburg Declaration from 1868⁵⁰ and soon after in Article 1 of the 1880 Oxford Manual, which states: “*the state of war does not admit of acts of violence, save between the armed forces of belligerent States. Person not forming part of belligerent armed forces should abstain from such acts*”.⁵¹

For purposes of this thesis, more relevant codification can be found in Article 4 (A) (6) of the GC III however, the core of the principle of distinction, and more fitting for the modern armed conflict, is set out in the AP I.⁵²

The principle of distinction is outlined in Article 48 of API „*In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives,*”.⁵³

⁴⁸ HENCKAERTS, Jean-Marie; DOSWALD-BECK, Louise. *Customary International Humanitarian Law Volume 1: Rules*. Cambridge: Cambridge University Press. 2005. ISBN 978-0-521-80899-6, p. 3.

⁴⁹ Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863. (hereinafter „**Lieber code**“), Art. 22.

⁵⁰ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 1868. (hereinafter „**St. Peterburg Declaration**“), preamble.

⁵¹ The Laws of War on Land. Oxford, 9 September 1880. (hereinafter „**Oxford Manual**“), Art. 1.

⁵² API, Arts. 48, 51 and 52.

⁵³ API, Art. 48.

The principle of distinction demands parties to the conflict to distinguish civilians and civilian objects from members of the military and military objects, respectively, while only the latter can be targeted.⁵⁴

The principle of distinction is further expanded upon in Article 51 (2) of the AP I stating that „*The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.*”⁵⁵ and further on in Article 52 (2) of the AP I⁵⁶, which limits the scope of the attack to solely military objectives, which will be further expanded upon.

Simply put, the principle of distinction puts an obligation on a party of the conflict, which is conducting an attack during an armed conflict, to distinguish at all times between civilians and combatants, limiting attacks strictly to military objectives and ruling that civilians shall not be the object of military attack, as well as civilian objects. All of which will be further discussed below.

For the purpose of application of the principle of distinction in NIAC, the principle is furthermore codified in Article 13 (2) of the AP II. The mentioned article prohibits making civilian population, or even individual civilians, an object of attack and threats or acts of violence with the primary purpose of spreading terror amongst these.⁵⁷

With all that said, it is obvious that the principle stands as a cornerstone of IHL and is one of the “*cardinal principles [...] constituting the fabric of humanitarian law.*”⁵⁸ alongside the principle of prohibition of unnecessary suffering.⁵⁹

The principle is generally considered to be customary international law,⁶⁰ making it binding for the contracting parties to the AP I, but also for the non-contracting parties, some of which most notorious ones are the United States of America and Israel. The International Law Commission considers the principle of distinction as part of jus cogens.⁶¹

The principle was imposed by also by international judicial bodies both ICJ⁶² and ICTY.⁶³

⁵⁴ ICRC. *International Humanitarian Law Database: Customary IHL Rule* [online]. 2024. [cit. 2024-12-14]. Accessed from: <https://ihl-databases.icrc.org/en/customary-ihl/v1>. (hereinafter „**ICRC Database**“), Rules 1, 7; ICJ, *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, I.C.J. Reports 1996, p. 226, paras. 16, 23, 25, 156 and 179.

⁵⁵ API, Art. 51 (2).

⁵⁶ API, Art. 52 (2).

⁵⁷ APII, Art. 13 (2).

⁵⁸ ICJ, *Legality of the Threat or Use of Nuclear Weapons, op. cit.*, para. 78.

⁵⁹ *Ibid.*

⁶⁰ BEST, Geoffrey. *The Restraint of War in Historical and Philosophic Perspective*. In DELISSEN, Astrid; TANJA, Gerard (ed.). *Humanitarian Law of Armed Conflict – Challenges Ahead*. Leiden: Brill. 1991. ISBN 978-07-92-31335-9, p. 17; ICJ, *Legality of the Threat or Use of Nuclear Weapons, op. cit.*, para. 79.

⁶¹ International Law Commission. Report of the Commission to the General Assembly on the work of its fifty-third session. *Yearbook of the International Law Commission*. 2001, Vol. II, No. 2, p. 112.

⁶² ICJ, *Legality of the Threat or Use of Nuclear Weapons, op. cit.*, paras. 78-79.

⁶³ ICTY, *Prosecutor v. Tihomir Blaškić*. IT-95-14-T. Judgment from 3 March 2000, para. 180.

2.1.2. Persons and objects subject to the principle of distinction under IHL

Subsequently, after we have established when the IHL applies, including the principle of distinction, it is necessary to establish the characteristics of persons and objects that the principle distinguishes between.

The principle distinguishes between a variety of persons involved in the armed conflict, no matter if on the passive or active side of hostilities. For the purposes of this thesis, this chapter explores the persons and objects to whom the principle of distinction applies, such are combatants and non-combatants including civilians, and civilians directly participating in hostilities, concerning objects this chapter explores what are civilian objects and military objectives.

The status of persons or objects has great importance as it constitutes if such person or object is a legitimate military target in times of armed conflict and in so being or not being protected by the principle of distinction.

Further on this chapter includes an excursion into the non-state actors in cyberspace whose activities will be further discussed in Chapter 3, therefore this chapter defines them according to the regulation in question.

2.1.2.1. Persons

Francis Lieber wrote in his 1863 Code: “*All enemies in regular war are divided into two general classes – that is to say, into combatants and noncombatants*”.⁶⁴ The following sub-chapter delves into categorization. How can a person be classified during an armed conflict, and how does the principle of distinction apply to them?

Firstly, the key issue that will be the further topic of discussion is that the law from which we derive the definitions of persons to whom the principle of distinction applies remains the same since the last century and has not been properly evolved for its application in the 21st Century.

The principle of distinction derives between two categories of persons: civilians and combatants, such can be read from the wording of articles 48, 51, or 52 of API.⁶⁵ The definitions and their differences will be further discussed in this chapter. As we will soon find out, their definitions are not so practical and as easily applicable in real-life scenarios.

To quickly elaborate, this sub-chapter firstly describes who the IHL considers to be a combatant and who are members of armed forces, then it delves into the second category, which are non-combatants.

⁶⁴ Lieber Code, Art. 155.

⁶⁵ API, Arts. 48, 51 and 52.

A. Combatants

i) Combatant status in IAC

The status of persons active in hostilities has been a topic of discussion since the earliest IHL instruments. Lieber Code saw such status gained since the moment a sovereign government arms an individual and he takes the soldier's oath.⁶⁶ Criteria for a combatant status have evolved and have been further discussed during the Brussels Conference of 1877 or the writing of the 1880 Oxford Manual. Neither of them adopted a binding instrument of law in which such would be encompassed.⁶⁷

The first definition of combatant found its place in the Hague IV.⁶⁸ Under Article 1, "belligerent" must be commanded by a person responsible for his subordinates, must be distinguishable from a distance by a fixed distinctive emblem, to carry arms openly, and to conduct military operations under the laws of war.

After the Second World War, and based upon experiences from it, the criteria were revisited and improved in the GCs and Additional Protocols.

Thus, current law encompassing the status of combatants is enshrined in the GCs and its API. The relevant provisions are contained in Article 13(1), (2) of GC I, Article 13(1), (2) and 4A(1), (2), (3) and (6) of GC III and Articles 43 and 44 of API.

Most importantly, a combatant is a person who fights, i.e., a person who is authorized by international law to fight following international law applicable in international armed conflict.⁶⁹

Combatants can withdraw from hostilities, lose their status, and forfeit being a legitimate target by not only retiring and turning into civilians but also by becoming hors de combat either by choice through surrender or as a result of getting wounded, sick, or shipwrecked. If captured a lawful combatant in international armed conflict becomes a prisoner of war with all its privileges.⁷⁰

Combatants can be differentiated into two sections, either the members of the armed forces of a party to a conflict (other than medical and religious personnel), and any others who take an

⁶⁶ Lieber Code, Art. 57.

⁶⁷ GREENWOOD, Christopher. Scope of Application of International Humanitarian Law. In DIETER, Fleck (ed.). *The Handbook of the International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press. 2008. ISBN 978-0-19-923250-5, p. 24; CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 146.

⁶⁸ Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, concluded on 18 October 1907, entered into force 26 January 1910. (hereinafter „Hague IV“), Arts. 1–2.

⁶⁹ DIETER, Fleck (ed.). *The Handbook of the International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press. 2008. ISBN 978-0-19-923250-5, p. 81.

⁷⁰ DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*. 1st ed. Cambridge: Cambridge University Press. 2004. ISBN 978-0-521-83436-0, p. 28.

active part in hostilities⁷¹. Under the principle of distinction, members of state armed forces can be regarded as combatants in both IAC and NIAC. However, the designation of "combatant status" applies exclusively to IAC.⁷²

GC III defines criteria for combatant status, which are that a combatant can be considered:

- a) 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.

Members of the armed forces of a Party to the conflict are the most general category of combatant, they comprise of members of the armed forces of a party to the conflict who are entitled to take direct part in the hostilities.⁷³

The second paragraph of Article 43 of the API provides that combatants are "*members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention)*"⁷⁴. Armed forces are defined in the first paragraph of the same article stating that they „*consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party*"⁷⁵.

As mentioned members of armed forces who cannot take a direct part in hostilities are not considered combatants, such include members of medical or religious personnel.⁷⁶

Note that a combatant is considered hors de combat if „*(a) He is in the power of the adverse party; (b) He clearly expresses an intention to surrender; or (c) He has been rendered unconscious or otherwise incapable by wounds or sickness, and is therefore incapable of defending himself provided that in any of the cases he abstains from hostilities and does not escape.*"⁷⁷

Furthermore, all persons who are not taking an active part in the hostilities are protected from arbitrary exercise of power by any party to the armed conflict. Such persons also include members of armed forces who have laid down their arms or those placed hors de combat.⁷⁸ Such protection is reinforced by the APII, which extends the protection to „*all persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been*

⁷¹ *Ibid*, 27.

⁷² ICRC Database, Eule 3.

⁷³ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law, op. cit.*, p. 92.

⁷⁴ API, Art. 43(2).

⁷⁵ *Ibid*, Art. 43(1)

⁷⁶ GC I, Art. 25; ICRC Database, Rule 3.

⁷⁷ API, Art. 41(2).

