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The Principle of Distinction and the Changing Nature of Contemporary Armed Conflict
Master's Thesis

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Introduction

International humanitarian law (IHL) is a set of rules created for humanitarian purposes, intending to protect persons who are no longer taking part in hostilities, to limit the means and methods of fighting as well as the impact of armed conflict.¹ IHL is also referred to as the laws of armed conflict (LOAC) or the laws of war. IHL is a section of international law, which is a body of norms regulating the relationship between states. International law is found in agreements between states such as conventions and customary norms, which includes continuous state practices recognized by all states as legally binding rules and general principles of law. IHL applies to all forms of armed conflict but does not regulate the use of force by states. For IHL to achieve its aims, members of the armed force are obliged to comply with the rules provided for in the principles of humanity, proportionality, precaution, and necessity during armed conflict. The successful application of these principles largely depends on the principle of distinction also known as the principle of discrimination.

The principle of distinction is widely accepted² and generally recognized by states as customary international law.³ The basis of the principle of distinction is to regulate the means and methods of warfare and to protect victims of armed conflict.⁴ The condition to distinguish between civilians and combatants is an essential way by which humanitarian principles are transferred into the rules guiding the conduct of war.⁵ For identification and a means of setting a combatant apart from a civilian, IHL provides that combatants are expected to wear uniforms, bear visible and recognizable signs from a distance as well as carry their arms openly.⁶ However case law has adopted and applied the principle of distinction in a wide range of cases. For instance in the advisory opinion of the nuclear weapon case, the International Court of Justice states that the distinction between civilians and combatants is a

¹ <https://www.icrc.org/en/document/what-international-humanitarian-law>

² Schmitt, Michael N 1999. The Principle of Discrimination in 21st Century Warfare, 2 Yale Human Rights and Development Law Journal 143:p. 148

³ Henckaerts, Jean-Marie and Doswald-Beck, Louise 2005. Customary International Humanitarian Law: Rules: Cambridge University press, Volume I, p. 3.

⁴ https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf

⁵ Kalshoven, Frits and Zegveld, Liesbeth 2001. Constraint in Waging of War: An Introduction to International Humanitarian Law, ICRC, Geneva; p.102

⁶ Sweney, Gabriel 2005. Saving Lives: The Principle of Distinction and the Realities of Modern War. International Lawyer, ABA, 39, pp.733-758.

central principle that involves the fabric of humanitarian law.⁷ Also in the prosecutor V. Matric case, the international criminal tribunal for the former Yugoslavia (ICTY) stated that the civilian population, as well as individuals, are not in any circumstances to be targets of an attack, as a general rule of IHL which applies to all armed conflicts. Similarly in the case of Bla'ski' in the year 2000, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that "the parties to the conflict are obliged to attempt to distinguish between military targets and civilian person".⁸ Also, the ICTY has acknowledged and affirmed the customary law status of article 56 of additional protocol 1 (AP 1)⁹ in a good number of cases for instance in Prosecutor v.Kupreskic,¹⁰ Prosecutor v. Galic¹¹ and Prosecutor v. Dragomir Milosevic¹² affirming the obligation on the parties to a conflict to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. This can be seen in the Events in La Tablada, where Inter American Commission on Human Rights underlined the obligation of the contending parties, based on common article 3 of the 1949 Geneva Conventions and customary principle applicable to all armed conflicts, which obliges all the parties to the conflict to desist from attacks aimed towards civilians and the civilian population as well as to distinguish in their targeting between civilians and combatants and other legitimate military objects.¹³

Furthermore State practice has also supported the existence of the principle of distinction. For instance, the US Air Force Pamphlet states that "to ensure respect and protection for the civilian population and civilian objects, the parties to the conflict must at all-time distinguish between the civilian population and combatants.¹⁴ Section 86 of the UK Military Manual (1958) refers to "the division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population". Also, the Nigerian Military Manual (1994) on page 41 provides that the main aim for all commanders and individual combatants is to distinguish combatants and military objectives from civilian persons and objects at all times.

⁷Internationale Justice, Cour DE 1996.Legality of the threat of use of nuclear weapon advisory opinion.

⁸ Prosecutor v. Blaskic 2000. Judgment Case No. IT-95-14-T ICTY Trial Chamber, para. 148 - 158 276 – 310.

⁹ https://www.icrc.org/en/doc/assets/files/other/icrc_002_0321.pdf

¹⁰ ICTY, 2000. Case No. IT-95-16T, Judgment, 524

¹¹ ICTY, 2003. Case No. IT-98-29-T, Judgment 61.

¹² ICTY, 2007. Case No. IT-98-29/I-T, Judgment 949

¹³ <https://casebook.icrc.org/case-study/inter-american-commission-human-rights-tablada>

¹⁴ Case No. 16 2, ICTY <https://www.icty.org/en/case/kupreskic>

In the Kassem case of 1969, Israel's Military Court at Ramallah recognized the immunity of civilians from direct attack as one of the basic rules of international humanitarian law.¹⁵

The problem with the principle of distinction is that the changing nature of modern armed conflict has created a wide range of dilemmas in distinguishing between civilians and combatants, and in the laws and provisions of the principle of distinction.¹⁶ This can be seen in modern armed conflict, where the proliferation of weapons and radicalization of civilians, has made it possible for civilians to engage in combat even when they are not combatants. What makes it even complex is a big number of these civilians engage in conflict while living among other civilians making distinction all the more difficult. The use of the urban centre, cities, towns as classical battlefields as well as the employment indiscriminate weapons that are incapable of distinguishing between lawful and unlawful targets leaving the civilian population in a vulnerable state which exposes them to participate in the conflict either for self-defence, financial or other reasons. At the centre of these problems in modern armed conflict is the principle of distinction between civilians and combatants.

The aim of this thesis is; to find out if the principle of distinction should be reform to suit the pattern of the contemporary armed conflict.

The research question is; how has the changing nature of armed conflict obstructed conflicting parties from implementing the principle of distinction in contemporary warfare? Is the nature of these problems practical or legal?

The research objective is; to determine whether conflicting parties ignore, misinterpret, or misapply the provision of the principle of distinction during armed conflict.

The object of the thesis is; the implementation of the principle of distinction in modern armed conflict. The necessary information is provided in the thesis which analyses how the changing nature of modern arm conflict obstructs the application of the principle of distinction. The hypothesis of this thesis is; since the changing nature of the armed conflict makes it difficult to distinguish between civilians and combatants, is it possible to say that distinction is unachievable in modern armed conflict.

¹⁵ GCIII, Article 4A (2)

¹⁶ Kinsella, Helen M. (2011) *the Image before the Weapon: A Critical History of the Distinction between Combatant and Civilian*, Cornell University Press.

This thesis will use a descriptive and analytical research method. The descriptive research method will be used to identify the various problems faced by the principle of distinction and to determine if the problems are more practical or legal. However the analytical research method will be used to establish why the principle of distinction is like that and how it came about.

The principle of distinction is a much-discussed topic both on global and international platforms. This thesis will add to the ongoing debate on the validity of the principle of distinction and demonstrate that the principle is not a bad law that needs to be discarded but rather it needs to be reform to align with the present trends of armed conflict.

This thesis will use both primary and secondary sources, the main primary source will be the Geneva Conventions of 1949 and its Additional Protocol I and II, the Rome statute of the international criminal court adopted in 2002 and the Hague Convention of 1899 and 1907, Military manuals of different states, court judgments, other humanitarian law treaties and material from the international committee of the Red Cross. The secondary sources used through this thesis will be books, articles, journals, websites, and newspapers that are related to the principle of distinction in modern armed conflict and other topics related to this thesis.

The thesis is limited to the problems faced by the principle of distinction in contemporary armed conflict. This thesis will not talk about terrorism although at some point terrorism violates the principle of distinction. Also, the thesis will not discuss other humanitarian law principles. A good number of newspapers article will be used to support the thesis and to show that the problem is real and requires timely solutions.

The thesis is divided into three chapters. The first chapter will discuss the legal and theoretical development of the principle, the distinction between persons and objects centre to the principle as well as the loss of protection. The second chapter will examine the past and present practices of the principle with the use of examples. It will also analyse both situations. The third chapter will focus on the various problems faced by the principle of distinction and will analyse if this problem is more or less practical or legal problems. This chapter will also argue that the dynamic nature of modern armed conflict has course the principle of distinction

to be outdated and the principle needs to be reform. Again this chapter will propose recommendations.

Keywords: Principle of distinction, civilians and combatant, armed conflict, international humanitarian law, non-state armed groups.

Chapter 1.

The Principle of Distinction

The principle of distinction is the cornerstone of international humanitarian law.¹⁷ At the centre of international humanitarian law is the struggle to protect civilians during the conflict by insisting on the concept of the distinction between civilians and combatants.¹⁸ The principle of distinction under international humanitarian law explains that only combatants and military objects may be targeted during the conflict. This is a compromise made by international humanitarian law to protect civilians in armed conflict. However without the principle of distinction, no limitations will be placed on the means and method of warfare. The principle of distinction is found in the 1949 GCs, reaffirmed in its two 1977 additional protocols. For example distinction is found in article 48 AP I and in article 13 AP II which states that

“to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly, shall direct their operations only against military objectives”,¹⁹

This distinction entails that civilian and civilian populations must at all times be shielded from attack. It also implies that the means and methods employed during the conflict are not limitless. The concept of distinction is universally recognized.²⁰ It applies to civilians, the civilian population in general as well as civilian property. It comprises all persons who do not participate in hostilities like medical personnel and religious personnel. It also protects who have surrendered as well as stopped participating in hostilities like the wounded and shipwrecked, sick combatants, and prisoners of war. Therefore attack is only considered legal when directed towards military objectives. This implies that targeting a hospital is prohibited. For example when the forces of the North Atlantic Treaty Organization (NATO) bombarded building around the Dragisa Misovic hospital in downtown Belgrade, and it hit the maternity

¹⁷ Engeland, Van Anicée 2011. Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition1:p.11

¹⁸ Reisman, Michael 2006. Holding the Centre of the Law of Armed Conflict: International law journal. 852 -856

¹⁹ Article 48 additional protocol 1

²⁰ Engeland, Van Anicée 2011. Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition1:p 28

ward injuring several women who were in labor. Though the maternity ward was evacuated, the fact is babies were born under heavy shelling conditions and mothers were wounded, hence leaving a significant impact on the international community when photos showed on newspapers and the news.²¹ NATO reported it as collateral damage.²² Several other hospitals were hit during that conflict, in violation of IHL.

The principle of distinction does not create room for doubt, which implies that in case of any doubt either concerning the status of a person or object, it is presumed that the person or object is an unlawful target and may not be attacked. Besides, any weapon which is incapable of distinguishing between civilians and combatant, civilian objects and military objects is also prohibited under IHL. It establishes the principle of distinction which protects civilians, the civilian population, and civilian objects. The GCs and with the two additional protocols laid down the guiding rules relating to the protection of civilians and civilian property which implies that civilians must be distinguished from combatants and civilian objects from military objects. According to the rules governing combat, were IHL grants a permit to kill, civilians must be protected. There is a clear distinction between civilians and civilian objects from legitimate, lawful combatants and military targets; it is permissible to bomb a military base but unacceptable to bomb a building where civilians reside. The issue here is realistically it is very difficult to make this distinction. Is a military base in a densely populated area a legitimate target? Is a computer expert working for an army a legitimate target? What happens if military personnel or armed rebels are hiding inside a civilian building? The situation is rarely correct or wrong particularly when it comes to qualifying a person or a property as civilian or combatant. This explains why it is very important to describe who a civilian and who a combatant under IHL is as will be discussed below. This chapter will also trace the historical development of the principle of distinction.

1.1. Historical and Legal Development of the Principle of Distinction in Armed Conflict.

For centuries, wars were waged not only against states and their armies but against the inhabitants of the enemy states, as well. Civilians of a defeated state were at the mercy of the conquering army and were often murdered or enslaved. "The notion that war is waged between soldiers and their nationals are not permitted to participate in hostilities was

²¹ CNN. April 2, 1999. NATO Strikes Heart of Belgrade for the First Time.

²² Hammond, Philipp 2000. Reporting "Humanitarian" Warfare: Propaganda, Moralism and NATO's Kosovo War, 1:3 Journalism Studies, pp. 365–386.

introduced in the sixteenth century and became established by the eighteenth century. The customs of war acquired a more humanitarian character through the process of civilization and as a result of the influence of scholars and jurists.”²³ Like most LOAC/IHL concepts, distinction grew from this just in Bello practice that eventually matured into customary law.

1.1. 1. Historical Development of the Principle of Distinction

Efforts to draw the line of distinction between civilians and combatants can be found in a good number of religious, legal, and philosophical sources other than the western region. As early as the start of the 2nd Century BC, Egypt and Sumeria had devised a complex set of rules governing the means and conduct of the war, which included the obligation to distinguish combatants from non-combatants.²⁴ Also in the 5th Century BC, Sun Tzu, the prominent Chinese Military General in his book title the Art of War, the anonymous Sanskrit treatise, and the Manu Smriti prohibited the killing of prisoners of war. However under Hindu law, the Manu code appears to be the oldest and it focused on the legal regulation of armed conflicts. It banned the use of certain weapons during conflict due to the kind of injury they caused. In addition it said that unarmed, wounded soldiers and civilians were to be spared during the conflict. In a nutshell a violation of this code will warrant prosecution in a law court.²⁵ Also Sun Tzu in his writings laid down a good number of humanitarian norms that placed limitations on the conduct of hostilities.²⁶ He does not rely on specific ethics and religion to substantiate these limitations rather he assesses the impact of war and tries to be realistic by stating that it is unnecessary to destroy the environment, the cities and kill the people, since you will need them after the conflict. He concluded by saying that it is baseless to rule a ruined and abandoned city.

However, a modern utilitarian philosopher would consider Sun Tzu’s ideas to be counterproductive in the sense that his ideas introduce new challenges instead of helping to achieve a goal. Instead his concept is more focused on making the most out of a conflict such as no destruction of the environment, property and most importantly keeping civilians alive. Both documents contain the concept of the distinction between civilians and combatants but

²³ Kolb, Robert and Hyde, Richard 2008. An Introduction to the International Law of Armed Conflict: 114

²⁴ Pictet, Jean 1985. Development and Principles of International Humanitarian Law :Nijhoff Publishers: Dordrecht, Geneva .p.7-8

²⁵ Manu, K. P Jayaswal and Yajnavalkya 1930. A Comparison and a Contrast —A Treatise on the Basic Hindu Law 106 (India: Butterworth 1930).

²⁶ Sun Tzu, The Art of Warfare (Ballantine Books 1993).

fail to address it directly. To add, Sun Tzu and the Smriti analyzed the idea of humanization of conflicts and the respect for civilian status by suggesting that the killing of civilians could be substituted with integrating them into the army, enslaving them as well as asking for a ransom. However after the defeat of the Chinese nationalist led by Chang Kai Chek, Mao Tse Tung's conception and actions were based on Sun Tzu's theory when he chose the integrated solution.²⁷

A fourth-century theologian in the west by name St. Augustine of Hippo emphasized the restraint of war and effects. His writings promoted a civilian-based approach during the conflict in the sense that innocent civilians were to be spared to avoid guilt.²⁸ His writings advocated violence for violence but insisted that this violence should only affect those involved in violence and innocent civilians should be spared from it. According to him it is necessary to justify the killing of a person during the conflict as a last resort.²⁹ His concept of just war focuses on three conditions namely; firstly war can only be accepted when fought for a good and just purpose instead of a show of power and self-gain. Secondly the war must be led by state authority and thirdly love must be the main purpose even in a situation of violence. However it can be argued that the sole reason for not killing during the war was based on religion and not ethics and law.³⁰ As a result the church particularly the Catholic Church used religion to emphasize that killings were not in line with religious teachings and beliefs and might not be ethical as well.

Another theologian who also participated in the establishment of a just war theory was St. Thomas Aquinas who emphasized morality.³¹ The work of St. Thomas Aquinas; establish conditions associated with just war, as explained in his definition of a just war, which provides that war should be started and organized by state leaders; it should be waged for a just cause; for the right intensions; compliance with the law or development of the law; war

²⁷ Howard S. Levie 2000. History of the Law of War on Land, 838 I.R.C.C.pp. 339–350

²⁸ McKeogh, Colm 2007. Civilian Immunity in War: From Augustine to Vattel, in Civilian Immunity in War : Igor Primoratz edition, Oxford University Press.p.62

²⁹ McKeogh, Colm 2007. Civilian Immunity in War: From Augustine to Vattel, in Civilian Immunity in War: Igor Primoratz edition, Oxford University Press. p 65.

³⁰ Hartigan, Richard Shelly and Saint Augustine 1966. The War and Killing: The Problem of the Innocent in 27:2 Journal of the History of Ideas.pp 194–204.

³¹ Gade, Kalah 2010. Defining the Non-Combatant: How do we Determine Who is Worthy of Protection in Violent Conflict? 9(3) Journals of Military Ethics: pp. 219-222.

should be used as last resort and the principle of proportionality should be obeyed.³² The principle of proportionality is very significant when it comes to civilians, hence the philosopher uses it to bring out the difference between targeting civilians, which is illegal, and the legal targeting of military objects.³³ Base on the write up of the philosopher the author puts it that no force used against civilians is justifiable, hence categorizing the intentional killing of civilians unlawful and a violation of the principle of distinction.

Also Francisco de Vitoria contributed to the just war doctrine. According to him it is legal to indiscriminately kill all enemy combatants, which in a way is the foundation of a formal distinction. He advocated that such as women, children, foreigners, travellers, and the rest of the civilian population should be immune from military attacks. He went on to explain that the immunity enjoys by this group of persons can be forfeited as of the time they participate in hostilities. Also, Victoria's concept of immunity recognizes that civilians could be killed as a result of a military attack but that should only be a last result to achieve their military aim.³⁴ His concepts are not clear cut based on the fact that he permitted the killings of males who failed to provide clear identification of themselves as civilians.³⁵ Base on this it can be argued that the presence of ethics in the background supported by religious belief suppressed his ideas and made it unclear.

Jean-Jacques Rousseau established a concept concerning the treatment of the population during armed conflict. His main argument emphasized the point that war is a battle between states and not individuals; therefore the protection of civilians is paramount.³⁶ He made a distinction between soldiers who have surrendered by laying down their weapons and soldiers carrying weapons.³⁷ He went on to explain that when combatants surrender by laying down their arms, they become men once more and no one has the right to take their life.³⁸

³²Engeland, Van Anicée 2011.Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition1:11

³³ Hartigan, Shelly Richard 1982.The Forgotten Victim: A History of the Civilian: Precedent Publisher.p .40.

³⁴Hartigan, Richard Shelly 1973. Political Theory, volume 1:1 pp.79-91.

³⁵Francisco, de Vitoria 1991. On the Law of War, in Vitoria: Political Writings: Anthony pagden and Jeremy Lawrence editions.cambridge University Press. p. 319

³⁶ Rousseau, Jean Jacques 1973 .Social Contract and Discourses .J. M. Dent & Sons, Ltd.; E. P. Dutton & Co.

³⁷Dapphne, Richemond 2007.Transnational Terrorist Organizations and the Use of Force', 56 Catholic University Law Review.pp.1001-1016

³⁸ Rosseau, Jean Jacque 1994.The Legitimation of Violence: A Critical History of the Laws of War', 35 Harvard International Law Journal 49: p.48.

Rousseau's idea that private persons are enemies by chance and protection should be offered to non-combatant citizens led to the development of non-combatant immunity.³⁹

Again religious groups like the Peace of God also known as the Pax Dei also existed, it was a movement that started in present-day France and was linked to the Catholic Church.⁴⁰ This movement aimed to limit violence in private wars taking place in feudal societies. Another aim of the movement was to Christianise people as well as appease the existing social structures at that time. The Peace of God was a pronouncement made by the clergy to civilians, which granted them civilians' immunity from violence. The clergy and the peasants were the first group of people to benefit from this concept. Also aristocrats who were engaged in the war were prohibited by the peace of God from entering the churches, harming civilians, and destroying properties. Consequently civilians were under the protection of the church. While Christians were using religion to elucidate the just war theory and to devise a means to legally distinguish between civilians and combatants and the protection of civilians, Islam emphasized on the ban placed on killing civilians and the concept of distinction which is highly rooted and rests on godly principle: like the killing of a civilian indicates a lack of faith. This is both legal and moral prohibition: the Shari'a law consists of every existing life aspect and every Muslim is expected to follow it. Since the Shari'a law forbids killing, every good Muslim must follow that law. Therefore, the principle of distinction between civilians and combatants is relatively clear in Islamic legal sources as compared to any other document up until the 1949 Geneva Conventions, rests on religious, legal, and ethical values.

To sum it up the author put it that military strategies later experience a shift from ethics, religion, and philosophy to the law through the establishment of IHL. The basis for this is that during the seventeenth and eighteenth centuries, the war was professionalized and fought by state armies. Again civilians at this time were not seen as actors possessing any right but rather they were recognized as victims of conflicts. Relatively as philosophical and ethical conceptions of conflict continue to develop, so did distinction legally. However states

³⁹ Rousseau Jean Jacques 2008. The Development of the "Direct Participation" Exception to Civilian Immunity', 90:872, *International Review of the Red Cross in the Past as Prologue*: 853 -858.

