

THE 11 DAYS GAZA AIRSTRIKES BY ISRAEL: ITS LEGALITY IN VIEW OF THE PROTECTION OF CHILDREN IN HUMANITARIAN LAW*

Abstract

Although Humanitarian Law is said to aim at the protection of persons not taking active part in hostilities inclusive of children, the 11 days relentless bombardment of Gaza by Israel is one out of the many incidences of the Israel-Palestine conflict that has called to question the correctness of this assertion as it exposed the vulnerability of children in situations of armed conflict. This is following the number of the death of children recorded during the said offensive. This Article seeks to interrogate the legality of the 11 days Gaza airstrikes in the light of the protection afforded children in Humanitarian Law. The Article adopted doctrinal method of legal reached which entails the use of primary sources, with data largely drawn from the Geneva Conventions 1049 and their Additional Protocols of 1977; the Rome Statute of the International Criminal Court, 1998; and case laws relevant to the Article. The Article finds that children remain one of the major victims of armed conflicts. It is the further finding of this Article that little or nothing is done by parties to the conflict to facilitate the protection of children as parties violate the principles of distinction and proportionality with flagrant abandon. To avert similar situations in future, the Article recommended among other things the adoption of specific laws protecting children in situations of armed conflict; holding individual members of the armed forces of the parties to armed conflicts criminally responsible for any act constituting a violation of the fundamental principles of International Humanitarian Law; and the establishment of neutralized zones by parties to the conflict so as to ensure that children are adequately protected in situations of armed conflicts. This way, children will be better protected.

Keywords: Humanitarian Law Armed Conflict, Israel-Palestine Conflict, Gaza Airstrikes, Protection, Children.

1. Definition of Key Terms

Children

A child (which is the singular form of ‘children’) refers to a ‘young person of either sex at any age less than maturity, but most commonly one between infancy and youth’.¹ It also means ‘every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier’.² In this Article, the term ‘children’ mean persons below the age of eighteen.

Civilian

‘A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A (1)(2)(3) & (6) of the Third Convention and in Article 43 of this Protocol’.³ To be precise, the persons referred to under Article 4A (1)(2)(3) & (6) of the Third Convention and Article 43 of Protocol I are: (1) members of armed forces of a party to the conflict and members of militias or volunteer corps forming part of such armed forces;⁴ (2) members of other militia and members of other volunteer corps including those of organized resistance movements provided that such militias or volunteer corps, including such organized resistance movements, meet the conditions of: being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly; and that of conducting their operations in accordance with the laws and customs of war.⁵ (3) Members of regular armed forces who profess allegiance to a government or any authority not recognized by the Detaining Power;⁶ and (4) *Levee en mass*.⁷ In other words, a civilian is any person that is not a combatant or a member of the armed forces of a Party to an armed conflict.

Combatants

These are members of the armed forces of a Party to a conflict who have the right to participate directly in hostilities.⁸

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¹Allen Walker Read, *The New International Webster’s Comprehensive Dictionary of the English Language*, Encyclopedic Edition (2004 Edition, Typhoon International Corp), 230.

²Convention on the Rights of the Child, 1990, Article 1,

³Protocol Additional to the Geneva Conventions, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter referred to as Protocol I), Article 50(1).

⁴Geneva Convention Relative to the Treatment of Prisoners of War, 1949, (hereinafter referred to as GC III), Article 4A (1).

⁵*Op cit*, Article 4A(2).

⁶*Op cit*, Article 4A(3).

⁷*Op cit*, Article 4A(6).

⁸Protocol I, *op cit*, Article 43(2).

Civilian Objects

‘Civilian objects are all objects which are not military objective....’⁹ They are those objects belonging to civilians and which are generally not to be made the object of attack.

Military Objective

‘...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 neutralization, in the circumstances ruling at the time, offers a definite military advantage’.¹⁰ They are objects other than civilian objects which are generally legitimate target of military operation.

2. Overview

The protection of children occupies a central place in the ‘heart’ of International Humanitarian Law since ‘children are greatly affected by situations of conflict...’¹¹ and ‘make up 40 percent of the civilian victims in conflicts...’¹² To that effect, children enjoy general protection against the dangers arising from military operations;¹³ and shall not be made the object of attack particularly in situations of armed conflicts.¹⁴ This protection draws from the general protection accorded civilians not taking active part in hostilities.¹⁵ The protection is not only limited to their persons but also extends to protect civilian objects.¹⁶ Thus, civilian objects shall not be made the object of attack or of reprisal.¹⁷ Additionally, objects indispensable to the survival of civilians (including children) shall not be made the object of attack.¹⁸ Apart from the above general provisions, International Humanitarian Law also protects children in a specific way.¹⁹ Additionally, International humanitarian Law is made up of certain fundamental principles (such as the principles of distinction and proportionality) which are geared towards facilitating the protection of children. The principle of distinction for instance, requires to distinguish at all times between civilians and combatants on the one hand and between civilian objects and military objective on the other hand; and to accordingly direct attacks against combatants and military objective but not against civilians and civilian objects.²⁰ Thus, indiscriminate attacks;²¹ attacks by bombardment by any method or means in a civilian concentrated area; and attacks which may be expected to cause incidental loss of civilian life or civilian objects or even both, are prohibited.²² Besides, acts or threats of violence the primary purpose of which is to spread terror among the civilian population are further prohibited.²³ On the other hand, the principle of proportionality requires that even where the target is military, that attacks causing incidental loss of civilians’ lives which would be clearly excessive in relation to the concrete and direct military advantage anticipated.²⁴ Civilians (including children) are entitled to the above protection except and unless for such time when they (civilians) take active part in hostilities.²⁵ The violation of the above rules constitutes a grave breach of the Geneva Conventions and the Protocol I and in fact constitutes a war crime.²⁶ However, this Article is informed by the constant attacks directed against children in the Israeli-Palestine conflict particularly the 11 days Gaza airstrikes which among other things resulted in the death of least 65 children;²⁷ and the destruction of both homes and schools while leaving not less than 10,000 persons including children homeless and the education of nearly 42,000 children disrupted.²⁸ The Article questions the legality of the said offensive in the light of the protection accorded children in International

