

The Principles of Distinction and Proportionality in International Humanitarian Law

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Abstract

This paper examines the principles of distinction and proportionality in International Humanitarian Law (IHL) and explores the complex relationship between them. Drawing on key legal instruments, case studies, and scholarly analysis, it argues that while these principles are foundational to IHL, and crucial for protecting civilians during armed conflict, their practical application faces significant challenges in modern warfare scenarios. The study critically analyses how the principles have been interpreted and applied in various conflicts, from World War II to contemporary asymmetrical warfare. It highlights the ongoing tensions between military necessity and humanitarian concerns, particularly in the context of technological advancements and the involvement of non-state actors.

The paper concludes that while distinction and proportionality remain vital for upholding humanitarian values in conflict, there is a pressing need for continuous refinement and adaptation of these principles to ensure their effectiveness in minimizing civilian harm in evolving conflict situations.

Keywords

Distinction, Proportionality, Legitimate Military Target, International Humanitarian Law

1. Introduction

The principles of distinction and proportionality are foundations for 'International Humanitarian Law' (IHL) and are aimed at protecting civilians and minimising any possible harm that can occur to them within armed conflicts. The proper application of both principles is essential for upholding the humanitarian objectives of International Humanitarian Law and ensuring the legitimacy of military actions. However, the complexities of modern warfare present challenges in effectively implementing these principles, highlighting the ongoing need for critical assessment and adaptation in response to evolving conflict scenarios.¹

2. Principle of Distinction

The principle of distinction is a fundamental principle of International Humanitarian Law that requires parties of an armed conflict to distinguish between civilian (civilian objects) and military targets, as civilians are not considered legitimate targets but instead require protection

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¹ Françoise Bouchet-Saulnier, Camille Michel and Laura Brav, *The Practical Guide to Humanitarian Law* (Rowman & Littlefield Publishers 2014).

from any direct attack. The principle of distinction can be understood in more depth as it is codified within Article 48 of Additional Protocol 1 of the Geneva Conventions: “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.”²

The International Court of Justice (ICJ) has further refined the principles of distinction in the *Legality of the Threat or Use of Nuclear Weapons* (1996), stating that the parties of a conflict must put forth paramount efforts to ensure that there is a minimum number of civilian casualties during the conflict.³ The International Court of Justice therefore concluded that the use of nuclear weapons is considered illegal. However, they could not determine whether there would be an instance where an exception could occur in the extreme circumstances of self-defence, where the survival of a state was threatened.⁴ Limiting the use of nuclear weapons exemplifies the principle of distinction, as it acknowledges their indiscriminate nature and the potential impact on civilian populations.

Furthermore, the principle of distinction is a fundamental aspect of customary international humanitarian law (customary international law is formed by the general and consistent practice of states, accompanied by a belief that such practice is legally required- ‘*opinio juris*’). Even in the absence of explicit treaty obligations, the principle of distinction has become a customary norm binding on all armed conflict parties, whether they have ratified specific treaties addressing the matter. By examining state practice and *opinio juris*, the International Committee of the Red Cross (ICRC) and other legal academics frequently play a critical role in discovering and codifying customary international humanitarian law. Certain standards, such as the principle of distinction, are universal and applicable to all governments, independent of their treaty obligations.⁵ This is highlighted by the adoption and acknowledgement of these principles through customary international law. The three key cases I will be focusing on, where devastating consequences and atrocities occurred due to the disregard of the principle of distinction in International Humanitarian Law include the bombing of civilian areas in World War II, the ethnic cleansing within the Yugoslav War, and the deliberate targeting of civilians in the Rwandan Genocide.

Initially, the bombing campaigns during World War II (1939) had resulted in the widespread destruction of cities and civilian infrastructure (notable examples include the bombings of Dresden, Tokyo, and London). These actions had caused immense civilian casualties and suffering, highlighting the need for clear principles to protect non-combatants during a time of conflict. In addition, the conflicts in former Yugoslavia (1991– 1995), witnessed extensive violations of International Humanitarian Law, including ethnic cleansing and indiscriminate attacks on civilian populations. This provides evidence that the principle of distinction was often ignored, leading to civilian casualties, displacement, and severe humanitarian crises. The final case of the Rwandan Genocide (1994) saw the deliberate targeting of ethnic groups, resulting in mass killings and atrocities. The principle of distinction was not upheld in this case, leading to civilians becoming direct targets of violence. The international community’s failure to intervene promptly further highlighted the importance of enforcing humanitarian norms. These historical events underscore the vital need to follow and acknowledge the principle of distinction to alleviate the impact of armed conflicts on civilian populations. The development

² Geneva Conventions 1949, Additional Protocol I 1977.

³ ‘Legality of the Threat or Use of nuclear weapons’ <<https://www.icj-cij.org/case/95>> accessed 9 September 2024.

⁴ Lord Iain Bonomy, *Principles of Distinction and Protection at the ICTY* (Torkel Opsahl Academic EPublisher 2013).