⁴⁰ Thomas Head and R. Landes 1992. *Peace of God: Social Violence and Religious Response in France Around the Year*, Cornell University Press:p.1000.

continue with their effort to regulate solely the conduct of hostilities during the conflict and paying very little attention to civilian protection.⁴¹

1.1.2 Legal Development of the Principle of Distinction

At the start of the seventeenth century, a good number of states started drafting military codes. This was the result of the rise of the nation-state and the professionalization of armies. The most significant of this code was the general order number 100 referred to as the Lieber Code, which was drafted by Francis Lieber and was adopted by Abraham Lincoln in 1863.⁴² The document emphasized the rules of war and was used for future developments in IHL. It served as a foundation for the 1874 Brussels conference on the harmonization and codification of the laws of war. The code emphasized the regulation of war and the concept of military necessity with the sole objective of defeating the enemy. Some rules concerning civilians were already in existence based on the principle of humanity. According to article 15 “Military necessity admits of all direct destruction of life or limb of armed enemies, and of other persons whose destruction is incidentally unavoidable in the armed contests of the war.”⁴³ Article 22, states that "Civilization requires the distinction between the private individual belonging to a hostile country and its men in arms the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit."⁴⁴ Although this principle had been recognized in the past, the Lieber code was used as a foundation for establishing the protection of non-combatants. Still, pragmatism and rationality were at the centre of the manual; it was a manual used as a guide to conduct hostilities during armed conflict and thus emphasized the military.

Five years later the 1868 Saint Petersburg Declaration was adopted. It banned the use of particular forms of a bullet for humanitarian causes. The distinction between civilians and combatants is found in the following article “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”⁴⁵ In the

⁴¹Cassese, Antonio 1989. International law in a divided world: Oxford University Press.

⁴² Lieber, Francis 1983. Lieber’s Code and the Law of War.

⁴³ Lieber, Francis 1983. Lieber’s Code and the Law of War.

⁴⁴ Solis, Gary 2010. The Law of Armed Conflict: International Humanitarian Law in War, 251.p. 43-44

⁴⁵The Declaration of St. Petersburg, Nov. 29, 1868, Dietrich Schindler and Jiri Toman, The Laws of Armed Conflicts (Martinus Nijhoff Publisher 1988).

1874 Brussels conference an international agreement on the laws and customs of war was drafted known as the Brussels declaration although it was never ratified. It said that belligerent forces do not have unlimited power as a choice of injuring the enemy. A similar rule is seen in article 22 of the 1907 Hague Regulations. Also basic rules concerning bombardment were put in place like issuing a warning to the population before the start of bombardment. The concept of distinction is inferred from all these rules but failed to directly address the protection of civilians.

During the nineteenth century, the war became a tool of national policy. According to Carl Von Clausewitz armies were aware that they will engage each other in combat and that war would determine the foreign policy of states. The outcome was the expectation of professional behaviour from each side. The 1864 GC I, adopted the principles that govern civilized nations during the war. It was said that attacks directed towards defenceless citizens and towns were a war crime. Also taking more than the expected need to feed and sustain an occupying army from the population was a war crime. The Martens clause existed as a preamble to the 1899 Hague Conventions. It describes the principle of humanity as a principle that outlaw the use of unnecessary means and methods that do not contribute to the achievement of definite military advantage.⁴⁶

The nineteenth-century witnesses the end of the American civil war and the wars in Europe. At this point the principle of distinction took more of a legal form with the 1899 and 1907 Hague Peace Conference, which was the first internationally recognized document stating that civilians were not to suffer the effects of conflict. These two conventions failed to directly establish the principle of distinction rather they declared that the means and method of conflict should not result in indiscriminate attacks towards civilians and combatants. The protection of civilians appears in article 25 of the 1907 Hague Regulation, the article prohibits the bombardment of towns, villages, dwellings, and other places which are defenceless. Also save heavens were established were the population could be protected. During this time distinction was used only for military purposes and not for the interest of civilians. The objective was to limit civilian casualties rather than protecting them. The 1907 Hague Convention IV annex to the treaty on land warfare regulation, article 25-8, and article 42-56

⁴⁶ Kwakwa, Edward 1992. *The International Law of Armed Conflict: Personal and Material Fields of application*, Dordrecht: Kluwer Academic. p.36.

provided rules on the protection of civilians during hostilities and in occupied territories. The principle of proportionality is involved in the treaty; it explains that parties to a conflict are not permitted to use limitless means and methods of warfare. The point here is employing certain means and methods during a conflict that might result in indiscriminate pain and suffering among combatants and the civilian population was banned. Consequently this led to the partial acceptance of the non-targeting of civilians but the document still laid more emphasis on the conduct of hostilities and the laws of war instead of humanitarian principles. Hence civilian protection was not yet at the centre of the law.

During the period of World War I (WW I) and particularly during World War II, several efforts to implement the distinction between civilian and combatants were challenged. These challenges came as a result of the evolution of new technologies and an increase in the movement of soldiers leading to the spread of conflict zones and the growth of civilian victims. In addition WW I witness an increase in civilian casualties as compared to the number of combatants who died. Resulting from the exposure of civilians during this period base on the reasons mentioned above. Furthermore the fact that soldiers became more mobile resulted in a rise in blurring the status of civilians and combatants. Realistically it is a common practice today to see civilians armed to defend themselves, like in the streets of Sarajevo or civilians who joined the active resistance to the occupation of their lands.⁴⁷

The author puts it that a historical study of the principle of distinction between civilians and combatants is not a new concept rather it is a concept that existed from time immemorial and has developed at a slow but consistent pace. However though much was done to implement the laws of war, the author argues that very little effort was made concerning the codification of the principle of distinction. It continued as customary law pending the drafting of the 1949 GCs. While the concepts of distinction remain abstract and the aim of war and rules governing hostilities overwhelmed the principle of humanity.⁴⁸

All these developments resulted to the codification of the laws of war and this time with a focus on the protection of both civilians and combatants, with the adoption of the 1949 GCs

⁴⁷UN Security Council, Commission of Experts, The Battle of Sarajevo and the Law of Armed Conflict, S/1994/674/Add.2 (Vol. I) (Dec. 28, 1994) (prepared by William J. Fenrick & Major A. J. van Veen), <http://www.ess.uwe.ac.uk/comexpert/ANX/VI-B.htm>.

⁴⁸Gail Gardam, Judith 1993. Non-Combatant Immunity as a Norm of International Humanitarian Law: 27.Dordrecht: Martinus Nijhoff.

and its two additional protocols, which were a breakthrough in the effort to move from a law of war, concentrating solely on combatants, the conduct of hostilities as well as the battlefield to a humanitarian law conception pointing towards the protection of civilians. The convention prioritized the interest of civilians and civilian population and it broadens humanitarian concerns, since it was the first time the issue of civilian protection was being addressed with a balance relation to military strategy and necessity. The conventions harmonized the laws of war previously codified by changing the subject from war realities to human beings at war.

The two additional protocols of the GCs can be described as a completion to the GCs because they were more detailed and addressed a whole lot of new issues like the development of new technologies, the struggle for self-determine as well as guerrilla warfare. This bulk of documents has been recognized as the governing law. The fourth GC relating to the protection of civilians in times of conflict and the two additional protocols to the 1949 GCs are the most significant documents concerning the distinction between civilians and combatants. Again the two documents address a good number of principles concerning the protection of civilians in hostilities and the protection of combatants. The status of combatants was addressed in the third GCs.

The author argues that although a bulk of these legal documents exists, deliberate attacks on civilians have not come to an end. Although the rules are definite, civilians remain the first victims of armed conflict today like in the case of Israel–Palestine, Yamen, Iraq and Afghanistan armed conflict: On the 14 of November 2019, thirty-five Palestinians including women and children died and one hundred and six injured persons from airstrikes from both Palestine and Israeli forces.⁴⁹ Also, forty deaths and sixty injured resulting from an airstrike fired by the Saudi led coalition in Yamen that hit the Dahyan market in Saada on 2 August 2018.⁵⁰ Furthermore, several issues have aroused concerning the interpretation of the conventions and debate regarding the significance of the new forms of conflict and the different types of conflict stated in the GCs.

1.2. The Main Objects of Distinction in International Humanitarian Law

⁴⁹ Protection of Civilians Report | 12-25 November 2019 | United Nations Office for the Coordination of Humanitarian Affairs - occupied Palestinian territory. <https://www.ochaopt.org/poc/12-25-november-2019>

⁵⁰ OHCHR Press briefing notes on Yemen civilian casualties.

<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23439&LangID=E>

The GCs with the two Additional Protocols address diverse forms of status quo and different types of people during the conflict. While the third Geneva Convention (GC III) applies to combatants concerning the treatment of prisoners of war, the fourth Geneva Convention (GC IV) applies to civilians concerning the protection of civilian persons in time of war. Both conventions are applicable in a case of international armed conflicts. The only article of the GCs that applies to non-international armed conflicts is Common Article 3. Also AP I relates to the protection of victims of international armed conflicts, while AP II concerns the protection of victims of non-international armed conflicts. For distinction there are two categories of person: civilians and combatants and two categories of objects: a civilian and military object that is centered on the principle of distinction as well as form the basis for distinction under IHL. The GC III and IV and the two protocols will be used to define and draw a distinction between these two categories of persons and objects while bearing in mind that there are two types of armed conflict: international and non-international.⁵¹

1.2.1. Civilians and Combatants in IHL

1.2.1.1. Civilian under IHL

A good number of international documents render protection to civilians during conflict. The main documents include GC IV and AP I apply to international armed conflict while common article 3 and additional protocol II apply to non-international armed conflict. The most important aspect is to understand who a civilian is, to be able to distinguish between a civilian and a combatant. A straightforward definition of a civilian is absent in the GCs and its additional protocols, instead, the definition of a civilian put forward by these documents take a negative form: a civilian is not a combatant.⁵² A civilian is a person who does not take part in hostilities, military actions as well as belongs to an armed force. Also a civilian is not a member of a militia, paramilitary police, and resistance movement.⁵³ The negative definition of a civilian, functions by opposing and eliminating a person who is not a combatant to be a civilian. This implies that the doctrine of combatants must be clearly defined. An answer to this is brought forth by article 4a of the GC III and article 43 AP I which defines who can be a

⁵¹Clapham, Andrew and Gaeta Paola 2014. The oxford handbook book of international law in armed conflict: oxford university press. pp. 299-307.

⁵² Doctors without borders :The Practical Guide to Humanitarian Law: <https://guide-humanitarian-law.org/content/article/3/civilians/>

⁵³ Engeland, Van Anicée 2011.Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition1: p.29

prisoner of war, bearing in mind that only combatants are entitled to that status. According to article 4 GC III, prisoners of war are people who belong to the following groups:

1. Members of the armed forces of a Party to the conflict, as well as members of militias or volunteer corps forming part of such armed forces.
2. Members of other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their territory, even if this territory is occupied, provided that such militias or volunteer corps, including such organized resistance movements, fulfill the following conditions: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations following the laws and customs of war. The purpose of the list is to provide an understanding of how to identify a combatant.⁵⁴

In addition article 43 of AP I defines the armed force, which also helps to ascertain who is a civilian. Article 43 of AP I states that; 1.) The armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party. Such armed forces shall be subject to an internal disciplinary system which, inter alia, shall enforce compliance with the rules of international law applicable in armed conflict. 2.) Members of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities. 3.) Whenever a Party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall so notify the other Parties to the conflict.⁵⁵

Also article 44(3) of AP I is very relevant since it provides guidance relating to distinction. This article says that “to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or a military operation preparatory to an attack.”⁵⁶ The point here is article 44 of AP I is very significant based on the fact that it relaxes the criteria of

⁵⁴ Ibid.p.29

⁵⁵ Ibid p.30

⁵⁶ Article 44(3) of AP I

a combatant and it covers those in armed groups. Hence implying that all fighters belong to an armed group that is fighting for national determination are combatants. Consequently if a person does not fulfil all these criteria, he is considered a civilian.

Furthermore article 50 API provides that in a case of doubt, relating to the status of a person the person should be considered a civilian. This article has somehow raised a debate between delegates who believe that paragraph 1 of article 50 AP I is contradicting paragraph 2 article 5 GC III. Article 5 GC III provides that if there is any doubt concerning the status of a person who commits a belligerent act and has been captured by the enemy; such a person will enjoy the protection of GC III until as of such time when his status has been decided by a court.⁵⁷ After the debate, it was accepted that no contradiction existed between the two articles since they deal with different cases.⁵⁸

In the situation of Article 5 GCIII, a person who has committed a belligerent act and claims to be a combatant, when captured by an enemy is treated as a prisoner of war. Meanwhile in the case of article 50 AP I talks of a person who has not committed a belligerent act and has a doubtful status because of the circumstance. In such situations that person is considered a civilian.⁵⁹ For example a civilian who was caught spying remains a civilian until proven that he is a combatant. This article is of great importance when likened to the ongoing Palestinian-Israeli situation where most often targets are shot only to be realized afterward that they are civilians. However, children are the first victims of belligerency acts.

1.2.2 Combatants under IHL

The definition of a combatant is very important since a civilian is defined negatively by a combatant. A combatant is a person who does not take part in hostilities. Also once a combatant is captured during the conflict he enjoys the status of prisoner of war. The main reference to combatants is the GC III. However not all situations are complex and most often it is easy to identify a combatant based on article 4 GC III and articles 43 and 44 API which relates to international armed conflicts. Article 4 GC III provides information on the eligibility of the prisoner of war status. In the course of doing so, it defines combatants as

⁵⁷ Geneva Convention III on Prisoners of War, 1949.

⁵⁸ Engeland, Van Anicée 2011. Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition 1: p.30

⁵⁹ The ICRC Commentary of Article 50 (1) of Protocol

examine in section 2.1 above. The definition of combatant in article 4 paragraph 1 omits medical and religious personnel but it takes in all persons working for the armed force even when their responsibilities do not directly relate. Article 4 paragraph 2 raises four criteria to identify a combatant as discussed in section 2.1 above. The first condition of paragraph 2 implies that a member of an armed force is not permitted to lead his military mission and war. The last three conditions of Article 4 paragraph 2 are directly related to the principle of distinction they assist in differentiating a combatant from a civilian.

Also members of the armed force are expected to bear a fix and distinctive sign that is identifiable from a distance. These signs are a must use when attending official missions and meetings with their adversary as well as any formal contact⁶⁰but they are not expected to wear and use these symbols when working at the backline or during training. It is inappropriate when one party to the conflict hides the emblem in a bit to deceive the other party, hence when members of an armed force hide their flag to look like civilians in the eyes of their adversary is a violation of the condition. To add, the identification of vehicles is also significant since it goes a long way to facilitate distinction. It is also the reason for wearing uniforms.⁶¹

The third condition which talks of carrying arms openly is also a means to distinguish a civilian from a combatant. Combatants are expected to carry their arms openly. This does not mean that they have to carry a grenade in their hands. With the other conditions a combatant is expected not to act in a manner that will make his status questionable. The fourth and last condition is to act per the customs and laws of war: simply put if the parties to the conflict especially members of their armed force are to benefit from this body of rules; they will have to respect it. Hence you cannot benefit from a law you cannot respect.⁶²

Yoram Dinstein also identifies three other conditions that link an individual to a combatant status in the chapeau and from the text of article 4 of GC III.⁶³ These conditions include: firstly the responsibility to be an organization, secondly requirement to belong to a party to

⁶⁰ Levie, Howard 1978. Prisoners of War in International Armed Conflicts: International Legal Studies: p. 47

⁶¹ Engeland, Van Anicée 2011. Civilians or combatant? A challenge for the twenty first century: terrorism and global justice. Oxford university press: edition1: p.37-40.

⁶² Ibid. p. 37-40

⁶³ Dinstein, Yoram 2004. The Conduct of Hostilities under the Law of International Armed Conflict: New York: Cambridge University Press. p.36-37

the conflict, thirdly to owe no allegiance to the detaining party that he gets from the case-law of the GCs. The fifth condition which is the obligation to be an organisation is closely linked with the first condition. It highlights the importance of an existing chain of command. There is also a need for a structure. The sixth condition which talks about belonging to a party obtains from a 1969 court ruling by an Israeli military court in the Kassem case.⁶⁴ In this case the criterion to belong to a party of the conflict was not met and this prevented the members from enjoying the prisoner of war status.⁶⁵ The court ruled that members of a group which is not a fraction to any of the parties in conflict cannot be recognized as combatants under the GC III. A certain degree of relationship had to be established. The court ruling was based on article 5 of GC III when defining the status of a prisoner of war. The author argues that the judges should have broadened the idea of belonging to an organization and should not have for example involved a test like a legality and illegality of movement. Also interpreting the requirement of the relation between a belligerent and an irregular armed force should have taken a more liberal approach.

The last condition identified by Dinstein is the non-allegiance to the detaining power that he derives from case law. This can be interpreted with the concept that a soldier of a state cannot fight in a war against his very state. Dinstein sixth condition can be likened to the Oie Hee Koi case.⁶⁶ During the conflict between Indonesia and Malaysia twelve Malaysian Chinese members of the armed force who were heavily armed led by Indonesia officers infiltrated into Malaysia. They were arrested, convicted, and sentenced to death.⁶⁷ Their defense was that they were entitled to the prisoner of war status and were supposed to enjoy protection under GC III. The fighters were Chinese Malay born. The problem here is the GC does not make mention if the prisoner of war status can be enjoyed by persons who are nationals of the state where they have been captured. A close deliberation on the GC III resulted in the UK Judicial Committee of the Privy Council to pronounce that GC III and customary international law indicate that a prisoner of war status cannot be given to a national of the detaining state. Hence the Chinese born Malay could not enjoy the prisoner of war status in Malaysia. The lesson from this case is that prisoners of war cannot hold the citizenship of the detaining power and cannot owe it any duty of allegiance. The rationale is that the sovereign State is

⁶⁴ The Military Prosecutor v. Omar Mahmud Kassem and Others case 1969. Israel Military Court sitting in Ramallah

⁶⁵ Benjamin Rubin 1989. PLO Violence and Legitimate Competency: A Response to Professor Green. Isr. Year book H. R. p.185.

⁶⁶ Public Prosecutor v. Oie Hee Koi and connected appeals, Judicial Committee of the Privy Council (U.K.), December 4, 1967, Dec. 04, 1967, A.C. 829.

⁶⁷ <http://www.internationalcrimesdatabase.org/Case/1130/Oie-Hee-Koi-et-al/#p3>

responsible for dealing with treason and rebellion within its army, and such offenses will be dealt with at the domestic level.

1.2.3 Distinction between Civilians and Combatants

For the principle of distinction, a distinction must be made between civilians and combatants: firstly the purpose of IHL is achieved easily; secondly, it influences the status and protection given to victims of armed conflict: It reduces the level of civilian death and casualties.

From the definition and description of a combatant and civilians 1.2.1 and 2.2.2 above, combatants are permitted to participate in conflict and are therefore classified as lawful targets and maybe attacked during conflict while civilians, on the other hand, are not permitted to participate in conflict and are recognized as unlawful targets and may not be attacked. Also combatants are permitted to carry arms openly while civilians are not. Again combatants enjoy the prisoner of war status when captured by their adversary while civilians for example who are capture when participating in conflict do not enjoy such privilege rather they are prosecuted under national law for taking part in hostilities.

Furthermore the basic rule of distinction found in article 48 AP I provides that the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.⁶⁸ This rule is very important in the sense that it places an obligation on combatants to always distinguish between civilians and military objectives. Therefore combatants have a responsibility not to target and attack civilians. Meanwhile civilians are protected by article 51 of AP I and article 13 AP II but this protection comes with a condition attached to it, which is when they do not participate in hostilities.⁶⁹

1.3. Civilian and Military Object under IHL

1.3.1.1. Military Objects

With the historical movement from a ban on attack directed towards defenceless towns and villages⁷⁰ as the focus of the law on the conduct of hostilities to the rule that only military objects may be attacked, the need to define military objects has become unavoidable. The principle of distinction is practically worthless without a definition of at least one of the

⁶⁸ Article 48 AP I

⁶⁹ Article 51 AP I and article 13 AP II

⁷⁰ Article 25 of the Hague Regulations

categories between which the attacker has to distinguish. According to Article 52(2) of AP I military objects are those objects which based on their nature, location, purpose, or use are beneficiary to military operations and partial or complete destruction, capture or being taken out gives a military edge to one of the conflicting parties. A similar definition was provided in article 2(4) of the 1980 protocol II to the 1980 Convention on Certain Conventional Weapons (CCCW) and in the 1996 amended protocol II to the CCCW in article 2(6) as well as in article 1(3) of the 1980 protocol III to the CCCW.⁷¹

Base on the definition it is important to know that for an object to be considered a military object it must satisfy two conditions. Firstly, the object has to effectively contribute to the military advantage of the opposing party. This is simplified by the objects' nature, purpose, location, and use, since it clarifies that objects with military nature are not there only objects that are military objectives. Secondly the destruction, capture, or neutralization of this object has to give the other party a military advantage.⁷² The definition of a military object helps a military commander to determine which object can and cannot be attacked during the conflict. It can be arguing that idea that for an object to be considering a military object it must provide military advantage on one of the parties is vague and can easily be manipulated by any of the conflicting parties to suit their needs since the burden of proof falls on them. For NATO attack on the Belgrade radio and TV station on grounds that the transmitters of this radio and television station were integrated into the military communication system.⁷³

1.3.2 Civilian Object

There is no definition of a civilian object under IHL rather one has to look at the definition of military targets to know what is civilian. Article 52(1) of API defines civilian objects as all objects which are not military objects. This definition is consistent in subsequent treaties such as the 1980 protocol II to the 1980 CCCW in article 2(5), protocol III to the 1980 CCCW article 1(4) as well as 1996 amended protocol II to the CCCW in article 2(7). Also rule 9 of the

⁷¹ https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_rul_rule8

⁷² Dinstein, Yoram 2002. Legitimate military objectives under: The Current Jus In Bello in Andru E. Wall, edition, Legal and Ethical Lesson of NATO's Kosovo Campaign, Volume 78, US Naval War College's International Law Studies.p.137-42

⁷³ Dinstein, Yoram 2002. Legitimate military objectives under: The Current Jus In Bello in Andru E. Wall, edition, Legal and Ethical Lesson of NATO's Kosovo Campaign, Volume 78, US Naval War College's International Law Studies.p.142.

customary IHL study provides a similar definition.⁷⁴ For the distinction between civilian and military objects article 48 of the 1977 AP I provides that to safeguard the respect for and the protection of civilian population and civilian objects, the parties to the conflict have as a responsibility to distinguish between civilian and military objects all the time. Therefore in times of armed conflict, military objects are lawful targets and liable for an attack while civilian objects are unlawful targets and are not liable for the attack.