⁹ *Op cit*, Article 52(1).

¹⁰ *Op cit*, Article 52(2).

¹¹ Medecins Sans Frontieres ‘The Practical Guide to Humanitarian Law’. Available at < <https://guide-humanitarian-law.org/content/article/3/children> > Accessed 22 June 2021.

¹² *Ibid*.

¹³ Protocol I, *op cit*, Article 51 (1); Protocol Additional to the Geneva Conventions, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977 (Protocol II), *op cit*, Article 13(1).

¹⁴ Protocol I, *op cit*, Article 51(2); Protocol II, *op cit*, Article 13(2).

¹⁵ *Ibid*; Geneva Conventions, 1949, common Article 3.

¹⁶ Protocol I, *op cit*, Article 52; Protocol II, *op cit*, Article 14.

¹⁷ Protocol I.

¹⁸ *Op cit*, Article 54.

¹⁹ GC IV, *op cit*, Article 50; Protocol I, *op cit*, Article 77; Protocol II, *op cit*, Article 4(3)(a).

²⁰ Protocol I, *op cit*, Article 48.

²¹ *Op cit*, Article 51(4).

²² *Op cit*, Article 51(5)(a).

²³ *Ibid*.

²⁴ Protocol I, *op cit*, Articles 51(5)(b) & 57(2)(b).

²⁵ *Op cit*, Article 51(3).

²⁶ Rome Statute of the International Criminal Court, 1998, Article 8(2)(b)(xxiv); 8(2)(b)(v); 8(2)(e)(vii); 8(2)(b)(iv).

²⁷ < <https://enginealarabiya.net/News/middle-east/2012/05/17/Israel-warplanes-launch-news-attacks-on-gaza-displacing-dozens-of-Palestinians> > Accessed 12 June 2021; < <https://theintercept.com/2021/05/21/gaza-bombing-hospital-israel> > Accessed 12 June 2021.

²⁸ ‘Israel, Hamas begin Truce to End 11 Days of Destruction and Airstrikes Killing over 240: Gaza Celebrates’ Jagran News Desk, New Delhi, 21 May 2012. Available at < <https://english.jagran.com/world/israel-hamas-begin-truce-to-end-11-days-of-destructions-and-airstrikes-killing-over-240-gaza-celebrates-10026919> > Accessed 17 June 2021.

Humanitarian Law. The Article argued that the protection of children can only be facilitated where parties to the conflict respect the fundamental principles of distinction and proportionality which require a clear distinction between legitimate targets and military objective for the purpose of limiting attacks to legitimate targets; and the avoidance of excessive loss of civilian lives respectively.

3. The Genesis of the 11 Days Gaza Airstrikes

The Israel-Palestine conflict is a long standing conflict in the Gaza Strip that has lasted over a decade and half.²⁹ The conflict has been characterized by all manner of violence against both persons and objects. However, the conflict took another shape or dimension in the wake of May 2021 resulting in the 11 days Gaza airstrikes by Israel.³⁰ The said offensive commenced on the 10th day of May, 2021 following a crackdown at the Al-Aqsa Mosque compound between Palestinian protesters and the Police.³¹ The crackdown was a carryover of a long standing conflict between Israel and Palestine over the control of East Jerusalem (a site considered holy by both Muslims and Jews) but which is majorly occupied by the Palestinians.³² The protest however became more violent as the Israeli Police prevented Palestinians from performing one of their Ramadan customary practices of converging at one of the City's ancient gates,³³ an action the Palestinians considered as a deliberate provocation.³⁴ In order to wade off the Palestinians from the old city's gate, the Israeli Police raided the Aqsa Mosque compound using demonstration dispersal method;³⁵ an action which led to the injuring of a handful of Palestinians and some Israeli Police officers as well.³⁶ In response to the Israeli Police intervention, Hamas and other militant groups fired over 4,000 rockets and launched projectiles;³⁷ incendiary balloons;³⁸ and missiles over Israel's towns and cities thereby inflicting fear on the residents and killing at least 12 Israeli residents, including two children.³⁹ In retaliation, Israel engaged on 11 days relentless bombardment of Gaza by launching a total of 1,500 airstrikes⁴⁰ and artillery barrages targeting Hamas' underground military structure.⁴¹ On the whole, at least 230 people including 65 children were killed; 1,620 people injured as at the Thursday of the attack;⁴² over 16,000 homes damaged; 50 schools and training centres destroyed; and 9 hospitals and 19 clinics damaged.⁴³ Such was the effect of the 11 days Gaza airstrikes.

