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The Principle of Distinction at the Crossroad of Armed Conflict and Natural Disasters

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The Principle of Distinction at the Crossroad of Armed Conflict and Natural Disasters*

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Abstract: *This article examines the challenges and limits of the principle of distinction in regard to the instrumentalization of natural disasters in armed conflict. While IHL requires parties to a conflict to distinguish between civilians and combatants, as well as between civilian and military objects, the disruption caused by natural disasters complicates this fundamental obligation. Existing scholarship has analyzed distinction in conventional warfare, but its application in disaster-affected conflicts remains underexplored. This study employs a legal doctrinal approach, assessing primary IHL sources to determine whether the exploitation of disaster effects constitutes a breach of distinction. The findings reveal two potential theories – one states that such instrumentalization inherently violates IHL, while the second advocates for a case-by-case analysis focused strictly on human action. The study underscores the need for heightened scrutiny in targeting decisions within disaster zones. By addressing this issue, this article contributes to the ongoing discourse on adapting IHL to contemporary challenges and ensuring the continued protection of civilians in conflict settings.*

Key-words: *International Humanitarian Law, Distinction, Natural Disasters, Armed Conflict.*

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This article was prepared with the assistance of AI tools, solely for editing purposes. All original ideas, legal reasoning, and conclusions presented in this article are solely those of the author.

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1. Introduction

The principles of International Humanitarian Law (IHL) constitute the primary legal framework governing conduct during armed conflicts.¹ Among these principles, distinction serves as a cornerstone, aiming to shield civilians and civilian infrastructure from the harmful effects of hostilities. While the rules of distinction are generally clear and effective in conventional warfare, their application becomes significantly more complex when armed conflict overlaps with natural disasters. In such settings, the neat separation between military and civilian spheres - fundamental to the principle of distinction - is increasingly blurred.

Natural disasters such as earthquakes, floods, and hurricanes profoundly disrupt civilian life, exacerbate humanitarian crises, and introduce new dynamics into conflict zones. These disasters often displace civilians into makeshift shelters, repurpose civilian infrastructure for immediate survival needs, and create acute resource scarcities. Consequently, military decisions in disaster-affected environments must consider not only adversarial strategy but also the chaotic and unpredictable conditions imposed by disasters themselves. Challenges include damaged communication networks, obstructed transportation routes, and disrupted humanitarian relief operations, all complicating accurate assessments and predictions regarding civilian movements and needs. Furthermore, infrastructures traditionally protected under IHL may become dual-use out of necessity: a civilian bridge facilitating humanitarian relief might become essential for military logistics, while military installations may serve as emergency civilian shelters. Such practical dilemmas highlight potential gaps in IHL's existing framework, raising critical questions about whether current legal provisions adequately address scenarios involving disaster conditions. Specifically, although IHL clearly prohibits direct attacks on civilians and civilian objects, it remains unclear whether it similarly forbids exploiting the effects of natural disasters, particularly disaster-induced vulnerabilities.

This article examines how the principle of distinction applies within armed conflicts occurring in disaster-affected regions, evaluating whether existing legal protections are sufficiently robust to handle the unique vulnerabilities created by natural disasters. Given the increasing frequency of armed conflicts in areas susceptible to climate-related disasters, understanding how IHL adapts to these compounded challenges is critical. Ultimately, this

¹ Dieter Fleck (ed.), *The Oxford Handbook of International Humanitarian Law*, 4th edn, Oxford University Press, Oxford, 2021, pp. 81-92; International Committee of the Red Cross, "Fundamentals of International Humanitarian Law" Casebook ICRC, <https://casebook.icrc.org/law/fundamentals-ihl>, accessed 20.11.2024.

analysis seeks to determine whether the exploitation of disaster conditions should be understood as an inherent breach of distinction or if a case-by-case legal assessment is required to evaluate compliance with IHL. By addressing these critical gaps, the article contributes to broader discussions on adapting IHL to contemporary realities, ensuring civilians remain protected even under complex and unpredictable conflict environments.

