



DEFENSIE
LA DÉFENSE

The principle of distinction

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The principle of distinction

1. Introduction
2. Combatants and civilians
 - a) Distinction in IAC
 - b) Distinction in NIAC
3. Civilian objects and military objectives



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1. Introduction

“The principle of distinction between combatants and non combatant (are) intransgressible principles of international, customary law and are so fundamental to the respect of the human person that they can be derived directly from a general principle of law, namely elementary considerations of humanity”

Nuclear Weapons Opinion, ICJ

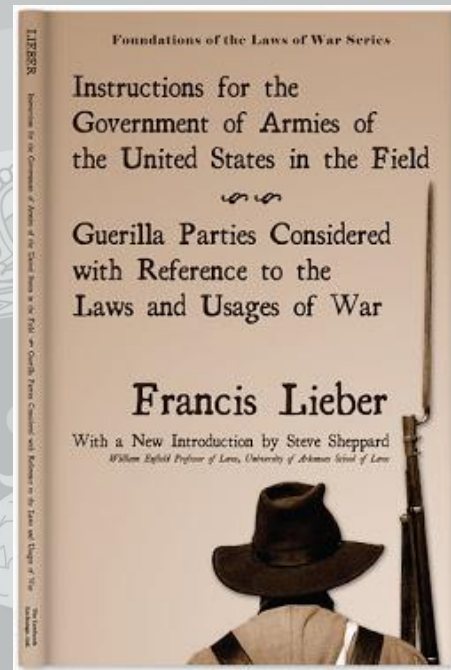


1. Introduction

Lieber code, 1863

Art. 21 . The citizen or native of a hostile country is thus an enemy, as one of the constituents of the hostile state or nation, and as such is subjected to the hardships of the war.

Art. 22. Nevertheless, 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. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.





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1. Introduction

Preamble of the St. Petersburg Declaration, 1868:

“The progress of civilization should have the effect of alleviating as much as possible the calamities of war; that the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy.”

2. Combatants and civilians - IAC

Basic rule

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.

Art. 48 AP I

2. Combatants and civilians - IAC

Combatant

Combatant immunity + POW status (only IAC)

Three groups of persons:

1. Members of the armed forces of a state (except...)
2. Members of other militia and volunteer corps (Incl resistanceGpn - vwn.)
3. Levée en masse





2. Combatants and civilians - IAC

Combatant

Geneva Conventions: no definition of armed forces, combatants
Combatants = POW status? Art. 4 GC III

A. Prisoners of war, in the sense of the present Convention, are persons belonging to one of the following categories, who have fallen into the power of the enemy:

- (1) 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.*
- (2) Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfil the following conditions:*
 - (a) that of being commanded by a person responsible for his subordinates;*
 - (b) that of having a fixed distinctive sign recognizable at a distance;*
 - (c) that of carrying arms openly;*
 - (d) that of conducting their operations in accordance with the laws and customs of war.*



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2. Combatants and civilians - IAC

Combatant

(3) Members of regular armed forces who profess allegiance to a government or an authority not recognized by the Detaining Power.

(4) Persons who accompany the armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces, provided that they have received authorization from the armed forces which they accompany, who shall provide them for that purpose with an identity card similar to the annexed model.

(5) Members of crews, including masters, pilots and apprentices, of the merchant marine and the crews of civil aircraft of the Parties to the conflict, who do not benefit by more favourable treatment under any other provisions of international law.

(6) Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war



2. Combatants and civilians - IAC

Combatant

1. The **armed forces** of a Party to a conflict 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. Such armed forces shall be subject to an **internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict.**
1. Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 [[Link](#)] of the Third Convention) are **combatants**, that is to say, **they have the right to participate directly in hostilities**

Art. 43 AP I



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2. Combatants and civilians - IAC

Combatant

Armed forces:

- Under a responsible command
- Being subject to an internal discipline
- All members - independent of function (status)
- Also members of militia and volunteer corps
- Possibility of incorporation





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2. Combatants and civilians - IAC

Combatant

2 additional requirements for POW-status for members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party:

- (a) having a fixed distinctive sign recognizable at a distance;
- (b) carrying arms openly;



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2. Combatants and civilians - IAC

Combatant

Consequences:

- *Combatant privilege*
- *Legitimate target*
- *POW- status*





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2. Combatants and civilians - IAC

Combatant

Consequences:

Distinguishing from the civilian population:

In order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:

- (a) during each military engagement, and*
- (b) during such time as he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate.*

Acts which comply with the requirements of this paragraph shall not be considered as perfidious within the meaning of Article 37, paragraph 1.

2. Combatants and civilians - IAC

Combatant

Levee en masse

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.



Art. 4A, 6 GC III



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2. Combatants and civilians - IAC

Civilians

Civilians: negative definition

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) [Link] of the Third Convention and in Article 43 [Link] of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.



