

Critical Analysis of the Effective Enforcement of the Fundamental Principles of International Humanitarian Law

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Abstract

The basic principle of international humanitarian law (IHL) lies in the prohibition of conducts considered to be cruel, unnecessary and dishonorable in armed conflicts. Contemporary efforts to bring international humanitarian law rules into force by minimizing civilian casualties in armed conflicts have raised serious questions particularly as it relates to the fundamental principles of IHL including, distinction, proportionality and precaution. In an effort to strike this balance, developments of new technology and the prevalence of asymmetric conflicts within and outside the borders of States have created uncertainty regarding the precise interpretation in the application of these principles. This paper examined the effective application of these fundamental principles of international humanitarian law in the management of contemporary armed conflicts, and assessed the role these principles play in moderating the effects of war on civilians and civilian objects. The paper argued that the fundamental objective of these principles can only be achieved by limiting parties' choice of weapons and prioritizing the protection of civilians and civilian objects. The paper concluded that without the effective application of these principles, there would be no international mechanism to mitigate the devastating effects of conflict, potentially leading to widespread atrocities and immense human suffering.

Keywords: *International Humanitarian Law, Distinction, Proportionality, Precaution and Armed Conflict*

Introduction

Current development in technology has no doubt brought serious legal, ethical and societal issues to light. These include but not limited to the use autonomous weapon system and the prevalence of asymmetric warfare (Knut, 2012). States have delved into arguments relating to what extent is it permitted, and desirable to use certain type of weapons in armed conflicts. This is more so that autonomous weapons present numerous benefits to wit: speed, flexibility, precisions, minimization of manpower, reduction in human casualties, absence of fear and self-interest (Andresen, 2017). In addition, IHL requires all military designs for weapons and operations to comply with the principle of distinction, proportionality and precaution to avoid unnecessary suffering (Benjamin, 2011). As it relates to non-international armed conflict, the decision by the appeal chamber of the International Criminal Tribunal for the former Yugoslavia in the (*Prosecutor v. Tadic*, 1995, Para 119) emphasized that the use of weapons by states against rebellion (NSAGs) must be accompanied with utmost regard for humanity. The asymmetric nature of contemporary conflict has no doubt led to several issues as it relates to the application of IHL rules (Robin, 2006). This results when a party to the conflict is apparently weaker than the other, thereby making the weaker party adopting means

and methods such as hostage taking, perfidy, torture summary execution etc. contravening the principles of IHL.

The principle of distinction suggests that combatants (parties to armed conflict) in armed conflicts must at all times distinguish between civilians and civilian objects, on one hand, and military objectives on the other, civilians and their objects should not be an object of attack in hostility (Gabriel, 2005). The prohibition on indiscriminate attacks which flows from the principle of distinction prohibits attacks not directed at a definite military objectives, therefore, any strike which applies means and methods of war that cannot be directed at a specific military target, and such other strikes which if carried out would not be limited to the military advantage as required by law of armed conflicts and as such, are the type of strikes that fails to distinguish between civilians and military objectives (Ford, 2018). This brings us to the principle of proportionality, which states that the anticipated incidental loss of civilian lives, injuries, and damage to civilian properties or both of an attack must not be excessive in relation to the concrete and direct military advantage expected. Meanwhile, some scholars and international lawyers are of the view that an “object” which serves dual purpose, e.g. being used by both civilians and military forces, such an object should be regarded as military objective (Agnieszka, 2016). In line with the principles of distinction, proportionality and precaution, it is *sine qua non* during hostilities to do everything humanly possible to check and confirm that a target is purely military objective, taking every necessary precaution in the choice of carrying out an attack, with the foresight of evading, and in any event, the anticipated incidental damage, of refraining from striking a target that might breach the principle of proportionality, to either cancel or suspend an attack if it becomes clear to the military commander that the target is not military objective.

