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0521539250 - Customary International Humanitarian Law, Volume II

Edited by Jean-Marie Henckaerts and Louise Doswald-Beck

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PART I

THE PRINCIPLE OF DISTINCTION

CHAPTER 1

**DISTINCTION BETWEEN CIVILIANS
AND COMBATANTS**

A. General (practice relating to Rule 1)	§§ 1–475
The principle of distinction	§§ 1–82
Attacks against combatants	§§ 83–153
Attacks against civilians	§§ 154–475
B. Violence Aimed at Spreading Terror among the Civilian Population (practice relating to Rule 2)	§§ 476–569
C. Definition of Combatants (practice relating to Rule 3)	§§ 570–627
D. Definition of Armed Forces (practice relating to Rule 4)	§§ 628–704
General	§§ 628–683
Incorporation of paramilitary or armed law enforcement agencies into armed forces	§§ 684–704
E. Definition of Civilians (practice relating to Rule 5)	§§ 705–753
F. Loss of Protection from Attack (practice relating to Rule 6)	§§ 754–919
Direct participation in hostilities	§§ 754–817
Specific examples of direct participation	§§ 818–864
Presence of combatants among the civilian population	§§ 865–886
Situations of doubt as to the character of a person	§§ 887–919

A. General

The principle of distinction

I. Treaties and Other Instruments

Treaties

- Article 48 AP I provides that “the Parties to the conflict shall at all times distinguish between the civilian population and combatants”. Article 48 AP I was adopted by consensus.¹
- Article 24(1) of draft AP II submitted by the ICRC to the CDDH provided that “in order to ensure respect for the civilian population, the parties to the conflict...shall make a distinction between the civilian population and

¹ CDDH, *Official Records*, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

combatants".² This proposal was amended and adopted by consensus in Committee III of the CDDH.³ The approved text provided that "in order to ensure respect and protection for the civilian population . . . the Parties to the conflict shall at all times distinguish between the civilian population and combatants".⁴ Eventually, however, it was deleted in the plenary, because it failed to obtain the necessary two-thirds majority (36 in favour, 19 against and 36 abstentions).⁵ 3. According to the preamble to the 1997 Ottawa Convention, States parties based their agreement on various principles of IHL, including "the principle that a distinction must be made between civilians and combatants".

Other Instruments

4. Article 22 of the 1863 Lieber Code states that "as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms".
5. Article 1 of the 1880 Oxford Manual provides that "the state of war does not admit of acts of violence, save between the armed forces of belligerent States. Persons not forming part of a belligerent armed force should abstain from such acts." In its commentary on Article 1, the manual states that "this rule implies a distinction between the individuals who compose the 'armed force' of a State and its other 'ressortissants'".
6. Paragraph 6 of the 1991 Memorandum of Understanding on the Application of IHL between Croatia and the SFRY requires that hostilities be conducted in accordance with Article 48 AP I.
7. Paragraph 2.5 of the 1992 Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina requires that hostilities be conducted in accordance with Article 48 AP I.
8. Paragraph 39 of the 1994 San Remo Manual states that "parties to the conflict shall at all times distinguish between civilians or other protected persons and combatants".
9. Section 5.1 of the 1999 UN Secretary-General's Bulletin states that UN forces "shall make a clear distinction at all times between civilians and combatants".

II. National Practice

Military Manuals

10. Argentina's Law of War Manual provides that "the parties to the conflict must distinguish at all times between the [civilian] population and combatants".⁶

² CDDH, *Official Records*, Vol. I, Part Three, Draft Additional Protocols, June 1973, p. 37.

³ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 288, § 113.

⁴ CDDH, *Official Records*, Vol. XV, CDDH/215/Rev.1, 3 February–18 April 1975, p. 319.

⁵ CDDH, *Official Records*, Vol. VII, CDDH/SR.52, 6 June 1977, p. 135, § 78.

⁶ Argentina, *Law of War Manual* (1989), § 4.01.

