

MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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Who is a Legitimate Target in International Humanitarian Law?

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Abstract for Master's Thesis

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Title of the Thesis: Who is A Legitimate Target in International Humanitarian Law?	
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Abstract: <p>There has always been the notion that there are specific items and people that can be legitimately attacked during armed conflicts. This notion/concept has evolved over time alongside the various international humanitarian law principles. The principles of international humanitarian law sets guiding principles for the conduct of hostilities during armed conflicts. This therefore made it imperative for the adoption of a law that will protect victims of armed conflict from indiscriminate and targeted attacks.</p> <p>Additional Protocol I relating to the Protection of Victims of International Armed Conflicts adopted in 1977 served this purpose alongside the first Geneva Convention of 1949. Article 48 of Additional Protocol I which provides that basic rule for the conduct of hostilities states that; in order to ensure the respect for and protections of the civilian population and civilian objects, the parties to the conflict must always ensure that they distinguish between the civilian population and the combatants, as well as between civilian objects and military objects, and must direct their operations solely against military objects.</p> <p>The law of war and armed conflict can be said to be a two way street with two important yet very contradictory terms, on the one hand is the need to gain military control over the adverse party and on the other hand is the obligation to exercise restraint and utmost care while engaging in warfare and the ensuring that the properties and persons which are protected by international humanitarian law are not harmed.</p> <p>This thesis seeks to analyze who are legitimate targets in armed conflicts and situations whereby they may lose protection under international humanitarian law as a result of activities which they may engage themselves in in the course of the armed conflict.</p> <p>This thesis will also analyze the complexities that arise in special situations when the person is a child and is actively conducting hostilities. Furthermore, with the dawn of new methods of warfare which were not prevalent during the drafting of the Geneva Conventions and their additional protocols, I find it imperative to analyze this situations and how they are regulated, one of such complex situation is the war on terror which came to limelight after the infamous 9/11 attacks on the United States by Al-Qaeda a terrorist organization headed by Osama Bin Laden at the time. The then US president declared a —war on terror”; this war on terror has been declared by many states such as Israel when faced with terrorist threats in their states. Complexities arise with the applicability of international humanitarian law in war on terror, which are legitimate targets in the war on terror, are they eligible for combatant status and is it legally acceptable to target terrorists.</p> <p>Several schools of thought have emerged when it pertains to the targeting of terrorists and the applicability of international humanitarian law in the so called war on terror, on the one hand some argue that it is morally wrong and a violation of international human rights law to target terrorist while others argue that even if targeting policies like that of Israel fall within the scope and jurisdiction of international humanitarian law, it is still illegal and can be described only as assassination and will constitute a violation to the right of life as per international human rights law.</p>	
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Table of Contents

1. Introduction	4
1.1. Background and Aim	4
1.2. Research Question	6
1.3. Method and Material	7
1.4. Limitations	7
2. Legitimate Targets in Armed Conflicts	8
2.1. Targeting in Armed Conflicts.....	9
2.1.1. International Armed Conflicts.....	12
2.1.2. Non-International Armed Conflicts.....	12
2.2. Principles of International Humanitarian Law.....	21
2.2.1. Principle of Distinction.....	22
2.2.2. Principle of Precaution.....	29
2.2.3. Principle of Proportionality.....	31
2.3. Means and Method of Warfare.....	34
2.3.1. Prohibited Means and Method of Warfare.....	36
2.3.1.1. Prohibition of Perfidy and Denial of Quarter.....	37
2.3.1.2. Starvation of Civilians as a method of warfare.....	38
2.3.1.3. Pillage.....	40
2.3.2. Legitimate Targets in International Humanitarian Law.....	41
2.3.2.1. Foreign Fighters.....	44
2.3.2.2. Child Soldiers.....	46
2.4. Protected persons and Protected objects in international humanitarian Law.....	50
3. Targeted Killing in the War Against Terrorism.....	55
3.1. The Applicability of IHL in the War Against Terrorism.....	58
3.2. Military Targets in the War against Terrorism.....	64
3.2.1. Distinction in the War against Terrorism.....	65
3.3. Legality of Targeted Killings in the War Against Terrorism.....	67
4. Conclusion.....	75

5. Bibliography.....77

LIST OF ABBREVIATIONS

- IHL International Humanitarian law
- POW Prisoner of War
- AP Additional Protocol
- ICTY International Criminal Tribunal for Former Yugoslavia
- ICTR International Criminal Tribunal for Rwanda
- IAC International Armed Conflicts
- NIAC Non-international Armed Conflicts
- GC Geneva Convention
- ICRC International Committee of the Red Cross
- SCS Special Court for Sierra Leone
- UN United Nations Organization

CHAPTER 1

1. INTRODUCTION

1.1. Background and Aim

International Humanitarian Law is that branch of public international law that regulates armed conflicts and the conditions in which the use of force is considered legal under international law which is prohibited in international law¹, as opposed to *Jus In Bellum*, which apply to all parties in an armed conflict regardless of who started the war is sometimes considered as neutrality in war. This branch of public international law regulates the methods used by belligerents/combatants in warfare, the weapons and systems which are permissible in warfare, the strategies and tactics which are permissible during an armed conflict, the separation of the various objects (military and civilian objects) and the protection of these objects and status of captured combatants and their protection under international law. Following a Swiss Humanitarian Henry Dunant's experience in the battle of Sulferino he made suggestions on how to regulate warfare in order to reduce suffering for wounded soldiers in wartime², The Geneva Society for Public Welfare embraces Dunant's suggestions, and in early 1863, a committee was formed to develop Dunant's ideas. Later that year, the committee convened an international conference in Geneva to discuss the draft. The committee had prepared and passed a number of resolutions agreeing to the creation of national committees, that would supply volunteer medical personnel to armies in the field, and these volunteers would wear a white armband with a red cross as a distinguishing sign medical personnel and humanitarian workers. Another significant step forward was the conference's recommendation that all countries adopt a uniform flag and sign for their medical corps and facilities, and that medical personnel, hospitals, and ambulances, as well as the injured themselves, be recognized as neutral, thereby giving them the needed protection to carry out their various humanitarian activities during warfare and making them illegitimate targets of attacks. To put these principles into action, the Swiss government invited states to a diplomatic conference in August 1864, which resulted in the historic Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. The fundamental provisions of the Convention were neutrality of the wounded and those who care for

¹ Article 2(4) of the Charter of the United Nations 1945

² International Committee of the Red Cross: History of the ICRC, 2016. <http://www.icrc.org/en/doc/history-icrc>

them, the implementation of the Red Cross on a white background as the distinguishing sign for medical facilities and staff, and an obligation to collect and care for the wounded and sick on the battleground, regardless of nationality.³ As time went on and many wars erupted in various parts of the world there was a constant need to develop laws that would regulate warfare. This led to subsequent conventions such as the 1899 and 1907 Hague and Geneva Conventions and the 1949 Geneva Conventions and their additional protocols of 1977.⁴ These conventions all regulated warfare and the limits of warfare.

The reason for an armed conflict must not affect the parties' obligation to follow the rules of international humanitarian law. Since these obligations are solely humanitarian in nature, they are owed to the international community as a whole rather than to individual states. They are, in other words, obligations *erga omnes*. All parties to the conflict, aggressor or victim, must equally respect civilians, protect captured enemy combatants, avoid using prohibited means and methods of warfare, ensure the safety of women and children, and so on, as per the Geneva Conventions.⁵ This thesis will analyze who a legitimate target is in international humanitarian law as well as in the war on terrorism.

In terms of targeting, armed conflicts are about targeting the adversary, hence as Michael Schmitt (2012) puts it; targeting is the *sine qua non* of the law of war. As a result, the law of targeting is at the heart of the law of war.⁶ The law on targeting contains sophisticated and extensive rules for when parties to a conflict may legitimately target objects and persons and when such people and objects are immune from targeting. IHL also sets restrictions on the kind of assaults that can be launched, as well as the means and methods that can be used in such attacks, and lays out extra measures those parties to a dispute must take before assaulting a target.⁷ In the law of war and armed conflicts there are legitimate objects of attacks and there objects which are protected from such attacks, parties to an armed conflict are at all times expected to respects the norms of international humanitarian law.

³ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 6

⁴ Ibid pg. 10-11

⁵ Naqvi Y. *Enforcing International Law Norms Against Terrorism*. London: Bloomsbury Publishing Plc; 2005. Pg. 26

⁶ Ibid note 2 pg. 185

⁷ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 163

After the 11th September 2001 attack on the US by terrorists and which marked the beginning of what is known as the war against terrorism, there has been increasing questions on the applicability of international humanitarian laws in a war of such nature. Some scholars have argued on the one hand that the norms of international humanitarian law cannot be applied in such situations because terrorists do not meet the requirements for combatants as per the Geneva Conventions which are the main laws governing international humanitarian law while other scholars hold the opinion that even though the Geneva Conventions makes mention only on acts of terror as one of the prohibitions during warfare, international humanitarian law can be applicable in the war against terrorism to a certain extent.⁸

This thesis will discuss the various principles of international humanitarian laws and how they are applied in situations of both international and non-international armed conflicts, who a legitimate target is as per these principles and when a target which might have otherwise been a legitimate target may be considered and illegitimate target and fall under the protection of international humanitarian laws. Also, with the dawn of new methods of warfare in the 21st century and the so called “war on terror” which gained popularity in the internationally after the September 11 2001 attacks on the United States of America by Al-Qaeda, i will also be analyzing the applicability of international humanitarian law norms in the war against terrorism, legitimate targets in the war on terror and the legality of targeting in the war on terror.

1.2. Research Question.

International humanitarian Law outlines the various rules and principles during armed conflicts, however there are situations whereby the nature of the conflict is uncertain or the conflict has not been classified as an international or non-international armed conflict under international humanitarian law. One of the core principles of international humanitarian law is the principle of distinction which seeks to protect victims of armed conflict against indiscriminate attacks by combatants. The issue of targeted killings has always been raised in armed conflicts and if we go back in time, this has always raised issues. This thesis seeks to analyze and answer the following question; who is a legitimate target in international humanitarian law? What are the legal obligations of parties of an armed conflict? What are the accepted means and methods of

⁸ Supra note2

warfare? Even though most if not all killings are targeted, when are killings of this nature prohibited in international humanitarian law? Who are those who are protected against such killings and when can they lose this protection? What are the legal justifications for such killings? Who is a legitimate target in the war against terrorism and are international humanitarian law norms applicable in the war against terrorism?

1.3. Method and Material

The method used for this thesis will be the legal dogmatic method to critically analyze the issues at hand, it will rely on the hard law and soft law and all other relevant materials mentioned below to examine the various concepts and principles in international humanitarian law and how their relevance before and during the war.

The primary sources material used for this paper will be conventions (The Four Geneva Conventions of 1949 and its additional protocols) alongside the Charter of the United Nations 1945 which are the main laws governing international humanitarian law as well as the Rome Statute of the International Criminal Court. Other sources such as journals, articles and books from various legal scholars and international organizations, customary international rules and case law from the International Criminal Tribunal for Rwanda and Yugoslavia relating to targeted killings and the principles of proportionality, and some cases from the ICJ.

1.4. Limitations

This thesis is centered on the analysis of legitimate targets in both contemporary and conventional armed conflicts and the applicability of international humanitarian law in these conflicts; however, despite the important role of international human rights law in armed conflicts, this thesis will not go into the details of the interplay between international human rights and armed conflicts.

CHAPTER 2

2. LEGITIMATE TARGETS IN ARMED CONFLICTS.

Law creation and codification were guided by instrumental considerations and a healthy dose of pragmatism regarding the realities of warfare, so as not to unduly limit the military's discretion or curtail its ability to gain victory. The subjecting of war to treaty law was primarily intended to protect combatants from certain degrees and types of suffering that contradicted notions of chivalry or were deemed as cruel as to undermine combatants will to fight.⁹ The process of planning and launching an attack also defines a legitimate target. Article 57 of the Additional Protocol 1 of the Geneva Convention (API) requires belligerents to take constant precautions to protect civilians. This means that those "who plan or decide upon an attack" must do everything possible to verify that the objectives to be attacked are military objectives and take all reasonable precautions in the selection of means and methods of attack. These prescriptions are sometimes thought to express a third principle known as the "precautionary principle."¹⁰ Given the prospect of incorporation into the military forces as well as the benefits that come with combatant status, civilian participation in wars has only been a minor concern.¹¹ In recent times, civilians take immediate part in hostilities and this is owing to the fact that in the 20th century there has been an increasing number of non-international armed conflicts.¹² According to media reports for targeting to take place, suspects are often discovered through intelligence, and after gathering pertinent personal information in a "target folder," they are placed on a list for political and/or military approval. When the individual is spotted by the entity in command, he is killed individually if the chance comes. A targeted killing maybe defined as the as the use of lethal force by a state in an armed conflict against a selected enemy not physically held in custody.¹³ It is also worth stating that drone strikes are different from targeted killings, drones are used as a tool for warfare, drones are certainly used in targeted killings, and they can greatly aid in the tracking and targeting of individuals, but they are only one of several methods for targeting and

⁹ Dill J, *Legitimate Targets?: Social Construction, International Law and US Bombing* (Cambridge University Press 2014) pg. 68

¹⁰ *ibid*

¹¹ Alkatout, J. (2015). In *The Legality of Targeted Killings in View of Direct Participation in Hostilities*. (Vol. 22, pp. 9–20). Duncker & Humblot GmbH. http://www.jstor.org/stable/j.ctv1q69wqg2_pg_23

¹² *ibid*

¹³ *ibid* pg. 30

killing identified militants. It is therefore a mistake to equate all US drone strikes, such as those in Pakistan or Yemen, with targeted killings. States carry out targeted killings in a variety of ways, including: They can send a special operations team, as the US did in Somalia in 2009, when it killed al Qaeda leader Saleh Ali Saleh Nabhan in a helicopter-borne commando raid; set up manned ambushes, as the British Special Boat Service (SBS) did in 2008 when it killed Taliban commander Mullah Abdul Matin; or plant and detonate hidden explosives near a wanted militant as Israel did in 1996 when it killed Hamas' Yahya Ayyash by detonating explosives hidden in his cell phone.¹⁴ Due to the nature of targeted killings, it is common to associate them with assassination or extrajudicial killing or with both. Assassination has a negative connotation of murder and treachery, which should not be assumed as a false premise when discussing targeted killings, and it involves the death of a political figure rather than a militant.¹⁵

2.1. TARGETING IN ARMED CONFLICTS.

Targeted killing during armed conflict is permitted when it is not directed against protected persons. These are defined as those who do not, or no longer, take an immediate part in hostilities (Art. 3 of GC I-IV). They include non-participating civilians (Art. 51 (3) of AP I), members of organized resistance movements, of the armed forces (Art. 8 (c) of the ICC Statute) or of organized armed groups, who have laid down their arms. It equally applies to prisoners of war (Art. 4 of GC III) or individuals otherwise in the power of the adverse party (in AP I: Arts. 11 (1) and (2), 44, 45, 73 and 85 (2), persons providing medical services. The adversary can be attacked regardless of how critically wounded, sick, or shipwrecked he is, as long as he poses a threat or attempts to flee; one cannot be hors de combat and engage in combat at the same time. This is also true for a member of the enemy forces who jumps from a downed plane; as long as he continues to participate in hostilities he may be attacked regardless of the injuries he may have sustained.¹⁶ Targeted killing occurs during an armed conflict, but it does not have to be an integral part of the hostilities. The concerned individual can also be targeted in an offensive

¹⁴ Wilner AS. *Detering Rational Fanatics*. Philadelphia: University of Pennsylvania Press; 2015. Pg. 76

¹⁵ *Ibid* pg. 79

¹⁶ Alkatout, J. Legality of Targeted Killings in Armed Conflict. In *The Legality of Targeted Killings in View of Direct Participation in Hostilities*. (Vol. 22). Duncker & Humblot GmbH. (2015) pg. 206
<http://www.jstor.org/stable/j.ctv1q69wqg.10>

manner, that is, even if his death is not required for immediate self-defense or the maintenance of law and order in areas under the attacker's control. However, in order for a targeted killing to be legal, it must be likely to result in an actual military advantage, even if only in the long run. This means that, even for legitimate targets and within the allowed armed reaction, international humanitarian law (IHL), along with the principles of humanity and military necessity, places limits on the use of force: only the amount of force required to achieve the military goal can be legally applied. Use of force without military reasoning is hardly justifiable under IHL and is likely to be despised by the parties to the conflict.¹⁷

The law of *jus in bellum* automatically applies when there is an existence of an armed conflict. These are governed by the Geneva Conventions whereas the conduct of hostilities was subject to the Hague Law.¹⁸ The law of war/international humanitarian law should not be misconstrued as the law permitting war. Relevant rules of international humanitarian law will apply even if there are no open hostilities; no formal declaration of war is required. The Geneva Conventions of 1949 provides that any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of common article 2 even if one of the parties denies the existence of an armed conflict.¹⁹ Apart from the aforementioned irregular situation, Additional Protocol 1 extends the definition of an international armed conflict to include armed conflicts of people fighting against colonial domination, alien occupation or racist regimes in exercising the right to self-determination.²⁰ The aforementioned laws were all an attempt to limit the destruction of war and also to protect combatants, and victims of armed conflicts. These laws/conventions have gone a long way in the protection of victims of armed conflicts in contemporary times and they are currently employed for the regulation of the conduct of parties to an armed conflict, by limiting some excesses which may be cause by an unregulated warfare such as indiscriminate attacks of specially protected person and their objects and also the targeted killings of non-combatants during warfare as a form of revenge or scare mongering which is sometimes used in warfare.

