THE PRINCIPLE OF DISTINCTION IN THE LIGHT OF CIVILIAN PROTECTION IN INTERNATIONAL ARMED CONFLICT*

Abstract

International Humanitarian Law draws a dividing line between civilians and combatants for the purpose of sparing the unarmed man against the effects of armed conflicts. This finds expression in the principle of distinction which permits direct attacks against the armed forces of parties to an armed conflict while those not or no longer taking a direct part in hostilities are to be spared of its effect. However, contemporary warfare blurs this distinction as such factors as the activities of Private Military Security Companies brings civilians closer and closer to the battlefield thereby creating doubt as to their status. The problem of this paper is whether civilians who take direct part in hostilities in whatever guise are entitled to protection under International Humanitarian Law. The paper appraised the principle of distinction within the context of international armed conflict. It also examined certain factors which create difficulty in the application of this principle in contemporary armed conflicts. It further considered the status of civilians who take active part in armed conflict. The paper adopted doctrinal methodology and analytical approach by which it x-rayed the principle of distinction within the context of the Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflicts 1977 and the Rome Statute of the International Criminal Court, 1998. This paper found civilians who are the primary beneficiaries of International Humanitarian Law now take active part in frontline battles. The result is that the sanctity of the principle of distinction between civilians and combatants is jeopardized as civilian protection which is the underlying basis of International Humanitarian Law is made very difficult. The paper recommends amongst other things the dissemination of the rules of International Humanitarian Law particularly among the civilian population; enactment of laws stipulating adequate, effective legal sanctions against civilians who take active part in hostilities; and stringent laws regulating the activities of Private Military Security Companies (PMSCs) operating within States’ territories.

Keywords: Civilians, Combatants, Principle of Distinction, International Humanitarian Law, International Armed Conflict

1. Introduction

The main thrust of International Humanitarian Law is to ‘limit human suffering in situations of armed conflicts while at the same time preventing atrocities’. It creates equilibrium between military necessity and concern for humanity; and in creating such a balance, while the humanitarian aspect puts a check on the extent of the effects of hostilities on civilians and civilian objects, the military aspect permits combatants to use such force that is lawful and necessary to achieve the intended military advantage. To achieve this protection, International Humanitarian Law consists of several fundamental principles of which the principle of distinction stands as the ‘gatekeeper of target selection’. The principle of distinction is a cardinal principle of International Humanitarian Law applicable in both international and non-international armed conflicts which ensures respect for and protection of civilians and civilian objects. It

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requires parties to an armed conflict to distinguish between civilians and civilian objects on the one hand and combatants and military objectives on the other hand. It further imposes on the parties an obligation to direct military operations only against military objectives but never against civilians and civilian objects except and for such times they take a direct part in hostilities. However, this protection can only be guaranteed where a clear line of distinction can be drawn between civilians and combatants, and accordingly, attacks directed against military objectives. Nevertheless, where this distinction is hazy or the status of the participants is in doubt, then, civilian protection becomes very difficult or almost impossible during the conduct of armed conflicts.

This paper however observes that the changing nature of the battlefield resulting from modern trends in armed conflicts such as increased reliance of States on the activities of Private Military Security Companies, the conduct of asymmetrical warfare, advancement in weaponry, human shielding tactics and global terrorism all constitute some obstacles to civilian protection as these activities facilitate the involvement of civilians in frontline balemtment either as victims or participants. These activities blur the distinction between civilians and combatants and threaten the sanctity of civilian protection thereby raising doubts as to the status of such civilians and whether they are lawful targets of military operations. Little wonder then, Eric Talbot observed as follows: ‘the recent erosion of the principle of distinction has certainly been one of the factors leading to an increase number of non-combatants’ deaths on modern battlefields. George Aldrich has also aligned himself to this in these words:

At the end of the nineteenth century, the overwhelming percentage of those killed or wounded were military personnel. Towards the end of the Twentieth century, the great majority of those killed or injured in the most international armed conflicts have been civilian non-combatants.

