

An Analysis of the Principle of Distinction in IHL: A Case Study of “Al-Aqsa Storm” and Israeli military response

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Abstract

The "Al-Aqsa Storm" operation on October 7, 2023, along with Israel's ongoing military responses over the past year, has resulted in substantial civilian casualties and significant damage to civilian infrastructure. While this conflict can be analyzed from various perspectives, including *jus ad bellum* and *jus in bello*, the alarming number of civilian casualties underscores the urgent need to focus on the principle of distinction. Although the International Court of Justice (ICJ) recognizes this principle as a cornerstone of international humanitarian law, the tragedies witnessed over the past year necessitate a thorough scientific re-examination of its

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application. This article aims to clarify the meaning and significance of the principle of distinction, assessing its observance during the hostilities in Gaza-Israel War. Additionally, it addresses the issue of civilian direct participation in the conflict, arguing that the stringent criteria governing such participation do not justify the loss of protection for civilians.

Keywords: Al-Aqsa Storm Operation, Hamas, Humanitarian Law, Israel, Principle of Distinction

Introduction

Following the "Al-Aqsa Storm" operation launched by Hamas on October 7, 2023, and the subsequent Israeli military response, thousands of civilians have been killed or injured in Gaza and Israel. In addition, numerous civilian infrastructures, including hospitals, schools, and residential areas, have been destroyed or severely damaged. Beyond the immense human suffering, these events can also be examined through the lens of international law, particularly international humanitarian law (IHL). A core principle of IHL is the principle of distinction, which the International Court of Justice (ICJ) has described as one of the "cardinal" principles forming the "fabric of humanitarian law" in its ruling on the *Legality of the Threat or Use of Nuclear Weapons* case. The Israel-Gaza conflict has raised critical questions about adherence to this principle, specifically regarding the protection it affords to civilians and civilian objects from direct attack. This article will provide a brief overview of the principle of distinction within IHL, followed by an analysis of the challenges and violations related to this principle during the "Al-Aqsa Storm" operation and the Israeli military operations in Gaza between October 7 and November 1, 2023.

I. The Concept of Principle of Distinction

First and foremost, it is important to recognize that the obligations imposed by IHL are universal and apply equally to all parties involved in an armed conflict, irrespective of which party initiated the hostilities. In other words, these legal obligations are mutual and include the absolute prohibition of direct and indiscriminate attacks against civilians, as well as the prohibition of causing disproportionate collateral damage.¹

It should be emphasized that the primary aim of IHL is to regulate armed conflicts by balancing military necessity with humanitarian concerns. The principle of distinction, one of the core tenets of IHL, stems from this balance. As noted by the ICJ, the principle of distinction is intended to protect "the civilian population and civilian objects and establishes the distinction between combatants and non-combatants." Furthermore, this principle mandates that "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".²

The principle of distinction, considered fundamental in determining legitimate targets during armed conflicts, was first articulated in the 1868 St. Petersburg Declaration. This declaration emphasized that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy".³ The

¹ . Jens David Ohlin, "International Criminal Law Analysis of the Situation in Israel", (12 October 2023), *Opinio Juris*, Available at: [International Criminal Law Analysis of the Situation in Israel - Opinio Juris](#)

² . *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] I.C.J. Rep, para.78

³ . In this regard see:

principle was further reflected, albeit implicitly, in Article 25 of the Hague Regulations.⁴ Today, this principle is firmly enshrined in various sources of international humanitarian law, including the Geneva Conventions of 1949 and their Additional Protocols. For example, Article 48 of the First Additional Protocol explicitly states: "The Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and shall direct their operations only against military objectives".⁵

The obligations arising from this principle require parties to a conflict not to use weapons that cannot adequately distinguish between combatants and civilians.⁶ This principle is recognized as a customary rule of international law and is binding even on States that are not parties to the Geneva Conventions or their Additional Protocols. The International Committee of the Red Cross (ICRC) has identified this principle as the first and seventh of its customary rules governing all armed conflicts.⁷

Despite certain differences in the rules governing internal and international armed conflicts, the principle of distinction holds equal