¹⁷ Ibid pg. 209

¹⁸ Schmitt, M.N., & von Heinegg, W.H. (Eds.). (2012). *The Development and Principles of International Humanitarian Law* (1st ed.). Routledge. <https://doi-org.ezproxy.vasa.abo.fi/10.4324/9781315086767> pg. 12

¹⁹ How is the Term Armed Conflicts Defined in International Humanitarian Law?; International Committee of the Red Cross(ICRC) Opinion Paper, March 2008. P. 1

²⁰ Ibid p. 2

International humanitarian law is specifically outlined to govern armed conflicts, when there is an armed conflict the rules of international humanitarian law will be applied. However, international humanitarian law does not cover confrontations amongst states and internal disturbances in countries such as riots, and sporadic acts of violence. In this light any differences between states which fall outside the definition of armed conflicts as provided for by international humanitarian law will be resolved using the relevant laws and instruments during peace time, for example, when citizens of one country are held captive in another country, human rights law may be applied in such situations but not international humanitarian law.²¹ IHL involves all the various types of armed conflicts as provided for by common article 3 of the Geneva Convention, it is in this light that the appeal chambers of the ICTY(International Criminal Tribunal for the Former Yugoslavia) stated that,

It is well established that Common Article 3 of the Geneva Conventions, which is applicable to both international and non-international armed conflicts, is part of customary international law and therefore binds all parties to a conflict.²²

For centuries states regulated their relations in both peace and war times through treaties and international customs recognized by these states. The incorporation of the concept of non-international armed conflict in common Article 3 therefore constituted a landmark in the development and codification of IHL.²³

Despite the similarities between both non-international and international armed conflicts, the differences between the two types of conflicts rest with the threshold of violence required in each of the instances. Since *jus ad bellum* prohibits the use of force in international law²⁴, any such use can be legitimately presumed to express belligerent intent and to create a situation of international armed conflict which is then governed by international humanitarian law. While on the other hand, states can use force against groups for law enforcement purposes this does not necessarily amount to an armed conflict thereby making the threshold for non-international

²¹ Melzer N and Kuster E ,International Humanitarian Law: A Comprehensive Introduction *ref.* 4231

²² Mrkšić et al. (IT-95-13/1), 2009

²³ *Ibid* note10, pg. 55

²⁴ The Charter of the United Nations, Article 2(4)

armed conflicts higher than that of international armed conflicts thereby making the application of international humanitarian law significantly higher.²⁵

2.1.1. INTERNATIONAL ARMED CONFLICTS.

As earlier stated, international armed conflicts (IAC) are conflicts between two or more state. This is the traditional method of warfare, the main provisions of the law governing conflicts of this nature are the Hague convention of 1907, the four Geneva conventions of 1949 and Additional protocols and the customary rules of international humanitarian Law. The Geneva Convention Relative to the Protection of Civilian Persons in Time of War provides that, In addition to the rules that will be enforced during peacetime, the current agreement will apply to all circumstances of declared war or any other armed confrontation that may emerge between two or more high contracting parties, even if the state is not recognized by one of them. The agreement must also apply to all circumstances of partial or whole occupation of a high contracting party's territory, even if the occupation is without opposition.²⁶ In this context, the International Criminal Tribunal for the Former Yugoslavia (ICTY) concluded that; an armed conflict exists whenever there is a resort to the use of arm force between states.²⁷

Traditionally, the law of war is broader than IHL because it comprises not only of humanitarian rules, but also, all norms governing the relations between belligerent States which includes provisions on diplomatic, economic and treaty relations, and on the legal position of neutral States on the other hand, traditional law of war is narrower than IHL in that it applies only during a formal state of war between States, whereas IHL establishes minimum standards of humanity that are applicable in any armed conflict, irrespective of the existence of a political state of war.²⁸

2.1.2. NON-INTERNATIONAL ARMED CONFLICTS.

The laws and customs of war, including those governing what are now referred to as non-international armed conflicts(NIAC), are centuries old. They have been described as an institution as old as war itself. The modern period of armed conflict regulation dates back to the

²⁵ Ibid, pg. 56

²⁶Article 2 of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War; Adopted on 12th August 1949 by the Diplomatic Conference for the Establishment of International Conventions for the protection of Victims of War, held in Geneva from 21 April to 12th August

²⁷ICTY, The Prosecutor vs. Dusko Tadic, IT-94-1-A, 2 October 1995, para 70

²⁸ Ibid not 10, pg. 58

nineteenth century. However, the nineteenth and much of the twentieth centuries were marked by states' general reluctance to regulate non-international armed conflicts through international law.²⁹ This reluctance was influenced by two notions in particular. First, war-making power was regarded as a sovereign prerogative, and as a result, only states could declare and fight wars. Upgrading violence involving non-state armed groups to the category of war, even civil war, was deemed to be a legal upgrade for rebels. Second, situations of internal violence were deemed to be within the *domain réservé* of states, and thus solely the responsibility of the affected state. As a result, the existing legal regulation of non-international armed conflict was ad hoc in nature and took two main forms: recognition of belligerency and regulation through bilateral agreement or unilateral declaration.³⁰ The significance of regulating non-international armed conflicts was therefore recognized more than a century before the 1949 Geneva Conventions and long before the Lieber Code was adopted in 1863. It was also acknowledged that the unique nature of civil wars necessitated their own set of rules. As a result, an article was proposed for inclusion in the 1820 Tratado de Regularización de la Guerra, which stated that, it is in civil war that the application of the law of nations should have its greatest scope, and humanity demands most urgently the application of its principles. Along the same lines, in 1847, General Dufour was reminded that he was fighting against his fellow citizens, and that, when the fighting is over, we will all be thankful that we did not lose sight of the fact that the struggle was between fellow Confederates and that we listened to the voice of compassion. Civil wars are of a unique nature, which has been recognized in recent instruments. For instance, during the attempted secession of Biafra from Nigeria in 1967, instructions issued to the state armed forces stated that you must remember that you are not fighting a war with a foreign enemy. You're also not fighting a religious war or Jihad. You're only putting down the rebellion of Lt.-Col. Odumegwu-Ojukwu and his gang and you should not do anything that jeopardizes the country's future unity.³¹ Under the auspices of the Swiss Federal Council, a Diplomatic Conference was convened in 1949 to consider revisions to the 1929 Geneva Conventions and the Xth Hague Convention of 1907, as well as to conclude a new Convention on the protection of civilians in time of war. The amended Stockholm drafts were presented to the Diplomatic Conference. According to one delegate, no

²⁹ Sivakumaran S. The Law of Non-International Armed Conflict. Oxford: Oxford University Press, Incorporated; 2012. Pg. 9

³⁰ *ibid*

³¹ *Ibid* note 27 pg. 27

other issue has sparked such a lengthy debate and detailed and exhaustive investigation as the question of extending the Convention to war victims of non-international conflicts.³² At the Diplomatic Conference, a number of states argued that civil wars (or armed conflicts with no international character, as they were soon dubbed) should not be governed by international law. For instance, the United Kingdom did not believe it was indeed possible to compel a State to apply the Conventions to situations that were not declared war, as this idea is defined by international law; their application to civil war might strike at the heart of national sovereignty and endanger national security, apart from the practical difficulties in doing so. The Burmese delegate expressed particularly strong views on the matter, stating that the proposed Convention should not grant legal status to insurgents who sought to overthrow a democratically elected government through the use of force, and that the Eastern countries he represented in the Special Committee tasked with reaching agreement on the situations in which the Conventions would apply could not agree to an extension of the Conventions to civil war, and if sue. As a result, the Burmese delegate proposed that the article on non-international armed conflicts be deleted, stating that its inclusion posed a serious threat to sovereignty and civilian rights, and that international recognition of insurgency would almost certainly be as grave an error as recognition of aggression. In his opinion, including the article would only serve as an incentive for armed conflicts with all of their terrible consequences.³³ In recent years, it has been suggested that distinguishing between IAC and NIAC is no longer necessary. Indeed, there has been a call to abolish the traditional distinction between international and non-international armed conflicts. Nonetheless, despite the Appeals Chamber of the ICTY's conclusion that, it is only natural that the aforementioned dichotomy should gradually lose its weight, the distinction remains very relevant today; both on the battlefield and after the fact, during (international) criminal trials.³⁴

Common article 3 of the Geneva Convention of 1949 provides the framework for internal armed conflicts. Additional Protocol 2 of the aforementioned convention also makes provision for the protection and treatment of victims in an internal armed conflict. Treaty bodies and ad hoc tribunals have always provided a rich body of jurisprudence and guidance to when violence

³² Ibid pg. 40

³³ Ibid

³⁴ Bartels R., *The Classification of Armed Conflicts by International Criminal Courts and Tribunals*; *International Criminal Law Review*, BRILL NIJHOFF 2020

amounts to an armed conflict. Additional Protocol II of the 1949 Geneva Convention provides that,

This protocol shall not apply to internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts.³⁵

International courts and tribunals play an important role in determining the existence of non-international armed conflicts. For instance, in the case of *Tadic* the Appeal Chamber of the ICTY stated that,

There is an armed conflict if there is protracted violence between the state forces and organized armed groups within that state.

The appeal chamber further said that for the purposes of Common Article 3 of the Geneva Convention, the intensity of the conflict and the organization of the parties must be taken into consideration in order to determine if there is in fact the existence of an armed conflict. From the position held by the appeal chambers in the aforementioned case, the provisions of common article 3, an armed conflict can be said to begin when there is protracted violence between organized armed groups and government forces. The threshold for a conflict to be categorized as a NIAC in IHL is higher compared to that of an IAC whereby the existence of fighting between two states automatically qualifies as an international armed conflict. For a NIAC to be said to exist in a particular country they must be a minimum degree of organization sufficient to conduct and coordinate military operations against the state and some degree of intensity that rises above mere unrest. There is the requirement of territorial control under the common article 3, that is the armed groups or the non-governmental parties must exercise some control over part of the territory in order to enable them carry out sustained and concerted military operations.

Therefore, short-lived insurrections, banditry, and terrorists activities do not fall under humanitarian law and thus cannot be considered and armed conflict. The courts always take into consideration the intensity of the violence and the organization of the belligerents; this is only done so as the minimum standard which the international courts and tribunals employ in order to

³⁵ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the protection of Victims of Non-International Armed Conflicts(Protocol II), Article 1(2).

be able to distinguish between banditry, unorganized and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law from actual armed conflicts within the meaning of common article 3 of the Geneva Convention.³⁶ After the case of *Tadic* the court which laid down the factors which determined the existence of an armed conflicts, this same position has been upheld in subsequent cases to determine whether an armed conflict actually exists, it was in this light that the ICTY in the case of *Fatimir Limaj* in 2005 while determining if an armed conflict existed was of the opinion that, there must be a determinate territory, the government of the territory should use military force against the belligerents, the insurgents' status as belligerents and they must all respect the rules of war. The appeal chambers in this case were also of the opinion that; despite the fact that the data suggests that the military clothes of the KLA troops were of diverse types, some KLA troops donned their own outfits, some people wore no uniforms at all. As the end of 1998 approached, the situation with uniforms improved, as it did with other things. While the existence of a uniform may be indicative of the existence of a well-organized entity, the Chamber believes that this factor alone is not determinative in this case of the existence of an organized military structure, as it has little bearing on the functioning of the KLA, particularly given its rapid expansion after March 1998, which undoubtedly placed unanticipated strain on the provision of commodities such as uniforms, at a time when other needs were unanticipated. From the above mentioned case and the provisions of common article 3, an armed conflict can be said to begin when there is protracted violence between organized armed groups and government forces. The threshold for a conflict to be categorized as a NIAC in IHL is higher compared to an IAC where fighting amongst two states is considered an IAC. For a NIAC to be said to exist in a particular country they must be a minimum degree of organization sufficient to conduct and coordinate military operations against the state and some degree of intensity that rises above mere unrest.³⁷ There is the requirement of territorial control under the common article 3, that is the armed groups or the non-governmental parties must exercise some control over part of the territory in order to enable them carry out sustained and concerted military operations.³⁸ According to Human Rights Watch, the crisis in Syria took a new turn in some parts of the country by May of 2012 and

³⁶Beth Van Schaack, International Humanitarian Law Teaching Supplement: Volume 2 - International Criminal Law

³⁷ Classifying the Conflict in Syria by Terry D. Gill page 364

³⁸ How is the Term 'Armed Conflict' Defined in International Humanitarian Law?. International Committee of the Red Cross (ICRC) Opinion Paper March 2008 page 4

reached the level of an armed conflict. The conflict entered a new phase during summer 2012 when opposition forces solidified control over significant territory in the North which made it possible for them to conduct significant military operations against government forces in Damascus and Deir al-Zor in Eastern Syria. One of such incidents was the bombing of the National Security headquarters in Damascus in July which left 3 senior officials³⁹. Also armed opposition groups fighting against the government such as ISIS has control over the Syrian provisional city of Rakka which aides them to perform organized attacks against the government. Other armed groups such as the Free Syrian Army which rose in 2011 also exist and has control over some territories even though it has lost some parts of it to ISIS. This new phase of the conflict led to the classification of the conflict in Syria as a non-international armed conflict.⁴⁰ The United Nations Human rights council determined that by February 2012 a non-international armed conflict existed in Syria and triggered the common article 3 of the Geneva Convention of 1949 the rules of International Humanitarian Law and customary international law related to armed conflicts.⁴¹ It possible for a non-international armed conflict to exist in only parts of a country, however, International Humanitarian Law applies to the entire territory under the control of the warring parties whether or not actual military operations occurs in the other territories or not.⁴² This is the case in Syria where the government has gained control over most of the large cities and most of the combat is taking part in rebel held territories.

If Syria had been a party to the convention, AP II would have applied because AP II applies to armed conflicts that take place in the territory of contracting parties between the state and armed groups. The protocol applies to the protection of victims of IAC and conflicts between the armed forces of high contracting parties and dissident forces or other OAGs.⁴³ However, confrontations between organized armed groups do not do not invoke the provisions of additional protocol II.

³⁹ The armed conflict in Syria, A. _Death From the Skies, Deliberate and Indiscriminate Air Strikes on Civilians_ Case prepared by Ms. Margherita D'Ascanio, LL.M., student at the Geneva Academy of International Humanitarian Law and Human Rights, under the supervision of Professor Marco Sassòli and Ms. Yvette Issar, research assistant, both at the University of Geneva.

⁴⁰ Supra note 4 page 357 and 358

⁴¹ A/HRC/21/50 para 12

⁴² International humanitarian law and the challenges of contemporary armed conflicts, Report prepared by the International Committee of the Red Cross for the 32nd International Conference of the Red Cross and Red Crescent, 8-10 December 2015

⁴³ Article 1 of the Protocol Additional to the Geneva Conventions of the 12th of August 1949 Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II). Adopted on the 8th of June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts and entered into force on the 7th of December 1978, in accordance with Article 23

The confrontations that take place between the various armed group in Syria such as the confrontations between the FSA, ISIS and other armed groups will not invoke the provisions of the protocol.

It is argued by some that the conflict in Syria turned to an IAC due to the involvement of other states such as USA, Turkey and Russia. The involvement of other states however in the conflict can be said to have turned the conflict to an international armed conflict under if the involvement was against the wish of the state and the involvement was against the state and in favor of the organized armed groups by aiding and providing them the necessary equipment and support to the group. Some have also argued that the conflict in Syria cannot be said to have turned to an IAC due to the fact the Syrian Government had consented to the involvement of the other states such as the USA. If the conflict is indeed an IAC, CA3 can no longer apply and the provisions of IHL on IAC will apply. In my opinion the conflict in Syria cannot be qualified as an IAC because the involvement of the other states was not geared towards fighting the Syrian government and their attacks have been aimed towards the armed groups especially the ISIS in a bid to fight against the terrorist acts of the groups.

One of the most significant changes is the increased prevalence of non-international armed conflicts. Given that these conflicts frequently involve at least one non-state actor as a party, the lines between those who do and do not participate in the fighting are frequently blurred. In light of this, the centennial of the Second International Peace Conference provides an excellent opportunity to revisit the principle of distinction. The Regulations, which identify belligerents in virtually the same way as their predecessors from 1899, are the historical cornerstone in international conventional law for distinguishing between persons who are legitimate targets and those entitled to protection during international armed conflicts. As such, they have unquestionably retained their relevance, both as treaty and customary international law, and despite further development in subsequent instruments. Nevertheless, what about the principle of distinction in non-international armed conflicts involving people? Who, and under what circumstances, can be targeted in non-international armed conflicts? Who, on the other hand, is exempt from being the target of an attack and is shielded from the dangers of military operations

by virtue of their civilian status?⁴⁴ Articles 43 and 44 of the First Additional Protocol had a significant shift; combatants are defined in Article 43 paragraph 2 as all members of a party to a conflict's armed forces (with the exception of military medical personnel and army chaplains). Such armed forces are defined as all organized armed forces, groups, and units which are under a command and are accountable to that Party for the conduct of their subordinates, even if that party is represented by a government or an authority not recognized by an adverse party and are subject to an internal disciplinary system, which, among other things, shall enforce compliance with the rules of international law applicable in armed conflict. Article 43 consequently goes beyond the previous distinction between regular and irregular armed forces and establishes uniform requirements that all such armed forces must meet; they must be organized, subject to responsible command, and subject to a disciplinary system. The most notable difference between the preceding instruments is that the requirements of wearing uniforms and openly carrying arms at all times have been eliminated under the First Additional Protocol.⁴⁵ In terms of legitimate targets in non-international armed conflicts, the principle essentially states that parties to an armed conflict must, in the words of the First Additional Protocol, at all times distinguish between the civilian population and belligerents and direct their attacks only against the latter and civilians who take a direct part in hostilities for the duration of their participation.⁴⁶ Therefore one can say that the laws applicable to targeting in international armed conflicts may be applicable to non-international armed conflicts. However, acts lawful under the laws of armed conflict, such as the killing of a member of the state armed forces or the damage or destruction of a military objective, remain in principle punishable under domestic law in non-international armed conflicts.⁴⁷ All that the laws of armed conflict do is encourage (rather than obligate) the authorities in power to grant the broadest possible amnesty to those who have participated in the armed conflict, provided that such individuals have not committed war crimes or other international crimes, which states are obligated to investigate and prosecute. Besides that, those who directly participated in hostilities in a non-international armed conflict and were held captive or detained do not have the right to be treated as prisoners of war. The reason for the lack

⁴⁴ Kleffner, J.K. From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities — On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference. *Neth Int Law Rev* **54**, 315–336 (2007). Pg. 4

⁴⁵ *Ibid* pg. 7

⁴⁶ *ibid*

⁴⁷ *Ibid* note 43 pg. 10

of combatant status in non-international armed conflicts is obvious: states are unwilling to grant combatant status to their own citizens, let alone others who might fight on behalf of a non-state group.⁴⁸ In an attempt to protect victims of non-international armed conflicts the courts have applied the rules of the First Additional protocol in defining a civilian for the purpose of distinction during military operations, The trial chamber in the case of *Kayishema and Ruzindana*⁴⁹ simply superimposed Article 50(1) of the First Additional Protocol to non-international armed conflicts and clearly delineated civilians as all persons who are not combatants, ignoring the utter lack of combatant status in these conflicts. Also in the case of *Nderubumwe Rutaganda*,⁵⁰ the International Criminal Tribunal for Rwanda defined civilians as people who are not combatants or who have been placed hors de combat, in other words, people who are not members of the armed forces. The Trial Chamber then substantially narrowed the definition of civilian, declaring that a civilian is anyone who falls outside the classification of perpetrator, perpetrators being persons of all ranks pertaining to the armed forces under the military command of either of the belligerent parties, or to individuals who were legitimately authorized and expected, as public officials or agents or persons otherwise retaining public authority or de facto representing the state to achieve its war objectives.

The Inter American Commission of Human Rights in the case of *La Tablada* held that, An attack on the Argentine military base La Tablada by members of the Movimiento Todos por la Patria (MTP) constituted a non-international armed conflict, according to Common Article 3, because the attackers associated with the attack carefully planned, organized, and conducted an armed attack, the commission went on to say that when civilians, such as those who attacked the Tablada base, take on the role of combatants by directly participating in fighting, regardless of whether alone or as part of a group, they become legitimate targets. As such, they are vulnerable to direct individualized attack in the same way that combatants are. Notwithstanding, the Commission emphasized that the persons who engaged in the attack on the military base were legitimate targets only during the time they actively participated in the fighting.⁵¹ In the case of *Dordevic* the International Criminal Tribunal for former Yugoslavia held that, it makes sense to

⁴⁸ *ibid*

⁴⁹ Prosecutor v. Kayishema and Ruzindana, ICTR-95-1-T, 21 May 1999.

