
APPLICATION OF THE PRINCIPLE OF DISTINCTION IN THE ISRAEL–IRAN ARMED CONFLICT: A CRITICAL ANALYSIS

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ABSTRACT

The principle of distinction, a cornerstone of international humanitarian law. The escalating military confrontation between Israel and Iran, culminating in Iran's unprecedented direct ballistic missile and drone attacks of April and October 2024, and Israel's retaliatory strikes, has thrust the international humanitarian law (IHL) principle of distinction into sharp relief. This article critically examines whether the belligerents have complied with the obligation to distinguish at all times between civilians and combatants, and between civilian objects and military objectives. Drawing on the framework established under the 1977 Additional Protocol I to the Geneva Conventions, customary international humanitarian law, and relevant jurisprudence, the article analyses specific incidents from the ongoing conflict, assesses allegations of violations, and evaluates the institutional responses of the United Nations and civil society. It further investigates allegations of violations, including attacks on civilian infrastructure, disproportionate use of force, and challenges in identifying legitimate military objectives in densely populated or dual-use environments. It argues that both parties have fallen short of their IHL obligations, exposing a troubling accountability gap that demands urgent attention from the international community.

Keywords: Principle of Distinction, International Humanitarian Law, Israel–Iran Conflict, Additional Protocol I, Customary IHL, Military Objectives, Civilian Protection, Proportionality.

I. INTRODUCTION

The principle of distinction constitutes one of the foundational pillars of international humanitarian law (IHL). It mandates that parties to an armed conflict shall at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives.¹ Attacks may only be directed against military objectives; civilian persons and civilian objects shall not be made the object of attack.² Enshrined in Article 48 of the 1977 Additional Protocol I (API) and recognized as a rule of customary international law binding on all states, the principle is neither aspirational nor optional, it is a peremptory norm of general international law.

The military confrontation between the State of Israel and the Islamic Republic of Iran has assumed a distinctly direct character since April 2024, when Iran launched Operation True Promise, a barrage of over 300 ballistic missiles, cruise missiles, and explosive drones aimed at Israeli territory, marking the first time Iran directly attacked Israel from its own soil. Israel responded with calibrated strikes on Iranian air defence infrastructure, and a second, larger Iranian missile salvo followed in October 2024. The conflict has thus evolved from a longstanding "shadow war" of proxy engagements, covert operations, and targeted killings into an overtly inter-state armed confrontation, raising acute questions under the law of international armed conflict (LOIAC).

Against this backdrop, this article critically analyses the application, and alleged violation of the principle of distinction in the Israel–Iran armed conflict. Part II situates the principle within the normative architecture of IHL and customary law. Part III examines the factual record of attacks and counter-attacks. Part IV applies the legal framework to contested incidents. Part V evaluates accountability mechanisms and their limitations. Part VI offers conclusions and recommendations.

II. THE PRINCIPLE OF DISTINCTION: NORMATIVE FRAMEWORK

A. Treaty Foundations

The principle of distinction finds its principal treaty expression in Articles 48 through 58 of

¹ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter API].

² Id. art. 51(2).

API.³ Article 48 sets out the "basic rule" in unequivocal terms: "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." Article 51 elaborates that the civilian population as a whole, as well as individual civilians, shall not be the object of attack.⁴ Article 52 defines military objectives as objects which, by their nature, location, purpose, or use, make an effective contribution to military action, and whose total or partial destruction, capture, or neutralization offers a definite military advantage in the circumstances ruling at the time.

Although Iran is not a party to API, a significant lacuna examined further below, the treaty codifies pre-existing custom. Israel, too, maintains reservations regarding certain API provisions, and has not ratified the Protocol. This bilateral non-ratification does not, however, extinguish treaty-independent customary obligations.

B. Customary International Law Status:

The International Committee of the Red Cross (ICRC) Study on Customary International Humanitarian Law, published in 2005, identifies the principle of distinction as Rule 1 of customary IHL, applicable to both international and non-international armed conflicts.⁵ The study documents an overwhelming body of state practice and *opinio juris* supporting the principle's customary character, making it binding on Iran, Israel, and any other state or nonstate armed group engaged in hostilities, regardless of treaty ratification.

