

## STRIKING A BALANCE IN THE NEED FOR UPHOLDING BASIC PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW IN THE FIGHT AGAINST TERRORISM\*

### Abstract

*Following the 9/11 attack, the world entered into a global fight against terrorist organizations and state sponsoring terrorism. The fight has started in 2001 in Afghanistan against Al-Qaeda and the Taliban and later extended to Iraq in 2003. However, the creation of the Islamic State (ISIS) and other terrorist organizations shifted both terrorism and the fight against terrorism to a different level. As a result, the world is under the Global Fight against International Terrorism (GFIT). The GFIT has posed so many problems in the application of the rules of International Humanitarian Law (IHL). Therefore, this article, doctrinally, discusses the changes and analyzing them according to the rules of IHL. Accordingly, the violations of the basic principles of IHL will be discussed.*

**Keywords:** *Global Fight against International Terrorism (GFIT), Military Necessity, Humanity, Distinction, International Humanitarian Law (IHL).*

### 1. Introduction

Terrorism is one of the old concepts in International Laws. And in various time and place of the World, it was given different meaning and took different forms. But less emphasis has been given to the subject matter. However, after the attack on 11 September 2001<sup>1</sup>, the issue has been magnified at an alarming rate all over the World and then the attacks on 11 Septembers 2001 constituted a turning point in the relationships between International Law, Global Institutions and Terrorism<sup>2</sup>. The main reason for considering it as a turning point is that the attack was a devastating act of Terrorism ever perpetrated on U.S. soil.<sup>3</sup>

However, lots of progress has been made in the World regarding the issue of Terrorism. The very best example in this regard is the progress in ratification of the Terrorism Financing Convention (TFC). This can be illustrated by the fact that, before the attack, by mid-2001, only four States ratified the Convention; after the attack and the calling of UN Security Council upon State to become a party as soon as possible, within five years, had done so.<sup>4</sup> The UN Security Council had also adopted the Resolution on Terrorism after the Government of Russia introduced it to the Security Council.<sup>5</sup> The result of the attack was the innovation of a new

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<sup>1</sup>P Hostettler, 'Human Right and The War Against International Terrorism', (hear in after cited as Hostettler), in Terrorism and international law: challenge and response (hear in after cited as terrorism and international law), a contribution presented at the meeting of independent expert, International institute of IHL, sanremo, 30 MAY-1 JUNE 2002, & 24-26 sep. 2002. Pp21.

<sup>2</sup> *ibid*

<sup>3</sup> A Steiner & R Goodman, *International Human Right in Context: Law, Politics & Morals: Text and Materials*, 3<sup>rd</sup> eds, (USA: Oxford University Press, 2008), pp380. (Herein after Human Right in Context)

<sup>4</sup> *Ibid*, pp.376

<sup>5</sup> *Ibid*, pp.377

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concept in International Law and Politics called a ‘Global War on Terrorism’<sup>6</sup>. The Security Council called for states to co-operate, and as some writer called it the swift and extraordinary response by International Institutions.<sup>7</sup> In a Resolution passed on 12 September, the UN Security Council determined that the attacks constituted a ‘threat to international peace and security and also recognized the inherent right to individual or collective self-defense with the Charter (res. 1368).<sup>8</sup> At the end of the day, GWOT declared against the Taliban and Al-Qaeda on 7<sup>th</sup> October 2001.<sup>9</sup> The above-listed facts had shown us the development in international cooperation in fighting Terrorism and the resulting GWOT.

### **2. Principle of Military Necessity and Humanity in GFIT**

The main objective of the law of armed conflict is protecting civilians, prisoners of war, the wounded, sick, and shipwrecked by regulating the conduct of armed hostilities.<sup>10</sup> While regulating the conduct of hostilities, it allows the use of force, by the party to the conflict, so long as they respect the fundamental principles of IHL such as principles of military necessity, distinction, humanity, precaution, and proportionality.<sup>11</sup> IHL is all about striking balance between the principle of military necessity and humanity.<sup>12</sup> In an armed conflict, the main aim of the party to the conflict is to weaken the enemy and win. As per the military necessity, the party to the conflict can use different means and methods as long as they don’t violate IHL.<sup>13</sup> The principle of humanity, on the other hand, aims at limiting the loss and suffering of armed conflict.<sup>14</sup> The wider interpretation of both principles has problems. Interpreting the principle of military necessity to include every kind of means and method without limitation will justify any violent measures deemed necessary to win an armed conflict. Whereas, the wide interpretation of the principle of humanity will cause impracticality, on the party to the conflict, by restricting the use of appropriate methods to win an armed conflict. So, it is very important to find a delicate balance in the application of the principles. This balance has been developed by custom over time which makes IHL a set of absolute rules.