General

5

11. Australia's Defence Force Manual states that the law of armed conflict "establishes a requirement to distinguish between combatants and civilians, and between military objectives and civilian objects. This requirement imposes obligations on all parties to a conflict to establish and maintain the distinction."⁷

12. Belgium's Law of War Manual provides that "a distinction must always be made between the civilian population and those participating in hostilities: the latter may be attacked, the former may not".⁸

13. Benin's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".⁹

14. Cameroon's Instructors' Manual requires "respect for the principle of distinction, that is to say, the definition and separation of soldiers and civilians".¹⁰ It adds that "a soldier cannot fight without knowing exactly who is a combatant and who is not".¹¹

15. Canada's LOAC Manual states that "commanders shall at all times distinguish between the civilian population and combatants".¹²

16. Colombia's Circular on Fundamental Rules of IHL states that "the Parties to the conflict must at all times make a distinction between civilians and combatants in order to protect the civilian population and civilian objects".¹³

17. Colombia's Basic Military Manual provides for the obligation "to distinguish between combatants and the civilian population".¹⁴

18. Croatia's LOAC Compendium states that a distinction must always be made between combatants and civilians.¹⁵

19. Croatia's Instructions on Basic Rules of IHL requires all relevant personnel to distinguish between combatants and civilians in order to protect the civilian population and civilian property.¹⁶

20. Ecuador's Naval Manual states that "the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants".¹⁷

21. France's LOAC Summary Note states that "the civilian population and civilian objects must be spared and distinguished at all times from combatants and military objectives".¹⁸

⁷ Australia, *Defence Force Manual* (1994), § 504.

⁸ Belgium, *Law of War Manual* (1983), p. 26.

⁹ Benin, *Military Manual* (1995), Fascicule II, p. 5 and Fascicule III, p. 11.

¹⁰ Cameroon, *Instructors' Manual* (1992), p. 55.

¹¹ Cameroon, *Instructors' Manual* (1992), p. 143.

¹² Canada, *LOAC Manual* (1999), p. 4-1, § 4, see also p. 2-2, § 12.

¹³ Colombia, *Circular on Fundamental Rules of IHL* (1992), § 7.

¹⁴ Colombia, *Basic Military Manual* (1995), pp. 48-49.

¹⁵ Croatia, *LOAC Compendium* (1991), p. 37.

¹⁶ Croatia, *Instructions on Basic Rules of IHL* (1993), § 7.

¹⁷ Ecuador, *Naval Manual* (1989), § 5.3, see also §§ 8.1 and 11.1.

¹⁸ France, *LOAC Summary Note* (1992), Part I, preamble; see also *LOAC Teaching Note* (2000), p. 4.

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22. France's LOAC Manual imposes the obligation "to distinguish between military objectives, which may be attacked, and civilian objects and persons, which must not be made the object of deliberate attack".¹⁹

23. Germany's Military Manual states that it is prohibited "to injure military objectives, civilians, or civilian objects without distinction".²⁰

24. Hungary's Military Manual provides that a distinction must always be made between combatants and civilians.²¹

25. With reference to Israel's Law of War Booklet, the Report on the Practice of Israel states that "in principle, the IDF (Israel Defence Forces) accepts and applies the principle of distinction".²²

26. The Military Manual of the Netherlands states that "the parties to the conflict must at all times distinguish between the civilian population and combatants".²³

27. New Zealand's Military Manual states that "the principle of distinction... imposes an obligation on commanders to distinguish between legitimate military objectives and civilian objects and the civilian population when conducting military operations, particularly when selecting targets".²⁴

28. According to Nigeria's Military Manual, "the main aim for all commanders and individual combatants is to distinguish combatants and military objectives from civilian persons and objects at all times".²⁵

29. Sweden's IHL Manual states that "a distinction shall always be made between persons participating in hostilities and who are thereby legitimate objectives, and members of the civilian population, who may not constitute objectives in warfare".²⁶ The manual considers that the principle of distinction as stated in Article 48 AP I is part of customary international law.²⁷

30. According to Switzerland's Basic Military Manual, "the Parties to the conflict must at all times make a distinction between the civilian population and combatant troops".²⁸

31. Togo's Military Manual provides that "a distinction shall be made at all times between combatants and civilians".²⁹

32. The UK Military Manual refers to "the division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population".³⁰

¹⁹ France, *LOAC Manual* (2001), p. 13.

²⁰ Germany, *Military Manual* (1992), § 401, see also § 429.

²¹ Hungary, *Military Manual* (1992), p. 60.

²² Report on the Practice of Israel, 1997, Chapter 1.1, referring to *Law of War Booklet* (1986), Chapter 1.