This is the situation in contemporary international armed conflicts where the intermingling of civilians and combatants in the battlefield beclouds the line of distinction between civilians and combatants and raises doubt as to the status of such civilians and whether they are still entitled to protection against military operations. This paper argues that civilians who are the primary beneficiaries of International Humanitarian

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3 Protocols Additional to the Geneva Conventions of 12 August, 1949 and Relating to the Protection of Victims of International Armed Conflicts, June 1977, Articles 48, 51(2) & (3), 52(2).
Law because they are presumed innocent during armed conflict cannot turn around to participate in hostilities and still expect to be protected. The paper contends that civilians who take active part in hostilities are lawful targets of military operation but only for such time they do so.

2. Nature and Scope of International Humanitarian Law

International Humanitarian Law ‘means international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems arising directly from international or non-international armed conflicts.’\(^{10}\) It regulates the conduct of armed conflicts in order ‘to limit human suffering in situations of armed conflicts while at the same time preventing atrocities’.\(^{11}\) International Humanitarian Law is therefore that branch of law that regulates the conduct of armed conflict by imposing a minimum standard expected of the parties to armed conflict. Oji aptly captures this when she asserts thus:

The essential purpose of these principles (International Humanitarian Law) is not to provide a code governing the game of war, but for humanitarian reasons to reduce or limit the suffering of individuals and to circumscribe the area within which the savagery of armed conflict is permissible.\(^{12}\)

The Geneva Conventions and their Additional Protocols did not define the term ‘armed conflict’. But then what is envisaged here is a situation of violent clashes between the armed forces of the parties to an armed conflict; it is any difference arising between two or more States leading to the intervention of armed forces even where one of the parties denies the existence of the state of war.\(^{13}\) The International Criminal Tribunal for the Former Yugoslavia gave a resounding definition in that regard. Thus: ‘(...) an armed conflict exists whenever there is a resort to armed forces between States or protracted armed conflict between governmental authorities and organized armed groups or between such groups within a State.’\(^ {14}\)

International Humanitarian Law recognizes two classes of armed conflicts, to wit, International and non-international armed conflicts. International armed conflicts are violent clashes involving two or more States referred to as High Contracting Parties under the Geneva Conventions. It includes all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties even if the situation of armed conflict is not recognised by the other party.\(^{15}\) In other words, it is a situation of arms resort between the armed forces of two or more States which may be a declared war or any other form of conflict the existence of which depends on verifiable facts in line with objective judgment.\(^ {16}\) The armed conflict may be a direct one or by way of intervention; where a foreign Power sends troops into the territory in favour of a rebel group. It can also be by proxy where the foreign Power merely supports and controls


\(^{13}\) AA Bouvier, *op cit,* p 23.

\(^{14}\) *Prosecutor v Tadic,* Decision of the Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, p 70.

\(^{15}\) Geneva Conventions, *op cit,* common Article 2(1).

\(^{16}\) J Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field,* (1952), vol I.
from a distance. The level of control required to qualify the conflict as international armed conflict must be of an overall character.\(^\text{17}\) This means that the foreign Power has a role in organising, co-ordinating or planning the military actions of the said group. This may also include financing, training and equipping or provision of operational support to the group. The hostilities must be characterised by the intention to harm the enemy. However, international armed conflict cannot be said to exist where a party consents to a foreign Power’s intervention in its territory. International armed conflict can also be by way of occupation whether partial or complete; even where such occupation met with no armed resistance.\(^\text{18}\) International armed conflict has further been extended to include situations where people are fighting in the exercise of their right of self-determination as provided under the United Nations Charter.\(^\text{19}\) On the other hand, non-international armed conflicts are armed conflicts in which at least one of the parties is not governmental. The classical type of non-international armed conflicts is fought between governmental forces and one or more organised armed group(s) or between such organised armed groups within the territory of a High Contracting Party.\(^\text{20}\) The scope of the application of International Humanitarian Law does not therefore extend to situations of internal violence or tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature.\(^\text{21}\) Internal violence and tensions are strictly the internal affairs of States.