4. International Humanitarian Law and the Protection of Children

International Humanitarian Law accords children both general and specific protection given their vulnerable nature especially in situations of armed conflicts.⁴⁴ This protection exists in both international and non-international armed conflicts and are available under the Geneva Convention Relative to the Protection of Civilians in Time of War, 1949 (GC IV); Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of International Armed Conflicts, 1977 (Protocol I); Common Article 3; Protocol Additional to the Geneva Conventions, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts; 1977 (Protocol II); and the Rome Statute of the International Criminal Court, 1998.

²⁹Shrouq Aila, Anna Theresa Day, The Intercept, 'Israel Attacks on Gaza left Strained Health Care System in Tatters' May 21 2021. Available at < <https://theintercept.com/2021/05/21/gaza-bombing-hospital-israel> > Accessed 12 June 2021.

³⁰Israel, Hamas begin Truce to End 11 Days of Destruction and Airstrikes Killing over 240: Gaza Celebrates' Jagan News Desk, New Delhi, 21 May 2012. Available at < <https://english.jagran.com/world/israel-hamas-begin-truce-to-end-11-days-of-destructions-and-airstrikes-killing-over-240-gaza-celebrates-10026919> > Accessed 17 June 2021.

³¹ *Ibid.*

³²Dan Bilefsky, 'What Drove the Israel-Gaza Conflict? Here's What You Need to Know' *The New York Times*, 16 June 2021 < <https://www.google.com/amp/s/www.nytimes.com/article/israel-gaza--what-we-know> > Accessed 21 June 2021.

³³ *Ibid.*

³⁴'Jerusalem Violence: Deadly Airstrikes Hits Gaza after Rocket Attacks' < <https://www.bbc.com/news/world-middle-east-57053074> > Accessed 26 June 2021.

³⁵'Jerusalem Violence: Deadly Airstrikes Hits Gaza after Rocket Attacks' < <https://www.bbc.com/news/world-middle-east-57053074> > Accessed 26 June 2021.

³⁶ *Ibid.*

³⁷Mahmud Hams 'Jerusalem Violence: Deadly Airstrikes Hits Gaza after Rocket Attacks' < <https://www.bbc.com/news/world-middle-east-57053074> > Accessed 26 June 2021.

³⁸'Israel Strikes in Gaza after Fire Balloons Launched' 16 June 2021. Available at < www.bbc.com/news/world-middle-east-57492745 > Accessed 22 June 2021.

³⁹ *Ibid.*

⁴⁰Sebastien Roblin, 'Israel's Bombardment of Gaza: Methods, Weapons and Impact'. Available at < <https://www.forbes.com/sites/sebastienroblin/2021/05/26/israels-bombardment-of-gaza-methods-weapons-and-impact/?sh=80db24d2f442> > Accessed 27 June 2012.

⁴¹ *Ibid.*

⁴²Mahmud Hams, 'Jerusalem Violence: Deadly Airstrikes Hit Gaza after Rockets Attacks' 10 May 2021. < <https://www.bbc.com/news/world-middle-east-57053074> > Accessed 25 June 2021.

⁴³'Israel Strikes in Gaza after Fire Balloons Launched' 16 June 2021. Available at < www.bbc.com/news/world-middle-east-57492745 > Accessed 22 June 2021.

⁴⁴ Protocol I, *op cit*, Article 51; Protocol II, *op cit*, Article 13.

Geneva Convention Relative to the Protection of Civilians in Time of Armed Conflict, 1949 (GC IV)

The GC IV regulates the conduct of international armed conflicts and specifically protects the civilian population inclusive of children in time of war. The said Convention⁴⁵ requires the Parties to the conflict to establish hospitals and safety zones and localities to protect the wounded, sick and children under the age of fifteen. Children are further entitled to the protection of their cultural environment; their education and the exercise of their religion.⁴⁶ In accordance with the provisions of the said Convention,⁴⁷ priority shall also be accorded to children in the distribution of relief supplies. In addition, High Contracting Parties must permit the free passage of necessities intended for children in besieged or occupied territories.⁴⁸ Again, children in detention are entitled to be lodged in the same place of internment with their family members;⁴⁹ and must be allowed to attend school either within or outside of the place of internment.⁵⁰ They are also entitled to be feed in accordance with their needs;⁵¹ and must be released as a matter of priority even if it means releasing them before the end of hostilities.⁵² This protection also applies to children in occupied territories.⁵³

Protocol Additional to the Geneva Conventions, 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, (Protocol I)

