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Excerpt
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PART I

THE PRINCIPLE OF DISTINCTION

CHAPTER 1

DISTINCTION BETWEEN CIVILIANS
AND COMBATANTS

Rule 1. The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.

Practice

Volume II, Chapter 1, Section A.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The three components of this rule are interrelated and the practice pertaining to each of them reinforces the validity of the others. The term “combatant” in this rule is used in its generic meaning, indicating persons who do not enjoy the protection against attack accorded to civilians, but does not imply a right to combatant status or prisoner-of-war status (see Chapter 33). This rule has to be read in conjunction with the prohibition to attack persons recognised to be *hors de combat* (see Rule 47) and with the rule that civilians are protected against attack unless and for such time as they take a direct part in hostilities (see Rule 6). Belligerent reprisals against civilians are discussed in Chapter 41.

International armed conflicts

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.¹ The Hague Regulations do not as such specify that a distinction must be made between civilians and combatants, but Article 25, which prohibits “the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended”, is based on this principle.² The principle of distinction is now codified in Articles 48, 51(2)

¹ St. Petersburg Declaration, preamble (cited in Vol. II, Ch. 1, § 83).

² Hague Regulations, Article 25.

and 52(2) of Additional Protocol I, to which no reservations have been made.³ According to Additional Protocol I, “attacks” means “acts of violence against the adversary, whether in offence or in defence”.⁴

At the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Articles 51 and 52 of Additional Protocol I were so essential that they “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.⁵ Also at the Diplomatic Conference, the United Kingdom stated that Article 51(2) was a “valuable reaffirmation” of an existing rule of customary international law.⁶

The prohibition on directing attacks against civilians is also laid down in Protocol II, Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons and in the Ottawa Convention banning anti-personnel landmines.⁷ In addition, under the Statute of the International Criminal Court, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in international armed conflicts.⁸

Numerous military manuals, including those of States not, or not at the time, party to Additional Protocol I, stipulate that a distinction must be made between civilians and combatants and that it is prohibited to direct attacks against civilians.⁹ Sweden’s IHL Manual identifies the principle of distinction as laid down in Article 48 of Additional Protocol I as a rule of customary international law.¹⁰ In addition, there are numerous examples of national legislation which make it a criminal offence to direct attacks against civilians, including the legislation of States not, or not at the time, party to Additional Protocol I.¹¹

In the *Kassem case* in 1969, Israel’s Military Court at Ramallah recognised the immunity of civilians from direct attack as one of the basic rules of international humanitarian law.¹² There are, moreover, many official statements which invoke the rule, including by States not, or not at the time, party to

³ Additional Protocol I, Article 48 (adopted by consensus) (cited in Vol. II, Ch. 1, § 1), Article 51(2) (adopted by 77 votes in favour, one against and 16 abstentions) (*ibid.*, § 154) and Article 52(2) (adopted by 79 votes in favour, none against and 7 abstentions) (*ibid.*, § 85).

⁴ Additional Protocol I, Article 49.

⁵ Mexico, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols (cited in Vol. II, Ch. 1, §§ 146, 307, 536 and 800).

⁶ United Kingdom, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols (*ibid.*, §§ 319, 537 and 803).

⁷ Protocol II to the CCW, Article 3(2) (*ibid.*, § 157); Amended Protocol II to the CCW, Article 3(7) (*ibid.*, § 157); Protocol III to the CCW, Article 2(1) (*ibid.*, § 158); Ottawa Convention, preamble (*ibid.*, § 3).

⁸ ICC Statute, Article 8(2)(b)(i) (*ibid.*, § 160).

⁹ See military manuals (*ibid.*, §§ 10–34 and 173–216), in particular the manuals of France (*ibid.*, §§ 21 and 188), Indonesia (*ibid.*, § 192), Israel (*ibid.*, §§ 25 and 193–194), Kenya (*ibid.*, § 197), United Kingdom (*ibid.*, §§ 212–213) and United States (*ibid.*, §§ 33–34 and 214–215).

