THE LAW OF TARGETING MILITARY OBJECTIVES: CHALLENGES IN CONTEMPORARY WARFARE

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CERTIFICATION

Be it certified that this dissertation is an original work of NWANKWO, CELESTINE NWAOKOMA (With Registration Number 2013397005f). Be it further certified that this work has not been submitted, in part or whole, for any degree or examination in any other university or academic institution, and that all the sources used had been indicated and acknowledge by complete reference..

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APPROVAL PAGE

THIS DISSERTATION ENTITLED 'THE LAW OF TARGETING OF MILITARY OBJECTIVES; CHALLENGES IN CONTEMPORARY WARFARE' HAS BEEN APPROVED FOR THE FACULTY OF LAW, NNAMDI AZIKWE UNIVERSITY, AWKA ANAMBRA STATE

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DEDICATION

This work is dedicate to my late father, Boniface Nwankwo Ihedioha who actually died the day I received the new of my admission for this programme and to my mother Mrs. Maria Nwankwo, my siblings, Barr. Eugene Ugo-Nwankwo and Martina Uche Ogbonna (Adanee).

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ABSTRACT

The question of "targeting" in armed conflict is receiving growing publicity. The incidental loss of civilian lives and damage to civilian property resulting from ariel bombing campaigns is at the heart of numerous political debate. World public opinion demands that governments account for the "collateral damage" caused by their armed forces. This subject is also a source of legal controversy. Analysts disagree on the question of whether or not the current rule applicable to targeting is sufficient. Some believe that the rules should be tightened in the light of increasingly sophisticated means and methods of combat. The rule applicable to targeting must be seen in the wider context of future advances in the field of International Criminal Law. Since the coming into force of the Rome Statute of the International Criminal Court in July 2002, the possibility of prosecuting individuals for breaches of the law governing the conduct of hostilities is no longer a distant prospect. This work clarifies the normative framework through an examination of cases, taken from recent armed conflicts of international character. This dissertation circumscribes the content to which certain controversial targeting can be admitted into the category of legitimate military objectives by identifying and analysing some of the most contentious interpretation of the relevant rules in approaching the regimes applicable to targeting from the perspective of contemporary challenges. This work adopts the doctrinal method of research. It uses the analytical approach to discuss the laws of targeting and apply it to contemporary practices in armed conflict. The problem investigated in this research is that virtually all armed conflicts has been marked by controversy about the choice of targets. The fundamental objective of this research is to analyse the means and method of warfare and the laws applicable during warfare. The research also analyse the issue of military objectives which is directly linked to the principle of distinction. The research finds out that sometimes divergent interpretations of concepts such as military objectives and proportionality in attacks that arise in international armed conflicts generate the same, if not more queries in non-international armed conflicts. This dissertation recommends the essential need for the modification of the laws regulating the conduct of law so that they can meet present day realities and make them a settled principle of modern International law. Again, this dissertation recommends that a new convention be quickly constituted to address the issue of the use of drones in warfare so as to regulate the use and determine when it can be deployed in an armed conflict.

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Regulation Respecting the Laws and Customs of War on Land, Annex to the Convention (IV), 18 October, 1907.

Rome Statute of the International Criminal Court, 17 July 1998.

United Nations Convention on the Prohibition of Military or any other Hostile Use of Environmental Modification Techniques, 2 September, 1976.

LIST OF ABBREVIATION

ADF	-	African Defence Force
API	-	Additional Protocol
CDDH		Conference on the Re-affirmation and Development of International Humanitarian Law Applicable in Armed Conflict
DCIHL	-	Diplomatic Conference on International Humanitarian Law
GA	-	General Assembly
IAC	-	International Armed Conflict
ICCPR		International Covenant on Civil and Political Rights
ICCJ	-	International Criminal Court of Justice
ICJ	-	International Court of Justice
ICRC	-	International Committee of the Red Cross
ICRC	-	International Committee of Red Cross
ICTR	-	International Criminal Tribunal of Rwanda
ICTY	-	International Criminal Tribunal of Yugoslavia
IHL	-	International Humanitarian Law
IHRL	-	International Human Right Law
IMF	-	International Monetary Fund
MSO	-	Military Staff Committee
NATO	-	North Atlantic Treaty Organization
NGO's	-	Non-Governmental Orgnization
NIAC	-	Non-International Armed Conflict
PGM	-	Precision Guided Munitions