The Protocol I complements the GC IV in the regulation of international armed conflicts. The said Protocol I protects children in a general way as their protection is subsumed in the general protection accorded civilians not taking active part in armed conflicts.⁵⁴ To that effect, civilians enjoy general protection against dangers arising from military operations.⁵⁵ Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.⁵⁶ To further ensure the protection of the civilian population and in particular children, the Protocol I⁵⁷ requires Parties to the conflict to distinguish at all times between civilians and combatants on the one hand and between civilian objects and military objective on the other hand and to accordingly direct attacks against combatants and military objective but not against civilians and civilian objects. Additionally, ‘in any armed conflict, the right of the parties to choose methods and means of warfare is not unlimited.⁵⁸ Thus, it is forbidden to use weapons, projectiles and materials and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.⁵⁹ More so, indiscriminate attacks⁶⁰(those attacks not directed at a specific military objective;⁶¹ those which employ method or means of warfare which cannot be directed at a specific military objective;⁶² or those which employ method or means of warfare the effect of which cannot be limited as required by law),⁶³ are also forbidden. Again, attacks by bombardment by any method or means in a civilian concentrated area; and attacks which may be expected to cause incidental loss of civilian life or civilian objects or even both are also prohibited.⁶⁴ These basic rules of protection also extend to children as they also constitute part of the civilian population;⁶⁵ and apply at all times unless and for such time they (civilians) take active part in hostilities.⁶⁶ However, even where children under the age of fifteen participate in hostilities and fall into the power of an adverse party, they shall continue to enjoy the special protection accorded to them, whether they are recognized as prisoners of war or not.⁶⁷ The Protocol I further protects children in a specific way as it forbids the recruitment of children under the age of fifteen into armed conflict.⁶⁸

⁴⁵ GC IV, *op cit*, Article 14 & 38(5).

⁴⁶ Articles 24 & 50.

⁴⁷ GC IV, *op cit*, Article 38(5) & 50.

⁴⁸ *Op cit*, Article 23.

⁴⁹ *Op cit*, Article 82.

⁵⁰ *Op cit*, Article 94.

⁵¹ *Op cit*, Article 89.

⁵² *Op cit*, Article 132.

⁵³ Articles 50 & 51.

⁵⁴ Article 51(1).

⁵⁵ Protocol I, *op cit*, Article 51(1) & (2); Protocol II, *op cit*, Article 13(1) & (2).

⁵⁶ *Ibid*.

⁵⁷ Protocol I, *op cit*, Article 48.

⁵⁸ *Op cit*, Article 35(1).

⁵⁹ *Op cit*, Article 35(2).

⁶⁰ *Op cit*, Article 51(4)

⁶¹ *Op cit*, Article 51(4)(a).

⁶² *Op cit*, Article 51(4)(b).

⁶³ *Op cit*, Article 51(4)(c).

⁶⁴ *Op cit*, Article 51(5).

⁶⁵ *Op cit*, Article 50(1) & (2).

⁶⁶ *Op cit*, Article 51(3).

⁶⁷ *Op cit*, Article 77.

⁶⁸ Protocol I, *op cit*, Article 77 (2).

Common Article 3

The common Article 3⁶⁹ regulates the conduct of non-international armed conflicts and also protects children in a general way. As earlier pointed out, this protection is rooted in the general protection accorded persons not taking active part in the hostilities.⁷⁰ Thus, the common Article 3 requires each Party to the conflict, as a matter of a minimum standard, in the case of an armed conflict not of an international character occurring on the territory of a High Contracting, to accord humane treatment in all circumstances without any adverse distinction founded on race, colour, religion, or faith, sex, birth or wealth, or any other similar criteria, to all persons not taking active part in the hostilities and persons who have been placed *hors de combat*.⁷¹ To this end, violence to life and persons, in particular murder of all kinds, mutilation, cruel treatment and torture; taking of hostages; outrages upon personal dignity; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples, are all prohibited.⁷² The wounded and sick shall also be collected and cared for.⁷³ These safeguards also apply to children as part of the civilian population.⁷⁴

Protocol Additional to the Geneva Conventions, 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 1977, (Protocol II)

The Protocol II complements the common Article 3 in the regulation of non-international armed conflicts. Article 13 (which is a replica of the provision of Article 51 of Protocol I applicable to international armed conflicts), protects civilians against the dangers arising from military operations. As such acts or threats of violence the primary purpose of which is to spread terror among the civilian population are forbidden.⁷⁵ On the other hand, objects indispensable to the survival of civilians such as foodstuffs, agricultural areas meant for that purpose, crops, livestock, drinking water installations and so on, are also protected against direct attacks.⁷⁶ Displacement of civilians is further forbidden unless such displacement is necessitated by security or military reasons.⁷⁷ Protocol II⁷⁸ further requires persons not taking active part in the conflict and persons who have ceased to take part in hostilities to be treated humanely in all circumstances without any adverse distinction. Hence, acts such as violence to life, health and physical or mental well-being of persons and cruel treatment are prohibited.⁷⁹ Collective punishment;⁸⁰ taking of hostages;⁸¹ acts of terrorism;⁸² outrages upon personal dignity;⁸³ slavery and slave trade;⁸⁴ pillage;⁸⁵ and threats to commit any of the above mentioned acts,⁸⁶ are further forbidden. Article 4(3) specifically requires children to be treated with care; and to receive education in accordance with the wishes of their parents.⁸⁷ All necessary steps must also be taken to re-unite children who are temporarily separated from their families.⁸⁸ Again, recruitment of children, who have not attained the age of 15 into the armed forces of a Party to the conflict, is forbidden.⁸⁹ Children shall also be temporarily removed from the area where hostilities are raging to a safer place subject to the consent of their parents.⁹⁰ The said Protocol⁹¹ further forbids the evacuation of children unless compelling security reasons exists. Children are entitled to this protection unless and for such time they take active part in the hostilities.⁹² However, even where they do take active part in the hostilities, the protection accorded to children captured by an adverse party;⁹³ and children under the age of 15 will still apply to them despite the provisions of 4(3)(c) of this Protocol which forbids the recruitment of child soldier.

⁶⁹ Geneva Conventions, 1949.