¹⁰ Sweden, *IHL Manual* (*ibid.*, § 29).

¹¹ See legislation (*ibid.*, §§ 217–269), in particular the legislation of Azerbaijan (*ibid.*, §§ 221–222), Indonesia (*ibid.*, § 243) and Italy (*ibid.*, § 245).

¹² Israel, Military Court at Ramallah, *Kassem case* (*ibid.*, § 271).

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Additional Protocol I.¹³ The rule has also been invoked by parties to Additional Protocol I against non-parties.¹⁴

In their pleadings before the International Court of Justice in the *Nuclear Weapons case*, many States invoked the principle of distinction.¹⁵ In its advisory opinion in the *Nuclear Weapons case*, the Court stated that the principle of distinction was one of the “cardinal principles” of international humanitarian law and one of the “intransgressible principles of international customary law”.¹⁶

When the ICRC appealed to the parties to the conflict in the Middle East in October 1973, i.e., before the adoption of Additional Protocol I, to respect the distinction between combatants and civilians, the States concerned (Egypt, Iraq, Israel and Syria) replied favourably.¹⁷

Non-international armed conflicts

Article 13(2) of Additional Protocol II prohibits making the civilian population as such, as well as individual civilians, the object of attack.¹⁸ The prohibition on directing attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons.¹⁹ It is also set forth in Protocol III to the Convention on Certain Conventional Weapons, which has been made applicable in non-international armed conflicts pursuant to an amendment of Article 1 of the Convention adopted by consensus in 2001.²⁰ The Ottawa Convention banning anti-personnel landmines states that the Convention is based, *inter alia*, on “the principle that a distinction must be made between civilians and combatants”.²¹

Under the Statute of the International Criminal Court, “intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in non-international armed conflicts.²² In addition, this rule is included in other instruments pertaining also to non-international armed conflicts.²³

¹³ See, e.g., the statements of Azerbaijan (*ibid.*, § 273), China (*ibid.*, § 279), France (*ibid.*, §§ 41 and 285), Germany (*ibid.*, §§ 290–291 and 293), Iran (*ibid.*, §§ 296–297), Iraq (*ibid.*, § 298), Pakistan (*ibid.*, §§ 311–312), South Africa (*ibid.*, § 49), United Kingdom (*ibid.*, § 321) and United States (*ibid.*, §§ 51–53 and 322–329).

¹⁴ See, e.g., the statements of Germany vis-à-vis Turkey (*ibid.*, § 292) and Iraq (*ibid.*, § 293), of Lebanon (*ibid.*, § 304) and Pakistan (*ibid.*, § 312) vis-à-vis Israel, and of Spain vis-à-vis Iran and Iraq (*ibid.*, § 315).

¹⁵ See the statements of Ecuador (*ibid.*, § 39), Egypt (*ibid.*, §§ 40 and 283), India (*ibid.*, § 42), Japan (*ibid.*, § 43), Netherlands (*ibid.*, § 309), New Zealand (*ibid.*, § 45), Solomon Islands (*ibid.*, § 48), Sweden (*ibid.*, § 316), United Kingdom (*ibid.*, §§ 50 and 321) and United States (*ibid.*, § 329).

¹⁶ ICJ, *Nuclear Weapons case* (*ibid.*, § 434).

¹⁷ See ICRC, *The International Committee's Action in the Middle East* (*ibid.*, § 445).

¹⁸ Additional Protocol II, Article 13(2) (adopted by consensus) (*ibid.*, § 156).

¹⁹ Amended Protocol II to the CCW, Article 3(7) (*ibid.*, § 157).

²⁰ Protocol III to the CCW, Article 2(1) (*ibid.*, § 158).

²¹ Ottawa Convention, preamble (*ibid.*, § 3).

²² ICC Statute, Article 8(2)(e)(i) (*ibid.*, § 160).