3. Purpose of International Humanitarian Law

The experience of Henry Dunant during the war in Solferino motivated him to call on the international community to find a way of fighting wars in a more humane way to forestall the kind of atrocities he witnessed during the said war. Hence, the focus of International Humanitarian Law is to limit the effect of war on innocent civilians and those who are no longer taking active part in hostilities (\textit{hors de combat}). It also restricts the means and methods of warfare available to the parties\(^\text{22}\) and protects civilian objects/property. In other words, International Humanitarian Law ensures that the rule of law takes upper hand in the conduct of armed conflicts by according protection to persons not taking active part in armed conflict. The concern of International Humanitarian Law is not whether parties to an armed conflict satisfy the conditions of engaging in war rather its concern is to regulate the conduct of parties engaging in war. It is for this reason that the law distinguishes between \textit{Jus in Bello} and \textit{Jus ad Bellum}. Whereas \textit{Jus in Bello} (International Humanitarian Law) is concerned with the regulation of the conduct of parties engaged in armed conflicts, \textit{Jus ad Bellum} regulates the conditions for engaging in armed conflict (use of force). To make the protection of civilians effective during armed conflicts, International Humanitarian has put in place several fundamental principles such as the principle of military necessity, the principle of proportionality and the principle of distinction. However, the concern of this paper is the principle of distinction.

\(\text{17}\) \textit{Prosecutor v Tadic, supra}, paragraph 137; \textit{Bosnia and Herzegovina v Serbia and Montenegro}, (Judgment), ICJ Reports 2007, 26 February 2007, paragraph 404.
\(\text{19}\) Article 1(4), Protocol I, \textit{supra}.
\(\text{20}\) \textit{Prosecutor v Tadic}, Case No.IT-94-1-T, Opinion and Judgment, paragraph 616 (May 7, 1997).
\(\text{21}\) Protocol II, \textit{op cit}, Article 1 (2).
\(\text{22}\) Protocol I, \textit{op cit}, Article 35.
The Principle of Distinction in International Humanitarian Law

The Principle of distinction is a cardinal and intransgressible principle of International Humanitarian Law which ensures respect for and protection of persons not and those no longer taking active part in hostilities. The principle is recognized as Rule 1 of Customary International Humanitarian Law applicable in both international and non-international armed conflicts. The principle was also enunciated in St. Petersburg Declaration which provides that ‘the only legitimate object which states should endeavour to accomplish during war is to weaken the military forces of the enemy’. The Hague Regulations annexed to the Hague Conventions of 1907 implied the application of this same principle when it forbade ‘the attack or bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended’. However, the principle of distinction in respect of international armed conflicts is basically codified under the Protocol I and the texts provide as follows:

In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall always distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.

However, attacks against the civilian population and individual civilian during armed conflict is not in itself illegal as International Humanitarian Law permits combatants to carry out attacks on military objectives even where there is the knowledge that such attacks will result in civilians’ death and loss of property (collateral damage). The law only frowns at intentional and disproportionate attacks or a situation where an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage. The principle of distinction therefore implies precision and precaution in the exercise of military operations so that the harm caused to civilians or civilian property will be proportionate and not excessive in relation to the concrete and direct military advantage anticipated. To further strengthen this principle, the Statute of the International Criminal Court forbids such acts as the intentional targeting of civilians; the launching of attacks on military objectives in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage.