⁷⁸ GC I-IV, Art. 3.

restricted“.⁷⁹ The ICRC Commentary clarifies this by stating that „*Ratione temporis combatants are protected as soon as they are hors de combat.*“⁸⁰

- b) Members of other militias and members of other volunteer corps, including those of organized resistance movements

Article 4A of GCIII includes a state’s auxiliary and reserve armed forces, as well as partisans, these do not refer to organized military reserve units. Reserve armed forces to which article 4A applies are forces not integrated into the nation’s armed forces nevertheless still actively participating in hostilities, as implies from the differentiation between article 4A(1) and 4A(2) of the GCIII.⁸¹ This category comprises of „*members of other militias and members of other volunteer corps and members 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, fulfill the following conditions.*“.⁸²

Firstly, that of being commanded by a person responsible for his subordinates.⁸³ There are many functions to this provision, it enables parties to conduct their operations in accordance with the laws of armed conflict and has important implications regarding commander responsibility.⁸⁴ The first paragraph of article 43 of API mentions not only organized armed forces incorporated into the state army, but also other groups and units with a requirement for both to be under a command responsible to the Party and that the forces must be „*subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict*“⁸⁵

Secondly, that of having a fixed distinctive sign recognizable at a distance.⁸⁶ Such signet can have various forms. The options range from a complete uniform to a small armband. Nonetheless, the distinctive emblem must be identical for all members of such a group; only they

⁷⁹ APII, Art. 4(1).

⁸⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional, op. cit.*, para 4520.

⁸¹ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Third Geneva Convention: Convention (III) relative to the Treatment of Prisoners of War*. Cambridge: Cambridge University Press. 2021. ISBN 9781108969208. para. 1001.

⁸² GC III, Art. 4A (2).

⁸³ GC III, Art. 4A (2) a.

⁸⁴ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law, op. cit.*, p. 93.

⁸⁵ Ibid.

⁸⁶ GC III, art. 4A (2) b.

can use it, and it must be visible from a distance.⁸⁷ The most vital element is visibility, as there must be no effort to create a false impression of being a civilian on the side of a combatant.⁸⁸

Thirdly, that of carrying arms openly⁸⁹. As will be discussed in the next chapter, defining the exact parameters of “carrying arms openly” is quite difficult. To openly carry arms does not mean to carry them visibly.⁹⁰ However, the participant in hostilities cannot create a false impression of being a civilian to take unfair advantage of his enemies.⁹¹ He must carry his arms openly in a reasonable way depending on the circumstances at the moment.⁹²

Lastly, that of conducting their operations under the laws and customs of war.⁹³

From the wording of article 43 of API can be derived a notion that as combatants, both governmental and non-governmental forces can be considered as such. Making a place for members of guerrilla forces, resistance fighters, rebels, and so on, to be granted the status of combatant. For such a thing to happen, these persons must follow certain basic criteria mentioned above. According to article 43 (3) of the API, they must distinguish themselves during confrontations, carry arms openly during confrontations, be commanded by a person responsible for his or her subordinates, and follow an internal disciplinary system.⁹⁴

- c) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the adverse power.

This group of combatants can be rarely encountered in today's time⁹⁵, and for purposes of this thesis will not be discussed any further.

- d) Levée en masse

Such a term has been long recognized, originating in the Lieber Code,⁹⁶ and later being codified in the Hague IV and the GC III.⁹⁷

⁸⁷ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, op. cit., p. 93

⁸⁸ DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*, op. cit., p. 38.

⁸⁹ GC III, art. 4A (2) c.

⁹⁰ SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*, op. cit., p. 196.

⁹¹ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Third Geneva Convention*, op. cit., p. 61.

⁹² DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*, op. cit., p. 39.

⁹³ GC III, Art. 4A.(2) d.

⁹⁴ API, Art. 43(3).

⁹⁵ SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*, op. cit., p. 198.

⁹⁶ Lieber Code, Arts. 49 and 51; Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874, Art. 10.

⁹⁷ Hague IV, art. 2; GC III, art. 4(A)(6).

Levée en masse stands for „*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 the time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.*“⁹⁸

As will be mentioned, civilians do not participate in hostilities, do not gain the status of combatant, nor are entitled to prisoner-of-war status. There is an exception to this rule, called *Levée en masse*, meaning the resistance of the masses, originating from the French Revolution of the 18th century, whereby inhabitants of the country or state, which is about to be, but not yet, occupied by the approaching enemy, take up arms as a resistance movement against invading army without having time to formally organize themselves into an armed force.

ii) Status regulation in NIAC

Lastly, let's examine the question of the personal status regulation in NIAC. Combatants in NIAC are not distinctively defined as a category.⁹⁹ Only option for categorical differentiation is the category of civilians, especially the civilians taking part in hostilities, as laid down by article 13(3) of the APII¹⁰⁰, this provision regulates the deprivation of immunity from being directly targeted, given to civilians, for such time as they take direct part in hostilities.¹⁰¹ Such will be discussed later in more depth.

iii) Incorporation of paramilitary and armed law enforcement agencies into armed forces

Special practice can be found regarding the incorporation of paramilitary or armed law enforcement agencies, such as police forces, into the armed forces.¹⁰² One of the armed law enforcement agencies incorporated into the armed forces was the Philippine Constabulary¹⁰³ and Spain's Guardia Civil.¹⁰⁴ Such incorporation is usually carried out by the formal act, and in the absence of formal incorporation, the status of such forces is to be determined based on the criteria

⁹⁸ GC III, Art. 4A (6).

⁹⁹ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 153.

¹⁰⁰ APII, Art. 13(3).

¹⁰¹ *Ibid.*

¹⁰² HENCKAERTS, *op. cit.*, p. 16.

¹⁰³ Philippines. Presidential Decree No. 765 providing for the constitution of the integrated national police and for other purposes. In Official Gazette. 1975. Accessed from: <https://www.officialgazette.gov.ph/1975/08/08/presidential-decree-no-765-s-1975/>.

¹⁰⁴ Spain. Ley Orgánica 13/1985, de 9 de diciembre, de Código Penal Militar. In Noticia jurídicas. 1985. Accessed from: https://noticias.juridicas.com/base_datos/ Penal/lo13-1985.html.

defining of armed forces. Such incorporation must be made known to the other party to the conflict.¹⁰⁵

B. Non-combatants

In the preamble to the 1868 St. Petersburg Declaration can be found first attempted in the necessity to target only military force, stating that „*the only legitimate object which States should endeavor to accomplish during weaken the military forces of the enemy*”.¹⁰⁶ It is important to remember that the respect for non-combatants is contingent on their abstaining from taking a direct part in hostilities.¹⁰⁷ As already mentioned Common Article 3 affords protection to all persons who are not taking an active part in hostilities against arbitrary violence to life and person, murder or extra-judicial execution,¹⁰⁸ such applies in NIAC as well as IAC.

i) Civilians

Generally speaking, as outlined in Article 50 of the API, in IAC, civilians comprise of all the persons who are not members of the armed forces and do not fit into any category under Art. 4A (1,2 and 6) GC III or Art. 43 API, and therefore the civilian population consists of all persons who are civilians.¹⁰⁹ Notably, in the 2000’s judgment of the ICTY, civilians were defined as „*persons who are not, or no longer, members of the armed forces*”.¹¹⁰ Exception to this is the already mentioned *levée en masse*, who are considered as combatants.¹¹¹

The author finds it important to point out that however civilians may be employed by the armed forces without them becoming part of the armed forces themselves. Meaning that their line of work should not endanger their civilian status.¹¹² Such status can be lost once they directly participate in hostilities without fulfilling the cumulative conditions of lawful combatancy.¹¹³ Civilians who would take an active and continuous part in an armed conflict, would be then treated as combatants, in the sense that they would be viewed as legitimate targets of attack and would not enjoy the protection granted to them on the basis of civilian status, however, they would not

¹⁰⁵ API, Art. 43(3).

¹⁰⁶ St. Petersburg Declaration, preamble.

¹⁰⁷ HENCKAERTS, *op. cit.*, p. 13.

¹⁰⁸ GC I-IV, Art. 3.

¹⁰⁹ API, Art. 50 (1) (2).

¹¹⁰ ICTY, *Prosecutor v. Tihomir Blaškić*, *op. cit.*

¹¹¹ GC III, art. 4(A)(6).

¹¹² DINSTEIN, Yoram. *The Conduct of Hostilities under the Law of International Armed Conflict*, *op. cit.*, p. 113.

¹¹³ Israel Supreme Court, *Public Committee against Torture v. Government*, HCJ 769/02, Judgment from 14 December 2006, paras. 24-40.

be entitled to the rights emerging from the combatant status, as they do not fulfill the criteria for lawful combatancy set out in the article 4A of the GCIII.¹¹⁴

When it comes to NIAC, the APII does not define the term civilian nor does it define civilian population, interestingly enough, the protocol is not oblivious to the notion of these terms and uses them in many provisions.¹¹⁵ Other treaties applicable to the NIAC have taken the same approach, and so while using these terms they avoided their definitions.¹¹⁶ The definition of civilian could be derived from the wording of article 1 of the APII stating „*dissident armed forces or other organized armed groups [...] under responsible command*“¹¹⁷ implicitly acknowledges the conditions of armed forces applicable in IAC consequently making the civilians being all persons who are not members of such forces or groups.¹¹⁸

ii) Civilians participating in hostilities

Article 51 (3) of the API holds the rule for the IAC whereby civilians lose their protection against attack when and for such time as they take a direct part in hostilities.¹¹⁹ In the case of NIAC Article 13(3) of the APII makes civilians immune from direct attack „*unless and for such time as they take a direct part in hostilities*“.¹²⁰

The definition of direct participation in hostilities has not been clarified. It is worth pointing out the imbalance created by such a rule. When taken in comparison, a member of an armed opposition group and a member of governmental armed forces may be attacked, however the member of an armed opposition group only for such time as he would take a direct part in hostilities.¹²¹ Such a problem in light of recent events in Ukraine will be further discussed in Chapter 3.1.

It needs to be mentioned, that an immunity from attack does not set forth the immunity from arrest and prosecution.

¹¹⁴ GC III, Art. 4A (2); International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report. International Review of the Red Cross*. 2007, Vol. 89, No. 867, p. 719-757.

¹¹⁵ APII, Arts. 13–15, 17–18.

¹¹⁶ Protocol II to the CCW, Art. 3(7)–(11); Protocol III to the CCW, Art. 2; CCW, preamble; Rome Statute of the International Criminal Court. Rome, concluded on 17 July 1998, entered into force 1 July 2002, UNTS No. 38544, art. 8(2)(e)(i), (iii) and (viii).

¹¹⁷ API, Art. 1.

¹¹⁸ ICRC Database, Rule 5.

¹¹⁹ API, Art. 51(3).

¹²⁰ APII, Art. 13(3).

¹²¹ MELZER, Nils. *Interpretive Guidance on the Notion of Direct Participation in Hostilities Under International Humanitarian Law* [online]. Geneva: International Committee of the Red Cross. 2009. [cit. 2024-12-03]. ISBN 978-2-940396-04-7. Accessed from: <https://www.icrc.org/sites/default/files/external/doc/en/assets/files/other/icrc-002-0990.pdf>. (hereinafter „**Interpretative Guidance**“), p. 71-72.