Art. 50 (1) AP I



2. Combatants and civilians - IAC

Civilians

Civilians - consequences:

(Art. 51 AP I)

General protection against dangers arising from military operations:

- *Not object of attack.*
- *Prohibited to spread terror*
- *Indiscriminate attacks are prohibited.*
- *Attacks by way of reprisals are prohibited.*
- *Human shield.*



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2. Combatants and civilians - IAC

Civilians

Civilians – end of protected status:

Civilians shall enjoy the protection afforded by this Section, unless and for such time as they take a direct part in hostilities.

Art. 51, 3 AP I

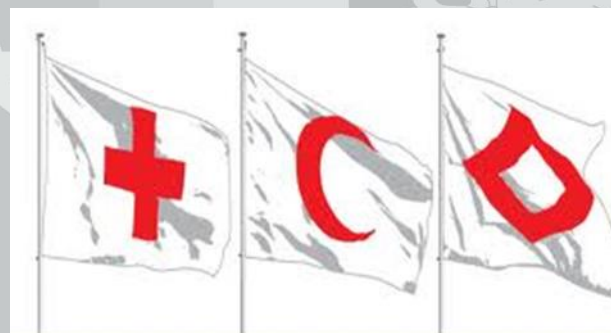


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2. Combatants and civilians - IAC

Special cases?

- Med Pers
- Civil Defence
- Mercenaries
- Private contractors
- Spies
-



2. Combatants and civilians - NIAC

The customary rule of distinction in NIAC:

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.

Customary law study , vol I, rule 1.

2. Combatants and civilians - NIAC

“Combatants”

- Functional definition (no combatant privilege or POW status in NIAC)
- Common Art. 3 >< Art 1 AP I
- Those who belong to armed forces or armed groups may be attacked at any time. (§4789, Commentary Art. 13 AP II)



2. Combatants and civilians - NIAC

“Combatants”

Membership vs Continuous combat function

ICRC DPH-study:

For the purposes of the principle of distinction in non-international armed conflict, all persons who are not members of State armed forces or organized armed groups of a party to the conflict are civilians and, therefore, entitled to protection against direct attack unless and for such time as they take a direct part in hostilities.

In non-international armed conflict, organized armed groups constitute the armed forces of a non-State party to the conflict and consist only of individuals whose continuous function it is to take a direct part in hostilities (“continuous combat function”).