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<sup>6</sup> A McDonald, ‘Terrorism Counter Terrorism and the Jus in Bello’, in *Terrorism and International Law: Challenge and Response*, International Institute of Humanitarian Law, 2002 (herein after cited as Avril McDonald’s) pp. 60 “President Bush declared a GWOT, led by U.S. but supported by many states with varying role”.

<sup>7</sup> Avril considered the U.S. response as a swift response

<sup>8</sup> A Steiner & R Goodman, foot note 3

<sup>9</sup> M N. Schmitt, ‘Deconstructing October 7<sup>th</sup>: A Case Study in The Lawfulness of Counter-Terrorist Military Operation, 2002, (Herein after Michael N. Schmitts), in *Terrorism and International Law: Challenge and Response*, International Institute of Humanitarian Law, pp.39 “In response to the attacks, president bush placed the USA on a war footing. Moreover, he demanded that the Taliban turn over Bin Laden & other Al-Qaeda lieutenants and allows the U.S. to verify that terrorist camps based in Afghanistan were no long in use. The president did this both publicly and through the government of Pakistan, which maintained diplomatic relations with Taliban. When Taliban quibbled, the U.S. &U.K. launched the air strikes of October 7<sup>th</sup>. Not long thereafter, follow- on air, land and maritime operations were conducted by a coalition of the willing.

<sup>10</sup> G D Solis, *The Law of Armed Conflict: International Humanitarian Law in War*, Cambridge University Press, 2016) pp3.

<sup>11</sup> J R Vogel, ‘Drone Warfare and the Law of Armed Conflict’, 39 *DENV. J. INT’L L. & POL’Y* 101, 104, 2010, pp114-129

<sup>12</sup> M N Schmitt, ‘Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance. *Va. J. Int’l L.*, 2009.50, pp795.

<sup>13</sup> *Ibid*

<sup>14</sup> Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict*, Cambridge University Press, 2016, pp. 4.

To put it in balance, other principles of IHL are very important. The principle of distinction, precaution and proportionality is the pivot of the equation to put military necessity and humanity in the balance. As a cardinal principle of IHL, principles of Humanity give rise to the principle of distinction, proportionality, and precaution. Under the principle of distinction, the parties to the conflict must at all times distinguish between civilians and combatants<sup>15</sup> as well as between civilian and military objects.<sup>16</sup> Attacks by bombardment by any method or means which treats as a single military objective several separated and distinct military objectives located in a city, town, village or other area confining a similar concentration of civilians or civilian objects are prohibited.<sup>17</sup>

The principle of proportionality says, attacks on legitimate military objectives 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 about the concrete and direct military advantage anticipated are prohibited.<sup>18</sup> Under the principle of precaution, an attack must take all feasible precautions to avoid and, in any event, to minimize incidental loss of civilian life injury to civilians and damage to civilian objects.<sup>19</sup> Furthermore, the use of a human shield is prohibited under IHL.<sup>20</sup> In addition, the party to the conflict has affirmative obligations to protect civilians by keeping them away from military targets.<sup>21</sup>

Notwithstanding, it is fair to conclude that the war posed a challenge to the application of principles of IHL. The challenge posed by the GFIT is obvious and immediate.<sup>22</sup> Therefore, in this part, I will explain the challenge of GFIT on a specific principle of IHL, namely the distinction, proportionality, and precaution.

### 3. Principle of Distinction Between Civilians and Combatants in The GFIT

Civilians, most of the time do not participate in hostilities They are the main victims of armed conflict. As a result, the main aim of IHL is to protect civilians. The three operational principles of IHL are the main source of protection. One of the basic principles is distinction. Therefore, this part, will discuss the ‘principle of distinction’ under IHL and the challenge of GFIT on it.

The principle of distinction requires that parties to a conflict distinguish at all times between combatants and civilians, as well as between military and civilian objects.<sup>23</sup> In addition, the principle protects civilians from indiscriminate attacks.<sup>24</sup> However, the principle of distinction does not forbid civilian casualties; rather, targeting decisions “must avoid civilian casualties

<sup>15</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ( Herein After AP I), 8 June 1977, 1125 UNTS 3, available at: <https://www.refworld.org/docid/3ae6b36b4.html> [accessed 29 April 2021], art 48, 51(2) and 52(2).