The ICRC has published an ‘Interpretative Guidance’ document aimed at offering recommendations for interpreting the conventional and customary regulations that govern civilian direct participation in hostilities.¹²² The Interpretative Guidance sets out 3 requirements under which, if cumulatively satisfied, individuals are considered actively participating in hostilities.

Firstly the sufficient threshold of harm must be met, *„the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack”*.¹²³ Direct participation does not set a requirement for an adverse effect to occur, although it sets importance on the effect of the action taken on the enemy’s military operations or capacity.

Secondly, *“there must be a direct causal link between the act and the harm likely to result either from the act, or from a coordinated military operation of which that act constitutes an integral part”*.¹²⁴ For the participation to be viewed as ‘direct’ there must be a sufficiently close causal relation between the act and the resulting harm.¹²⁵ When considering how close, ICRC stated that storing and assembling explosives or volunteering as a human shield does not amount to direct participation.¹²⁶

And lastly, there must exist a nexus with the Parties to the conflict through either opposing or supporting them.¹²⁷

iii) Medical and religious personnel of the Armed Forces

Medical and religious personnel are granted under the IHL immunity from being targeted and attacked, they must be respected and protected in all circumstances, and further on, they must be allowed to carry out their medical and religious duties¹²⁸ Same protection is afforded also to civilians who are taking care of the sick and wounded, no matter if the sick and wounded are combatants or civilians.¹²⁹ Category of protected persons is further expanded upon all who carry out medical or religious functions, whether they fulfill such duties on a temporary or permanent basis.¹³⁰

¹²² *Ibid*, p. 9.

¹²³ *Ibid*, p. 46.

¹²⁴ *Ibid*, p. 52.

¹²⁵ *Ibid*.

¹²⁶ *Ibid*, p. 56–57.

¹²⁷ *Ibid*, p. 58–64.

¹²⁸ GC I, Arts. 24–7; GC II, Arts. 36–7; AP I, Arts. 15–20; AP II, Art. 9.

¹²⁹ GC I, Art. 18.

¹³⁰ GC IV, Art. 20(1); API, Art. 10.

C. Non-state actors in cyberwarfare

In 2007 the Estonian governmental websites and banks were struck by attacks resulting in distributed denial of services¹³¹, in 2008 during the South Ossetia war, Georgian digital systems were similarly attacked.¹³² Ukraine, the year 2013, Operation “Armageddon”, the campaign has been targeting the Ukrainian government, law enforcement, and military officials in an attempt to steal information.¹³³ Those were some examples of cybernetic tools used to attack. That in the present moment, we have seen its practical uses of.

To classify non-state actors operating in cyberspace is not so simple. They may differ in size, being unicellular organisms or large transnational groups; also, by their internal structure, which may be informal, lacking a chain of command, or complex and hierarchical relation with a particular state, which would affect the overall attribution of its actions to that state.

Most known are criminal organizations, with hierarchical structures, with mostly financial motivation for their existence.¹³⁴

On the other hand, the so-called ‘Hacktivists’ and ‘Patriotic hackers’ are strongly motivated by ideology and their politics, however, hacktivists are independent groups, whereas the patriotic hackers are exclusively driven by a patriotic devotion to their country and protection and its empowerment.¹³⁵

Upon closer inspection, in contrast to real-life scenarios, in 2012 as a response to the Israeli military operation in Gaza Pillar of Defence, the hacktivist organized group under the name ‘Anonymous’ infiltrated and attacked through DDoS attack several Israeli websites and posted online names, identification numbers and personal pieces of information and emails of over five thousand Israeli Defence Force officials.¹³⁶ The same did the Anonymous group in 2014, again as a response to the aggressive behavior of a state, this time due to Russian maneuvers in Crimea,

¹³¹ REMENYI, Dan (ed.). *7th European Conference on Information Warfare and Security 2008*. Plymouth: Academic Conferences. 2008. ISBN 978-1-62276-533-1, p. 163-8.

¹³² TIKK, Eneken; KASKA, Kadri; VIHUL, Liis. *International Cyber Incidents: Legal Considerations*. Tallinn: Cooperative Cyber Defence Centre of Excellence. 2010. ISBN 978-9949-9040-0-6, p. 66-89.

¹³³ WEEDON, Jen. Beyond 'Cyber War': Russia's Use of Strategic Cyber Espionage and Information Operations in Ukraine. In GEERS, Kenneth (ed.). *Cyber War in Perspective: Russian Aggression against Ukraine*. Tallinn: NATO CCD COE Publications. 2015. ISBN 978-9949-9544-4-5..

¹³⁴ LUBLAN, David; O’SULLIVAN, Julie R.; STEWART, David P. *International and Transnational Criminal Law*. 1st ed. Aspen Publishing. 2010. ISBN 978-0735562141, p. 505.

¹³⁵ DENNING, Dorothy E. Cyber Conflict as an Emergent Social Phenomenon. In HOLT, Thomas J.; SCHELL, Bernadette Hlubik (ed.). *Corporate Hacking and Technology-Driven Crime: Social Dynamics and Implications*. 2010. ISBN 978-1616928056, p. 172.

¹³⁶ GREENBERG, Andy. Anonymous Hackers Ramp Up Israeli Web Attacks And Data Breaches As Gaza Conflict Rages. *Forbes* [online]. 19 November 2012. [cit. 2024-12-14]. Accessed from: <https://www.forbes.com/sites/andygreenberg/2012/11/19/anonymous-hackers-ramp-up-israeli-web-attacks-and-data-breaches-as-gaza-conflict-rages-2/>.

striking Russian cyberspace. On the opposite side, as a patriotic hacker group, the pro-Russian hacker group named Cyber Berkut has numerous attacks on NATO¹³⁷ and Ukrainian websites.¹³⁸

Patriotic hacker groups are usually linked to a certain geopolitical event, more precisely their actions are triggered by events that in their eyes might pose a threat or even damage the interest or security, and assets of their country.¹³⁹

In her article, Mrs. Dorothy E Denning states that if the goals and motivations of a patriotic hacker group are interlinked with geopolitical claims based on religion, such hacker organizations may have connections or even actively cooperate with terrorist groups.¹⁴⁰ Such may be true, however, it is the opinion of an author that when actions of such a Patriotic hacker group may be attributable to a certain state, in such instances, a vital aspect is that a strong ideological linkage with a certain state shall transpire into a relationship of control by state authorities. In such instances, when the directive to conduct offensive cyber operations provenly comes from the military chain of command, such shall be considered as an official action by the military. In events not as such, the groups may still retain their independence and so their actions may only be attributed to them as a sole non-state actor, which may grant them a mark of a terrorist organization in itself.

Lastly and most important player in the field of cyberspace and their participation in an Armed Conflict is an individual hacker. His classification and protection from being targeted will later be a focus of our discussion.

When it comes to the classification of *ius in bello* of such persons and groups in an armed conflict, participation in hostilities is of utmost importance. In IAC, individuals having official combat tasks in the armed forces of a belligerent party are considered lawful combatants.¹⁴¹ Also members of groups assimilated to official military forces of the state are considered combatants, the same may apply to individuals being assigned to the concept of *levée en masse*. Individual hackers may as well possess the status of civilians participating in hostilities.

2.1.2.2. Objects

A. Military objective

¹³⁷ North Atlantic Treaty Organization (hereinafter „NATO“).

¹³⁸ CARR, Jeffrey. Rival hackers fighting proxy war over Crimea. *CNN* [online]. 25 March 2014. [cit. 2024-12-14]. Accessed from: <https://edition.cnn.com/2014/03/25/opinion/crimea-cyber-war/index.html>.

¹³⁹ BUSSOLATI, *op. cit.*, p. 111.

¹⁴⁰ DENNING, *op. cit.*, p. 171-80.

¹⁴¹ API, Art. 43 (2).

For the purpose of applying the principle of distinction, it's necessary to distinguish between objects and military objectives in the IHL because attacks are limited only to military objectives.¹⁴²

A military objective, is defined in Article 52(2) of AP I which provides that „*military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*“.¹⁴³

Military objectives are, therefore, irreconcilable with an object, as an object cannot be targeted if its destruction or capture would not provide a definite military advantage.

Note that for the purposes of targeting, combatants or other persons taking direct part in hostilities are also a legitimate object of attack and can therefore be considered as military objectives.¹⁴⁴

B. Civilian Objects

Civilian objects are defined in Article 52 (1) of the API very simply. They are all objects which are not military objectives. For the purposes of law applicable in NIAC, civilian objects are not set out in APII, however, they have been incorporated into the Protocol II to the CCW¹⁴⁵ which is applicable in NIAC. Furthermore, the definition set out in Article 52 (1) of the API has been by the state practice established as a customary international law which is applicable in both IAC and NIAC.¹⁴⁶

C. Military Objects

For purposes of legitimate targeting, military objects are defined only as targetable if they sufficiently satisfy the criteria set out in the already mentioned Article 52 (2) of the API. Such criteria are the nature, location, purpose or use of the object.

Military objects have a somewhat changeable nature during the armed conflict, their use may radically change depending on the military necessity at the time. The „*nature, location, purpose or use*” categories set out in Article 52(2) of the API¹⁴⁷ are crucial for differentiation

¹⁴² API, Art. 52(2).

¹⁴³ *Ibid.*

¹⁴⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit.*, p. 325.

¹⁴⁵ Protocol II to the CCW, Art. 2(7).

¹⁴⁶ ICRC Database, Rule 9.

¹⁴⁷ API, Art. 52(2).

whether the object at the time of the attack is of a military character, and they can affect one another.

i) Nature, location, purpose, use

Nature, location, purpose, and use operate as a determinative condition, which decide whether an object can be considered as a lawful military objective and, therefore, be targeted. Note that certain objects have changeable character, making them at one moment a lawful military objective and an immune object at the other.

a) Nature

An object's nature plays an essential role in setting out its distinctive characteristics, for example, a tank or military bunker is without a doubt of military nature. However, a non-military object might seem at first glance like a civilian one but can be turned into a military one.¹⁴⁸ Rules of distinguishing whether an object is of a military nature have radically changed.¹⁴⁹

Clearer is a situation when a commercial industrial plant starts manufacturing products exclusively for military use, its nature has now changed from a civilian facility to a military.

b) Location

The site where the object is situated is undoubtedly significant in relevance to the military importance. E.g., the actual physical location of a bridge and its capture or destruction often means definitive military advantage making such location a military objective.

It is important to remember that, as already stated, all of these characteristics are intertwined however not of cumulative character. That means that an object does not need to be military in nature, but just its location may carry military importance, making it a military objective.¹⁵⁰ So much so that military necessity may dictate for a civilian object to be seized or even destroyed to clear a field of fire and any other military cause, therefore at that moment an object ceases to be civilian and is to be considered a military object.¹⁵¹

c) Purpose and Use

¹⁴⁸ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, op. cit., p. 163.

