

**Distinction**

# Definition

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- Article 48, Additional Protocol I:  
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.
- History
  - Declaration of St. Petersburg 1868 - weaken only the military forces of the enemy.
  - Article 23(g) Hague Regulations 1907 - forbidden to destroy or seize enemy's property, unless such destruction or seizure is imperatively demanded by the necessities of war.
- Article 52(2), Additional Protocol I - definition of 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 neutralisation, in the circumstances ruling at the time, offers a definite military advantage.

# Article 52(2)

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- Military objectives according to
  - Nature - objects which are directly used by the armed forces such as weapons, equipment, military transport, fortifications, depots, buildings occupied by armed forces, staff headquarters, military communications centers etc.
  - Location - objects which by virtue of their location make an effective contribution to military action, such as bridges, areas of land (including hills - ICTY *Blaskic* decision).
  - Purpose - objects which if used in the future will make an effective contribution to military action.
  - Use - objects which in their current use make an effective contribution to military action.
- Article 52(3) - in case of doubt, assume it is a civilian object.

# Definite Military Advantage

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- Destruction, capture or neutralisation of the military objective has to offer a 'definite military advantage' in the circumstances ruling at the time.
  - 'Definite' requires continuous obligation to evaluate and ensure that targeted object is a military objective.
- Military advantage
  - Specificity - evaluated in reference to the attack as a whole
  - Connection between jus ad bellum and jus in bello
- NATO Targeting
  - ICTY Committee of Experts - strikes on tactical targets, such as artillery and field headquarters, had a more immediate effect in disrupting the ethnic cleansing of Kosovo, while strikes against strategic targets, such as government ministries and refineries, had long term and broader impact on the Serb military machine.

# Customary Definition of Military Advantage

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- Debate over US definition of military advantage - includes war-sustaining capability.
- US targeting of oil fields in ISIS-controlled region in Syria in 2016 - destruction of oil trucks, oil wells and bulk cash stockpiles.
  - Criticism - connection between revenues earned from oil exports and the military action was considered 'too remote' to constitute direct military advantage.
- US targeting 'laboratories' producing heroin and other opiates in Afghanistan in 2017
  - Found that only one target was factually engaged in heroin production, whereas the other compounds were long abandoned.
- UN Report in 2019 - war-sustaining argument construes financial assets as military targets and unnecessarily puts wider civilian infrastructure at risk, thereby violation of principle of distinction.

# Protection of Civilians and Civilian Objects

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- Civilians and civilian objects shall not be the object of attack or of reprisals.
- Definitions
  - Civilian (Article 50(1), API) - anyone who does not belong to one of the categories of persons referred to in Article 4(A)(1), (2), (3), and (6) of the Third Geneva Convention, 1949, or Article 43, API.
  - Civilian objects (Article 52(1), API) - all objects which are not military objectives as defined in Article 52(2), API
- ICTY, Prosecutor v Galic - “there is an absolute prohibition on the targeting of civilians in customary international law” and that “the prohibition against attacking civilians and civilian objects may not be derogated from because of military necessity”.

# Presence of Combatants in Civilian Population

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- Article 50(3), API - The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.
  - ICRC - in wartime conditions, combatants may intermingle with civilian population. Provided that these are not regular units with fairly large numbers, does not change the civilian character of the population.
  - ICTY Appeals Chamber, Prosecutor v Blaskic - presence of combatants does not necessarily change the civilian status of the population, subject to situations in which the population is actually combatant with civilians intermingled, rather than a civilian population with some combatants'.

# Objects Indispensable to the Civilian Population

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- Article 54, API - starvation of the civilian population and destruction of objects indispensable to the survival of the civilian population for the purpose of denying them their sustenance value to the civilian population or to the adverse Party are prohibited
- Eritrea-Ethiopia Claims Commission
  - Ethiopia bombarded a reservoir claiming that the loss of water supply to Eritrean military would contribute to military advantage. Eritrea claimed that the reservoir only served the civilian population.
  - Eritrea not a party to API, but Commission upheld customary status of the protection of objects indispensable to civilian population.
  - Held that Ethiopia deliberately targeted the reservoir to deprive Eritrea of the sustenance value of its water.

# Sieges

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- Article 25, Hague Regulations 1907 - prohibition of attacks on undefended towns or villages. Sieges on defended towns or villages are permitted only if all necessary steps are taken to spare, as far as possible, buildings dedicated to religion, art, science or charity.
- Article 17, Fourth Geneva Convention 1949 - Parties to the conflict must conclude agreements for the removal of the wounded, sick, infirm and aged, children and maternity cases from besieged or encircled areas and for the passage of medical personnel and chaplains to such places.
- Article 54, API - starvation of combatants is a legitimate means of warfare (owing to certain restrictions) but not so for civilians. Laying siege to a defended town and not letting supplies in to force the enemy to surrender violates Article 54 if it results in the starvation of the civilian population as well.