⁷⁰ Protocol I, *op cit*, Article 51.

⁷¹ Common Article 3.

⁷² Geneva Conventions, *op cit*, common Article 3.

⁷³ *Ibid*.

⁷⁴ Protocol I, *op cit*, 50.

⁷⁵ *Op cit*, Article 13 (2).

⁷⁶ Protocol II, *op cit*, Article 14.

⁷⁷ *Op cit*, Article 17.

⁷⁸ Article 4 (1).

⁷⁹ Article 4(2)(a).

⁸⁰ Article 4(2)(b).

⁸¹ Article 4(2)(c).

⁸² Article 4(2)(d).

⁸³ Article 4(2)(e).

⁸⁴ Article 4(2)(f).

⁸⁵ Article 4(2)(g).

⁸⁶ Article 4(2)(h).

⁸⁷ Article 4(3)(a).

⁸⁸ Article 4(3)(a).

⁸⁹ Article 4(3)(c).

⁹⁰ Article 4(3) (e).

⁹¹ Article 7.

⁹² Article 13(3).

⁹³ Article 4(3)(d).

Rome Statute of the International Criminal Court, 1998 (Rome Statute)

The Rome Statute of the International Criminal Court also protects children in a general way, as part of the civilian population. Thus, ‘intentionally directing attacks against civilian population as such or against individual civilians not taking active part in hostilities;⁹⁴ and intentionally directing attacks against civilian objects, are both war crimes.⁹⁵ Again, ‘intentionally directing attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects ... which would be clearly excessive in relation to the concrete and direct military advantage anticipated, is a grave breach of the Geneva Conventions and in fact a war crime.⁹⁶ Besides, bombardment by whatever means, of towns, villages, dwellings or buildings which are undefended and which are not military objective, is also a grave breach and therefore a war crime.⁹⁷ Again, conscripting children under the age of fifteen into the armed forces or groups or using them to take active part in the hostilities is a war crime.⁹⁸ The above provisions together constitute the legal framework for the protection of children in International Humanitarian Law.

5. Legality of the 11 Gaza Airstrikes

It is trite that in any armed conflict, the parties have the right to resort to methods and means of warfare of their choice.⁹⁹ However, this right is not unlimited as it is subject to the basic principles of International Humanitarian Law, particularly the principles of distinction and proportionality.¹⁰⁰ Thus, employing methods and means of warfare which cannot discriminate between legitimate targets and protected persons and objects are forbidden. While the principle of distinction requires precision and prohibits indiscriminate attacks;¹⁰¹ the principle of proportionality prohibits attacks that are excessive in relation to the anticipated military advantage.¹⁰² Thus, the legality or otherwise of the 11 days Gaza airstrikes by Israel is weighed against among other things, these basic principles. The 11 days Gaza airstrikes witnessed the relentless bombardment of Gaza by Israel which targeted civilian concentrated areas and resulted in among other things, the death of not less than 65 children; and the destruction of about 50 schools thereby halting the education of more than 42,000 children.¹⁰³ However, bombardment is not illegal *per se*.¹⁰⁴ Hence, bombardment generally as a method of warfare is not forbidden.¹⁰⁵ International Humanitarian Law only forbids area bombardment,¹⁰⁶ that is, the bombardment of civilian concentrated area. This is against the backdrop that area bombardment is indiscriminate¹⁰⁷ and therefore offends the principle of distinction¹⁰⁸ which is the backbone of International Humanitarian Law. The bombardment carried out by Israel in May 2021 is area bombardment and therefore illegal. Human Rights Watch¹⁰⁹ particularly noted that on the 10th of May 2021 when the fighting between Israeli and Palestinians ensued, ‘Israeli military carried out attacks in the densely populated Gaza Strip with missiles, rockets, and artillery’.¹¹⁰ Going further, it noted that many of the attacks by Israeli military used explosive weapons with wide-area effects in populated areas without any apparent military target nearby.¹¹¹ To substantiate this claim, Human Rights Watch investigated 3 attacks by the Israeli military in Beit Hanoun; Al-Shati refugee camp; and Al-Wahda Street, Gaza City and conducted interviews in that regard. In all these 3 investigations, it found no evidence of a military target at or near the sites of the strikes.¹¹² The attacks were not also directed at a specific target nor were any feasible precaution taken to minimize civilian harm. Again, the incidental loss of civilian lives and objects outweighed the expected military advantage.¹¹³ Furthermore, there was no information from Israel justifying the said attack. In

⁹⁴ Rome Statute, *op cit*, Article 8(2)(b)(i).

⁹⁵ *Op cit*, Article 8(2)(b)(ii).

⁹⁶ *Op cit*, Article 8(2)(b)(iv).

⁹⁷ *Op cit*, Article 8(2) (b) (v).

⁹⁸ *Op cit*, Article 8(2)(b)(xxiv) & 8(2)(e)(vii)

⁹⁹ Protocol I, *op cit*, Article 35(1).

¹⁰⁰ *Op cit*; J Borrie & M Brehm, ‘Enhancing Civilian Protection from the Use of Explosive Weapons in Populated Areas: Building a Policy and Research Agenda’, (2011) 93 883, *International Review of the Red Cross*, 809, 820

¹⁰¹ *Op cit*, Article 48.

¹⁰² Protocol I, *op cit*, Article 51(5) (b).