¹⁴⁹ HATHAWAY, OONA A. War Unbound: Gaza, Ukraine and the Breakdown of International Law. *Foreign Affairs Magazine*. 2024, Vol. 103, No. 3, p. 84-96.

¹⁵⁰ WALL, Andru E. Legal and Ethical Lessons of NATO's Kosovo Campaign. *International Law Studies*. 2002, Vol. 78, p. 215.

¹⁵¹ SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*, op. cit., p. 522.

Purpose and use are often separated from one another, but for this thesis's consideration, the Author decided to combine them into one section because their main difference is the time frame. Purpose refers to its "*intended future use, or possible use*",¹⁵² whereas use refers to the actual momentary utilization of an object.¹⁵³ Difference, therefore, can be seen if at the time of military campaigns such objects can be useful to the adversary's armed forces and so be rendered as military objective.

A prima facie civilian object can be rendered as a military objective and lose its immunity from targeting, such can happen even with an apartment building if part of it serves for weapons storage.¹⁵⁴ Hand in hand goes with its purpose the actual use, and so an object originally immune from targeting¹⁵⁵, may lose its immunity if used for military purposes.¹⁵⁶

In case of doubt, whether an object which is normally dedicated to civilian purposes, such as worship, a house or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.¹⁵⁷

ii) Destruction and other forms of neutralization

The spectrum of attacks is wide and consists of destruction, total or partial, capture and neutralization or disablement of the objective. When commencing an attack on a targetable object, one must first assess it via the "military objective" test, which states that *„not only must a military objective make an effective contribution to the adverse Party's military action, its destruction, capture, or neutralization must also offer a definite military advantage to the attacker.”*¹⁵⁸ Therefore, we have a significance of military character attached to the object on the one hand and the military significance attached to the destruction/capture/neutralization of that object on the other, together they are intertwined, generating a situation in which if one or the other is missing, the object may not be lawfully targeted.

iii) Definite military advantage

Another defining feature of the attack is its purpose to offer and bring forth a definite military advantage. Such can consist only of ground gained and of annihilation or weakening of

¹⁵² *Ibid*, p. 525.

¹⁵³ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 164.

¹⁵⁴ BOOTHBY, William H. *The Law of Targeting*. Oxford: Oxford University Press. 2012. ISBN 978-0-19-969661-1, p. 103-4.

¹⁵⁵ Hague IV, Art. 27; GC IV, Art. 18; API, Art. 52(3).

¹⁵⁶ Hague IV, Art. 27; GC IV, Art. 19; API, Arts. 13(1), 52(3); APII, Art. 11(2).

¹⁵⁷ API, Art. 52(3).

¹⁵⁸ BOTHE, Michael. *New rules for victims of armed conflicts: Commentary on the Two 1977 Protocols Additional to the Geneva Conventions of 1949*. 2nd ed. Leiden: Brill. 2013. ISBN 978-90-04-24629-4, p. 366.

the enemy armed forces.¹⁵⁹ Definite can be understood as that the destruction of the target or objective must offer „a concrete and perceptible military advantage rather than a hypothetical and speculative one”¹⁶⁰ or as that „it is not legitimate to launch an attack which only offers potential or indeterminate advantages”¹⁶¹. Therefore, there must be expected and specifically defined outcome as a result of the attack.

Some states, namely the USA and in its footsteps, Israel, Great Britain, and France have argued that solely economic targets can be seen as lawful targets as the state’s economy and its capabilities have a significant effect on their war effort.¹⁶² USA claims that the definitive military advantage is gained in targeting the economic infrastructure of a state, giving the economic object name as an “*enemy’s war-fighting or war-sustaining capability*”.¹⁶³ Emily Crawford claims that such an approach may be dangerous and, in her opinion, such attacks are likely illegal under current law.¹⁶⁴ More on this issue will be discussed in the following chapter.

iv) Circumstances ruling at the time

When conducting any targeting, firstly its legality must be assessed, and it must be done so in light of the circumstance ruling at the time, meaning that all intelligence gathered on the objective must suggest that the objective is of a military nature, that its purpose, location or use is of a military character and that it fulfills all other obligations for it to be targetable. Even ex post facto the attack will remain lawful, with the new intelligence suggesting the objective was at the moment of attack not used for military purposes.¹⁶⁵

¹⁵⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, op. cit., p. 685.

¹⁶⁰ BOTHE, op. cit., p. 326.

¹⁶¹ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, op. cit., p. 636.

¹⁶² SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*, op. cit., p. 522.

¹⁶³ ICRC Database, Rule 8.

¹⁶⁴ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, op. cit., p. 264.

¹⁶⁵ HUMAN RIGHTS WATCH. *Needles Deaths in the Gulf War: Civilian Casualties During the Air Campaign and Violations of the Laws of War*. 1991. ISBN 1-56432-029-4, p. 126–34.

2.2. Rules governing targeting intertwined with the principle of distinction

The principle of distinction is not a stand-alone rule of the IHL granting protection to civilians and civilian populations or civilian objects. This sub-chapter explores the remaining principles, which, together with the principle of distinction, are interlocked and dependent on each other, and form the protection of civilians under the IHL. These fundamental principles include military necessity and humanity, which guideline other principles such as the principle of proportionality, the prohibition of indiscriminate attacks, and precautions. This sub-chapter explains their definitions, regulations in the IHL, and their applicability.

2.2.1. Military Necessity & Humanity

Every rule of the IHL is an embodiment of balance between the principle of necessity and humanity. These rules guard line the interpretation and application of all the remaining principles.¹⁶⁶

The principle of military necessity mandates that all parties to an armed conflict may use and resort to the attacks via means and methods necessary to achieve the weakening and surrender of the enemy and, therefore to achieve the legitimate aim of the armed conflict.¹⁶⁷ Firstly codified in Lieber code¹⁶⁸, the principle's definition is not set out in either the GCs or its Protocols, however, it can be found in the Hague IV¹⁶⁹ and its core is embodied in the principle of proportionality, which will be soon mentioned.

The principle of humanity then sets out certain limitations on the means and methods of attacks, requiring human treatment and limitation of human suffering and injury during an armed conflict.¹⁷⁰ Its origin can be found in the clause in the Hague II¹⁷¹ suggested by Fyodor Martens and has been since incorporated into the GCs and its Protocols.¹⁷²

2.2.2. Prohibition of indiscriminate attacks

The prohibition of indiscriminate attacks in IAC is codified in Article 51(4) of the API, which begins with the general prohibition, „*Indiscriminate attacks are prohibited.*“¹⁷³, i.e., it is a

¹⁶⁶ St. Peterburg Declaration; Hague IV, preamble; APII, Art. 1(2); ICJ, Legality of the Threat or Use of Nuclear Weapons, *op. cit.*, p. 257.

¹⁶⁷ GREENWOOD, Christopher. Historical Development and Legal Basis. In GILL, *op. cit.*, p. 130-132; ICTY, *Prosecutor v. Tihomir Blaškić*, *op. cit.*, para. 157.

¹⁶⁸ Lieber Code, Art. 14.

¹⁶⁹ Hague IV, Art. 23(g).

¹⁷⁰ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 80-81.

¹⁷¹ Hague II, preamble.

¹⁷² API, Art. 1(2); GC I, Art. 63; GC II Art. 62; GC III, Art. 142; GC IV, Art. 158.

¹⁷³ API, Art. 51(4).

prohibition of an attack in which no distinction between civilian and military character is made.¹⁷⁴ Article 51(4) of the API further defines three different types of indiscriminate attacks.

As an indiscriminate attack one might consider either attacks that „are not directed at a specific military objective“¹⁷⁵; or „those which employ a method or means of combat which cannot be directed at a specific military objective“¹⁷⁶; and lastly those attacks „which employ a method or means of combat the effects of which cannot be limited as required by this Protocol“.¹⁷⁷

The connection to the principle of distinction can be explicitly seen in subparagraphs (a) and (b), therefore, a clear rule can be formulated that any attacks that violate the principle of distinction are indiscriminate attacks.¹⁷⁸

For further clarification of what exactly constitutes an indiscriminate attack we need not look any further than Article 51(5) of the API, which provides a demonstrative list of indiscriminate attacks: „an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and [...] an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.“¹⁷⁹

For the purposes of applicability of the rule of prohibition of an indiscriminate attack in NIAC, the rule is considered customary international law.¹⁸⁰ This is further supported by the jurisprudence of the ICJ.¹⁸¹ The prohibition is also contained in Protocol II to the CCW¹⁸², which is applicable in NIAC.

Note that the rule prohibiting indiscriminate attacks must be distinguished from a violation of the principle of distinction and both must be taken into account. An indiscriminate attack occurs when an individual does not specifically aim to harm civilians yet also fails to take measures to avoid civilian casualties, showing disregard for who might be affected.¹⁸³

The rules against indiscriminate attacks include several specific prohibitions, namely releasing bombs randomly over enemy territory or conducting bombing raids at night, or from high

¹⁷⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, op. cit., para. 1950.

¹⁷⁵ API, Art. 51 (4) (a).

¹⁷⁶ API, Art. 51 (4) (b).

¹⁷⁷ API, Art. 51(4) (c).

¹⁷⁸ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, op. cit., p. 167.

¹⁷⁹ API, Art. 51(5).

¹⁸⁰ ICRC Database, Rule 11.

¹⁸¹ ICJ, Legality of the Threat or Use of Nuclear Weapons, op. cit., para. 79.

¹⁸² Protocol II to the CCW, Art. 3(8)(a).

¹⁸³ SOLIS, Gary D. *The Law of Armed Conflict: International Humanitarian Law in War*, op. cit., p. 537.

altitudes without precise identification of the target.¹⁸⁴ Another practice of indiscriminate attack is firing imprecise missiles at military objectives near or within civilian areas¹⁸⁵, such has been done numerous times in the last years by Russia in the war with Ukraine.¹⁸⁶

2.2.3. Principle of proportionality

For the purposes of the application in IAC, the principle of proportionality is set out in Articles 51 (5)(b) and 57 (2) (a) (iii) and (b) of the API, in all these instances the wording of the rule remains deliberately identical.¹⁸⁷ The principle of proportionality asserts that attacks must not be disproportionate, meaning such that „*may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.*”¹⁸⁸ The principle acknowledges that civilian casualties may occur within the context of an armed conflict, nonetheless, its objective is to balance the humanitarian considerations of civilian protection and the military necessity of using military force.¹⁸⁹

The definite military advantage must be considered in the context of its relation to the armed conflict as a whole, not simply in the context of a specific attack.¹⁹⁰ The Israeli Supreme Court, in the Public Committee Against Torture in Israel case, stated that civilians might be harmed if they are present inside or near military objects. However, any harm must meet the principle of proportionality's requirements. If civilian casualties are disproportionate to the concrete military advantage, the object should not be attacked.¹⁹¹ Such a decision in the light of the events happening the Gaza since 2023 shed light on how subjective such criteria for military advantage may be.

