

AN EXAMINATION OF THE PRINCIPLE OF PROPORTIONALITY IN THE CONTEXT OF THE ISRAEL HAMAS WAR 2023

By

Wulengkah Gopar Yilkang Ph.D

Abstract

International humanitarian law has made robust provisions in the Geneva Conventions of 1949 and its 1977 Protocols for the protection of the civilians and civilian objects in the conduct of hostilities during armed conflict. Critical amongst the protective principles are the principles of distinction and proportionality. However, the Israeli Defence Force (IDF) has demonstrated disregard to these basic principles in the targeting of Mohammed Deif and his deputy by killing 90 civilians in pursuit of just two Hamas fighters. This article sets out to interrogate the classification of the Israel-Hamas conflict and concludes that Hamas is a terrorist armed group not representing any state, thereby making the conflict a non-international armed conflict. The paper argues that the definition of military advantage envisioned in any attack is subjective and gives the IDF the latitude to give it a broad interpretation which legitimize the killing of civilians depending on the importance attached to then legitimate target of attack. The paper concludes with a call for an-overhaul of article 57(2)(iii) of AP 1 on the determination of whether loss of civilian life damage to civilian object is excessive in relation to concrete military advantage anticipated from the attacker and place it under the control of a neutral party.

Keywords: *Distinction, Proportionality, Precaution, civilian attack, civilian object, combatants.*

1.0 Introduction

Following the devastating surprised attack against Israel by the Palestinian militant group, Hamas on the 7th day of October 2023, at the Nova Music Festival, killing 1,400 Israelis mostly civilians and taking 220 hostage¹, Israel launched a combined armed offensive in the Gaza strip, with the goal of eradicating Hamas as an effective fighting force. The war has lingered on for over 9 months now and has continued to claim the lives of Palestinians, mostly civilians as against the rules of armed conflict, prohibiting attacks on civilians and civilian objects. In specific terms, 38, 713 Palestiniens have been reportedly killed since the commencement the war on October 7th 2023 to 18th July, 2024².

There is no doubting the fact that there are in place laws of war regulating the conduct of hostilities by parties to armed conflict. However, the increasing numbers of civilian casualties in the on-going Israel-Hamas war calls to question the level of compliance with the laws as succinctly elaborated in the Geneva conventions and customary international law. Critical to the protection of the civilians and civilian population and civilian objects is the principle of distinction between civilians and combatants³. To

* Wulengkah Gopar Yilkang, is a Senior Lecturer in the Department of International Law and Jurisprudence, Faculty of Law University of Jos. He can be reached on the following contacts. 08057316122 or 09133777201. Email: yilkangwulengkah@gmail.com or yilkangg@unijos.edu.com.

¹ See The Times of Israel. Com of 25, October 2023.12:40pm. www.times ofisrael.com, reported by Jeremy Sharon. Date accessed: 17/7/24.

² See France 24. Com News, 10:00pm 18th July, 2024.

³ Generally, Geneva Convention IV and more particularly article 48 of API, 1977 on the Principle of distinction.

further guarantee the protection of civilians and civilian objects, the right of the parties to the conflict to choose methods or means of warfare is not unlimited⁴, but limited only to weapons that by their design have the capacity to discriminate between civilians and combatants by reason of its capacity to aim with some degree of precision at legitimate targets only. In furtherance of the desire to protect the civilian from the effects of war, the law provides for precautionary measures to limit the volume of civilian damage while pursuing legitimate targets⁵. It is the requirement of the law that, in the conduct of hostilities, constant care shall be taken to spare the civilian population, the civilians and civilian object.

However, on the 13th day of July 2024, while targeting Mohammed Deif, the supreme commander of Hamas military wing and his deputy Rafe Salama in Khan Yunis⁶, 90 Palestinian civilians were reported killed and 300 others wounded by the IDF⁷. Indeed, Mohammed Deif and his Deputy Rafe Salama were believed to be the masterminds of the October 7, 2023 “Al-Aqsa Flood” attack which led to the current armed conflict in Gaza⁸. Granted that Mohammed Deif was the supreme commander of Hamas military wing and Rafe Salama, his deputy who was the wing commander in Khan Yunis made them to be combatant and therefore legitimate targets of attack. However, Khan Yunis was a humanitarian zone and therefore an attack on a humanitarian zone negates the principle of distinction, being a civilian centre. Furthermore, the killing of 90 Palestinian civilians and wounding 300 others was a negation of the principle of proportionality⁹.