¹⁰³ ‘Israel, Hamas begin Truce to End 11 Days of Destruction and Airstrikes Killing over 240: Gaza Celebrates’ Jagran News Desk, New Delhi, 21 May 2012. Available at < <https://english.jagran.com/world/israel-hamas-begin-truce-to-end-11-days-of-destructions-and-airstrikes-killing-over-240-gaza-celebrates-10026919> > Accessed 17 June 2021.

¹⁰⁴ *Op cit*, Article, 51(5) (a).

¹⁰⁵ *Op cit*.

¹⁰⁶ *Op cit*, Article, 51(5) (a).

¹⁰⁷ *Op cit*, Article 51(4).

¹⁰⁸ *Op cit*, Article 48.

¹⁰⁹ *Human Rights Watch*, ‘Gaza: Apparent War Crimes during May Fighting’, July 27 2021. Available at <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting> . Accessed 25 October 2021.

¹¹⁰ *Ibid*.

¹¹¹ *Ibid*.

¹¹² *Ibid*.

¹¹³ *Human Rights Watch*, ‘Gaza: Apparent War Crimes during May Fighting’, July 27 2021. Available at <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting> . Accessed 25 October 2021.

Beit Hanoun for instance, guided missile killed 8 people including 6 children; and injured 18 persons.¹¹⁴ Another of the attacks investigated by Human Rights Watch was that of the Al-Shati refugee camp—a camp covering about half a square kilometer along the coast of northern Gaza which houses about 90,000 people; and is considered as one of the densely populated areas in the world.¹¹⁵ Israel claimed that it targeted a building in the camp because ‘a number of Hamas terror organization senior officials were in an apartment used as terror infrastructure and that their attack on a bunker was rather responsible for the collapse of the building.’¹¹⁶ However everyone interviewed by Human Rights Watch with respect to the said attack confirmed that they were not aware of any militants in or around the building at the time of the attack.¹¹⁷ On the other hand, Human Rights Watch found no other evidence of any Palestinian armed groups’ presence in the building at the time of the attack or any evidence that there was a bunker underneath the building as claimed by Israel.¹¹⁸

With respect to the attacks on Al-wahda Street which claimed 44 civilian lives including 18 children; and injured 50 people, Israel claimed that it targeted an underground command centre. However, on investigation, Human Rights Watch did not find any evidence of military target including tunnels or an underground command centre under Al-Wahda Street or building at or near the site of the strikes. Human Rights Watch also concluded that the Al-Wahda Street strikes involved the use of 1,000 kilogram GBU-31 series air drop bombs in a densely populated area which caused foreseeable harm to civilians and civilian objects.¹¹⁹ Investigation and interviews by Human Rights Watch showed that there was no prior information or warning prior to the attacks from the Israeli authorities as to allow the residents evacuate the affected buildings.¹²⁰ The Israeli authorities could not also establish their claim as to the existence of tunnels or an underground command centre in the area. Again, they have not been able to prove that the anticipated military gain from the attacks outweighed the expected harm to civilians and civilian property; nor showed how circumstances could not permit them to give prior notice to the residents of Al-Wahda to evacuate the affected building before the said strikes.¹²¹

Summarizing the 11 days Gaza airstrikes by Israel, Independent investigations of *Human Rights Watch* and *New York Times* showed that Israel’s military embarked on the bombardment of civilian densely populated areas of such areas like Al-Wahda Street of Gaza City (considered as one of the densely populated areas in the world); and Al-Shati refugee camp housing about 90,000 people. Investigations also showed that there were no apparent military targets at or around the targeted areas as at the time of the attacks as to warrant the attacks in the first instance. Again, investigations showed that no prior information was given by Israeli authorities to the residents to evacuate the affected buildings before the attacks were carried out. Over and above all, there was no evidence by the Israeli authorities to justify the disproportionality of the attacks. Besides, request by Human Rights Watch to enter Gaza to conduct further investigations on the hostilities was declined by Israel.¹²² It is a well-established principle of International Humanitarian Law that attacks are only limited to combatants and military objectives.¹²³ Civilians and civilian objects are not legitimate targets.¹²⁴ Directing against civilians is clearly illegal as this violates the most basic principle of International Humanitarian Law.¹²⁵ Again, methods and means of warfare which cannot discriminate as required by law are also forbidden. International Humanitarian Law prohibits attacks by bombardment by whatever methods or means which treats as a single military objective a number of a clearly separate and distinct military objective located in a city, town, village or other area containing a similar concentration of civilians or civilian objects, is illegal.¹²⁶ However, even where the target is military as claimed by Israel, all feasible measures (such as giving prior information to the residents of the location of the attacks to evacuate) must be taken to minimize incidental loss of civilian lives and injury to both civilians and civilian objects. Over and above all, the attacks must be excessive in relation to the concrete and military advantage anticipated.¹²⁷ Israel failed to observe the principles requiring parties to the conflict to avoid indiscriminate attacks; and incidental loss of civilian lives and objects which are excessive in relation to the anticipated military advantage. It also failed to take feasible measures as required by law. Thus, on the strength of the foregoing, the 11 day Gaza airstrikes by Israel resulting in the death of about 65 children is clearly illegal as it violates the basic principles of distinction and proportionality which are the fundamental principles of International Humanitarian

¹¹⁴ *Ibid.*

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.*

¹¹⁹ *Ibid.*

¹²⁰ *Ibid.*

¹²¹ *Human Rights Watch*, ‘Gaza: Apparent War Crimes during May Fighting’, July 27 2021. Available at <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting> . Accessed 25 October 2021

¹²² *Ibid.*

¹²³ Protocol I, *op cit*, Articles 48 & 52(2).