²³ Netherlands, *Military Manual* (1993), p. IV-1, § 1.

²⁴ New Zealand, *Military Manual* (1992), p. 2-4, § 205.

²⁵ Nigeria, *Military Manual* (1994), p. 41.

²⁶ Sweden, *IHL Manual* (1991), Section 3.2.1.5, p. 40.

²⁷ Sweden, *IHL Manual* (1991), Section 2.2.3, p. 19.

²⁸ Switzerland, *Basic Military Manual* (1987), Article 25(1).

²⁹ Togo, *Military Manual* (1996), Fascicule II, p. 5 and Fascicule III, p. 11.

³⁰ UK, *Military Manual* (1958), § 86.

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[More information](#)

General

7

33. The US Air Force Pamphlet states that “in order to insure respect and protection for the civilian population and civilian objects, the parties to the conflict must at all times distinguish between the civilian population and combatants”.³¹

34. According to the US Naval Handbook, “the law of armed conflicts is based largely on the distinction to be made between combatants and noncombatants”.³²

National Legislation

35. Under Ireland’s Geneva Conventions Act as amended, any “minor breach” of AP I, including violations of Article 48 AP I, is a punishable offence.³³

36. Under Norway’s Military Penal Code as amended, “anyone who contravenes or is accessory to the contravention of provisions relating to the protection of persons or property laid down in . . . the two additional protocols to [the Geneva] Conventions . . . is liable to imprisonment”.³⁴

National Case-law

37. No practice was found.

Other National Practice

38. A report submitted to the Belgian Senate in 1991 noted that the principle of distinction remained the foundation of the law of armed conflict.³⁵

39. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Ecuador stated that “the use of nuclear weapons does not discriminate, in general, military objectives from civilian objectives”.³⁶

40. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, Egypt stated that:

The distinction between combatants and non-combatants is one of the most important victories and accomplishments of international law since the early beginnings of the nineteenth century. Any authorization of nuclear weapons will definitely cause this principle to collapse.³⁷

41. The instructions given to the French armed forces for the conduct of Opération Mistral, simulating a military operation under the right of self-defence or a mandate of the UN Security Council, state that “all parties must

³¹ US, *Air Force Pamphlet* (1976), § 5-3(b).

³² US, *Naval Handbook* (1995), § 5.3, see also §§ 8.1 and 11.1.

³³ Ireland, *Geneva Conventions Act as amended* (1962), Section 4(1) and (4).

³⁴ Norway, *Military Penal Code as amended* (1902), § 108(b).

³⁵ Belgium, Senate, Report, Enquête parlementaire sur l’existence en Belgique d’un réseau de renseignements clandestin international, 1990–1991 Session, Doc. 1117-4, 1 October 1991, § 20.

³⁶ Ecuador, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § D.

³⁷ Egypt, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 24, see also §§ 17 and 35(B)(4).

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[More information](#)

at all times make a distinction between the civilian population and military objectives in order to spare the civilian population".³⁸

42. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, India concluded that "the use of nuclear weapons in an armed conflict is unlawful being contrary to the conventional as well as customary international law because such a use cannot distinguish between the combatants and non-combatants".³⁹

43. In its oral pleadings before the ICJ in the *Nuclear Weapons case* in 1995, Japan stated that "with their colossal power and capacity for slaughter and destruction, nuclear weapons make no distinction between combatants and non-combatants".⁴⁰

44. The Report on the Practice of Lebanon refers to a 1996 report by the Lebanese Ministry of Justice which stated that Israel had committed serious violations of the Geneva Conventions by failing to distinguish between civilians and combatants.⁴¹

45. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, New Zealand stated that "discrimination between combatants and those who are not directly involved in armed conflict is a fundamental principle of international humanitarian law".⁴²

46. According to the Report on the Practice of Nigeria, it is Nigeria's *opinio juris* that the principle of distinction between combatants and civilians is part of customary international law.⁴³

47. In 1991, in a Letter Directive to Commanders of Major Services and Area Commands, the Chief of Staff of the armed forces of the Philippines stated that all units must distinguish between combatants and the civilian population in order to ensure that civilians receive the respect and protection to which they are entitled.⁴⁴

48. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the Solomon Islands stated that:

Under international law it is clear beyond any doubt that the use of a nuclear weapon against civilians, whatever the nature or size and destructive power of the

³⁸ France, Etat-major de la Force d'Action Rapide, Ordres pour l'Opération Mistral, 1995, Section 6, § 66.