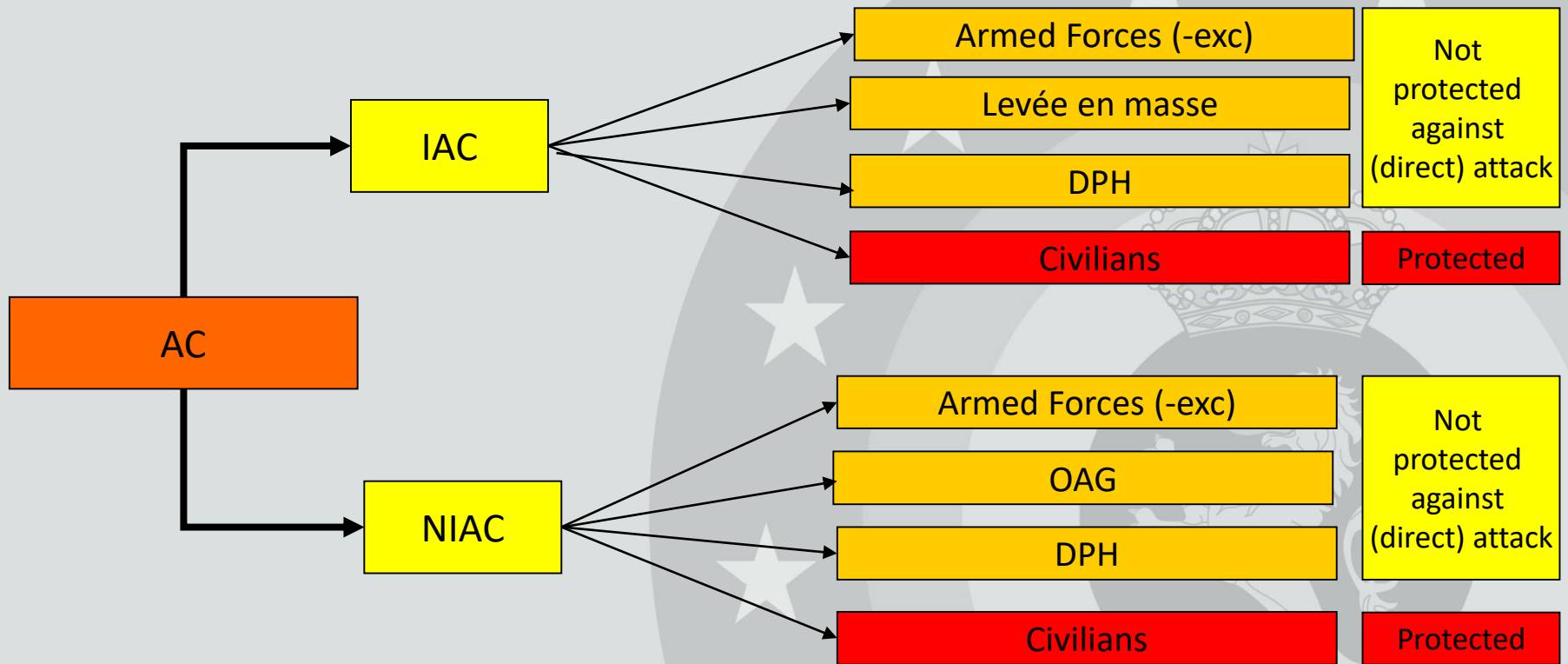


2. Combatants and civilians - NIAC

Civilians

- No definition in treaty IHL
- Draft article 25 (1) of AP II: *“a civilian is anyone who is not a member of the armed forces or of an organized armed group.”*
- Anyone not belonging to the armed forces of a party to the conflict (art. 3) or to state armed forces, dissident armed forces or an organized armed group of a party to the conflict (art. 1(1) of AP II).

2. Combatants and civilians - NIAC





3. Civilian objects and military objectives

Military objectives

Attacks shall be limited strictly to military objectives. In so far as objects are concerned, 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.**

(API-52/2)

3. Civilian objects and military objectives

Military objectives

Nature: Fundamental character

Location: Specific area

Purpose: Intended future use

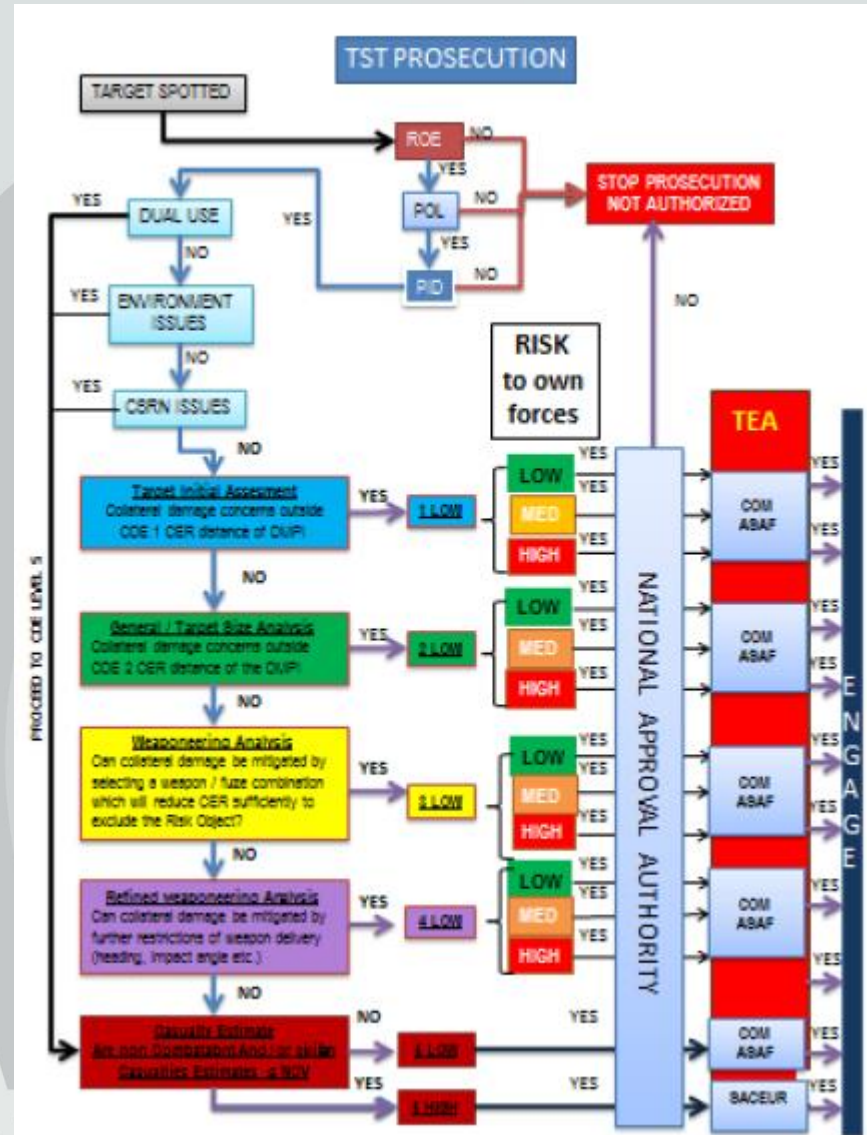
Use: Present use





Military objectives

- Dual use...
- War fighting – War sustaining





3. Civilian objects and military objectives

Civilian objects

«Gewone»
bescherming

«Bijzondere»
bescherming

Installaties
gevaarlijke
krachten

Goederen
onmisbaar
voor overleven

Culturele
goederen

Natuurlijk
milieu

Beschermde
zones



Algemene
bescherming

Bijzondere
bescherming

Versterkte
bescherming