The International Court of Justice (ICJ) has consistently affirmed the customary status of the principle. In *Military and Paramilitary Activities in and Against Nicaragua*, the Court characterized core IHL rules, including distinction, as "intransgressible principles of international customary law."⁶ This characterization was elaborated in the *Nuclear Weapons Advisory Opinion*, where the Court held that the principle of distinction represents one of the "cardinal principles" of IHL.⁷

³ Id. art. 51(2).

⁴ Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* vol. I, Rule 1, at 3 (ICRC 2005) [hereinafter ICRC Customary IHL].

⁵ *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 194 (June 27).

⁶ *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 78 (July 8).

⁷ API, *supra* note 1, art. 50.

C. Key Operational Concepts:

The effective application of the principle of distinction depends on three interrelated subsidiary concepts. First, the definition of civilians: Article 50(1) of API provides that in cases of doubt, persons shall be considered civilians.⁸ Civilians lose protection only for such time as they directly participate in hostilities.⁹ The ICRC's Interpretive Guidance on the Notion of Direct Participation in Hostilities has attempted to elaborate this standard, though it remains contested in practice.¹⁰

Second, the definition of military objectives: only objects that satisfy both a functional criterion (effective contribution to military action) and a military advantage criterion (definite military advantage from destruction, capture, or neutralization) qualify as military objectives.¹¹ Civilian objects, including infrastructure serving dual civilian and military purposes, do not automatically become military objectives.¹²

Third, precautionary measures: Article 57 of API imposes obligations on attacking parties to do everything feasible to verify that objectives are military, to choose means and methods of attack that minimize civilian casualties, and to refrain from or suspend attacks when expected civilian harm is excessive in relation to the anticipated military advantage.¹³ The obligation to give effective advance warning to civilians, where circumstances permit, is similarly codified.¹⁴ These precautionary obligations constitute customary law.

III. THE ISRAEL–IRAN ARMED CONFLICT: FACTUAL RECORD

A. Iran's Direct Attacks on Israel:

On April 13 and 14, 2024, Iran launched Operation True Promise, deploying an estimated 170 drones, over 30 cruise missiles, and more than 120 ballistic missiles toward Israel. Israel, supported by the United States, the United Kingdom, Jordan, and France, intercepted the overwhelming majority of projectiles. The operation caused minimal physical damage, with one notable exception: a young Bedouin girl in the Negev sustained serious injuries from

⁸ API, *supra* note 1, art. 51(3).

⁹ ICRC Customary IHL, *supra* note 4, Rule 6, at 19.

¹⁰ API, *supra* note 1, art. 52(2).

¹¹ ICRC Customary IHL, *supra* note 4, Rule 8, at 29.

¹² API, *supra* note 1, art. 57(2)(a)(i).

¹³ *Id.* art. 57(2)(b).

¹⁴ ICRC Customary IHL, *supra* note 4, Rule 15, at 51.

shrapnel. The Israeli military reported that the barrage targeted a range of military installations, including the Nevatim and Ramon air bases. Iranian authorities characterized the strikes as a lawful exercise of self-defence under Article 51 of the United Nations Charter in response to Israel's April 1, 2024 strike on the Iranian consulate compound in Damascus.

A second, larger wave of Iranian ballistic missile attacks followed on October 1, 2024, involving approximately 180 ballistic missiles. Iran stated that the attacks were aimed at military targets, specifically Israeli military bases and intelligence infrastructure.¹⁵ The missiles struck residential areas in several Israeli cities, including Tel Aviv, Haifa, and Jaffa, with some projectiles landing near Nevatim Air Base. The October strikes generated significantly greater concern among international observers regarding compliance with IHL, given the inaccuracy of certain ballistic missile systems in densely populated environments.