⁵⁰ Prosecutor v. Georges Anderson Nderubumwe Rutaganda, ICTR-96-3-T, International Criminal Tribunal for Rwanda (ICTR), 6 December 1999

⁵¹ *Abella v. Argentina (La Tablada)*, Case 11.137, judgment of 18 November 1997, OEA/Ser.L/V/II.98

apply the IAC *jus in bello* principle in NIACs, which states that if there is any doubt about whether a person is a civilian, the presumption is that he is. But not every situation is shrouded by a veil of doubt. When doubts are stirred, they can be weeded out in several ways, either through skillful intelligence gathering or as a result of an in-depth investigation of the individual's past record.⁵²

Targeting in non-international armed conflicts must be in line with the various laws governing the conduct of hostilities in international humanitarian law which include the Hague regulations, the Geneva Conventions and its Additional Protocols, and the customary international law principles of International Humanitarian Law. As a result, any purposeful targeting of specified persons must adhere to the appropriate legal protections of humanitarian law in order to be legitimate: notably, adhering to the fundamental principles of IHL, that is, military necessity, distinctiveness, and proportionality are all criteria that must be followed.⁵³

2.2. Principles of International Humanitarian Law.

There are several principles in international humanitarian law which governs the conduct of hostilities in armed conflicts, for targeting to be considered legal they must adhere to these principles to the latter. The important principles that govern the contemporary laws on targeting are drawn from the elemental principles of IHL; these laws/ principles suggests that the means and methods of warfare which are available to parties to an armed conflict have a limit; that a distinction should always be made between military and civilian persons and their objects; that the sole purpose of a legitimate military act is that the act should lead to the submission of the adverse party through the weakening of their military potential.⁵⁴ These principles help to give more weight to the saying that “even war has limits”.⁵⁵

In recent times, due to the prevalence of non-international armed conflicts in many parts of the world, civilians have been involving themselves in the war by engaging certain activities in war

⁵² Dinstein Y, *Non-International Armed Conflicts in International Law* (Cambridge University Press 2014) pg. 62

⁵³ Bachmann, S. (2013). Targeted Killings: Contemporary Challenges, Risks and Opportunities. *Journal of Conflict and Security Law*, 18(2), pg.275

⁵⁴ Supra note 2

⁵⁵ ICRC, *People on War: Even War Have Limits*,1998, www.icrc.org/eng/resources/documents/film/f00392.htm

such as aiding in the transportation of weapons and supplies to parties of opposing camps or the non-state actors, and also giving moral backing to the combatants, this has however caused some states to resort to targeting the civilian population with the hope of achieving victory against the non-state actors. The principles of international humanitarian law is aimed at ensuring that victims of war are not subjected to unnecessary suffering and excessive injuries as a result of indiscriminate means and methods of warfare. The basic rule governing the accepted means and methods of warfare is governed by article 35 of Additional Protocol 1 which states that,

~~In~~ any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.

It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering”

This basic rule set by Additional protocol 1 is to ensure that parties to an armed conflict do not perform excessive acts which may lead to mass destruction of protected property and persons and their objects as well as causing harm to the environment. The rule also makes us understand that, targeting is not prohibited in International Humanitarian Law but the idea of targeting is not left at the discretion of the parties to the conflict, they must adhere to the principles of international humanitarian law and employ the appropriate means and methods of warfare.

This fundamental rule stems from the St Petersburg Declaration, which provided that the sole and authentic object which States have to endeavor to accomplish at some point of hostilities is to weaken the military forces of the enemy and that this object would be handed by using the employment of ammunitions which uselessly worsen the sufferings of disabled men, or render their loss of life inevitable.⁵⁶ The principles of distinction, proportionality, and precautions govern the legality of targeting individuals and objects during armed conflict in international humanitarian law.⁵⁷

2.2.1. The Principle of Distinction

⁵⁶ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 195

⁵⁷ Blank L. R., Extending Positive Identification from persons to places: Terrorism, Armed Conflicts and the identification of Military Objectives. *Utah Law Review* Volume 5 2013 pg. 1232

The first step in any targeting assessment is to adhere to the fundamental principle of distinction, as outlined in Article 48 of Protocol I; 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, as well as between civilian objects and military objectives, and accordingly shall direct their operations only against military objectives.' Article 48 is considered customary international law, and it is supported by Protocol I's Article 57(2), which states that when planning an attack, parties to a conflict must do everything possible to verify that the objectives to be attacked are neither civilians nor civilian objects.⁵⁸

This principle purports that, before launching an attack the attacker must do everything feasibly possible to verify the targets that they are indeed military targets. The parties to the conflict are under the obligation to at all times distinguish between military and civilian objects, attacks may only be directed against the military and their objects and not civilians and their objects.⁵⁹ In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.⁶⁰ Military planners and decision-makers must exhibit extreme caution, attentiveness, and accuracy throughout the planning stage to ensure that they are completely aware of all facts and situations in their sphere of operations. To do so, they must check military goals in a timely manner and thoroughly assess the quality and dependability of target information. They must, in particular, conduct rigorous and extensive evaluations of the quantity and position of people and civilian objects in the vicinity of probable military objectives. The feasibility aspect shows that the capacity to carry out an accurate and timely identification of military goals is a means duty.⁶¹ The prohibition on indiscriminate attacks, defined in customary IHL as attacks that employ a method or means of combat that cannot be directed at a specific military objective or the effects of which cannot be limited as required by international humanitarian law in contemporary armed conflict situations because military objectives are frequently in close proximity to protected persons and objects. The need to avoid or limit incidental loss by taking all reasonable care in the selection of means and methods of attack is a key component of this ban. This broad rule is to be implemented case by

⁵⁸ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 187

⁵⁹ ICRC Customary Rules of International Humanitarian Law (2005), Rule 7

⁶⁰ AP I, Article 52(3)

⁶¹ International Review of the Red Cross (June 2010), Volume 92 Number 878 pg. 479

case and does not imply a restriction on specific means or techniques of conflict.⁶² The most direct emanation of the principle of distinction is, of course, the prohibition of direct attacks against civilians.⁶³

Despite early attempts by the ICRC to outline a list of such examples, Article 52(2) does not contain any examples of what constitutes a military objective. This reflects the mutable nature of modern warfare; civilian objects can be militarized through use or location, whereas certain military objects may not provide a clear military advantage and thus may not be attacked lawfully. This implies that certain objects may have a variable status, which, depending on a number of factors, may render the object immune to targeting one day but targetable the next. Also, the element of circumstances ruling at the time implies that any post-hoc assessment of the legality of targeting decisions must be made in context, that is, the decision must be viewed in light of the circumstances surrounding the targeting decision at the time the decision was made, rather than with hindsight or informed by later intelligence.⁶⁴ Article 52(2) makes no explicit mention of combatants or persons directly involved in hostilities as lawful military objectives. When read in conjunction with Article 48's basic rule, which allows only for the targeting of military objectives, it appears that only objects, not people, may be lawfully targeted. On the surface, Article 52(2) appears to put participants in an armed conflict in the untenable position of being able to target military objectives, but only if there are no people in, on, or near the objective. Bothe et al. noted in their commentary to the Additional Protocols that it would, of course, be manifestly absurd to conclude from this somewhat imprecise drafting, that combatants are not a legitimate object of attack. This apparent legal anomaly can be attributed to concerns expressed by delegates at the Diplomatic Conference for the Additional Protocols that affirmatively suggesting violence even against combatants is not appropriate in a humanitarian instrument. A reading of a number of Protocol I articles, such as Articles 37, 41, 42, 43(2), 44(3), 51(3), and 52(2), however, supports an interpretation of military objectives as including combatants.⁶⁵

⁶² Ibid pg. 481

⁶³ Melzer N, Kuster E International Humanitarian Law: A Comprehensive Introduction Pg. 85

⁶⁴ Ibid note 38 pg. 188

⁶⁵ ibid

Before any attacks are launched by the military, they have to ensure that they give adequate warnings to the civilian population. Making civilians the object of an attack regardless of the reasons is strongly prohibited by international humanitarian law.⁶⁶ Military manuals that apply to or have been used in non-international armed conflicts indicate that a difference must be established between combatants and civilians, with the latter being the only ones who can be targeted.

Directing assaults against civilians in any armed conflict is a crime under the laws of several countries. There are also a number of official pronouncements on non-international armed conflicts that invoke the principle of distinction and condemn assaults on civilians. States' submissions to the International Court of Justice in the aforementioned Nuclear Weapons case were couched in broad terms relevant to all armed situations.⁶⁷ Violations of this principle have been constantly condemned by states and United Nations Security Council (UNSC) in both international and non-international armed conflicts. This could be seen in the 80's when there was a clash between the Israeli and Lebanese which led to a series of clashes between the Israel, Lebanon, Syria and the Palestinian Liberation Organization. This led to severe targeting and violence against the civilians in Lebanese and refugees in camps in Palestine. On the 31st of May 1985 the United Nations Security Council unanimously adopted a resolution, recalling the President of the United Nations Security Council's statement on the heightened violence in certain parts of Lebanon on 24 May 1985 on behalf of the Council's members, alarmed at the continued escalation of violence involving the civilian population, including Palestinians in refugee camps, resulting in grievous casualties and material destruction on all sides, the United Nations Security Council expressed anew its deepest concern at the heavy costs in human lives and material destruction on all sides. The Council called upon all parties to take necessary measures to alleviate the suffering resulting from acts of violence, in particular by facilitating the work of United Nations agencies, especially the United Nations Relief and Works Agency for Palestine Refugees in the Near East, and non-governmental organizations, including the International Committee of the Red Cross, in providing humanitarian assistance to all those affected and emphasizes the need to ensure the safety of all the personnel of these organizations; Appeals to all interested parties to co-operate with the Lebanese Government and the Secretary-

⁶⁶ Additional Protocol II Art. 13(2)

⁶⁷ Jean-Marie H, Doswald-Beck L, Customary International Humanitarian Law, Volume 1: Rules pg. 67

General with a view to ensuring the implementation of this resolution, and requests the Secretary-General to report to the Security Council thereon.⁶⁸ The United Nations Security Council at its 3106th meeting, on 13 August 1992 expressed grave concern with regards to the continuous reports of widespread violations of international humanitarian law occurring within the territory of the former Yugoslavia and especially in Bosnia and Herzegovina including reports of mass forcible expulsion and deportation of civilians, imprisonment and abuse of civilians in detention centers, deliberate attacks on non-combatants, hospitals and ambulances, impeding the delivery of food and medical supplies to the civilian population, and wanton devastation and destruction of property, In this resolution, the council reaffirmed that all parties to the conflict are bound to comply with their obligations under international humanitarian law and in particular the Geneva Conventions of the 12th of August 1949, and that persons who commit or order the commission of grave breaches of the Conventions are individually responsible in respect of such breaches; The Security Council also condemned in strong terms any violations of international humanitarian law, including those involved in the practice of ethnic cleansing. The council went ahead to demand all parties and others concerned in the former Yugoslavia, and all military forces in Bosnia and Herzegovina, immediately cease and desist from all breaches of international humanitarian law including from actions such as those described above, that all relevant international humanitarian organizations, and in particular the International Committee of the Red Cross, be granted immediate, unimpeded and continued access to camps, prisons and detention centers within the territory of the former Yugoslavia and calls upon all parties to do all in their power to facilitate such access and they called upon states and, as appropriate, international humanitarian organizations to collect substantiated information in their possession or submitted to them relating to the violations of humanitarian law, including grave breaches of the Geneva Conventions, being committed in the territory of the former Yugoslavia and to make this information available to the Council.⁶⁹ The targeting of civilians and the failure to make distinctions between civilians and combatants has always been condemned. Taking in account the condemnation of civilian targeting, the League of Nations Assembly stated that, ~~the~~ intentional bombing of civilians is illegal⁷⁰ This could also be seen in

⁶⁸ UN Security Council, Security Council resolution 564 (1985) [Lebanon], 31 May 1985, S/RES/564 (1985)

⁶⁹ United Nations Security Council Resolution 771 (Concerning Information on Violations of International Humanitarian Law in the Territory of the Former Yugoslavia), S/RES/771 (1992)

⁷⁰ League of Nations, Assembly, Resolution adopted on 30 September 1938

Cameroon where the state has on many occasions has execute hundreds of civilian in some parts of the English-speaking regions with the hope of achieving victory in these places. One of such examples is the famous Ngarbuh Massacre which took place on the 14th of February 2020 in Ngarbuh, Ntumbaw, Donga-Mantung Division of the Northwest Region Of Cameroon, on this day, the military invaded the village with some Mbororo men attacking civilians and killing at least twenty-two civilians, one pregnant lady and at least thirteen children, the military later on arrested some eye witnesses and murdered them in order to conceal any evidence which might point to them, the military accused the villagers of supporting the so called Ambazonian fighters who have been fighting against the state for over three years now. This was condemned by many the Human rights watch and other international organizations⁷¹

Also indiscriminate attacks are also a violation of international humanitarian law, this can be said to serve as an implementation of the principle of distinction; indiscriminate attacks are prohibited in international humanitarian law. Indiscriminate attacks are those attacks that; are not directed at a specific military objective; use of a method or means of warfare that cannot be directed at a specific military objective; or use of a method or means of warfare with the effects of which cannot be limited as required by international humanitarian law; and, as a result, are of a nature to strike military objectives and civilians or civilian objects without discrimination. A clear relationship between the principles of distinction and proportionality in attack; any attack that violates either the principle of distinction or the principle of proportionality is an indiscriminate attack.⁷²

Attacks by bombardment by any technique or means that regards a number of clearly separated and distinct military targets situated in a city, town, hamlet, or other region having a similar concentration of civilians or civilian objects as a single military goal are also prohibited,⁷³ this can also be called as carpet bombings which is a situation whereby, a bomb or bombs are dropped in such a way that they cover an anticipated area, for example a city or a village, here no distinction is made between combatants and non-combatants and this is considered a war crime. A good example of carpet bombing took place during World War II when the United States of America bombed Hiroshima and Nagasaki on the 6th and 9th of August 1945 using nuclear

⁷¹ https://en.wikipedia.org/wiki/Ngarbuh_massacre

⁷² Ibid note 38 pg. 195

⁷³ ICRC Customary Rules of International Humanitarian Law (2005) Rule 11-13

bombs which left over 200,000 people dead most of whom were civilians. The prohibition of such methods of warfare is to the effect that, attacks whose effects cannot be limited based on the principles of international humanitarian should be avoided at all cost. The use of a weapon that cannot be directed at a military target is also considered an indiscriminate attack. This provision would apply to the use of non-guided weapons, such as certain types of cluster munitions, or other weapons that cannot be controlled once released, such as certain chemical or biological weapons, such as mustard gas.⁷⁴ This position was held by the International Criminal Tribunal for Former Yugoslavia, when the court stated that, The M-87 Orkan is a non-guided projectile whose primary military application is to target soldiers and armored vehicles. Each rocket can carry either a cluster warhead with 288 bomblets or 24 anti-tank shells. The evidence indicates that rockets with cluster warheads containing bomblets were used in the attacks on Zagreb on the 2nd and 3rd of May, 1995. Each bomblet contains 420 pellets measuring 3mm in diameter. The bomblets are ejected from the rocket at a height of 800-1,000m above the target area and explode upon impact, releasing the pellets. The M-87 Orkan has a maximum firing range of 50 kilometers. The dispersion error of the rocket at 800-1,000m in the air increases with firing range. This error was caused by firing from the maximum range. This error is about 1,000m in any direction when fired from the maximum range. The dispersion area of the bomblets on the ground is approximately two hectares each pellet has a ten-meter lethal range. As a result, the Trial Chamber concluded that, the M-87 Orkan was incapable of hitting specific targets due to its characteristics and the firing range in this particular case. For these reasons, the Trial Chamber concludes that the M-87 Orkan is an indiscriminate weapon whose use in densely populated civilian areas, such as Zagreb, will result in severe casualties.⁷⁵ Indiscriminate attacks should always be distinguished from violations of the distinction principle. An indiscriminate attacker does not seek out civilians to target, but rather does not consider whether civilians may be injured or killed in an attack.⁷⁶

⁷⁴ Ibid note 38 pg. 196

⁷⁵ Prosecutor vs., Martić, IT-95-11, Judgement 12th June 2007 para 462-463

⁷⁶ Ibid note 56

2.2.2. Principle of Precaution

This principle requires that constant care be taken at all times in advance to prevent casualties on the civilian population. The combatants in targeting the adversary must at all times ensure that little or no harm is done to the civilian population, this principle was first elaborated in the Hague convention which provided that;

It is understood that the prohibition to bombard the undefended town holds good, as in the case in paragraph I and that the commander shall take all due measures in order that the town may suffer as little harm as possible.⁷⁷

The obligation to exert constant caution and/or take measures to limit or minimize inadvertent civilian losses is included in other international legal instruments such as the Geneva Convention which provides that, while conducting military operations, constant care should be taken to spare the civilian population and civilian objects, those who plan or decide on an attack should do everything feasible to verify that the targets to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives as provided for by International Humanitarian Law. They should take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects, they should refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. An attack should be canceled or suspended if it becomes clear that the objective is not military or is subject to special protection, or that the attack may be expected to result in incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; effective advance warning of attacks that may affect civilians should be provided so they may be able to leave before the attack occurs.