⁵ Jérémie Labbé and Pascal Daudin, ‘Applying the Humanitarian Principles: Reflecting on the Experience of the International Committee of the Red Cross’ (2015) 97 *International Review of the Red Cross* 183.

and reinforcement of International Humanitarian Law through the International Court of Justice (ICJ), aims to hold individuals accountable for war crimes, crimes against humanity, and genocide, further emphasising the importance of respecting the principle of distinction in modern conflicts.⁶

On the other hand, an example where the principle of distinction was acknowledged and applied was during Operation Inherent Resolve in Mosul Iraq (2016 to 2017).⁷ The Iraqi security forces, with support from the United States-led coalition, demonstrated a commitment to minimising harm to civilians and distinguishing between military targets and civilian areas. The efforts included precision airstrikes, intelligence coordination to identify specific ISIS positions, and measures to protect the local population. This provides evidence that the principle of distinction was recognised, and ultimately reduced civilian casualties and damage to infrastructure during the challenging urban warfare against ISIS in Mosul. On the other hand, the conflict between Israel and Palestine has raised significant challenges to the principle of distinction, as the conflict has witnessed many military operations, including airstrikes, which have resulted in significant civilian casualties (particularly in highly populated Palestinian territories like Gaza). Critics argue that Israel's military actions have caused challenges to this principle such as the impact on civilian infrastructure. The targeting of infrastructure in densely populated areas can have severe consequences for civilians, as this could affect multiple aspects of lives such as food and health needs. Critics further argue that the destruction of vital facilities, such as hospitals and schools, is not proportional to the military objectives being pursued.⁸

However, the key issue associated with the implementation of the theory of distinction is that it faces unique challenges and criticisms in scenarios involving asymmetrical warfare or non-state actors. For example, in asymmetrical conflicts involving non-state actors, distinguishing between combatants and civilians becomes challenging. The absence of uniforms among non-state actors makes it difficult to distinguish between military targets and civilians. This ambiguity can lead to civilians being mistakenly targeted, thus violating the principle of distinction.

Furthermore, non-state actors may deliberately operate from civilian areas, using the presence of civilians as a form of protection. This could therefore complicate efforts to target combatants without causing harm to civilians, as attacking military targets near civilians becomes a significant challenge. Additionally, global public opinion can be considered significant in influencing the conduct of military operations. When asymmetrical conflicts result in civilian casualties, there may be widespread condemnation, leading to increased scrutiny and pressure on involved parties to adhere to the principle of distinction.⁹

3. Principle of Proportionality

The principle of proportionality explains that the use of force must never exceed what is deemed necessary to achieve the legitimate military objective. This principle is articulated within Article 51 of Additional Protocol 1 to the Geneva Conventions, where it is stated that: 'an attack which may be expected to cause incidental loss of civilian life, injury to civilians,

⁶ Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).

⁷ 'Special Report: Operation Inherent Resolve' (U.S. Department of Defense 2017) <<https://dod.defense.gov/OIR/>

⁸ 'Amnesty International, Breach of the Principle of Distinction | How Does Law Protect in War? - Online Casebook' (casebook.icrc.org) <<https://casebook.icrc.org/case-study/amnesty-international-breach-principle-distinction>> accessed 11 September 2024.

⁹ Orly Maya Stern, *Gender, Conflict, and International Humanitarian Law. A Critique of the Principle of 'Distinction'* (Routledge 2018).

damage to civilian objects, or a combination thereof, would be excessive in relation to the concrete and direct military advantage anticipated.¹⁰ This article clearly sets out the principle of proportionality, as it emphasises that attacks resulting in accidental harm to civilians or civilian objects must not be excessive compared to the direct military advantage that would be anticipated.

An example of when this principle brought legal consequences occurred in 2004 when the International Court of Justice (ICJ) upheld the customary character of the proportionality criteria in its advisory opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory.¹¹ As the court determined that the barrier that violated international law, it was deemed that it should be torn down with immediate effect. This scenario underscores the need for a delicate balancing act to ensure that the anticipated collateral damage to any civilian is not seen as excessive and instead is proportionate.¹²

Within armed conflicts, this principle is crucial as it aids in preventing unnecessary harm to civilians, and therefore aids in maintaining a balance between humanitarian considerations and military necessity. Failing to adhere to this principle would constitute violations of International Humanitarian Law, resulting in substantial harm to civilians, which would undermine both the moral and legal legitimacy of the conflict in question. By analysing these specific passages from Article 51(5)(b), we establish a foundation for the customary nature of the proportionality principle.¹³ The acknowledgement of such principles in Additional Protocol I signifies their importance and contributes to their status as binding norms in customary international law, as affirmed by the ICJ. However, a fundamental problem to the theory is determining a proportionate response in the context of a specific military operation, leaving this up to constant debate and controversy.¹⁴