However, the author argues that any attack directed to an object which does not fall under the ambit of the article (52) of AP I can be classified as an attack on a civilian object and it violates the principle of distinction. The main problem here is that some of the objects have a dual-use.

In a nutshell the main distinction between civilian and military objects is, civilian objects are an unlawful target, and they may not be attacked but could lose their protection as of the time they abet and participate in military operations. Meanwhile military objects are a lawful target and maybe attack.

1.4. Loss of Protection during Armed Conflict; Civilians, Combatants, and Civilian objects

For distinction, under both international and non-international armed conflict, all persons and objects centre to the principle could lose their protection provided they failed to adhere to the rules and regulations of IHL. Civilians are not permitted to participate in hostilities but ones they do they lose their protection and may be prosecuted under national law for participating in hostilities. This can be found under rule 6 of the ICRC catalogue which explains that civilians lose their protection when they directly participate in hostilities. This law is also enriched in the last part of article 51(3) of additional protocol I and article 13(3) additional protocol II come which states that “ civilians will enjoy protection against the dangers arising from military operations “unless and for such time as they take a direct part in hostilities”.⁷⁵ For example, the case concerning the situation at La Tablada in Argentina, the Inter American Commission on Human Rights held that civilians who directly take part in the fighting, whether singly or as members of a group, thereby become legitimate military targets but only

⁷⁴Henckaerts, Jean-Marie and Doswald-Beck, Louise 2005. Customary International Humanitarian Law Customary International Humanitarian Law: Rules: Cambridge University press, Volume I, p. 32.

⁷⁵ Additional protocol I article 51(3) and Additional Protocol II Article 13 (3) 1949 Geneva Convention.

for such time as they actively participate in combat.⁷⁶ This rule is also supported by official statements and state practices for example during the armed conflict in the middle east in 1973 the ICRC called on the conflicting parties to respect civilian immunity from attack except during or as of such time they took part in hostilities and the states involved gave a favourable reply.⁷⁷ It is important to understand that the privilege of immunity from attack enjoyed by civilians also comes with a condition which is to abstain from hostilities. In a situation where a civilian directly participates in hostilities, he or she loses their immunity from attack. The problem here is the lack of a common definition of the term direct participation and what constitutes it, when does it start and end as well as what happened to the status of this person after such time, these intricacies will be explored later in chapter three.

Combatants are lawful targets, who are permitted by law to participate in hostilities but during hostilities or when engaging in combat members of the armed force be it regular or irregular have as a responsibility to distinguish themselves from the civilian population. As stated in article 44(3) of Additional Protocol I, which says “to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or a military operation preparatory to an attack.”⁷⁸ This implies that identifying oneself as a combatant before engaging in armed conflict or military operations is a precondition for a prisoner of war status and failure will result in forfeiting the prisoner of war status. Also when members of the regular armed forces do not wear uniforms, they risk being charged as spies or saboteurs.⁷⁹ For instance, in the Dwarka case in 1974, an Israeli Military Court found that members of the Egyptian armed forces who had infiltrated Israeli territory and launched an attack in civilian attire were not entitled to prisoner-of-war status and could be prosecuted as saboteurs. The Court considered that it would have been illogical to regard the duty to distinguish oneself as applicable to irregular armed forces but not too regular armed forces, as the defendants had claimed.⁸⁰ The use of human shields by either combatants or insurgent armed groups during combat is prohibited as mentioned in rule 97 of the ICRC catalog. Civilian objects can also

⁷⁶ Maxwell, Mark David and Meyer, Richard V 2007. The Principle of Distinction: Probing the Limits of Its Customariness. Army Lawyer, HeinOnline. vol. 3: pp.1-11

⁷⁷ *Ibid*

⁷⁸ Additional protocol I article 44(3)

⁷⁹ The United Kingdom, the manual on the law of armed conflict ministry of defense July 2005.

⁸⁰ Levush, Ruth 2017. Israel Military Court Decision on Killing Neutralized Palestinian Assailant.

lose their immunity from attack. The idea of civilian objects losing their protection must be read in accord with the basic rule of distinction that only military objectives may be attacked as seen in the last part of article 48. In line with this view, the ICRC customary rule 10 establishes that civilian objects are immune from attack but this immunity is jeopardized when they are used partially or completely for a military purpose, hence making them liable for the attack. The problem with an object is mainly in the case of a dual used object. How can a distinction be carried out in such situations?

Chapter 2.

Principle of Distinction in Practice

Tension has always existed between the principle of distinction and the realities of armed conflict. In the past distinction was simple and could be easily applied because most conflicts were interstate and fought in the isolated battlefield but lack of political will and compliance by combatant was a major problem as opposed to today where most conflicts are intrastate and are fought by non-state armed groups who are not willing to adhere to this principle, therefore, putting civilians in grave danger during the conflict. This chapter will examine the history of distinction in past wars and current practices of the principle of distinction in contemporary wars with the use of examples such as American civil war, WWI, WWII, and the cold war. On the other hand, Israel-Palestine conflict, Iraq, and Yemen will be used as an example of contemporary conflicts.

2.1. Historical Overview

From the period of the American civil war, states approved that civilians should be immune from attack but military commanders continuously attacked civilians, even when they acknowledged the existence of distinction hence making looked like the politicians and military commanders were speaking different languages.⁸¹ This necessitated the creation of more explicit and defined laws about the distinction, nonetheless, throughout the Twentieth Century the level of breach and violation of distinction continue to escalate. The historical narrative on the principle of distinction is simply not only for providing background information of the concept but to enhance understanding of where the principle originated from, what it is and why it is that way. However, development in international humanitarian

⁸¹Sweney, Gabriel 2005. Saving Lives: The Principle of Distinction and the Realities of Modern War, *International Lawyer* (ABA), 39, pp.733-758.

law is a result of major conflicts with a wide range of similarities, and nowhere is the more evident other than the principle of distinction.⁸²

However as conflicts between states become extremely violent and the degree of suffering experienced by civilians' increases, legislators decide to draft more definite laws on the protection of civilians during armed conflict. Additional Protocol I is a good example of a direct response from lawmakers following the great danger experienced by civilians during the cold war and this is because the cold war is similar to the American Civil War, WWI, and WWII which was conflicts fought between states. Though the Vietnam War was still unfaded in the minds of the protocol drafters, they establish the principle of distinction in the association of all the previous wars that had been fought; one designed on the concept of major interstate conflicts.⁸³ However, the cold war was a war that would be fought with millions of troops across entire continents, and one in which the objectives of the combatants were designed. The fact that the rules regulating the principle of distinction were easily implemented in the context of past conflicts does not mean it does today.

2.1.1 The American Civil War

Throughout the 19th Century, the US experienced tremendous growth that amplified the difference between the north and the southern states. In the North was manufacturing and industry with few small-scale farmers while the south had large-scale plantation farmers who mostly depended on slave labour for cash crops, such as cotton and tobacco.⁸⁴ The war was fought between the southern states and the northern states: The confederates' army fought on behalf of the southern states while the unionist army fought on behalf of the northerners. The cause of the civil war was based on a long-standing existing tension over slavery, states' rights, and westward expansion. Also, Abraham Lincoln, who openly opposed slavery, was elected as the first republican president in 1860 was a major cause of the war as some seven states, namely South Carolina, Mississippi, Florida, Alabama, Georgia, Louisiana, and Texas to cede from the Union to form the Confederate States of America in 186.⁸⁵ This was greatly

⁸² Schmitt, Michael N 1999. The principle of discrimination in 21st century Warfare, 2: Yale human rights and development law journal: 143.p. 145-146.

⁸³ Schmitt, Michael N 1999. The principle of discrimination in 21st century Warfare, 2: Yale human rights and development law journal: 143.p.145-146.

⁸⁴ Arthur, Bestor 1988. The American Civil War as a Constitutional Crisis. In Friedman at el. American Law and the Constitutional Order: Historical Perspectives. The American Historical Review. 69. Harvard University Press. pp. 327-352.

⁸⁵ Ibid

objected by the new Lincoln administration and the northerners refused to recognize the legality of separation, with the fear that it will dishonour democracy and create disastrous practices that would later divide the no longer United States into many small, squabbling countries

The war began when the Confederates bombarded Union soldiers at Fort Sumter, South Carolina on April 12, 1861, and ended in 1865 when General Robert E. Lee surrendered the last major Confederate army to Ulysses S. Grant at Appomattox Courthouse on April 9, 1865. The last battle was fought at Palmito Ranch, Texas, on May 13, 1865. It resulted in the death of 620,000 soldiers of the 2.4 million who fought the war. America is a party to all the IV GCs and recognizes and acknowledges the concept of distinction as seen in the general code 100 which became known as the Lieber code under article 22 which states that The Principle of distinction is codified in article 22 of the Lieber Code which states that “Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit”.⁸⁶

According to this article 22 of the Lieber Code combatants have as a responsibility to distinguish themselves from civilians. Also combatants are expected to spare the lives of civilians and avoid the destruction of civilian objects during the conflict. Regardless both parties to the conflict targeted civilians and civilians’ objects during the conflict for instance the Shelton Laurel massacre which was carried out by the confederate regiment led by lieutenant colonel James A. Keith against civilians accused of being union sympathizers.⁸⁷ It led to the execution of thirteen civilians including children. Also homes were burnt down and livestock slaughtered. Another example is the sacking of Osceola was a Kansas Jayhawker initiative aimed at pushing out pro-slavery southerners at Osceola, Missouri. It was not authorized by Union military authorities but was the work of an informal group of anti-

⁸⁶ Lieber, Francis 1863. Instructions for the Government of Armies of the United States in the Field art. 22 reprinted by Martinus Nijhoff in 1988, 1973. The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and other Documents : Dietrich Schindler and Jiri Toman eds., Publishers

⁸⁷ Wellman, Manly 1973. The Kingdom of Madison. Chapel Hill: N.C.: University of North Carolina Press. pp. 83-84.

slavery in Kansas called Jayhawkers⁸⁸ The town of 2,077 people ⁸⁹ was plundered and burned to the ground, 200 slaves were freed and nine local citizens were court-martialled and executed.⁹⁰ This raid stirred hatred that led to William Quantrill's raid on Lawrence, Kansas.⁹¹

Reciprocity was noticeable during the American civil war. The concept of reciprocity is not accepted during the conflict. Most often it is practice when a party to the conflict carries out a massive attack on the civilians of the other party as a means of weakening their military moral and the other parties react by carrying out the same action. A good example is the Lawrence massacre⁹² also known as the Quantrill's raid were a confederate guerrilla group led by William Quantrill raided Lawrence, Kansas a unionist town leading to the death of one hundred and fifty civilians. The raiders also pillaged in most of the banks and stores as well as burned a quarter of the buildings in Lawrence including all businesses except two. The raid was more of an execution than a battle since the raider came in carrying a list of those they wanted to kill and buildings to destroy.⁹³ The attack on Lawrence town was because the town was recognized as a stronghold for anti-slavery and a staging area for union and jayhawkers incursions into Missouri.⁹⁴ Lane's raid stirred hatred that led to William Quantrill's raid on Lawrence, Kansas, ⁹⁵ leading in turn to the depopulation of four counties of western Missouri under General Order No. 11.⁹⁶ The point here is during the conflict the fact that an opponent does not respect the rules of war is not a ground for the party to reciprocate hence rendering it a violation under IHL.

The conflict was fought in a good number of places, from southern Pennsylvania to Texas; from New Mexico to the Florida coast. The majority of the fighting took place in the states of Virginia and Tennessee. The point here is because of the changing nature of armed conflict wars is mostly fought in urban centres and towns instead of isolated battlefields. Fighting this

⁸⁸ Spurgeon, Ian 2009. *Man of Douglas, man of Lincoln: the political odyssey of James Henry Lane*, University of Missouri Press, pp. 185–88

⁸⁹ <https://www2.census.gov/library/publications/decennial/1860/population/1860a-23.pdf>

⁹⁰ Missouri Jayhawking Raids 1861 by Albert Castel. www.civilwarstlouis.com.

⁹¹ Castel, Albert E. 1999. *William Clarke Quantrill: His Life and Times*. Norman, Oklahoma: University of Oklahoma Press. p. 142.

⁹² Pringle, Heather 2010. Digging the Scorched Earth. *Archaeology*. 63 (2):p. 21.

⁹³ Castel, Albert 1959. *Kansas Jayhawking Raids into Western Missouri in 1861* .

⁹⁴ Goodrich, Thomas 1992. *Bloody Dawn: The Story of the Lawrence Massacre*. Kent, OH: Kent State University Press. pp. 4–6. .

⁹⁵ Castel, Albert E. 1999. *William Clarke Quantrill: His Life and Times*. Norman, Oklahoma: University of Oklahoma Press. p. 142

⁹⁶ Coffey, Walter 2012. *The Civil War Months: A Month-By-Month Compendium of the War Between the States* Bloomington, in: Author House. p. 207.

war in densely populated cities puts civilians in the spotlight which results in killing as well as injuring civilians, by the end of the civil war 50,000 civilians were killed and their property destroyed. Both parties to the conflict use children as soldiers which is a violation under IHL. For perspective on the age of participants in the conflict, it has been estimated that about 800,000 Union soldiers were seventeen years of age or younger, with about 100,000 of those being fifteen or younger.⁹⁷ Most of Quantrill's guerrilla fighters were teenagers. One of the youngest was Riley Crawford, who was 13 when taken by his mother to Quantrill after her husband was shot and her home burned by Union soldiers.⁹⁸

Apart from these violations states at some point in the conflict protected its citizens. During the civil war adversary soldiers who were captured were entitled to the prisoner of war status. More than 400,000 soldiers were captured throughout the Civil War. In the first years of the conflict, equal numbers of captured troops were regularly exchanged for one another, helping to keep the total number of prisoners manageable for both sides.⁹⁹ Also the soldiers warn civilians to leave some towns in preparation for future attacks. Confederate general Robert E. Lee ordered women and children to leave Fredericksburg for their safety. They took refuge in churches, barns, and tents.

2.1.2 First and Second World War.

The First World War (WWI), also known as the Great War, was a worldwide war that started in Europe in 1914. The war was fought between the central powers consisting of Germany, Austria-Hungary, Bulgaria, and the Ottoman Empire and the allied powers made up of Great Britain, France, Russia, Italy, Romania, Japan, and the United States.¹⁰⁰ Several issues prompted the war but the immediate cause of the war was the assassination of Austrian Archduke Franz Ferdinand by Gavrilo Princip, a Bosnian Serbia Yugoslav nationalist.¹⁰¹ In response, Austria-Hungary issued a petition to Serbia. Serbia failed to provide a favourable reply to the Austrians, who declared war on Serbia. This prompted the allies of both countries to join the war in a bid to support and protect them. The conflict was mostly fought in Europe along two fronts namely; the western and eastern front. Some of the most influential battles

⁹⁷ Boys in the Civil War. Civil War Home. February 15, 2002. .

⁹⁸ Petersen, Paul R. (2003). *Quantrill of Missouri: The Making of a Guerrilla Warrior—The Man, the Myth, the Soldier*. Nashville, Tennessee: Cumberland House Publishing. P.226.

⁹⁹ <https://www.battlefields.org/learn/articles/civil-war-facts>

¹⁰⁰ Charles Seymour 1916. *The Diplomatic Background of the War*. Yale University Press. pp. 35, 147.

¹⁰¹ *Ibid* .p.147.

include; Somme, Battle of Tannenberg, Battle of Gallipoli, and the Battle of Verdun. The conflict ended in 1918 when a general cease-fire was agreed to by both sides. The war officially ended between Germany and the Allies with the signing of the Treaty of Versailles. An estimated number of nine million combatants and seven million civilians died as a direct result of the war.

During the First World War, combatants were aware of the principle of distinction but failed to adhere to it during the war. World War I tested the degree of commitment states demonstrated towards the principle of distinction. The untouchable nature of the conflict on one hand and civilian controlled industries as one of the main aims of the war, the urge to attack civilian targets was irresistible. According to legal advocates, "the bombing campaigns of Britain, France, Germany, Italy, and America all reflect adherence to two, interrelated principles of international law: firstly the only legitimate targets are military objectives, and secondly the prohibition of indiscriminate bombing"¹⁰²

The prohibition the use of chemical weapons during warfare which was a direct violation of the 1899 Hague Declaration concerning asphyxiating gases and the 1907 Hague Convention on land warfare.¹⁰³ The type of chemicals used ranged from tear gas to lethal agents like phosgene, chlorine, and mustard gas.¹⁰⁴ The problem is the poisonous gas could not be limited to combatants since the wind blows the poisonous gas through civilian towns and villages and most often they received no warnings' which puts them at great risk. Also many commanders from both conflicting sides were aware of the side effect of such weapons and how much harm could be incurred by civilians still they continue to use them and most often failed to warn civilians. An estimated number of 100,000–260,000 civilian casualties were recorded from the use of chemical weapons during the conflict and tens of thousands more died after the war.¹⁰⁵

An estimated number of eight million men surrendered during the war and were held in prisoners of war camps while the war continued. All countries involved in the war agreed to

¹⁰² Ibid at 61,p. 149

¹⁰³Mayor, Adrienne 2003. Greek Fire, Poison Arrows and Scorpion Bombs: Biological and Chemical Warfare in the Ancient World.

¹⁰⁴ Telford Taylor 1993. The Anatomy of the Nuremberg Trials: A Personal Memoir. Little, Brown and Company. .

¹⁰⁵ D. Hank Ellison (2007). Handbook of Chemical and Biological Warfare Agents, Second Edition. CRC Press. pp. 567–70. .

comply with The Hague Convention relating to the fair treatment of prisoners of war. The problem is most states failed to keep their word and some of the prisoners of war were badly treated for instance they are not supposed to do any work which contributes to the war effort of the enemy but this rule was violated and they were made to work. Also because of the poor treatment given to them most of them died at the camps for instance 4250 prisoners of war died at a camp controlled by the Ottoman Empire.¹⁰⁶ At the start of the war most of the conflict was fought in two fronts: the west and eastern front but during the war the battlefield was shifted to cities and two as Germany started with the bombardment of cities like Liege in Belgium, Paris in France and London in Great Britain. This was a violation of the Hague convention and the principle of distinction since the bombardment resulted in the loss of civilian lives and properties. However throughout the war, zeppelin and airplane attacks on English and German cities killed almost 2,000 civilians.¹⁰⁷ During WW1 civilians were not the target but no effort was made to stop the targeting of civilians. Military commanders and combatants were aware of the principle of distinction and they accepted it but failed to practice it.

The instability experienced by Europe after WW I established a foundation for another global conflict, World War II (WW II) which started two decades after WWI and will become more devastating than the first one. The war was fought between the allied powers which consist of France, the United States, Great Britain, Soviet Union, and China to a lesser extent and the axis powers consisting of Germany, Italy, and Japan.¹⁰⁸ The war was fought because Adolf Hitler wanted to dominate the world and to do so he signed strategic treaties with Italy and Japan. The war started in Europe in 1939 when Germany under the leadership of Adolf Hitler invaded Poland. After which a state of total war emerged and more than thirty countries got involved. The major participants during WW II put their entire economic, industrial, and scientific capabilities at the mercy of the war, therefore, blurring the distinction between civilian and military objectives.¹⁰⁹ WW II ended in 1945 and is recognized as the deadliest conflict in human history which led to the death of seventy to eighty-five million people most of whom were civilians.

¹⁰⁶ <https://www.iwm.org.uk/history/voices-of-the-first-world-war-prisoners-of-war>

¹⁰⁷ <https://www.crf-usa.org/bill-of-rights-in-action/bria-15-3-a-firestorms-the-bombing-of-civilians-in-world-war-ii>

¹⁰⁸ Wells, Anne Sharp 2014. Historical Dictionary of World War II: The War against Germany and Italy. Rowman and Littlefield Publishing. p. 7.