Methodology

By way of methodology, this paper adopted the qualitative research method that utilized both primary and secondary sources. The resources used in analyzing the research were subjected to critical analysis in order to arrive at sound conclusion. Various journals on the subject area of study were consulted and maximum use of Conventions, cases and statutes form the body of primary sources. The study also exploited secondary sources such as books, chapters in books and peer review journal articles etc.

The Principle of Distinction

Consistent practice of states had established the rule of distinction as customary international law in armed conflicts of both international and non-international character. This principle was first codified in the St. Petersburg Declaration which provides that only targets aimed at weakening the military power of a party to a conflict should be the legitimate target in a conflict (Adler, 1970). The principle of distinction is contained in articles 48, 51(2) and 52(2) of Additional Protocol I applicable to international armed conflict. It is of interest to emphasize that no reservations have been made. The principle is further contained in Additional Protocol II, Amended Protocol II and Protocol III to the Convention on Certain Conventional Weapons and in the Ottawa Convention Banning Anti-Personnel Landmines. The breach of this rule has enjoyed international condemnation; this is regardless of whether the said breach occurs in international or non-international conflict. The UN Security Council has reiterated this principle in its resolutions in an effort to compel compliance with IHL rules in various conflicts around the globe (Anita, 2020).

The rule of distinction in armed conflicts had been opined to be the most valuable of all the three (Kalshoven, 1982). However, not until the codification of the Additional Protocols above, the rule though part of customary international law had not been expressly stated in

international treaties. The idea emanates from early writers who hold the view that only those who have taken arm should be subjected to punishment (Lewis and Emily, 2013).

It is also important to state that the provisions of Article 51 of AP I suggest two types of indiscriminate attacks: the first deals with attacks not directed at military targets. This involves attacking civilian populations and objects without regard to whether they constitute military targets or not (Kelisiana, 2009). A perfect example of this could be associated with the Boko Haram group as they attack not only Nigerian armed forces in their campaign; they extend their attack to schools, hospitals, market places, and civilian settlements (Ezeani, 2017). Such form of indiscriminate attacks is usually committed by terrorist groups. In few occasions, state authorities in their effort to counter armed groups are occasionally guilty of the IHL rule of distinction (William, 2003). This, occurs in civilian areas in the stronghold of armed group(s) where they enjoy civilian sympathy, this form of attacks comes in conflicts where there is rebellion against an occupying state. Classical example of such can be seen in places like Iraq and Afghanistan, where Taliban and al Qaeda living within densely civilian populated areas which in turn makes military target extensively difficult for the U.S and its coalition forces (David, 2011). The latter part of the rule against indiscriminate attack deals with the use of weapons whose means and method of use are not subject to control as to guide against civilian casualties (Hauptman, 2013). These types of weapons include cluster bombs, barrel bombs, chemical weapons and biological weapons.

As it relates to “indiscriminate weapon”, it is apt to state that there is no unanimous definition of the term. However, the ICRC while defining the term held that it involves weapons which are by their nature indiscriminate. Such weapons are prohibited under customary international law. The criteria in determining whether a weapon is indiscriminate or not lies in; whether the weapon has the capacity of being targeted at a specific military objective, and whether the impact of the weapon is such that can be limited in accordance with international law (Jean-Marie and Louise, 2009).

In defining the term “civilian,” article 50 (1) of Additional Protocol I defined the term to mean any “person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3), and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt as to whether a person is a civilian, *that person shall be considered to be a civilian.*” Sub article 2 while defining the term “civilian population” referred to the term as *comprising all persons referred to as civilians.* In determining the status of a civilian particularly in belligerent warfare and contemporary fight against terrorism, the ICTY in the (*Prosecutor v. Tadic*, 1995, Para, 119) case, held that it is irrelevant to create any dividing line between civilians and those actively involved in hostility.