It is instructive to point out at this stage, that since Israel withdrew its military forces and citizens from the Gaza strip in 2005 and since 2007, Hamas have governed the territory¹⁰. It is also instructive to note that since 2007, Hamas have governed the territory, which is not the recognized government of Palestine¹¹. It is further instructive to state that the statehood of Palestine has remained a controversial issue in international law since the unilateral declaration of statehood on 15 November 1988, which was proclaimed by Yasser Arafat at the meeting of exiled Palestinian National Council in Algiers¹². Although a number of states have given recognition to the statehood of Palestine following the unilateral declaration in 1988 and acquired United Nations General Assembly non-member observer status in 2012, Palestine is not a full member of the United Nations family following its veto by the United States of America thereby blocking its full membership.¹³

The import of the Interrogation of the statehood of Palestine and the status of Hamas at this stage is to clearly design a roadmap for the understanding of the applicable law in terms of the classification of the conflict. However, it is instructive to point out that the principles of international humanitarian law

⁴ See Article 35 of API, 1977.

⁵ See generally article 57 of API, 1977.

⁶ See France 24. Com of 13 July 2024, 10:00pm News.

⁷ Ibid.

⁸ Ibid.

⁹ See generally article 57 of API, 1977, see also Rule 14 of Customary International Humanitarian Law.

¹⁰ See Sagan S. and Weine A, “Understanding the Rules of War in the Context of the Israel – Hamas Conflict” <https://law.stanford.edu.>press> accessed: 17/07/2024.

¹¹ Ibid.

¹² See Palestinian Declaration of Independence. Palestinian De.... En.m.wikipedia.org. Accessed 19/07/2027

¹³ See the Times of Israel. US Vetoes UNSC resolution on Palestinian Statehood after 12 countries voted in favour. US Vetoes UN... timesofisraelcom. Accessed 19/07/2024.

relevant to the discourse of the topic of this article are applicable in both international and non – international armed conflict. Accordingly, an in-depth analysis of the classification of the conflict will be treated in the body of the article.

The article is divided into three parts. Part one interrogates the classification of the Israel – Hamas conflict with a view to ascertaining the applicable laws. Part two, discusses the nature and status of Hamas as a fighting force and part three examines the scope of compliance with the principles of distinction and proportionality by the Israel Defence Force (IDF) in relation to the killing of 90 Palestinian civilians while pursuing Mohammed Deif and his deputy Rafe Salama. Part four will draw the conclusion and make recommendations towards a more precession driven attacking process consistent with IHL rules.

2.0 Classification of the Israel – Hamas Gaza Conflict 2023 Under International Humanitarian Law

There is no doubting the fact that the conflict between Israel and Hamas come under the purview of law of armed conflict, also refers to as “International Humanitarian Law”. This is consistent with the definition proffered by the ICTY in the *Tadic’s case* to the effect that:

“an armed conflict exist whenever there is a resort to armed force between states or protracted armed violence between governmental authorities or between such groups¹⁴.

It is a known fact that Israel and Hamas have been at war since the 7th of October 2023, following the attack against Israeli citizens at the Nova Music Festival, killing scores and several others hostage. It is instructive to note that the law of armed conflict comes into effect immediately upon the outbreak of hostilities. It is equally instructive to point out that, international law recognizes two kinds of armed conflict; international¹⁵ and non – international armed conflicts¹⁶. Each has its own rules even though many of the basic provisions are common to both.

The term, international, entails that two or more sovereign states are involved in an armed conflict. However, the conflict between Israel, a sovereign state and Hamas an organized terrorist group is not easily discernible as such. This is because Hamas is not a state party neither are they representing their state or fighting on behalf of their state, but a terrorist armed group operating from another territory proclaimed to be part of the acclaimed Palestinian state. To further complicate issues, the statehood of Palestine remained unsettled even though they have acquired non-state observer status at the United Nations General Assembly. On the other hand, Gaza strip is not a state nor a territory under occupation or controlled by Israel since it pulled out or withdrew occupation in 2005¹⁷.

¹⁴ See *Prosecutor V Dusko Tadic a/k/a “Dule” IT-94-1-AR72*, Appeal Chamber, Decision Sassoli, Antone AB and Anne Qui9ntin how Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practices in International Humanitarian Law. International Committee of the Red Cross Geneva, Switzerland, 2011, P1789.