<sup>16</sup> *Ibid*

<sup>17</sup> *Ibid*, art 51(5)(a)

<sup>18</sup> *Ibid*, art 51(5)(b) and 57)

<sup>19</sup> *Ibid*, art 57(1)

<sup>20</sup> *Ibid*, art 51(7), and GC III art 23, GC IV art 28)

<sup>21</sup> *Ibid*, art 58

<sup>22</sup> E Chiara GILLARD, ‘The Complementary Nature of Human Rights Law, International Humanitarian Law and Refugee Law’, in M N Schmitt, and G L Beruto, 2003, in *Terrorism and international law: challenges and responses*, International Institute of Humanitarian Law,(herein after, Emanuela-Chiara GILLARD, 2002) pp. 50

<sup>23</sup> AP I art. 48; AP II art. 13(2)

<sup>24</sup> *Ibid*. art. 51(2) and (4).

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that are excessive about the anticipated military advantage.”<sup>25</sup> The only circumstance in which civilians may be targeted is for the time in which they take a direct part in hostilities.<sup>26</sup> In other words, the principle of distinction permits targeting of individuals “who commit specific acts likely to influence military action.”<sup>27</sup> Attacks on legitimate military objectives 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 about the concrete and direct military advantage anticipated are prohibited.<sup>28</sup> Attacks by bombardment by any method or means which treats as a single military objective several separated and distinct military objectives located in a city, town, village or other area confining a similar concentration of civilians or civilian objects are prohibited.<sup>29</sup>

However, in the course of the armed conflict, the application of the principle of distinction is under constant threat.<sup>30</sup> This is due to different reasons. To start with the act of terrorism itself violates the two cornerstones of IHL, which is called the principle of distinction and prohibition of attacks on civilians.<sup>31</sup> At the time of armed conflict terrorists used two primary techniques of war; namely, directly and deliberate targeting of civilians, and using civilians as a shield. In the former case, there have been numerous reports that suggest terrorist organizations have participated in the deliberate attack on civilians.

For example, According to a joint report by the *United Nations Assistance Mission for Iraq (UNAMI)* and the *Office of the United Nations High Commissioner for Human Rights (OHCHR)*, in 2014, ‘ISIS and associated armed groups carried out attacks deliberately and systematically targeting civilians and civilian infrastructure, intending to kill and wound civilians.’<sup>32</sup> Whereas, in the latter scenario, ‘...the use of human shields by terrorist groups at the time of armed conflict has dramatically escalated and ... become an important weapon in waging a new type of warfare that relies on the belligerent’s observance of international law’.<sup>33</sup> In this regard, combatants did not distinguish themselves from civilians rather they hide inside civilian dwellings. They hide their weapons and use the prohibited acts of perfidy to hide within civilians.<sup>34</sup> This act of perfidy, which is specifically prohibited under IHL<sup>35</sup>, is like a wolf in sheep’s clothing; seeking to gain a tactical or strategic advantage by resort to deception and trickery.<sup>36</sup> The most prominent example in this regard is, under the recent campaign to free Mosul from ISIL, it has been noticed that ISIS fighters kidnapped 200 children to use them as

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<sup>25</sup>C Andrew, ‘Unmanned, Unprecedented, and Unresolved: The status of American Drone Strikes in Pakistan under International Law’, *Cornell Int’l LJ*, 44, 2011, pp748.

<sup>26</sup> AP I art 51(3)

<sup>27</sup> *Ibid.*

<sup>28</sup> *Ibid.*, art 51(5) (b).

<sup>29</sup> *Ibid.*, art 51(5) (a)

<sup>30</sup> N Quéniévet., ‘The ‘War on Terror’ and The Principle of Distinction in International Humanitarian Law’, *Colombian Yearbook of International Law*, 2010,pp. 156. Available at SSRN: <https://ssrn.com/abstract=1879133>, [accessed 27 April 2021]

<sup>31</sup> E Chiara GILLARD, 2003, pp.51

<sup>32</sup> UN Assistance Mission for Iraq (UNAMI), Report on the Protection of Civilians in Armed Conflict in Iraq: 6 July – 10 September 2014, 10 September 2014, available at: <https://www.refworld.org/docid/542d3eb64.html> [accessed 27 April 2021]

<sup>33</sup> A Rubinstein, and Y Roznai., ‘Human Shields in Modern Armed Conflicts: The Need for A Proportionate Proportionality’, *STANFORD LAW & POLICY REVIEW* [Vol. 22:1] 2011, pp.93.