2. Definition and Scope

Called the “basic rule”, which already indicates its importance, the principle of distinction provides that “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.”²

Several elements are clearly identifiable in this provision. First, the purpose of the norm is centered around the protection of civilians and their property. Second, this obligation is incumbent on the parties to the conflict. Third and most important is the obligation itself, which is to distinguish at all times between the civilian population and civilian objects, on the one hand, and combatants and military objectives, on the other. Finally, after distinguishing between the two categories, the parties to an armed conflict must direct their operations only against military objectives.

Under this principle, combatants are legitimate targets, while civilians are afforded protection from direct attack unless and for such time as they directly participate in hostilities.³ Similarly, military objectives, defined as “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”,⁴ may be lawfully targeted. On the other hand, civilian

² 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 48 AP I. See also Bogdan Aurescu, Ion Galea, Lazar Elena, Ioana Oltean, *Drept international public, Scurta culegere de jurisprudenta pentru seminar*, Editura Hamagiu 2018, p. 470.

³ For a comprehensive analysis on the notion of direct participation in hostilities, see Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, International Committee of the Red Cross, Geneva, 2009.

⁴ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Article 52(2).

objects, which are all objects that are not military objectives,⁵ must not be targeted by military operations. Distinction thus plays a critical role in regulating the conduct of warfare by drawing clear boundaries around acceptable targets. By upholding this principle, IHL aims to prevent the indiscriminate violence that characterizes total war and instead enforce a more controlled approach to hostilities. It functions as a safeguard to ensure that military operations remain directed solely at military forces, thereby preserving civilian lives, infrastructure, and essential services.

A common misconception surrounding this principle is that AP I limits its protection of civilians and civilian objects to prohibiting only direct attacks. While AP I does indeed prohibit direct attacks on civilians, this is only part of the protection framework. Article 48 AP I extends the prohibition beyond attacks, covering all military operations against civilians and civilian objects. The term “attack”, as understood under IHL, is defined in Article 49 AP I, which provides that “‘Attacks’ means acts of violence against the adversary, whether in offence or in defence.” AP I differentiates in several instances between attacks and military operations, making it clear that these two terms are not interchangeable and have distinct meaning.⁶

To understand the difference between attacks and military operations, we must look closely at how the two terms are defined and differentiated within IHL. The definition used for attacks in Article 49 restricts the term to acts involving direct violence aimed at harming the opponent’s military capabilities or personnel, distinguishing it from other types of actions taken in the course of an armed conflict. The term “military operation,” however, encompasses a far wider range of activities that do not necessarily involve acts of violence. Military operations include strategic movements, encirclements, and logistical maneuvers that impact the broader conflict dynamics but may not involve direct hostile engagements. Article 51(4) AP I specifies that indiscriminate attacks - attacks that fail to distinguish between military targets and civilians - are prohibited. Article 51(5) AP I expands on this by defining indiscriminate actions in two specific ways: actions that target areas containing a mix of civilian and military assets without aiming at a specific military objective, and actions likely to cause excessive harm to civilians in relation to the military advantage gained. However, it is the same article that emphasizes that “the civilian population and individual civilians shall enjoy general protection against dangers arising from military

⁵ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Article 52(1).

⁶ Other instances in AP I where the notion of ‘military operation’ is used: Articles 3, 39, 44, 56, 57, 58, 59, 60.

operations.” This clause clarifies that civilian protection encompasses all risks associated with military actions, whether or not these actions qualify as direct attacks. By including “military operations” in its language, Article 51 broadens the principle of distinction to prohibit indiscriminate harm from both combat actions and broader strategic maneuvers.

The differentiation between attacks and military operations in IHL highlights the comprehensive scope of the principle of distinction. This principle does not merely prohibit violent, direct attacks on civilians; it also imposes a duty to avoid any military operations targeted at civilians or civilian objects. Therefore, the prohibition in Article 48 extends to the entirety of military conduct in armed conflict. Such differentiation has significant implications, as it clarifies that all actions within a military strategy, whether direct or indirect, offensive or defensive, must respect the boundaries set by the principle of distinction.⁷

3. Application to Natural Disasters

Having established that all military operations targeting civilians and civilian objects are prohibited under IHL, we must now consider how the principle of distinction applies in the context of natural disasters. This presents a unique challenge, as natural disasters, by their very nature, are indiscriminate phenomena that usually affect civilians and combatants alike without distinction. The central question is whether exploiting the effects of such phenomena can itself breach the principle of distinction. In addressing this, two possible theories emerge.