¹⁰⁹ Barber, John and Harrison, Mark 2006. Patriotic War in Russia. In Ronald Grigory Suny. The Cambridge History of Russia, Volume III, Cambridge, Cambridge University Press. pp. 217 - 242

Both parties to the conflict carry out the indiscriminate bombing of town and cities on a different level, scales and purpose. Indiscriminate bombing of towns and cities is a violation under the 1907 Hague convention. For example Germany bombs London, Warsaw, and Rotterdam resulting in the death of tens of thousands of civilians. Britain and the United States also carried out aerial bombing but with a different aim for instance the British belief that bombing Germany cities will render the people homeless and hopefully would shatter their morale and will to continue the war. While the United States' most effective way to destroy the enemy's ability and prevent him from continuing in the war was to strike specific targets like aircraft factories and oil refineries. A good example is the indiscriminate bombing of cities like Hiroshima, Tokyo, and Nagasaki resulting in the death of more than half of the population in all cities and the destruction of civilian property.¹¹⁰

During WW II the idea of reciprocity was very common among conflicting parties, although at the time of the war it was not found in any treaty or convention. The idea of reciprocity is found in article 1 of the 1949 GCs and rule 140 of the customary international law study. It provides that parties to the conflict must respect the provision of IHL during the conflict and must not derail base on the disobedience of the other party. The noncompliance of the other party is not a ground for violation. For instance during the Second World War Adolf Hitler of Germany violated this principle by targeting civilians and civilian property and in retaliation Britain did the same and that automatically makes him a violator too. Again during the Second World War civilians and civilian property became the target. This explains why most of the wars which were supposed to be fought in the isolated battlefield were now shifted to densely populated cities and town since most of the countries involved believed that destroying the morale of the citizen of the enemy will weaken them and cause them to discontinue fighting. For example Major General Curtis Le May believed that the bombing of Japanese cities and towns will force them to surrender instead they wanted to fight the more and only give up when everything was lost and all hope of winning gone.¹¹¹

Before World War II, the protection of civilians and civilians as victims of the conflict were not much of an issue of preoccupation in debates about waging war. In western conferences,

¹¹⁰ Barber ,John and Harrison,Mark 2006.Patriotic War in Ronald Grigory Sunny. The cambridge history of Russia ,Volume III,Cambridge, Cambridge university press. PP.217 - 242

¹¹¹ The Showdown With Japan,1941 US Army in WWII – Strategic Planning for Coalition Warfare. pp. 63–96.

treaties and codes concerning *jus in Bello* or humanitarianism talk about the protection of civilians during the conflict were rare. A bulk of documents referred to distinctions between combatants and non-combatants and others, more or less explicitly, to some sort of idea of non-combatant immunity. Experts agree, however, that that distinction served military purposes rather than civilian interests and was rather about limiting civilian casualties than about protecting non-combatants. Protection was in the 19th century an idea developed with regards to soldiers and wounded combatants.

2.1.3 The Cold War and Codification.

After 1923, laws concerning airstrikes were unanimously dismissed; hence no attempt was made to codify the principle of distinction until the 1950s were the cold war was ongoing. The result of WWI on civilians triggered the International Committee of Red Cross (ICRC) to propose that the 1949 GCs be reformed to include distinction.¹¹² Members of the ICRC felt that it was wise to regulate, if not forbid the use of airstrike bombardment out of the immediate battlefield. In support of this, the United Nations (UN) and The Institute of International Law (IIL) came up with a proposition although most major powers were less concerned about it.¹¹³ Unfortunately, none of these proposals were adopted and the idea was supposedly abandoned.

At the beginning of the Korean War, the principle of distinction made a major comeback practically.¹¹⁴ Civilians were not targeted by Americans in a bid to prevent North Koreans from gaining international sympathy for being subjected to unlawful attacks.¹¹⁵ The American air force discontinued the distinction between civilians and military targets when the Chinese military joined the war in favour of North Koreans.¹¹⁶ They launch attacks on towns, cities, villages, and even on the communication systems. Also, airstrikes attacks were launched and surprisingly these airstrikes were designed to destabilize the morale of citizens who supported the enemy. For example, the bombing attacks around Pyongyang, after civilians in those areas

¹¹² Meyer M Jeanne 2001. Tearing down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine, 51 A.F.L. REV. 143:pp. 160-161

¹¹³ Meyer M Jeanne 1956. International Committee for the Red Cross, Draft Rules for the Limitations of the Dangers Incurred by the Civilian Population in Times of War.

¹¹⁴ Hone, Thomas C 1998. Strategic Bombing Constrained: Korea and Vietnam, in Case Studies in Strategic Bombardment. R. Cargill Hall edition :pp. 473

¹¹⁵ Reinhold, Herman 2002. Target Lists: A 1923 Idea with Applications for the Future, 10 J. Tulsa. Compl. and Int'l l. 1.pp.12

¹¹⁶ Reinhold, Herman 2002. Target Lists: A 1923 Idea with Applications for the Future, 10 Tulsa J. Compl. and International law 1.pp.19

had been warned of the upcoming attack. Even during the Vietnam War, the principle of distinction continued to be disregarded. Though airstrikes bombing of the civilian and civilian structure was not common like the case in North Korea, the American infantry destroyed towns and villages and was globally reported for intentionally killing civilians. Furthermore, the use of Agent Orange and Naplan caused a great amount of damage to the civilian food supply.¹¹⁷

The idea to codify the principle of distinction made a comeback in 1974 when a good number of countries with ICRC effort attended the diplomatic conference on the reaffirmation and development of IHL applicable in armed conflict.¹¹⁸ After the diplomatic conference, it took three years for states to deliberate, draft, and adopts additional protocol I and II to the 1949 GCs. The provisions of Additional Protocol I focus on limiting attacks only on military objectives and protecting civilians from intentional attacks during conflict.¹¹⁹ It is important to understand that not all states have signed the Additional Protocol I, although a majority of them including the United States have accepted that the statements of the protocols about the principle of distinction are international customs and opinion Juris. The principle of distinction finally becomes law after a century of discrepancies of rhetoric and practice.

2.1.4 The Post-Cold War Period.

The first Gulf war was a conflict between, Iraq and thirty-four coalition states lead by the United States. The war started in August 1990 when Iraq invades Kuwait to control and annex as well as using the country's oil wealth to pay off debts his own country had incurred during the 1980 – 1988 Iran-Iraq War. This invasion was highly condemned by the United Nations who four days later imposed economic sanctions on Iraq while the next day, the president of the United States George HW Bush ordered the start of operation desert storm. Hostilities started in January 1991 and end with an overwhelming victory for the coalition forces which drove Iraq out of Kuwait with a few coalition death. The war was fought on the ground and by air and it resulted in an estimated death of 100,000 and 200,000 civilians.

¹¹⁷ 1975. Stockholm International Peace Research Institute, Incendiary Weapons: 49-58

¹¹⁸ Meyer M Jeanne 2001. Tearing Down the Facade: A Critical Look at the Current Law on Targeting the Will of the Enemy and Air Force Doctrine, 51 A.Fl. Rev. 143:158-159

¹¹⁹ 12 August 1949, Protocol Additional to the Geneva Convention and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), article. 48, 51-52 U.N. Doc. A/32/144, Annex I, 1125 U.N.T.S. 512

During this conflict, the ideas of the United State (U. S) on targeting was governed by the notions put forward by the U.S. Air Force Colonel John Warden, who promoted the idea that destroying an enemy centre of gravity was paramount during the conflict.¹²⁰ He describes enter of gravity as those characteristics, capabilities, or locations from which the adversary gains his freedom of action, physical strength, or will to fight.¹²¹ Furthermore his criteria for targeting comprised a wide variety of objects that by their nature were civilian objects for instance power plants, communications facilities, and oil refineries. Almost all these objects were attacked during the conflict.¹²² Even though, U.S employed precision-guided munitions to reduce civilian deaths during the conflict still civilian objects were targeted by the U.S and coalition forces. ¹²³ Also after the conflict General Colin Powell from the U.S department of defense, told Congress that the U.S military had done it best during the conflict to adhere to the principle of distinction.¹²⁴

All parties to the conflict are not a party to the additional protocol I but from the wordings of articles 48 and 49(1) of this protocol except for the vast word “attack”, generally its consider as customary international law and therefore binding on all states. Both parties are aware of these rules and accepted to fight in line with these rules.

Both parties to the conflict used aerial attacks, although they did so in different ways, on different scales, and with a different purpose. Most often coalition airstrikes aimed at military targets in Iraq and Kuwait consisting of worldwide and much-publicized use of cruise missiles and laser-guided bombs. Also it consists of extensive types of weapons and techniques. As a general rule, IHL prohibits the intentional destruction of civilian objects that do not provide a military advantage to the other party and the direct intentional attack on civilians not taking part in hostilities. In preparation for the conflict, U.S developed, acquires weapons systems, and used munitions that are capable of adhering to these prohibitions during the conflict. The Central Command (CENTCOM) forces adhere to this general rule of war prohibitions in controlling military operations during operation desert storm by using discriminating target selection and careful identification of available forces and weapon system to select a target

¹²⁰ Richard G. Davis 1996 .Strategic bombing in the Gulf War, in Case studies:pp. 535.

¹²¹ Ibid.pp.535

¹²² Reynold ,Richard T. 1995, Heart of the storm: The Genesis e of the air Campaign against Iraq 54

¹²³ Reinhold, Herman 200. Target Lists: A 1923 Idea with Applications for the Future, 10 J. Tulsa. Compl. and International law. 1:pp.21

¹²⁴ Powell, Colins 1992. Final Report to congress: Conduct of the Persian Gulf, Pub. Law No.102-25: 696-703

and Iraqi defense regardless of Iraq violation of the laws of war obligations towards civilians and civilian objects.

In addition coalition forces use several possible measures to avoid the killing and injuring of a civilian. This was done by the careful selection of the aircraft; aircrew and weapons with the aim that attacks directed towards populated areas will be almost accurate and provide minimal risk to the civilians and civilian objects. For example attacking aircraft was accompanied by support mission aircraft to divert any distraction towards attacking aircraft aircrew which will compromise their mission. In addition aircrews attacking targets in densely populated areas were told not to use their munitions if they had any doubt with the identification and status of their target.¹²⁵ Concerning this most often in such a situation aircrew drops their bomb on an alternate neither confirm target nor return with it to their base. The coalition forces focus their attack on military objects which is acceptable by law. Coalition forces also avoided attacks on military objects that were located in densely populated areas and near cultural sites although it is permitted under the law. Hence the attack on lawful Iraqi military targets even though it resulted in collateral injury on civilians and the civilian object was consistent with IHL and customary international law.¹²⁶ To add the presence of civilians and civilian objects around a potential military target do not render the target immune from attack rather attackers are advised to carry out such attack in the best way possible to avoid injury on civilians and damage to civilian property. The defending party must exercise reasonable precautions to separate the civilian population and civilian objects from military objectives and avoid placing military objectives in the civilian population.

According to Adam Roberts, the development of accurate methods of bombing cannot be expected to transform completely the civilian's vulnerability in war. To him war especially war from the air is most likely to miss its target a countless number of times; firstly as a result of poor intelligence, inaccuracy in the weapon itself, panic on the part of an aircrew under fire, or deflection of an incoming missile by an anti-missile exploding in a "near-miss." Or intelligence may suggest, wrongly, that a given location has a purely military function, when that function is mixed or has changed.¹²⁷ For instance the bombing of the Amariya bunker in

¹²⁵ Richard G. Davis 1996 .Strategic bombing in the Gulf War, in Case studies: 535.

¹²⁶ Ibid .pp.540

¹²⁷ Powell, Colins 1992. Final Report to congress: Conduct of the Persian Gulf, Pub. Law No.102-25.pp. 696-703

Baghdad resulted in three hundred casualties that appeared base on a tragic outcome of an intelligence error and the intermingling of civilian and civilian objects.¹²⁸ Another example is the bombing of traffic retreating north from Kuwait City at Matla ridge.¹²⁹ Secondly even when weapons successfully hit a legitimate military target and their aim has been reached, still some unavoidable collateral damage may be incurred by civilians. A good example is a case of a motorist driving past that location when the incident occurs. Thirdly sometimes belligerents deliberately hit a civilian or military object to distract the adversary from their mission by causing them to devote time to protect civilians or civilian objects. In the end by that in combat, the legal concern is whether every reasonable attempt was made to avoid and minimize civilian damage.

The author argues that the U.S from all indication carried out the most discriminate air campaign in history as well as extraordinary measures by coalition aircrews to reduce the level of collateral damage on civilians and civilian objects still collateral damage and injury caused by coalition forces are unavoidable because of the following reasons; firstly in contemporary society, many objects meant for the civilian purpose could also be used for the military purpose, for instance, a bridge and highway used by a civilian to commute every day could be used to support a countries war effort. This implies that the destruction of certain objects like bridge, airport, port facility, electricity, power plant as well as highway could impede the war effort of an adversary. Furthermore in February 1991 land war, large numbers of Iraqi prisoners were taken. While estimates at the time ranged as high as 180,000, the actual figure was lower. Between January 18 and May 2, 86,743 Iraqi POWs were captured by the coalition forces.¹³⁰ The ICRC received 71,000 Iraqi prisoner-of-war and civilian internee capture cards; and between March 6 and May 9, 1991, over 64,000 Iraqi POWs were repatriated under ICRC auspices.¹³¹

¹²⁸ On the Amariya bunker attack, see Final Report to Congress, pp. 0-14 and 0-15; and General Sir Peter de la Billiere, *Storm Command: A Personal Account of the Gulf War* (London: HarperCollins, 1992), p. 261

¹²⁹ For a powerful defense of the bombing on the road north of Kuwait City on Februarv 27, ” and the rknimization of casualties and damage, see Final Report to Congress, pp. 1-35. Billiere, *Storm Command*, pp. 301, 311 and 329, refers to evidence of madness and destruction everywhere but also says “the situation can be fully justified.”

¹³⁰ Final Report to Congress, pp. 16 17.

¹³¹ The presentation by ICRC President Cornelio Sommaruga, *Swiss Neutrality, ICRC Neutrality: Are They Indissociable?* International Review of the Red Cross (Geneva), No. 288 (May-June 1992), p. 272.

Apart from this aspect mentioned above, the principle of distinction was violated in a certain situation by both parties to the conflict. Both parties to the conflict are expected not to use civilians and civilian objects with the inclusion of cultural and historical properties to shield lawful targets from being attack by their enemy. The Iraqi authorities refused to move civilians away from such objects recognized as legitimate military targets, thereby placing those civilians at risk of injury incidental to Coalition attacks against these targets. A classic example was the positioning of two fighter aircraft adjacent to the ancient temple of Ur. The concurrent use of civilian objects for military purposes; they are liable to attack if there is a military advantage to be gained in their attack. For example place a gun on the roof of a residential home, placing military supplies inside church, schools, and hospitals.

The Government of Iraq was aware of its law of war obligations. In the month preceding the Coalition air campaign, for example, a civil defense exercise was conducted, during which more than one million civilians were evacuated from Baghdad. No government evacuation program was undertaken during the Coalition air campaign. As previously indicated, the Government of Iraq elected instead to mix military objects with the civilian population. Pronouncements that Coalition air forces would not attack populated areas increased Iraqi movement of military objects into populated areas in Iraq and Kuwait to shield them from attack, in callous disregard of its law of war obligations and the safety of its civilians and Kuwaiti civilians. In general, the rules governing the treatment of prisoners are easier for belligerents to follow than the rules governing combat, but even here difficulties arose. The main problem, as expected, was getting Iraq to observe the 1949 Geneva Convention III. Iraq refused ICRC delegates' access to prisoners throughout the land war.¹³² Coalition prisoners in Iraqi hands were treated in a manner inconsistent with the Convention; and many, perhaps even most, were tortured.¹³³ At the end of the war, the Iraqi regime belatedly turned to the ICRC to achieve an efficient and humane transfer of prisoners.

The same idea of targeting used in the gulf war was used in 1995 during the Bosnia intervention and in 1999 during the Kosovo intervention. For instance drafters of operation deliberate force used the concept of center of gravity during deliberations on what targets to

¹³² Confirmed in ICRC, *The Gulf 1990-1991*, p. 40

¹³³ Final Report to Congress, PP. 1-19. For personal testimony see RAF Flight Lieutenants John Peters and John Nichol, *Tornado Down* (London: Michael Joseph, 1992), esp. at pp. 99ff

attack in Bosnia.¹³⁴Based on political reasons, they designed clear cut rules of combat aimed at limiting civilian death and suffering. During the intervention in Kosovo, NATO forces attacked a radio and television station they believed to be a primary center of gravity for the Serbian government, as well as power stations, factories, and bridges.¹³⁵ NATO considered the Serbian government's use of these facilities to be classic examples of dual uses, and thus legitimate grounds for attacking civilian objects.¹³⁶

Wars between powerful states, those conflicts that prompted the development of humanitarian law, are increasingly rare. Instead of large-scale combat between organized militaries, modern warfare is becoming asymmetrical. Insurgencies, not armies, are the norm. Asymmetrical wars are ongoing in Afghanistan, Chechnya, Colombia, the D.R. Congo, Iraq, Israel/Palestine, Indonesia, Nepal, and Sri Lanka, Syria, Yemen just to name a few. Application of the laws of war to conflicts like these is a major challenge to international law. By looking at the examples of Iraq, Israel-Palestine, and Sri Lanka, this section explores how the Principle of Distinction is applied to asymmetrical conflicts, both in rhetoric and in practice.

2.2.1 Contemporary Practices

The truth is conflicts between powerful states that trigger the establishment of the principle of distinction in international humanitarian law do almost not exist today. In the past conflicts were mostly large scale combat between organized militaries, of recent conflicts have become asymmetrical in the sense that most conflicts are now fought by non-state armed groups (NSAGs) rather than the regular arm force. A good number of asymmetrical conflicts are ongoing in places like Iraq, Israel/Palestine, Afghanistan, Yemen, Syria, Mexico drug war just to mention a few. However, situations like this become a big challenge to IHL. By looking at examples of Iraq, Israel-Palestine, and Afghanistan this part of the thesis will explore how the principle of distinction is applied in contemporary armed conflict in both rhetoric and practice.

¹³⁴ Powell, Colins 1992. Final Report to Congress: Conduct of the Persian gulf, Pub. Law No.102-25: PP.696-703.

¹³⁵ Final Report to the Prosecutor by the committee Established to Review the NATO bombing Campaign against the Federal Republic of Yugoslavia <http://www.un.org/icty/pressreaV/nato061300.htm>.

¹³⁶ Human Rights Watch, Ticking Tinge Bombs; NATO's Use of Cluster Munitions in Yugoslavia, June 1999, <http://www.hrw.org/reports/1999/nato2/index.htm>.

1.2.1 Israel -Palestine Conflict.

The Israel-Palestine conflict is one of the longest conflicts in the world. For more than 60 years there has been ongoing violence between the Israeli government and Palestinian militants. The violence at some point becomes intense and at another point, it becomes less intense at times but unfortunately has never ended. Before the invasion of Afghanistan and Iraq, the Israeli-Palestinian conflict was the most prominent in the world; still, very little international attention has been seen to persuade both parties to distinguish between civilians and combatants. Although Israel has not ratified API, the Israeli Defence Force (IDF) or military manual makes mention of distinction. It states that IDF members or members of the armed force are prohibited from using their weapons to harm civilians or prisoners of war and have an obligation to protect civilians and civilian properties.¹³⁷ However the Israeli military manual fails to include international law as one of the binding authorities, hence it states that its armed force will function following the IDF values and rules while obeying the laws of the state of Israel as a sovereign state only without making mention of international as a binding authority to. The laws of armed conflict are indeed recognized in Israel yet Israeli justifies Operations against civilians targets as required by the military rule of necessity.

Israel through its military has targeted and destroyed Palestinian homes base on the notion of punishment and as a preventive measure. From 1967 to 2019 it has been estimated that Israel has demolished almost 49532 Palestine houses with more than 100,000 Palestine at the West Bank and Gaza Strip. The destruction of houses for the Israeli is not just an issue of policy but has legal backings from the Israeli high court. The high court has even rejected the constitutional and international law arguments raised against the strategy of destroying hundreds of Palestinian houses close to the Egyptian border to create a buffer zone before the Israeli with drawer from the Gaza stripe.¹³⁸The court has a further rule in favor of the Israeli policy of destroying the homes of suicide bombers families. Israel is more than strict with its interpretation of its right to self-defense. In a nutshell from the Israeli perspective, self-defense is more of an act of grace rather than obeying the law.

Military operations carried out by the Israeli especially airstrikes often result in numerous death of civilians. For example in 2014 amid a conflict that erupted between Israel and

¹³⁷ Israel Defense Force 2005. Doctrine, <http://wwwl.idfilVDOVER/site/mainpage.asp?sl = EN and id = 32> (last visited,

¹³⁸ Myre, Greg 2005. Israel Halts Decades-Old Practice of Demolishing Militants' Homes, N.Y. Times: A4.

Palestinian militants in the Gaza strip, both sides attempted to harm each other. Hundreds of rockets were fired from the Palestinian side to harm Israeli civilians, while Israeli military strikes have hit hundreds of targets in the Gaza Strip leading to the death of 100 Palestinians according to the Palestinian Health Ministry, with hundreds more wounded. Also in 2019, the Israeli airstrike killed a Palestinian Islamic jihad leader called Bahaa Abu al -Ata with his wife leaving two other civilians wounded.¹³⁹

Also, civilian death does not necessarily mean there has been a violation of the principle of distinction. Instead, large scale deaths of civilians can take place even when the correct military objectives are targeted. However collateral damage is only illegal under international law when it violates the principle of proportionality or the principle of necessity. Still, when collateral damage is extensive as compared to the military objective, the attacks in question seem to become more of distinction than of proportionality or necessity. The policies of the Palestinian Militant organizations regarding distinction are somehow inconsistent therefore making it difficult to identify which policies they use in targeting since they don't make their targeting policies public.