B. Israeli Counter-Strikes:

Israel conducted retaliatory air strikes on Iranian territory on October 26, 2024. The Israeli Defense Forces (IDF) stated that the strikes targeted Iranian air defence systems and military infrastructure, including S-300 air defence batteries and facilities linked to Iran's missile production capacity.¹⁶ Israeli officials maintained that the operations were carefully calibrated to avoid civilian objects and to minimize collateral damage, emphasising the precision-guided nature of the munitions employed.

Prior to the direct exchange, Israel had conducted strikes on Iranian-linked military and paramilitary infrastructure in Syria and Lebanon, including the April 1 strike on the Consulate annex building in Damascus. Israel characterised the consulate compound as a covert military command centre for the Iranian Islamic Revolutionary Guard Corps Quds Force (IRGC-QF), specifically identifying the target as a building used for military planning and meetings of senior IRGC commanders, thereby asserting it constituted a military objective despite its diplomatic designation.¹⁷

IV. CRITICAL ANALYSIS: APPLICATION OF THE PRINCIPLE OF

¹⁵ Israel Ministry of Foreign Affairs, Operation True Promise: Iran's Direct Attack on Israel (Apr. 14, 2024), <https://www.mfa.gov.il>.

¹⁶ U.N. Secretary-General, Report on the Situation in the Middle East, U.N. Doc. S/2024/320 (Apr. 2024).

¹⁷ Permanent Mission of Iran to the United Nations, Statement of the Permanent Representative of the Islamic Republic of Iran (Apr. 14, 2024).

DISTINCTION

A. Iran's Ballistic Missile Attacks: Targeting and Indiscriminate Effects:

The most serious IHL concern arising from Iran's attacks relates to the indiscriminate character of certain weapons systems and targeting practices. Article 51(4) of API prohibits indiscriminate attacks, defined to include attacks not directed at a specific military objective, attacks employing methods or means of combat that cannot be directed at a specific military objective, and attacks whose effects cannot be limited as required by IHL.¹⁸ Rule 12 of the ICRC Customary IHL Study likewise prohibits indiscriminate attacks.¹⁹

Several ballistic missile variants employed by Iran in the October 2024 strikes, including the Fattah-1 and Emad series, have limited circular error probable (CEP) ratings, particularly at extreme ranges. When deployed against military objectives situated within or adjacent to populated urban areas, the inherent inaccuracy of such systems raises the question of whether their use constitutes an indiscriminate attack by design. Human Rights Watch documented missile impacts in residential neighbourhoods of Tel Aviv and Jaffa that struck several hundred metres from the nearest identifiable military installation. Amnesty International likewise noted that the use of unguided or less-accurate ballistic missiles in civilian-populated areas may violate the prohibition on indiscriminate attacks, depending on the intended target and the proximity of civilian concentrations.²⁰

The proportionality principle, codified in Article 51(5)(b) of API and Rule 14 of the ICRC Customary IHL Study, further requires that attacks not be expected to cause incidental civilian harm excessive in relation to the anticipated concrete and direct military advantage.²¹ Assessing proportionality requires reconstruction of the commander's good-faith assessment at the time of the attack. Iran's assertion that the April strikes deliberately limited impact (with Iran reportedly deploying slower-moving drones precisely to enable interception) complicates the legal analysis, as it suggests some degree of precautionary consideration. However, this strategic calibration does not necessarily satisfy the IHL requirement to take all feasible

¹⁸ API, *supra* note 1, art. 51(4).

¹⁹ ICRC Customary IHL, *supra* note 4, Rule 12, at 40.

²⁰ Human Rights Watch, *Iran: Ballistic Missile Attacks on Israel Raise Serious Concerns* (Oct. 2, 2024).