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25 Nuclear Weapon case, supra.
26 St. Petersburg Declaration, 1868, Preamble.
27 The Hague Regulations, Article 25.
28 Protocol I, ibid, Articles 48, 51(2) and 52(2).
29 Protocol I, ibid, Article 48.
30 Ibid, Article 52 (2).
31 Ibid, Article 52 (2).
33 Ibid, Article 8(2)(b)(iv); Protocol I, op cit, Article 51(5)(b).
34 Protocol I, op cit, Article 57.
35 Ibid, Articles 51(5)(b), and 52.
36 Ibid, Article 8(2)(b)(i).
excessive in relation to the anticipated military advantage; and the killing or wounding of persons who are hors de combat. The violation of these provisions constitutes War Crime. However, the protection of civilians is not absolute under International Humanitarian Law. Civilians are only entitled to protection so long as they do not take active part in hostilities. Hence, Article 51(3) of AP I provide that ‘civilians shall enjoy the protection afforded by this section unless and for such time as they take a direct part in hostilities.’ It follows then that once civilians become hostile or take direct part in hostilities, they become lawful targets of military operations. They nevertheless regain their immunity once they ceased to be hostile. The Commentary on the Additional Protocols confirms this position as follows:

If a civilian participates directly in hostilities, it is clear that he will not enjoy any protection against attacks for as long as his participation lasts. Thereafter, as he no longer presents any danger for the adversary, he may not be attacked.

The provision of Article 48 on the principle of distinction is the replication of Rule 1 of Customary International Humanitarian Law which by virtue of State practice binds even States that are not parties to the Protocol I.

5. Civilians as Major Beneficiaries of the Principle of Distinction under International Humanitarian Law

The Protocol I defined a civilian as:

‘Any person who does not belong to one of the categories of persons referred to in Article 4 A (1)(2)(3) and (6) of the 3rd Geneva Convention and in Article 43 of this Protocol’. On the other hand, it defined civilian population as comprising of all persons who are not civilians. For the purpose of clarity, the category of persons referred to in the above two Articles are:

(a) Members of armed forces of a party to the conflict;
(b) Members of militias or volunteer corps forming part of such armed forces;
(c) Members of other militia and members of other volunteer corps including those of organized resistance movements provided they have a chain of command, wear a distinctive mark, carry arms openly and comply with the laws and customs of war;
(d) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power;
(e) People who accompany the armed forces without actually being members
(f) Members of crews; and
(g) Levee en mass

Civilians quite unlike combatants are not lawful targets of military operations. Article 51 of Protocol I specifically accord civilians both special and general protection against direct attack since the protection of civilians and those hors de combat underscores International Humanitarian Law. To that extent, the

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37 Ibid, Article 8(2)(b)(iii).
38 Ibid, Article 8 (2)(b)(v).  
39 Ibid, Article 8(2)(b).
40 International Red Cross and Crescent Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, (Yves Sandoz Eds., 1987) at 4789.
41 Article 50(1).
42 Ibid, Article 50(2).
law forbids deliberate and indiscriminate attacks against civilians. Indiscriminate attacks are attacks which are not directed against specific military objective\textsuperscript{43} or attacks which employs means or method of warfare which cannot be directed against a specific military objective\textsuperscript{44} or any attack that adopts means or method of warfare which effect cannot be limited as required by law.\textsuperscript{45} In other words, it forbids any means or method of warfare which has the nature of striking both military objectives and civilians without distinction. The law further forbids reprisal attacks against civilians\textsuperscript{46} and the use of civilians as shields\textsuperscript{47}. Means or methods of warfare that has the capacity of inflicting superfluous harm or unnecessary injury are also prohibited\textsuperscript{48}. The presence of persons other than civilians within the civilian population shall not deprive the population of its civilian character.\textsuperscript{49} The protection accorded civilians under the principle of distinction also extends to civilian objects and objects\textsuperscript{50} indispensable to the survival of civilians.\textsuperscript{51} However, this protection is not absolute: it ceases to be effective once civilians take active part in hostilities.\textsuperscript{52} The import is that civilians who take active part in hostilities do not cease to be civilians but then they lose their immunity for such time they take part in hostilities.