It is important to state that Additional Protocol II which applies to non-international armed conflict has not made any express definition of the term armed forces, however it is logical to contend that the provisions of article 43 above extends to entities which are not states. Consequently, NSAGs that fulfill the requirement of the above article fall under the scope of the article (Martha, 2020). It has also been opined that theoretically, the idea of the term “Party to the conflict” as used in the Protocol attracts wide interpretation accommodating resistance movement, government in exile, freedom fighters, and liberation movements (Heike, 2001). However, this position has been criticized on the basis that it will render the distinction in the legal regime regulating international and non-international conflict irrelevant and confusing (Sassoli and Laura, 2008).

Premised upon the above, the armed force of a party to a conflict includes all organized armed forces, groups and unit under the command of the party to the conflict. The Hague Regulation and the Geneva Conventions require that members of the armed forces other than regular armed forces must comply with the requirement of responsible command, wear

distinctive sign noticeable at a distance, openly carrying of arms, and operating within the confines of IHL (Thomas, 2018). It is apt to state that armed forces of NSAG failing to meet the four conditions identified may not be accorded the privileges of combatant and prisoner of war status when captured (Jensen, 2005).

As it relates to preparatory measures by a civilian to per-take in direct hostile acts in the conflict, the determining factor for preparatory efforts amounting to direct participation in hostility depends on what IHL treaties define as military measures preparatory to an attack. This preparatory measure must be directly linked to the hostile act (Yoram, 2013). In other words, the preparatory measures must be an indispensable part of the hostile act. For example, the assembling of sniper rifle for a direct target on military objects in an area of hostility constitutes a measure preparatory to a specific hostile act, hence qualifies as direct participation in hostilities. On the other hand, preparatory measures which are not specific to a hostile act are not considered as direct participation in hostility (Laurie, 2025). For instance, assembling sniper rifles for transportation from a factory to the strong hold of a party to the conflict for unspecified future use would not constitute direct participation in conflict but a mere indirect participation.

Article 44 (3) of the Additional Protocol I emphasized and recognized the need for “military measures preparatory to an attack” on the part of a civilian in the process of engaging in active hostility.

The Principle of Proportionality

The principle of proportionality is one of the core principles of the law of armed conflict, which seeks for humanitarian purposes, to protect civilians and civilians objects or properties against anticipated incidental damage, from an attack that is extreme to the military advantage expected from an attack (Kolb, 2015). As such combatants and military commanders are refrained from arranging and executing indiscriminate attacks. The principle is recognized as *jus cogens* norm of customary international law that is applicable to both international and non-international armed conflict. Notwithstanding its status as one of the core principle of international humanitarian law, either Additional Protocol I of 1977 or any international treaty provides us with clear meaning for some of the key terms such as “maybe expected” or “military advantage” (Handerson and Reece, 2018). This has left academicians and international lawyers alike to ponder and debate the test of applying the principle of proportionality in times of war.

Regrettably, preceding case laws have not helped as required in interpreting the test of the principle in clear and simple terms. In the case of the (*prosecutor v. Kupreskic*, 2004, Para 524), the trial court held that the principle of proportionality obliges that any incidental and unintentional harm on civilians must be within the ratio of direct military advantage to be achieved by any military attack.

In the (*prosecutor v. Galic*, 2003, Para 58), the trial court was of the view that definite prohibition of indiscriminate attacks on civilians in the first Additional Protocol is contemplative of the customary law associated to all conflicts. Unfortunately for commentators, practitioners of international law, and the court did not undertake further legal scrutiny for applying the test of proportionality to the facts of the case.

The practical application and enforcement of the principle has in several occasions proven to be difficult (Wenging, 2025). This is perhaps not unconnected with the fact that wide range of discretion is given to military commanders of warring parties, and it involves creating balance between two opposite factors military objectives, and civilian life and objects (Richard and John, 2009). Yet again, the test for determining proportionality is subjective and not objective. Judith argues that the principle of proportionality requires an objective test

rather than the commander's subjective confidence (Judith, 1993). Obviously, even though, the test in the final analysis is subjective and therefore naturally difficult to apply. It is important to note, that this uncertainty works to the advantage of the military and not civilians. Therefore, to strike a target in a war situation, the commander must take into account the entire attack, and the military advantage which in most occasions, the decision must be made within the shortest possible time with very limited information available (Charles, 2015).