¹⁵ See article 2, Common to the four Geneva Conventions of 1949.

¹⁶ See articles 3 common to the four Geneva Conventions of 1949.

¹⁷ See Hamas – Israel conflict 2023: Key Legal Aspect. <https://www.gov.1>pages>hamas> Date Accessed: 22-07-2023.

It is instructive to recall that Israel Supreme Court had in 2008 determined that granting the existing context of occupation and trans-boundary nature of the conflicts between Israel and the armed groups in Gaza, it qualified as international armed conflict (IAC)¹⁸. Although the opinion of international law experts differ from the position of the Israeli supreme court, I turn to agree with the decision of the court to the extent that it was during the period or era of Israeli occupation of the Gaza strip until 2005 when it pulled out of the strip that the case was determined. On the other hand, recognizing that the Gaza strip is no longer under occupation of Israel, this article agrees with the arguments and decisions that qualify or classify the conflicts as non-international armed conflicts (NIAC) for obvious reasons which is the cessation of occupation. It means in effect that conflicts taking place between Israel and armed groups in the Gaza strip outside of Israeli occupation cannot be recognized in international law as international armed conflict (IAC) but non-international armed conflict (NIAC).

Research into the classification of armed conflicts into international and non-international armed conflicts have established certain basic elements for a conflict to so qualify. An international armed conflict¹⁹ is said to arise in all cases of declared war or of any other armed conflict between two or more of the High contracting parties, even if the state of war is not recognized by one of them. The International Criminal Tribunal for the former Yugoslavia (ICTY) maintained that:

it is indisputable that an armed conflict is international if it takes place between two or more states, in addition, in case of an internal armed conflict breaking out on the territory of a state it may become international (or depending upon the circumstances, be international in character along an internal armed conflict) if (i) another state intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other state²⁰.

The import of article 2 (1) common to the four Geneva Conventions and article 1(3) of API, is that the conflict is between two sovereign states directly or a case of intervention in a previously existing internal conflict thereby transforming it into an internationalized armed conflict. It is instructive to point out that for an internal conflict to be internationalized the role of the interventionist state must include, organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group²¹. It is pertinent to note that common article 2 to the four Geneva Conventions also include cases of partial or total occupation of a territory of a High contracting party. This position is made more explicit in article 1(4) of API, to include armed conflict in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination as enshrined in the charter of the United Nations²².

¹⁸ *ibid.*

¹⁹ See article 2(1) Common to the Four Geneva Conventions of 1949 and article 1 (3) of additional Protocol I(API) 1977, to the Four Geneva Conventions.

²⁰ See *Prosecutor V Tadic*, *Supra*.

²¹ See Sylvain Vite, "Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and actual situations in Toni Pfanner (ed) *International Review of the Red Cross* Vol 91 Number 873 March 2009. P69.

²² See Article (2) and 55 of UN Charter.

A critical examination of common article 2 to the Geneva Conventions of 1949 and article 1 (3)(4) of API, makes it reasonable to conclude in relation to the ongoing Israel Hamas conflict that it is not an international armed conflict. This conclusion is reached in view of the fact that Hamas is not a sovereign state but a terrorist group. Furthermore, it is obvious that the foreign states supporting Hamas are not in any way exercising the role of organizing, coordinating or planning the military actions of Hamas neither are they providing operational support²³.

Non-international armed conflict on the other hand are those in which at least one of the parties involved is not governmental.²⁴ In this concept depending on the case in question, hostilities take place; wither between one or more armed groups and government forces or solely between armed groups.²⁵ This concept is well captured in article I, Additional Protocol II, to the Geneva conventions of 1949 as follows:

This protocol, which develops and supplements article 3 common to the Geneva conventions of 12, August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by article 1 of the Protocol Additional to the Geneva conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (protocol 1) and which take place in the territory of a High contracting party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command exercise such control over a part of its territory as to enable them to carryout sustained and concerted military operations and to implement this protocol.