6. What Constitutes Direct Participation in Hostilities for the Purposes of the Principle of Distinction?

An online dictionary defines hostilities as ‘fighting; acts of overt warfare’.\textsuperscript{53} Verri, defines it as ‘acts of violence by a belligerent against an enemy, in order to put an end to his resistance and impose obedience’.\textsuperscript{54} The Commentary of the International Committee of the Red Cross (ICRC) on the other hand, defines hostilities as ‘acts of war which are intended by their nature and purpose to hit specifically the personnel and the material of the armed forces of the adverse Party.’\textsuperscript{55} The ICRC’s Interpretative Guidance further defines hostilities as the ‘collective resort by the parties to the conflict to means and methods of injuring the enemy’.\textsuperscript{56} On the other hand, ‘participation in hostilities’ is defined as ‘specific acts carried out by individuals as part of the conduct of hostilities between parties to an armed conflict.’\textsuperscript{57} However, it is not every act that constitutes direct participation in hostilities, capable of robbing civilians and those not taking direct part in hostilities of the protection accorded them under International Humanitarian Law.\textsuperscript{58} The level and the nature of the participation determine whether or not the participation is direct. What amounts to

\begin{itemize}
\item protocol I, \emph{Ibid} Article 51(4)(a).
\item ibid, Article 51(4)(b).
\item ibid, Article 51(4)(c).
\item ibid, Article 51(6).
\item ibid, Article 51(7).
\item ibid, Article 57.
\item ibid, 50(3).
\item ibid, Article 52(1).
\item ibid, Article 54.
\item ibid, Article 51(3).
\item N Melzer, \textit{op cit}, p 43.
\item ibid, part 1, p 19.
\item Protocol I, \textit{op cit}, Article48.
\end{itemize}
direct participation in hostilities is therefore a question of fact,\textsuperscript{59} to be determined on case by case basis. Therefore, the Interpretative Guidance provides a yardstick for the assessment of what constitutes direct participation in hostilities.\textsuperscript{60} The conditions are:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or alternatively inflict death, injury, or destruction on persons or objects protected against direct attack. This is also known as the threshold of the harm. The harm need not materialize for such a threshold to be attained. It is enough that such harm may be reasonably expected to result from the act.

2. There must be a direct causal nexus between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part. This is also called the direct causation element. This condition is satisfied where the said specific act designed to bring about the harm has enough close causal connection between the act and the resulting harm; that is, the resultant harm must directly proceed from the specific act. Acts that merely maintains the capacity of a party to harm its adversary does not constitute direct participation in hostilities within the meaning of International Humanitarian Law. Thus, acts such as recruitment and training of personnel, will not amount to direct participation in hostilities unless such recruitment and training is for the performance of a specific act considered as an integral part of that act.

3. The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another. This is also called the belligerent nexus. However, not every specific act carried out during hostilities which adversely affects military operations or military capacity or directly causes death, injury or destruction on protected persons and objects amounts to direct participation. The belligerent nexus must be assessed alongside the first and second elements.

7. Lawful Targets of Military Operations
International Humanitarian Law limits direct attacks to military objectives.\textsuperscript{62} In other words, the only lawful targets during military operations are military objectives. Military objectives also include combatants who constitute human military objectives and other non-human objects.

Combatants
There are only two legally recognized classes of persons under International Humanitarian Law, to wit, combatants who are entitled to fight on behalf of a party to the armed conflict and civilians who are entitled to be protected against the effects of,\textsuperscript{63} unless and for such times they take a direct part in hostilities.\textsuperscript{64} There is no intermediate class between these two. The Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1977(herewith referred to as Protocol I), provides that the 'members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Geneva Convention) are combatants, that is to

\textsuperscript{60}Ibid, p 40 f., 43 f., and 49 f.,
\textsuperscript{62}Protocol I, op cit, Article 48.
\textsuperscript{63}Protocol I, op cit, 48, 51(2) and 52(2).
\textsuperscript{64}Protocol I, op cit, Article 48.
say, they have the right to participate directly in hostilities’. On the other hand, the Third Geneva Convention, for the purposes of granting Prisoner of War status considers the following category of persons as combatants:

(a) Members of armed forces of a party to the conflict
(b) Members of militias or volunteer corps forming part of such armed forces
(c) Members of other militia and members of other volunteer corps including those of organized resistance movements provided they have a chain of command, wear a distinctive mark, carry arms openly and comply with the laws and customs of war.
(d) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power
(e) People who accompany the armed forces without actually being members
(f) 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 and
(g) The inhabitants of 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 a regular armed units, provided they satisfy the legal requirements of carrying arms openly and respect the laws and customs of war.