There is no established number of civilian deaths or casualty required to breach the rule of proportionality. To violate the rule, there must be excessive occurrence of civilian death in relation to the military objective (Bartels, 2013). The Rome Statutes in reiterating this principle states in Article 8 (2) (b) (iv) that "intentionally launching an attack with the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated" is prohibited. A careful reading of the provision shows the fact that the following elements must be established: excessiveness, intention, and collateral damage. However, these requirements only come to play under international criminal law.

All military operations must comply with the rule of proportionality. The use of conventional military equipment such as the Unmanned Aerial Vehicle (drone) must comply with this rule. The use of UAV to strike military targets has on several occasions attract criticism from experts on the ground that it is highly disproportionate in achieving its objective (Lewis and Emily, 2013). However, whether the use of conventional weapons such as the UAV breaches the rule of proportionality depends on their deployment and the decision made by the commanding officer or operator. Some practitioners and scholars contended that where the target is on a senior ranking member of an enemy combatant, a relatively high number of civilian casualties in such a strike may be considered to be proportionate. On the other hand, where the strike is against a low-level member of an enemy combatant, a high level of civilian casualty may be considered to be in breach of the rule of proportionality (Charlotte, 2013). The provision of article 51 (5) of API requires parties to the conflict to disregard some military advantages if it will create civilian casualties not proportionate to the military gain. However, questions have been raised as to the possibility of balancing the rights of civilians and military objectives. This is due to the fact that the elements which call for detailed interpretation in relation to the principle are attack, military advantage, consideration of civilians, and excessiveness of civilian casualty and these have been subjected to various forms of interpretations and no treaty or case law has defined the elements (Aurel, 2025).

On the term "*attack*," Article 49 of Additional Protocol I, 1977, defined the term as "an act of violence against the adversary, whether in offence or defense." However, this seems very confusing particularly, to the military commander in defensive position. Whether it connotes every individual shot made by a soldier in the firing line? In relation to proportionality, question as to whether every soldier must assess the possible damage his shot may occasion? It is pertinent to emphasize that the lack of appropriate guide in determining an attack not in compliance with the rule of proportionality will no doubt create serious problem in ascertaining the breach of the rule of proportionality (James, 2016). With regards to "military advantage," the principle of proportionality requires a contrast between collateral damage and expected military advantage (Samuel, 2011), which fulfills the condition of distinction, when collateral damage is expected, in order to comply with proportionality, the military objectives does not mean a definite military advantage, but a concrete and direct military advantage (Bothe, 1982). Attempts to clarify the concept of military advantage vary largely in terms of the time involved. Bothe holds that the military advantage must be concrete, that is specific

and perceptible to the senses, and direct that is, without necessitating any intervening action (Bothe, 1982, p 365).

A second and narrower interpretation by ICRC suggests that concrete and direct means substantial and close, in relation to the casualty but this view is not widely accepted (Rogers, 1996). Hays-Parks however, disagree with the definitions offered with the reason that the suggestions are too narrow as it disregards lasting benefit (Hays-Parks, 1990). This reproach, however, seems to disregard the very purpose of the prohibition: to protect civilians in wartime. It appears no reason why it ought to be legal to risk excessive collateral damage for remote military advantages to be achieved. By implication, advantages that are general in purpose and have no clear connection with the attack must be disregarded.