¹²⁴ *Op cit*, Articles 48 & 51.

¹²⁵ *Ibid.*

¹²⁶ Customary International Humanitarian Law, Rule 13; Protocol I, *ibid*, Article 51(5) (a).

¹²⁷ Protocol I, *op cit*, Article 51(5) (b).

Law. Besides, Israel failed to minimize collateral damage because of the failure to give prior information to the residents of the location of the attacks to enable the residents evacuate.¹²⁸

6. Principle of Distinction – the Cornerstone of International Humanitarian Law

The principle of distinction is a cardinal principle of International Humanitarian Law¹²⁹ geared towards guaranteeing the protection of persons not taking active part in hostilities.¹³⁰ It is also a vehicle for humanizing war.¹³¹ It is in fact the most basic principle that ‘determines the feasibility of the other principles of International Humanitarian Law’.¹³² The principle of distinction constitutes Rule 1 of Customary International Humanitarian Law; and it states as follows: ‘the Parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians’.¹³³ The principle of distinction is further implied in the Preamble to the St. Petersburg Declaration¹³⁴ as it provides that the only legitimate object which parties should pursue in any armed conflict is to weaken the armed forces of an adverse party.¹³⁵ In addition, The Hague Regulations Annexed to The Hague Convention¹³⁶ implies this basic principle by prohibiting attack and bombardment, by whatever means, of towns, villages, dwellings, or buildings which are undefended.¹³⁷ The principle of distinction is ultimately codified under Protocol I.¹³⁸ Thus:

In order to ensure respect and protection of the civilian population and civilian objects, the Parties to the conflict shall always distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objective.¹³⁹

The above provision is the replication of Rule 1 of Customary International Humanitarian Law.¹⁴⁰ In other words, the principle of distinction defines the persons and objects that are legitimate targets and those that are not; and limits attacks only to legitimate targets. To facilitate respect for this principle, International Humanitarian Law prohibits indiscriminate attacks;¹⁴¹ that is, attacks not directed at a specific military objective;¹⁴² those which employ method or means of warfare which cannot be directed at a specific military objective;¹⁴³ or those which employ method or means of warfare the effect of which cannot be limited as required by law.¹⁴⁴ However, although International Humanitarian Law limits attacks to combatants and military objective,¹⁴⁵ directing attacks against civilians and civilian objects are not in themselves unlawful since Article 52(2)¹⁴⁶ permits combatants to carry out military operations even where such operation will result in collateral damage. But then, such attacks must not be intentional nor should the incidental loss of civilian lives and objects thereto be excessive in relation to the anticipated military advantage.¹⁴⁷ In other words, the principle of distinction ‘implies precision and precaution’.¹⁴⁸ Precision in the conduct of military operation is the ability to direct attacks on specific legitimate objects; and to employ such means and method of warfare that will facilitate same. Hence, the offensive against for instance Beit Hanoun, Al-Shati refugee camp, and Wahda Street without any evidence of military objectives at or around these

¹²⁸Human Rights Watch, ‘Gaza: Apparent War Crimes during May Fighting’, July 27 2021. Available at <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting> . Accessed 25 October 2021.

¹²⁹ Nuclear Weapon Advisory Opinion (*supra*).

¹³⁰Anita Nwotite, ‘The Principle of Distinction in the Light of Civilian Protection in International Humanitarian Law’ (2020) 4 (2) *African Journal of Law and Human Rights*, 78, 84. Available at <<https://ezenwaohaetoor.org/journals/index.php/AJLHR/article/view/1016> > Accessed 9 July 2021.

¹³¹K Watkin , ‘Warriors without Rights? Combatants, Unprivileged Belligerents and the Struggle over Legitimacy’, (2005) 2, *Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series*. Available at <<https://www.reliefweb.int/files/resources>> Accessed 3 June 2020.

¹³²E A Oji, ‘The Problem with International Humanitarian Law: Distinguishing Targets in Armed Conflict’, (2013) 4 *UNIZIK J.I.L.J.*, 9-11.

¹³³ < <https://www.ihl-database.com> > Accessed 14 July 2021.

¹³⁴ 1868.

¹³⁵ *Ibid*.

¹³⁶ 1907.

¹³⁷ Article 25.

¹³⁸ Article 48.

¹³⁹ Protocol I, *op cit*, Article 48.

¹⁴⁰ Anita Nwotite, *op cit*, 83.

¹⁴¹ Protocol I, *op cit*, Article 51(4)

¹⁴² *Op cit*, Article 51(4) (a).

¹⁴³ *Op cit*, Article 51(4) (b).

¹⁴⁴ *Op cit*, Article 51(4) (c).

¹⁴⁵ *Op cit*, Articles 48 & 51.

¹⁴⁶ Anita Nwotite, *op cit*, 82.

¹⁴⁷*Op cit*, 87-89; Protocol I, *op cit*, Article 51(5) (b); Rome Statute of the International Criminal Court, 1998, Article 8(2) (b)(iv).