However, the term combatant is used in its generic sense to refer to persons who do not enjoy the protection accorded civilians against direct attack and does not imply a right to combatant status or prisoner of war status.

Military Objectives
Military objectives are defined as:

...those objects which by their nature, location, purpose or use make an effective contribution to military action and purpose and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Military objectives therefore include both material and human military objectives. Some objects are intrinsically military in character, for example munitions factory, while others take up military character by virtue of their location, use (a Church, a Mosque or a School). Thus, where a Church, a Mosque or a School is used for military purposes, it automatically becomes a military objective for such time it so used. An object must satisfy two cumulative conditions for it to be considered a military objective. The object must first, by its nature, purpose, location or uses contribute effectively to the military action of the opponent. This means that even objects that are not of a military nature can be military objectives where they satisfy the above requirements. Thus, where a Church, a Mosque or a

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65 Protocol I, op cit, 43(2).
66 Geneva Convention Relative to the Treatment of Prisoners of War, op cit, Article 4 A (1).
67 N Melzer, p 22.
68 Ibid, 4 A (2).
69 Ibid, Article 52 (2).
School which is prima facie civilian in nature is used for a military purpose, it automatically becomes a military objective for such time it is so used. However, where there is doubt as to whether an object is military or not, the doubt is to be resolved in favour of civilians.

The second requirement as to the assessment of military objectives is that its total or partial destruction, capture or neutralization, in the circumstances ruling at the time, must offer the enemy a definite military advantage. The nature, location, purpose or use of the objects, therefore constitute the yardstick for evaluating whether the object contributes effectively to military action or whether its destruction, capture or neutralization offers a definite military advantage. Military objectives do not simply cease to be so because of the presence of civilians within or close to them. They remain legitimate targets of military operations despite the presence of civilians. On the other hand, civilians who find themselves in or around such military objectives for whatsoever reason will also be subject to attack. In other words, military objectives do not metamorphose into protected objects because of the presence of protected persons or objects in or around them; neither do civilians claim protection where they find themselves within or around military objectives. Furthermore, although the principle of distinction permits attacks on military objectives, the attack may nevertheless be unlawful if the collateral damage that will affect civilians and civilian objects is foreseeable or anticipated. The essence of this limitation is to ensure balance between military necessity and consideration for humanity. Precision and precaution are therefore required in carrying out such military operations.

8. Factors Militating against Civilian Protection in the Light of the Principle of Distinction

Before now, the distinction between civilians and combatants was as clear as the daylight. However, this distinction is becoming less obvious in modern warfare. This is as a result of certain trends in modern armed conflicts which facilitate the involvement of civilian even in frontline battle. These trends include amongst other things:

Advancement in Weaponry

As development and sophistication of modern weapons systems soar, civilians become more and more involved in the maintenance and operation of these systems. For instance, civilians have become increasingly involved in activities such as ‘design, manufacture, aircraft maintenance, security, transportation of troops and ammunitions and other tasks implicating the laws and customs of war’. During the World War II, the attack on civilian population was justified for the simple reason that they augmented military effort. The use of civilians in such capacities creates difficulty as to their status:

73 M T Ladan, op cit, p 138.
75 Protocol I, op cit, Article 57.
78 E A Oji, op cit ,p 9.
and exposes them to the danger of direct attack. These activities have increased the presence of civilians in the battlefield thereby impeding the application of the principle of distinction.