POWs	-	Prisoners of War
PSO		Peace Support Operations
RES	-	Resolutions
SC	-	Security Council
SCSL	-	Special Court for Sierra Leone
UN	-	United Nations
UNHCR	-	United Nations High Commissioner for Refuges

CHAPTER 1

GENERAL INTRODUCTION

1.1 Background of the Study

States have long recognised the existence of laws regulating the conduct of hostilities, which can be conveniently categorized as the *Jus ad bellum* and the *jus in bello*. The *jus ad bellum* is the area of law that regulates the conditions under which a state may resort to war or to force in general. The *Jus in bello* on its part is the area of law that governs the conduct of belligerents during a war, and in a broader sense comprises the rights and obligations of neutral parties as well[1]. War generally has a significant and direct impact on the civilian population.

There is no agreement on what to call *jus in bello* in every language, While the International Law comprising the *jus in bello* has in recent times generally been referred to as International Humanitarian Law (IHL) by the International Committee of the Red Cross (ICRC), military manuals and military (and some non military) writers often use the terms law(s) of armed conflict or laws of war[2]. While it is arguable that laws of war is synonymous with laws of armed conflict, and that both terms incorporate the distinct areas of International Humanitarian Law (IHL) and the law of neutrality, the more important issue is, what actual law applies to a given situation and not the term for that law.

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[1]. R Kolb, "Origin of the Twin Terms *Jus ad bellum/Jus in bello"* (1997), *International Review of the Red Cross (1997)320*

[2]. I Henderson, '*The Contemporary Law of Targeting; Military Objectives, Proportionality and Precautions in Attacks under Additional Protocol 1* (Leiden: Martinus Nijhoff Publishers,7th ed,2005) p.23

Roberts and Guelff provide a brief history to the historical origins of the rules governing armed conflict, referring to rules many thousands of years old[3]. Nevertheless, as seems to be the nature of law, and International Law in particular, the exact meaning of many of the various individual laws that make up IHL remain unclear. For example, the issue of whether voluntary human shields have lost protection from attack, remains unsettled. While some might be prepared to accept a high degree of ambiguity in the law, as has been clearly stated by Yves Sandoz; "armed forces must know precisely what their own obligations are as well as those of their adversaries[4]. Of particular importance to this study are two questions; what is the rule involved in contemporary warfare? and, what are legitimate military objectives? The above two concepts have proved very elusive and the interpretation remains very much debated. Indeed, it was not until 1977 with the adoption of the Additional Protocol I (API) that; a treaty definition of military objective was adopted[5].

Despite the importance of IHL to the attainment of humanitarian objectives during armed conflict, it is disappointing to observe that in an article discussing the training of IHL, Murphy commented that "the language of the international instruments in question is often obtuse and unintelligible"[6]. This was without deference to an exhortation of the 1972 Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict of the "importance of succeeding in laying down – rules which were clear, precise and easily

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3. A Robert and R Guelff, "Documents on the Laws of War" (3rd ed, 2000) 23
Ministry of Defence, *The Manual of the Laws of Armed Conflict* (2004) 1-2.

4. Y Sandoz, Humanitarian Law: Priorities for the 1990s and Beyond in William Maley (ed), *Shelters from the Storm: Developments in International Humanitarian Law* (1995)11, 14.

5. See Additional Protocol I, Article 52 (2) (adopted by 79 votes in favour, none against and 7 absentations) (cited in 11.ch.2,5,319)

6. R Murphy, "International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience" (2000) 840.

understood and applicable by combatants and by civilians alike"[7]. Indeed, after 25 years of the adoption of the text of API, the president of the ICRC has stated that the application of the rules in API "in practice is sometimes difficult due to the fact that the provisions are framed in rather abstract terms, thus leaving room for divergent interpretation".

1.2 Statement of the Problem

Every armed conflict in history has been marked by some controversy about the choice of targets. The targeting choices during the early hostilities in Afghanistan in 2001, and Iraq in 2003 were some of the examples where the violations of International Humanitarian Law led to significant civilian casualities. Increasingly, attacks on fleeting targets of opportunity have started dominating the war effort in more recent conflicts. Much of the debate around specific incidents have been generated by the reporting of the mass media and non-governmental organizations. The controversy have shown the need for a clarification of the concept of military objective in law and practice. This study addressed these issues not only through a comprehensive examination of all the components of the legal definition and their interpretation, but also by considering how the definition works in practice.