IHL Treaties - St Petersburg Declaration relating to Explosive Projectiles, 1868 - Declaration (icrc.org)

⁴ . See:

IHL Treaties - Hague Convention (IV) on War on Land and its Annexed Regulations, 1907 - Regulations: Art. 25 (icrc.org)

⁵ . See:

IHL Treaties - Additional Protocol (I) to the Geneva Conventions, 1977 - Article 48 (icrc.org)

⁶ . Borrie, John, "Unacceptable Harm: A History of how the treaty to ban cluster munitions was won", (2009) New York: United Nations Institute for Disarmament Research, p.18

⁷ . In this regard see:

Customary IHL - Rules (icrc.org)

normative importance in both contexts.⁸ In internal armed conflicts, just as in international ones, belligerents are obligated to distinguish, under all conditions and circumstances—even in cases of military necessity—between combatants (whether regular or irregular) and civilians, as well as between military and civilian property.⁹

II. Losing Protection: Direct Participation in Armed Conflict

Civilians lose the protection afforded by the principle of distinction against armed attacks only when they are directly participating in hostilities. However, not every form of civilian involvement in a conflict qualifies as direct participation. In most conflicts, civilians play various roles, such as working in factories that produce military uniforms or weapons. Despite their contribution to the war effort, these individuals do not necessarily lose their civilian status or protection under international humanitarian law.

While the treaty provisions of IHL do not provide precise criteria for defining and identifying direct participation in hostilities, the ICRC published the *Interpretive Guidance on the Notion of Direct Participation in Hostilities* in 2009. This guidance reflects the input of a group of eminent jurists invited by the ICRC. As noted in the preamble, the ICRC stated that the “recommendations made by the Interpretive Guidance, as well as the accompanying commentary, do not endeavour to change binding rules of customary or treaty IHL, but reflect the ICRC’s institutional position as to how existing IHL should be interpreted.” However, many of the participating jurists later

⁸ . J. Momtaz and A. H. Rangebarian, *Humanitarian International Law: Internal Armed Conflict*, (Tehran: Mizan Legal Foundation, 2008), pp. 149-15 (In Persian).

⁹ . M. R. Ziaee Bigdeli, *International Humanitarian Law*, (Tehran: Canjedanesh Publications, 2013), pp. 101-102 (In Persian).

criticized the ICRC's interpretive principles, arguing that the guidance did not fully reflect their views on the matter.¹⁰

According to the ICRC's *Interpretive Guidance*, an act must meet the following cumulative criteria to qualify as direct participation in hostilities:

1. The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict, or alternatively, to inflict death, injury, or destruction to persons or objects protected against direct attack (threshold of harm).
2. There must be a direct causal link 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 (direct causation)
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 (belligerent nexus).

It is worth mentioning that, these criteria have been intentionally defined narrowly to ensure that most forms of civilian involvement are not mistakenly categorized as direct participation in hostilities.¹¹

¹⁰ . Rogers, A.P.V., "Direct Participation in Hostilities: Some Personal Reflections", (2009) *Military Law and the Law of war*, Vol. 48, p.153

¹¹ . See:

www.lawfareblog.com

III. The Principle of Distinction and the Al-Aqsa Storm Operation

One of the challenges related to the principle of distinction during the Al-Aqsa Storm Operation is considering Israeli settlers as “voluntary human shields¹²” and consequently stripping them of their immunity from being attacked as civilians who are directly participating in hostilities. In examining this issue, regardless of whether Israeli settlers can be considered as voluntary human shields, it is important to answer the question of whether, according to international humanitarian law, voluntary human shields can be considered as direct participants in hostilities.