²³ See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SFRRY, para. 6 (*ibid.*, §§ 6, 97 and 167); Agreement on the Application of IHL between the Parties

Military manuals which are applicable in or have been applied in non-international armed conflicts specify that a distinction must be made between combatants and civilians to the effect that only the former may be targeted.²⁴ To direct attacks against civilians in any armed conflict is an offence under the legislation of numerous States.²⁵ There are also a number of official statements pertaining to non-international armed conflicts invoking the principle of distinction and condemning attacks directed against civilians.²⁶ States' submissions to the International Court of Justice in the *Nuclear Weapons case* referred to above were couched in general terms applicable in all armed conflicts.

No official contrary practice was found with respect to either international or non-international armed conflicts. This rule is sometimes expressed in other terms, in particular as the principle of distinction between combatants and non-combatants, whereby civilians who do not take a direct part in hostilities are included in the category of non-combatants.²⁷

to the Conflict in Bosnia and Herzegovina, para. 2.5 (*ibid.*, § 7, 98 and 168); San Remo Manual, paras. 39 and 41 (*ibid.*, §§ 8 and 99); UN Secretary-General's Bulletin, Section 5.1 (*ibid.*, §§ 9, 100 and 171); Cairo Declaration on Human Rights in Islam, Article 3(a) (*ibid.*, § 165); Hague Statement on Respect for Humanitarian Principles (*ibid.*, § 166); UNTAET Regulation 2000/15, Section 6(1)(e)(i) (*ibid.*, 172).

²⁴ See, e.g., the military manuals of Argentina (*ibid.*, § 173), Benin (*ibid.*, § 177), Cameroon (*ibid.*, § 178), Canada (*ibid.*, § 179), Colombia (*ibid.*, §§ 181–182), Germany (*ibid.*, § 189), Netherlands (*ibid.*, § 201), New Zealand (*ibid.*, § 203), Philippines (*ibid.*, § 205), Togo (*ibid.*, § 211) and Yugoslavia (*ibid.*, 216).

²⁵ See, e.g., the legislation of Armenia (*ibid.*, § 218), Australia (*ibid.*, § 220), Azerbaijan (*ibid.*, §§ 221–222), Belarus (*ibid.*, § 223), Belgium (*ibid.*, § 224), Bosnia and Herzegovina (*ibid.*, § 225), Canada (*ibid.*, § 228), Colombia (*ibid.*, § 230), Democratic Republic of the Congo (*ibid.*, § 231), Congo (*ibid.*, § 232), Croatia (*ibid.*, § 234), Estonia (*ibid.*, § 239), Georgia (*ibid.*, § 240), Germany (*ibid.*, § 241), Ireland (*ibid.*, § 244), Lithuania (*ibid.*, § 248), Netherlands (*ibid.*, § 250), New Zealand (*ibid.*, § 252), Niger (*ibid.*, § 254), Norway (*ibid.*, § 255), Slovenia (*ibid.*, § 257), Spain (*ibid.*, § 259), Sweden (*ibid.*, § 260), Tajikistan (*ibid.*, § 261), United Kingdom (*ibid.*, § 265), Vietnam (*ibid.*, § 266), Yemen (*ibid.*, § 267) and Yugoslavia (*ibid.*, § 268); see also the legislation of the Czech Republic (*ibid.*, § 237), Hungary (*ibid.*, § 242), Italy (*ibid.*, § 245) and Slovakia (*ibid.*, § 256), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 217), Burundi (*ibid.*, § 226), El Salvador (*ibid.*, § 238), Jordan (*ibid.*, § 246), Nicaragua (*ibid.*, § 253) and Trinidad and Tobago (*ibid.*, § 262).