²¹ Amnesty International, *Israel/Iran: Both Parties Must Comply With International Humanitarian Law* (Oct. 3, 2024).

precautions to minimise civilian harm; the obligation is one of means as well as ends.²²

B. The Damascus Consulate Strike and the Law on Military Objectives:

The April 1, 2024 Israeli strike on the Iranian consular annex in Damascus constitutes one of the most legally contested incidents in the conflict. Seven senior IRGC officers were killed, including a senior commander. Israel argued that the building had been repurposed as a covert military operations centre, thereby satisfying the military objective definition under Article 52(2) of API.²³

The legal analysis turns on whether the building, by its use, made an effective contribution to military action such that its partial destruction offered a definite military advantage. Israel presented intelligence purporting to demonstrate the building's operational military function. However, the attack also implicated obligations under the Vienna Convention on Consular Relations, which prohibits the violation of consular premises. The interplay between diplomatic law and IHL in such circumstances is underexplored in the literature.²⁴

Article 52(3) of API provides that in cases of doubt as to whether an object normally dedicated to civilian purposes is being used to make an effective contribution to military action, it shall be presumed not to be so used.²⁵ Critics of the Israeli strike argue that a consulate carries a sufficiently strong presumption of civilian character that any doubt should have been resolved against attacking. Proponents counter that the presumption against attack must yield to reliable intelligence demonstrating the object's military use, and that states cannot immunize genuine military command centres by co-locating them within nominally protected premises.

C. Precautionary Obligations and Their Implementation:

Article 57 of API imposes affirmative obligations on attacking parties to take constant care to spare the civilian population in the conduct of military operations.²⁶ Rule 15 of the ICRC Customary IHL Study codifies the obligation to take all feasible precautions in attack to avoid, and in any event to minimise, incidental civilian casualties and damage. Similarly, Article 58

²² API, *supra* note 1, art. 57(2)(a)(iii).

²³ Marco Sassoli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* 252 (2019).

²⁴ Dinstein, *supra* note 17, at 127.

²⁵ API, *supra* note 1, art. 52(3).

²⁶ API, *supra* note 1, art. 57(1).

and Rule 22 require parties to take precautions against the effects of attacks, including removing civilians from the vicinity of military objectives to the maximum extent feasible.²⁷ Iran's conduct in locating missile launch sites, IRGC command infrastructure, and weapons production facilities within or adjacent to populated civilian areas in Tehran and elsewhere raises serious questions about precautions against the effects of attacks under Article 58. Military advantage derived from the shielding effect of civilian proximity does not legitimize the colocation; rather, such co-location may compound IHL responsibility by exposing civilians to the lawful consequences of counter-targeting.²⁸

Israel, for its part, has faced criticism regarding precautionary measures in its broader military campaign in Gaza, though that theatre is governed by distinct legal considerations involving occupation law and the law of non-international armed conflict. In the context of strikes on Iran and Iranian-linked targets in Syria, the IDF has publicly invoked the use of precision-guided munitions and intelligence-based target verification as evidence of precautionary compliance.²⁹ The adequacy of these measures remains contested among independent legal observers.

D. Accountability Gaps: Non-Ratification of Additional Protocol I:

A significant structural challenge to the application of the principle of distinction in the Israel–Iran conflict is that neither state has ratified API. While the customary international law rules discussed above bind both states irrespective of treaty adherence, the absence of treaty ratification complicates invocation of the detailed procedural obligations contained in API including the requirement to establish fact-finding mechanisms under Article 90 and the duty to investigate alleged violations under Article 86.³⁰ Iran's position that it is not bound by the specific definitional framework of Article 52(2) of API further complicates objective legal assessment, even if the customary rule on military objectives tracks the treaty standard.³¹

V. ACCOUNTABILITY MECHANISMS AND THEIR LIMITATIONS

A. United Nations Responses:

²⁷ ICRC Customary IHL, *supra* note 4, Rule 22, at 68.

²⁸ ICRC Customary IHL, *supra* note 4, Rule 17, at 58.

²⁹ Sassoli, *supra* note 29, at 267.

³⁰ API, *supra* note 1, art. 86.

³¹ Dinstein, *supra* note 17, at 162.

The United Nations Security Council convened emergency sessions following both the April and October 2024 Iranian missile salvos. The Security Council's structural paralysis, with the United States and Russia capable of exercising permanent-member vetoes on resolutions concerning Israeli and Iranian conduct respectively, has prevented the adoption of binding resolutions imposing legal obligations or establishing investigative mechanisms.³² The Secretary-General's reports on the Middle East situation have documented the attacks and called for restraint, but have stopped short of formal legal determinations regarding IHL compliance.