<sup>34</sup> *Ibid.*, pp54

<sup>35</sup> AP I, art,37&85

<sup>36</sup> M Madden., ‘Of Wolves and Sheep: A Purposive Analysis of Perfidy Prohibitions in International Humanitarian Law’, *Journal of Conflict and Security Law*, 17(3), 2012, pp.439.

a shield.<sup>37</sup> In addition, the footage also shows a fighter forcing a child to use a shield.<sup>38</sup> Not only a deliberate attack on civilians but also terrorist organizations lack the necessary precision and precaution in their tactics.<sup>39</sup>

The international response to terrorism has also posed problems on the application of the principle of distinction. This is due to some of the means and methods of warfare in the GFIT are against the principle. In this regard, in general, IHL is against the notion of total warfare and the principle of distinction is central to this by limiting the effect of war on civilians. As mentioned hereinabove, when an attack is specifically directed against civilians and civilian objects; launched indiscriminately without distinction between civilian and military target; and/or directed at a military object, but disproportionate to the civilian loss, it is the violation of the principle of distinction<sup>40</sup> without any exception, except the civilian directly participated in hostilities.<sup>41</sup> This in other word means a party to the conflict of GFIT cannot invoke the notation of military necessity as an excuse for the civilian loss.<sup>42</sup>

Nonetheless, the means and methods of warfare employed by the parties to GFIT are clearly against the principle of distinction. The first instance by which the GFIT became a challenge for the application of the principle is, the fact that most attacks are conducted without actual combat. As Dr Avril clearly expressed ‘peacetime security issue became increasingly militaristic.’<sup>43</sup> The usage of highly sophisticated and dangerous military weapons in a place inhabited by civilians is a challenge to the principle of distinction. Of this with particular importance is the use of certain weapons in the course of GFIT. Accordingly, even if IHL prohibits weapons that are indiscriminate by their nature and causes unnecessary sufferings, the parties to the GFIT are nevertheless using them. For instance, the use of drone in military campaign in the Middle East costs an enormous number of civilian life and wounded countless.<sup>44</sup> Drone warfare, by its character, gave a very wide margin of power to the pilot to take on the target. It is a covert strike the pilot always manipulate the drones with remote control outside the established combat theatre.<sup>45</sup> Generally, there are two kinds of drone strikes,

<sup>37</sup> B Thomas., ‘ISIS Kidnaps 200 Children To Use As Human Shields In Desperate Bid To Cling Onto Mosul As Iraqi PM Claims Terror Group Will Be Defeated ‘Within Weeks’, 2017. [Online]. London: Daily Mail. Available At: <http://www.dailymail.co.uk/news/article-4353862/ISIS-Kidnaps-200-Children-Use-Human-Shields.html> [accessed 27 April 2021]

<sup>38</sup> K Ekin., ‘The Ultimate Act of Cowardice: Footage Shows ISIS Fighter ‘Forcing A Child To Act As A Human Shield During Firefight With Iraqi Forces’ [online]. 2017, London: Daily Mail. Available at: <http://www.dailymail.co.uk/news/article-4363816/ISIS-fighter-forces-child-human-shield-Mosul.htm> [accessed 27 April 2021].

<sup>39</sup> A McDonald, ‘The Challenges to International Humanitarian Law and The Principles of Distinction and Protection From The Increased Participation of Civilians in Hostilities’, 2004, background working paper on spotlight on issues of Contemporary Concern in International Humanitarian Law and International Criminal Law, *Center for International and European Law*, Tehran, (herein after Avril McDonald, 2004) pp. 14.

<sup>40</sup> AP I art 51(2) and (4) and AP II, art 13

<sup>41</sup> AP I art 51(3). See also CIHL, pp. 198 (rule 6)

<sup>42</sup> *Prosecutor v. Stanilav Galic (Trial Judgement and Opinion)*, IT-98-29-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 5 December 2003, para. 44.

<sup>43</sup> Avril McDonald, 2004

<sup>44</sup> C Grut, N Shah, L O’Neill L, S.Saadoun, Z Hutchinson, and D Mule, ‘Counting Drone Strike Deaths’, *Human Rights Clinic, Columbia Law School*, 2012, pp. 2-3.