One line of argument would be that the exploitation of the effects of natural disasters inherently violates the principle of distinction. Natural disasters, as indiscriminate events, impact civilians and combatants without differentiation. If a party to the conflict uses these effects to achieve a military advantage, it inherently fails to distinguish between civilians and combatants or between civilian objects and military objectives. This theory argues that the obligation under Article 48 of AP I extends not only to direct military actions but also takes into account the backdrop against which such military action is taken. By leveraging the indiscriminate effects of a natural disaster, the party effectively disregards its duty to direct operations solely against

⁷ Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law, Volume I: Rules*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005, p. 3. For a study on the practice of states, see Jean-Marie Henckaerts and Louise Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume II: Practice*, International Committee of the Red Cross, Cambridge University Press, Cambridge, 2005, p. 3.

military targets.

Another, more temperate view, on the other hand, would be that the effects of natural disasters and their instrumentalization should be treated independently from the natural disaster itself. Since natural disasters are not man-made and do not originate from a party to the conflict, their effects cannot be attributable to a party and thus automatically cause the party to be in breach of its obligations under the principle of distinction. Instead, the focus should shift strictly to the specific actions taken by the belligerent party. Under this theory, exploiting the effects of a disaster is not inherently unlawful but must be evaluated on a case-by-case basis to determine whether the belligerent's conduct respects the distinction between civilians and combatants and between civilian and military objects. In this scenario, targeting resources or areas already affected by a disaster would only breach distinction if those actions directly or indiscriminately harm civilians or civilian property, irrespective of who and what the natural disaster itself has damaged. Building on these two perspectives, the debate over whether exploiting the effects of natural disasters violates the principle of distinction requires a deeper analysis of their respective strengths, weaknesses, and broader implications.

3.1. The Theory of Inherent Breach

The first theory (the author's theory) posits that instrumentalizing the indiscriminate effects of natural disasters inherently breaches distinction, while the second theory argues for a more nuanced, case-by-case approach that assesses the specific actions of the parties to the conflict. The argument for inherent violation of distinction asserts that the very nature of natural disasters makes their exploitation a violation of distinction. Natural disasters, by definition, impact civilians and combatants indiscriminately, as they are uncontrollable phenomena that do not differentiate between military and civilian. When a party to a conflict exploits these effects to achieve a military objective, it arguably fails to uphold its duty to ensure that military operations are directed solely at military targets.

It is important to acknowledge that in rare circumstances where a natural disaster is highly localized and affects only combatants and military objectives, the instrumentalization of its effects by an opposing party would not breach the principle of distinction. In such cases, the disaster itself cannot be deemed indiscriminate, and leveraging its effects would not inherently

violate the obligation under Article 48.⁸ However, in all other scenarios where natural disasters impact both civilians and combatants in a given region, exploiting the effects of these events would constitute an inherent breach of the principle of distinction. This interpretation suggests that while the belligerent party did not cause the natural disaster, its decision to exploit the disaster's effects essentially makes it as though such effects were part of its own conduct. In this view, the indiscriminate nature of the underlying event transfers to the actions of the belligerent, bypassing the need for a separate evaluation of the specific acts or the manner in which the effects were exploited. The mere act of exploiting the effects of a natural disaster, under these conditions, would itself violate the principle of distinction, irrespective of the details of the belligerent's conduct. Imagine that a powerful earthquake devastates a densely populated urban area in the midst of an armed conflict. The destruction impacts both civilian neighborhoods and military installations. A belligerent force, aware of the widespread devastation, deliberately delays or obstructs resources from reaching areas where enemy combatants are also present, hoping that the lack of such resources will weaken the opposing forces. Under the first theory, this act would inherently violate the principle of distinction. The earthquake, as an indiscriminate event, affects civilians and combatants alike. By choosing to exploit its consequences, i.e. intentionally blocking resources and obstructing recovery efforts, the belligerent effectively assumes responsibility for the disaster's effects as if they were part of its own military strategy. Since the disaster itself does not distinguish between military and civilian populations, any instrumentalization of its effects would necessarily fail the distinction test. There is no need to look further, at the specific manner in which the belligerent instrumentalized the disaster, e.g. whether they allowed certain exceptions for aid delivery to civilians or not. The mere connection with the disaster constitutes an inherent breach of the principle of distinction.