The U.N. Human Rights Council's Independent International Commission of Inquiry on the Occupied Palestinian Territory has monitored broader regional developments, including the implications of the Iran–Israel exchange for civilians in the region. However, the Commission's mandate is geographically circumscribed and does not extend to scrutiny of conduct on Iranian or Israeli metropolitan territory.

A. International Criminal Court Jurisdiction:

The International Criminal Court (ICC) has jurisdiction over war crimes committed on the territory of State Parties or by nationals of State Parties.³³ Israel is not a party to the Rome Statute. Iran acceded to the Statute in 2000 but has not ratified it. Palestine is a State Party, though jurisdiction over conduct on Israeli and Iranian metropolitan territory by Iranian nationals or Israeli nationals falls outside the Court's automatic jurisdiction. The Pre-Trial Chamber's 2024 arrest warrants in the situation concerning the State of Palestine do not extend to the direct bilateral exchange between Israel and Iran.

The war crime of intentionally directing attacks against civilians, codified in Article 8(2)(b)(i) of the Rome Statute, and the war crime of launching attacks with knowledge that they will cause disproportionate civilian harm, codified in Article 8(2)(b)(iv), remain the applicable international criminal law standards.³⁴ Absent ICC jurisdiction, accountability for violations in this bilateral context depends primarily on domestic military justice mechanisms, which have historically demonstrated limited capacity for independent scrutiny, and on diplomatic

³² U.N. Security Council, Statement by the President of the Security Council, U.N. Doc. S/PRST/2024/4 (Apr. 2024).

³³ Rome Statute of the International Criminal Court art. 8(2)(b)(i), July 17, 1998, 2187 U.N.T.S. 90.

³⁴ *Id.* art. 8(2)(b)(iv).

pressure from third states and international organisations.

B. Evidentiary and Intelligence Challenges:

The effective adjudication of distinction violations requires reliable, independently verifiable evidence of targeting decisions, weaponry deployed, and damage caused. In the Israel–Iran context, both states operate with high levels of operational secrecy. Open-source intelligence, satellite imagery, and survivor testimonies have partially filled the evidentiary gap. Nonetheless, the absence of access for independent monitors, including ICRC delegates, to the relevant territories and facilities severely constrains the ability to make definitive legal determinations.

VI. CONCLUSIONS AND RECOMMENDATIONS

This article has demonstrated that the principle of distinction, a foundational norm of customary IHL, has been severely tested by the direct military confrontation between Israel and Iran. Several provisional conclusions emerge from the analysis.

First, Iran's use of ballistic missiles with limited accuracy against targets in or near populated Israeli urban centres raises serious *prima facie* concerns about compliance with the prohibition on indiscriminate attacks and the proportionality rule.³⁵ The burden rests on Iran to demonstrate that the specific systems employed were capable of being directed at discrete military objectives and that the anticipated civilian harm was not excessive in relation to the anticipated military advantage, a burden that, on the available evidence, has not been discharged.³⁶

Second, the legality of the Israeli strike on the Iranian consular annex in Damascus turns on contested empirical questions about the building's actual use. The legal framework applicable is clear, a building enjoying consular status carries a strong presumption of civilian character that can only be displaced by clear and reliable evidence of its conversion to a military objective but the adequacy of Israel's evidence base remains disputed. Israel's obligation under

³⁵ Vienna Convention on Consular Relations art. 22, Apr. 24, 1963, 596 U.N.T.S. 261 (providing that consular premises are inviolable and must not be entered by authorities of the receiving state); see also Dinstein, *supra* note 17, at 130–31 (noting the unresolved interplay between diplomatic premises and military objective targeting).

³⁶ API, *supra* note 1, art. 57(2)(a)(i) ("those who plan or decide upon an attack shall . do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects").

Article 57 to do everything feasible to verify the target's military character before attacking applies with full force.³⁷

Third, both parties have failed to demonstrate adequate compliance with their respective obligations to take precautions against the effects of attacks by refraining from co-locating military assets and personnel within civilian areas. This structural failure creates the conditions in which distinction violations become endemic regardless of the good or bad faith of individual attackers.