²⁶ See, e.g., the statements of Belgium (*ibid.*, § 274), France (*ibid.*, §§ 286 and 288–289), Germany (*ibid.*, §§ 294–295), Malaysia (*ibid.*, § 306), Netherlands (*ibid.*, § 308), Philippines (*ibid.*, § 47), Slovenia (*ibid.*, § 314) and Uganda (*ibid.*, § 317).

²⁷ See, e.g., the military manuals of Croatia (*ibid.*, § 718), Dominican Republic (*ibid.*, §§ 185, 583 and 720), Ecuador (*ibid.*, §§ 20 and 721), Hungary (*ibid.*, § 724), Sweden (*ibid.*, § 733) and United States (*ibid.*, §§ 34 and 737); Israel, Military Court at Ramallah, *Kassem case* (*ibid.*, § 271); the statements of Belgium (*ibid.*, § 274), Colombia (*ibid.*, § 840), Egypt (*ibid.*, § 40), India (*ibid.*, § 42), Iran (*ibid.*, § 296), Japan (*ibid.*, § 43), South Korea (*ibid.*, § 302), Solomon Islands (*ibid.*, § 48) and United States (*ibid.*, §§ 53, 328); UN Security Council, Res. 771 (*ibid.*, § 337) and Res. 794 (*ibid.*, § 338); UN Commission on Human Rights, Res. 1992/S-1/1 (*ibid.*, § 388); UN Secretary-General, Report on protection for humanitarian assistance to refugees and others in conflicts situations (*ibid.*, § 57); 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 (*ibid.*, § 58); ICJ, *Nuclear Weapons case*, Advisory Opinion (*ibid.*, § 61). For other formulations, see, e.g., the military manuals of Belgium (*ibid.*, § 12) (distinction between “the civilian population and those participating in hostilities”) and Sweden (*ibid.*, § 29) (distinction between “persons participating in hostilities and

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Alleged violations of this rule have generally been condemned by States, irrespective of whether the conflict was international or non-international.²⁸ Similarly, the UN Security Council has condemned or called for an end to alleged attacks against civilians in the context of numerous conflicts, both international and non-international, including in Afghanistan, Angola, Azerbaijan, Burundi, Georgia, Lebanon, Liberia, Rwanda, Sierra Leone, Somalia, Tajikistan, the former Yugoslavia and the territories occupied by Israel.²⁹

As early as 1938, the Assembly of the League of Nations stated that “the intentional bombing of civilian populations is illegal”.³⁰ The 20th International Conference of the Red Cross in 1965 solemnly declared that governments and other authorities responsible for action in all armed conflicts should conform to the prohibition on launching attacks against a civilian population.³¹ Subsequently, a UN General Assembly resolution on respect for human rights in armed conflicts, adopted in 1968, declared the principle of distinction to be applicable in all armed conflicts.³² The Plan of Action for the years 2000–2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999, requires that all parties to an armed conflict respect “the total ban on directing attacks against the civilian population as such or against civilians not taking a direct part in hostilities”.³³ In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN Security Council reaffirmed its strong condemnation of the deliberate targeting of civilians in all situations of armed conflict.³⁴

The jurisprudence of the International Court of Justice in the *Nuclear Weapons case*, of the International Criminal Tribunal for the Former

who are thereby legitimate objectives, and members of the civilian population”); the statement of New Zealand (*ibid.*, § 45) (distinction between “combatants and those who are not directly involved in armed conflict”); UN General Assembly, Res. 2444 (XXIII) (*ibid.*, § 55) (distinction between “persons taking part in the hostilities and members of the civilian population”) and Res. 2675 (XXV) (*ibid.*, § 56) (distinction between “persons actively taking part in the hostilities and civilian populations”).

²⁸ See, e.g., the statements of Australia (*ibid.*, § 272), Bosnia and Herzegovina (*ibid.*, § 276), China (*ibid.*, § 279), Croatia (*ibid.*, § 281), France (*ibid.*, §§ 284, 286 and 288–289), Germany (*ibid.*, §§ 290 and 292–295), Iran (*ibid.*, § 297), Kazakhstan (*ibid.*, § 301), Lebanon (*ibid.*, § 305), Netherlands (*ibid.*, § 308), Pakistan (*ibid.*, §§ 311–312), Slovenia (*ibid.*, § 314), Spain (*ibid.*, § 315), Uganda (*ibid.*, § 317) and Yugoslavia (*ibid.*, § 331).