The terms ‘concrete and direct’ indicate that the military benefit must be significant and relatively immediate, excluding minimal or long-term advantages.¹⁹² Even a valid target cannot be attacked if the civilian casualties would be disproportionate to the specific military gain.¹⁹³

¹⁸⁴ DIETER, Fleck (ed.). *The Handbook of the International Humanitarian Law*. 2nd ed. Oxford: Oxford University Press. 2008. ISBN 978-0-19-923250-5, p. 174.

¹⁸⁵ *Ibid.*, p. 175.

¹⁸⁶ *Ibid.*

¹⁸⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, *op. cit.*, para. 2204.

¹⁸⁸ API, Art. 57(2)(a)(iii).

¹⁸⁹ BOTHE, *op. cit.*, p. 683.

¹⁹⁰ ICTY, *Prosecutor v. Gotovina et al.*. IT-06-90-T. Judgment from 15 April 2011, para. 1908.

¹⁹¹ Israel Supreme Court, *op. cit.*, paras. 42-44.

¹⁹² BOTHE, *op. cit.*, para. 2209.

¹⁹³ ICJ, *Legality of the Threat or Use of Nuclear Weapons*, *op. cit.*, p. 587.

Note that in light of article 51 of the API the principle of proportionality is subsidiary to the principle of prohibition of indiscriminate attacks as the type of such attack, the same goes for article 57 of the API, in the relevance to the precautionary measures.¹⁹⁴

For the purposes of the principle of proportionality's application in NIAC, the principle is considered customary international law¹⁹⁵. Also, it occurs in Protocol II to the CCW¹⁹⁶, which, as already mentioned, is applicable in NIAC.

The Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia noted the difficulty in applying proportionality to specific situations due to the comparison of unlike quantities and values.¹⁹⁷ Evaluating proportionality is partly subjective and relies on the common sense and good faith of the persons in charge of directing the attack.¹⁹⁸ The language of AP I allows for extensive civilian casualties if they are not excessive compared to the military advantage, however when there is doubt, civilian interests should prevail.¹⁹⁹

One of the issues proportionality struggles with involve using civilians as shields, known as 'counter-targeting'.²⁰⁰ Such was used during the 2003 Iraq War, when Iraqi forces used civilians as human shields and similar tactics were used by Hezbollah in the 2006 Lebanese war and the Liberation Tigers of Tamil Eelam in Sri Lanka.²⁰¹

2.2.4. Precautionary measures

Parties to an armed conflict must always, when undertaking to target a certain military objective take certain precautionary measures, both in offense and in defense.²⁰² Parties to an armed conflict must take all feasible precautions when planning and directing an attack, as is set out in article 57 of the API²⁰³, but also must take to the maximum extent feasible precautions to minimize the effects of attacks, which is an obligation arising from the article 58 of the API²⁰⁴, making it applicable in IAC. As for the applicability of the principle in NIAC, APII does not

¹⁹⁴ BOTHE, *op. cit.*, para 2207.

¹⁹⁵ ICRC Database, Rule 14.

¹⁹⁶ Protocol II to the CCW, Art. 3 (3) (c).

¹⁹⁷ Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report to the Prosecutor*, PR/P.I.S./510-e (1999), Press release from 13 June 2000.

¹⁹⁸ BOTHE, *op. cit.*, para 2208.

¹⁹⁹ *Ibid*, para. 2215.

²⁰⁰ SCHMITT, Michael N. Precision attack and international humanitarian law. *International Review of the Red Cross*. 2005, Vol. 87, No. 859, p. 458.

²⁰¹ SUMANADASA, Darshana. Principle of Proportionality: The criticized formula of International Humanitarian Law. *ISIL Year Book of International Humanitarian Law*. 2010, Vol. X, p. 36. ISSN 0974-9500.

²⁰² CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 268.

²⁰³ API, Art. 57.

²⁰⁴ API, Art. 58.

explicitly state such an obligation, however, article 13(1) of the APII requires „*the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations*“²⁰⁵, such could be done only with taking precautionary measures. The principle is also codified in Protocol II to the CCW²⁰⁶, which is applicable in NIAC. Lastly, the principle is considered a customary international law.²⁰⁷

2.2.4.1. Precautions in attack

The principle of precautions in attack is set out in article 57 of the API setting out an obligation to any party to the armed conflict that when conducting military operations, constant care must be taken to spare civilian lives and civilian objects, and all feasible precautions must be taken to avoid incidental loss of civilian life or damage to civilian objects.²⁰⁸ Military operations are „*any movements, maneuvers and other activities whatsoever carried out by the armed forces with a view to combat*“.²⁰⁹ Words ‘everything feasible’ were understood at the time of adoption of API as „*everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations*“²¹⁰.

The article mandates that „*those who plan or decide upon an attack*“²¹¹ must identify but also verify²¹² the nature of the target they wish to attack and do it with great care. Secondly, the choice of means and methods of an attack must be used so as to prevent or minimize incidental loss of life or damage to the civilian population and civilian objects.²¹³ No specific types of weapons are prohibited under this rule, however at the time of the drafting of this article, the problem of mines and booby-traps was brought up²¹⁴, such was later inscribed into Protocol II to the CCW, which also renders the term ‘feasible precautions’²¹⁵. Thirdly, the test of proportionality is required to be made.²¹⁶ The principle of proportionality plays here a secondary rule to merely

²⁰⁵ APII, Art. 13(1).

²⁰⁶ Protocol II to the CCW, Art. 3.

²⁰⁷ ICRC Database, Rules 15-24.

²⁰⁸ API, Art. 57; Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *op. cit.*, para 77.

²⁰⁹ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit.*, para. 2191.

²¹⁰ *Ibid*, para. 2198.

²¹¹ API, Art. 57 (2) (a) (i)

²¹² INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit.*, para. 2194.

²¹³ API, Art. 57 (2) (a) (ii).

²¹⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit.*, para. 2201.

²¹⁵ Protocol II to the CCW, Art. 3.

²¹⁶ API, Art. 57 (2) (a) (iii).

contribute to the clarification of matters²¹⁷ and since it was already described in the previous sub-chapter, it will be discussed no further.

2.2.4.2. Precautions against the effects of attacks

This rule is set out to work as a ‘passive’ precaution, having concern for what measure must every party to the armed conflict take in its own territory in favour of its nationals, or in territory under their control. The rule sets out the duty to act also already in peacetime, even though its is addressed to the parties of an armed conflict.²¹⁸

The rule sets an obligation on a parties to an armed conflict that when conducting an attack parties to an armed conflict must take all feasible defense precautions to protect civilians and civilian objects under their control against the effects of attacks.²¹⁹ Such precautions require taking certain measures in preparation during peacetime.²²⁰

²¹⁷ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, *op. cit.*, para. 2207.

²¹⁸ *Ibid*, paras. 2239-2244.

²¹⁹ API, Art. 58(c); see also ICRC Database, Rule 22; see also ICTY, *Prosecutor v Kupreškić et al.*. IT-95-16-T. Judgment from 14 January 2000, para. 46; ICRC, Draft Rules for the Limitation of the Dangers Incurred by the Civilian Population in Time of War [online]. April 1956. [cit. 2024-12-14]. Accessed from: <https://ihl-databases.icrc.org/en/ihl-treaties/icrc-draft-rules-1956>, Art. 9.

²²⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, *op. cit.*, paras. 2247, 2251.

3. Problematic application of the Principle of Distinction in the 21st century

In this day and age, more civilians have become involved in day-to-day warfare. Most armed conflicts do not take place between two states, but increasingly more often, the world comes across an NIAC between a state and a non-state actor, also operating via cyber warfare.²²¹ The way modern conflicts are fought has caused shifts in procedures that are being used that either do not fit the exact definition set by the IHL or they fit, but they were not counted on at the time of their drafting. The ignorance of world powers in their arrogance led to a shift of IHL rules protecting civilians and civilian infrastructure, leading to a world where another world conflict seems closer than ever, and the rules protecting civilians are being weakened.

The principle of distinction is centered on safeguarding civilians and civilian property and minimizing the threat of them being targeted. As has already been pointed out, its practical application has its predicaments, mainly that since its codification in the AP I IHL's definitions have not been kept up to the current needs regarding the way modern warfare is fought. The focus of this chapter shall be the exploration of some of the problematic parts of its practicable application, particularly the status of civilians using mobile apps used for submitting the whereabouts of enemy forces or how broad the application of dual-use objects is, and how the rules of IHL have been bent to the wishes of global powers in an endeavor to legitimize unlawful targets as lawful.

3.1. Not so really “civilians” participating in hostilities.

The controversy around targeting civilians who directly participate in hostilities has been one of the most important questions in recent years in IHL.²²² The question is, what status do civilians who have an installed app on their phone, which can be used to inform governmental or other even non-state parties to an armed conflict about the location, numbers or equipment of enemy forces? Does it make a difference if the app's main function is not military but generally

²²¹ International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report* [online]. Geneva: International Committee of the Red Cross. 2024 [cit. 2024-12-03]. Accessed from: <https://www.icrc.org/en/report/2024-icrc-report-ihl-challenges>, p. 48; BUSSOLATI, *op. cit.*, p. 102.

²²² In relation to the civilian direct participation in hostilities via the use of applications that enable assistance to the military, this was addressed by Professor Schmitt in SCHMITT, Michael N.; BIGGERSTAFF, William Casey. Ukraine Symposium – Are Civilians Reporting With Cell Phones Directly Participating in Hostilities?. *Articles of War* [online]. 2 November 2022. [cit. 2024-12-13]. Accessed from: <https://lieber.westpoint.edu/civilians-reporting-cell-phones-direct-participation-hostilities/>; SCHMITT, Michael N. Ukraine Symposium – Using Cellphones to Gather and Transmit Military Information, A Postscript. *Articles of War* [online]. 4 November 2022. [cit. 2024-12-13]. Accessed from: <https://lieber.westpoint.edu/civilians-using-cellphones-gather-transmit-military-information-postscript/>; MAČÁK, Kubo and VIGNATI, Mauro. Civilianization of Digital Operations: A Risky Trend. *LAWFARE* [online]. 5 April 2023. [cit. 2024-12-13]. Accessed from: <https://www.lawfaremedia.org/article/civilianization-digital-operations-risky-trend>.

civilian but has been updated with the new function installed or if the app was created solely for military purposes?