⁷⁷ Hague Convention (IX) 1907, Article 2(3)

When there is a choice between many military objectives for gaining a similar military advantage, the objective to be chosen is the one whose attack is predicted to cause the least harm to civilian life and civilian objects. In conducting military operations at sea or in the air, each party to the conflict must take all reasonable care to avoid civilian casualties and damage to civilian property in accordance with its rights and obligations under the norms of international law applicable in armed conflict. No provision of this article may be interpreted as sanctioning assaults on persons, civilians, or civilian objects.⁷⁸ Rule 15 states that, constant care must be taken in the conduct of military operations to spare the civilian population, civilians, and civilian objects. All feasible precautions must be taken to avoid, and in any case to minimize, incidental loss of civilian life, civilian injury and civilian object damage. Rule 16 further provides that, each party to the conflict must do everything conceivable to verify that targets are military objectives. Each party to the conflict must also take all feasible precautions in the choice of means and methods of warfare with a view to avoiding, and in any event minimizing, inadvertent loss of civilian life, injury to civilians, and damage to civilian objects, as per Rule 17. Rule 20 provides that, unless circumstances prevent it, each party to the conflict must provide effective advance warning of attacks that may affect the civilian population. When a choice between several military objectives for obtaining a similar military advantage is possible, the objective to be selected must be that the attack on which can be expected to cause the least danger to civilian lives and civilian objects, Rule 21. The parties to the conflict must take all feasible precautions to protect the civilian population and civilian objects under their control from the effects of attacks, according to Rule 22. To the greatest extent possible, each party to the conflict must avoid locating military objectives within or near densely populated areas in order to avoid attacks which may cause loss to civilian lives, Rule 23 and finally, to the greatest extent possible, each party to the conflict must remove civilian persons and objects under its control from the vicinity of military objectives.⁷⁹

It must however be emphasized that the principle of precautions in attack must be adhered during all phases of an attack, in tandem with, but also dependent on the principle of proportionality. In other words, even if the anticipated incidental loss of civilian life, injury to civilians, and damage to civilian objects is not excessive in comparison to the concrete and direct military advantage

⁷⁸ Additional Protocol I, Article 57

⁷⁹ Rule 24 of ICRC Customary Rules of International Humanitarian Law 2005

expected from the attack, the attacking party must still take all feasible precautions to select means and methods of warfare that will avoid as much incidental harm to civilians as possible.⁸⁰ The duty of precaution both during an attack and against the effects of an attack is limited to taking feasible precautionary measures; feasible precautionary measures are those measures that are practically possible taking into account all circumstances ruling at the time, including humanitarian and military considerations, according to IHL. Feasibility of precautionary measures are shaped by a range of factors, which would include available intelligence, territorial control, weapon precision, the urgency of military action, and the costs and risks associated with additional precautionary measures. For example, a sniper actively looking for targets of opportunity should be treated with more caution than an ambushed infantry patrol reacting to unexpected fire. Furthermore, while armed forces cannot and should not be expected to place anti-aircraft batteries inside civilian population centers, it would be difficult to separate dual-use installations such as bridges, railway stations, and airports from the civilian environments they are designed to serve. In practice, commanders must ultimately decide whether precautions are feasible based on their own assessment of the information available to them at the time.⁸¹ In addition to the above, a targeting decision must be cancelled or suspended if it becomes obvious that the target is not a military one or is subject to special protection, or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. This requirement expands on the distinction and proportionality principles.⁸²

2.2.3. Principle of Proportionality

In general, the principle of proportionality has a wide range of applications, including the law of force (*jus ad bellum* and *jus in bello*), human rights law, environmental law, economic law, and so on. Its operation and breadth of application vary depending on the normative context. It may be thought to have the characteristics of a general principle of law, at least within the specific framework in which it is embedded. Following the principle of military necessity, it is an additional constraint under the law of armed conflict; this is intended to further constrain any

⁸⁰ Melzer N, Kuster E International Humanitarian Law: A Comprehensive Introduction Pg.125

⁸¹ Ibid pg. 104

⁸² Ibid note 38

military action that may be deemed tactically necessary.⁸³ Although no explicit reference to the principle of proportionality can be found in AP II, relevant to non-international armed conflict, state practice establishes that this principle amounts to a norm of customary international law applicable to both international and non-international armed conflicts, as per the ICRC Customary IHL Study. An attack is proportionate, and thus legitimate, if the loss of civilian life or property damage is not excessive in comparison to the concrete and direct military advantage anticipated.⁸⁴ This was recognized by Israel's Supreme Court, such assessment is a values-based test based on balancing conflicting values and interests, and achieving that balance is difficult. The Supreme Court in this case stated that; the principle of proportionality is a significant part of international law pertaining to armed conflict, and it arises when a military operation is directed toward combatants and military objectives or against civilians while they are directly participating in hostilities, but civilians are also harmed. The requirement of proportionality in the laws of armed conflict primarily focuses on what our constitution calls "stricto sensu" proportionality, that is, the requisite that there must be a proper proportionate relationship between the military objective and civilian damage.⁸⁵

Proportionality within the laws of armed conflict constrains the means of warfare, ensuring that the parties to an armed conflict do no more than is required by the necessities of war as interpreted in light of basic human values. The principle of proportionality was created specifically to limit the discretion of conflicting parties. For example, it forces commanders to weigh civilian values against military gains when making tactical decisions.⁸⁶ In the proportionality equation, the key term to consider is "excessive." While the proportionality obligation is absolute, the "excessiveness" principle is relative. IHL doesn't quite specify an objective threshold above which the infliction of incidental harm is always considered excessive. In broad sense, targets with a higher military value (high-value targets) will justify more incidental harm than targets with a lower military value (low-value targets), although the assessment of proportionality is inherently subjective, the terminology used in the treaty text can

⁸³ Thüerer, D, & Thüerer, D, *International Humanitarian Law: Theory, Practice, Context : Theory, Practice, Context*, BRILL, Leiden 2011, pg. 75

⁸⁴ Djukić, D, & Pons, N (eds), *The Companion to International Humanitarian Law*, BRILL, Boston, 2018 PG. 579

⁸⁵ *The Public Committee against Torture in Israel and Palestinian Society for the Protection of Human Rights and the Environment v. The Government of Israel et. al*, HCJ 769/02 (2006) para 42-46

⁸⁶ *Ibid* note 83 pg. 76

provide some objective guidance. As a result, inflicting incidental harm on protected persons or objects can only be justified by "military" advantages, not by political, economic, or other nonmilitary benefits. Furthermore, the anticipated military advantage must be "concrete" and "direct," rather than merely hypothetical, speculative, or indirect. As a result, the overriding goal of winning the war cannot be used to justify the infliction of incidental harm on persons and objects protected from direct attack.⁸⁷ Proportionality assessment methods apply to all stages of the targeting process, including target selection, weapon selection, and overall attack execution. An attack that kills civilians does not appear to be disproportionate. Instead, the rule of proportionality in attack is a balancing test, in which the expected direct military gain is balanced against the expected loss of civilian life and damage to civilian objects. Only when the scale tips in favor of the civilian damage being outweighed by the military benefit does the attack become disproportionate.⁸⁸ The reason for the necessity condition in proportionality in war is that proportionality between incidental civilian harm and military advantage is not a fixed state that can be defined in *abstractum*. A natural state of balance between two values exists when one can be expressed in terms of the other or when they can be translated into a common metric. If such an objective state were conceivable, for example, ten expected civilian casualties are worth and thus proportionate to a medium-sized anticipated military advantage, one could argue that, once the prognosis of an attack accorded with that state, the principle of proportionality imposed no further obligation to reduce the expected collateral damage by looking for alternative targets.⁸⁹ Military necessity in IHL provides that one may attack a military objective, but only if the military advantage gained outweighs any collateral damage to civilians or their objects. More specifically, Additional Protocol I prohibits an attack that may be expected to result in incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, that would be excessive in relation to the concrete and direct military advantage anticipated. The goal here is to ensure that parties to an armed conflict only use as much force as is required rather than wielding a hammer to crack a nut.⁹⁰ This position was held by the trial chamber in the case of *Prlic et al* that, while the destruction of the Old Bridge by HVO making it impossible for civilians to get food and medical supplies resulting in a serious deterioration of the humanitarian

⁸⁷ Ibid note 48 pg. 101

⁸⁸ Ibid note 38 pg. 197

⁸⁹ Crawford E and Pert A., *International Humanitarian Law* (Cambridge University Press) 2015 pg. 74

⁹⁰ Winter E., *Pillars not Principles: The Status of Humanity and Military Necessity in the Law of Armed Conflict*; *Journal of Conflict & Security Law*, Oxford University Press 2020

situation for the population living there may have been justified by military necessity, however, the harm done to the civilian population was undeniable and substantial. As a result, the tribunal held that the impact on the Muslim civilian population of Mostar was disproportionate to the concrete and direct military advantage expected by destroying the Old Bridge. In this case, the ICTY sentenced six accused for crimes committed during the dissolution of the former Yugoslavia on Bosnia's. The accused were members of the Croatian Defense Council (HVO), Herceg-supreme Bosna's executive, administrative and military body run by ethnic Croats that was engaged in an armed conflict with Bosnia and Herzegovina's primarily Muslim armed forces (ABiH). The accused detained Muslims and also destroyed the bridge that was used for the supply of food and medical supplies.⁹¹ Military necessity arguments for the use of force are inherently ambiguous. Arguments about necessity thus served to override prima facie limits on warfare for much of the history of warfare. In stark contrast to the resulting connotations of military necessity as promoting brutality, the Hague Conventions required belligerents to refrain from any destruction that was not necessitated by the necessities of war. In this interpretation, military necessity limits violence; only force that is absolutely necessary enters the realm of what is permissible. Therefore necessity is the limit of legality; a broad consensus holds that appeals to necessity no longer justify violations of established rules. Despite the undisputed status of necessity as a limit on the use of force, its place in the legal regulation of hostilities remains debatable. The term "necessity" is certainly unsuitable for referring to a substantive goal of legal regulation, such as military pragmatism or humanitarianism. But is it a third principle, along with distinction and proportionality, which determines the legitimacy of a target?⁹²

2.3. Means and Methods of Warfare

Combatants are members of the fighting forces of belligerent parties to a conflict; all the members of the armed forces of a party to an international armed conflict are combatants except medical personnel religious personnel and humanitarian workers. According to International humanitarian law norms, the parties to a conflict right to choose the various means and methods

⁹¹ ICTY, *The Prosecutor v. Prlić et al.*, IT-04-74-T, Trial Chamber, Judgement and Opinion, 29 May 2013 para 1583

⁹² *Ibid* pg. 77-78

of warfare are not limited,⁹³ international humanitarian law has developed a body of rules which regulates the use of certain weapons during warfare, that is the means of warfare by the belligerent parties and the manner in which they conduct hostilities which is otherwise known as the method of warfare. The distinction between these two is important because any weapon can be used in an unlawful manner such as targeting individuals which are otherwise protected from attacked during warfare such as humanitarian relief workers, clergymen and medical personnel, whereas the use of prohibited weapons in prima facie unlawfully regardless of how they are used.⁹⁴ The International Court of Justice accepted these rules in its advisory opinion in the Nuclear Weapons case by stating that; the following are the cardinal principles found in the texts that make up the core of humanitarian law. It is prohibited to cause unnecessary suffering to combatants, and it is therefore prohibited to use weapons that cause such harm or unnecessary aggravation of their suffering. States do not have unrestricted freedom of choice in the weapons they employ. In conformity with the above mentioned principles, humanitarian law prohibited certain types of weapons from the start, either because of their indiscriminate effect on combatants and civilians, or because of the unnecessary suffering caused to combatants, i.e. harm greater than that unavoidable in order to achieve legitimate military objectives. These fundamental rules must be followed by all states because they are inviolable principles of international customary law. The only legitimate goal of an armed conflict is to weaken the enemy's military forces, for which it is sufficient to disable as many enemy combatants as possible. Targeting civilians as a method of warfare is prohibited and this might be considered a war crime as well as using prohibited means of warfare.⁹⁵ Besides norms on means and methods of warfare per se, IHL also contains additional obligations with regard to the choice of means and methods when planning and deciding on an attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects. Those precautionary measures in attack, while being designed with reference to the protection of

⁹³ Art 35(1) of AP 1

⁹⁴ Henckaerts, J-M. and Louise D-B., International committee of the red cross: Customary international humanitarian law. International Committee of the Red Cross: Customary International Humanitarian Law, 2005 pg. 453-497

⁹⁵ Sassòli M., Bouvier A. A., Quintin A., HOW DOES LAW PROTECT IN WAR?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law. Volume 1, 3rd ed. Pg.43

civilians and civilian objects, might be considered relevant for other types of means and methods of warfare to ensure respect for all relevant norms of IHL.⁹⁶

2.3.1. Prohibited means and methods of warfare

The prohibition of certain means and methods of warfare can be said to limit the so-called targeted, which lends credence to the popular statement that "there is limit to war," that is, the ways in which parties to an armed conflict operate is not unlimited, the law regulates hostilities in order to protect victims of warfare and not only to protect against indiscriminate attacks with weapons, or even weapons of mass destruction, but also to protect them from acts or omissions by the belligerents which may cause superfluous harm or may even lead to death in certain cases such as poisoning.

The prohibition of direct attacks against civilians and civilian objects, cultural property, and installations containing dangerous forces,⁹⁷ the prohibition of indiscriminate attacks,⁹⁸ the prohibition of the use of civilians or other protected persons as human shields,⁹⁹ the prohibition of acts or threats of violence with the primary purpose of spreading terror among the civilian population,¹⁰⁰ the prohibition of methods causing widespread, long-term and severe damage to, or involving the hostile manipulation of, the natural environment,¹⁰¹ the prohibition of starvation of civilians as a method of warfare.¹⁰²

Despite that fact that targeting killings may be legal in armed conflicts considering the fact that the main objective of the parties to the conflict is to weaken the military prowess of their opponent, there are certain situations whereby these killings will prima facie be illegal despite, these includes the situations listed above and also other prohibited methods of warfare which includes the following;

⁹⁶ Ibid pg. 43

⁹⁷ AP I, Arts 48, 51(2), 52(1), 53 and 56; Hague Convention on Cultural Property, Art. 4; CIHL, Rules 1, 7, 38 and 42.

⁹⁸ AP I, Art. 51(4); CIHL, Rule 11.

⁹⁹ GC III, Art. 23(1); GC IV, Art. 28; AP I, Art. 51(7); CIHL, Rule 97

¹⁰⁰ AP I, Art. 51(2); CIHL, Rule 2

¹⁰¹ AP I, Arts 35(3) and 55; CIHL, Rules 43–45.

¹⁰² AP I, Art. 54(1).

2.3.1.1. Prohibition of Perfidy and Denial of Quarter

In all types of armed conflict, it is illegal to order or threaten that 'no quarter' will be given; that is, that there will be no survivors and no prisoners will be taken.¹⁰³ This was first prohibited in Hague Regulations Article 23(d). Denial of quarter is defined by Additional protocol I as, an order that there shall be no survivors, article 40 of Additional Protocol I provides that;

It is prohibited to order that there shall be no survivors, to threaten an adversary therewith or to conduct hostilities on this basis.

During the 1990 invasion of Kuwait, Iraqi armed forces were given orders ordering the execution of every Kuwaiti military man should he fail to surrender to Iraqi forces; Kuwaiti authorities condemned the orders as savage practices.¹⁰⁴

This is equally the case with perfidy, Additional Protocol I forbids using deception to kill, injure, or capture an adversary.¹⁰⁵ States that are not parties to the Protocol are bound by the customary international law prohibition of perfidy, which includes the killing, wounding, or capturing of an adversary through perfidy. In furthermore, the customary prohibition against treachery forbids the treacherous killing or wounding of 'individuals belonging to the hostile nation or army by the belligerent parties. Perfidy or treachery is defined as acts inviting an adversary's confidence in order to lead him to genuinely think that he is entitled to, or obligated to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence. This is prohibited in international humanitarian law;¹⁰⁶ perfidy is considered a war crime under international criminal law.¹⁰⁷ The feigning of surrender or negotiation under a truce flag, the feigning of incapacity due to wounds or sickness, the feigning of civilian, non-combatant status,

¹⁰³ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 241

¹⁰⁴ Letter from Kuwait to the United Nations Secretary General, UN Doc S21815 24TH September 1990

¹⁰⁵ AP I, Art. 37.

¹⁰⁶ AP I, Art 37

¹⁰⁷ Article 8(2)(b)(xi) of the Rome Statute of the ICC

and the feigning of protected status by using the signs, emblems, or uniforms of the UN or of neutral or other non-belligerent States are all examples of perfidious or treacherous acts given in treaty IHL. The same is true for the devious or treacherous use of the protective emblems of the Red Cross, Red Crescent, or red crystal.¹⁰⁸ Perfidious activity was alleged to have occurred during Operation Cast Lead in 2009, when local Gazans and IDF soldiers reported seeing Hamas operatives dressed in medical uniforms and attempting to commandeer ambulances.¹⁰⁹ It is important to distinguish between ruses of war and perfidy; ruses of war are not prohibited in international humanitarian law. Acts which constitute ruses of war are provided in article 37 (2) of Additional Protocol I as acts intended to mislead an adversary or induce him to act recklessly, but which violate no rule of international law applicable in armed conflict and are not perfidious because they do not inspire an adversary's confidence in the law's protection. Camouflage, decoys, mock operations, and misinformation are some examples of such ruses. Allied forces engaged in a number of ruses during WWII to deceive the Axis powers into believing that the invasion of Europe would take place at the Pas-de-Calais rather than the Cotentin Peninsula in Normandy; the plans were dubbed Operation Bodyguard and Operation Fortitude. 158 Ruses used decoy machinery and equipment such as inflatable and papier mâché trucks and tanks, mock airfields with wooden airplanes, and a bogus oil dock at Dover all built by stagehands from the British film industry.¹¹⁰ If targeting takes place after ruses it cannot be considered as being illegal for the simple reason that ruses in itself is not prohibited, however the target in question must be a legitimate target of attack for the targeting to be legal. Other prohibited method of warfare is the misuse of the emblems of the International Committee of the Red Cross or the Geneva Conventions as a ruse of war is also prohibited in international humanitarian law,¹¹¹ a party to conflict is prohibited to use these emblems with the intention of deceiving the adversary in order to target them.