It goes further to supply clarification for situations not covered by the article such as internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.²⁶ It is imperative to note that, for a conflict to qualify as non-international distinct from internal disturbances and tensions, that is, riots, isolated and sporadic acts of violence, the state is obliged to resort to its army, as its police forces are no longer able to deal with the situation. Other factors for determining the existence of non-international armed conflict include; the length of the conflict, the number and organizational framework of the rebel groups, their installation or action a part of the territory, the existence of victims, the methods employed by the legal government to re-establish order.²⁷

Indeed, flowing from our analysis on the classification of the armed conflict between Israel and Hamas operating in the Gaza strip, there is no doubting the fact that classifying the conflict as international or non-international pauses a very complex challenge. However, from the analysis above, this article resolved that the on-going conflict between Israel and Hamas is a non-international armed conflict, for determining the applicable law. In any case, the rules contained in article 3 common to the four Geneva

²³ Sylvain Vite, *op. cit.*

²⁴ See Toni Pfanner (ed) *International Review of the Red Cross; Humanitarian debate, Law Policy, action.* volume 91 Number 873 March 2009 p. 75.

²⁵ See Article 1 Additional Protocol II of 1977 to the Geneva Conventions of 1949.

²⁶ Article (2) APII, of 1977 to the four Geneva Conventions of 1949, also see Article 8 (2) (f) of the ICC Statute 1998.

²⁷ See Toni Pfanner, *op cit*, P77.

conventions are regarded as customary international law and therefore applicable to both international and non-international armed conflicts.

3.0 The Status and Obligations of Hamas in International Humanitarian Law

International humanitarian law applies to states as well as non-state armed groups involved in conflict. Hamas is a non-state armed group founded in 1987 known as Harakat Al-Muqawama Al-Islamiya (Islamic Resistance Movement) and has been designated as a violent terrorist group by United States and the European Union.²⁸ It is pertinent to put on record that Hamas won legislative elections in Gaza in 2006 and has held on as defector power since then without conducting any elections.²⁹ On the other hand, the status of Palestine in international law remains a subject of debate despite its unilateral declaration of statehood on November 15, 1988 and the subsequent recognition by 137 states and the attainment of the non-state member observer status at the United Nations General Assembly (UNGA). The bottom line is that Palestine is not a sovereign state properly so called in international law. However, following the unilateral declaration of statehood in 1988, the recognized leadership of the territories making up Palestine is the Palestinian Authority headed by Mahmoud Abbas since 2005.³⁰ It is therefore pertinent to determine whether Hamas is fighting on behalf of the recognized leadership of Palestine. Research has shown that Hamas is fighting for supremacy with the Palestinian Authority, feeling that the Palestinian Authority is not defending Palestine enough, and that they are in the best position to defend Palestine's national aspirations and Jerusalem Muslim holy sites.³¹ It means in effect that Hamas is not fighting for the generality of Palestinians, but promoting their agenda. It is however instructive to note that the Gaza strip is not a state neither is it laying claim to statehood, but part of the territory of Palestine, which encompasses the Gaza strip, the West Bank, and East Jerusalem, which came under the occupation of Israel in 1967³²

Having established that Hamas is a non-state armed group, it is imperative to interrogate how and why it can be bound by international law since, it lacks the capacity to ratify any treaty. International law recognizes the place of non-state armed groups as parties to armed conflict whether international or non-international armed conflict Accordingly, Hamas is bound by international law to the extent that it satisfies the threshold provided under article 4A(2) of the third Geneva Convention of 1949, which provides to the effect that:

Members of other militias and members of other volunteers corps, including those of organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements fulfill the following conditions:

- a) that of being commanded by a person responsible for his subordinates;

²⁸ Is Hamas bound by international Law? what to know. <https://www.nytimes.com>>would,-accessed 1st August 2024.

²⁹ Ibid.

³⁰ President of the state of Palestine <https://wikipedia.org>>pre, accessed August 1, 2024.

³¹ Ibid.

³² See Israel and the occupied Palestinian Territory. <https://www.globalr2p.org>>countries accessed: August 1, 2024.

- b) that of having a fixed distinctive sign recognizable from a distance;
- c) that of carrying arms openly;
- d) That of conducting their operations in accordance with the laws and customs of war.

As an organized armed group, Hamas is expected to distinguish themselves from civilians and complying with laws of war. Whether or not Hamas is complying with the laws of war is not a difficult thing to ascertain. This is because Hamas by design prefer to station themselves in the midst of civilians and civilian objects by using them as shield in order to avoid being distinguished for attack by the Israel Defence Force (IDF). This indeed, is responsible for the huge civilian casualties and massive destruction of civilian objects.³³ It is therefore imperative to note that by locating military objectives in civilian dominated areas or launching attacks from civilian populated areas makes the civilians and civilian objects legitimate targets of attack. The *modus operandi* of Hamas in the conduct of hostilities is a clear manifestation of disregard to the laws of war that binds them. This paper sets out to discuss the scope of compliance with the principle of proportionality by the Israel Defence Force, therefore the manifest violations of International humanitarian law by Hamas will be spared for another paper.