It is important to clarify if the users of the app are directly or indirectly participating in hostilities. Depending on the quality and degree of such involvement, individual participation in hostilities may be described as 'direct' or 'indirect'.²²³ Indirect participation refers to any contribution to the general war effort, however, without directly harming the enemy.²²⁴ No loss of protection for civilians against direct attacks is encompassed with indirect participation.²²⁵ Collecting information on enemy operations and forces and sharing it with the armed forces of the other party to an armed conflict qualifies as a cyber attack related to an armed conflict²²⁶ and shall be considered by the opinion of the Author as direct participation in hostilities. Note that the terms „*active*“²²⁷ and „*direct*“²²⁸ participation in hostilities indicate the same quality and degree of individual participation in hostilities.²²⁹

Determining that a civilian is directly participating in hostilities has much influence on the application of the principle of distinction, altering the analysis for targetability in two important ways. Firstly, attacking a civilian directly participating in hostilities can potentially enhance the anticipated military gain of the strike. Secondly, such civilians forfeit their protection against direct attack and are excluded from being considered civilians in proportionality evaluations. Consequently, classifying civilians as directly participating in hostilities can render an attack proportionate that might otherwise be deemed disproportionate.²³⁰ However, this puts those civilians at risk, as using the app to report armed conflict party's military activities can be seen as "directly participating in hostilities," making them legitimate targets.

It is important to differentiate between two categories of apps used to inform on the enemy forces. The first category concerns applications that were created by the military for military purposes only. Such apps have no other function than to be used to inform other parties of an armed conflict on the enemy forces, an example of this would be the „*ePPO app*“²³¹ which was designed and created purely to report incoming missiles. The second category refers to applications

²²³ CLAPHAM, *op. cit.*, p. 325; ICTR, *Prosecutor v. Akayesu*, ICTR-96-4-T, Judgment from 2 September 1998, para. 629.

²²⁴ Interpretative Guidance, p. 51-56.

²²⁵ *Ibid*, p. 51

²²⁶ Tallinn Manual 2.0., p. 401-511.

²²⁷ GCI-IV, Art. 3.

²²⁸ API, Arts. 51(3), 43(2) and 67(1) (e); APII, Art. 13(3).

²²⁹ Interpretative Guidance, p. 43; The synonymous meaning of both terms is further supported by the ICTR, *Prosecutor v. Akayesu*, *op. cit.*, para 629.

²³⁰ COHEN, Amichai; ZLOTOGORSKI, David. *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures*. 2021. ISBN 9780197556726, p. 138.

²³¹ ЄППО Україна [online]. Ukraine, 2022. [cit. 2024-12-14]. Accessed from: <https://eppoua.com/>.

that have primarily other functions, meaning civilian ones, and providing information about adversary forces was added at some point down the line, such was the case of the „*E-enemy*”²³², which is merely a function of the app, that was used to file taxes at the first place. So the actual character of the app as well as the intention under which it has been downloaded by the virtue of wording of the Tallinn Manual 2.0, which, unlike the ICRC Interpretive Guidance, includes intention in its first requirement of a threshold of harm, is suggested that it plays a vital role in deciding on the status of civilians who have such an app downloaded on their phones. If the app has but one function, which is to take pictures and videos of the enemy forces and report them to one side of the armed conflict, then the answer is apparent. However, if the app’s main function is not military but rather civilian, but it has been updated with a new feature, which is then automatically installed, then its user might not even notice the update and might be in legitimate danger. In certain circumstances, merely downloading the application might be considered and classified as directly participating in hostilities, potentially marking its user as a target. Therefore, it is essential to clarify when direct participation in hostilities begins and when it ends.

The beginning and the end of direct participation is another debated matter. The ICRC is of the opinion that direct participation includes a return from where the action was executed if such movement is an “integral part” of the operation.²³³ In case of repeated action, in our case, repeated use of an app, the Interpretative Guidance of ICRC suggests the “revolving door” effect, which is characterized by repeated loss and gain of protection from direct attacks on civilians in intervals of their engagement in direct participation in hostilities.²³⁴ Such would apply only to users of the app who actively download and use the app in search of enemy systems and troops and, of course, whilst reporting them. Such was disputed by the late Hays Parks.²³⁵ The Author of this thesis sees such effect as unfounded in law and inoperable, which the Author extends to the entire field of distinction of directly participating civilians in hostilities via a mobile app. Part of experts argued in the Tallin manual 2.0 that „*direct participation begins with the first such cyber operation and continues throughout the period of intermittent activity*“.²³⁶ Via the ICRC approach an individual who would over the course of one month report via the app 10 times enemy forces would be

²³² O’CARROLL, Lisa. Meet Diia: the Ukrainian app used to do taxes ... and report Russian soldiers. *The Guardian* [online]. 26 May 2023. [cit. 2024-12-14]. Accessed from: <https://www.theguardian.com/world/2023/may/26/meet-diia-the-ukrainian-app-used-to-do-taxes-and-report-russian-soldiers>.

²³³ Interpretative Guidance, p. 67; U.S. Department of Defense. *Law of War Manual* [online]. June 2015. Updated July 2023. [cit. 2024-12-14]. Accessed from: <https://media.defense.gov/2023/Jul/31/2003271432/-1/-1/0/DOD-LAW-OF-WAR-MANUAL-JUNE-2015-UPDATED-JULY%202023.PDF>, para. 5.8.4.1.

²³⁴ Interpretative Guidance, p. 70.

²³⁵ WATTS, Sean. Hays Parks and Direct Participation in Hostilities. *Articles of War* [online]. 7 October 2021. [cit. 2024-12-11]. Accessed from: <https://lieber.westpoint.edu/hays-parks-direct-participation-hostilities/>.

²³⁶ Tallinn Manual 2.0., p. 401-511.

targetable only while conducting each individual attack. Via the latter, he or she would be targetable for the entire month. Furthermore, if the individual would not clearly and without a doubt indicate that he or she no longer engages in such cyber-attacks, then he or she would still remain targetable beyond such period.²³⁷ It seems logical that the latter conclusion adheres more closely to the existing law and, therefore, a civilian who actively takes part in hostilities via taking photographs and video recordings of enemy forces and shares information about them with the other party to the armed conflict does not cease to be taking an active part in hostilities by putting their phone in their pocket until he or she explicitly withdraws from the hostilities via an affirmative act²³⁸, such could be done via un-installment of the app. In the moment of doubt, the attacker should review all information at their disposal and act reasonably in the circumstances without any presumptions.²³⁹

It would be fitting to apply an appropriate comparison to a given situation between civilians directly participating in hostilities in a regular way and via cyber means using the three constitutive criteria for direct participation, which have already been established in the chapter on civilians participating in hostilities²⁴⁰. Firstly, the requirement to reach a certain threshold of harm is in the eyes of the ICRC met by causing harm of a military nature or by inflicting death, injury or destruction. Not every cyber operation satisfies this requirement. However, there need not to be actual physical harm done as long as there is intent to negatively affect the enemy's military.²⁴¹ Secondly, there is a difference in causal links between regular attacks via kinetic means and via cyber means. When using kinetic means, there must be a causal link between the act and the harm likely to result from the act.²⁴² Whereas via cyber means, the existence of a causal link between the act and the harm intended is suggested.²⁴³ Lastly, the belligerent nexus, in the case of civilians directly participating in hostilities via kinetic means, is fulfilled when the action must be in support of one party to the conflict and to the detriment of another.²⁴⁴ However, when directly participating in hostilities via cyber means, it is suggested that the civilian's action be simply directly related to the hostilities²⁴⁵, meaning there only needs to be a direct connection between the act and hostilities.

²³⁷ *Ibid.*

²³⁸ SCHMITT, Michael N. Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees. *Chicago Journal of International Law*. 2005, Vol. 5, No. 2, p. 511-546.

²³⁹ Tallinn Manual 2.0., p. 401-511.

²⁴⁰ See chapter 2.1.2.1. (A) (ii) of this Thesis.

²⁴¹ Tallinn Manual 2.0., p. 401-511; such is also supported by how the Tallinn Manual defines an attack. See Tallinn Manual 2.0., p. 109: „A cyber operation need not actually result in the intended destructive effect to qualify as an attack.“.

²⁴² Interpretative Guidance, p. 51.

²⁴³ Tallinn manual 2.0., p. 401-511.

²⁴⁴ Interpretative Guidance, p. 58.

²⁴⁵ Tallinn manual 2.0., p. 401-511.

If a person has downloaded the app created for civilian purposes before the military function was added and is non-vigilant about the hidden function, then the third element would be missing.

The author of this thesis sees the activity as direct participation with all the criteria fulfilled in both cases, either when the app was solely designed and later downloaded for purposes of identifying the enemy troops or in the case when civilians download the app with multiple functions, and later used them with the intention of reporting enemy forces and objects to another side of the armed conflict, with the beginning of participation being once the civilian starts using such app for reporting to other parties of an armed conflict until he or she via an affirmative act of withdrawal stops. There needs to be a moment of opting out of hostilities, done voluntarily. If an individual stops using the mobile application, the intent is lost, however, if he does not signal the loss of intent via an affirmative act, he still ceases to be a civilian participating in hostilities. Nevertheless, there may still be misunderstandings about his or her status, in such a case a civilian directly participating in the hostilities bears all the risk for such misunderstandings.

3.2. Dual Use Objects – double-edged sword?

Following the events of September 11th, 2001, the United States of America has used its power to allow for more expansive targeting of dual-use sites and structures.²⁴⁶ Other countries, including France²⁴⁷, Israel²⁴⁸, Saudi Arabia²⁴⁹, and the United Kingdom²⁵⁰, have likewise followed and loosened constraints on their militaries in regard to what objects can be perceived as military objectives.

Objects in relation to targeting are either civilian or military objectives, such as explained in the chapter on objects²⁵¹ As already mentioned, civilian objects may sometimes become partly used for military purposes; such happens in every warfare, most notable examples are bridges, power stations, and so forth. The question is, what about the objects relevant to the enemy's

²⁴⁶ U.S. Department of Defense, *op. cit.*, para. 5.6.1.2.; Department of the Army. *The Commander's Handbook on the Law of Land Warfare*. Independently published. 2019. ISBN 1673191312. para. 2.72.

²⁴⁷ RUBIN, Alissa J.; BARNARD, Anne. France Strikes ISIS Targets in Syria in Retaliation for Attacks. *New York Times* [online]. 15 November 2015. [cit. 2024-12-09]. Accessed from: <https://www.nytimes.com/2015/11/16/world/europe/paris-terror-attack.html>.

²⁴⁸ MERRIAM, John J.; SCHMITT, Michael N. Israeli Targeting: A Legal Appraisal. *Naval War College Review*. 2015, Vol. 68, No. 4, p. 16-33.

²⁴⁹ SPIEGEL, Paul. Responding to Epidemics in Large-scale Humanitarian Crises: A Case Study of the Cholera Response in Yemen, 2016–2018. *BMJ Global Health* [online]. 8 June 2019. [cit. 2024-12-13]. Accessed from: <https://gh.bmj.com/content/bmjgh/4/4/e001709.full.pdf>.