There are three major militant groups in Palestine namely Hamas, Islamic jihad, and the al Aqsa Martyrs Brigade. However public statements made by the Hamas group do provide some guidance although they do not agree with or recognize the principle of distinction and pay little or no attention to any part of international law as a binding authority. Hence it is the main focus is to govern by its interpretation of Islam. Throwing light on suicide bombing attacks and its permissibility, according to Hamas the criteria used to determine whether such operations are lawful and justified must and can only be an Islamic one. This implies that the judgment can be made under the Quran and Sunnah only. Hence all other sorts of judgment are rejected and to do the contrary will be considered un-Islamic.¹⁴⁰ According to Hamas attacking Israeli Civilians in retaliation for the Israeli attack on Palestinian civilians is justifiable.¹⁴¹

¹³⁹https://www.aljazeera.com/news/2019/11/israeli-forces-kill-top-islamic-jihad-commander-gaza-strike-191112040427905.html?utm_source=website&utm_medium=article_page&utm_campaign=read_more_links

¹⁴⁰Hamasonline, Islamic Resistance Movement, Martyrdom Operations in Islam, <http://hamasonline.org/index.php?page=Qassam/martyrdom%20operations> (last visited on Jan. 11,2020).

¹⁴¹ Hamas Spokesman: Shedding Palestinian Blood Leads to Shedding Jewish Blood, <http://hamasonline.com>.

As mentioned by a military wing of Hamas known as Qassam Brigades in a press release, it is natural for them to fight back attacks launched against their citizens from the Israeli.¹⁴²It's important to know that the Hamas and other militant groups are willing to recognize distinction as mention by their spokesperson, who went further to say this could be successful if the Israeli forces would stop attacking or targetting Palestinian civilians.¹⁴³Hamas to a certain extent are prepared to recognize the principle of distinction between civilians and combatants. Most recently the Israeli and the Palestinian militants in Gaza ceasefire in 2019 although they did not announce an end to a three-day battle that killed twenty-three people in Gaza and four in Israel, hence both parties signal an end to hostilities.¹⁴⁴ The fact that these organizations conceptually separate Israelis in Israel from Israelis in Palestine demonstrates a willingness to at least make distinctions within the civilian population itself.

The Palestinian militant organization has killed, hundreds, if not thousands of Israeli civilians both in Israel and in the occupied territories. Although these militant groups have different targetting policies, they still have one objective which is to attack civilians in pursuit of their aim. For instance, the Qassam Brigades has regularly attacking Israeli settlements in the Gaza Strip with homemade rockets.¹⁴⁵ Also in 2003 Islamic Jihad claimed that they were responsible for the murder of a pregnant Israeli civilian and her four children.¹⁴⁶In 2005 the al Aqsa Martyrs Brigade killed five Israeli civilians with a bomb at a border crossing between Israel and Gaza.¹⁴⁷ Besides, all three militant groups are noted for using suicide bombers to attack Israeli citizens in both Israel and the Palestinian territories.¹⁴⁸

2.2.2 America-Iraq Conflict

The invasion and occupation of Iraq by the American led coalition has resulted in asymmetrical conflict. The first time after the Soviet Union evacuated its troops from

¹⁴² Ezzedeen Al-Qassam Brigades, Nov. 19, 2004 Firing Five Mortar Shells on the Enemy Sites of South Gaza Strip, www.alqassam.info/english/statements/49.htm.

¹⁴³ Asfour before His Arrest: We Are Ready to Spare Civilians, Dec. 23, 2003, [www. Hamasonline.com](http://www.Hamasonline.com). Although it is impossible to verify that this is a website run by Hamas, its materials are consistent with public statements of that organization.

¹⁴⁴<https://www.theguardian.com/world/2019/may/06/gaza-ceasefire-halts-fighting-between-israel-and-palestinians>

¹⁴⁵Qassam Brigades Fire 90 Missiles at Zionist Settlements in Three Days, Apr. 23, 2004, [HTTP//www.hamasonline.com](http://www.hamasonline.com).

¹⁴⁶Silver, Eric 2004. Palestinians Murder Pregnant Israeli, and Her Four Daughters, *the independent*:19.

¹⁴⁷ MacKinnon, Ian 2005. Eight Die in Gaza Raid, *The Times London* ed :44

¹⁴⁸ Ibid at 103

Afghanistan, a superpower with technical sophistication and military strength is coming face-face in combat with a non-state armed group (NSAGs). Truly it has become a common phrase that “everything changed after September 11,” nonetheless is that the case with distinction? With urban fighting reality and insurgents who are often indistinguishable from civilians, the temptation for American forces to ignore Distinction might be high. Likewise, increasing coordination between aid agencies, civilian contractors, and the American military could tempt insurgents to disregard Distinction as well. As a high profile conflict, the America-Iraq conflict provides a snapshot of how the distinction is practiced and how it is preached.

The United States is not a party to additional protocol 1 but America's military institutions have openly adopted the principle of distinction. The principle of distinction appears in chapter four of the U.S department of defense war of law manual and training materials.¹⁴⁹ This is to ensure that every member of the U. S Army is aware that civilians are not to be targeted. For instance, the United States air force gives every employee, military or civilian a copy of the air manual, a small paperback instructional book.¹⁵⁰ The air manual simply describes the distinction as "Do not attack civilians"¹⁵¹The principle of distinction is also found in the US army training materials. The laws of war are found in the first chapter of the soldier's manual of common tasks, a guide for evaluating the performance of individual soldiers.¹⁵²The Manual explains that the Hague conventions and customary international law limit targeting decisions, and that the latter forbids attacks on civilians or targeting of civilians.¹⁵³

Besides, it continues to say that civilians enjoy immunity from all acts or threats of violence,¹⁵⁴ similarly, the army's field manual on the law of land conflict states that it is prohibited to attack a civilian as well as the civilian population. Indeed disallowing attacks toward civilian's targets continue to raise the question of what is a civilian target. Military target decisions made by Americans are based on the concept of the enemy's centers of

¹⁴⁹<https://dod.defense.gov/Portals/1/Documents/pubs/DoD%20Law%20of%20War%20Manual%20-%20June%202015%20Updated%20Dec%202016.pdf?ver=2016-12-13-172036-190>.

¹⁵⁰Department of the air force 2015. Air force handbook 1 air man. <https://www.studyguides.af.mil/Portals/15/documents/AFH%201%20v2019.pdf?ver=2019-10-07-133050-243>

¹⁵¹ Ibid at 105: 14

¹⁵²Headquarters, Department of the army 2015. Soldier's manual of common task: Skill level 1 https://www.atu.edu/rotc/docs/stp_21-1-smct.pdf

¹⁵³ Ibid at 106.PP. 3-17

¹⁵⁴ Ibid at 107 .pp. 3-25

gravity. According to the U.S. Air Force, "everything may be destroyed if there is a military reason to destroy it". For instance, the American targeting guidelines permit attacks against an adversary's ability to "sustain" itself, a concept beyond traditional definitions of what constitutes a military target.¹⁵⁵ The American-led invasion and occupation of Iraq have resulted in numerous civilian deaths. Though the U.S. military does not track civilian deaths, it's almost impossible to get precise numbers for verification. According to the body count project the number of civilian deaths from violence from the start of the war to 2019 ranges between 23,589 and 26,705, although the numbers are not certain.¹⁵⁶

The insurgency in Iraq is made up of many different groups and movements; it's impossible to identify a unitary policy concerning distinction. However, the most influential insurgent leader by name Abu Musab al-Zarqawi outlined his policies in a letter he addressed to his followers.¹⁵⁷ Zarqawi carved out a plan which did not only focus on Americans as targets but also on the Kurds, agents of the Iraqi government, and the Shiite community.¹⁵⁸ Zarqawi does not intend to practice distinction especially when it comes to one of his main targets, the Shia people and religious symbols as well. Zarqawi intends to pull out the teeth of the Shia population in anticipation of a Sunni-Shia civil war.¹⁵⁹ His followers have adhered to his plans to attack civilians. Most often insurgents have detonated bombs in civilian markets and along busy civilian streets. Sometimes these attacks are intended to kill U.S. soldiers in the area, but other attacks are conducted with no apparent connection to military targets. For example, Shia pilgrims celebrating the Ashura religious holiday were attacked with roadside bombs on March 2, 2004, in Karbala, killing eighty-five and wounding 230.¹⁶⁰ In 2005, Iraqi families were shopping and preparing for evening prayers at the Musayyib Husainiyya Mosque, when the bomb blew up. A suicide bomber from an unknown armed group detonated his explosives next to a tanker truck filled with cooking gas, igniting a massive fireball that swept through the market and surrounding streets. Killing more than 90 civilians mostly Shi'a Muslim town

¹⁵⁵ Wallis, Catherine, 2004. Legitimate Targets of Attack: Considerations when targeting in a Coalition, in the army lawyer 44, 49-50.

¹⁵⁶ July 26, 2017. Iraq Body Count database Archived, at the Way back Machine, From the Iraq Body Count project.

¹⁵⁷ 2004. The letter attributed to Abu Musab al-Zarqawi, (<http://www.iraqcoalition.org/transcriptindex.html>).

¹⁵⁸ Ibid at 111

¹⁵⁹ Ibid at 112

¹⁶⁰ Canestaro, Nathan A. 2004. Small Wars and the Law: Options for Prosecuting the Insurgents in Iraq, 43 Colum. J. Transnational law. 73.p. 126-127

just south of Baghdad, including women and children. Hundreds more were badly burned or pierced by shrapnel.¹⁶¹

Also apart from killing civilians, civilians were taken, hostage.¹⁶² This is prohibited by common article 3 of the 1949 GCs. This rule is consistent with article 34 and article 147 of the 1949 IV GC. According to Human Rights Watch an estimate of thirteen to forty non-Iraqis were taken hostage within one week in 2004 by insurgents. Most often those taken hostages are aid workers or civilian contractors and often they are killed by insurgents.¹⁶³ However, taking civilians hostage is a violation of the principle of distinction even if the hostage is released at a later stage. Distinction disallows combatants from directing their attacks towards civilians still that is what hostage-takers normally do.

2.2.3 Yemen Armed Conflict

The Yemeni armed conflict is an ongoing conflict between the Yemeni government led by Abdrabbuh Mansur Hadi and the Houthi non-state armed group, with their supporters and allies. Both parties claim that they constitute the legal Yemen government. The Houthi forces and forces loyal to former president Ali Abdullah Saleh gain control of Yemen's capital, Sanaa, and other parts of the country in 2014. In 2015, the Saudi-led coalition attacked Houthi-Saleh forces in support of Yemeni President Abdu Rabbu Mansour Hadi. The US supported coalition attacks with targeting intelligence and air refueling. As the war has continued, alliances have fractured. Houthi forces killed Saleh in December 2017 after clashes broke out in Sanaa.

All members of the coalition are a party to the 1949 Geneva Conventions and Yemen and some states participating in the conflict are a party to additional protocol II of the Geneva Convention, which provides further protection for combatants and civilians during non-international armed conflicts. The conflict in Yemen has greatly affected the civilian population. The coalition has carried out a series of indiscriminate and disproportionate airstrikes killing thousands of civilians and hitting civilian objects in violation of the laws of

¹⁶¹<https://www.hrw.org/report/2005/10/02/face-and-name/civilian-victims-insurgent-groups-iraq>

¹⁶² Human Rights Watch, Iraq: Avoid Harm to Civilians, April 16, 2004, <http://hrw.org/english/docs/2004/04/16/iraq8446.htm>

¹⁶³ Mille, Christian T 2005. The Conflict in Iraq; To Rebuild Amid Danger: an Alliance; Private contractors work with U.S. forces, sharing intelligence and workload, in their combat reconstruction' of the Volatile Nation, the law times: at A4.

war, particularly the principle of distinction. For example in 2018 the coalition bombed a wedding, resulting in the death of twenty-two people, including eight children. Also in another strike by the coalition, a bus filled with children was bombed resulting in the death of twenty-six children.

Both parties to the conflict have used banned weapons. The Saudi led coalition has used six different types of munitions during this conflict according to human rights watch. Although no coalition member is a party to the 2008 cluster munitions convention, it does not have room for it to be used. The use of an indiscriminate weapon is prohibited in international humanitarian law because it causes incapable of identifying its specific target and cause superfluous damage to civilian and the environment when used.

The use of landmine is also prohibited under the laws of war but in the ongoing Yemen conflict, the insurgent group(Houthi) have used it on several occasions which have resulted to the death and maimed of civilians, disrupted civilian life in affected areas, and will pose a threat to civilians long after the conflict ends. Yemen is a party to the 1997 Mine Ban Treaty. Both the Yemeni government, the UAE, and UAE-backed Yemeni forces and the Houthi forces have carried out arbitrary detention, torture, and enforced disappearance on people including children, abuse detainees and held them in poor conditions. For example according to human rights watch the United Arab emirate and Yemeni government forces have arbitrarily detaining, torturing, and forcibly disappearing scores of people in areas of southern Yemen, which is nominally under government control. Also, the Houthi officials have torture and ill-treatment persons they suspected to be a political opponent or security threat. For instance, a former detainee described Houthi officers beating them with iron rods and rifles, and being hung from walls with their arms shackled behind them.

The Houthis have also taken civilians, hostage. Human Rights Watch has documented more than sixteen cases of a hostage by Houthis. Most of the people taken hostage are civilians and civilian workers, who are eventually killed by their captors. The Saudi-led coalition has restricted and diverted imports which have worsened the humanitarian situation of the country. The coalition has delayed and diverted fuel tankers closed critical ports, and stopped goods from entering Houthi-controlled seaports. Hence fuel required to power hospital generators and pump water to homes has also been blocked. This is a violation of international

humanitarian law. Also, Houthi forces, on the other hand, have blocked and confiscated food and medical supply hence denied the population access.

The Saudi led coalition has targeted both civilians and civilian objects during airstrikes in the conflict. Hence civilians fleeing coalition airstrikes were chased and shot at by helicopters. For example in February 2020 a coalition led airstrikes was shot down by the insurgent's forces leading to the death of 31 civilians.¹⁶⁴ Again two air raids carried out by the Saudi led coalition have led to the death of 68 civilians on the same day. The first air raid strikes a market in the province killing 54 civilians including 8 children and wounding 32. The second raid was in Hodeida and it killed 14 people from the same family. In 2017 a ballistic missile was fired toward Riyadh from an unknown location in Yemen. The Houthis claim it was fired by them and it was aimed at the Saudi palace. By implication are a violation of international humanitarian law and the principle of distinction in particular.

2.2.4. Analysis of Current Practices.

States have a responsibility to respect as well as ensure respect for all international conventions. This rule appears under article 1 common to all four GCs and article 1 of AP 1. Also according to the International Court of Justice, the obligation to respect as well as ensure respect for IHL is applied in line with the obligation provided in common article 3 to the GCs.¹⁶⁵ Again states have a legal obligation to respect and ensure respect for IHL within their territory, common article one bestow a negative legal responsibility on states not to support a party to a conflict to violate IHL and to avoid carrying out acts that will aid and abet in such violations. Furthermore the International Law Commission has drafted a good number of articles on states' responsibility affirming this negative responsibility under general international law by ascribing obligation to a state that intentionally aids and abet another state in carrying out an internationally wrongful act.¹⁶⁶ An example of negative obligation will include the prohibition for a state to undertake the transfer of arms and sale of weapons to a State or other party to an armed conflict who is known to use such arms or weapons to commit violations of international humanitarian law

Secondly most often the conduct of states during armed conflict may or may not yield sanctions after the conflict which explains why states have a responsibility to comply with

¹⁶⁴<https://www.theguardian.com/world/2020/feb/16/yemen-air-strikes-kill-31-civilians-after-saudi-jet-crash>

¹⁶⁵ Nicaragua v. United States of America, Merits, ICJ Reports 1986, p. 14, para. 115.

¹⁶⁶ Articles on Responsibility of States for internationally wrongful acts drafted by International Law Commission, 53rd Session, 2001

IHL. States are required to make reparations for the gross violation amounting from their conduct during armed conflict to other states.¹⁶⁷ It does not confer a right to compensation on the individual victims of violations. This traditional implementation structure is at variance with internal armed conflicts, as in such cases victims of violations are often nationals of the State concerned, and international human rights law expects states to make reparation for this damages too. Reparations take different forms like restitution, compensation, rehabilitation, and a guarantee of non-repetition.¹⁶⁸ States could provide restitution in the following way: Restitution can include the restoration of liberty; enjoyment of human rights, identity, family life, and citizenship; return to one's place of residence; restoration of employment; and return of property.¹⁶⁹ While states could provide compensation through legal, medical, psychological, social, administrative services as well as financial means. Thus, for a growing number of violations, International Human Rights Law requires that the State make reparation directly to the beneficiary of the rule.

Both states and NSANGs lack the political will to obey the provisions of IHL.¹⁷⁰ The capacity of political will is most difficult to determine but if the situation can be understood and those in leadership positions can be reached and dialogue with, this could help. Still, within a state and NSANGs the approach used by different factions may be different. For instance, within both parties, the military division of the party might concede the need to respect the law, while its political representative might not accept the need to respect the applicability and support the implementation of the provisions of IHL.¹⁷¹ The opposite is conceivable. In a situation where the intentions of a party to a non-international armed conflict are itself different from the concepts, norms of humanitarian law there will be no political will to implement the law. For example parties who carry out systematic attacks on a particular group of civilians and parties whose main objective is to seize power, control the resources and wealth of the nation. In both cases there is bound to be a violation of IHL to achieve their aims.

¹⁶⁷ Article 3, the Hague convention 1907

¹⁶⁸ <https://guide-humanitarian-law.org/content/article/3/reparation-compensation/>

¹⁶⁹ Ibid

¹⁷⁰ Mack, Michelle, and Pejic, Jelena 2008. Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts: ICRC.P.12

¹⁷¹ *ibid*

NSAGs do not have sufficient knowledge of IHL norms and it can be argued that the absence of knowledge and training in IHL hampers attempts to increase respect for IHL.¹⁷² Truly it is very obvious that the law will not be obeyed except those whose duties are to respect and apply it are instructed and trained to respect its obligation. As mentioned by Bangerter “only a relatively small circle of persons are aware of legal concepts in any given society, and it is unlikely that leaders of armed groups will be recruited in this particular circle”.¹⁷³ It is possible that they are not aware and will not even accept that recruiting children as soldiers is prohibited, that certain weapons have been outlawed. However, concepts that are familiar to military lawyers and IHL experts such as the principle of distinction, proportionality, in the conduct of hostilities may be difficult for NSAGs members to understand, interpret and apply at both senior and lower levels. In a good number of non-international armed conflicts, those carrying arms are directly involved with fighting and are those who have a narrow knowledge and training on IHL.¹⁷⁴ State armed forces know IHL because most often it is incorporated in the military manual of their respective states. The problem here is to ensure that the members of the armed forces not only know the limits that the law sets, but understand its practical application and integrate it into their doctrine, training, and operations. Also beyond knowledge, understanding, and integration, base past and present practices examined in this chapter it is possible to argue that being aware of the law does not equate it to acceptance and respect for the law. The violation of IHL is not a new thing and it's sometimes carried out by mistake still clearly also by design and civilians bear the cost for it.

In non-international armed conflicts states and NSAGs use warfare strategies that violate IHL to achieve their aim for instance the parties fight amongst the civilian population, stationing military equipment in densely populated areas, using civilian objects for military purposes and using both civilian and military objects as a shield during combat.¹⁷⁵ Also the mere existence of NSAGs is used by states as an excuse not to respect IHL under the pretext that they are protecting territorial integrity and national security of the states. Meanwhile, the imbalance

¹⁷² ICRC 2008. On the increasing of respect for IHL in non-international armed conflicts www.icrc.org/sites/default/files/topic/file_plus_list/0923-increasing_respect_for_international_humanitarian_law_in_noninternational_armed_conflicts.pdf.

¹⁷³ Bangerter, Olivier 2011. Reasons why armed groups choose to respect international humanitarian law or not. *International Review of the Red Cross* 93,882, pp.353-384.

¹⁷⁴ Ibid

¹⁷⁵ Annyssa, Bellal 2016 .Beyond the Pale? Engaging the Islamic State on international humanitarian law. *Yearbook of International Humanitarian Law* ,18. Pp 123-153

between states state armed force and NSAGs concerning size, weapons, training, financial resources makes NSAGs feel inferior and have to devise strategies that will undermine the power of the state, for instance, they cause terror within the civilian population either by killing them, destroying their properties or taking them hostage as a means to prove to the world that the state is incapable of protecting its citizens. In line with this the United Nations Secretary-General explains “that NSAGs face military inferiority when fighting with states and to overcome it they devise strategies that violate international law openly. These violations start from intentional attacks towards civilians, including sexual violence to attacks on civilian objects like schools, to abduction, forced recruitment, and using civilians to shield military objectives.”¹⁷⁶ The risks for civilians are further increased as members of the armed forces engage in fighting an enemy that is often difficult to identify, hence states are bound to respond by using means and methods of warfare that may violate the principles of distinction giving rise to further civilian casualties.

Political inequality between states and NSAGs is another reason for their behavior during conflict. States are not ready to grant combatant status and the privileges tied to the status to members of NSAGs in humanitarian law instruments¹⁷⁷. So NSAGs only have hybrid status but are still under the jurisdiction of the domestic law of the state against which they are fighting which considers them as criminals because they have taken arms against the state. It can be argued that the status of NSAGs in humanitarian law is highly determined by legal and political asymmetry that exists between NSAGs and states. Consequently this results in a legal imbalance unfavorable to the imposition of reciprocal responsibilities under humanitarian law. This leaves the state with no choice but to use all essential material, military, and judicial means within their reach to maintain and restore public order.