4.0 The Scope of Compliance with the Principles of Distinction and Proportionality by the IDF in Targeting and Killing of Mohammed Deif in Khan Yunis

International humanitarian law in its desire to ensure the protection of civilians and civilian population and combatants that have been rendered *hors de combat* and civilian objects have developed robust protection mechanisms in the basic principles of IHL. The principles encompass prohibitions and precautionary measures in the conduct of hostilities, including limiting the choice of methods and means of warfare.³⁴ Critical amongst the principles are; the principle of humanity,³⁵ principle of military necessity,³⁶ the principle of proportionality,³⁷ principle of distinction and the prohibition on causing unnecessary suffering.³⁸ These principles seek to protect civilians not taking a direct part in hostilities and civilian objects not serving any dual purpose. It is instructive to note that the civilian will lose the benefit of protection whenever they take part in hostilities and this extends to civilian objects whenever they are converted to military purpose or use.

Accordingly, parties to a conflict are required under article 48 of AP1, 1977 to distinguish between the civilian population and combatants and between civilian objects, military objectives, and direct attacks against military objectives only. The import of this is that civilians and civilian objects³⁹ should not be made objects of direct attack, rather constant care shall be taken to spare the civilian population and civilian objects from the effects of hostilities. It is expedient therefore to expound on the distinction

³³ See Hamas-Israel conflict 2023: Key legal Aspects. <https://www.9or.iipages>hamas> accessed: August, 1, 2024.

³⁴ See article 35 of AP1, 1977.

³⁵ Principles of ICRC, article 35 of AP1, 1977.

³⁶ see generally article 52 of AP1, 1977.

³⁷ see Article 51(5)(b) of AP1, 1977.

³⁸ See article 48 and 52 AP1, 1977.

³⁹ see article 50 and 52 AP1, 1977.

between civilians and combatants and military and civilian objects in order to have a clear understanding of what makes a legitimate target of attack.

Military objectives are referred to as objects which;

by their nature, location, purposes 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 advantage⁴⁰. On the other hand, Additional Protocol I, to the Geneva Conventions on the definition of civilian objects is vague, as it simply states that; any object that does not meet the criteria that constitutes a military objective is a civilian object.⁴¹ Further to article 52(2) standard, an object is expected to fulfill certain standards to qualify as military objectives; ie

- i. The objective must contribute effectively to the military action of the enemy, and
- ii. the destruction, capture or neutralization of the object has to offer a definite military advantage,

Following the vagueness of the definition of civilian objects, it is natural that doubts can be created, consequently where there is a doubt on the status of an object the doubt should be determined in favour of the civilian.⁴² It is instructive to point out that certain objects have dual use. However, they cannot be referred to as military objectives until such a time when they can make an effective contribution to military action to the extent that their total or partial destruction capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Apart from military objectives combatants are legitimate targets of attack that require some clarification Article 43 of AP1 defines armed forces as:

The armed forces of a party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government of or an authority not recognized by the adverse party. Such armed forces shall be subject to an internal disciplinary system, which inter alia shall enforce compliance with the rules of international law applicable in armed conflict.⁴³

Article 43(2)(3) of AP1, expands the definition of armed forces to include paramilitary or armed law enforcement agency into its armed forces following which it will notify the other party. This shows that any armed group with a measure of organizational structure, having a responsible command and an internal disciplinary system qualifies as armed force of the party concern. The importance of this definition is to establish the legitimacy of the attack on Mohammed Deif and his deputy in Khan Yunis by the IDF.

⁴⁰ see article 52(2) of AP1, to the Geneva Conventions of 1949.

⁴¹ See article 52(1) AP1, 1977, this definition is limited to material objects such as buildings, vehicles, bridges etc.

⁴² see article 52(3) AP1.

⁴³ see Article 43(1) AP1, 1977.