<sup>45</sup> N Shah, R Chopra, J Morna, C Grut, E Howie, D Mule, Z Hutchinson, and M Abbott, ‘The Civilian Impact of Drones: Unexamined Costs, Unanswered Questions’. 2012. *Center for Civilians in Conflict, Columbia Law School Human Rights Clinic*, 20, pp. 1. [ herein after Grut, C. *et.al* ]

namely: personality strikes and signature strikes.<sup>46</sup> In the former scenario, a known individual is targeted and the role of the pilot is to follow the target and execute the action. If the target uses civilians as a shield, which is the most common practice, the pilot can still strike. In this case, for example, in 2008 and Airstrikes in Afghanistan kill dozens of wedding guests after aimed at the Taliban and miss the target.<sup>47</sup> Whereas, in the latter scenario, the drone strike is conducted based on suspicious behaviour of the target. The target here is unknown but the individuals match pre-identified signatures of the behaviour of a suspected militant.<sup>48</sup> A prominent example in this regard is the strike conducted on March 17 2011 in Pakistan. Accordingly, the strike killed over 40 civilians who were attending a tribal meeting.<sup>49</sup>

Furthermore, in the GFIT, most military campaigns are conducted outside the actual combated zone. As a result of this, civilian life has always been in danger. And also, parties to the GWIT opt to kill the suspect terrorist than capturing them. In this regard, the former deputy general of US Counsel for International Affairs, under Bush administration, Charles Allen's once said:

*When we have a lawful military target that the commander determines needs to be taken out, there is by no means a requirement under the law of armed conflict that we must send a warning to these people, and say, "You may surrender rather than be targeted."<sup>50</sup>*

This trend is also the same today. Thus, for example, US administration officials have said in speeches that 'militants are targeted for killing when they pose an imminent threat to the US and capture is not feasible.'<sup>51</sup> This is a clear danger for civilians due to three reasons: first, most of the operations against terrorists are based on suspicious behaviour. As per logic and common sense, the suspected terrorist might end up being an innocent civilian if being captured. Secondly, even if the target is an actual terrorist, there is a trend that the conduct still is taken even if the civilian loss is high. Thirdly, terrorist usually uses civilian as a shield which makes the matter worse for civilian if the operating still taken without trying to capture the suspect. Therefore, as a result of the above mention reasons, applying the basic rules of IHL is very difficult.

#### **4. Principle of Proportionality in the GFIT**

The other fundamental principle in the center of the equilibrium of balancing the principle of humanity and military necessity is the principle of proportionality. Unlike other instruments,<sup>52</sup> the principle precisely stated under article 51(5) of AP I. Accordingly, it prohibits:

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<sup>46</sup> *Ibid*, pp. 8

<sup>47</sup> BBC News, South East Asia, 2008. US 'Killed 47 Afghan Civilians'. [online]. London: BBC. Available from: [http://news.bbc.co.uk/go/pr/fr/-/2/hi/south\\_asia/7501538.stm](http://news.bbc.co.uk/go/pr/fr/-/2/hi/south_asia/7501538.stm) [accessed 27 April 2021].

<sup>48</sup> Grut, C. *et.al*

<sup>49</sup> BBC News, South East Asia, 2011, 'US Drone Strike 'Kills 40' In Pakistani Tribal Region', [online]. London: BBC. Available from: <http://www.bbc.com/news/world-south-asia-12769209> [accessed 27 April 2021]

<sup>50</sup> Avril McDonald, pp.66

<sup>51</sup> C Currier, 'Everything We Know So Far About Drone Strikes', 2013, *Journalism in the public interest*. Avail-able at: <https://www.propublica.org/article/everything-we-know-so-far-about-drone-strikes> [accessed 27 April 2021]

<sup>52</sup> For example, the 1907 Hague Regulations forbid, under Article 23(e), the employing of arms, projectiles, or material calculated to cause unnecessary suffering.

An 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 about the concrete and direct military advantage anticipated.<sup>53</sup>

In this instance, the principle of proportionality dictates that the foreseeable civilian causality and anticipated military advantage must be balanced. In this regard, the means and method of attacking the enemy are limited.<sup>54</sup> The rule states that unintended collateral damages are prohibited if the expected loss to civilian life is excessive about the direct and concrete military advantage anticipated. During an armed conflict, the loss of life often referred to as collateral damage, is inevitable. Under IHL, the collateral damage has to be proportionate to the anticipated military advantage. Therefore, the fact that a target is a lawful military objective is less important for the principle of proportionality. As a result, the principle of proportionality is a limitation on the means and methods of warfare that may lawfully be used.<sup>55</sup> In this regard, the assessment of proportionality is the most important. The attack should only harm the military objective and if any unintended civilian loss happens to occur, it should not be excessive.<sup>56</sup> Under difficult circumstance to determine the level of civilian loss, the civilian population should prevail.<sup>57</sup> In addition, a military target ‘cannot be long term and speculative.’<sup>58</sup> It should not be a long run in the sense that the advantage acquired by the military conduct must be instant and should be assessed based on the information available at the time of the attack. Whereas, the non-speculative rule expects the military advantage to be proven with certainty. The direct and concrete military advantage anticipated should be objectively assessed. In any event, there should be some minimum protection. According to ICRC commentary on AP I, ‘military necessity cannot justify any derogation from rules which are drafted in a peremptory manner.’<sup>59</sup> In this instance, an attack is prohibited from being conducted.