²⁵⁰ U.K. MINISTRY OF DEFENCE. RAF air strikes in Iraq and Syria: December 2015. *Gov.uk* [online]. 2015, last updated 31 July 2024. [cit. 2024-12-14]. Accessed from: <https://www.gov.uk/government/publications/british-forces-air-strikes-in-iraq-monthly-list/raf-air-strikes-in-iraq-and-syria-december-2015>.

²⁵¹ See chapter 2.1.2.2. of this Thesis.

economy, which many global powers see as a sector sustaining the war and, therefore as a legitimate target?²⁵²

Legally there is no distinctive category of dual-use objects²⁵³; for them to be legally targeted, these of course must be military objectives. Generally, industries that are directly related to the military or defense are targetable, as we have talked about in the chapter on military objects²⁵⁴ each object has a certain nature, location, purpose, and use, and so the ones producing arms or supplying fuel to military vehicles are certainly military. However, oil wells, refineries, and so forth were struck, which was justified by them being seen as giving sufficient effective contribution to the adversary's ability to continue the warfare.²⁵⁵ Such an approach can be deemed tricky in light of the broader interpretation as questionmark would then lay over banks, businesses, or generally any source of economic activity contributing to an adversary's ability to sustain itself. These resources often become direct targets even though they are crucial for civilian livelihood.²⁵⁶ Above all, in the NIAC, armed non-state actors frequently depend on the same resources as the civilian population.

The question arises in relation to industries not directly contributing to military activities,²⁵⁷ such include industries critical to the local economy. Article 52 of the API states that for an object to become a military objective, it must make an „*effective contribution to military action*”²⁵⁸, and such contribution must have a direct connection between the object and war-fighting capability.²⁵⁹ The problem with such an approach is that there is seemingly no limit to what can still be targeted and what cannot - such approach would allow belligerents to attack anything that might even remotely support the enemy's economy.

²⁵² HATHAWAY, Oona A.; KHAN, Azmat; REVKIN, Mara Redlich. The Dangerous Rise of Dual-Use Objects in War. *Duke Law School Public Law & Legal Theory Series*. 2024, Vol. 2024, No.56, p. 84; U.S. Department of Defense, *op. cit.*, paras. 5.6.6.2., 5.6.8.

²⁵³ CRAWFORD, Emily; PERT, Alison. *International Humanitarian Law*, *op. cit.*, p. 375; ROWE, Peter (ed.). *The Gulf War 1990-91 in International and English Law*. 1993. ISBN 9780415075206, p. 73.

²⁵⁴ See chapter 2.1.2.2. (iii) (A) of this Thesis.

²⁵⁵ RAMPTON, Roberta; MASON, Jeff. Faster progress needed against Islamic State - Obama. *Reuters* [online]. 14 December 2015. [cit. 2024-12-14]. Accessed from: <https://www.reuters.com/article/mideast-crisis-obama/faster-progress-needed-against-islamic-state-obama-idINKBN0TX25D20151214/>.

²⁵⁶ COSTI, Alberto. Reverberating Effects in Armed Conflict: An Environmental Analysis. *Arizona Journal of International & Comparative Law*. 2022, Vol. 39. No. 2, p. 317-353; SHUE, Henry; WIPPMAN, David. Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*. 2002, Vol. 35, No. 7, p. 559-579.

²⁵⁷ GOODMAN, Ryan. The Obama Administration and Targeting 'War-Sustaining' Objects in Non-International Armed Conflict. *American Journal of International Law*. 2016, Vol. 110, No. 4, pp. 663-679.

²⁵⁸ API, Art. 52(2).

²⁵⁹ International Committee of the Red Cross. International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report. *International Review of the Red Cross*. 2003, Vol. 86, No. 853, p. 222.

Civilians and civilian infrastructure may be protected by the proportionality calculus equating the potential military advantage anticipated. However, states disagree on whether the damage to such an object is not part of the proportionality calculus.²⁶⁰

Moreover, and that becomes extremely relevant, immediate civilian harm may not be the only issue, as the long-term loss of vital civilian resources is often not taken into account before taking the strike.²⁶¹ Generally, intentional direct damage has more relevance than unintentional one. For the purposes of this Thesis, direct damage is perceived as „*harm caused as the immediate result of an attack*“ whereas indirect damage means „*harm that occurs after an attack but as a foreseeable result*“²⁶², indirect damage is often referred to as the „*reverberating effect*“²⁶³

Therefore, if no non-combatants are hurt during the execution of the attack as a result of direct damage, the indirect damage caused to an object does not carry the same relevance as if it would be intentional direct civilian damage of the attack, even though its destruction may restrict electricity access for the civilian population, not even talking about the road access to hospitals and other polyclinics. Such happened as a result of USA-backed Saudi Arabia's operation against Iranian-backed Houthi rebels in Yemen²⁶⁴. Saudi Arabia has been later accused of violating legal protections for civilians. Throughout the Ukrainian conflict, Russia has also struck on Ukraine's energy infrastructure, which has deprived millions of civilians of electricity, water, and heat.²⁶⁵ Even if unintentional, the incidental civilian damage should not be excessive. Considering not only the immediate but also long-term impacts on the civilian population could provide a more comprehensive solution and solve the issue to a larger degree.²⁶⁶ This approach should also account

²⁶⁰ HATHAWAY. *The Dangerous Rise of Dual-Use Objects in War*, *op. cit.*, p. 81.

²⁶¹ SHUE, *op. cit.*, p. 564.

²⁶² *Ibid.*

²⁶³ ROBINSON, Isabel; NOHLE, Ellen. Proportionality and Precautions in Attack: The Reverberating Effects of Using Explosive Weapons in Populated Areas. *International Review of the Red Cross*. 2016, Vol. 98, No. 901, p. 107-145; SCHMITT, Michael N. The Principle of Discrimination in 21st Century Warfare. *Yale Human Rights and Development Law Journal*. 1999, Vol. 2, p. 143-182; International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report* [online]. Geneva: International Committee of the Red Cross, 2015, [cit. 2024-12-03]. Accessed from: https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf.

²⁶⁴ The Saudi aerial bombardment, during which the hospital was also struck, was carried out in the form of indiscriminate attacks. This does not change the impact of destruction partial or total of an object vital for civilian population, for more see UN Security Council, Letter dated 26 January 2018 from the Panel of Experts on Yemen mandated by Security Council resolution 2342 (2017) addressed to the President of the Security Council, U.N. Doc. S/2018/594 from 26 January 2018, p. 47-48; SPIEGEL, *op. cit.*

²⁶⁵ The World Bank. *\$200 Million Grant Supported by the World Bank Will Help Repair Energy Infrastructure in Ukraine* [online]. 12 April 2023. [cit. 2024-12-14]. Accessed from: <https://www.worldbank.org/en/news/press-release/2023/04/12/200-million-grant-supported-by-the-world-bank-will-help-repair-energy-infrastructure-in-ukraine>.

²⁶⁶ ROBINSON, *op. cit.*, p. 107-145; SCHMITT. The Principle of Discrimination in 21st Century Warfare, *op. cit.*, p. 143-182; International Committee of the Red Cross. *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts: Report* [online]. Geneva: International Committee of the Red Cross, 2015, [cit.

for not just direct but also indirect effects on the economy, environment, and services that are crucial for civilian infrastructure.²⁶⁷

The ICTY saw undermining of the principle of distinction in the dual-use targeting when the tribunal criticized the Croatian forces for the destruction of a historic bridge even though it had been used for military purposes, stating that the Croatian forces had not taken into account the bridge's importance to the civilian population, disregarding its „*great symbolic, cultural and historical value*”.²⁶⁸

The author sees a possible solution for the problem of such targeting, requiring legal reform. Firstly, for the purposes of the targeting calculus set out in Article 52 of the API, the objects are rendered either civilian or as military objectives since they “*by their nature, location, purpose, or use, make an effective contribution to military action*” and their “*total or partial destruction, capture, or neutralisation [...] would provide a definite military advantage.*”²⁶⁹ The harm caused to the civilian population by destroying such objects is often not immediate. Therefore, the long-term harm to the civilian population, often with a delayed effect is not regarded as when commencing the proportionality test. As mentioned, the principle of proportionality prohibits attacks that „*cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.*”²⁷⁰ The proportionality calculus lacks the notion of the long-term harm to a civilian population caused by the loss of such objects as a result of indirect civilian damage of the attack. The author of this thesis is inclined to the opinion expressed by Professor Schmit of not assessing the whole building as one military objective but rather just separate components of it. But such notion only certain aspects of the building are perceived as a military objective, not the building entirely.²⁷¹ Secondly, the author of this thesis also sees a possibility in adding long-term effects of the destruction of objects on the civilian population into the practice of states reflected in their military manuals. The wording of the proportionality test is in fact open for wider interpretation allowing it to prohibit causing injury to civilian lives, which might take an effect even a long time after perpetrating the attack.

2024-12-03]. Accessed from: https://www.icrc.org/sites/default/files/document/file_list/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf.

²⁶⁷ HATHAWAY. The Dangerous Rise of Dual-Use Objects in War, *op. cit.*, p. 90; LUBELL, Noam; COHEN, Amichai. Strategic Proportionality: Limitations on the Use of Force in Modern Armed Conflicts. *International Law Studies*. 2020 Vol. 96, p. 161-195. ISSN 2375-2831.

²⁶⁸ ICTY, *Prosecutor v. Prlić et al.* IT-04-74-A. Judgment from May 29, 2013, paras. 1581–1584.

²⁶⁹ API, Art. 52.

²⁷⁰ API, Arts. 51(5)(b) and 57(2)(a)(iii).

²⁷¹ SCHMITT, Michael N. Targeting Dual-Use Structures: An Alternative Interpretation. *Articles of War* [online]. 28 June 2021. [cit. 2024-12-13]. Accessed from: <https://lieber.westpoint.edu/targeting-dual-use-structures-alternative/>.

Also, in relation to the precautionary measures principle article 57 of the API sets out an obligation to any party to the armed conflict that when conducting military operations, constant care must be taken to spare civilian lives and civilian objects, and all feasible precautions must be taken to avoid incidental loss of civilian life or damage to civilian objects.²⁷² Military operations are „any movements, maneuvers and other activities whatsoever carried out by the armed forces with a view to combat“.²⁷³ Words „everything feasible“ were understood at the time of adoption of API as „everything that was practicable or practically possible, taking into account all the circumstances at the time of the attack, including those relevant to the success of military operations“²⁷⁴ The article mandates firstly that „those who plan or decide upon an attack“²⁷⁵ must identify but also verify²⁷⁶ the nature of the target they wish to attack and do it with great care. Secondly, the choice of means and methods of an attack must be used so as to prevent or minimize incidental loss of life or damage to the civilian population and civilian objects.²⁷⁷ When the nature of the target is viewed as of dual-use, then still the means of an attack must be the least destructive, and attacking forces are obliged to take precautions. It is suggested that the perpetrator of an attack should use the least destructive means, trying to avoid the destruction of an object as a whole, and focus on the seizure of the object if its destruction would be in the long term disproportional to the military advantage gained.