From the preceding analysis and definitions of civilians and civilian objects and military and military objectives as legitimate targets of attack, it is easy to resolve that Mohammed Dief and his deputy Rafe Salama were members of the armed forces of Hamas and therefore legitimate targets of attack. This leads us to the next issue, whether the principle of distinction was observed. The answer is yes. However, the civilianization of and urbanization of armed conflict in contemporary armed conflicts require more precautionary measures to guarantee the protection of the civilian population, civilians and civilian objects as the case may be. Having identified Mohammed Deif and his deputy as legitimate targets by reason of being Hamas military commanders in civilian dominated area, it was required of the IDF to dig into the next principle which is precautions in attack.

The starting point in the precautionary measures is the choice of the weapons to use. This is necessary from the aspect of military targeting as it prohibits attacks carried out against civilian populated areas believed to contain military objectives with means and methods that do not have the capacity for distinction between civilians and military objectives.⁴⁴

Article 51(4) provides to the effect that; indiscriminate attacks are:

- (a) Those which are not directed against any specific military objective;
- (b) Those which employ a method or means of combat which cannot be directed at a specific military objective;
- (c) Those, which employ a method or means of, combat the effect that cannot be limited as required by this protocol.

Also related to this form of prohibited attack are those pointed out in article 51(5) to the effect that;

An attack by bombardment by any method or means which treats as a single military objectives a number of clearly separate and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilians objects.

The import of this provision is to ensure that only legitimate targets are attacked. Yet in an attempt to attack Mohammed Deif and his deputy, 90 civilians were killed in contradistinction to the principle of distinction and precautions in attack that provides combatants with guidance as to their responsibility to civilians and civilian objects when carrying out attacks on legitimate military objectives.

One of the principles of IHL designed to ensure the protection of the civilian is the principle of proportionality.⁴⁵ The principle of proportionality seems to be more of an exception to the legitimation of attacks on military objectives. The import of this provision is that a legitimate target has been identified for attack, however, the attacker or the commander is restrained from launching the attack because of the presence of civilians and the likelihood of excessive collateral damage. This indeed, entails the balancing of excessive harm to civilians and the military advantage anticipated. This no doubt is quite complex an assignment to the commander. However the choice of worlds in article 57(2)

⁴⁴ See generally article 35 of AP1 and specifically article 51(4) (5) AP1.

⁴⁵ See article 57(2) AP1 1977.

(a)(i-iii) may make for some clarity in the complex assignment aforesaid. Those who plan or decide upon an attack;

- i. must do everything feasible to verify that the chosen object is military and not civilians or civilian object;
- ii. must take all feasible precautions in the choice of means and methods of attack, in order to avoid or in any event minimizing incidental losses to civilian life and objects.
- iii. must “refrain from deciding to launch” any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Part B of paragraph 2, explicitly call for the cancellation or suspension of an attack if it becomes apparently clear 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, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Consistent with article 57(2)(a)(b), it is expected of every reasonable commander to cancel or suspend an attack when the expected incidental loss of civilian life, injury to civilians or damage to civilian objects will be excessive in relation to the concrete and direct military advantage anticipated from the attack. More specifically, an attack on Khan Yunis considered a humanitarian zone, should reasonably expect the presence of civilians requiring higher observance of the principle of proportionality. There is indeed, no doubting the fact that Mohammed Deif and his deputy were very important and legitimate military targets, their killing will bring about tremendous military advantage to the IDF. However granting that Khan Yunis was predominately-civilian residential area, it was a notorious fact, that it will create a significant risk of a high number of civilian casualties and injuries that happen to be the resultant effect of the attack as we have.⁴⁶

Agreed, that Mohammed Deif and his deputy were important military targets, killing 141 civilians and injuring about 400⁴⁷ others is obviously disproportionate. Although Israel claims that the attack was targeted at Mohammed Deif, a legitimate military target who is Israel’s most wanted Hamas militant leaders for decades, it failed the proportionality test in view of the number of collateral damage suffered.

Furthermore, Israel was said to have bombarded Al-Mawasi area in pursuit of Mohammed Deif⁴⁸ in disregard to the prohibitions of indiscriminate attack as a method of warfare.⁴⁹ It is pertinent to examine the extent of military advantage derivable from the killing of Mohammed Deif that could warrant the colossal collateral civilian casualties. Killing 141 civilians and injuring 400 others is quite

⁴⁶ Top Hamas Military commander Mohammed Deif killed in Israel strikes, www.washingtonpost.com accessed 5/08/2024.