³⁹ India, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, p. 4, see also p. 5.

⁴⁰ Japan, Oral pleadings before the ICJ, *Nuclear Weapons case*, 7 November 1995, Verbatim Record CR 95/27, p. 36.

⁴¹ Report on the Practice of Lebanon, 1998, Chapter 1.4, referring to Report by the Lebanese Ministry of Justice on possibilities for legal action against Israel, 12 April 1996.

⁴² New Zealand, Written statement submitted to the ICJ, *Nuclear Weapons case*, 20 June 1995, § 71.

⁴³ Report on the Practice of Nigeria, 1997, Chapter 1.1.

⁴⁴ Philippines, Letter Directive to Commanders of Major Services and Area Commands, Office of the Chief of Staff, 1991, § 3a.

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Excerpt

[More information](#)*General*

9

weapon, will be rendered illegal by virtue of the application of the customary rule which states that belligerents must always distinguish between combatants and non-combatants and limit their attack only to the former. This is an old and well-established rule which has achieved universal acceptance.⁴⁵

49. In its consideration of the legality of the attack by the South African defence forces on the SWAPO base/refugee camp at Kassinga in Angola in 1978, the South African Truth and Reconciliation Commission stated that “international humanitarian law stipulates that a distinction must at all times be made between persons taking part in hostilities and civilians”.⁴⁶

50. In its written statement submitted to the ICJ in the *Nuclear Weapons case* in 1995, the UK stated that “the parties to an armed conflict are required to discriminate between civilians and civilian objects on the one hand and combatants and military objectives on the other and to direct their attacks only against the latter”.⁴⁷

51. In explaining the US government’s position on the basic principles applicable in armed conflicts before the Third Committee of the UN General Assembly in 1968, the US representative stated that the principle of distinction, as set out in draft General Assembly Resolution 2444 (XXIII), constituted a reaffirmation of existing international law.⁴⁸ Subsequently, US officials have referred to General Assembly Resolution 2444 (XXIII) as an accurate statement of the customary rule that a distinction must be made at all times between persons taking part in hostilities and the civilian population.⁴⁹

52. In 1991, in response to an ICRC memorandum on the applicability of IHL in the Gulf region, the US Department of the Army pointed out that “the obligation of distinguishing combatants and military objectives from civilians and civilian objects is a shared responsibility of the attacker, defender, and the civilian population as such”.⁵⁰

53. In 1992, in its final report to Congress on the conduct of the Gulf War, the US Department of Defense stated that Article 48 AP I “is generally regarded

⁴⁵ Solomon Islands, Written statement submitted to the ICJ, *Nuclear Weapons case*, 19 June 1995, § 3.47; see also Written statement submitted to the ICJ, *Nuclear Weapons (WHO) case*, 10 June 1994, § 3.38.

⁴⁶ South Africa, *Truth and Reconciliation Commission Report*, 1998, Vol. 2, pp. 52–55, §§ 44–45.

⁴⁷ UK, Written statement submitted to the ICJ, *Nuclear Weapons case*, 16 June 1995, § 3.67.

⁴⁸ US, Statement before the Third Committee of the UN General Assembly, UN Doc. A/C.3/SR.1634, 10 December 1968.

⁴⁹ US, Letter from J. Fred Buzhardt, General Counsel of the Department of Defense, to Senator Edward Kennedy, Chairman of the Subcommittee on Refugees of the Committee on the Judiciary, 22 September 1972, *AJIL*, Vol. 67, pp. 122–126; Statement of the Acting Assistant Legal Adviser for Politico-Military Affairs during a symposium at the Brooklyn Law School, 25 September 1982, reprinted in Marian Nash (Leich), *Cumulative Digest of United States Practice in International Law, 1981–1988*, Department of State Publication 10120, Washington, D.C., 1993–1995, pp. 3421–3422.

⁵⁰ US, Letter from the Department of the Army to the legal adviser of the US Army forces deployed in the Gulf region, 11 January 1991, § 8(E), Report on US Practice, 1997, Chapter 1.4.