**Privatization of the Military**

Civilians were not traditionally part of hostilities. However, the engagement of the services of PMCs by government and other bodies is a common trend in contemporary armed conflicts and one recent shift in the dynamics of warfare with a serious implication on the principle of distinction. Privatization of the Military Companies are companies that perform tasks that were traditionally executed by the military of a sovereign nation. These companies provide a wide range of services including 'security services, training of troops and sometimes combat operations to replace or back-up an army or army group to enhance effectiveness'. These services are ‘identical to those of governmental security, military or police forces but usually on a smaller scale’. There has been confusion as to the status of the employees of Private Military Companies. The situation becomes even hazier where these employees partake in activities more closely related to military operations. These activities expose the ‘civilian employees’ of the PMCs to the dangers of armed conflicts thereby constituting serious challenge to the principle of distinction. This is against the backdrop that the effective application of the principle of distinction is hinged on a clear line of distinction between civilians and combatants on the one hand and combatants and military objectives on the other hand.

Private Military Companies so to speak do not constitute parties to an armed conflict under International Humanitarian Law because they do not meet the requirements as combatants as some of them are not incorporated into the armed forces of a State, thus their membership is not linkable to any of the Parties to the armed conflict. Although incorporation is dependent on the will of States, the law requires that where PMCs are so incorporated, that due notice be given to the adverse Party to enable it to determine with certainty who the combatants on the other side are. The dividing line between which activities of the PMCs amounts to direct participation in hostilities is not clear-cut in contemporary armed conflicts; this is evaluated on case-by-case basis. It is therefore sometimes difficult to determine when they are to be considered civilians and when they qualify as combatants. However, the position is that where PMCs are not incorporated into the armed forces of a State, they are considered as civilians and do not cease to be so because they take active part in hostilities. They rather lose the protection accorded them for such time they take active part in hostilities. However, where they are incorporated, they qualify ‘as members of organized armed forces or group or unit under a responsible command to a party to the conflict. They are therefore combatants for the purpose of the principle distinction.

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80 *Ibid*, p 68.


84 Protocol I, *op cit*, Article 43(3).

Human Shielding Tactics

Human shielding is a situation whereby civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict. For instance, during the Operation Iraqi Freedom, some civilians travelled to as far as Iraq for the purpose of serving as human shields against the British and American attacks. The presence of civilians in or near military objectives constitutes an obstacle to the military operations of the adverse party because it blurs the line of distinction between civilians and military objectives. Human shielding tactics is a violation of International Humanitarian Law, thus the law provides as follows:

The presence or movement of the civilian population or civilians shall not be used to render certain points or areas immune from military operations, in attempts to shield military objectives from attacks or to shield, favour or impede military operations.

In fact, the Committee of the Red Cross and Crescent has once declared it a cruel and barbaric act. Nonetheless, it has been posited that ‘where civilians voluntarily and deliberately position themselves to create a physical obstacle to military operations of a party to the conflict, they could directly cause the threshold of harm required for a qualification as a direct participation in hostilities’. As such, civilians who voluntarily position themselves to shield military objectives from attack, are like the military objective liable to attack for such time they do so.

9. Conclusion

The principle of distinction has been recognised as the most basic principle that ‘determines the feasibility of the other principles of International Humanitarian Law’. However, the protection afforded under this principle is specifically for civilians not taking active part in hostilities and can only be guaranteed where a clear line of distinction can be drawn between civilians and combatants. However, modern trend in contemporary armed conflicts blur this distinction thereby making civilian protection very difficult or almost impossible. To ensure the effectiveness of civilian protection, this paper recommends amongst other things the domestication of the Relevant Treaties of International Humanitarian Law by States. It also recommends dissemination of the rules of International Humanitarian Law particularly among the civilian population. In addition, States should enact laws stipulating Adequate, Effective and Appropriate Legal Sanctions against civilians who take active part in hostilities. States should also enact stringent laws regulating the activities of Private Military Security Companies (PMSCs) operating within their territories.

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88 A Rubinstein and Y Roznai, op cit, p 97.
90 Protocol I, op cit, Article 51(7).
91 A Rubinstein and Y Roznai, op cit, p 103.
92 Public Committee against Torture in Israel v Government of Israel, Case No. HCJ 769/02,13(‘Targeted Killing Case’), N Melzer, op cit, p 56; Prosecutor v Karadzic &Mladic, Case No. IT-95-14-A.