Both states and NSAGs have a reputation to protect. This is one of the reasons states sometimes refuse to accept the existence of an armed conflict at the start. Instead they might claim that it is a situation of political disturbance or tension which does not amount to non-international armed conflict. Another reason is stated most often comply with IHL to develop a good reputation and be seen as a reliable partner since a violation of a commitment today

¹⁷⁶ UN Security Council (2010) Report of the Secretary-General on the Protection of civilians in armed conflict, UN doc. S/2010/579

¹⁷⁷Annyssa, Bellal 2016 .Beyond the Pale? Engaging the Islamic State on international humanitarian law. Yearbook of International Humanitarian Law ,18. Pp 123-153

may affect the way states see tomorrow.¹⁷⁸ Also the dominant theory of international cooperation is institutionalism which emphasized the assumption that a state's reputation affects the way other states behave towards the state.¹⁷⁹ Honoring international commitments is a 'big deal' in inter-state relations, a state's reputation can have real material consequences based on its reputation. A reputation for keeping promises, for instance, can make it easier for governments to secure cooperation in the future and other issue-areas. In contrast, a reputation for unreliability may well hinder cooperation because promises to abide might appear non-credible.¹⁸⁰

Non-State groups might also deny the applicability of humanitarian law by refusing to recognize a body of law created by States, or by claiming that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by strong ideology and generally they are excluded from taking part as full members of the treaty drafting body. Most often NSAGs are unwilling to comply with IHL on grounds that they were not involved in making this law and most especially this law was drafted by states which they are fighting with. Also, they argue that because these rules are not drafted by them, they see no reason why they should respect it.¹⁸¹ This argument has been greatly criticized by Bangerter who explains that the conception that NSAGs have a problem with IHL because they did not participate in its formation and cannot ratify it seems wrong if we consider their discourse. For example, the Revolutionary Armed forces of Colombia (FARC) have often taken such a viewpoint but similarly they have stated in the same document that they have integrated basic concepts of IHL into their own rules which makes it acceptable. Most at times NSAGs rarely use the lack of ownership over IHL as a defense in situations of violations instead of them taking responsibility for such acts. Nonetheless, involving NSAGs in some kind of law-making remains significant. This can be formalized by persuading them to draft their codes of conduct and by sampling their opinions through interviews. It is unusual for NSAGs to claim that they have a different conception and interpretation of international law and that they don't have the capacity of implementing them. This implies that a snapshot of the practices and ideas of NSAGs is not entirely divested on a particular

¹⁷⁸ Ibid pp. 124

¹⁷⁹ Ibid .pp .130

¹⁸⁰ Ibid .pp. 132

¹⁸¹ Ibid pp. 133

stage of normativity. NSAGs may feel compelled by the laws they approved rather than by international conventions and international customary norms, the embellishment of which they have not taken part in and these norms evolving from their practices might have the possibility of being implemented.

Furthermore, although some particular NSANGs are aware of some applicable law, their ideology, be it political or religious, may cause them to intentionally violate IHL. For example, Jihadist NSANGs, like the Islamic State and Al Qaeda as well as their associates could be included in this class, still, there are others, which are diverse such as the Lord's Resistance Army (LRA) formerly operating in Uganda and the Revolutionary United Front (RUF) a former rebel army in Sierra Leone presently existing as a political party have to a particular extent, applied tactics terrorizing the civilian population for strategic motives.¹⁸² Still although these NSAGs no longer exist, the point here is no matter the level violations carried out by these groups, some form of humanitarian engagement is possible in particular situations, for instance through indirect means like employing the good office of the NSAGs' close associates.¹⁸³

Apart from the above, most often both states and NSAGs don't agree with each other. A state will most likely not like the presence of NSAGs in their territory because of the following reasons, firstly states see NSAGs as a threat to their regime, politically, economically, socially, and culturally and religiously. Politically NSAGs want to seize power from the state and install their government. Economically NSAGs always destroy states resources and source of wealth as a means of getting their attention to do what they want, Socially they always inside the population against the state which may result to an uprising in the country and lastly some NSAGs have as an objective to convince everybody to either accept their culture or religion and failure to attain this aim cause them to result to the killing of other ethnic and religious groups. All these aspects about NSAGs create tension and disturbance in states and no state wants that.

¹⁸² Bangerter , Olivier 2011. Reasons why armed groups choose to respect international humanitarian law or not. *International Review of the Red Cross* 93,882.pp 353-384

¹⁸³ Annyssa, Bellal 2016 .Beyond the Pale? Engaging the Islamic State on international humanitarian law. *Yearbook of International Humanitarian Law* ,18. Pp 123-153

Also, both states and NSAGs are ready to comply with the law only when the law is favorable to them, and through it, they can achieve their desired objectives which can be political, economic, social, cultural, and religious reasons. When the law does not work in their interest both states and NSAGs violate the law and then provide hypocritical justifications.

In a nutshell based on all the past and present practices of the principle of distinction examined above it can be concluded that the problems faced by the principle of distinction are more of a practical than legal problems because states and NSAGs were aware that civilians and civilian properties had to be spared in times of war but they did not abide by these laws because they put their objectives and interest before the law. Even when these laws have been adopted and states have ratified a good number of international treaties as well as incorporate the law in their domestic laws they still violate it which goes a long way to explain the principle of distinction might be facing some legal problems but the bulk of it is practical.

Chapter 3.

Problems Encountered by the Principle of Distinction

The principle of distinction was conceived and birthed at a time when the armed conflict was interstate. It was designed with the concept of large scale conflicts in mind, fought in isolated battlefields away from the civilian population. Today such patterns of war hardly occur rather the world is faced with intrastate armed conflict which takes place at an alarming rate. This conflict is mostly fought in densely populated civilian areas, leading to the involvement of civilians and civilian objects, hence blurring the line of distinction and posing a good number of unending practical and legal problems. However the principle of distinction is one of the basic principles of IHL, still, it's considered old fashioned and outdated because of the challenges it encounters in modern armed conflict. This chapter will identify the practical and legal problems faced by the principle of distinction and will determine if these problems are more practical or legal.

3.1. Practical Problems Faced by the Principle of Distinction

3.1.1 The changing nature of the armed conflict.

The principle of distinction is simply on paper but adhering to it practically has become increasingly difficult especially in modern armed conflict. After the cold war, interstate conflict experienced a tremendous decline while intra-state conflict has taken a hike due to the changing nature of the armed conflict. For the past twenty years, states have increasingly fought against non-state armed groups (NSAGs), who have been empowered by the political, economic, and technological changes. These changes were brought by globalization especially in the transportation sector, the informal sector, and the global system. This has enabled NSAGs to move communication and transfer their capital easily.¹⁸⁴ Also the forces of globalization have empowered NSAGs, by decentralizing powers inside states like Somalia, Afghanistan, the Democratic Republic of Congo, and Mexico, enabling them to control parts of the country and challenge government monopoly on violence.¹⁸⁵ Following the effect

¹⁸⁴ Smith, Rupert 2006. The utility of force: The art of war in the modern world.

¹⁸⁵ Mackinlay, John 2002. Globalization and Insurgency. Adelphi papers , No. 352: 17 -18

wrought by globalization, the threat to go to war by states in their bid to claim territories has reduced tremendously. Currently, the threat to international peace and security most often emanates from poorly functioning states. Although NSAGs have become more powerful as compared to the past, state armed forces still have a significant edge over them because of their superior and technologically advanced weapons. For NSAGs to survive in an asymmetric conflict against the United States, the European powers, or Israel, they have to mingle within the civilian population and force these powerful states to fight conflict of attrition. This new form of combat is referred to as "War Amongst the People."¹⁸⁶ This new form of combat called "War Amongst the People" is characterized by six major trends. Firstly, the main aim of fighting such conflicts by states is fundamentally different as compared to regular military conflict. While in the past states engaged in conflict to defeat their adversary, presently state fight this conflict with the aims of secure a political outcome or guarantee security in the trail of a civil war. Secondly, most of the conflicts are fought in urban areas, towns, and cities amongst the population instead of on isolated battlefields far away from the civilian population.¹⁸⁷ Thirdly most conflicts fought by western militaries tend to be timeless and unending.¹⁸⁸ However, wars are no longer characterized by decisive battlefield victories resulting in a clear victor.

Of recent western powers engage in armed conflict to preserve power rather than risk it to attain their objectives.¹⁸⁹In the 1990s the idea of force protection became a phenomenon because of the debacles experienced by European and American soldiers while carrying out humanitarian operations in the Balkans and Eastern Africa. The aftermath of this caused western states to limit their level of engagement in peace protection and security missions. A good example of this phenomenon is NATO's air intervention in Kosovo, A good example of this phenomenon is NATO's air intervention in Kosovo. However, it has become almost impossible to reconcile the high standard of force protection with political objectives in modern armed conflict.¹⁹⁰This idea has been recognized by the new counterinsurgency (COIN) principle established by the United States. COIN expects US soldiers to use minimal force to prevent civilian casualties, a fundamental change, which are both counter-intuitive for the

¹⁸⁶ Smith ,Rupert 2006.The Utility of force: The art of war in the modern world

¹⁸⁷ Ibid at 121: 280

¹⁸⁸ Ibid at 122 : 280

¹⁸⁹ Ibid at 122 : 280

¹⁹⁰ Sewall Sarah, 2007. Introduction to the University of Chicago Press edition: A Radical Field Manual, in U.S. Army/Marine Corps counterinsurgency Fieldsman: xxvii

soldier and essential to ensuring U.S. objectives in Afghanistan. Although force protection is still important, the U.S. military has seemingly accepted the need for greater risk to its soldiers to secure political objectives in counter-insurgency warfare. Again armed forces are well organized and trained to fight conventional arm conflict as compared to this new form of conflict, where they are unequipped.¹⁹¹ Lastly, this new type of conflict is mostly fought between states and NSAGs.¹⁹² For example conflicts in places like Afghanistan, southern Lebanon, and the eastern Congo are fought between states and NSAGs. In line with the above point the author argues that although most of these new forms of war are fought between the state and NSAGs, this does not in any way prevent foreign states from supporting NSAGs as it all depends on the goal being pursued by the intervening power. Also, most often foreign states are more concerned about how to support this NSAGs. Hence, states often fight covertly through NSAGs in many contemporary wars.

In modern armed conflict, insurgents are organized differently and they also fight differently that is without wearing military uniforms or any visible sign to enface the distinction between foes and friends.¹⁹³ This is a strategy used by insurgents in a bid to stand a chance against highly trained militaries with advanced weapons, for instance, militant groups in Afghanistan, Iraq, Somalia, and Cameroon often melt into a crowd of civilians, relying on stealth, secrecy and staying power. As a result, the distinction between civilians and combatants will become very difficult in modern armed conflict. Hence establishing a new challenge for protecting civilians from violence because of the difficulty or inability to determine who is targetable and who is not.¹⁹⁴ In places like Afghanistan, it is almost impossible for state militaries to distinguish combatants from civilians by relying on formal membership mechanisms. Adapting to changes in how armed groups organize themselves, state militaries resort to a function-based approach for targeting militants, whereby combatants are identified through their DPH.

3.1.2 Combatants Disguising as Civilians

IHL has distinguished who and what can or cannot be targeted. Most at times, combatant acts deceitfully by impersonating as a civilian and utilizing civilian objects for military gain and

¹⁹¹ Rupert, Smith 2006. The utility of force: The art of war in the modern world.p. 280

¹⁹² Ibid at 126 p. 8

¹⁹³ Snow, Donald 1996. Uncivil wars:p.110

¹⁹⁴ Jensen, Talbot Eric 2008. The ICJ's Uganda Wall: A Barrier to the Principle of Distinction and an Entry Point for Lawfare. 35 International Law and Policy : p.243

attaining a military edge over their opponent. The issue here is the absence of boundaries between civilian areas and conflict areas, and between those directly participating in hostilities and those who are not, that in contemporary armed conflict poses a serious threat to the principle of distinction.¹⁹⁵ However, even the emblems of international organizations like the International Committee of the Red Cross and Crescent have been abused. In 2008 Colombia misuse the ICRC emblem.¹⁹⁶ Photographs of a Colombia military intelligence officer were seen using the ICRC emblem in a rescue mission in which the Leftist Guerrillas were tricked into handing over hostages.¹⁹⁷ Misuse of the red cross emblem is governed by article 37,38 and 85 of AP I to the 1949 GCs, the international rules of law. These articles prohibit the “feigning of protected status by the use of emblems” of neutral parties and establish that such misuses are a violation of IHL and qualify as a war crime. In line with this Mark Ellis, categories such as misuse of the emblem as a war crime under the GCs and IHL hence could endanger humanitarian workers in the future. Also, Colombia is a party to the 1949 GCs and AP I and II. The prohibition aimed to protect the neutrality of the ICRC and the United Nations (UN) during armed conflict and to guarantee their access to all sides. Use of those emblems by one side of a conflict, for example, could endanger aid workers because those on another side might no longer trust that symbols they see represent those humanitarian organizations.

3.1.3 Powerful and Weak Parties

The doctrine of distinction is a doctrinal matter that protects civilians as well as civilian objects. But the distinction does not, however, apply to the conflicting parties in the same way, since most armed conflict now our day are fought by states (powerful party) and NSAGs (the weak party) which is also a challenge in implement the rules of distinction.¹⁹⁸ As far as civilians themselves are concerned, the criteria of distinction are incontestable; meanwhile on the other hand as far as civilian objects are concerned, the requirements of distinction are challenged. Therefore, this concept of distinction is reliable and imprecise as well as vague and simple at the same time. The gap that exists within the concept is beneficial to powerful actors. The vagueness in the concept of distinction concerning dual-use objectives permits

¹⁹⁵ Blank, Laurie R 2012. Taking Distinction to the next level: Accountability for fighters failure to distinguish themselves from civilian., 46 Valparaiso University Law Review .P.774

¹⁹⁶ <https://casebook.icrc.org/case-study/colombia-misuse-emblem>

¹⁹⁷ <http://edition.cnn.com/2008/WORLD/americas/07/16/colombia.cross/index.html>

¹⁹⁸ A document prepared by ICRC in October 2007 on international humanitarian law and the challenges of contemporary armed conflicts.

wealthy and powerful states to attack the infrastructures of their opponent, hence using superior weapons that prevent putting their troops in the path of damage.¹⁹⁹ A prohibition on targeting civilians directly is little of a deterrent to these actors, who can destroy the fighting ability of their opponents.

For weak actors, the situation is quite different, particularly for those who cannot project force against civilian objects of their enemies.²⁰⁰ The consequence of the distinction for the weak party is that they are severely limited in their aiming decisions. Powerful states will pay contractors to fight their wars and motivate settlers to support their occupation but distinction keeps these civilians out of reach for insurgents.²⁰¹ Weak actors have virtually no legal targets remaining. The modern armies, however, will carry out lawful attacks NSAGs. The absence of resources or wealth prevents weak powers from using PMSC staff to help fight their wars.²⁰² However, they must engage in combat by themselves and become lawful targets under the law of armed conflict. Powerful states will follow the law of Distinction because it scarcely limits them at all; the combination of complexity and clarification of Distinction plays a role in the capabilities of powerful players.

It is unfair as well as unwise to create a legal standard that handicaps insurgents. The issue is societies under occupation are occupied by soldiers and also by PMSC who are considered civilians. Besides, obstructing NSANGs from attacking these people implies that the law protects power states; hence it embeds the status quo. Also that if the international community wishes to choose to recognize that some insurgents are legitimate and has done so in the past it must also be willing to provide the tools they need to achieve their goal.²⁰³ If changes are not made NSAGs will continue to reject the IHL since they are not also ready to accept defeat and the consequence is warfare without rules and limitations.²⁰⁴ The principle of distinction can be seen as unfair and unwise. Michael Schmitt argues that IHL was established to save lives and not for creating a soft ground for conflicting parties. He went to say that those who have humanitarian commitments will not be will to sacrifice the protection given to civilians during

¹⁹⁹Sweney, Gabriel 2005. Saving Lives: The Principle of Distinction and the Realities of Modern War. *International Lawyer*, volume 39, no. 3 .39:733-758.

²⁰⁰ Ibid. pp.735

²⁰¹ Ibid .pp. 740

²⁰² Schmitt, Michael N 1999. The Principle of discrimination in 21st century warfare, 2 *Yale human rights and development law journal*. 143.p .171.

²⁰³ Like the anti-apartheid struggle in South Africa and the American Revolution

²⁰⁴ Kahn, Paul W 1993. Lessons for International Law from the Gulf War, 45 *ST sx. L. Rov.* 425,p. 437,

armed conflict just to make conflict equitable for both sides.²⁰⁵ He continues by arguing that fairness and equality is no reasonable ground to change a law rather it will put IHL in a position where it can be seen as a law which was design fair fight rather than protects civilians from the consequences of hostilities which could be risky from a humanitarian point of view.²⁰⁶

The author argues there is no chance to say that the principle of distinction protects civilians from attacks. For instance insurgences in Yamen, Iraq, Israel-Palestine all engage in targeting civilians without respect for internal law. Also major power has targeted civilian objects too and justify it with the same hypocritical reason that they are dual used objects. In the end, some form of change needs to be made to address the situation.

3.1.4 The problem with Dual Used Objects

Although the principle of distinction forbids targeting of civilians and civilian objects, it does not clearly define what that prohibition means in practice. The most common criticism of the principle of distinction stems from its inability to clearly define the use of double used objects.²⁰⁷ Civilian objects have been used in recent times to boost military strength in a good number of ways, and IHL has stepped in intending to limit the reach of distinction's protection but the result has been more confusion and what appears to be a simple and straightforward rule has now become ambiguous. The fact is as per distinction only military objects are subject to attack.²⁰⁸ Still, in numerous cases, possible targets serve a dual purpose in the sense that they are used for both civilian and military purposes and a good example of such objects will include power plants, bridges, communication facilities, and a house. From a real-world perspective, the strict distinction between civilian and military objects conceived by the principle of distinction does not exist.²⁰⁹ Therefore, the application of distinction lies in the interpretation of the user or what interpretation of the principle one holds. This makes the principle weak and erodes the basic norm of distinction that civilians should be protected. Again, the principle of distinction might be completely wiped out because of the double use

²⁰⁵ Schmitt, Michael N 1999. The Principle of discrimination in 21st century warfare, 2 Yale human rights and development law journal. 143.p .171.

²⁰⁶ Ibid. p.167

²⁰⁷Schmitt, Michael N 1999. The Principle of discrimination in 21st century warfare, 2 Yale human rights and development law journal. 143.p .148.

²⁰⁸ Article 48 Additional Protocol I

²⁰⁹ Schmitt, Michael N 1999. The Principle of discrimination in 21st century warfare, 2 Yale human rights and development law journal. 143.p .148.

exception if care is not taken. Also, an extensive amount of civilian product, supply, communication, and logistical facilities is relied upon by modern militaries. If distinction permits attack to be direct toward any person, who collaborates with the enemy or contribute in boosting their strength, then the limitation it provides on targeting will be narrow.

The ICRC interpretation of distinction is stricter.²¹⁰ According to its commentary on AP I, the ICRC states that attacks can only be permitted against objects used for direct participation in conflict by the armed force for example weapons and equipment, some locations remain special during an armed conflict such as bridges, and objects aimed at using for military purposes.²¹¹ Based on the ICRC commentary most double used objects is off-limits. Still, a distinction has its problem when read. As most of the adversary's military complex is shielded from attack, hence it will extend an otherwise ending war. However, for the sake of securing the protection of distinction, it will encourage the mingling of civilian and military objects. Also, it will establish a ground for the use of a human shield, hence interpreting distinction in a strict fashion could cause more harm than good. The issue is different countries have different interpretations and not any one of these definitions used by these countries is problem-free.²¹² Furthermore, the absence of a clear definition between civilian and military objectives hampers the application of IHL and makes it very difficult to enforce. For example, the prosecutors at the International Criminal Tribunal for former Yugoslavia were thwarting at the uncertainty of the principle of distinction when they wanted to bring a case against NATO forces. However, the ad hoc committee explained that "when the definition of military objective is applied to dual-use objects which have some civilian uses and some actual or potential military use such as communications systems, transportation systems, petrochemical complexes, manufacturing plants of some types, opinions may differ."²¹³ Because the nature of the law is ambiguous, the committee decided that the "selection of certain objectives as targets may create room for a legal controversy in future "The committee eventually decided that continuing prosecution against NATO forces will be unwise for two reasons: Firstly further

²¹⁰ ICRC, Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 .p .636.

²¹¹ Additional Protocol I, *ibid* art. 48.

²¹² Wallis, Catherine 2004. Legitimate Targets of Attack: Considerations when Targeting in a Coalition, in *The Army Lawyer* 44: 49-50

²¹³ Sweney, Gabriel 2005. Saving Lives: The Principle of Distinction and the Realities of Modern War, 39 *Int'l Law*. 733

investigation will likely provide insufficient evidence and secondly, the law is not clearly defined.²¹⁴ One can conclude by saying the principle of distinction is too vague to enforce.

3.1.5 Political Will

The idea here is states support the principle of distinction but they lack the political will to rectify the treaties and conventions governing the principle.²¹⁵ For example, United States is a strong proponent of the principle of distinction but America as well as other countries like Israel, Turkey, and Iran, Pakistan is not a party to AP I. The principle of distinction is codified and provided for in the Additional Protocols of the 1949 Geneva Conventions.²¹⁶ This now raises the question of how you support a concept but refuse to endorse that same concept.