2.3.1.2. Starvation of civilians as a method of warfare

Also, targeted killings like earlier stated may not only take the form of killing with weapons, employing methods such as starvation in order to ensure that the civilian population or even the

¹⁰⁸ Melzer N and Kuster E, *International Humanitarian Law: A Comprehensive Introduction* ref. 4231 pg. 108

¹⁰⁹ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 242

¹¹⁰ *Ibid* pg. 243

¹¹¹ AP I, Art. 39; CIHL, Rules 62 and 63

adverse party undergoes suffering or starve to death is also a prohibited method of warfare. Starvation of civilians as a method of warfare is prohibited. It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive. These prohibitions shall not apply to such of the objects covered by it are used by an adverse Party; as sustenance solely for the members of its armed forces; or if not as sustenance, then in direct support of military action, provided, however, that in no event shall actions against these objects be taken which may be expected to leave the civilian population with such inadequate food or water as to cause its starvation or force its movement.¹¹²

In humanitarian law it is prohibited to engage in activities such as cutting of civilian supplies which may lead to the suffering and subsequently dead. This is safeguarded by article 54 of additional protocol 1 which provides that; Civilian starvation as a method of warfare is prohibited. It is prohibited to attack, destroy, remove, or render useless objects essential to the survival of the civilian population, such as foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party, whatever the motive, whether to starve out civilians, cause them to move away, or for a different reason. These prohibitions in paragraph shall not apply to such of the objects covered by it as are used by an adverse Party: as sustenance solely for members of its armed forces; or if not as sustenance, then in direct support of military action, provided, however, that no actions against these objects shall be taken that could leave the civilian population with insufficient food or water to cause starvation or force its movement. Furthermore, these objects shall not be made the subject of a requisition.¹¹³ Hunger has long been used as a weapon of war sometimes used to target a particular segment of the population in order to make them surrender or to cause death; the issue has recently gained attention due to the increased risk of mass starvation in today's conflicts. Political acts that cause hunger and

¹¹² Article 54 of AP I

¹¹³ Article 54 of API

starvation are classified as acts of commission, omission, or provision. Acts of commission include attacks on food production, markets, and restrictions on people's freedom of movement. Provision is the selective provision of aid to one side of a conflict, whereas omission is the failure to act, such as when food relief is halted.¹¹⁴ Starvation as a means of targeting a particular segment of the population in an armed conflict with the hope that they surrender could also be seen in Nigeria during the Biafran Crisis between 1967-1970, during this period, the Federal Republic of Nigerian had just gained independence from the United Kingdom and the people of Biafra declared their independence on the 30th of May 1967, Nigerian authorities resisted the secession because Biafra's oil reserves were critical to the economy. By June, Nigerian troops had advanced, erected roadblocks, and declared starvation a legal weapon of war. Biafra's 13 million people were deprived of food. Hunger first gripped the region in September 1967, and Biafrans were deliberately starved to death for three years. Every day during the height of the war, an estimated 10,000 people including 6,000 children died of starvation. Over the course of three years, an estimated 2 million civilians, or 15% of Biafra's population, were killed.¹¹⁵ As a result, the United Nations Security Council unanimously adopted Resolution 2417 (UNSC S/RES/2417) in May 2018; starvation as a weapon of war and deliberate blockade of humanitarian aid are explicitly condemned and declared war crimes. The Assembly of States Parties to the International Criminal Court supplemented the Rome Statute on December 6, 2019: starvation can now be prosecuted in non-international armed conflicts without having to prove that civilians have died as a result of starvation.¹¹⁶

2.3.1.3. Pillage

This can be defined as taking property without consent for private or personal use, this had been prohibited since the Lieber code in its article 44 which provides that; All wanton violence against persons in the invaded country, all destruction of property not commanded by the authorized

¹¹⁴ Nobel peace prize: hunger is a weapon of war but the World Food Programme can't build peace on its own. The Conversation 2020 <https://theconversation.com/nobel-peace-prize-hunger-is-a-weapon-of-war-but-the-world-food-programme-cant-build-peace-on-its-own-147872>

¹¹⁵ Giovetti O., Timeline: 54 Years of Hunger as a Weapon of War. Concern Worldwide US 2021 <https://www.concernusa.org/story/hunger-as-weapon-of-war-timeline/#:~:text=By%20June%2C%20Nigerian%20troops%20advanced,were%20deliberately%20starved%20to%20death.>

¹¹⁶ WHEN HUNGER BECOMES A WEAPON OF WAR: Deliberate starvation as a method of warfare must be outlawed internationally. Welthungerhilfe <http://www.welthungerhilfe.org/news/publications/detail/factsheet-when-hunger-becomes-a-weapon-of-war/>

officer, all robbery, pillage or sacking, even after taking a place by main force, all rape, wounding, maiming, or killing of such inhabitants are all prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer, or private who is in the act of committing such violence and disobeying a superior who orders him to refrain from doing so may be lawfully killed on the spot by that superior.¹¹⁷ The International Criminal Tribunal for Former Yugoslavia has condemned this method of warfare and is of the opinion that pillage constitute war crimes¹¹⁸ in international law, the Trial Chamber hearing in this case reminded the parties that the prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their personal gain, and to organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory. As a result, the trial chamber determined that individual acts of appropriation committed by people motivated by greed may result in individual criminal responsibility on the part of the perpetrators.¹¹⁹ Despite the condemnation of pillage by international courts this practice is still very much prevalent in both international and non-international armed conflicts; this method of warfare was also condemned and considered a breach of international law by the International Criminal Tribunal for Rwanda in the Bisengimana case.¹²⁰

2.3.2. LEGITIMATE TARGETS IN INTERNATIONAL HUMANITARIAN LAW.

In international humanitarian law, there is what we call legitimate and illegitimate targets. As earlier stated several persons fall under the protection of international humanitarian law and ought not to be the object of attacks. In an armed conflict, there are combatants and there are civilians and international humanitarian law accords different types of protection to them. The dual rights of combatant immunity and prisoner of war (POW) treatment are the distinguishing features of combatant status. Though the term combatant immunity is not used explicitly in the Geneva Conventions, the notion can be found in Article 43(2) of AP I, which also states that

¹¹⁷ Article 44 of The Lieber Code, Prepared by Francis Lieber, promulgated as General Orders No. 100 by President Lincoln, 24 April 1863

¹¹⁸ Article 8 of the Statute of Rome

¹¹⁹ *Prosecutor v. Goran Jelusic (Trial Judgement)*, IT-95-10-T, International Criminal Tribunal for the former Yugoslavia (ICTY), 14 December 1999

¹²⁰ *Prosecutor vs. Bisengimana*, ICTR 00-60-T, Judgment 13th April 2006

combatants have the right to participate directly in hostilities.¹²¹ According to the 2013 commentary to AP I, the combatants privilege provides immunity from the application of local law prohibitions against homicides, wounding and maiming, or capturing persons and destroying property, so long as these acts are committed as acts of war and do not violate the restrictions of the rules of international law applicable in armed conflict. It further provided that, those who have the combatant's privilege are legitimate targets for the adversary's attacks until they are rendered hors de combat or prisoners of war. The essence of prisoner of war status under the Third Convention is the obligation imposed on a Detaining Power to respect the rights of combatants who have fallen under its control. In order to be considered a combatant under international humanitarian law there are certain prerequisites that must be met, As per Article 1 of the Regulations Respecting the Laws and Customs of War on Land, belligerents must meet the following requirements; to be led by a person who is accountable to his subordinates; to have a fixed distinctive emblem that can be recognized from a distance; to openly carry arms; and to conduct their operations in accordance with the laws and customs of war. Article 4 A of the Geneva Conventions III is regarded as outlining the essential provisions for combatant status. As per this article combatants are; Members of a Party to the conflict's armed forces, as well as members of militias or volunteer corps that are part of such armed forces; Members of other militias and volunteer corps, including those of organized resistance movements, belonging to a conflicting party and operating in or outside their own territory, even if that territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, meet the following conditions: being commanded by a person accountable to his subordinates; ii. having a fixed distinctive sign recognizable from a distance; openly carrying arms; and conducting their operations in accordance with the laws and customs of war. Also, regular armed forces personnel who declare allegiance to a government or authority not recognized by the detaining power.

Additional protocol I gives legal status to irregular fighters who are engaged in wars of national liberation, this section provides that; The armed forces of a party to a conflict include all organized armed forces, groups, and units that are under a command that is accountable to that party for the actions of its subordinates, even if that party is represented by a government or an

¹²¹ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015) pg. 97

authority that is not recognized by an opposing party.¹²² Such armed forces will be subject to an internal disciplinary system that will enforce compliance with the rules of international law applicable in armed conflict, among other things. This covers decolonization and liberation movements. In the debates that supposedly took place in the UN and in civil society more broadly in the run-up to the Protocols' adoption, a popular argument was that old legislation was insufficient to regulate these new types of armed conflict. As previously stated, the 1949 Geneva criteria for irregular fighters state that in order to be granted combatant status, such irregulars must openly carry their arms and wear a fixed, distinct and unique insignia that is visible from a distance. Nevertheless, it was pointed out during the Diplomatic Conference in the 1970s that such provisions were incompatible with guerrilla warfare, a tactic of warfare that relied on stealth and subterfuge for success. The criterion of wearing a fixed visible insignia would be untenable and counter-productive if the new Protocol was intended to better regulate guerrilla warfare.¹²³ According to some scholars in practice, it was recognized early that the requirement that members of such movements bear fixed distinctive signs visible from a distance and carry arms openly virtually precludes the use of the provision... They must work in secret, wear no uniform or distinguishing sign, and conceal their identity prior to the attack in order to complete their mission. Realization of this provision's inadequacy in providing privileged combatant status for those fighting regular military forces in colonial wars and struggles for self-determination sparked strong initiatives to relax or abolish the 1949 Geneva Conventions standards for freedom fighters.¹²⁴

Those taking part in a *levée en masse* are another group of people who are eligible for combatant and POW status. *Levée en masse* was a concept that emerged in the years following the French Revolution; 43 in international humanitarian law, it refers to a situation in which, upon the approach of an invading army, the civilians of the threatened territory spontaneously take up arms to resist the invasion. Participants in a *levée* must openly carry their weapons and follow the laws of armed conflict. Unlike irregulars in Article 4A (2) Additional protocol 1, there is no requirement for *levée* participants to have a fixed distinctive sign or organizational structure, in

¹²² Article 43(1) of AP I

¹²³ Crawford E and Pert A, *International Humanitarian Law* (Cambridge University Press 2015), pg. 102

¹²⁴ *ibid*

fact, the their fundamental character is its spontaneous, unorganized nature.¹²⁵ Article 13(6) of GC I, Article 13(6) of GC II, and Article 4(A) (6) of GC III all recognize *levée en masse*. They can be legitimate targets of attack but once they have been captured, they enjoy the prisoner of war status and can no longer be tortured, killed and subjected to any form of inhumane treatment as this is punishable as a war crime under article 8 of the Statute of Rome.

2.3.2.1. Foreign Fighters

Foreign fighters are defined as non-citizens of conflict countries who join insurgencies during civil war. They are different from mercenaries and personnel of private military and security firms on two counts. First, in most cases, mercenaries or private military and security companies are hired by state governments rather than rebels, and when they are hired by private entities such as transnational corporations, the state does not prohibit their recruitment. Second, foreign fighters are typically not motivated by monetary gain. Foreign fighters join an insurgency abroad for ideological or religious reasons rather than financial gain.¹²⁶ Beyond recognizing that combatant status confers the right to directly participate in hostilities, IHL does not directly define the term combatant. Combatant status has two significant consequences. To begin, combatants are immune from criminal prosecution for belligerent acts committed in accordance with IHL; they have combatant immunity or privilege. Second, if a combatant falls into the hands of the enemy, he or she is considered a POW. The definition of POW status in Article 4 of the 1949 Geneva Convention III and Article 44(1) of the 1977 Additional Protocol 1 infers the referent of combatant. It includes only the regular armed forces of the state in question, as well as members of other militias and volunteer corps, including those of organized resistance movements, who belong to a party to the conflict, if certain conditions are met.¹²⁷ Regarding the classification of foreign fighters under the aforementioned legal framework, it appears clear that if they are incorporated into the armed forces of one of the IAC parties, they should be considered combatants and thus entitled to the full protection of GC III in the event of capture.

¹²⁵ Ibid pg. 104

¹²⁶ Geneva Academy of International Humanitarian Law and Human Rights: Foreign Fighters under International Law, Academy Briefing No. 7 2014

¹²⁷ Ibid pg. 18

Incorporation into the armed forces can occur before the conflict (as in the cases mentioned above) or during hostilities.¹²⁸

There are also other categories of irregular at warfare known as spies, Spies apprehended while engaged in clandestine activities and not wearing their armed forces uniforms are considered unlawful combatants and are not entitled to combatant immunity or POW rights.¹²⁹ This applies to both civilian spies and members of the armed forces who disguise themselves as civilians and are apprehended while engaged in acts of espionage in enemy territory. While civilian spies are in any case denied combatant status and POW rights due to their civilian status, combatants' losing such status has far-reaching consequences.

There are also mercenaries, who are considered unlawful combatants and are not eligible for prisoner of war status under international humanitarian law, The Organization of African Unity (OAU) first prohibited the use of mercenaries in its 1967 Resolution AHG/Res. 49 (IV), which urged "all States of the world to enact laws declaring the recruitment and training of mercenaries in their territories a punishable crime and discouraging their citizens from enlisting as mercenaries." Following this was a draft Convention in 1971, which was eventually adopted by the OAU in 1977. The OAU Convention makes no mention of financial gain as a requirement for mercenary status, instead focusing on the concept of a person who is not a national of the state against which his actions are directed. The monetary gain for such acts is deemed irrelevant for classification as a mercenary, which appears to contradict the conventional understanding of mercenaries as soldiers of fortune that have fought for money and plunder rather than for cause or patriotism.¹³⁰ The issue of mercenaries being given the POW (prisoner of war) status if captured was recently raised in the ongoing conflict between Russia and Ukraine. On the fourth day following Russia's armed attack and invasion of Ukraine on February 24, President Zelensky issued a call for foreigners who would like to defend Ukraine to join the International Legion of Territorial Defense (ILTG).

Hundreds of fighters from the United States, Canada, France, Croatia, Georgia, and Belarus responded to the call and decided to travel to Ukraine, with or without the permission of their respect

¹²⁸ Guttry De. A. et al. (Eds.), *Foreign Fighters under International Law and Beyond* (2016)

https://doi.org/10.1007/978-94-6265-099-2_9

¹²⁹ Article 29, AP I

¹³⁰ *Ibid* pg. 108

ive governments. Zelensky then announced on Tuesday, March 1, that roughly 16,000 foreign fighters had decided to volunteer for military service. Russia's Defense Ministry spokesperson stated that none of the mercenaries detained by the West in Ukraine can be considered combatants under international humanitarian law (IHL) or prisoners of war (POW), and threatened to prosecute them as criminals for any subversive acts against the Russian army.¹³¹ In recent armed conflicts, the use of irregular foreign forces such as mercenaries and foreign terrorist fighters, who straddle the blurry line distinguishing combatants and civilians under IHL, has multiplied. In addition to Ukraine, the foreign fighters have recently participated in hostilities in Mali and Nagorno-Karabakh, the Central African Republic since 2017, Syria, and Libya. Combatants, who fall within the definitions of Article 4 of Geneva Convention III governing the treatment of POWs, as well as the extensive definition of combatants set out in Article 43 of Additional Protocol I, are legally allowed to have POW status and combatant immunity. That is, they are permitted to directly participate in hostilities and cannot be prosecuted for simply taking part in combat. The disadvantage for combatants is that they may be targeted at any time by the opposing army's armed forces, even if they are not engaged in hostilities. Combatants are members of a conflicting party's armed forces or a volunteer corps incorporated into the conflict. The requirement for membership in the armed forces or the incorporation of the volunteer corps, according to the ICRC Commentary to Article 4, is a matter of domestic regulation. Even so, the incorporated unit must be a professional fighting force that meets the criteria outlined in Article 4(A) (2) of GC III and report to the regular army command. The fact that a person is a national of a third country rather than a national of the armed forces in which they are serving is widely regarded as insignificant when determining combatant or POW status. Members of the ILTG are thus combatants who can be legitimately targeted and they can also enjoy POW status. Their prosecution and punishment for directly participating in hostilities or for the crime of mercenarism would be in violation of API Articles 43 and 44, and could amount to war crimes.¹³²

¹³¹ Nuzov I., Mercenary or Combatant? Ukraine's International Legion of Territorial Defense under International Humanitarian Law. (European Journal of International Law). <https://www.ejiltalk.org/mercenary-or-combatant-ukraines-international-legion-of-territorial-defense-under-international-humanitarian-law/>

¹³² Ibid

2.3.2.2. Child Soldiers

Another problematic issue when it comes to legitimate targets in international humanitarian law is the issue of targeting child soldiers. There is a moral dilemma regarding the use of lethal force against child soldiers. Children are given special protection during armed conflicts under armed conflict laws and international human rights law. This protection, however, does not extend to the law of targeting. Child soldier, like their adult counterparts, are targetable under targeting law and may be subject to the use of lethal force.¹³³ Targeting child soldiers raises two distinct legal issues: first, whether child soldiers are combatants like any other combatants, and second, if so, whether the means used to target them follow the same rules as adult combatants.¹³⁴ Article 4(A) of the 1949 Third Geneva Convention and Article 43 of the 1977 Additional Protocol I define what a combatant is under international humanitarian law. If a child is enlisted in the armed forces of a party to an international armed conflict, there appears to be no apparent basis in current international humanitarian law to characterize that child as anything other than a combatant. Article 1 of Protocol I defines the protocol's scope of application as only covering conflicts between the armed forces of the states and dissident armed forces or other organized armed groups, implying that there is a legal concept of insurgent armed forces. Given this, it is possible that a child could be fully integrated into the insurgent armed forces and thus be a regular fighter on a par with other armed participants in a non-international armed conflict. Individuals with a continuous combat function are not civilians in non-international armed conflict, according to the ICRC Interpretive Guidance on Direct Participation in Hostilities, and can thus be targeted. Children, according to Frédéric Mégret, should be regarded as non-members of the armed forces and should not be targeted unless they are directly participating in hostilities, implying that there is no continuous function probability for children. The underlying premise appears to be that children, due to their age, can never become combatants in the full sense of the term. That does not seem to square with the reality on the ground in many armed conflicts, where children, as with the West Side Boys unit in Liberia, can become ruthless fighters on a strategic par with adults.¹³⁵ Protocol I Article 50(1) states that In the event of a

¹³³ Barrett R. C., Humanizing the Law of Targeting in Light of a Child Soldier's Right to Life. (International Journal of Children's Rights) 2019 pg. 7

¹³⁴ Provost R., Targeting Child Soldiers . (European Journal on International Law) 2016
<https://www.ejiltalk.org/targeting-child-soldiers/>

¹³⁵ *ibid*

doubt as to whether an individual is a civilian, that individual shall be regarded as a civilian. It is not unreasonable to argue that, in terms of applying both the continuous combat function and the revolving door principles, the fact that the individual in question is a child should raise a red flag as to whether he or she is targetable. That doubt may be dispelled in light of the facts available to those determining the targetability of the child in question, but it necessitates overcoming a presumption of civilian status in a way that an adult would not.¹³⁶

It has been questioned whether there is a moral obligation to pursue an alternative to the traditional shoot to kill strategy. Some writers have discussed the approach that should be taken to varying degrees. It has been suggested, for example, that child soldiers should only be targeted when they are directly participating in hostilities. Some writers agree that killing a child who has become a soldier illegally or involuntarily is ethically wrong. Targeting child soldiers in these circumstances may also be traumatic or demoralizing for armed forces. Unfortunately, the law of targeting does not usually address the mode of recruitment of those who take part in hostilities.¹³⁷ Child soldiers appear to be a permanent feature of today's conflict landscape. However, theories of non-combatant immunity based on varying degrees of moral culpability or responsibility fail to justify using violence against children, no matter how dangerous they are. Children are not typically regarded as morally responsible actors, particularly if they have been abducted and coercively brainwashed. Such child soldiers are practically pure examples of innocent attackers, with all of the difficulties that entails in justifying violence against them. On the other hand, theories such as Walzer's or Lazar's that allow unjust attackers to be harmed without restraint appear repugnant when applied to children. Avoiding harm to children is one of our most deeply felt moral impulses, and it is abhorrent to apply a principle that does not allow for some form of protection from attack. This is especially true given that many child soldiers eventually flee their commanding officers when given the chance.¹³⁸

Comprehensive protection of children under international law, and the lasting cultural norms that children deserve special protection, calls for special protection of children. Vulnerability, immaturity, the nature of recruitment, and the abuse of child soldiers make them fundamentally

¹³⁶ *ibid*

¹³⁷ Barrett R. C., Humanizing the Law of Targeting in Light of a Child Soldier's Right to Life. (International Journal of Children's Rights) 2019 pg. 7

¹³⁸ Oren J. L., Weaponized Noncombatants, Child Soldiers, and Targeting Innocents, Journal of Military Ethics, (2020) <https://doi.org/10.1080/15027570.2020.1771842> pg. 63

different from adults and need to be protected accordingly. It is reasonable to suggest that the fact that a person is a child should raise a tentative question as to whether he or she can be targeted. But to reflect the reality of war, child soldiers must remain vulnerable, at least in certain situations. The fact that child soldiers can gain combatant status under current law and therefore can be targeted at any time in the same way as their adult soldiers is an inadequate finding. The ICRC's Interpretation Guidelines and Targeting Law do not adequately reflect the increasing trend of international law regarding the need for special protection of child soldiers.¹³⁹

Customary international law does not provide any form of protection for child soldiers; also, there is no express provision in the treaties dealing with child soldiers for protection from attack. Though the use and recruitment of child soldiers is prohibited in international humanitarian law, the treaties make no restrictions on military operations against child soldiers.¹⁴⁰ One can therefore say that child soldiers are legitimate targets in international humanitarian law and can be targeted when taking part in direct hostilities. Nevertheless, the French version of the prohibition on superfluous injury and unnecessary suffering, which speaks of *maux superflus*, provides some support for a duty to use the least injurious means or method of warfare against a child soldier. Several authors have pointed out that the French is the original, taken from the 1868 St. Petersburg Declaration and later reproduced in the 1899 and 1907 Hague Regulations. The concept of *maux superflus* appears to be broader than its English translation in that *maux* can be taken to refer not only to injury or suffering, but also to an evil; indeed, the concept of a mal superfluous inevitably evokes its companion, the *mal nécessaire*. In other words, while war is a necessary evil, evils that are not necessary for the pursuit of the legitimate aims of war (as defined in the St. Petersburg Declaration) are illegitimate. Coming back to child soldiers, direct targeting is only permissible if it is a necessary evil, which means that no viable alternative can be identified and that there is a tangible military necessity for this attack; otherwise, it violates the treaty and customary prohibition on superfluous injury and unnecessary suffering.¹⁴¹

¹³⁹ Roughley C., Mind the gap: child soldiers and the law of targeting. (Australian International Law Journal), <https://heinonlineorg.ezproxy.vasa.abo.fi/HOL/PrintRequest?collection=journals&handle=hein.journals/ustintlj2017&div=7&print=section&format=PDFsearchable&submit=Print%2FDownload&id=48> pg. 78

¹⁴⁰ Sam P., Targeting Child Soldiers: Striking a Balance between Humanity and Military Necessity' (2016), Journal for International Humanitarian Legal Studies. Pg. 190

¹⁴¹ Provost R., Targeting Child Soldiers . (European Journal on International Law) 2016 <https://www.ejiltalk.org/targeting-child-soldiers/>

2.4. Protected Person and protected objects in international humanitarian law.

These are persons who are protected from attacks by the belligerents. They are not only protected from attacks but their objects which are essential for the survival are also prohibited from attacks. In other words, they are illegitimate targets in armed conflicts and deliberately targeting them will amount to war crime under the Article 8 of Rome Statute of International Criminal Court.