However, in the course of GFIT, it has been noticed that the very principle of proportionality has been violated. When we see the GFIT, it involves different means and methods that invited the violation of principles of proportionality. In this regard the use of drone warfare the most important. Drone warfare resulted in a disproportionate loss of civilian life which is prohibited under Article 51(5) (b) of AP I. Even if it has been portrayed as the most accurate and precise military technologies, recent research demonstrates that it is the most brutal machine for civilians.<sup>60</sup> For example, in 2014 analysis of data conducted by human rights group exposed the inaccuracy of drone strikes. According to the analysis, 41 men have been targeted and 1,147 people killed by US drone strikes. Particularly in Pakistan in which most of the drone strike is conducted, as of March 2017, there were 425 drone strikes, as a result, an estimated 2501-4003

<sup>53</sup> AP I, art. 51(5) (b).

<sup>54</sup> AP I, Art 35(1)

<sup>55</sup> AP I, art 51(5) (b) and 57(2) (a) (iii).

<sup>56</sup> C Pilloud , Y Sandoz, C Swinarski, B Zimmermann , editors, *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: International Committee of the Red Cross, 1987, (herein after commentary on APs), para.1976-1981.

<sup>57</sup> *Ibid*

<sup>58</sup> H Duffy, *The ‘War on Terror’ and the Framework of International Law*, (London: Cambridge University Press., 2015), pp 374.

<sup>59</sup> Commentary on APs, para 1405.

<sup>60</sup> T J Huntington, *Exposing the Clandestine: Silence and Voice in America’s Drone War*, 2016, (Doctoral dissertation, University of Kansas). Available online at: <https://kuscholarworks.ku.edu/handle/1808/22399>

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people have been killed of which 424 to 966 of them are civilians.<sup>61</sup> In addition, in Yemen, as of March 2017, as a result of 178 drones strike an estimated 1147 – 1472 individuals lost their life of which 95 – 126 estimated to be civilians.<sup>62</sup> Furthermore, in the data by the Bureau of Investigative Journalism, 9 children under the age of 13 have been killed by the US drone attack in Yemen.<sup>63</sup>

In addition, most of the attacks conducted by drones do not have a direct and concrete military advantage. People and objects are targeted without being sure that whether they are legitimate military targets. To corroborate this none is better than the so-called ‘signature drone strike’ conducted in the Middle East.<sup>64</sup> Accordingly, most of the targets are based on suspicious behaviour, which is not proven with certainty that they are either belligerent or directly participating in hostilities.<sup>65</sup>

### **5. Challenges on the principle of precaution in the GFIT**

As discussed in the previously mentioned sub-topic, IHL is all about striking balance between the principle of humanity and military necessity. As the principle of military necessity gives the military force to attack the enemy, humanity, on the other hand, ‘is a guiding principle that limits actions that might other ways have been justifiable under military necessity.’<sup>66</sup> The principle of distinction and proportionality are the main tools in balancing the two fundamental yet contradictory principles. Precaution is the other important principle in the fulcrum of the equation of balancing. However is also the very tool of respecting the principle of distinction and proportionality. This is mainly because it is very difficult to distinguish civilians from military objects and assess the proportionality of the attack in case collateral damage is inevitable.

Under IHL, the principle of precaution dictates that ‘in the conduct of military operations, constant care must be taken to spare the civilian population, civilians and civilian objects.’<sup>67</sup> Accordingly, all feasible precautions must be taken to avoid, and in any event to minimize, incidental loss of civilian life, injury to civilians and damage to civilian objects. This rule is CIHL and is applicable both at the time of IAC and NIAC. The general obligation lies under article 57(1) of AP I, which states oblige a party to the conflict ‘to take constant care to spare the civilian population, civilians and civilian objects. In addition, there are some specific precautionary measures to be taken at the time of attacks. Accordingly, in planning an attack, feasible precaution has to be taken in the verification of targets; and choice of means and method of attack. When an attack could cause disproportionate incidental civilian loss, parties to the conflict are obliged to refrain from launching an attack.