United States believes that article 43 and 44 of AP I has changed a good number of criteria found in article 4(2) of the 1949 GC III Which is related to the entitlement of the prisoner of war status to persons who are combatants but not members of the state armed force rather they are members of the militia and volunteer corps, comprising of organized resistance and liberation movements, belonging to a party to the conflict.²¹⁷ According to the Geneva Convention III in article 4A (2) combatant can only qualify for the prisoners of war status when they fulfill the conditions mentioned in this article: (a) that of being commanded by a person responsible for his subordinates; (b) that of having a fixed distinctive sign recognizable at a distance; (c) that of carrying arms openly; (d) that of conducting their operations following the laws and customs of war.²¹⁸

United States observed that article 44 of AP I approved that the prisoners of war status should be given to combatant defined in article 43 of the same convention even without the fulfillment of the expected criteria listed in Article 4A(2) which says that as long as they were able to carry their arms openly during the following situations; firstly during every military engagement, secondly when he or she is recognizable from a distance by his adversary in the

²¹⁴ Wallis, Catherine 2004. Legitimate Targets of Attack: Considerations when Targeting in a Coalition, in *The Army Lawyer* 44: 83

²¹⁵ Mack, Michelle, and Pejic, Jelena 2008. Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts: ICRC.P.12.

²¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977. International Committee of the Red Cross. Federal Department of Foreign Affairs of Switzerland

https://www.eda.admin.ch/dam/eda/fr/documents/aussenpolitik/voelkerrecht/geneve/1977-prot-1-art90_f.pdf

²¹⁷ Begley, Tracey on ICRC blog on, is it time to ratify additional protocol 1 on July 6 2015

²¹⁸ Article 4A (2) of the 1949 Geneva Convention III

course of carrying out a military deployment before the launching of an attack in which he is to take part. Again, United States noted that in any, under AP I, all combatants are expected to distinguish themselves from the civilian population while they engage in an attack or military operation preparatory to an attack, by nothing that article 44(3), permitting this distinction to be done through by carrying arms openly, was an exception, and was limited to situations where “owing to the nature of the hostilities” the armed combatant could not so distinguish himself.

The United States disagreed with the privilege in article 44 given to combatants who did not distinguish themselves with a fixed distinctive sign and who were seemingly not required to conduct their operations per the laws of armed conflict, but who would still be entitled to retain their combatant status and its entitlement.²¹⁹ Furthermore, United States articulated that it was unfair for such an extension to be made as it blurred the concept of distinction from the civilian population, and it warned that this relaxing of the AP I definitions would jeopardize civilians' safety among whom terrorists and other irregulars attempt to conceal themselves. The issue here is the United States does not have the will to ratify the treaty because of all the disadvantages of discrepancies it believes this treaty has and cannot be forced to do so. This lack of political will jeopardize the principle as well as blur the line of distinction since enforcement cannot be made against states who are not members.

It can be argued it does not make any sense to ratify a treaty you don't intend to commit to. United States is right to not ratify AP I because it is self-contradictory in the sense that it was created to protect victims of armed conflict and how then does it do that when it grant combatant status and its entitlement of the prisoner of war status along with combatant immunity to an insurgent's fighter who hide among civilians when preparing for and carry out attacks, hence putting these civilians lives in danger and blurring the same line of distinction it was created to protect.

²¹⁹ A message from the president of the United States concerning 1977 additional protocols I to the Geneva Conventions of August 12, 1949, concerning the protection of victims of non-international armed conflict on 29 January 1987.

3.1.6 The Ever, Increasing Number of Civilians on the Battlefield.

Under IHL civilians are persons who are not considered as combatants as mentioned under article 4(a) of the 1949 GC III.²²⁰ During the twentieth centuries distinction between civilians and combatants was not very noticeable. The battlefields were not in defined geographical areas anymore. The evolution of weaponry and air power witnessed the conflicts turn into space battles.²²¹ This resulted in too many civilians getting involved in conflicts firstly as victims of the evolution of new weapons and secondly as participants.²²² However IHL on the one hand tries to create a balance between humanity and military necessity.²²³ The issue here is IHL is aimed at limiting the amount of harm caused to civilians and civilian objects while on the other hand civilians who are prohibited from taking part in hostilities and are protected by law have become participants in modern conflict. Again, the increasing number of civilians in the battlefield destabilizes military operations particularly in situations where drawing the line between those participating and those who are not is hazy.

Also, in densely populated areas like towns, cities, and urban centers, it is very complex for a distinction to be practiced because combatants intermingle with civilians and civilian objects. Most often measures have been taken to curb civilian damage and suffering but still, civilians are affected. For instance, in the Palestine-Israeli conflict, the Israeli defense force has sometimes used phone calls, leaflets, and a technique known as ‘the knock on the roof’ to warn civilians about future attacks in the area to minimize the harm.²²⁴

Again, in modern armed conflict most of the conflicts are conducted in densely populated areas, hence drawing the line between indispensable civilian objects and military objects is becoming impossible. According to article 52(3) in the case of doubt as to whether an object is civilian or military, such objects include the place of worship, residential homes, schools and hospital which gives the military advantage to a party during the conflict, it shall be presumed to be a civilian object. Civilian objects are protected and only lose their protection

²²⁰ Article 4(a) of the 1949 GC III

²²¹ Garraway, Charles 2011. The Changing Character of the Participants in War: Civilianization of War fighting and the Concept of Direct Participation in Hostilities, 87 International Law Studies US Naval War Colum. 177 :179

²²² Ibid at 143:177-186

²²³ Schmitt, Michael N 2012. Essays on Law and War at the Fault Lines, T.M.C. Asser Press, Springer:97

²²⁴ Erlanger, Steven, and Akram, Fares 2014. Israel Warns Gaza Targets by Phone and Leaflet’ in the New York Times and Human Rights Watch 2009. Israel: Ensure Improved ‘Attack Warnings’ to Civilians Are Effective

as of the time they are used for military purposes.²²⁵ For example, a hospital used by insurgents as hideout will lose its protection and become a military target because it provides the military advantage to the insurgents. Although such destruction is in contrast with IHL which aims at limiting the harm caused to those not participating or no longer taking part in hostilities. Hence caution is required when launching attacks toward such kind of objects.

Again, battlefields have shifted to urban areas and populated cities which have also caused the increasing number of civilians in battlefields. The number of civilians contributing to the war efforts has also increased tremendously. Civilians working in these entities are at great risk and may eventually become lawful military targets or collateral damage base on the role they are involved with. For example during World War II the bombing of civilians and industrial targeting was justified as military targets.²²⁶ The notion that civilians should be protected was conceived in the Lieber Code which says that civilians were unarmed and harmless, were no longer valid in the face of conflict.

After the WWI and II, civilian casualties were still very high despite the measures put in place to protect civilians, the states responded by adopting additional protocol I in 1977, to provide a stricter approach to civilian protection as seen in the provision of article 50 of this protocol. These provisions protected all civilians, even though they were harmful or not. For example, those who did not fall into the traditional conception of civilians were also accorded this privileged and they enjoyed immunity from attack.

However, with the introduction of API especially its article 50, civilians regularly play significant roles in military operations and have devised a good number of ways to cause damage to the enemy. The value of civilians in the military has evolved greatly to the extent that doubts and questions have popped up as to whether the criteria for direct participation under article 51(3) of API is still capable of striking the balance between conflicting concepts like military necessity and humanity.²²⁷ Also, technological development especially in the sector of weapons production, the asymmetric trend of modern armed conflict and the continuous growth and increase of private military and security companies who outsource civilians to states, international organization, non-governmental organization to carry out military

²²⁵ Article 52(3) AP I

²²⁷ Ibid at 149.p 881

functions on their behalf have increased the number of civilians in the battlefield and make them potential targets to their enemies and vice versa.²²⁸ This makes it hard to differentiate between ordinary crimes committed and direct participation in hostilities. This gets more complex during the armed conflict because it's almost impossible to distinguish a civilian from a combatant there for jeopardizing the concept of distinction.²²⁹

The military continuous use of civilians in modern armed conflict has also increased the number of civilians on the battlefield hence jeopardizing the practical applicability of distinction. In modern armed conflicts civilian activities are more of a militarized fashion while military activities are more of civilian nature, making it difficult to discern who or what constitutes a lawful military objective.

To minimize cost the military of power state, most often makes use of a wide range of civilian facilities that are sharing of office space, Pursuing partnerships with commercial space entities and consortiums.²³⁰ Also the high level of inequality between the conflicting parties, and the asymmetry between the forces has created room for the weaker party to resort perfidious acts and conduct during the armed conflict which has led to the involvement of civilians.²³¹ For instance using a human shield to protect a military object or using a civilian object for military purpose or placing military objects in densely civilian-populated areas.²³² The continuous reliance by the military or non-state armed groups on the civilian or civilian population for one reason or the other blurs the line of distinction between civilians and combatants. The contracting of civilians by the military to carry out activities that were traditionally meant for members of the armed force has also increased the number of civilians on the battlefield. This issue is best explained with the use of examples; Countries like America have in the past contracted civilians to do jobs like aircraft maintenance, security, transportation of troops and supplies, and housings.²³³

²²⁸ Ibid at 149 .p .854

²²⁹ Singer, Peter W 2001-2002. Corporate Warriors: The Rise of the Privatized Military Industry and Its Ramifications for International Security, International Security, Volume. 26, The MIT Press, No. 3. pp. 186-220

²³⁰ Schmitt, Michael , N 2012. Essays on Law and War at the Fault Lines, T.M.C. Asser Press, Springer.p.149

²³¹ Ibid at 149.p.880

²³² Schmitt, Michael N 2005. War, Technology, and International Humanitarian Law, Program on Humanitarian Policy and Conflict Research, Harvard University, Occasional Paper Series, No. 4. pp. 35-41

²³³ Schmitt, Michael N 2012. Essays on Law and War at the Fault Lines, T.M.C. Asser Press, Springer:P.148

3.2. Legal Problems Faced by the Principle of Distinction

3..2.1 The Use of the Human Shield

The predominance of asymmetrical and urban conflicts in the contemporary world has intensified fighting among the civilian population. Also, the use of human shields in modern armed conflict has equally experienced an increase. The human shield could either be voluntary or involuntary. This particular strategy includes the placing of civilians and other protected persons closer to a lawful target or the placing of legitimate military targets amid civilians and other protected persons to avert attacks.²³⁴

Although the use of human shields is prohibited in IHL, the aim of using it is to gain a military edge by taking advantage of the status of civilians and protected persons. Also using prisoners of war as a shield to avert attack or placing military objects inside facilities like schools, hospitals occupied by protected persons, civilians and persons hors de combat is based on achieving the same aim and results. A classic example of the use of human shields can be seen during the Iraq war in 2003 when Iraqi kept air defense missile systems in and around civilian areas during the Iraq war.²³⁵ Also, the human shield was reported to have been used in Afghanistan,²³⁶ Syria,²³⁷ Iraq. Also, recently during armed conflicts parties to the conflict have taken upon themselves to place military assets in schools²³⁸ and hospital facilities.²³⁹

The parties to the conflict are put in the position of confusion when the human shield is used because attacking as well as not attacking the military objective has negative impacts. In the sense that an attack directed against a lawful target shielded by a protected person is subject to collateral damage. Although this can be justified as an anticipated concrete and direct military advantage, which is legal concerning the principle of proportionality under IHL. At the same time, the level of civilian casualties may weaken the attacker's popularity among the

²³⁴ Schopenhauer, Daniel P 2004. Targeting Decisions Regarding Human Shields, Military Review, P.26.

²³⁵ Kittie,F 2003. Senior Défense Official, U.S. Department of Défense, Briefing on Human Shields in Iraq.P. 19.

²³⁶ David, Eric 2002. Principe's de Droit des conflicts armés, Brussels: Bruylant: P.267

²³⁷ Pyne-Jones, Louise 2018. ISIS using women and children as human shields in final Syria battles.

²³⁸ 2015 Global Coalition to Protect Education from Attack, "Lessons in War: Military Use of Schools and Universities during Armed Conflict, For an updated map, see: <http://www.protectingeducation.org/restricting-militaryuse-and-occupation>

²³⁹ Gordon , Neve and Perugini, Nicola 2016. Military Attacks on Hospitals Shields: The Law Itself is Partly to Blame Just Security,

population especially where the combat occurred, domestic constituencies as well as in the international community at large. Also, it of great importance to understand that failure to justify the collateral damage as an anticipated concrete and direct military advantage, qualifies the attack as a breach and violation of IHL perpetrated by the attacker.

Furthermore, discontinuing the launching of an attack may require some additional effort to engage the target in a fight as well as expose the troops to more danger. However, the moderation of military action resulting from the use of human shields could obstruct the troops from attaining their military objectives. Apart from preventing the troops from achieving their objective, the human shield endangers the lives of civilians and puts them at great risk. Although there are cases where civilians voluntarily act as a human shield to military objectives, most often they are under duress to do so or they don't even know that they are being used for such a purpose as well as them having the idea that military assets have been placed in their vicinity.

In Fact, in case of an attack, it is no doubt that the success of the human shield truly tallies with the human cost. Certainly, the higher the probabilities of civilian death or injury, the greater credibility the human shield can avert an attack. Also, in a similar fashion the greater the loss incurred by civilians in case of an attack, the more effectively can the attacker be held accountable for acting unprincipled and behaving unlawfully during hostilities. Finally, even in situations where the collateral damage is low, those used to serve as human shield still bear the consequence of an attack notwithstanding their status as protected persons.

The problem here is human shield blurs the line of distinction and creates confusion in the mind of the opponent who is unable to discern who to target or not to target. Also, it breaches the most basic standards of human dignity and morality. Under international humanitarian law, the use of human shields amounts to a war crime. This is an enemy that ruthlessly exploits civilians to serve its ends and has not even the faintest qualm about deliberately placing them in danger."²⁴⁰

²⁴⁰ 2017 Office of the UN High Commissioner for Human Rights, Mosul: Protection of civilians paramount as ISIL intensifies the use of human shields.

3.2.2 Increasing the use of private military and security companies.

Most often applying the principle of distinction is not always very difficult especially concerning civilians, although the same cannot be said about civilian objects, the principle is precise: civilians are immune from attack except as of or such time they directly participate in hostilities. Although the principle is clearly stated, still it does not guarantee rationality. However, based on a personal choice some civilians have decided to be crucial actors in armed conflict. The use of private military and security companies (PMSCs) by states, international organizations and non-governmental organization for the performance of a wide range of task normally performed by soldiers in areas like intelligence gathering, protection of persons, security, logistic, transport, and objects has increased tremendously in the current world was contemporary armed conflict always changing.²⁴¹ Most often civilians are used by occupying powers to consolidate their control over land. Even when contractors and settlers are unarmed, still they are significant to the prosecution of wars as soldiers and this is enough reason them not to enjoy the same privileges as other civilians.

The contracting states, territorial states, home states, all other states, PMSCs and their personnel have international legal responsibilities which have been restated in a document²⁴² recognized by almost all the states concerned. IHL is binding on contracting states even if they cancel some activities relating to PMSCs. Most often the conduct of PMSCs has attributed to the contracting state following the general rules on state responsibility or the state has a legal responsibility in this respect which must ensure that the PMSs, contract act must be in line with IHL. Beyond the few cases of activities, IHL rules specifically assign to State agents,²⁴³ The author argues that it is forbidden under IHL for states to outsource persons who are non-combatants to participate in hostilities. Under IHL the PMSCs staffs do not qualify under the restrictive definition of mercenaries.²⁴⁴ However, they are not de jure or de facto integrated into the armed forces of a party and therefore, are not recognized as combatants but civilians. Their conduct concerning armed conflict is governed by the norms of IHL, which criminalizes certain types of conduct. The main problem is PMSCs' staffs always benefit from de facto or de jure immunity in countries where they work and criminal

²⁴¹ Hoffman, Peter J 2014. Private military and security companies in Weiss, Thomas G .International organisations and global governance:Routledge.pp. 389-390

²⁴² Montreux Document on pertinent international legal obligations and good practices of states related to operations of private military and security companies during armed conflict Montreux document on private military and security companies.

²⁴³ Article 39 GC III on who may exercise the power of a responsible officer of the POW camp

²⁴⁴ Article 47 API

jurisdiction over them is not well regulated in third countries as compared to members of the regular armed force and usually, their law enforcement systems lack enough support.

From a legal perspective, PMSC staffs are civilians and are not permitted by law to participate in hostilities. For this reason, PMSC and major contracting states usually emphasize the point that the main function of the PMSCs is to defend nothing further. In the course of carrying out their function, they may get directly involved in hostilities, which is kind of accepted if they are station to defend combatants and military objectives against the opponent.²⁴⁵ Meanwhile, it has been accepted that defending a military target against common criminals or defending civilians and civilian objects against illegitimate attacks do not involve direct participation in hostilities. However, in the case of PMSC, the situation becomes complex when PMSC staff are assigned to guard persons, transports, or objects.²⁴⁶ If the person, transports, or objects are not immune from attack under IHL, protecting or guarding them against attack qualifies as directly participating in hostilities and is not self-defense of others under criminal law. It can be argued that situations like this often occur when the attacker is a member of the conflicting parties and has lost or does not enjoy the combatant status, the illegal status of the attacker does not establish a right to self-defense. For instance, if the person or object that was attacked is a civilian or civilian object, in some countries under their domestic law the use of force can be justified as self-defense under the criminal law even against a combatant.²⁴⁷ This analysis is very much complex because self-defense and the defense of others do not meet the criteria for self-defense under international law which creates doubts about whether self-defense under criminal law defence which prevents conviction can serve ex-ante as a legal basis for business activity as a whole. However, on serious note self-defence can only be used against the attack and not against arrest or confiscation of properties.

The author argues that if self-defense has to be used as an exception when classifying certain conduct as direct participation in hostilities, it must be done narrowly. Again most PMSC staff guarding an object they don't know or are unable to detect whether that object is a military objective, which implies that self-defense cannot be used as a defense because the attack is illegitimate and if the attackers are not members of a party which excludes resistance

²⁴⁵ Chiara Gillard, Emmanuella 2006. Private military and security companies and international humanitarian law: international law review of the red cross 88, no.863:pp 525-572

²⁴⁶ Ibid p.555

²⁴⁷ Ibid p.560

against such attackers as direct participation in hostilities, though the object attacked constitutes a military objective. From a realistic point of view is difficult for an adversary to distinguish between combatants, PMSC staff who directly participate in hostilities, in the sense that during the conflict which category of persons they are allowed to attack and who may attack them and on the other hand PMSC staff who do not take part in hostilities are considered as an unlawful target for the attack to the enemy and are not also allowed to attack the enemy. To establish a clear distinction between civilians and combatants as well as guarantee protection for PMSC staff and ensure they continue to enjoy protection as civilians, therefore it will be unwise to put them in ambiguous circumstances.

3.2.3 Issues with the definition of a Combatants

The problem of definition is not only noticeable by legal experts but by states also. The term combatant has been widely defined by different sources of law and some commentators have claimed that the gap which exists within this definition gives room for a third category of person who is either a civilian or a combatant to evolve. In the modern armed conflict, the definition issues have gained a lot of traction.²⁴⁸ The various conventions and laws governing armed conflicts such as the Geneva Convention, AP I, and international humanitarian law provide different definitions of the term combatant. In association with the concept of interpretation "lex posterior derogat priori" and "Lex specialis derogat generali" API should reflect the latest and most sufficient definition. The customary aspect of the definition found in API was absent at the time of drafting. This was like an obstacle to some states who took a lot of time before ratifying the protocol simply because they felt API did not reflect customary law concerning combatants.

Also, countries like Israel, Iraq, Turkey, and the US have completely denied ratifying it or adhering to its rules of a combatant.²⁴⁹ That notwithstanding a study on customary international law has recommended that API is a summary of the current laws on combatants which says that combatants must differentiate themselves from civilians when they engage in

²⁴⁸ Quenivet, Noelle 2010. The War on Terror and the Principle of Distinction in International Humanitarian Law, ACDI, Anuario Colombiano de Derecho Internacional, Colombian Yearbook of International Law 3, no. Special Issue . pp.155-186

²⁴⁹ Maxwell, M. D. and Meyer, R. V 2007. The principle of distinction: probing the limits of its customariness. Army Law. 1.p .3.

combat or before carrying out an operation.²⁵⁰ Another aspect that poses complexity to the issue of competency is that it can be viewed from two different perspectives. The first usage is associated with The Hague law on the conduct of an individual's right to participate in armed conflict.²⁵¹ A similar position is adopted in API. The second usage is dated in the Geneva law relating to the status and protection of an individual who was fighting in the conflict.²⁵² The US is in support of the Hague law. Similar since the approach adopted in API is the same as the Hague law, therefore one expects the United States to support or uphold the same standard in API. Though the United States does not support the interpretation of the definition of combatant adopted in API by its drafters, hence it has regularly disputed the interpretation as such. Four criteria are expected to be fulfilled by an individual to qualify as a combatant under the provisions of the Hague Law while article 43(2) of API adopts a more relaxed definition of what constitutes a combatant. This is absolutely a serious problem in the sense that the definition of civilian and military objectives is significant to the principle of distinction.²⁵³ This implies that how certain individuals are perceived and categorized is based upon the source of law which was used. For example, civilians offering food and shelter to combatants,²⁵⁴ are at risk of losing their protection on grounds that they are involved in the conflict or support a party to the conflict. Hence some individuals may fall prey to this legal indeterminacy principle.²⁵⁵

The problem is very serious because it will preclude IHL from performing its primary aim, which is the protection of those who do not participate in hostilities, except it is comparatively clear who falls within which category of protected persons and who does what?²⁵⁶ Paradoxically with the developing customary nature of relevant provisions embedded in API, This looks like some states like America still refuse to apply it. Therefore it is possible to understand considering them as relevant objectors to an emerging customary rule

²⁵⁰ Henckaerts, Jean-Marie, and Doswald-Beck, Louise 2005. Customary International Law . Volume. 1, The Rules . Cambridge: Cambridge University Press, part 1. P.217

²⁵¹ Acquiring the status of combatant means that one is immune from prosecution under criminal law for having taken part in the hostilities

²⁵² Once captured, combatants have to the right to prisoner of war status which entitles them to a series of rights according to GC III.