As with means, there are general rules regarding methods of warfare. Under Article 57(2) of AP II provides that, those who plan or decide upon an attack shall; do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives within the meaning of paragraph 2 of Article 52 and that it is not prohibited by the provisions of this Protocol to attack them; take all feasible precautions in the choice of means and methods of attack with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; refrain from deciding to launch any attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; This article further provides that, an attack shall be cancelled or suspended if it becomes apparent that the objective is not a military one or is subject to special protection or that the attack may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated; effective advance warning shall be given of attacks which may affect the civilian population, unless circumstances do not permit. When a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be that the attack on which may be expected to cause the least danger to civilian lives and

to civilian objects. In International Humanitarian Law, Medical personnel and objects, humanitarian relief personnel and object religious personnel, personnel and objects involved in peace keeping missions and journalists are granted special protection as well as civilians. Medical personnel are divided into three categories which are; medical personnel of a party to the conflict, medical personnel of national societies other voluntary aid societies recognized by the belligerents and medical personnel seconded by humanitarian aids. In IHL, on medical personnel who are actively in service on the battle field receive special protection, other medical personnel are given protection under international humanitarian law as civilians. Such individuals must always be protected and treated humanely, without debate; it is forbidden to target, kill or inflict wounds on an enemy who surrenders or is unable to participate in a fight; wounded and sick must be gathered and taken into the care of the party in the conflict from which they are gathered.¹⁴² This protection extends to medical personnel as well as medical devices, vehicles, and equipment. Religious personnel are chaplains both military and civilian who carry out their ministry and are temporarily or permanently attached to the armed forces. Both Religious and medical personnel are not to be directly attacked, hindered, threatened or captured while performing their functions in their various capacities.

Once they are captured, they are given prisoner of war status irrespective of the fact that they maybe civilians or members of the armed forces.¹⁴³ According to Article 25 of the Customary Rules of IHL medical personnel are protected and only lose their special protection under IHL once they act out of their scope of authority and take part in any hostilities which is in any way harmful to the enemy, in situations like this once they are targeted and killed by the enemy forces, it can't be said to be illegal because at the time they acted out of the scope of their authority they were automatically considered as belligerents or combatants and they automatically also lose their protection under international humanitarian law. As per Article 28 and 29 medical units and medical transports are also protected and can only lose such protection if they are used outside their humanitarian functions for direct hostilities against the enemy.

¹⁴² Goniewicz K., Protection of Medical Personnel in Armed Conflicts- Case Study: Afghanistan, Eur J Trauma Emerg Surg (2013)
https://www.academia.edu/2936697/Protection_of_medical_personnel_in_armed_conflicts_case_study_Afghanistan pg. 109

¹⁴³ Article 33 of the Geneva Convention III

According to Rule 27, religious personnel can only lose their special protection if they act outside their humanitarian activities and commit acts which are harmful to the enemy.

Attacks against religious personnel displaying the distinctive emblems of the Geneva Convention is prohibited in IHL, targeting them is illegal and against international humanitarian law norms.¹⁴⁴

Rule 31 and 32 of the Customary Rules of IHL provides that humanitarian aid assistants should not be attacked and should be protected and respected at all times and objects used for humanitarian assistance such as vehicles, buildings, aircrafts should also be respected and protected at all times. Humanitarian aides and assistance should be impartial and non-discriminatory and should be distributed proportionally to meet the needs of the entire population. As per article 10 Geneva Convention IV there is no obstacle to humanitarian assistance from the International Committee of the Red Cross or any other impartial organization which is out to protect the relief of the population subject to the consent of the parties as per article 70(1) of AP I of 1977 no valid reason can be used as justification to deny humanitarian relief if the denial would lead to the starvation and untold hardship of the population and this constitute a war crime therefore both parties to the conflict both international and non-international are obliged to allow access to humanitarian assistance from an impartial organization for the good of the civilian population. Peace keeping cops and their objects are also protected in IHL, but in recent times they have experienced a lot of attacks directed towards them which led to the loss of many lives and left many wounded. Journalists have been attacked several times during conflicts; they also enjoy special protection in IHL as long as they do not take any active part in the hostilities, article 13 of Additional Protocol II and common article 3 provides the protection and respect of journalists performing professional duties in armed conflicts. According to article 79 of AP I journalist who embark in dangerous professional missions in areas of armed conflicts are considered as civilians within Article 50 whether they are on an individual mission or are war correspondents accompanying the military thereby making attacks on journalists prohibited under IHL. However, only war correspondents are given prisoner of war status. Individuals who receive special protection in IHL can also lose this protection if they engage in activities which are beyond the scope of their activities, medical

¹⁴⁴ Article 33 of the Geneva Convention III,

personnel, journalists, religious personnel, humanitarian aides etc. are some of the categories of persons who are given special protection in IHL but they turn to lose this protection once they take active part in hostilities or engage in acts which may harm the enemy. Many medical personnel and journalists have been directly attacked during armed conflicts by the parties to the hostilities, journalists in particular perform very dangerous tasks by reporting in war zones, most times they are attacked because they expose the actual situations and atrocities that are conducted by one or all parties in the conflict and this might anger the party or parties which will try to stop the journalists or media personnel from performing his or her duties smoothly either by censorship, arbitrary detention, harassment, censorship and sometimes they are even murdered, medical personnel on the other hand are sometimes attacked because they are attending or giving medical care to an opponent, this is not illegal as it is the duty of the medical personnel to care for all the wounded in an armed conflict regardless of the site they belong to. Journalists have become targets due to the complex role they play in armed conflicts; during wartime, the media is not only an observer but also a source of intelligence. However, journalists remain illegitimate targets and deliberately targeting journalists' amounts to a violation of IHL norms.¹⁴⁵ Even though attacks on journalists and medical personnel are strictly prohibited by international humanitarian law but it is rather unfortunate that a good number of these persons are still being attacked in armed conflicts by belligerents as a war tactic or as a form of revenge. It is prohibited to conduct hostilities on the basis that there shall be no survival. If the one of the parties to the conflict surrenders, they automatically become Hors de combat and it is prohibited to target and kill them in this situation, if there is no means to evacuate them or they should be captured if evacuation is impossible.

Given the fact that international humanitarian law places a lot of emphasis on the protection of the civilian population, it is very unlikely that the defense of military necessity can ever be given preference over the need to protect the civilian population from superfluous injuries and harm during armed conflicts. If the protected persons as well as adverse parties are killed using any of these prohibited methods of warfare it is illegal and may be considered as a war crime which is punishable under international criminal law.¹⁴⁶ Article 52(2) of AP I does not outline the various

¹⁴⁵ Lisosky, J. M., and Henrichsen, J. Don't shoot the messenger: prospects for protecting journalists in conflict situations. *Media, War & Conflict* 2009, <http://www.jstor.org/stable/26000135> pg. 131

¹⁴⁶ Article 8 of Rome Statute of International Criminal Court

military objects; it only mentions “nature, purpose or use”. Nevertheless, it can be said that objects that are actively used in conducting hostilities are military objects, armed forces and combatants; positions or installations occupied by armed forces as well as objectives directly contested in battle; military installations such as barracks, war ministries, munitions or fuel dumps, vehicle storage yards, airfields, rocket launch ramps, and naval bases are all legitimate military targets. Lines and methods of communication, command, and control railway lines, highways, bridges, tunnels, and canals used for conducting hostilities are all legitimate targets. Broadcasting and television stations, as well as critical military telephone and Military-industrial targets include companies that manufacture armaments, transportation, and communications equipment for the military; metallurgical, engineering, and chemical industries whose nature or purpose is primarily military; and storage and transportation facilities that serve such businesses. Experimentation research institutes for the development of weapons and combat equipment are legitimate military research objectives. Installations that provide energy primarily for national defense, such as coal and other fuels are legitimate energy targets, as are plants that produce gas or electricity primarily for military usage. Nuclear power plants and hydropower dams are often, but not always, forbidden under international law¹⁴⁷, telegraph exchanges, are legitimate communications targets.

¹⁴⁷ Rule 3 of ICRC Customary IHL Rules

CHAPTER 3

3. TARGETED KILLINGS IN THE WAR AGAINST TERRORISM

The term targeted killing refers to a method of warfare in which individuals are identified and confirmed as High Value Targets, followed by a separate and individual targeting process that ultimately leads to the execution of a military operation aimed at killing these individuals.¹⁴⁸ It is also referred to as military operations that use lethal force to kill individuals who are not in the physical custody of those who are targeting them.¹⁴⁹

The League of Nations adopted the Convention for the Prevention and Punishment of Terrorism in 1937, following the assassination of King Alexander of Yugoslavia by a Croatian nationalist. The definition was narrow and limited to criminal acts directed against a state and intended or calculated to instill fear in the minds of specific individuals, groups of individuals, or the general public.¹⁵⁰ While it is clear that the members of the League's main concern was the protection of public figures and property, the wording appears to be broad enough to cover most of the acts that are now considered terrorist.¹⁵¹ As attempts to reach a comprehensive terrorism convention stalled at various stages, the search for a generic definition was replaced by the development of a framework of conventions identifying specific forms of terrorism. At least twelve of these

¹⁴⁸ Bachmann S-D., Targeted Killing as a Method of Warfare - Challenges and Opportunities, *Journal of Conflict & Security Law*, Oxford University Press 201355 doi:10.1093/jcsl/krt007. Pg. 5

¹⁴⁹ Melzer N, Targeted Killings in Operational Law Perspective, in *The Handbook of the International Law of Military Operations*, eds. Gill and Fleck (Oxford University Press, 2010), pp. 277

¹⁵⁰ Carey, J, Dunlap, W, & Pritchard (eds) 2006, *International Humanitarian Law: Prospects : Origins, Challenges, Prospects*, Volume International Humanitarian Law - Prospects, BRILL, Leiden. PG. 2

¹⁵¹ Ibid

conventions exist. These conventions do not seek to define terrorism, but rather to address its consequences, specific behavior that may fall within the scope of what is commonly referred to as terrorist activity was defined, and a framework of obligations was established on states parties, including measures to prevent such crimes and cooperate in the prosecution of those who commit them.¹⁵² Some international tribunals as well as most national courts have in fact established a crime of terrorism. In addition, various international Conventions and UN Security Council (UNSC) Resolutions support such a finding as various treaties have emerged condemning terrorism. In fact, the Security Council declared terrorism as a threat to international peace and security in Resolution 1368 (2001)¹⁵³ effectively allowing for actions to be taken under chapter VII of the UN Charter. Hence, by trying to combat terrorism, the international community has by default included terrorism in its international legal personality. As such, one could argue that terrorism as a concept has now become customary international law. Nevertheless, defining terrorism and identifying a terrorist are perhaps the most complex and highly charged issues of modern times.¹⁵⁴

With the development of several weapons and contemporary wars that did not exist at the time of the drafting of the Geneva Conventions and their Additional Protocols, several war tactics have been developed by belligerents and armed groups against the state and vice versa. As the world becomes more urbanized and developed most wars are fought in densely populated cities, resulting in numerous disproportionate attacks on civilians and their objects. When weapons such as bombs, missiles, artillery, mortars, and multi-barrel rocket-launchers are used in densely populated areas, the victims are usually civilians, leaving long-term mental and physical damage.¹⁵⁵ Signature strikes, long-range hot pursuit, decapitation strategies, selective targeting, surgical eliminations, targeted thwarting, man hunting, active self-defense, pinpoint prevention, and focused disruption are just a few examples of the various names of targeted killings. They entail using deliberate and pinpoint force to pursue and kill individual militants. Nils Melzer proposes five definitional elements of targeted killings in his authoritative work assessing their

¹⁵² Duffy H, *The 'War on Terror' and the Framework of International Law* (Cambridge University Press 2005) pg. 23

¹⁵³ UN Security Council, Threats to international peace and security caused by terrorist acts, 12 September 2001, (4370th plenary meeting) S/RES/1368

¹⁵⁴ Motto J., International Terrorism: What are the Current Challenges in Bringing Terrorist to Justice, Groningen Journal of International Law, vol 4(1): International Criminal Organisations. Pg. 45

¹⁵⁵ International Committee of the Red Cross, Waging war in cities: A deadly choice. 2020

international legality: They involve the use of lethal force that are intended to target specifically identified individuals (rather than a group or using random punishment), they are executed with the deliberate intent to kill the individual in question, are used against individuals who are not in the physical custody of the state (distinguishing it from judicial execution), and are conducted by states and their central governments.¹⁵⁶

Targeted killings have become a cornerstone of US counterterrorism policy and strategy in the years since 9/11. Targeted killings, in theory, represent a cost of planning and participating in terrorism. Targeting killings affect both individual militant behavior and group behavior. Indeed, the literature on the subject suggests that the use of targeted killings in the war against terrorism reduces the capability of a militant group and influences its motivation and behavior. To sum it up, the selective targeting of terrorist leaders and facilitators is both empirical and quantifiable.¹⁵⁷ Despite the increasing prevalence of targeted killings in counterterrorism and counterinsurgency operations, the legality of targeted killings remains unclear. On the surface, international law prohibits their use. The 1973 United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, prohibits attacks on state leaders, representatives, and officials, arguing that such acts create a serious threat to the maintenance of normal international relations. The goal is to ensure that even states at war retain the diplomatic ability to negotiate with one another. In response to Israel's unprecedented campaign of targeted strikes in Gaza and the West Bank against Hamas, UN Secretary General Kofi Annan called Israel's actions an affront to "international law, particularly human rights law, but also general principles of law" in July 2001.¹⁵⁸

Regardless of the moral and legal implications of targeted killings in the war against terrorism, this is still prevalent. Both the US and Israeli governments have resorted to a policy of targeting terrorists in their ongoing wars on terror. In essence, both states authorize their military or intelligence agencies to kill specific suspected terrorists who they believe pose a grave threat to citizens and cannot be neutralized otherwise. In some cases, alleged terrorists have been gunned down from a distance while at home, in their cars, at work, or while performing terrorist attacks. Typically, alleged terrorists have been killed by missiles fired from aircraft, in the United States,

¹⁵⁶ Wilner A.S., *Deterring Rational Fanatics*. Philadelphia: University Press; 2015. Pg 76

¹⁵⁷ Wilner AS. *Deterring Rational Fanatics*. Philadelphia: University of Pennsylvania Press; 2015. Pg. 75

¹⁵⁸ *Ibid* pg. 81

from unmanned Predator aerial vehicles, and in Israel, from Apache Attack helicopters. President Bush refers to this as sudden justice, while the Israeli government refers to it as targeted killing, or, more recently, targeted thwarting, preventive liquidation and interception.¹⁵⁹ The targeting of terrorists have proven to be highly controversial, the US has taken a somewhat inconsistent public stance on terrorist targeting. It has frequently voted against resolutions condemning Israeli practice, and then criticized Israel while secretly engaging in terrorist targeting.¹⁶⁰

3.1. THE APPLICABILITY OF INTERNATIONAL HUMANITARIAN LAW IN THE WAR AGAINST TERRORISM.

Since the beginning of the war on terror after September 11, 2001, international lawyers and policymakers have debated whether the range of international legal instruments available in each field is adequate to meet the challenges of global terrorism. Many authors have made the underlying assumption that this may not be the case, and that the current legal framework may be insufficiently developed or even counterproductive. As a result of the aftermath of the September 11 2001 attack on the US by terrorists, the US has expressed concerns that the Geneva Conventions are out of date. Many of its provisions are perceived to be obsolete, and they are primarily addressed to states, making their application, in the opinion of many commentators, the convention is completely unfit to face the challenges of the "global fight against terrorism; The ensuing contentious and highly political debate necessitates an objective assessment of international humanitarian law's suitability for effectively countering the terrorist threat. Some have proposed that international humanitarian law rules be put on hold for the time being, pending reform or, at the very least, reconsidered in light of the changed international context.¹⁶¹

The United States, in particular, has objected to the application of Geneva Convention rules to individuals apprehended during the armed conflict in Afghanistan and held in Guantanamo Bay, Cuba, or elsewhere ever since..¹⁶² International humanitarian law seeks to regulate the use of armed violence in wartime by first restricting the right to use armed force to combatants, who are members of the armed forces of the conflicting parties. Furthermore, certain groups of people, such as civilians and those who are no longer involved in the conflict must be protected from

¹⁵⁹ Plaw A. Targeting Terrorists: A License to Kill? Pg. 2

¹⁶⁰ *ibid*

¹⁶¹ Naqvi Y. Enforcing International Law Norms Against Terrorism. London: Bloomsbury Publishing Plc; 2005. Pg. 26

