

expression of this norm is found within Article 48 of Additional Protocol I to the Geneva Conventions¹⁹. The principle obliges the belligerents to distinguish at all times between non-combatants and combatants, as well as between civilian property and military objectives. Consequently military operations may only be directed against military objectives²⁰. From the principle of distinction flows a duty of care, which is imposed upon those who plan military operations. In planning an attack everything feasible must be done to verify that the objective to be attacked is neither civilians nor a civilian object but is in fact a legitimate military objective. This is an obligation of means and not an obligation of results. If there is a doubt that a civilian object is being used to make an effective contribution to military action, it must be presumed not to be so used and must not be attacked²¹. Consequently, civilians may not take part in hostilities. At this point it is important to note that LOAC establishes a difference between civilians who are taking a direct part in hostilities thus losing their protection and those who are only making a contribution in the war effort and who do not lose their protection.²².

The corollary of the principle of distinction is that attacks must not be indiscriminate. An indiscriminate attack is defined as being one which²³:

- Is not directed at a specific military objective;
- Employs a method or means of combat which cannot be directed at a specific military objective; or
- Employs a method or means of combat the effects of which cannot be limited as required by AP I.

Furthermore civilians and civilian objects may not be the object of reprisals.²⁴

I 4. Proportionality

The principle limits the effects of attacks by attempting to establish a balance between the military interests and the humanitarian interests. During the conduct of military operations constant care is to be taken to spare the civilian population, civilians and civilian objects²⁵. In planning and executing military operations, military planners must take all feasible and reasonable precautions in the choice of means and methods of attack in order to avoid, or at least to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects²⁶. Thus military operators must refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated²⁷. Should it become apparent that the object to be attacked is not a legitimate military objective, or that the attack may be expected to cause incidental loss of civilian life or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated, the said attack must then be cancelled²⁸. Furthermore, should there exist a

¹⁹ Reprinted in Roberts & Guelff supra note 5 at 419.

²⁰ A.P. I art. 48. It is interesting to note the following comment in the United States, Department of Defense Report to Congress on the Conduct of the Persian Gulf War, Appendix on the Role of the Law of War (hereinafter referred to as "The Gulf War Report") reprinted at 31 I.L.M. 612 (1992), "Article 48 API "states that attack means acts of violence against the adversary, whether in offence or defence. The use of the word attack in this manner is etymologically inconsistent with its customary use. The word attack historically has referred to and today refers to offensive operations only... "The language of art 48 and 49(1) (except for the erroneous use of the word attack) is generally regarded as a codification of the customary practice of nations, and therefore binding on all". At p. 625.

²¹ AP I Art. 52.3, supra note 11. It is interesting to note that, within the Gulf War Report, this disposition is criticized as not reflecting customary international law as it "shifts the burden for determining the precise use of an object from the party controlling that object (and therefore in possession of the facts as to its use) to the party lacking such control and facts... This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat." supra note 20, at 627.

²² According to A.P.V. Rogers "Taking a direct part in hostilities must be more narrowly construed than making a contribution to the war effort, and it would not include taking part in arms production or military engineering works or military transport.", *Law on the Battlefield*, (Manchester University Press, Manchester et New York, 1996) at 8.

²³ AP I art 51.4. The principle was reaffirmed by the ICJ in the Nuclear Weapons Case "States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets". supra note 6, para. 78, supra note 11.

²⁴ A.P. I art. 51 para. 6, art 52 para 1, art. 53 para c, art 54, para 4, art 55, para 2, art 56 para 4, supra note 11.

²⁵ A.P. I, art. 57.1, supra note 11.

²⁶ A.P. I art. 57.2 (a) ii) and art 57.4, supra note 11.

²⁷ A.P. I art. 57.2 (a) iii), supra note 11.

²⁸ A.P. I art. 2(b), supra note 11.