This argument faces significant challenges. The principle of distinction is traditionally understood to regulate human actions, particularly those involving direct targeting. Extending it to encompass natural phenomena - events beyond the control of any party - risks overreaching the scope of the principle. While IHL often addresses indirect consequences, such as incidental harm to civilians, the causative link between the actions of the party and the harm caused by the disaster's effects must be more clearly defined.

⁸ Although a case could be made that distinction requires not only not to target civilians and civilian objects, but also an active effort to differentiate the two from military objectives, something a natural phenomenon is of course incapable of performing. Even though a flood may only affect a military base, no one could argue that a distinction was made and that military objective was identified and targeted.

Without this causal connection, the argument that mere exploitation of a natural disaster inherently breaches distinction becomes tenuous.

3.2. The Case-by-Case Assessment Theory

The second theory offers a more restrained approach, arguing that the effects of natural disasters and their instrumentalization should be treated independently from the disaster itself. Since natural disasters are not caused by parties to the conflict, their indiscriminate nature cannot automatically be attributed to the actions of those exploiting their effects. Under this view, whether the principle of distinction is breached depends on the specific conduct of the parties involved. This theory shifts the focus to the intent and actions of the belligerents, requiring an evaluation of whether those actions distinguish between civilians and combatants and between civilian and military objects.

This perspective is more aligned with the existing IHL framework. As we've seen, attacks are defined as "acts of violence against the adversary, whether in offence or in defence,"⁹ stressing the fact that the principle of distinction governs deliberate human actions. This only takes into account the restrictive scope of the principle of distinction, as applicable for attacks and not military operations in general. But even the term 'military operation' itself indicates a focus on human actions, regardless of the background against which these actions are performed. The indiscriminate natural disaster that acts as a premise for the military operation is irrelevant for the analysis of the human actions that follow. Exploiting the effects of a natural disaster would, therefore, need to be assessed strictly through the following lens: does the action directly or indirectly target civilians or civilian objects? For example, bombarding a disaster-affected hospital to establish a military base would breach the principle, as it involves attacking a civilian object. Conversely, using a floodplain as a natural defensive barrier without causing additional harm does not necessarily violate distinction. In the example of the earthquake presented in the previous section, it would be necessary to assess the specific conduct of the belligerent. If the obstruction of resources were targeted solely at military installations, without preventing civilian rescue efforts, then a case could be made that distinction was preserved. However, if the obstruction targeted aid aimed for civilians, the action would likely still constitute a breach. This perspective requires a more detailed analysis of the exact measures taken by the belligerent rather than assuming a blanket violation based on the disaster's indiscriminate nature.

⁹ 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (AP I), Art. 49.

The strength of this theory lies in its flexibility and adherence to established legal principles. It avoids conflating natural phenomena with human agency and provides a clear standard for evaluating conduct. However, its focus on direct actions risks overlooking the broader context of heightened civilian vulnerability in disaster-affected areas. In such scenarios, even actions that might comply with the letter of IHL could harm civilians, raising questions about whether a stricter interpretation of distinction is needed.

3.3. A Nuanced Case-by-Case Approach

While the second theory provides a more robust and legally sound framework, it benefits from incorporating elements of a third approach: the idea that the principle of distinction implicitly imposes heightened obligations in disaster contexts. Natural disasters often exacerbate civilian vulnerability, displacing populations, damaging infrastructure, and creating scarcity of essential resources. These conditions demand greater care in distinguishing between civilians and combatants, as the risks of harm are magnified.