¹⁶² *ibid*

attacks and the worst consequences of the conflict. Both of these methods of regulating violence in times of war imply a prohibition on the activities of terrorists, who may or may not be members of the armed forces and whose attacks are, by definition, intended to terrorize civilians. Very few provisions of the Geneva convention make mention on terrorism and mention must be made of Article 51(2) of Additional Protocol I,¹⁶³ which provides that; The civilian population as a whole, as well as individual civilians, shall not be attacked. Acts or threats of violence with the primary aim of spreading terror are strictly prohibited. International humanitarian law establishes a specific, broad obligation to protect civilians from acts of war. It is explicitly stated in this context that terrorist acts, or even the threat of terrorist acts, against civilians are prohibited. It is important to note that the term terrorism is not explicitly used. This is due to the term's somewhat ambiguous nature, which has, as previously stated, prevented the adoption of a comprehensive international legal instrument on the subject. Article 51 hold that, any act or threat directed at spreading terror among civilians is prohibited is to say that the nature and scale of the act or threat are irrelevant to its prohibition. It is important to note that the rule laid down in article 51 does not take into account the nature of that act, the factors which may trigger such acts. Therefore, not only direct attacks against the civilian population is prohibited, also, acts which are aimed at spreading terror regardless of the magnitude of such acts are prohibited in international humanitarian law.¹⁶⁴

The terrorist attacks of September 11, 2001, and subsequent military operations in Afghanistan and elsewhere, have raised some troubling issues about the applicability of international humanitarian law to the war on terror. The fact that the September 11 attacks were conducted by civilians of various nationalities who were members of an internationally affiliated terrorist group with no fixed territorial base, using a civilian object (though turned into a weapon), on civilian targets within a State (although the Pentagon could arguably count as a military objective), does not easily fit into the definition of an act of war because it is not directly attributable to a State, nor does it fulfill the definition of an act of war as per the Geneva conventions, possibly article common article 3.¹⁶⁵ The attack on the US and the US attack on Afghanistan in October 2001 have constantly raised questions on when international

¹⁶³ Ibid pg. 27

¹⁶⁴ Ibid

¹⁶⁵ Ibid pg. 31

humanitarian law became applicable in the war against terrorism. If one recognizes that the United States was the target of an act of aggression in violation of international law and the United Nations Charter on September 11, and that, as a result, the military response by the United States in Afghanistan could be qualified as an act of self-defense, legitimate or not it can be logically argued that this is the date that marked the beginning of the armed conflict.¹⁶⁶ This position has been criticized by some scholars on the basis that, the armed attacks which may trigger the exercise of the right to self-defense under the Charter of the United Nations can only be done by states. It has been asserted that an isolated attack by non-State actors on a State, despite the horrific number of casualties, may not be considered the start of an armed conflict. This argument is countered by the view that September 11th was part of a long-running armed terrorist campaign against western targets, fulfilling the criteria of a protracted armed conflict required (according to the ICTY in the 1995 *Tadic* case) to trigger the application of common Article 3 to the Geneva Conventions.¹⁶⁷ Terrorist acts perpetrated by either party to an NIAC and in connection with the armed conflict are considered a grave violation of the AP II and customary IHL and are thus prosecuted as war crimes. More precisely, Article 4(2) (d) and 13(2) of the AP II state that violent acts intended to spread terror among civilians or individuals are prohibited at any time and in any place. Terrorist acts, as specified in Articles 3(d) and 4(d) of the Statute of the Special Court for Sierra Leone (SCSL), are a serious violation of AP II and Common Article 3 applicable to the NIAC.¹⁶⁸ The Special Court for Sierra Leone upheld this position in the cases of *Brima, Sesay and Taylor*.¹⁶⁹

Terrorism is also defined in international law for the specific context of armed conflict. In international and non-international armed conflict, IHL prohibits "acts or threats of violence with the primary purpose of which is to spread terror among the civilian population. Serious violations of this and other IHL prohibitions may also constitute a war crime for which individuals may be held accountable, as the International Criminal Tribunal for former Yugoslavia recently affirmed this by holding the opinion that the infliction of terrorist acts on

¹⁶⁶ *ibid*

¹⁶⁷ *ibid*

¹⁶⁸ Shun Ming Yau S., *Blurring the Beginning of Non-International Armed Conflicts: The Frustration of Legal Paradigms in Response to Terrorism*. Groningen Journal of International Law 5(2) pg. 248

¹⁶⁹ *Prosecutor v. Brima*(Appeals Chamber Judgment) SCSL-2004-16-A(22 February 2008) para 172; *Prosecutor v. Sesay*(Trial Chamber Judgment) SCSL-04-15-T (2 March 2009) para. 677; *Prosecutor v. Taylor*(Appeals Chamber Judgment) SCSL-2003-01-A(26 April 2012) para 1979

civilians during an armed conflict in prima facie a breach of international treaty law .¹⁷⁰ As a result, terror inflicted on civilians during armed conflict is a special case, providing an exception to the rule that "terrorism" as such is not defined in international treaty law and does not constitute a crime under it. This is so because most terrorism conventions do not cover times of armed conflicts.¹⁷¹ It is tempting to dismiss post 9/11 references to the "war on terror" declared by the US as merely rhetorical devices with no more meaning than the wars on drugs or crime that are frequently invoked in political circles. While it is obvious that there cannot be an armed conflict with an abstract phenomenon, too much misdirection would overlook the seriousness with which governments and at least some commentators advance the view that there is an armed conflict with al-Qaeda and other (unidentified) terrorist networks or organizations.¹⁷² Since 9/11, the war against terrorism has demanded a great deal of international attention and this has resulted in considerable division and uncertainty. Could perhaps al-Qaeda and other networks be deemed as parties to an armed conflict, to be defeated militarily in accordance with IHL, or as criminal organizations requiring effective law enforcement? Since September 11, many policy arguments have been advanced emphasizing the benefits and drawbacks of considering al-Qaeda a party to a conflict, with particular relevance to ongoing discussions about whether IHL should evolve in response to new challenges posed by 9/11 and the response thereto.¹⁷³ It is worthy to state that up until the 9/11 attacks on the US international humanitarian law was only applicable to armed conflicts between states (civil wars), but the law has been slowly moving toward recognizing dissident armed factions and authorities representing liberation movements as quasi-states and it is now possible to argue that a state can engage in an armed conflict with an organization. While this viewpoint may not reflect the current law, it does indicate a possible direction for future legal development.¹⁷⁴ In situations of non-international armed conflicts, there must exist a certain threshold of violence for the it be considered a non-international armed conflict, the 9/11 attacks may well be said to have reached that threshold but the questions that are left looming is, does Al-Qaeda meet the requirement of the various characteristics which will qualify them as an armed group as per the Geneva Conventions/ International Humanitarian Law? Do they possess sufficient organization, identifiable scope and member that they can abide

¹⁷⁰ Prosecutor v. Gali'c, Case No. IT-98-29-T, Judgment, 5 December 2003

¹⁷¹ Ibid note 82

¹⁷² Ibid pg. 250

¹⁷³ Ibid

¹⁷⁴ Ibid

by the principles of international humanitarian law? even though this terrorist organization may meet some of these characteristics some commentators are still of the opinion that, these organizations lack the characteristics of armed groups and that international humanitarian law is not the most appropriate legal framework to govern the relationship between persons associated with al-Qaeda and those states executing the war on terror.¹⁷⁵ Article 3 of the four Geneva Conventions, while not expressly prohibiting acts of terrorism, could be interpreted to include them. General principles such as the principle of humane treatment, as well as more specific prohibitions such as the prohibition on cruel treatment, could be applied to terrorist acts. Additional Protocol II to the Geneva Conventions on non-international armed conflicts confirms and expands on these legal standards.

Determining when IHL applies to the war against terrorism is a difficult task. Not only because some states may deny the applicability of IHL on the grounds that non-State armed groups designated as terrorist organizations are not considered parties to an armed conflict. Several circumstances may be classified as international armed conflicts, while others may be classified as non-international armed conflicts, and various acts of violence may fall outside of any armed conflict due to a lack of the necessary nexus. Another critical question concerning IHL applicability is whether terrorist non-state armed groups meet the organization criterion for classifying a situation as a non-international armed conflict.¹⁷⁶

The subject of terrorist targeting and its applicability in international humanitarian law was raised during the 2011 killing of Osama Bin Laden in Pakistan, questions were raised whether the US allowed to plan and carry out a shoot-to-kill operation, or were its troops required to try to capture Bin Laden and give him a chance to surrender before resorting to lethal force?. Immediately following the incident, there was a significant debate about the applicable law and whether the operation met the required standards.¹⁷⁷ The traditional test for a non-international armed conflict, and thus for applying IHL to current operations against non-state actors, is for the violence to reach a certain level of intensity. Adil Haque argued against that intensity threshold in September. He claimed that the organization and capacity of an armed group to sustain

¹⁷⁵ *ibid*

¹⁷⁶ Terrorism, counter-terrorism and international humanitarian law; International Committee of The Red Cross 2016, <https://www.icrc.org/en/document/terrorism-counter-terrorism-and-international-humanitarian-law>

¹⁷⁷ Hakami M., Taking Stock of the Law on Targeting, Part I. (European Journal of International Law). 2016 <https://www.ejiltalk.org/taking-stock-of-the-law-on-targeting-part-i/>

military operations should be enough to trigger IHL. His proposal would have the practical effect of applying International Humanitarian Law to early strikes that occur before any intensity threshold is met. Because such strikes could be governed by IHRL as well, Haque's proposal sparked the most recent round of the International Humanitarian Law versus International Human Rights Law debate.¹⁷⁸ According to Jonathan Horowitz, Haque's proposal is "dangerous" because it "clears the way for States to rely more frequently on IHL's targeting and detention rules." Horowitz was concerned that these rules were more permissive, or at least more easily manipulated, than the IHRL rules. Similar concerns were expressed by Deborah Pearlstein. According to her, it is not possible to reconcile the basic human rights law prohibition on killing with the basic international humanitarian law] acceptance of the power to kill as a last resort. In this case, Horowitz and Pearlstein oppose the application of international humanitarian law in the war against terrorism because they believe it would allow for more deprivations of life and liberty.¹⁷⁹

The Geneva Conventions and customary international law rules were fully applicable to the international armed conflict involving the US-led coalition on one side and Afghanistan on the other in 2001. However, much of the terrorist violence that occurs in other parts of the world is perpetrated by loosely organized groups (networks) or individuals who, at best, share a common ideology. It is debatable whether these organizations and networks can be considered parties to any type of armed conflict. Terrorism is a phenomenon. War cannot be waged against a phenomenon, but only against an identifiable party to an armed conflict, both practically and legally. For these reasons, it would be more appropriate to refer to the war against terrorism as a multifaceted fight rather than a 'war against terrorism'.¹⁸⁰ Persons detained in connection with a non-international armed conflict fought in the fight against terrorism are protected by common Article 3, Additional Protocol II, and the relevant rules of customary IHL. They are subject to the rules of both human rights law and domestic law. If they are tried for crimes they may have committed, they are entitled to the fair trial guarantees of IHL and human rights law. All persons detained outside of an armed conflict in the fight against terrorism are protected by the detaining State's domestic law as well as human rights law. If they are tried for crimes they may have

¹⁷⁸ *ibid*

¹⁷⁹ *ibid*

¹⁸⁰ What does humanitarian law say about terrorism? ; International Committee of the Red Cross 2017. <https://blogs.icrc.org/ilot/2017/08/14/humanitarian-law-say-terrorism/>

committed, they are protected by the fair trial guarantees of these bodies of law.¹⁸¹ Recognizing the applicability of IHL in the fight against terrorism will not grant captured terrorists undesirable legitimacy or full range of POW privileges. At the same time, depriving the terrorist group of the privileges of unlawful combatancy and POW status does not allow the target state to treat captives inhumanely. It simply means that they are not entitled to the full range of rights and privileges afforded to soldiers in armed conflicts by states. They should still be afforded the more fundamental protections afforded by IHL under common article 3.¹⁸²

3.2. Military Targets in the War against Terrorism

As asymmetry grows, the disadvantaged party has an incentive to blur the distinction between its forces and civilian population in the hope that this will deter the other side from attacking.

When hostile individuals (members of armed groups or civilians directly participating in hostilities, for example) do not wear uniforms or openly carry their weapons, distinguishing between legitimate targets and innocent civilians becomes extremely difficult and dangerous for both the soldier and the innocent civilian. Every day, insurgents take advantage of this quandary to gain an advantage over state forces' superior military capabilities and resources.¹⁸³ Even though the core principle in the law of war purports that only military objectives are targetable, it becomes complex to apply these principles (distinction, proportionality and precaution) in the war on terror because of how these terrorists operate. Numerous components of the definition of military objective, as well as aspects of object identification based on that definition, play out differently in conflicts with non-state actors than in traditional international armed conflict.¹⁸⁴ Military objectives varies when a conflict is between states than when it is between non-state actors like the case in the war against terror, a state may destroy military objectives regardless of the fact that at the time of the targeting the object was not actively in use, this was the case when the NATO bombed the Serbian Radio and TV Station (RTS) during Operation Allied Force in 1999, the broadcasting station was a legitimate military target as part of a larger attack aimed at disrupting the FRY Command, Control, and Communications network, the nerve center and

¹⁸¹ *ibid*

¹⁸² Neuman L. G., Humanitarian Law and Counterterrorist Force, *European Journal On International Law* 2003, pg. 295

¹⁸³ Blank L. R., Extending Positive Identification from persons to places: Terrorism, Armed Conflicts and the identification of Military Objectives. *Utah Law Review* Volume 5 2013 pg. 1237

¹⁸⁴ *Ibid* pg. 1245

apparatus that keeps Milosevi in power. Similarly, in July 2011, NATO forces enforcing a United Nations Security Council Resolution authorizing the use of force to protect civilians in Libya bombed Tripoli's state television satellite transmitters because they were an integral component of the regime apparatus designed to systematically oppress and threaten civilians.¹⁸⁵ These broadcast stations served as military objectives regardless of whether the State was actually using them as communications networks at the time of the attack because they were part of the communications network used by the State in advance of its military effort (though in both cases, the State was using them directly to further its own objectives) but the case is different in situations where the broadcast station may be used by terrorists, the broadcast station could certainly be a lawful military objective, but it would most likely only meet that definition as a result of the group's use of the station and would cease to be a military object at the time they stop using it. When a non-state armed group controls or administers territory, the conclusion about where a broadcast station or other communications network equipment fits into the definition of military objective may be completely different. The differences between these classifications of the same type of object highlight how the various components of the definition of military objectives can differ in conflicts with non-state actors. As a result, in conflicts with non-state actors, the concept of "nature" as an operational definitions component of military objective must be interpreted in different ways. It will also differ according to the type of conflict with non-state actors. However, it is important to note that this vastly differing definition of nature of military object does not necessarily imply that fewer objects will constitute lawful military objectives in such conflicts. Rather, the operational implications will be minor in most cases because the majority of these "nature" objects will also fall into the "use" or "purpose" categories.¹⁸⁶

3.2.1. Distinction in the War against Terrorism

The standard method for assessing who may or may not be killed in a war is to distinguish between combatants (i.e., uniformed soldiers as well as irregular belligerents) on one side and innocent, unarmed civilians on the other. Evidently, the distinction between combatant and noncombatant, which grants immunity to the latter, cannot be used to support arguments against

¹⁸⁵ Ibid pg. 1249

¹⁸⁶ Ibid note 154

assassinating terrorist leaders. Terrorists, by definition, are not civilians. They may regard themselves as freedom fighters or guerrilla warriors, but they never claim to be combat-free on the contrary, terrorist leaders and the groups they represent are always proud to publicly assume responsibility for the atrocities they plan and carry out.¹⁸⁷

Terrorism puts the principles of distinction and protection in jeopardy. This is because terrorists not only lack precision and caution in their tactics to protect civilians, but their very purpose is to attack civilians and inflict as much damage, suffering, and fear as possible. Terrorists who attack civilians in the context of an actual armed conflict are unlawfully participating in hostilities if they have a connection to the armed conflict, and terrorism is a war crime. While nothing justifies terrorist attacks on civilians, states frequently overreact and show a less-than-exemplary regard for the principles of distinction and protection of the innocent civilian population. However, states are increasingly asserting that, when confronted with an unconventional and ruthless enemy, such as terrorists, new methods of policing and combat, as well as an unconventional military response, may be required.¹⁸⁸

The type of non-state armed group involved in the conflict such as domestic rebel group, transnational terrorist organization, and cross-border insurgency does not always have an impact on the military objective analysis. Nevertheless, in the case of terrorist entities, different interpretations of the group's objectives can play a significant role. For instance, the nature of Hamas as a terrorist organization governing a non-state entity and engaging in terrorism and insurgent warfare raises difficult questions about the specifics of military objectives. The viewpoint of how and whether such entities have nonmilitary or non-terrorist activities and infrastructure is directly related to the assessment of which objects constitute military objectives in the event of military confrontation. This issue was significant in the legal analysis of Israeli targeting decisions during Operation Cast Lead, the conflict between Israel and Hamas and other Palestinian groups from December 2008 to January 2009 where the Israeli Defense Forces

¹⁸⁷ Meisels, T. "Targeting terror." *Social Theory and Practice* Vol.30, no.3, Gale Academic OneFile 2004

¹⁸⁸ SILLIMAN LAW JOURNAL VOLUME 7 DECEMBER 2014,
https://node1.123dok.com/dt01pdf/123dok_us/004/134/4134039.pdf.pdf?X-Amz-Content-Sha256=UNSIGNED-PAYLOAD&X-Amz-Algorithm=AWS4-HMAC-SHA256&X-Amz-Credential=7PKKQ3DUV8RG19BL%2F20220420%2F%2Fs3%2Faws4_request&X-Amz-Date=20220420T143311Z&X-Amz-SignedHeaders=host&X-Amz-Expires=600&X-Amz-Signature=0e942da6a9ec743e187ca6efb430e4fe5184a5fde8a2704671dc33b55e6e630a_

attacked a vast swath of government buildings and civilian political infrastructure in Gaza, including civilian ministries, the al-Saraya prison, and the Council building. This therefore implied that Hamas terrorist activities turned all Hamas infrastructure into military objectives and Hamas members are to be considered as enemy forces and can be legitimately targeted.¹⁸⁹ The laws regulating lethal targeting are just as complicated. Soldiers may kill other soldiers without repercussions in international armed conflicts, but the intentional murder of non-combatants is prohibited. Correspondingly, in non-international armed conflicts, killing civilians and those hors de combat (outside the fight) as a result of injury, surrender, or detention constitutes illegal war crimes. However, uncertainties may arise in cases when civilians become belligerent, employing guerilla or terrorist tactics to conceal their identity. They lose their immunity to attack in such cases, but only for as long as they directly participate in hostilities. Also, the definition of direct participation in hostilities is still debated.¹⁹⁰ Due the fact that the Afghan war began as an international armed conflict between the US and Afghanistan, lawyers argued that captured Al-Qaeda and Taliban forces did not qualify for prisoner of war status. Instead, they were labeled as unlawful enemy combatants which meant they could be detained and targeted like soldiers but lacked the rights that lawful combatants had. Though this is not an entirely irrational analysis given their non-compliance with Geneva criteria for privileged combatancy, the administration went on to claim that no other rules, including the minimalist humanitarian criteria of Common Article 3 of the Geneva Conventions, applied to these detainees.¹⁹¹

3.2.2. The Legality of Targeted killings in the war against Terrorism

Since 2001, Israeli and US terrorist targeting policies have sparked a heated debate among experts about the legality of the practice. Also on the legal aspects, Robert Turner, Associate Director of the University of Virginia's Center for National Security Law, believes that using deadly force against terrorists does not violate international law or US Executive Orders. Purdue Professor Louis R. Beres has argued that targeting elusive terrorist leaders is not only legal, but

¹⁸⁹ Ibid note 155 pg. 1250

¹⁹⁰ Sanders R, "Human Rights Abuses at the Limits of the Law: Legal Instabilities and Vulnerabilities in the 'Global War on Terror'" (2018) 44 Review of International Studies 2 pg. 14

¹⁹¹ Ibid

may be considered as enforcing international law norms.¹⁹² However, the former President of the International Criminal Tribunal for the former Yugoslavia Antonio Cassese in submitting an expert opinion on the case of *The Public Committee against Torture in Israel et al v. The Government of Israel et al*¹⁹³, he argued that holding terrorist targeting to be lawful would be a blatant departure from the fundamental principles of international humanitarian law and indeed would entail undermining of the very foundation of that body of law. According to Cassese, targeting is not only clearly illegal, but it may constitute a war crime.