²⁹ See, e.g., UN Security Council, Res. 564 (*ibid.*, § 336), Res. 771 (*ibid.*, § 337), Res. 794 (*ibid.*, § 338), Res. 819 (*ibid.*, § 339), Res. 853 (*ibid.*, § 340), Res. 904 (*ibid.*, § 341), Res. 912 (*ibid.*, § 342), Res. 913 (*ibid.*, § 343), Res. 918, 925, 929 and 935 (*ibid.*, § 344), Res. 950 (*ibid.*, § 345), Res. 978 (*ibid.*, § 346), Res. 993 (*ibid.*, § 347), Res. 998 (*ibid.*, § 348), Res. 1001 (*ibid.*, § 349), Res. 1019 (*ibid.*, § 350), Res. 1041 (*ibid.*, § 351), Res. 1049 and 1072 (*ibid.*, § 352), Res. 1052 (*ibid.*, § 353), Res. 1073 (*ibid.*, § 354), Res. 1076 (*ibid.*, § 355), Res. 1089 (*ibid.*, § 356), Res. 1161 (*ibid.*, § 357), Res. 1173 and 1180 (*ibid.*, § 358) and Res. 1181 (*ibid.*, § 359).

³⁰ League of Nations, Assembly, Resolution adopted on 30 September 1938 (*ibid.*, § 378).

³¹ 20th International Conference of the Red Cross, Res. XXVIII (*ibid.*, §§ 60 and 429).

³² UN General Assembly, Res. 2444 (XXIII) (adopted by unanimous vote of 111 in favour, none against and no abstentions) (*ibid.*, §§ 55 and 379).

³³ 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the years 2000–2003 (adopted by consensus) (*ibid.*, § 433).

³⁴ UN Security Council, Res. 1296 (*ibid.*, § 361).

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Yugoslavia, in particular in the *Tadić case*, *Martić case* and *Kupreškić case*, and of the Inter-American Commission on Human Rights in the case relative to the events at La Tablada in Argentina provides further evidence that the obligation to make a distinction between civilians and combatants is customary in both international and non-international armed conflicts.³⁵

The ICRC has called on parties to both international and non-international armed conflicts to respect the distinction between combatants and civilians.³⁶

Rule 2. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.

Practice

Volume II, Chapter 1, Section B.

Summary

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

International armed conflicts

Article 51(2) of Additional Protocol I prohibits “acts or threats of violence the primary purpose of which is to spread terror among the civilian population”.³⁷ No reservations have been made to this provision. At the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Article 51 of Additional Protocol I was so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”.³⁸ Also at the Diplomatic Conference, the United Kingdom stated that Article 51(2) was a “valuable reaffirmation” of an existing rule of customary international law.³⁹

The prohibition of acts or threats of violence aimed at terrorising the civilian population is set forth in a large number of military manuals.⁴⁰ Violations of this

³⁵ ICJ, *Nuclear Weapons case*, Advisory Opinion (*ibid.*, §§ 61 and 434); ICTY, *Tadić case*, Interlocutory Appeal (*ibid.*, §§ 435, 625, 750 and 882), *Martić case*, Review of the Indictment (*ibid.*, §§ 437 and 552) and *Kupreškić case*, Judgement (*ibid.*, §§ 441 and 883); Inter-American Commission on Human Rights, *Case 11.137 (Argentina)* (*ibid.*, §§ 64, 443 and 810).

³⁶ See, e.g., the practice of the ICRC (*ibid.*, §§ 67–75).