Fourth, the accountability framework applicable to the Israel–Iran conflict is severely deficient. The non-ratification of API by both states, the jurisdictional limitations of the ICC, and the political paralysis of the Security Council combine to produce a near-total accountability gap. Addressing this gap requires concerted multilateral action, including the establishment of ad hoc investigative mechanisms under General Assembly auspices,³⁸ the development of thirdstate reporting obligations for arms transfers implicated in IHL violations, and renewed diplomatic pressure on both states to provide transparent accounts of their targeting processes.

The principle of distinction did not emerge from a vacuum. It reflects millennia of moral reasoning about the limits of organized violence and embodies the insight that warfare, however destructive, must remain bounded by humanity. The Israel–Iran conflict, with its combination of technologically sophisticated ballistic arsenals, contested legal characterizations, and opaque accountability structures, represents precisely the kind of challenge for which IHL's foundational principles were designed. Upholding those principles not merely as aspirational rhetoric but as enforceable legal obligations is the central task confronting the international community in the present moment.³⁹

The following recommendations is designed to address specific structural deficiencies exposed by the Israel–Iran conflict, with the dual objectives of strengthening the strict

³⁷ Sassoli, *supra* note 29, at 278 ("The obligation to take precautions is continuous and applies throughout the planning and execution of an attack.").

³⁸ U.N. General Assembly Res. 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflicts, U.N. Doc. A/RES/2675(XXV) (Dec. 9, 1970) (affirming the obligation to distinguish civilians from combatants as a matter of general international law).

³⁹ Nuclear Weapons Advisory Opinion, *supra* note 7, 79 ("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.").

enforceability of IHL and preserving international peace and security.

Recommendation 1: Activation of the "Uniting for Peace" Mechanism as a Standing IHL Enforcement Trigger:

Where the United Nations Security Council is structurally paralyzed by permanent-member vetoes and cannot fulfil its primary responsibility for the maintenance of international peace and security,⁴⁰ this article proposes the formal codification of a standing trigger mechanism under General Assembly Resolution 377(V), the "Uniting for Peace" Resolution, specifically calibrated to IHL enforcement contexts.⁴¹ The existing Uniting for Peace procedure, invoked ad hoc and inconsistently since 1950, has never been systematically operationalized for IHL violations in bilateral inter-state armed conflict. The proposal is this: whenever the Security Council fails to adopt a resolution addressing credible allegations of systematic distinction violations within seventy-two hours of a documented attack, an automatic referral mechanism would convene an Emergency Special Session of the General Assembly empowered to (a) establish an Independent Fact-Finding Commission with compulsory evidentiary access, (b) recommend provisional measures binding on the belligerents under the moral authority of the international community, and (c) authorize third-state countermeasures proportionate to the violations established. This proposal does not require Charter amendment; it operates within the existing constitutional architecture of the United Nations and fills the enforcement vacuum created by permanent-member paralysis. It represents a genuinely novel institutional design that moves IHL enforcement from the discretionary to the quasi-automatic — matching the peremptory character of the norms it protects.

Recommendation 2: An Erga Omnes Standing Protocol Enabling Third State Litigation Before the International Court of Justice:

International law has long recognized that obligations erga omnes, obligations owed to the international community as a whole, generate standing for any state to invoke responsibility

⁴⁰ U.N. Charter arts. 24, 39 (conferring on the Security Council primary responsibility for the maintenance of international peace and security and authorizing it to determine the existence of any threat to or breach of the peace).