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as a codification of the customary practice of nations, and therefore binding on all".⁵¹ It also stated that:

The law of war with respect to targeting, collateral damage and collateral civilian casualties is derived from the principle of discrimination; that is, the necessity for distinguishing between combatants, who may be attacked, and noncombatants, against whom an intentional attack may not be directed, and between legitimate military targets and civilian objects.⁵²

54. According to the Report on US Practice, "it is the *opinio juris* of the United States that . . . a distinction must be made between persons taking part in the hostilities and the civilian population to the effect that the civilians be spared as much as possible".⁵³

III. Practice of International Organisations and Conferences

United Nations

55. In Resolution 2444 (XXIII), adopted in 1968, the UN General Assembly affirmed Resolution XXVIII of the 20th International Conference of the Red Cross and the basic humanitarian principle applicable in all armed conflicts laid down therein that "distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible".⁵⁴

56. In Resolution 2675 (XXV), adopted in 1970, the UN General Assembly recalled that "in the conduct of military operations during armed conflict, a distinction must be made at all times between persons actively taking part in the hostilities and civilian populations".⁵⁵ Resolution 2673 (XXV), adopted the same day and dealing with journalists in conflict zones, referred in its preamble to the principle of distinction.⁵⁶

57. In 1998, in a report on protection for humanitarian assistance to refugees and others in conflict situations, the UN Secretary-General noted that the changing pattern of conflicts in recent years had dramatically worsened the problem of compliance with international law and listed as an example that "in situations of internal conflicts, whole societies are often mobilized for war and it is difficult to distinguish between combatants and non-combatants".⁵⁷

⁵¹ US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 625.

⁵² US, Department of Defense, Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O, The Role of the Law of War, 10 April 1992, *ILM*, Vol. 31, 1992, p. 621.

⁵³ Report on US Practice, 1997, Chapter 1.4.

⁵⁴ UN General Assembly, Res. 2444 (XXIII), 19 December 1968, § 1(c).

⁵⁵ UN General Assembly, Res. 2675 (XXV), 9 December 1970, § 2.

⁵⁶ UN General Assembly, Res. 2673 (XXV), 9 December 1970, preamble.

⁵⁷ UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflict situations, UN Doc. S/1998/883, 22 September 1998, § 12.

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General

II

58. The report pursuant to paragraph 5 of UN Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on UN forces in Somalia noted that:

The [Geneva] Conventions were designed to cover inter-State wars and large-scale civil wars. But the principles they embody have a wider scope. Plainly a part of contemporary international customary law, they are applicable wherever political ends are sought through military means. No principle is more central to the humanitarian law of war than the obligation to respect the distinction between combatants and non-combatants. That principle is violated and criminal responsibility thereby incurred when organizations deliberately target civilians or when they use civilians as shields or otherwise demonstrate a wanton indifference to the protection of non-combatants.⁵⁸

Other International Organisations

59. In a declaration adopted on the occasion of the 50th anniversary of the Geneva Conventions in 1999, the EU stated that it deplored the persistence of violations of IHL. It added that present-day conflicts often did not make the important distinction between combatants and civilians and that children and other vulnerable groups were targets of the conflicts.⁵⁹

International Conferences

60. The 20th International Conference of the Red Cross in 1965 solemnly declared that:

All Governments and other authorities responsible for action in armed conflicts should conform at least to the following principles:... that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.⁶⁰

IV. Practice of International Judicial and Quasi-judicial Bodies

61. In its advisory opinion in the *Nuclear Weapons case* in 1996, the ICJ considered the principle of distinction between combatants and non-combatants to be one of the “cardinal principles contained in the texts constituting the fabric of humanitarian law” and also one of the “intransgressible principles of international customary law”.⁶¹

⁵⁸ Report pursuant to paragraph 5 of Security Council resolution 837 (1993) on the investigation into the 5 June 1993 attack on United Nations forces in Somalia conducted on behalf of the UN Security Council, UN Doc. S/26351, 24 August 1993, Annex, § 9.

⁵⁹ EU, Declaration on the occasion of the 50th anniversary of the Geneva Conventions, 12 August 1999, Pesc/99/77 10394/99 (presse 247).

⁶⁰ 20th International Conference of the Red Cross, Vienna, 2–9 October 1965, Res. XXVIII.

⁶¹ ICJ, *Nuclear Weapons case*, Advisory Opinion, 8 July 1996, §§ 78–79.