³⁷ Additional Protocol I, Article 51(2) (adopted by 77 votes in favour, one against and 16 abstentions) (*ibid.*, § 477).

³⁸ Mexico, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols (*ibid.*, §§ 146, 307, 536 and 800).

³⁹ United Kingdom, Statement at the Diplomatic Conference leading to the adoption of the Additional Protocols (*ibid.*, §§ 319, 537 and 803).

⁴⁰ See, e.g., the military manuals of Argentina (*ibid.*, § 489), Australia (*ibid.*, § 490), Belgium (*ibid.*, §§ 491–492), Benin (*ibid.*, § 493), Cameroon (*ibid.*, § 494), Canada (*ibid.*, § 495), Colombia (*ibid.*, § 496), Croatia (*ibid.*, § 497), Ecuador (*ibid.*, § 498), France (*ibid.*, § 499), Germany (*ibid.*, § 500),

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rule are an offence under the legislation of numerous States.⁴¹ The prohibition is also supported by official statements.⁴² This practice includes that of States not, or not at the time, party to Additional Protocol I.⁴³ States party to Additional Protocol I have also invoked this rule against States not party.⁴⁴

When the ICRC appealed to the parties to the conflict in the Middle East in October 1973, i.e., before the adoption of Additional Protocol I, to respect the prohibition of “methods intended to spread terror among the civilian population”, the States concerned (Egypt, Iraq, Israel and Syria) replied favourably.⁴⁵

It can be argued that the prohibition of acts or threats of violence aimed at terrorising the civilian population is further supported by the wider prohibition of “all measures of intimidation or of terrorism” in Article 33 of the Fourth Geneva Convention.⁴⁶ Prior to the adoption of this provision, the Report of the Commission on Responsibility set up after the First World War listed “systematic terror” as a violation of the laws and customs of war.⁴⁷

Non-international armed conflicts

Article 13(2) of Additional Protocol II prohibits acts or threats of violence the primary purpose of which is to spread terror among the civilian population.⁴⁸ In addition, the prohibition is included in other instruments pertaining also to non-international armed conflicts.⁴⁹

The prohibition of acts or threats of violence aimed at terrorising the civilian population is set forth in military manuals which are applicable in or have been applied in non-international armed conflicts.⁵⁰ Violations of this rule in any

Hungary (*ibid.*, § 501), Kenya (*ibid.*, § 502), Netherlands (*ibid.*, § 503), New Zealand (*ibid.*, § 504), Nigeria (*ibid.*, § 505), Russia (*ibid.*, § 506), Spain (*ibid.*, § 507), Sweden (*ibid.*, § 508), Switzerland (*ibid.*, § 509), Togo (*ibid.*, § 510), United States (*ibid.*, §§ 511–512) and Yugoslavia (*ibid.*, § 513).

⁴¹ See, e.g., the legislation of Argentina (*ibid.*, § 514), Australia (*ibid.*, § 515), Bangladesh (*ibid.*, § 516), Bosnia and Herzegovina (*ibid.*, § 517), China (*ibid.*, § 518), Colombia (*ibid.*, § 519), Côte d'Ivoire (*ibid.*, § 520), Croatia (*ibid.*, § 521), Czech Republic (*ibid.*, § 522), Ethiopia (*ibid.*, § 523), Ireland (*ibid.*, § 524), Lithuania (*ibid.*, § 525), Netherlands (*ibid.*, § 526), Norway (*ibid.*, § 527), Slovakia (*ibid.*, § 528), Slovenia (*ibid.*, § 529), Spain (*ibid.*, § 530) and Yugoslavia (*ibid.*, § 531).

⁴² See, e.g., the statements of Israel (*ibid.*, § 534), Lebanon (*ibid.*, § 535) and United States (*ibid.*, §§ 538–540).

⁴³ See, e.g., the practice of France (*ibid.*, § 499), Israel (*ibid.*, § 534), Kenya (*ibid.*, § 502) and United States (*ibid.*, §§ 511–512 and 538–540).