1.3 Purpose of the Study

The uncontested rationale behind IHL is to mitigate and circumscribe the cruelty of war for humanitarian purposes based on the overriding consideration of humanity[8]. The aim

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[7]. International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts, Volume I, Report on the Work of the Conference (1972), 172.

[8]. *Nuclear Weapons Case* (1996)ICJ Rep. 226 at 86

of this principle of humanity is to mitigate the effects of war on civilians and combatants alike. It is important to realize that the issues that IHL are intended to address are not mere philosophical debating points. As Justice Werumenty has said:

> By their very nature problems in humanitarian law are not abstract, intellectual enquires which can be pursued in ivory-tower detachment from the sad realities which are their stuff and substance. Not being mere exercise in logic and black-letter law, they cannot be logically or intellectually disentangled from their terrible context. Distasteful though it may be to contemplate the brutalities surrounding these legal questions, the legal questions can only be squarely addressed when those brutalities are brought into vivid focus[9]

The purpose of this study is to provide a contemporary and detailed analysis of the law concerning targeting that applies to warfare and thereby provide a solid foundation for decision making by military commanders confronted with complex targeting decisions. According to Kellenberger, 'one practical area where the law could be further classified is with regard to targeting[10]. He went on to say that he did not see a need to modify the misleading military objectives and the rule of proportionality, but rather there might be a need to further clarify their proper interpretation and application"[11]. Consequently, this work analyses the relevant laws from the perspective of a commander who might have to apply that law.

Again, the purpose of this study was to analyze the international law concerning target selection during international armed conflict. The work focused on areas of current uncertainty in IHL. These areas which has attracted attention through the media include the choice of targets for aerial or other forms of bombardment and the precautions to be

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[9]. *Nuclear weapons case* (Supra) at 92.

[10]. J Kelleberger, International Humanitarian Law at the Beginning of the "21st Century", Statement at the 26th Round Table in San Remo, (2002)1.at 16. Available at http://www.icrc.org. Accessed on 10th April, 2016

[11]. J Kelleberger, International Humanitarian Law at the Beginning of the "21st Century" Statement at the 26th Round Table in San Remo Ibid at 32

taken when launching attacks on those targets. The work also addressed the practical impact of the rules of humanitarian law on the conduct of military operations.

The purpose is to explore international legal standards regarding what decision-makers in the armed forces are expected to know in order for targeting decisions to be lawful. We will examine how those standards have developed over times, as well as how states are interpreting and implementing those standards today, especially in light of development in war-fighting technologies and intelligence – gathering techniques. We will explore potential effects on battle field proportionality decisions of the increasingly greater and more immediate media and public scrutiny due in part to the proliferation of video, audio, and image capture devices (such as smart phones).

1.4 Scope of the Study

The subject of the research has a universal outlook. The study considered the laws applicable when peace has failed and the military are engaged in armed conflict. The research cuts across the realms of public international law touching mainly on international humanitarian law (law of war)

It discussed principally, the lawful use of force in an armed conflict, against whom and against what force may be used, and the precautions that must be taken in exploring that force.

The law of targeting of military objectives, challenges in contemporary warfare is examined under customary international law, case laws, military manuals, UN charter and Resolutions. The research highlights the law of targeting applicable during armed conflict with a view to exposing inadequacies of state practice during warfare.

Consequently, the work examined how the states involved in armed conflict comply with the extant laws on targeting of military objectives.

1.5 Significance of the Study

This work is significant in that by x-raying the challenges of contemporary warfare as it affects the law of targeting of military objectives, it brings to the fore, the questionable actions of states during armed conflict. The recommendations will bring consistency in state practice and adherence to International Humanitarian Law (IHL). With so many conflicts and abuse in the principle of distinction, this work is apt at this time to serve as a guide for states that will be involved in armed conflict. Furthermore, this work will be beneficial to legal practitioners with interest in public international law and researches of international humanitarian law and international human right law respectively.

Finally, this work will also serve as a guide for the military and those who will find themselves in battlefield on the need to comply with the international humanitarian law best practice during warfare.

1.6 Methodology

The researcher, in the evaluation and analysis of the dissertation, adopts the doctrinal method of research which entails both identification of the sources of law, interpreting and analysis of primary source material.

The doctrinal method of research in this context shall be complemented by the analytical and comparative approaches in evaluation of primary source materials and secondary material, such as, the United Nations Charter and Resolutions, Customary

International law, Case law, textbooks, journal/ articles, research reports and internet sources on the subject.