In this regard, it should be acknowledged that there are various approaches and significant disagreements among legal scholars as to whether voluntary human shields can be considered as direct participation in hostilities (considering the aforementioned criteria for the direct participation of civilians).¹³ Obviously, it is not possible to examine and scrutinize all the approaches and disagreements in this brief writing. However, in support of the approach that does not consider voluntary human shields as direct participants in hostilities, it can be briefly stated that humanitarian law absolutely prohibits the use of human shields without referring to the different circumstances of its occurrence. Moreover, in a self-executing system like international

¹² . In this regard see:

[Human shields | How does law protect in war? - Online casebook \(icrc.org\)](#)

¹³ . See for example: Ryan Goodman, “The ICRC’s Position on Human Shields (and Gaza)—A Reply to Professor Adil Haque”,(August 2014) Just Security; Michael N. Schmitt, “Human Shields in International Humanitarian Law”,(2009) Columbia Journal of Transnational Law, Vol.47, and Beth Van Schaack, “Human Shields: Complementary Duties under IHL”,(2017) Stanford Public Law Working Paper No. 2904502.

humanitarian law, the loss of protection against attacks can lead to a situation in which the parties to the conflict are able to abuse this lack of protection and accordingly the indiscriminate killing of civilians can become an available maneuver. Ultimately, it can be argued that since in most cases voluntary human shields do not fall within the concept of direct participation, the principle is to protect all human shields as civilians.

Additionally, in case of doubt as to whether a specific behavior by a civilian constitutes direct participation in hostilities, it is presumed that such behavior does not constitute direct participation in hostilities.¹⁴ Nevertheless, it should not be overlooked that if Israel arms settlers and civilians and invites them to participate in the conflict (even under the pretext of self-defense), their protection and immunity from attack under international humanitarian law would be nullified once they directly participate in conflict. This is because if civilian settlers are armed and directly participate in hostilities, they can be considered as legitimate military objectives. It is also noteworthy that although humanitarian law negates civilian immunity from direct attack if they directly participate in hostilities, the importance of respecting human dignity requires that, when confronting such individuals, capture should be prioritized over injury, and injury over killing.¹⁵

¹⁴ . Habibi, Homayon and Ramezani, Salehe, “Legal Status of Voluntary Human Shield in International Humanitarian Law”,(2014) The Quarterly Journal of Public Law Research, Vol.16, No.45, Winter, pp. 89 & 96 (In Persian).

¹⁵ . Habibi, Homayon and Ramezani, Salehe, Ibid, p.97

IV. The Principle of Distinction and Israeli Attacks on the Gaza Strip

it is important to note that Israel has described the Gaza Strip as an “enemy entity” since 2007.¹⁶ This term implies that all Palestinians living in Gaza are enemies of Israel, and this regime believes it can take any hostile action against them.¹⁷ However, aside from the incorrectness of this interpretation and the fact that such a term does not exist in international law, such descriptions do not create any rights in favour of its user.¹⁸ Following this approach, in the present case, senior political and military officials of Israel have generally not distinguished between Hamas and Palestinian civilians in their statements. The remarks of Isaac Herzog, the President of Israel, stating that all Palestinian civilians are responsible for supporting Hamas, also reflect this view.¹⁹ it should be noted that while most civilians (as voters, etc.) play a role in the actions of their government, these sorts of roles cannot be interpreted direct participation in in armed conflicts. As a matter of fact, They are ordinary people who may protest against military occupation or support repressive policies but are not military objectives²⁰, as the elements of direct participation

¹⁶ . In this regard see:

www.amin.org

¹⁷ . See for example:

[Israel-Palestine war: 'We are fighting human animals', Israeli defence minister says | Middle East Eye](#)

¹⁸ . Dehghani Poudeh, Hamidreza, “The Evolutions of Gaza from the Perspective of International Humanitarian Law,” (2008) *The Journal of Foreign Policy*, Vol.22, No.3, Autumn, p.801 ([In Persian](#)).

¹⁹ . In this regard see:

[Law and Survival in Israel and Palestine \(justsecurity.org\)](#)

²⁰ . In this regard see:

[Conceptualizing Civilians: Beyond “Innocence” - Lieber Institute West Point](#)

do not apply to them. Therefore, there is no doubt that, in general, Israeli attacks on the Gaza Strip, based on such approaches, violate the principle of distinction. Given the high and rigid threshold regarding the criteria of direct participation in hostilities, the protection of international humanitarian law for Palestinian civilians against attacks cannot be overlooked according to the such claims. However, aside from the aforementioned approach, some Israeli attacks, including those on the Jabalia refugee camp in Gaza, have been accompanied by justifications and claims that require further examination.