⁴⁴ See, e.g., the statement of Lebanon vis-à-vis Israel (*ibid.*, § 535).

⁴⁵ See ICRC, The International Committee's Action in the Middle East (*ibid.*, § 556).

⁴⁶ Fourth Geneva Convention, Article 33 (*ibid.*, § 476). The relevance of this provision to the present rule is explained in Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4538.

⁴⁷ Report of the Commission on Responsibility (cited in Vol. II, Ch. 1, § 481).

⁴⁸ Additional Protocol II, Article 13(2) (adopted by consensus) (*ibid.*, § 479).

⁴⁹ See, e.g., Memorandum of Understanding on the Application of IHL between Croatia and the SFRY, para. 6 (*ibid.*, § 485); Agreement on the Application of IHL between the Parties to the Conflict in Bosnia and Herzegovina, para. 2.5 (*ibid.*, § 486).

⁵⁰ See, e.g., the military manuals of Argentina (*ibid.*, § 489), Australia (*ibid.*, § 490), Benin (*ibid.*, § 493), Cameroon (*ibid.*, § 494), Canada (*ibid.*, § 495), Colombia (*ibid.*, § 496), Croatia (*ibid.*, § 497), Ecuador (*ibid.*, § 498), Germany (*ibid.*, § 500), Hungary (*ibid.*, § 501), Kenya (*ibid.*, § 502), Netherlands (*ibid.*, § 503), New Zealand (*ibid.*, § 504), Russia (*ibid.*, § 506), Spain (*ibid.*, § 507), Togo (*ibid.*, § 510) and Yugoslavia (*ibid.*, § 513).

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armed conflict are an offence under the legislation of many States.⁵¹ There are also official statements pertaining to non-international armed conflicts invoking this rule.⁵²

It can be argued that the prohibition of acts or threats of violence aimed at terrorising the civilian population is further supported by the wider prohibition of “acts of terrorism” in Article 4(2)(d) of Additional Protocol II.⁵³ “Acts of terrorism” are specified as war crimes under the Statutes of the International Criminal Tribunal for Rwanda and of the Special Court for Sierra Leone.⁵⁴ In his report on the establishment of a Special Court for Sierra Leone, the UN Secretary-General noted that violations of Article 4 of Additional Protocol II have long been considered crimes under customary international law.⁵⁵

No official contrary practice was found with respect to either international or non-international armed conflicts. Alleged violations of this rule have generally been condemned by States.⁵⁶ Similarly, the UN General Assembly and UN Commission on Human Rights have adopted several resolutions condemning the terrorisation of the civilian population in the conflicts in the former Yugoslavia.⁵⁷ Furthermore, the indictments in the *Dukić case*, *Karadžić and Mladić case* and *Galić case* before the International Criminal Tribunal for the Former Yugoslavia included charges of terrorising the civilian population in violation of the laws and customs of war, in the first two cases as part of charges of unlawful attack.⁵⁸ In its judgement in the *Galić case* in 2003, the Trial Chamber found the accused guilty of “acts of violence the primary purpose of which is to spread terror among the civilian population, as set forth in Article 51 of Additional Protocol I, as a violation of the laws or customs of war under Article 3 of the Statute of the Tribunal”.⁵⁹

⁵¹ See, e.g., the legislation of Bosnia and Herzegovina (*ibid.*, § 517), Colombia (*ibid.*, § 519), Croatia (*ibid.*, § 521), Ethiopia (*ibid.*, § 523), Ireland (*ibid.*, § 524), Lithuania (*ibid.*, § 525), Norway (*ibid.*, § 527), Slovenia (*ibid.*, § 529), Spain (*ibid.*, § 530) and Yugoslavia (*ibid.*, § 531); see also the legislation of the Czech Republic (*ibid.*, § 522) and Slovakia (*ibid.*, § 528), the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina (*ibid.*, § 514).