In the aforementioned case, during the armed conflict between the State of Israel and terrorist organizations operating in the territories of Judaea, Samaria, and the Gaza Strip, the Israeli government decided to take up a policy of targeted killings against terrorists by conducting air strikes with the aim of targeting terrorists who are launching attacks against Israeli military and civilians or who are committing acts of terrorism in Israel and the above mentioned territories, these strikes also killed some civilians and the question which was raised was whether the actions of the Israeli government was legal. The petitioners in this case asked the court to declare that the respondents policy was illegal under international law and to order them to stop using it. The Supreme Court sitting as the High Court of Justice before President Emeritus A. Barak, President D. Beinisch and Vice-President E. Rivlin held that, International customary law distinguishes between combatants and civilians and there is insufficient evidence to conclude that a third category of unlawful combatants has been recognized by customary international law at this time. Terrorists must be classified as civilians because they do not meet the requirements of the definition of combatants in international law, namely that they do not observe the laws and customs of war. Civilians may not be targeted by armed forces in principle, as per article 51 of the First Additional Protocol to the Geneva Conventions of 1977. However, according to Article 51(3) of the First Protocol, civilians shall enjoy the protection afforded by this section, unless and until they take a direct part in hostilities, thus, terrorists may be targeted by armed forces if they directly participate in hostilities. The targeting of terrorists by armed forces must meet the requirements of art. 51(3); the terrorists must take a direct part in hostilities, and the targeting of terrorists may take place for as long as they do so. The proportionality principle should also be

¹⁹² Ibid note 88 pg. 121

¹⁹³The Public Committee against Torture in Israel et al v. The Government of Israel et al HCJ 69/02J of December 11 2005

followed when launching attacks these attacks. As a result, it is not possible to say that targeted killings are prohibited by customary international law in every case, just as they are not permitted by customary international law in every case. Each case should be investigated prospectively by military authorities and retrospectively by an independent investigation, with the findings based on the merits of the particular case and these findings will be scrutinized by the court. The petition was rejected by the Supreme Court.

In many countries around the world, the doctrine of targeting is considered prima facie as murder.¹⁹⁴ This could be seen under the botched Mossad mission in the 90's that took place in Norway in the city of Lillehammer where a Mossad team looking for the terrorists responsible for the Munich Olympics massacre fatally shoots Moroccan waiter Ahmed Bouchiki as he walks home from a movie with his wife. The Lillehammer Affair is named after the botched assassination. Incorrect information led Israel to believe that Bouchiki was Ali Hassan Salameh, a high ranking Palestine Liberation Organization official suspected of orchestrating the Black September attack on the Israeli delegation at the 1972 Summer Olympics which led to the death of at least eleven Israelis. In response, Israel hunted down and killed Black September leaders throughout Europe and the Middle East. Six of these agents were captured by the Norwegian authorities and out of the captured six, four were found guilty of premeditated murder and were sentenced to five and a half years in prison. The Mossad however, found Ali Hassan Salameh in Beirut on the 22nd of January 1979 and killed him with a remote controlled bomb killing at least 8 other civilians and 16 seriously wounded in an operation dubbed Operation Wrath of God. The Norwegian court in this case noted the relatively light sentences by pointing out that those who bore the most responsibility for the murder those who planned and authorized it and thus should have received the harshest sentences had escaped (9 others including the leaders of the Mossad had managed to escape after the assassination). This therefore goes further to corroborate the point that the principle of targeting is considered as murder in some if not all countries of the world.¹⁹⁵

The Norwegian tribunal's perspective here seems to be popular with the majority of European countries today. EU representatives, for example, have been among the most strident in their

¹⁹⁴ ibid

¹⁹⁵ <https://israeled.org/mossad-kills-wrong-man-in-norway/>

denunciation of the extrajudicial, and thus illegal, nature of terrorist targeting. Swedish Foreign Affairs minister Anna Lindh, for example, was one of the most outspoken critics of the US targeting of Qaed Salim Sinan Al-Harethi in November 2002. Abu Ali al-Harithi was a Yemeni Al-Qaeda operative suspected of involvement in the October 2000 USS Cole bombing and the October Limburg attack. On November 3, 2002, he was killed by the CIA during a covert targeted killing mission in Yemen. The CIA used a Predator drone to launch the Hellfire missile that killed Al-Harithi and five other Al-Qaeda operatives while they were riding in a vehicle east of Yemen's capital, Sanaa. Al-Harithi was also traveling with US citizen Kamal Derwish, and Derwish's death was the first known case of the US government killing a US citizen during the war against terrorism. The United States claims to be engaged in an armed conflict with al-Qaeda and affiliated forces, triggering International Humanitarian Law rules. This armed conflict is not geographically limited: al-Qaeda members can be targeted wherever they live, whether in hot zones of armed conflict or in non-hostile territories. The rationale for this stance is self-evident. To limit the geographical scope of a conflict means that suspected terrorists can find safe havens outside of a combat zone where they can plan and carry out terrorist acts.¹⁹⁶

Despite the increasing prevalence of targeted killings in counterterrorism and counter insurgency operations, the legality of targeted killings remains uncertain. On the surface, they are illegal under international law. Attacks on state leaders, representatives, and officials are prohibited under the 1973 United Nations Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, arguing that such acts create a serious threat to the maintenance of normal international relations.¹⁹⁷ The goal is to ensure that even states at war can negotiate with one another diplomatically. In response to Israel's unprecedented campaign of targeted strikes in Gaza and the West Bank in July 2001, UN Secretary-General Kofi Annan called Israel's actions an affront to international law, particularly human rights law, but also general principles of law. Even after 9/11, a UN report issued in the aftermath of a 2002 US Predator drone strike in Yemen that killed Abu Ali al-Harithi—al Qaeda's mastermind behind the 2000 USS Cole bombing and the 2002 suicide attack on the Limburg, a French oil tanker referred to the American strike truly disturbing, calling it a clear

¹⁹⁶ Ramsden M., *Assessing US Targeted Killings Under An International Human Rights Law Framework*. Groningen Journal of International Law 2018 pg. 22

¹⁹⁷ *ibid*

case of extrajudicial killing and an alarming precedent. It is not, however, prohibited to send a detachment or individual members of the armed forces to kill a combatant in a surprise attack. It is in this definition that the threat of legally eliminating individuals, even though a covert and surprise attack becomes clear.¹⁹⁸ In Canada, the legal debate over targeted killings revolves around the peace-war axis, though a clear and careful distinction is made between assassinations of noncombatants and targeting of combatants. Assassination is prohibited as per to the Canadian Law of Armed Conflict at the Operational and Tactical Level.¹⁹⁹

The Law of Armed Conflict touches on the international debate over the legal classification of terrorists. If they are considered enemy combatants actively engaged in the preparation for conflict and war against specific states, then targeting and killing them selectively is permissible under traditional notions of warfare.²⁰⁰ Terrorists are combatants, and in the current state of affairs, where terrorist organizations have the intent and capability to carry out mass-casualty attacks, governments must take measures, including targeted killings, deemed necessary to protect national interests and the safety and well-being of their citizens. In defending its pre-September 11 policy of targeted killings, Israel weighed in on the gray area between peace and war. Colonel Daniel Reisner, head of the Israeli Army's legal division's international law branch, stated that international law only recognizes two situations: peace or war. But life isn't that easy. To be more specific, Israel was not at war with Palestinian terrorist organizations, and the Palestinians lacked both a state apparatus and a functioning military. Nonetheless, Israel was unquestionably engaged in an armed and lethal conflict and, as a result, was legally permitted to target and kill enemy combatants.²⁰¹ In the United States of America, assassination is not illegal; there is no legislation in the US that expressly bans assassination even though the government of the US has publicly renounced it. It was in this light that, in 1976, Gerald Ford issued Executive Order 11905 which contained a "Prohibition of Assassination," and it stated that no employee of the United States Government shall engage in, or conspire to engage in, political assassination. Presidents Jimmy Carter and Ronald Reagan of the United States followed suit with their own initiatives. Nonetheless, one of the most significant advantages of executive orders is their ability to be repealed. Furthermore, as result of the fact that assassination was never formally defined,

¹⁹⁸ Wilner, Alex S.. *Deterring Rational Fanatics*, University of Pennsylvania Press, 2015. Pg. 81

¹⁹⁹ Article 7 of Canadian Charter on Rights and Freedoms 1982

²⁰⁰ *Ibid* pg. 82

²⁰¹ *Ibid* pg. 83

giving decision makers more leeway than one might expect when considering the elimination of an adversary's leadership in times of war and peace. For example, Reagan interpreted the assassination ban to exempt death "incidental to a military action. Thus, Reagan's April 1986 strike on Colonel Muammar Qaddafi's compound (and personal tent) in retaliation for Libya's involvement in the terrorist bombing of Berlin's La Belle discotheque was not an attempt to target and kill the Libyan ruler. But Reagan was not shy about his intentions, saying that he did not believe any of ~~us~~" would have shed any tears if Qaddafi had been killed.²⁰²

Terrorist targeting critics, on the other hand, raise a number of objections to such attempts to justify targeting by citing humanitarian law. To begin, critics of terrorist targeting frequently question whether there is a war against terrorism and thus whether humanitarian law properly applies to such operations. As a result, counter-terrorist policies and actions should be subject to the normal legal constraints of peacetime. States should pursue terrorists through criminal law enforcement, as the United States did successfully with the perpetrators of the World Trade Center bombing in 1993. Furthermore, some of these critics argue the legality of terrorists targeting based on their applicability in international humanitarian law, Philip Alston, the UN Special Rapporteur on Extrajudicial, Summary, or Arbitrary Executions, developed the legal argument. The Rapporteur has argued forcefully that even if the ongoing conflict with international terrorists were classified as an armed conflict, it would still be subject to international human rights law. Terrorist targeting, he claims, violates the right to life and due process of law under that law, as Christopher Patton suggested, it is a form of extrajudicial killing that is prohibited under international human rights law.²⁰³ A further important objection is articulated persuasively by critics such as Yael Stein (Stein 2001a, 2001b: 11; Gross 2003: 351), who argues that it is doubtful whether cases of terrorist targeting, such as those conducted by Israel, properly fall within the jurisdiction of humanitarian law, but that even if they did, they would still be illegal. Terrorist targeting, she claims, is a form of assassination that is prohibited in both peace and war. As a result, whether or not targeting terrorists is properly subject to international humanitarian law, it is a criminal act.²⁰⁴ A targeted killing operation's legality will also be determined by whether it was necessary. This criterion entails two major inquiries. First,

²⁰² Ibid pg. 84

²⁰³ Plaw A., Targeting Terrorists: A License to Kill? Pg. 124

²⁰⁴ Ibid pg. 125

it was determined whether there were any non-lethal alternatives to containing the threat. Second, whether or not the threat was imminent. Each will be addressed one at a time. In weighing the alternatives to non-lethal force, human rights law states that lethal force may only be used as a "last resort" if no other means of preventing a threat to life exist. In response to Israel's practice of targeted killings, the Human Rights Committee stated that before resorting to the use of lethal force, all measures to arrest a person suspected of being in the process of committing terrorist acts must be exhausted.²⁰⁵ In the case of *McCann and others v. UK*, in this case, the court found that the UK had violated Article 2 of the European Convention of Human Rights, the court observed that the state had other means at its disposal which included arresting the terrorist suspect before arriving at the location targeted for the terrorist attack, and that its failure to assert authority at an earlier stage of the operation negated the legality of its later killing of the terrorist suspect.²⁰⁶

In his 1992 seminal study of law relating to state-sponsored assassination, Michael Schmitt, Director of the Advanced Program in Security Studies at the George C. Marshall European Center for Security Studies, notes that the only international treaty that specifically addresses assassination in times of peace is the Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons (Schmitt 1992: 618; Beres 1995). However, the Convention only forbids political assassination. It specifically addresses the assassination of internationally protected persons (officials of states and intergovernmental organizations). Terrorist targeting, on the other hand, is generally not directed against internationally protected persons, and thus is not "political assassination" as defined in the Convention. According to the Convention, terrorist targeting cannot be used legally against the public officials. He then justifiably concludes that, while some forms of deliberate state-directed killing are prohibited under international law (both in peacetime and during wartime), others are permissible. His example of permissible killing is, predictably, legally conducted military operations aimed at combating terrorism, according to him, whether terrorism amounts to armed conflict is debatable. If it does, states will be able to engage terrorists directly and individually. Even if it does not, states have a generally recognized right to self-defense under international law, as

²⁰⁵ Ramsden M., *Assessing US Targeted Killings Under An International Human Rights Law Framework*. Groningen Journal of International Law 2018 pg. 27

²⁰⁶ *McCann and others v. UK*, Application No. 18984/91, 1995

enshrined in the United Nations Charter. As a result, attacking the targeted individual is legal if he engages in activity that would qualify him as a combatant during an armed conflict.²⁰⁷

While some forms of deliberate state-directed killing are prohibited by international law (both in peace and war), others are permitted. His example of permissible killing is, predictably, legally conducted military operations aimed at counter-terrorism. It is debatable whether terrorism constitutes armed conflict. If it does, states will be able to engage terrorists directly and individually. Even if it does not, states have a generally recognized right to self-defense under international law, as enshrined in the United Nations Charter. As a result, attacking the targeted individual is legal if he engages in activity that would qualify him as a combatant during an armed conflict.²⁰⁸

Targeting supporters are divided on how far the right to self-defense extends in the aftermath of armed attacks by terrorist organizations. Some defenders see the resulting situation as an armed conflict or war between terrorist organizations and the states against which they have launched armed attacks. They argue that states at war with terrorist groups may use terrorist targeting to attack their adversaries on a regular basis, in a manner analogous to the use of conventional military operations against the armed forces of another state. This is the position that both the US and Israeli governments have taken in recent years. Defenders also argue vehemently that where targeting can be justified as lawful (either in self-defense or in the context of armed conflict), and where it is done in accordance with humanitarian law, it does not constitute a violation of human rights.²⁰⁹ It can be confirmed that targeted killings do not embrace a practice which ipso facto violates the general principles of IHL. However, given the different modalities that a targeted killing might use (drone, etc.), an overall theoretical assessment is difficult to operate and closer scrutiny can be necessary depending on the scenario.²¹⁰

²⁰⁷ Ibid 176 pg. 126

²⁰⁸ Plaw A., Targeting Terrorists: A license to Kill? Pg. 140

²⁰⁹ Ibid pg. 162

²¹⁰ Alkatout, J. The Legality of Targeted Killings in View of Direct Participation in Hostilities. (Vol. 22, pp. 9–20). Duncker & Humblot GmbH) 2015, page 205

4. CONCLUSION

The law of armed conflict appears to be torn between two fundamentally contradictory impulses; the need to wage war effectively on the one hand, and the desire to protect people and property from the ravages of such warfare on the other. Armed conflict law seeks to reconcile these impulses in a fundamentally pragmatic manner. IHL requires states and non-State Parties to do everything possible to protect and preserve the life, limb, and property of civilians and others hors de combat, while also allowing conflict parties to commit acts of violence within certain boundaries. Although the laws and usages of war evolved over the years, state practice was far from uniform; in many cases, these were rules, as Grotius puts it, "if not of all nations, certainly of the better sort." With the dawn of new means and methods of warfare and the prevalence of modern types of warfare such as the war on terrorism, it seems the laws, customs and principles of international humanitarian law, human rights law play a great role in regulating the conduct of hostilities and distinguishing between legitimate targets and illegitimate target. Targeting is at the heart of conflicts; legitimate targets in armed conflicts are combatants and the objects they use to carry out military operations. When targeting is performed, it is always necessary to distinguish between legitimate and illegitimate targets. Although targeting is permitted under IHL, parties to a conflict are obligated to carry it out in accordance with the guiding principles of IHL. Attacks launched without all necessary precautions, attacks that are indiscriminate and disproportionate in nature are prohibited; failure to comply with these principles amounts to a violation of international humanitarian law norms as well as a violation of article 8 of the Statute of Rome(war crimes). It is also worth noting that military necessity will never take precedence over civilian safety; therefore, if the attack will cause more harm to civilians than legitimate targets, the attack should be avoided. Combatants have certain privileges in armed conflicts, and when captured, they have POW status. Another set of combatants are the foreign fighters, they also enjoy the POW status and are non-nationals who may travel to participate in a conflict due to his or her political or religious convictions. Mercenaries on the other hand are mostly recruited to engage in combat in other states and they do so for their personal gain. According, to rule 108 they do not have the right to combatant or prisoner of war status.

Once the targeting web falls on child soldiers, the principle of humanity must always prevail except in extreme situations. Furthermore, the mere fact that one is a legitimate target of attack

does not imply that they can be subjected to torture, inhumane and degrading treatment as this all amount to a violation of international criminal law. The stipulation that targeting be used as a last resort in the absence of less harmful means of neutralizing combatants is an efficient point of agreement in targeting. It also adheres closely to one of the key tenets of humanitarian law, the principle of necessity, which states that deadly force can only be used to accomplish a legitimate military objective. Furthermore, the courts have held in several cases that terrorist targeting operations are only legal if they can be performed without posing an undue risk to civilians. Combatants and terrorists are not to be harmed if the expected serious harm caused to nearby innocent civilians disproportional to the military advantage gained by harming the combatants and terrorists.

When it relates to legitimate targets, the war against terrorism takes a complicated stance. Some schools of thought believe that terrorists can only be targeted when they are actively participating in hostilities and that the primary goal of states should be to capture terrorists who are not actively participating in hostilities, whereas countries such as the United States and Israel hold that terrorists remain legitimate targets of attacks even when they are not actively participating in hostilities. Even though IHL is applicable to the war against terrorism to some extent, terrorists do not have POW status, but this does not mean that they can be subjected to inhumane and degrading treatment while in captivity. They are protected by common article 3 and also, they can be considered enemy nationals in the Fourth Geneva Convention. Unlike combatants in armed conflicts, terrorists in the war against terrorism may be tried as per the domestic laws of the country where they conducted terrorist activities.

Nevertheless, due to the multifaceted nature of targeting and identifying legitimate targets as well as the fight to combat terrorism, it can be concluded that domestic courts, international tribunals and courts, international institutions all play an important coordination and support role which have significantly improved the conventional methods of targeting in both IHL and the war against terrorism.

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