²⁵³ Dorman 2005. Proportionality and distinction in the International Criminal Tribunal for the Former Yugoslavia. International Law 83 .p. 84.

²⁵⁴ 1999. Parties to conflicts interviewed in the framework of the ICRC People on War Report asserted that report by Greenberg Research, Inc., Geneva, International Committee of the Red Cross,

²⁵⁵ 2004. The Legal Case against the Global War on Terror, 36 Case W Res. International law. 349 .p. 351.

²⁵⁶ Akande , Dapo. 2010. Clearing the Fog of War? The ICRC's Interpretive Guidance on Direct Participation in Hostilities. 59 the blog of the European journal of international law, 180.p. 184.

associated with the definition of the combatant.²⁵⁷The US has repeatedly and strongly opposed the provision before it materialized into law according to the ICRC study.²⁵⁸It is practicable to assert that the definition of competency offered by API does not apply to the US. Although opposing a rule does not stop that rule from gaining a customary status.²⁵⁹Hence the definition of combatant under API may have reached that status despite the strong opposition made. Again, from the discussion, it is clear that the US has never supported the overruling of the distinction between combatants and civilians. It's not just in support of the definition of combatant under API, not the principle as a whole. In contrast, it has always supported the principle.

3.3.1 Analysis of the Achievability of the Principle of Distinction in modern Armed Conflict

Presently armed conflict is witnessing a lot of changes starting from the actors to the forms, patterns, and weapons used in fighting. These changes have brought a lot of challenges both practically and legally as examine in chapter III above to IHL and its core principles especially the principle of distinction which is aimed at protecting civilians and civilian population during armed conflict as well as to regulate the means and method used in fighting armed conflict. From observation it is possible to say that the dynamicity of contemporary armed conflict and the challenges posed by it has shaken the principle of distinction and made it seemed outdated and label as bad law because it has failed to archived the purpose it was established for. Nonetheless this does not mean that the principle should be discarded rather it should be reformed to overcome these changes and challenges posed by modern armed conflict. This chapter will argue that the principle of distinction is not achievable in modern armed conflict, and it should be reformed instead to suit the dynamicity of modern armed conflict.

Firstly, the principle of distinction was designed with large scale inter-state armed conflicts in

²⁵⁷ Stem Ted L1985 .The approach of the different drummers: the principle of the persistent objector in International Law. 26 Harvard university press.p 457.

²⁵⁸ Crawford, Emily 2007.Unequal before the Law: the case for the elimination of the distinction between international and non-international armed conflicts., 441.p .457.

²⁵⁹ Paust, Jordan J 1995. The complex nature, sources, and evidence of customary human rights. , 25 Ga. J Intl and Comp. L.p. 147.

mind, fought in isolated battlefields far from civilians and the civilian population. Today most armed conflicts are intrastate and are fought in urban cities. For example, conflict in Afghanistan, Israel-Palestine conflict, Yemen, Iraq, and the Mexico drug war. The principle of distinction cannot be achieved in modern armed conflict because it was designed for interstate not intrastate conflict. Also, it was designed when conflicts were fought in faraway isolated areas fought by conventional militaries who could easily distinguish themselves from other combatants and civilians, by wearing uniforms and bearing visible signs recognizable from a distance.²⁶⁰ Meanwhile, conflicts today are intrastate, mostly fought by the states and fractions of non-state armed groups or by many states against two or more non-state armed groups. These conflicts are mostly fought in urban cities and by insurgents who make little or no effort to distinguish themselves from civilians either by wearing a uniform, bearing a visible sign, or carrying their arms openly. Instead, when insurgents fight with conventional militaries they prefer to use the strategy of engaging in a fight and during combat, they rush to the midst of civilians or civilian population, making it difficult for their opponent to be able to distinguish between lawful and unlawful target, therefore, blurring the line of distinction and standing as an obstacle to its achievability of the principle.

Secondly, the growing number of civilians in battlefield has blurred the line of distinction, therefore reducing its applicability in modern armed conflict. Today most civilians take part in hostilities either directly or indirectly, voluntarily or involuntarily. Civilians have always taken part in providing a wide range of activities to combatants during an armed conflict such as supplying food, providing medical and religious function, combatant functions, logistics, communication, and intelligence.²⁶¹ Some of the support provided by civilians to combatants gives them a military edge over their opponent. All these functions performed by civilians during armed conflict get them involved in the conflict either directly or indirectly and it puts them on the frontline of danger or risk while confusing combatants who are unable to discern who to attack and who not to attack.

Again, the achievability of distinction is not possible, when conflicting parties have started using strategies like a human shield to gain a military edge over their opponent. A human

²⁶⁰ Crawford, Emily 2007. *Unequal before the Law: the case for the elimination of the distinction between international and non-international armed conflicts.*, 441.p .457.

²⁶¹ *Ibid* .pp. 460

shield is either voluntary or involuntary. when used during the armed conflict it provides military edge to the user while creating a disadvantage to the opponent as well as put the opponent in a state of a dilemma because he is unable to discern who or what is a civilian or military target, a lawful or unlawful target. Base on this he is left at the mercy of his enemy whom he is unaware of and can strike at any time. Both states and non-international armed groups use a human shield, and most often their victims include women, children, and men of that state or foreigners who are in government positions, humanitarian workers, and other protected persons. For example, in 1997 Saddam Husayn encouraged hundreds of Iraqi families to act as voluntary human shields at palaces and strategic facilities in Iraq, when a crisis erupted as a result of Iraq's refusal to allow united nations (UN) inspections of sensitive government sites. He also kidnapped and used foreigners whose government had joined the coalition fight against Iraq in the 1990 Iraq's occupation of Kuwait as a human shield.²⁶²This has blurred the line of distinction. However, civilian objects also act as human shields. For instance, in 2002 during the America-Iraqi war, Saddam authorized the placement of high-value military units and equipment in heavily populated civilian neighborhood's and near civilian facilities such as mosques, markets, schools, and cultural sites to conceal these military assets but also to deter as well as capitalize on the attack of these places by coalition forces as a likelihood of collateral civilian casualties.

Thirdly using indiscriminate weapons during an armed conflict such as anti-personnel landmines, balloon-borne bombs, biological weapons, chemical weapons and cluster munitions²⁶³ have greatly impacted the achievement of the principle of distinction and further blurred the lines of distinction. This is so because these weapons cannot be directed at a particular target and are incapable of distinguishing between civilians and combatants. Also, IHL is unable to limit the effect of such weapons. This point is best explained with the use of an example. Since the Saudi-led coalition started in Yamen it has used cluster munitions at least three times, the most recent was in 2017 where it led to the death of two civilians and leaving ten injured according to human right watch.²⁶⁴However drones and autonomous weapons are used in modern armed conflict. These weapons are incapable of distinguishing between a civilian and a combatant, as well as who can be targeted and who cannot.

²⁶² 2003, Putting Non-combatants at Risk Saddam's Use of Human Shields
https://fas.org/irp/cia/product/iraq_human_shields/index.html

²⁶³ <http://www.weaponslaw.org/glossary/indiscriminate-weapon>

²⁶⁴ <https://www.hrw.org/news/2017/03/17/yemen-cluster-munitions-wound-children>

In the past the main aim of fighting armed conflicts was for, occupation that is powerful states wanted to occupy or take over the weak state and the objectives of this conflict were victory at the end. Instead, most armed conflicts recently fought or ongoing like the ones examined in chapter two of this thesis was fought for political, economic, socio-cultural, and religious reason and their end objective is not victory. This has prevented the achievement of distinction as illustrated in some examples; for more than twenty years the government of Sri Lanka fought a civil war with the insurgent separationist group. The conflict is based on ethnic reasons with the Tamil minority population in the north trying to separate from the Sinhalese majority.²⁶⁵ Also the Yemen conflict between the Saudi-led coalition and Houthis is fought based on political reasons.

Again, political will is one of the issues that hinder the achievability of the principle of distinction. Some states like have not rectified the various conventions and their additional protocols linked with distinction. Although the principle of distinction is recognized as a customary rule, a good number of states have not rectified it which implies that although these states recognized the principle the fact remained that they have not rectified, which makes it non-binding on them. However, this has paved the way for strong and powerful states to interpret and apply the laws guiding this principle in a manner that suits and favor them. The absence of a general definition of what constitutes a civilian and a combatant under non-international armed conflict greatly hinders the achievability of the principle of distinction, given that most modern armed conflict bears the nature of non- international armed conflict. There is no general definition of both terms which has paved the way for states to come up with different definitions of what constitutes these terms as well as provide different interpretations of their various definitions, therefore, creating inconsistency both in law and in practice.

The line of distinction continues to be a blur as it starts to use the eye for an eye approach. for instance during an armed conflict like the Israeli Palestinian conflict, most of the violent erupt base on grounds that the other party to the conflict had the lunched an attack against citizens of the other states resulting to death and in retaliation, the other party strikes back ignoring the

²⁶⁵ <https://www.aljazeera.com/focus/2008/11/2008112019115851343.html>

principle of distinction²⁶⁶ which goes a long way to threaten the existence of the principle and call for reform. Previously during an armed conflict, only combatant and military objects were to be targeted, that is not the case today. Recent conflict portrays that civilians are the main target especially for an insurgent fighter who is willing to recognize distinction because of ethnic cleansing, for example, Iraqi conflict. Also, sometimes insurgents perceive civilians as a security threat or a threat to their aims an objective so attacking and killing that person is all they desire for example in the Yamen conflict. Also, the modern conflict has demonstrated a lot of changes as insurgents now kidnapped civilian's especially humanitarian workers, of which they will be killed by their captor.²⁶⁷

The imbalance between powerful and weak state has prevented the principle of distinction from achieving its goals. Actually the principle of distinction was written by and for powerful states. In reality distinction was written in favor of powerful states. For example in modern conflict powerful states bend and violate the rules of distinction to suit their different needs while insurgents ignore it.

Furthermore, the lack of a middle category of statute between a civilian and a combatant has also influenced the achievability of the principle. This point can be best explained with illustrations. For instance, the first category of persons is those people who continuously perform a combatant function and the second category of persons are those who spontaneously participate in hostilities. These two groups of persons are civilians but take up combatant function and can only attack or targeted as of the time they take part in hostilities. This implies when they are not taking part in hostilities they may not be attacked. Indeed, this has dwindled distinction and prevent it from achieving its aim.

Lastly the absence of sanction and enforcement system under non-international armed conflict on acts of breach and violation of the principle of distinction makes it weak and achievable in contemporary armed conflict.

In summary, even though the principle of distinction is not achievable in modern armed conflict as discussed above, yet The author suggests that if this principle is reformed to suit the changing nature of modern armed conflict then its achievability can be guarantee. Also,

²⁶⁶ Canestaro, Nathan A 2004. Small Wars and the Law: Options for Prosecuting the Insurgents in Iraq, 43 Colum. Journal Transnational law 73: 26-27.

²⁶⁷ <https://www.aljazeera.com/focus/2008/11/2008112019115851343.html>

this thesis will not make suggestions on practical issues because to a certain extent they cannot be solved, but legal suggestions will be proposed below.

3.3.2 Proposed Legal Reforms

- A harmonized definition of a combatant should be adopted by states to facilitate understanding and interpretation, hence creating room for the attainment of distinction. For this reason, the author proposed that the definition of combatant which is only found in international armed conflict should be extended to non-international armed conflict and insurgents should be incorporated in this definition as a combatant, although states feel that referring to insurgents as combatant will be creating room for insurgents or non-state armed groups to challenge the government, still, the author argues classifying non-state armed groups as insurgent will in the first place create awareness in the mind of this fraction groups that their actions during combat are not only guided by the laws of the state they belong but also under international law and they may be prosecuted for violations.

Also, this will facilitate those courts to reach a ruling easily over issues of distinction without having to prove that the breach was done in an international armed conflict, hence a good number of war crimes taking place in non-international armed conflict will be tried and it will serve as a lesson to the other armed groups that they are obliged to follow the law even as insurgents. Recent armed conflict has taken a different dimension and is mostly fought between states and non-state armed groups based on political, economic, socio-cultural reasons. Following this, the author proposes that a combatant under non-international armed conflict should comprise of all regular state armed groups, militia or volunteer corps, who form part of the state army and insurgents who perform continuous combatant functions.

- The term civilians and the civilian population is used in both international and non-international armed conflict, still, the definition of civilians is given only under international armed conflict. The meaning of civilians is not available in non-international armed conflict but the word civilian and civilian population has been used in so many treaties that apply to a non-international armed conflict without a definition. For instance in the Rome Statute of the International Criminal Tribunal (ICC) at article 8(2) (e) (i) (iii)

and (viii),²⁶⁸ and Amended Protocol II of the Convention on Certain Conventional Weapons (CCW) at article 3(7)-(11).²⁶⁹ The author recommends that a civilian should be referred to as a person who has not in any circumstances, intentionally participated in hostilities either directly or indirectly at any point in their lives during armed conflict. At this point a civilian population comprises two or more civilians.

- The continuous growth and use of PMSCs during armed conflict are on the rise in modern armed conflict and a lot of problems are attributed to it as discussed above and this problem could be addressed in the following ways; Firstly under international law state responsibilities entails that states bear the responsibility for acts committed by their staffs or agents and it does matter if they are private staffs, what is showing that that state was in control at that point and that instructions come from the state involved. Also, if the state acknowledges is responsible for the staff and is aware of the activities and conduct of the staff. There the author proposes that the state should bear the responsibility for the breach or poor conduct demonstrated by PMSCs staff under their watch during armed conflict. Also, states should ensure that PMSCs staffs under their watch or command respect IHL. Again, before contracting staffs states should take into consideration which activities or function carried out by this personnel's contractually is capable of involving them to participate directly in armed conflict. Furthermore, states should also come up with a doable and suitable administrative mechanism to facilitate an accurate way of carrying out the contract and the culpability of the contracted persons for their indecorous and illicit behavior during armed conflict.
- The evolution of technology especially in the weaponry system has given rise to a good number of multilateral treaties that prohibit the use and development of certain weapons like biological weapons, chemical weapons, blind laser, landmines, and cluster munitions. The good news is this treaty uses a wide range of approaches to restrict and regulate the use of these weapons. For instance, the chemical and biological weapons convention forbids all states which are parties to this convention from acquiring, developing, producing, researching, stockpiling, and retaining both biological and chemical weapons.

²⁶⁸The 1998 Rome Statute of the International Criminal Court, by the International Criminal Court at pp.13 <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

²⁶⁹Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 CCW Convention as amended on 3 May 1996) <https://ihl.databases.icrc.org/applic/ihl/ihl.nsf/52d68d14de6160e0c12563da005fdb1b/05e54e8fb1a42782c125641f002d5ee5?OpenDocument>

However, AP IV does not in its discussion on blind laser prohibits the research and development of blind laser rather it prohibits the use of it. In this light the author proposes that the law should place a restraint on the research, development, and use of blind laser as well as cluster munitions in modern armed conflict.

- Again, sanctions on the violation and breach of the principle of distinction only occur when such violations take place in international armed conflict while the law is silent when such breach occurs in non- international armed conflict. The author thinks that it is unfair for a person under international armed conflict to be punished for atrocious crimes committed during an armed conflict such as war crimes or crimes against humanity while on the other hand a person under non-international armed conflict who commits the same crime does not get punished. The author proposes that such crimes are punishable under international law and the nature or type of conflict under which the crime was committed should be waived to strike a fair balance in law and justice.
- The human shield is the most common strategy used in modern armed conflict by both the weak and strong during armed conflict. In modern armed conflict both civilians and civilian objects are used as a human shield, voluntarily or involuntarily. The author proposes that the state could issue a statement that recognizes the prohibition of a human shield as customary international law. Also states who a not yet a party to the Rome Statute can publicly communicate or adopt it in their national law that using a human shield is a war crime during armed conflict under customary international law. The state could take this further by saying that the prohibition under customary international law applies to both international and non-international armed conflict. Also, a human shield is completely absent in some national regulations although they sometimes refer to it as grave breaches. States could use this as an opportunity to strengthen the prohibition, interpretation, and application of human shield by unequivocally stating that the employment of human shield during armed conflict is considered a grave breach.

Again, the state could put in place enforcement measures to halt violation and prevent further breach of the norm. State that are parties to the Rome Statute is obligated to endorse laws and rules that prohibit their national from using a human shield and prevent those who are not their national but in their jurisdiction from using the human shield as

well. Also, persons that have committed such crimes must be prosecuted. However, it is normal that not all states have adopted national laws relating to human shield, but they could still do so even when they are not a party to the Rome Statute.

However in situations where the use of human shield fall under the ambit of grave breaches under the Geneva Conventions and API states has as an obligation to search for the violator or person who instructed the execution of the act which led to a violation, although they may not have territorial or active nationality jurisdiction over suspected offender. Also they need to permit adjudication or extradition of the suspected offender in their custody.

Conclusion

The principle of distinction between civilians and combatants is a basic rule under international humanitarian law. The principle is applicable in both international and non-international armed conflict. Distinction aims to protect victims during armed conflict and to regulate the means and methods of use in fighting armed conflict. The principal persons and objects under this principle are divided into two categories namely, Combatant and military objects and civilians and civilian objects. Combatant and military objects are the lawful targets and are permitted to participate in hostilities meanwhile civilians and civilian objects are unlawful targets and are not permitted to participate or used to carry out military objectives. Civilians or civilian object lose their protection against attack as of such time as they participate in hostilities. While combatants lose their protection if the failure to adhere to the rules regulating warfare. During armed conflict combatants distinguish themselves from civilians by wearing uniforms; visible signs that are recognized from a distance as well as carry their arms openly. The principle of distinction started before the middle ages and has evolved both theoretically and legally. The principle of distinction was much discussed in the past by international law scholars like Hugo Grotius, St Thomas Aquinas. The principle of distinction is codified and endorsed in all the IV Geneva Conventions and its Additional Protocols. It is also referred to in The Rome Statute as well as in the ICRC catalog.

Before the twentieth century wars were fought in large scales, by regular state armies of different states in isolated battlefields far away from civilians and the civilian population. In the wake of the twentieth century armed conflict began to take a different turn as states began to shift their battlefield to densely populated areas to destroy the morale of the civilian enemy. For instance, during the period of the American civil war states recognized and acknowledge the need to spare civilians during armed but failed to respect this concept during conflict rather military commander continue to attack civilians in densely populated cities resulting to the creation and birth of explicit rules and provision on the principle of distinction. Still the level of breach and violation of distinction continues to grow at an alarming rate.

However, the principle of distinction has always been in tension with existing armed conflict and that is not different from what is happening in contemporary armed conflict. The main

issue in contemporary armed conflict is, it has and is still witnessing a lot of changes beginning from the types of armed conflict, to its participants, means, and method used in fighting as well as the use of the weapon in the fighting. All this aspect has become a nightmare to the principle of distinction even though this principle has been codified and enshrined in a good number of international treaties that have been ratified by numerous states. In the past armed conflict was fought by regular armies of a state against another state, instead of recent conflict are fought by states and non-state armed groups or by two or more states against fractions of non-state armed groups or between two non-state armed groups who often do not respect the laws of distinction. Examples of such conflicts are ongoing in places like Iraq, Israel/Palestine, Afghanistan, Yemen, Syria, and Mexico. Also, modern armed conflict can be termed as a war among the people as both parties have moved the battlefield to an urban center, cities, and towns that are densely populated. Insurgents whose forces are unable to contain the might and superior weapons used by states armed force have resulted in fighting their battle among the people for instance they engage in an attack and during combat they run into the midst of civilians. They have also resulted in the killing of civilians as a means to undermine states' ability of protecting their citizens.

Furthermore, the changes experienced by modern armed conflict have led to the rise of both practical and legal problems which has in one way other jeopardized the application of the principle. It is of no doubt that civilians perform a wide range of functions directly or indirectly during armed conflict and in the course of performing such functions they have either been directly or indirectly involved in armed conflict which has increased the number of civilians in the battlefield and blurs the line of distinction as combatants are unable to discern who to or who not to attack. Also modern armed conflict has witnessed the use of human shield by both parties either voluntarily or involuntarily. The human shield is used by one party to gain the military advantage of the other party, although the use of the human shield is prohibited under IHL, its use continues to make waves in modern armed conflict because human shield does not have legal standing in non-international armed conflict and is highly controversial under international armed conflict as most often the decision on a human shield are left in the hands of the military commanders.

This challenges faced by the principle of distinction have greatly undermined its existence and left doubt in the minds of the scholar who have argued that the principle is not achievable and

should be replaced but concerning this thesis, the author acknowledges that distinction is not achievable in modern armed conflict and therefore argues that instead of discarding this principle and replacing it with a new principle, the principle should be reformed to suit the patterns of modern armed conflict. This thesis proposed reforms that could be made to the principle of distinction, though these reforms are mainly legal and not practical because practical issues of modern armed conflict are impossible to resolve.

ABBREVIATIONS

AP I: Additional Protocol I

AP II: Additional Protocol II

CCW: Convention on Certain Conventional Weapons

COIN: Counter Insurgency

GCs: Geneva Conventions I, II, III, IV

IACs: International Armed Conflict

ICC: International Criminal Tribunal (ICC)

ICTY: International Criminal Tribunal for the Former Yugoslavia

IDF: Israeli Defence Force

IED: Improvised Explosive Device

IHL: International Humanitarian Law

LOAC: The Laws of Armed Conflict

NATO: North Atlantic Treaty Organisation

NIACs: Non-International Armed Conflict

NSAGs: Non-State Armed Groups

PMSC: Private Military and Security Company

UN: United Nations

US: United State

WW: World War I, II

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