To explain, on 31 October and 1 November 2023, Israeli air forces targeted the Jabalia refugee camp in Gaza, resulting in hundreds of casualties and injuries. Israel attempted to defend itself against allegations of wrongdoing by noting that the target of these attacks were Hamas commanders in the area as well as a ‘vast’ tunnel complex at the site of the camp.²¹ On the other hand, Hamas denied the presence of commanders in the camp²² and claimed that Israel’s real purpose behind the attacks was to harm and kill civilians.²³ As far as Hamas combatants and its high-ranking commanding officers are

²¹ . In this regard see:

Israeli strikes Gaza refugee camp Jabalia, which it says is Hamas stronghold : NPR

²² . If true that Hamas commanders and troops were located and infiltrated within the camp, Hamas’s legal ability to argue that Israel violated the principle of distinction would be somewhat weakened, as a second facet of the rule on distinction places a clear obligation on warring factions to not intermingle their troops, ammunition and weapons with civilians and civilian infrastructure; See: Andreea Manea, “Too Early To Tell? The (Un)lawfulness of Israeli Attacks: The Case of the Jabalia Refugee Camp”,(4 November 2023) EJILTALK, Available at:

<https://www.ejiltalk.org/too-early-to-tell-the-unlawfulness-of-israeli-attacks-the-case-of-the-jabalia-refugee-camp/>

²³ . In this regard see:

Israel claims to kill Hamas senior commander in deadly airstrikes on Jabalia refugee camp (aa.com.tr)

concerned, they are recognized as members of an organized armed group which, according to the ICRC's Interpretative Guidance on Direct Participation in Hostilities can be targeted. Turning to the issue of the tunnels as direct targets, we need to look at Art. 52 AP I which represents customary humanitarian law. One question to answer is whether Israel had credible information that the tunnels located under the refugee camp were being used for the movement and planning of Hamas combatants and military activities. If the answer is positive, the following point that needs to be determined is whether the wholly or partial destruction of the tunnel was to offer a definite military advantage to the Israeli army. Therefore, if the answers to these questions are affirmative (which is hard to imagine!), it can be claimed that from the perspective of the principle of distinction, Israel has not violated international humanitarian law in this regard.

Anyway, even when we are not able to consider the violation of the principle of distinction through Israeli attacks to some targets in Gaza Strip, we are faced with another challenging element called the proportionality of these attacks, which is referred to as the principle of proportionality in international humanitarian law. The principle of proportionality is closely related to the principle of distinction. According to the principle of proportionality, which is also part of customary international law, parties to an armed conflict are not permitted to cause incidental harm to civilians where the expected military advantage is not predominant.²⁴ Therefore, if it is anticipated that civilian objects will be harmed or civilians will be killed or injured, it is necessary to examine and determine whether the military

²⁴ . Amichai Cohen and David Zlotogorski, "Proportionality in International Humanitarian Law: Consequences, Precautions and Procedures", (Oxford University Press, Vol.6, 2021), p.4

advantage gained from this attack outweighs the incidental harm to civilians.²⁵ In the present case, the number of civilian casualties and injuries resulting from the airstrikes has been undeniably tragic, and nothing can change this reality.²⁶ In this regard, the United Nations High Commissioner for Human Rights has also qualified the attacks that hit the Jabalia refugee camp as disproportionate attacks that could be considered war crimes, referring to the high number of civilian casualties and the scale of destruction.²⁷

²⁵ . Sharifi Tarazkoohi, Hossein, Zamani, Seyyed Ghasem, Yaghoubi, Moslem, “Principles of International Humanitarian Law in the Face of New Military Weapons: Challenges and Solutions”,(Summer 2023) Journal of Legal Research, Vol.22, No.54, pp. 22-23 (In Persian).

²⁶ . In this regard see:

[With Gaza's death toll over 40,000, here's the conflict by numbers | AP News](#)

²⁷ . In this regard see:

[Israel says new strike on Gaza refugee camp kills second Hamas leader, first evacuees reach Egypt | Reuters](#)