Assessing adherence to the principle of proportionality in armed conflict is a complex task that entails legal and ethical considerations. In the Gulf War (1990-1991), the coalition forces, led by the U.S., demonstrated efforts to adhere to the principle by employing precision-guided weaponry to target military installations while minimising harm to civilians. This approach aimed to achieve military objectives without causing excessive harm to non-combatants. On the other hand, the ongoing Syrian civil war serves as an example of the principle of proportionality being violated. Aerial bombardments and the use of barrel bombs in densely populated areas have resulted in significant civilian casualties, prompting concerns about the proportionality of military actions by various parties involved in the conflict. Both examples illustrate the challenges and complexities in applying the principle of proportionality during armed conflicts. The assessment often involves considering the specific circumstances of each case, including the nature of the conflict, the available military technologies, and the intent behind military actions. The international community, human rights organisations, and legal institutions play crucial roles in holding parties accountable for violations of the principle of proportionality.¹⁵

¹⁰ Geneva Conventions 1949, Additional Protocol I 1977, Article 51(5)(b)

¹¹ Roger O'Keefe, 'Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory: A Commentary' [2004] SSRN Electronic Journal <<https://www.tjls.edu/slomansonb/PalWallAdv.pdf>> accessed 11 September 2024.

¹² *ibid.*

¹³ Additional Protocol I 1977, Article 51(5)(b)

¹⁴ Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).

¹⁵ 'Proportionality | How Does Law Protect in War? - Online Casebook' (*casebook.icrc.org*) <https://casebook.icrc.org/a_to_z/glossary/proportionality#:~:text=The%20principle%20of%20proportionality%20prohibits> accessed 11 September 2024.

However, the principle of proportionality is subject to various criticisms and challenges, which reflect the complex nature of its practical application and interpretation, such as technological challenges. Technological advancements in military weaponry have yielded highly precise tools. However, these advances do not necessarily alleviate the challenge of the principle of distinction, as civilian casualties may still occur despite precise targeting. This raises questions about the adequacy of current technologies meeting the requirements of proportionality.¹⁶ Additionally, balancing military necessity with proportionality is a persistent challenge. In some cases, military commanders may argue that the strategic importance of a target justifies potential civilian harm. However, there is an ongoing debate about where to draw the line here, leading critics to argue that the principle of proportionality should take precedence to prevent excessive harm.¹⁷

4. Relationship between the Two Principles

The principles of distinction and proportionality are closely interconnected within International Humanitarian Law, constantly influencing each other within armed conflicts.

The principle of distinction requires parties to an armed conflict to distinguish between combatants and civilians whilst distinguishing between military objectives and civilian objects. When this principle of distinction is effectively applied, it facilitates the proportionate use of force. By accurately identifying and targeting military objectives, parties to the conflict can minimise the possible collateral damage to civilians, allowing for more precise and more targeted military actions. Since the principle of distinction is closely tied to the prohibition of in-discriminatory attacks, it could possibly limit the result of excessive harm in conflicts and therefore acknowledge the principle of proportionality.¹⁸

Furthermore, when discussing the impact of proportionality on the principle of distinction, we understand that a balance of military necessity is crucial to the principle of proportionality. This balance inherently involves considerations of distinction, as it ensures that the targeting of military objectives is not broad or discriminatory. Since this requires an assessment of potential collateral damage, it is intimately tied to the accuracy of distinguishing between military and civilian entities. This provides evidence that a failure to adhere to the principle of distinction throughout the principle of proportionality can lead to an underestimation of collateral damages, resulting in a direct violation of proportionality.¹⁹ To expand on this, in situations of asymmetrical warfare, where non-state actors may operate within civilian populations, proportionality requires careful consideration of the potential harm to civilians. This makes adherence to the principle of distinction crucial in accurately identifying combatants and civilian populations.

In conclusion, respect for the concept of distinction has a big impact on how proportionate military operations are. Parties to a conflict can reduce collateral damage and acknowledge the concept of proportionality by precisely differentiating between combatants and civilians as well as between military objectives and civilian objects. On the other hand, disregarding the concept of difference may jeopardise a military operations' proportionality, resulting in undue harm to civilians and transgressions of international humanitarian law. To guarantee that military operations are carried out with appropriate consideration for the protection of civilians in

¹⁶ Jack M Beard, 'The Principle of Proportionality in an Era of High Technology' [2018] SSRN Electronic Journal.

¹⁷ Craig Forrest, 'The Doctrine of Military Necessity and the Protection of Cultural Property during Armed Conflicts' (2007) 37(2) California Western International Law Journal <<https://core.ac.uk/download/pdf/232620737.pdf>> accessed 11 September 2024.

¹⁸ Christine D Gray, *International Law, and the Use of Force* (Oxford University Press 2018).

¹⁹ Amichai Cohen and David Zlotogorski, *Proportionality in International Humanitarian Law: Consequences, Precautions, and Procedures* (Oxford University Press 2020).

armed situations, the concepts of distinction and proportionality must cooperate and be balanced.

5. Conclusion

It is shown that the principles of distinction and proportionality are vital elements of International Humanitarian Law, which reflect the international community's commitment to humanising and cultivating the conduct of armed conflicts. The principles' customary nature and inclusion in legal instruments provide evidence of their significance. Even though both principles face challenges within contemporary warfare, the principles of distinction and proportionality, remain crucial for upholding humanitarian values amidst the complexities of conflict. A continued commitment to refining and adapting these principles is essential to minimise civilian harm, and to ensure their effectiveness in safeguarding civilian lives and minimising the human cost of war, which has not historically been the case.