⁴¹ U.N. General Assembly Res. 377 (V), Uniting for Peace, U.N. Doc. A/RES/377(V) (Nov. 3, 1950) (establishing the General Assembly's residual authority to convene emergency special sessions and recommend collective measures when the Security Council fails to act due to lack of unanimity among permanent members).

for their breach.⁴² The ARSIWA affirm this principle in Article 48(1)(b), confirming that any state may invoke responsibility for violations of obligations owed erga omnes.⁴³ Yet the practical invocation of this principle before the ICJ remains hamstrung by the requirement that respondent states either accept the Court's compulsory jurisdiction under Article 36(2) of the ICJ Statute or consent to adjudication, neither of which Israel nor Iran has done in relevant proceedings.⁴⁴

This article proposes the negotiation of an Optional Protocol to the Geneva Conventions or alternatively a free-standing multilateral treaty establishing compulsory ICJ jurisdiction over grave breaches of IHL, including systematic violations of the principle of distinction, exercisable by any state party on behalf of the international community.⁴⁵ The Protocol would confer automatic active standing on third states regardless of direct injury, operationalizing the erga omnes concept as a genuine litigation right rather than a theoretical category. It would also authorize the Court to grant interim measures of protection including cease-and-desist orders on specific weapons systems or targeting practices enforceable through the Security Council under Article 94 of the UN Charter or, where the Council is paralyzed, through the Uniting for Peace mechanism described above. This proposal addresses the single greatest structural deficiency of the current IHL enforcement regime: the absence of any compulsory third-party adjudication mechanism for the world's most serious violations of the laws of war.

Recommendation 3: A Treaty-Based Prohibition on Ballistic Missiles Incapable of Complying with the Principle of Distinction:

The Iran–Israel exchange of 2024 exposed a catastrophic gap in the conventional weapons treaty regime: no existing instrument specifically regulates or prohibits ballistic missile

⁴² *Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, 34 (Feb. 5) (establishing the concept of obligations erga omnes, which include the protection of the human person from acts of aggression and from grave violations of IHL).

⁴³ ARSIWA, art. 48(1)(b) (providing that any state may invoke the responsibility of another state for breach of an obligation owed to the international community as a whole — an obligation erga omnes — including core IHL obligations protecting civilian populations).

⁴⁴ Statute of the International Court of Justice art. 36(2), June 26, 1945, 33 U.N.T.S. 993 (optional clause jurisdiction); see also *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia & Herzegovina v. Serbia & Montenegro)*, 2007 I.C.J. 43, 471 (Feb. 26) (affirming the Court's capacity to adjudicate state responsibility for IHL adjacent violations).

⁴⁵ Draft Articles on Responsibility of States for Internationally Wrongful Acts art. 41, [2001] 2 Y.B. Int'l L. Comm'n 26, U.N.

Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) [hereinafter ARSIWA] (imposing on all states the obligation not to recognize as lawful situations created by serious breaches of peremptory norms, and to cooperate to bring such breaches to an end).

systems whose inherent inaccuracy renders them structurally incapable of being directed at discrete military objectives in populated areas.⁴⁶ The Certain Conventional Weapons Convention and its Protocols address cluster munitions and anti-personnel mines but do not regulate ballistic missile CEP thresholds. The Rome Statute war crimes provisions capture the outcome of indiscriminate attacks but provide no *ex ante* prohibition on the development, stockpiling, or transfer of weapons systems whose design makes distinction compliance impossible.

This article proposes the negotiation, under ICRC auspices and CCW framework, of a Protocol on Ballistic Missile Accuracy Standards establishing minimum CEP requirements for any ballistic missile deployed against targets located within or within a defined proximity of civilian-populated areas. States parties would be required to certify that any ballistic missile system in their arsenal meets the applicable CEP standard before deployment, and to conduct mandatory Article 36-style legal reviews at the design and procurement stages. Transfer of noncompliant systems to third states would be prohibited. The proposal is grounded in the elementary principle, affirmed by the ICJ in the Nuclear Weapons Advisory Opinion, that states must never use weapons incapable of distinguishing between civilian and military targets.⁴⁷ It extends that principle from weapons of mass destruction, where it has long been applied to the conventionally-armed ballistic missile arsenals that now pose the most immediate threat to civilian populations in inter-state conflicts.

⁴⁶ Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Oct. 10, 1980, 1342 U.N.T.S. 137 [hereinafter CCW]; Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended, May 3, 1996, 35 I.L.M. 1206 (CCW Protocol II).

⁴⁷ Nuclear Weapons Advisory Opinion, *supra* note 7, 79 ("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.").

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