⁴⁷ See Hamas – run health ministry says 141 killed in Israeli strikes, <https://www.bbc.com>articles> accessed 5th August 2024

⁴⁸ Israel May have finally killed its most wanted man after seven attempts, but proof of Mohammed Deif demise may be elusive eee.abc.net.au accessed: 5th August, 2024.

⁴⁹ see particularly article 51(5) of AP1 1977

a disproportionate attack that amounts to war crime. However, reflecting on the purpose of war, which is to weaken the military capability of the enemy and Israel's desire to destroy the military capabilities of Hamas by neutralizing two of its high commanders which has been described as a milestone in the process of dismantling Hamas as a military and governing authority in Gaza,⁵⁰ no doubt offers a definite military advantage to Israel granting that Hamas constitutes an existential threat to Israeli citizens in the Gaza boarder region and the country as a whole.⁵¹

It is instructive to point out that a target is not critical in and of itself. Its importance is derived from its potential contribution to achieving the commanders military objective. In this case for the IDF, the objective of dismantling Hamas military capability. Mohammed Deif's contribution in strengthening Hamas military capability cannot be under estimated, being a founding member of the Qassam Brigades and Chief Commander for over two decades, and having been on Israels most wanted list for many years makes his capture and neutralization a definite military advantage as far as the overall objective of dismantling Hamas is concern. Moreover, the import of article 57(2)(b) of AP1 recognizes the inevitability of incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination, thereof, which will be excessive in relation to the concrete and direct military advantage. Who then determines when an attack is excessive? The attacker or the victim? The answer simply is the attacker who knows the importance attached to the target, in which case the commander can still maintain that the attack is not excessive considering the importance of the attack in achieving the overall objective. In this regard, it is logical to conclude that an attack that would provide the IDF with significant military advantage such as neutralizing Mohammed Deif even if many civilians are killed cannot be considered excessive. It is worthy of note, that the definition of military advantage is subjective such that even if many civilians are killed, even in an excessive manner, it is not necessarily illegal,⁵² granting its subjective nature.

5.0 Conclusion

The nature and character of the Israel-Hamas conflict being war fought in civilian dominated cities make the application of the basic principles of IHL a huge challenge. The article established that Hamas strategy includes amongst other things the deliberate use of civilians as human shield and the location of military command centres in densely populated centres with a view to shielding them from attacks. This method of warfare makes the application of the principle of distinction difficult, more so that Hamas fighters are not putting on uniforms for ease of distinction from the civilian population. Furthermore, Hamas strategy of locating command and control centres under specially protected sites such as hospitals, schools and warship centres and ambulances in violation of the prohibitions provided by law against situating military objectives within civilian dominated areas.

The article frowns at the huge number of civilian casualties suffered on the part of Hamas. However, the article acknowledges that the deliberate intermingling of Hamas fighters within civilian dominated

⁵⁰ See Israel says Hamas commander Mohammed Deif killing in July air raid on Gaza, accessible at www.aljazeera.com last accessed 6th August 2024.

⁵¹ The Times of Israel: Is the IDF's ongoing Gaza operations complying with the laws of war? www.timesofisrael.com . Accessed: 17/07/2024

⁵² Ibid.

areas and the situating of command and control centres in residential and commercial areas in themselves make any attack on them a legitimate one. This goes to show that no matter the level of precautions observed by the IDF and their commanders in respecting the principles of distinction and proportionality, there is bound to be civilian casualties. We may blame the Israeli soldiers for not complying with the dictates of proportionality, but we must also blame Hamas for choosing to use civilians as a shield. There is indeed, no doubting the fact that the laws providing precautionary measures clearly obligates commanders who plan attacks to ensure that targets to be attacked are military targets. However, articles 57 (2) (iii) requiring attackers to refrain from attack which may be expected to cause incidental loss of civilian life injury to civilians, damage to civilian objects or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. This obligation is left to the discretion of the attacker who alone determines whether is excessive in relation to the concrete and direct military advantage anticipated. This indeed informs the position of the IDF in the killing of 90 civilians in the pursuit of Muhammed Deif and his deputy in Khan Yunis. This article calls for the overhaul of article 57(2)(iii) of API of the Geneva conventions to remove the right of determining whether the loss of civilians lifes and damage to civilian objects would be excessive in relation to the concrete and direct military advantage anticipated. This will enhance compliance to IHL rules and reduce civilian casualties during armed conflict.