¹⁴⁸ Anita Nwotite, *op cit*, 82.

areas at the time of the attacks which among other time resulted in the death and injury to civilians including children clearly violates the principle of distinction which limits attacks to military objectives.¹⁴⁹

7. Principle of Proportionality

The principle of proportionality constitutes Rule 14;¹⁵⁰ and is codified under Protocol I.¹⁵¹ Article 57(2)(b) provides thus:

An attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damages to civilian objects, or combination thereof which would be excessive in relation to the concrete and direct military advantage anticipated.

The principle prohibits disproportionate attacks.¹⁵² In essence, the principle does not rule out the possibility of civilian casualty; certainly not. But that such harm should not be excessive in relation to the military advantage anticipated. The principle of proportionality is not just central but also fundamental to International Humanitarian Law¹⁵³ as it balances competing military and humanitarian interests.¹⁵⁴ Thus, it is not enough that a target is a military objective; attack on such target must in addition be proportionate. However, the application of this principle has been a subject matter of controversy in International Humanitarian Law¹⁵⁵ against the backdrop that it does not actually or exactly provide how much collateral damage is disproportionate.¹⁵⁶ On the other hand, Shamash¹⁵⁷ asserts that the determination of what constitutes ‘excessive collateral damage is unclear to the point of inapplicability’. Thus, ‘the rule does not impose an absolute limit on extensive civilian harm; and what is to be considered proportionate is in most cases unclear and disputed’.¹⁵⁸ Furthermore, the International Criminal Court for the Former Yugoslavia opines that: ‘the main problem with the principle of proportionality is not whether it exists or not it exists but what it means and how it is applied’.¹⁵⁹ Hence, the issue of how to balance civilian harm and military necessity remain unanswered. This notwithstanding the principle of proportionality remains integral to civilian protection as requires justification for any attack on civilians and civilian objective in excess of military necessity anticipated.¹⁶⁰ To that effect, any level of civilian harm could be accepted as proportionate provided that it is justified.¹⁶¹ Thus, the 11 days Gaza airstrikes which were not justified by Israel is considered disproportionate as they have not been able to prove that the anticipated military gain from the attacks outweighed the expected harm to civilians and civilian property.¹⁶²

8. Conclusion and Recommendations

The respect for the fundamental principles of International Humanitarian Law particularly the principle of distinction remains one of the effective ways through which the protection of children is enhanced. Children as part of the civilian population benefit more from these principles as the situation of armed conflict makes them more vulnerable to attacks. However, these fundamental principles are often violated to the detriment of children as parties to the conflict employ methods and means of warfare (such as area bombardment as witnessed in Gaza) which cannot distinguish between lawful targets and protected persons/objects. The failure to adopt all measures feasible to minimize loss of civilian life, damage to civilian objects, further exacerbate the situation as attacks are disproportionate in relation to the concrete military advantage anticipated. These and other issues of violation characterized the 11 days Gaza airstrikes thereby making the strikes illegal. This accounted for the difficulty in protecting children during the said airstrikes. Thus, if children must be effectively protected in the situation of armed conflicts, the principles of distinction and proportionality amongst other things must be respected. To that effect, parties to the conflict must be more committed to their obligation of respecting and ensuring respect for

¹⁴⁹ Protocol I, *op cit*, Article 48.

¹⁵⁰ Customary International Humanitarian Law, *op cit*.

¹⁵¹ Protocol I, *op cit*, Articles 51(5)(b); & 57(2)(b); Protocol Additional to the Certain Conventional Weapons, (Protocol II), *op cit*, Article 3(8).

¹⁵² *Ibid*; *International Court of Justice Nuclear Weapon Advisory Opinion, supra*, para 43; *Israel, The Targeted Killing Case*

¹⁵³ J Borrie & M Brehm, *op cit*, 820.

¹⁵⁴ H E Shamash, ‘How Much is too much? An Examination of the Principle of *Jus in Bello* Proportionality’, *Israel Defense Forces Law Review* (2005-2006) vol. 2, 2.

¹⁵⁵ J Borrie & M Brehm, *op cit*, 820

¹⁵⁶ H E Shamash, *op cit* 3 & 6.

¹⁵⁷ *Op cit*, 2.

¹⁵⁸ *Ibid*.

¹⁵⁹ *ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, 2000, para 48.

¹⁶⁰ Protocol I, *op cit*, Articles 51(5)(b) & 57(2)(b).

¹⁶¹ *ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, supra*.

¹⁶² *Human Rights Watch*, ‘Gaza: Apparent War Crimes during May Fighting’, July 27 2021. Available at <https://www.hrw.org/news/2021/07/27/gaza-apparent-war-crimes-during-may-fighting> . Accessed 25 October 2021.

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the Geneva Conventions by putting in place effective measures in that regard. Such measures will among other things include:

1. Adoption of specific laws protecting children in situations of armed conflict owing to the peculiarity of their situation. This will make for a more detailed legal framework as against the general provisions of the Geneva Conventions.
2. Enactment of domestic laws repressing the violation of International Humanitarian Law.
3. Stipulation of stringent sanctions punishing the violation of the Geneva Conventions.
4. Holding individual members of the armed forces of the parties to armed conflicts criminally responsible for any act constituting a violation of the fundamental principles of International Humanitarian Law;
5. Establishment of neutralized zones by parties to the conflict so as to ensure that children are adequately protected in situations of armed conflicts.