²⁷² API, Art. 57; Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *op. cit.*, para 77.

²⁷³ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, *op. cit.*, para. 2191.

²⁷⁴ *Ibid*, para. 2198.

²⁷⁵ API, Art. 57 (2) (a) (i).

²⁷⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols*, *op. cit.*, para. 2194.

²⁷⁷ API, Art. 57 (2) (a) (ii).

Conclusion

This thesis examined the current state of the principle of distinction in international humanitarian law and the impact that the dynamically evolving conduct of an armed conflict in the 21st century is having on this principle. More precisely, how the way in which warfare is conducted has affected the principle of distinction, how the means of conduct complicate the application of the principle, and not only by kinetic means but in some cases, also by cybernetic ones as well. The thesis aimed to answer the research question of the legality of civilian direct participation in hostilities by civilians via cyber means and of the classification of dual-use objects. Both issues stand alone, as individual problems of the modern application of the principle of distinction and were therefore separated into two sub-chapters.

Before proceeding with the analysis and discourse of the research question, it was essential to first establish a clear terminological foundation. Firstly, chapter 1, introduced the various types of armed conflicts. What means and methods of warfare are used and how the character of armed conflict affect the law applicable to it. Chapter 2 further elaborates on the information presented in Chapter 1, working with the qualification of armed conflicts and how this affects the status of persons in them. Firstly, the nature of the principle of distinction was introduced, how it affects the targeting of persons and objects in armed conflict, what its origins are, and most importantly, what its application is. Next, the types of persons in armed conflicts and the division of objects that can or cannot be targeted were presented, precisely on the basis of the principle of distinction. The principle of distinction is not a completely independent rule of targeting and therefore other principles of international humanitarian law and their relationship to the principle of distinction were further introduced.

Chapter 3 addressed the research question, namely, what are the problems in applying the principle of distinction in modern armed conflicts. Two major problems were presented and solutions were proposed; these were each addressed in individual subchapters. In the first subchapter, the thesis addressed the problem of the status of civilians who actively participate in hostilities by means of cyber-means, more precisely, the use of mobile applications through which civilians take photographs or otherwise make a record of enemy forces and then share this information with the other side of the armed conflict. When civilians actively participate in hostilities, they lose for the time they take part in such hostilities their protection from being directly targeted which is granted by, but not only, the principle of distinction. The author draws on the *de lege ferenda* proposal of the Tallinn Manual 2.0 and concludes that, in contrast to the ICRC's approach, the civilian's intent is relevant in determining his or her status in an armed conflict. The nature of the mobile application is relevant as well, it can either be purely military or

civilian with a military feature added later. Further, the thesis addressed the question of when a civilian's active participation in hostilities begins and ends. The author concluded that participation begins with the use of a given application to inform on enemy units and does not end with each completion of an attack, but only with the formal withdrawal of the civilian participating in hostilities from participation in hostilities. If an individual stops using the mobile application, the intent is lost, however, if he does not signal the loss of intent via an affirmative act, he still ceases to be a civilian participating in hostilities. Nevertheless, there may still be misunderstandings about his or her status, in such a case a civilian directly participating in the hostilities bears all the risk for such misunderstandings.

The second subchapter dealt with the evolving trend of distinguishing objects into not only civilian and military objectives but also into dual-use objects. For reasons of applying the principle of distinction, only objects that are identified as military objectives can be targeted, and civilian ones are protected against such direct attacks. However, the practice of many global powers shows signs of attempting to override or outright disregard these rules of international humanitarian law. Some states also perceive objects as military objectives that do not directly influence the course of an armed conflict but rather indirectly support one side of that conflict in the eyes of the other. The subchapter discusses that these objects are often linked to the economy of a given area or state, and thus their destruction, whether partial or complete, has negative consequences for the civilian population and may cause death or harm. The author discusses how this long-term harm is not taken into account in the application of the proportionality test. The test of proportionality is closely related to the principle of distinction. The Author proposes that states should take into account not only the immediate but also the long-term impact on the civilian population caused by an attack on a given object when calculating the proportionality test. The author then provides an operational solution to the problem, explaining that the concept of the proportionality principle is open to interpretation and that individual states should proceed to account for the impact of the attack on civilians that may occur long after the attack has taken place. The author also presents the need for the application of precautionary measures, whereby the API imposes an obligation to choose the least destructive means by which to achieve the desired outcome. Last but not least, the author refers to the idea of Professor Schmit, who proposed to perceive not the whole building as military, but only parts of it, such as individual apartments or sectors, and to perceive the rest of the building as civilian.

List of Abbreviations

IHL	International Humanitarian Law
GC I	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 970.
GC II	Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 971.
GC III	Convention (III) relative to the Treatment of Prisoners of War, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 972.
GC IV	Convention (IV) relative to the Protection of Civilian Persons in Time of War, concluded on 12 August 1949, entered into force 21 October 1950, UNTS 973.
API	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), concluded on 8 June 1977, entered into force 7 December 1978, UNTS 17512.
APII	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), concluded on 8 June 1977, entered into force 7 December 1978, UNTS 17513.
DDoS	Distributed denial of service attack
IAC	International Armed Conflict
NIAC	Non-international Armed Conflict
ICRC	International Committee of the Red Cross
ICJ	International Court of Justice
ICTY	International Criminal Tribunal for former Yugoslavia
CCW	Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495.
Protocol I to the CCW	Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol I, entitled Protocol on Non-Detectable Fragments), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495.

Protocol II to the CCW	Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol II, entitled Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495.
Protocol III to the CCW	Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol III, entitled Prohibitions or Restrictions on the Use of Incendiary Weapons), concluded on 10 October 1980, entered into force 2 December 1984, UNTS 22495.
Protocol IV to the CCW	Additional Protocol to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (Protocol IV, entitled Protocol on Blinding Laser Weapons), concluded on 13 October 1995, entered into force 30 July 1998, UNTS 22495
St. Peterburg Declaration	Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868.
Lieber Code	Instructions for the Government of Armies of the United States in the Field (Lieber Code). 24 April 1863.
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Hague IV	Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, concluded on 18 October 1907, entered into force 26 January 1910.
Hague II	Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, concluded on 29 July 1899, entered into force on 4 September 1900.

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Princip Rozlišování v Mezinárodním Humanitárním Právu

Abstrakt

Tato práce se zabývá principem rozlišování v mezinárodním právu humanitárním, přesněji uvádí jeho místo v mezinárodním právu humanitárním, jeho aplikaci a převážně problematická úskalí jeho výkladu a aplikace v praxi během ozbrojených konfliktů. Práce si klade za cíl zodpovědět otázku legality dvou konkrétních případů aplikace principu rozlišování, a to určení statusu civilistů, kteří se aktivně účastní na bojích v kyberprostoru, a to pomocí mobilních aplikací, které využívají, aby informovali jednu stranu ozbrojeného konfliktu o pozici, počtech a dalších informacích o ozbrojených jednotkách strany druhé. Druhým případech je legalita označování objektů jako tzv. dvojího použití, přesněji vnímání převážně civilních objektů, které nepřímo mohou v očích aktéra útoku pomáhat druhé straně konfliktu. Aby bylo možné tyto otázky řešit, práce se nejprve zabývá vnímáním pojmu principu rozlišování v rámci kontextu Ženevských úmluv a jejich Dodatkových Protokolů. Dále práce rozvádí pojmovou strukturu ozbrojeného konfliktu, jaké statusy osob a objektů se rozlišují během nich a představuje vedlejší pravidla mezinárodního práva humanitárního, které se principem rozlišování nerozlučně souvisí. Práce dochází k závěru, že civilisté používající aplikace k informování o ozbrojených jednotkách druhé strany konfliktu přicházejí o ochranu před přímým útokem a jejich status se mění na civilisty aktivně se účastnící nepřátelství, kdy tento status trvá od momentu prvního použití aplikace k informování o nepřátelských jednotkách až do jednoznačného aktu vystoupení z nepřátelství civilistou, kdy pokud tento chybí a osoba se pouze přestane svým jednáním aktivně účastnit na bojích, jeho status civilisty se navrácí, ale jakékoliv nedorozumění s tímto plynoucí, jdou k tíži této osoby. Tato práce dále dochází k závěru, že momentální úprava principu proporcionality je nedostačující k naplnění ochrany civilního obyvatelstva, kdy je nutné vzít v potaz i dlouhodobé následky zničení či poškození objektů, vnímaných jako dvojího užití na civilní obyvatelstvo. Tyto jsou nedílně spojeny s civilním obyvatelstvem a jejich zničení nebo poškození může v dlouhodobém časovém úseku ohrozit životy civilního obyvatelstva. Dále je nutné při plánování útoku na takovéto objekty využít ty nejméně ničivé prostředky, kterými je stále možné dosáhnout tíženého výsledku.

Klíčová slova: Princip rozlišování, aktivní účast nepřátelství, objekty dvojího použití

The Principle of Distinction in International Humanitarian Law

Abstract

This thesis examines the principle of distinction in international humanitarian law, more precisely outlining its place in international humanitarian law, its application and the mainly problematic challenges of its interpretation and application in practice during armed conflict. The thesis aims to answer the question of the legality of two specific cases of the application of the principle of distinction, namely the determination of the status of civilians actively participating in hostilities in cyberspace through the use of mobile applications, which they use to inform one party to an armed conflict about the position, numbers and other information about the other party's forces. The second case concerns the legality of labeling objects as so-called dual-use, more specifically the perception of predominantly civilian objects that may indirectly aid the other side of the conflict in the eyes of the perpetrator of the attack. In order to address these issues, the thesis first examines the perception of the principle of distinction within the context of the Geneva Conventions and their Additional Protocols. Next, the thesis elaborates on the conceptual structure of armed conflict, what statuses of persons and objects are distinguished within them, and outlines the subsidiary rules of international humanitarian law that are intertwined with the principle of distinction. The thesis concludes that civilians using apps to inform about the other side's forces lose protection from direct attack and their status changes to that of civilians actively participating in hostilities, where this status lasts from the moment of the first use of the application to inform about enemy troops until the affirmative act of withdrawal from hostilities by such person, where if this is absent and the person merely ceases to actively participate in hostilities by his or her actions, his or her status as a civilian is restored, but any misunderstandings arising from this are the responsibility of that person. This thesis further concludes that the current regulation of the principle of proportionality is insufficient to meet the protection of civilians, where the long-term consequences of the destruction or damage of objects perceived as dual-use on civilians must be taken into account. These are inextricably linked to the civilian population and their destruction or damage may endanger the lives of the civilian population in the long-term. Furthermore, when planning an attack on such objects, it is necessary to use the least destructive means that can still achieve a desired outcome.

Key Words: Principle of Distinction, direct participation in hostilities, dual-use objects