A significant challenge in applying the principle of distinction in post-disaster settings arises when civilian objects take on dual-use functions, simultaneously serving both military and civilian needs.¹⁰ The principle of distinction requires that parties to a conflict distinguish at all times between civilian objects and military objectives. However, the disruption caused by natural disasters often forces the repurposing of civilian infrastructure,¹¹ creating ambiguity regarding the application of this principle. Food and water supply infrastructure, such as grain storage facilities or water treatment plants, may be used by both civilian populations and military forces, particularly when a disaster has reduced the number of viable alternatives. Similarly, roads and transport networks damaged by disasters may emerge as critical supply routes for humanitarian relief efforts while also facilitating military logistics. The presence of military personnel or logistical activities in these

¹⁰ The issue of dual-use objects has been addressed in Yves Sandoz et al (eds.), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Martinus Nijhoff Publishers, Geneva, 1987, para. 2022-2023. It has come also in the case law of international tribunals, such as ICTY, Prosecutor v Jadranko Prlic, Bruno Stojic, Slobodan Praljak, Milivoj Petkovic, Valentin Coric and Berislav Pusic, Case No IT-04-74-A, 29 November 2017, Judgment. For an analysis of the judgment, see Maurice Cotter, “Military Necessity, Proportionality and Dual-Use Objects at the ICTY: A Close Reading of the Prlić et al. Proceedings on the Destruction of the Old Bridge of Mostar,” *Journal of Conflict and Security Law*, vol. 23, no. 2, 2018, p. 283-305.

¹¹ A comprehensive analysis of dual-use object targeting can be found in Oona A. Hathaway et al, “The Dangerous Rise of ‘Dual-Use’ Objects in War: History, Evidence, and the Case for Reform,” *Yale Law Journal* (forthcoming 2025), currently available at SSRN: <https://ssrn.com/abstract=4938707> or <http://dx.doi.org/10.2139/ssrn.4938707>.

locations raises the question of whether such objects remain protected under the principle of distinction.

Article 52(2) AP I provides that an object loses its civilian protection only if it makes an effective contribution to military action and if its destruction, capture or neutralization offers a definite military advantage. This threshold remains difficult to assess in disaster contexts, where civilian infrastructure often assumes strategic significance without necessarily losing its primary humanitarian function. An infrastructure facility may provide some level of military advantage while remaining indispensable to the civilian population. In such circumstances, the classification of an object as a military target is not straightforward. The issue becomes even more complex when considering objects that temporarily serve military purposes before returning to civilian use. A school or hospital used briefly as a military command post does not remain a military objective indefinitely. The principle of distinction does not provide explicit guidance on the timeframe within which an object regains civilian status. However, the logic of Article 52(3) suggests that targeting decisions must be based on an object's current, rather than past, use, and that once an object ceases to be used for military purposes, it must be treated as a civilian object again.

The determination of whether an object has lost its civilian status is further complicated by the issue of evidentiary standards. Article 52(3) AP I establishes a presumption of civilian protection in cases of doubt. This requirement imposes an evidentiary burden on the attacking party, which must demonstrate that an object has become a military objective before launching an attack. In post-disaster contexts, the practical challenges of intelligence gathering and real-time assessment often lead to disputes over whether a facility's military use was sufficiently established.

Incorporating this perspective into the case-by-case approach ensures that the principle of distinction is applied with the heightened scrutiny required in disaster scenarios. Actions that may appear lawful under normal circumstances, such as targeting dual-use infrastructure, should be reassessed in light of the disaster's impact on civilian populations. This hybrid approach aligns with the humanitarian purpose of IHL, emphasizing that parties to a conflict must account for the unique challenges posed by natural disasters while adhering to the core tenets of distinction.

4. Conclusions

The debate over the application of the principle of distinction to the instrumentalization of natural disasters highlights the complexities of balancing IHL's protective aims with the realities of conflict. While the first possible theory we have analyzed underscores the inherent risks of exploiting indiscriminate phenomena, its broad application risks overextending the principle of distinction. The second theory offers a more pragmatic and legally grounded approach, focusing on the conduct of parties and their adherence to IHL norms. However, integrating a heightened obligation to protect civilians in disaster contexts strengthens this framework, ensuring that the principle of distinction is both flexible and responsive to the unique vulnerabilities created by natural disasters. This nuanced interpretation provides the most balanced and effective way forward, addressing the legal and ethical challenges of modern armed conflict.

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