The Principle of Precaution

This principle requires parties to conflict during hostilities, to take precautionary measures before launching an attack, especially where the place of attack is civilian concentrated area. This is based on the general principle of IHL, that “constant care” must be put in place in the event of attack to avoid harming civilians and civilian properties. The principle further requires the military commander either the attacker or defender, to either suspend or where necessary to cancel the attack if such attack will cause serious civilian losses and destruction of civilian properties (Michael, 2010). While Art. 57(b) states that military commanders of both parties to the conflict to give “effective advance warning” to civilians, except where circumstances fails to permit such measures. The precautionary procedure of either suspending or cancelling the attack is contained in the four Geneva conventions of 1949. However, where there is a possible choice of choosing a military objective to attack, in such a situation, the law of armed conflict requires the parties to the conflict to always choose the military objective causing the minimum harm to the civilian population (Robert and Fumiko, 2019). The provisions of Article 58 Additional Protocol I, has clearly spelt out three obligations to be observed by parties in conflicts to protect and minimize civilian losses; a) endeavor to remove the civilian population, persons and their objects under their control from the vicinity military objectives” b) refrain from locating military objectives close to settlements, and c) to take all necessary precautionary measures to protect the civilian population and civilian properties under their control against the dangers due to military operations. All these essential precautionary procedures such as advance warning, suspending or cancelling an attack etc have reached the status of *jus cogens* under customary law, to be recognized and observed in both international and non-international armed conflicts (Haque, 2016). For example, the ICRC customary IHL study obliges parties to conflicts to take all feasible precaution to avoid, and in any event to minimize, incidental civilian losses, injury to civilians, and damage to civilian objects as part of the general duty to take constant care to spare civilian lives. However, as it relates to non-international armed conflict, the Additional Protocol II to the Geneva Convention does not expressly make provision with regards to precaution. However, Article 13(1) of Additional Protocol II emphasized that civilians must enjoy all protection against any form of harm emanating from military operations (Charles, 2024). By implication, it is practically impossible to comply with the requirement of article 13 (1) without adhering to the rule of precaution (Shehab, 2021). In an effort to remedy this lacuna, the recent Amended Protocol II to the Convention on Certain Conventional Weapons and the Second Protocol to The Hague Convention for the Protection of Cultural Property adequately made provisions for the requirement of precaution (John, 2024).

Therefore, in an effort to determine what the term precaution is, the obligation to take all feasible preventive measure has been interpreted to be restricted to only the precautions that are practically possible, having regards to all the circumstances at the time of armed conflict

(Daniele, 2024).

Conclusion and Recommendation

The fundamental principles and rules of international humanitarian law certainly form part of the methodical standards set out to protect civilians and property, or minimize the harm to civilians and destruction of civilian objects. Such fundamental principles includes the principle that requires parties conflicts – state and non-state alike, to distinguish between civilians and combatants, civilian objects and military objectives; the principle of proportionality requires parties to conflicts to direct their attacks to military targets and objectives only, and the requirement to either suspend or cancel an attack where such attack as observed by the principle of proportionality that if the anticipated incidental loss of life, injury to civilians and destruction to civilian properties will certainly be excessive in relation to the concrete and direct military advantage expected from the attack. Similarly, it is the responsibility of high-ranking officers to instruct their subordinates appropriately so as to avoid attacks carried out without adequate regards to the rule of precaution.

With regards to the choice of means and methods to be adopted in an attack, it is the intent of sub-paragraph 2 (a) (ii) that the weapon used must be such that their precision and range should be appropriately considered before launching an attack. Most importantly, this provision does not proscribe the use of any specific weapon(s). This shortcoming even though aimed at attracting international consensus in relation to the subject, has created significant gap and present parties to armed conflict with opportunity to adopt weapons the effect of which abuse the fundamental principles of IHL. This could be seen in the current situations in Russia-Ukraine, Iran-Israel, the indiscriminate bombardment of civilians and civilian objects in Gaza, as well as in Nigeria's war against Boko Haram where the use of weapons such as drones, hypersonic and ballistic missiles, cluster and barrel bombs has been employed to the detriment of civilian population. It is therefore, the observation of this paper that, before striking a target, the reasonable commander should cautiously consider whether the military advantage anticipated from destroying the military part of the objective, is greater than the harm done to the civilian settlements, by damaging the civilian part of the object or wind-up its civilian use.

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