⁵² See, e.g., the statements of Botswana (*ibid.*, § 533) and United States (*ibid.*, § 540).

⁵³ Additional Protocol II, Article 4(2)(d) (adopted by consensus) (*ibid.*, § 478). The relevance of this provision to the present rule is explained in Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *Commentary on the Additional Protocols*, ICRC, Geneva, 1987, § 4538.

⁵⁴ ICTR Statute, Article 4(d) (cited in Vol. II, Ch. 1, § 487); Statute of the Special Court for Sierra Leone, Article 3(d) (*ibid.*, § 480).

⁵⁵ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone (*ibid.*, § 545).

⁵⁶ See, e.g., the statements of Israel (*ibid.*, § 534), Lebanon (*ibid.*, § 535) and United States (*ibid.*, § 540).

⁵⁷ See, e.g., UN General Assembly, Res. 49/196 (*ibid.*, § 541) and Res. 53/164 (*ibid.*, § 542); UN Commission on Human Rights, Res. 1992/S-2/1, 1993/7, 1994/72 and 1995/89 (*ibid.*, § 543).

⁵⁸ ICTY, *Dukić case*, Initial Indictment (*ibid.*, § 551), *Karadžić and Mladić case*, First Indictment (*ibid.*, § 553) and *Galić case*, Initial Indictment (*ibid.*, § 554).

⁵⁹ ICTY, *Prosecutor v. Stanislav Galić*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, § 769.

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The ICRC has reminded parties to both international and non-international armed conflicts of the prohibition on terrorising the civilian population.⁶⁰

Examples

Examples of acts of violence cited in practice as being prohibited under this rule include offensive support or strike operations aimed at spreading terror among the civilian population,⁶¹ indiscriminate and widespread shelling,⁶² and the regular bombardment of cities,⁶³ but also assault, rape, abuse and torture of women and children,⁶⁴ and mass killing.⁶⁵ The indictments on the grounds of terrorising the civilian population in the above-mentioned cases before the International Criminal Tribunal for the Former Yugoslavia concerned deliberate and indiscriminate firing on civilian targets,⁶⁶ unlawful firing on civilian gatherings,⁶⁷ and a protracted campaign of shelling and sniping upon civilian areas.⁶⁸ These examples show that many acts violating the prohibition of acts or threats of violence aimed at terrorising the civilian population are also covered by specific prohibitions.

Rule 3. All members of the armed forces of a party to the conflict are combatants, except medical and religious personnel.

Practice

Volume II, Chapter 1, Section C.

Summary

State practice establishes this rule as a norm of customary international law in international armed conflicts. For purposes of the principle of distinction (see Rule 1), members of State armed forces may be considered combatants in both international and non-international armed conflicts. Combatant status, on the other hand, exists only in international armed conflicts (see introductory note to Chapter 33).

⁶⁰ See, e.g., the practice of the ICRC (cited in Vol. II, Ch. 1, §§ 556–558 and 561).

⁶¹ Australia, *Defence Force Manual* (*ibid.*, § 490).

⁶² UN General Assembly, Res. 53/164 (*ibid.*, § 542).

⁶³ UN Commission on Human Rights, Special Rapporteur on the Situation of Human Rights in the Former Yugoslavia, Report (*ibid.*, § 546).

⁶⁴ UN High Commissioner for Human Rights, Report on systematic rape, sexual slavery and slavery-like practices during armed conflicts (*ibid.*, § 547).

⁶⁵ OSCE, Kosovo/Kosova, as seen as told, An analysis of the human rights findings of the OSCE Kosovo Verification Mission (*ibid.*, § 549).

⁶⁶ ICTY, *Đukić case*, Initial Indictment (*ibid.*, § 551).

⁶⁷ ICTY, *Karadžić and Mladić case*, First Indictment (*ibid.*, § 553).

⁶⁸ ICTY, *Galić case*, Initial Indictment (*ibid.*, § 554).