1.7 Literature Review

This research reviews a selection of international law literature on the law of targeting of military objectives, challenges in contemporary warfare. Thus, various scholars have divergent views relative to the subject under discourse to which we now discuss.

Bothe, Partsch and Waldemar in their book titled: "New Rules for Victims of Armed conflict; Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949"[12], had remarked that the definition of the "military objective" in the sense of targets for attack had, until adoption of Article 52 of Protocol Additional 1"eluded all efforts to arrive at a generally accepted solution". This remark is indeed surprising. We contend in this work that after the adoption of AP1, targeting issues still remain the "battleground" of International Humanitarian lawyers, even the military in battlefield. Additionally, the concept of modern warfare, combined with considerable technological advancements in military hardware, represent modern challenges to the law of targeting, as manifested in the 1977 protocol. The learned authors did not advance their attention to that. It is in this context that this dissertation provides an expanded understanding of the contemporary law of targeting under AP1.

However, Normand and Jochnick in their paper titled, the Legitimation of Violence. A critical history of the Laws of War[13] has stated that the law of war

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[12] . M Both, K J Partsch and WA Solf, *New Rules for Victims of Armed Conflict: Commentary on the two 1977 Protocols Additional to the Geneva Convention's of 1949 (The Hague: Martinus* Nijhoff Publisher, 1982), 746.

[13] . K. Normand and C Jochnick, The Legitimation of Violence: A Critical History of the Laws of *War, Harvard International Journal,* (1994) 35at 49.

principally serves state military priorities, ensuring the subordination of concomitant humanitarian objectives. The author viewed law as a tool to influence belligerent conduct and added that its legal compliance implied a notion of legitimacy which was used to conceal, a massive destructive agenda where everything as tendentiously justified behind the fig leaf of "military necessity". It is my view that the position taken by Normand and Jochnick is both harsh and misplaced. While their view demonstrates the clash expectations between humanitarian and military interpretation and the inherent uncertainties of the principles in play, its repeated implications that the military acted in bad faith when interpreting the principles of distinction and proportionality prevents it from realistically assessing important law of armed conflict issues raised by the first Gulf war. Their failure to investigate the military perspective of the first Gulf war is evidenced by their use of a world War 11 era bombing survey to explain the motivation of the US Air Force in 1990. Their misinterpretation of military terminology such as "unchallenged air supremacy in pages 391, to imply that the coalition Air Forces Flew with impunity over Iraq and their insistence that attacks on the oil sector and the electrical grid conferred no military advantage on the coalition, but rather were undertaken for economically punitive reasons, prevent them from undertaking a meaningful proportionality analysis that might have actually supported their position. With respect to Normand and Jochnick, their stand illustrates the ambiguities of a common but broad vocabulary. The humanitarian values they placed upon target selection did not correspond with the military assessment of the operational significance and "price" of attacking those targets. Their resulting disillusionment leads to their conclusion that there has been a subversion of principle. What appears not to be accepted is that the target assessment

formulas employed were a product of a different set of values that was nonetheless consistent with the broad discretions acknowledged under the prevailing law. This dissertation provides the stop-gap by comprehensive evaluation of the changing trend in the law of targeting of military objectives and also suggest solutions to the challenges in contemporary warfare.

Again. Solf in his article titled "The Status of Combatants in Non-international Armed Conflicts under Domestic Law and Transactional Practice"[14] contrast "national strategic planning and the planning of a field commander. He states that national – strategic planning focused on the "attainment of a definite military advantage" while we agree that a field commander rightly seek the defeat of enemy, including through surrender. Again, axiological targeting aimed at influencing the enemy to surrender when limited is permissible. Following Solf's reasoning, it is our view that axiological targeting aimed at achieving national-strategic planning goals is impermissible.

This dissertation demonstrates and articulates the emerging trends that achievement of national-strategic goals are not a military advantage and in compliance with Article 52(2) APL, an attack on an object must offer a military advantage for that object to be a lawful military objective. We further state that the advantage derivable must be military and not purely political.

Msassoli,. Bouvier and Quintin have observed in their article titled, How Does Law Protect in War? Cases, Documents and Teaching Material on Contemporary Practice

[14] A W Solf, The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transactional Practice, *American University Law Review, (*1983), Vol. 33, p. 53-56

in International Humanitarian Law[15] that the meaning of the obligations imposed by the rules of targeting in practice remains controversial in many cases. In this line, the author opined that states have not disclosed the criteria that commanders employ to guide their application of the rules to battlefield scenarios. The states tend to keep secret information about what situation existed on the ground, how a commander conducted the military operation and why a commander made a particular decision.