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<sup>61</sup><http://www.reprive.org/drones/>

<sup>62</sup> *Ibid*

<sup>63</sup> J Serle and J Purkiss, January 1 2017, ‘Drone Wars: The Full Data’, *Bureau of Investigative Journalism*. Available at: <https://www.thebureauinvestigates.com/stories/2017-01-01/drone-wars-the-full-data> [accessed 29 April 2021]

<sup>64</sup> A Entous et al., Nov. 4, 2011, ‘U.S. Tightens Drone Rules’, *WALL ST. J.*, Available at: <https://www.wsj.com/articles/SB10001424052970204621904577013982672973836> [accessed 29 April 2021]

<sup>65</sup> J Cavallaro, S Sonnenberg, and S Knuckey, ‘Living Under Drones: Death, Injury and Trauma to Civilians from US Drone Practices in Pakistan’, *International Human Rights and Conflict Resolution Clinic at Stanford Law School and Global Justice Clinic at NYU School of Law*, 2012, pp.12

<sup>66</sup> A C C H Lopes, A.C.C.H., *Conduct of hostilities: precautions in attack* (Doctoral dissertation), Universidade Católica Portuguesa, 2015, pp. 9

<sup>67</sup> AP I, art. 57(1) .

In the case of NIAC, “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”<sup>68</sup> In this instance, even if this provision does not specifically mention the principle of precaution, it would be difficult to comply with this requirement without taking precautions in attack. However, a more elaborated obligation has been enshrined under Amended Protocol II to the Convention on Chemical Weapons (CCW) which is applicable on NIAC. Accordingly, the protocol states: ‘All feasible precautions shall be taken to protect civilians from the effects of weapons....’<sup>69</sup>

However, in the GFIT, applying the principle of precaution is very challenging. There are two reasons for the difficulty in applying. First, the degree of precaution expected of the party to the conflict is not clear. According to the existing rule, the party to the conflict must take precaution to the ‘extent feasible’.<sup>70</sup> The term ‘feasible’ can be interpreted in different ways which make it susceptible to abuse. According to ICRC customary IHL, the phrase “to the extent feasible” has been interpreted by many states as the measure that should be taken by the parties has to be practically possible.<sup>71</sup> The practical possibility should be examined depending on different circumstances which makes it more subjective than objective.<sup>72</sup> Subjectivity would render the applicability of the principle difficult. In the GFIT, this has been noticed on several occasions. Particularly, in the GFIT the war is not a conventional war rather it is the fight against well-organized but mysterious terrorist groups. It is believed that terrorist organizations do not take arms openly and, mostly, use civilians as a shield. This makes the assessment of the practical feasibility of the attack very difficult.

The second reason for the difficulty of applying the principle distinction, in GFIT some of the means and method of warfare chosen causes indiscriminate and disproportional attacks. The most prominent example in this regard is the use of armed drones in combats. On too many occasions drone attacks have erroneously killed or injured civilians.<sup>73</sup> Most of the killings are arbitrary which cause the death of many civilians. Once the UN Special Rapporteur on Extrajudicial Executions Mr Alston told the British Broadcasting Corporation (BBC) that "My concern is that these drones, these Predators, are being operated in a framework which may

<sup>68</sup> International Committee of the Red Cross (ICRC), Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, 1125 UNTS 609, available at: <https://www.refworld.org/docid/3ae6b37f40.html> [accessed 29 April 2021], art 13

<sup>69</sup> United Nations, Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) (As Amended on 3 May 1996), 10 October 1980, available at: <http://www.refworld.org/docid/4a54bc060.html> [accessed 27 April 2021]

<sup>70</sup> AP I, art 57(2) (a)

<sup>71</sup> [https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule15#Fn\\_59\\_9](https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule15#Fn_59_9) See also at: Harvard School of Public Health. Program on Humanitarian Policy and Conflict Research, 2013. *HPCR Manual on international law applicable to air and missile warfare*. Cambridge University Press. which define feasible as ‘means that which is practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations’.

<sup>72</sup> Théo BOUTRUCHE, 2015, ‘Expert Opinion on the Meaning and Scope of Feasible Precautions under International Humanitarian Law and Related Assessment of the Conduct of the Parties to the Gaza Conflict in the Context of the Operation ‘Protective Edge’’, *Diakonia, international humanitarian law resource center*, pp. 15 . available at: <https://www.diakonia.se/globalassets/blocks-ihl-site/ihl-file-list/ihl--expert-opinionions/precautions-under-international-humanitarian-law-of-the-operation-protective-edge.pdf> [accessed 27 April 2021]

<sup>73</sup> See at: <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm>

## ***BEKELE: Striking a Balance in the Need for Upholding Basic Principles of International Humanitarian Law in the Fight against Terrorism***

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well violate international humanitarian law and international human rights law”<sup>74</sup> this is so true in the case of, particularly, “signature strikes” conducted by the US government Central Intelligence Agency (CIA).<sup>75</sup> Accordingly, there are so many complain that ‘signature strikes’ are often misguided.<sup>76</sup> ‘The legality of a signature strike depends on whether the ‘signature’ is adequate to comply with the principles of distinction and precaution.<sup>77</sup> On the course of GFIT, it has been noticed that innocent civilians have been targeted on several occasions. For example, on 14 of July 2016 ‘a drone strike killed nearly 60 civilians, including children, in Syria after the coalition mistook them for ISIS fighters.<sup>78</sup> These kinds of attacks may be conducted by mistake or ‘in some cases, people may be targeted without their identities being known, based on insignia or conduct.’<sup>79</sup>

### **6. Conclusion**

IHL is all about striking balance between the principle of military necessity and humanity. As per the military necessity, the party to the conflict can use different means and methods as long as they don’t violate IHL. The principle of humanity, on the other hand, aims at limiting the loss and suffering of armed conflict. So, the main challenge here is a striking balance between the two principles underpinning IHL.

The three operational principles of IHL, by being the centre of the equilibrium, are the main source of protection. One of the basic principles is distinction. The principle of distinction requires that parties to a conflict distinguish at all times between combatants and civilians, as well as between military and civilian objects. However, in the course GFIT, the application of the principle of distinction is under constant threat. The first instance by which the GFIT became a challenge for the application of the principle is the fact that most attacks are conducted without actual combat. The usage of highly sophisticated and dangerous military weapons in a place inhabited by civilians is a challenge to the principle of distinction. The use of drone in the military campaign in the Middle East costs an enormous number of civilian life and wounded countless. In addition, most military campaigns are conducted outside the actual combated zone which contributes to the challenge.

The other fundamental principle in the centre of the equilibrium of balancing the principle of humanity and military necessity is the principle of proportionality. The principle of proportionality dictates that the foreseeable civilian causality and anticipated military advantage must be balanced. However, in the GFIT, the usage of drone warfare resulted in a disproportionate loss of civilian life which is prohibited under Article 51(5) (b) of AP I. In

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<sup>74</sup> BBC Americas, 2009, ‘US Warned on Deadly Drone Attacks’, [Online]. London: BBC. Available at: <http://news.bbc.co.uk/2/hi/8329412.stm> [accessed 27 April 2021].

<sup>75</sup> S Helton, ‘Cloaked Order: Who’s really Behind ‘New Authority’ for CIA Drone Strikes?’ *Global Research*. 2015, Available at: <http://www.globalresearch.ca/cloaked-order-whos-really-behind-new-authority-for-cia-drone-strikes/5580604>

<sup>76</sup> R O Millson, and D A Herman, ‘Killing by Drones: Legality under International Law’, *The Foundation for Law, Justice and Society in association with the Centre for Socio-Legal Studies*, 2015. *And Wolfson College, University of Oxford*, pp 4. Available at: [accessed 27 April 2021]. <http://www.fljs.org/sites/www.fljs.org/files/publications/Killing%20by%20Drones-Legality%20under%20International%20Law.pdf>

<sup>77</sup> *Ibid.*

<sup>78</sup> J Ensor, ‘A US Air Strike Killed Nearly 60 Civilians, Including Children, in Syria After The Coalition Mistook Them For Islamic State (ISIL) Fighters’, *The Telegraph*, 2016, vol19(11).

<sup>79</sup> Assembly, G., Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, UN Document A/68/382, 13 September 2013, para 72

addition, most of the attacks conducted by drones, do not have a direct and concrete military advantage.

The principle precaution is the other operational principle of IHL. According to article 57(1) of AP I, states are obliged 'to take constant care to spare the civilian population, civilians and civilian objects. However, in the GFIT, applying the principle of precaution is very challenging. There are two reasons for the difficulty in applying. First, the degree of precaution expected of the party to the conflict party is not clear. When we see the second reason for the difficulty of applying the principle distinction, in GFIT some of the means and method of warfare chosen causes indiscriminate and disproportional attacks. Most of the killings are arbitrary which cause the death of many civilians.

## **7 Recommendation**

Lots of issues have been raised, regarding the challenge of GFIT on the application of rules of IHL. Since the subject is relatively new, controversy and challenges are expected.

But, what matters most is finding a way to respect the rules of IHL at the maximum level possible. States must come to some consensus on the definition of terrorism.

In addition, the rule of IHL must be respected to give maximum protection to civilians. One way of addressing this issue would be to negotiate and adopt a new additional protocol that deals with issues of terrorism under IHL.