This position canvassed by the learned author is in contradistinction to the established principles of targeting. This dissertation demonstrates that if civilians are to fully benefit from the protection to which they are entitled under IHL, there must be greater clarity as to the criteria that commanders use in applying the rules of targeting to battlefield scenarios. This work also develop how commander can balance these elements in applying the rules of targeting.

In her book, titled "Responsibility for Crimes under International Law[16], Oji carefully discussed the basic principles of IHL, and in chapter 8-12 discussed the prosecutorial powers of the various International Criminal Courts /Tribunals. With respect, the learned author did not discuss the issue of targeting which is at the heart of IHL and which its breach constitutes a serious war crime. This dissertation tend to breach that gap by discussing the choice of targets by a military commander in battle field during armed conflict. This dissertation further demonstrates and articulates the emerging trends towards the law of armed conflict particularly in targeting military objectives in contemporary warfare.

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[15]. M Sassoli, A Bouvier and A Quintin, *How Does law protect in War? Cases, Documents and teaching materials on contemporary practice in International Humanitarian Law*, Part 1, Vol. 1, 3rd ed (Geneva: International Committee of the Red Cross, 2011), 25.

[16]. E A Oji, "Responsibility for Crimes under International Law" (Lagos: Odade Publishers, 2013) 73-9.

On his part, Umezuruike in his book titled "The Present State of International Humanitarian Law"[17] had opined that Humanitarian law should be given the widest dissemination and publicity as are the reporting of breaches and verification of the observation of existing instrument. With respect to the learned author, he never adverted his mind to the attitude/orientation of the military commanders and their subordinates in battle field with respect to target selection, the law on proportionality and Military Objectives. While we agree with him that humanitarian law should be given the widest dissemination, however, the issue of re-orientation with respect to target choice, proportionality, military objective should be established within the military circle since they are more concerned with armed conflict. If the law of targeting is properly obeyed by the military, there would be minimum breach of IHL. This dissertation tends to breach the gap by discussing the challenges in contemporary warfare[18].

Again, Agwu in his book "World Peace through World Law"; The Dilemma of the United Nations Security Council had merely observed in page 14 of his book that peace-keeping consists essentially of observer missions and lightly armed forces monitoring cease fire, operating in an essentially static mode with the consent of the parties involved. The learned author never adverted his mind on the controversial issue concerning objects involved in peace-keeping as "targets". He did not discuss the legal status of the peace-keeping operations during armed and the law of targeting applicable to peace-keeping operations. This dissertation clarifies the law of targeting applicable in peace keeping mission/ operation and also sited instances where the ICTY uphold the

[17]. U O Umezuruike, *The present State of International Humanitarian Law*", (Ibadan: Ibadan University Press, 1982), 2.

[18]. F A Agwu, World Peace through World Law; *The Dilemma of the United Nations Security Council* (Ibadan: Ibadan University Press, 2007), 14.

conviction of the killing of Belgian peacekeeper as a serious violation of Article 3 common to the Geneva Convention[19].

In her article, The Problem with International Humanitarian Law; Distinguishing Targets in Armed Conflict, OJi had stated while discussing the principle of distinction in Armed Conflict that the presence or the movement of civilian population or individual civilians shall not be used to render certain points or areas immune from military operations. My view is that the above runs contrary to the established principle contained in the 4th Geneva Convention of 1949 which is primarily for the protection of civilian and civilian object. According to Article 48 of Additional Protocol, "In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly, shall direct their operations only against military objectives. This dissertation clarifies the fact that laws applicable to targeting in contemporary warfare is basically to protect the civilian at all cost and those not taking any part in hostilities. Indeed, I agree with her submissions with respect to combatants and non-combatants, that those not combatants are, in so far as is possible, to be spared from attack or violence. The above amongst others stands as the objective of this dissertation.

[19]. EA Oji, The Problem with International Humanitarian Law: Distinguishing targets in Armed Conflict, *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* (JILJ) 2013, Vol. 4. Available online at www.ajo.ingo, 6th April.

Damsbothan and Woodhouse in their book titled "Humanitarian Intervention in Contemporary Conflicts"[20] only discussed the conditions of the victims of armed conflicts, the UN Nations, interventions and merely mentioned the ugly situations of war. But the learned authors never adverted their mind that it is the breach of the laws applicable to targeting of military objectives that is the cause of superfluous injury to those not participating in armed conflict. This dissertation tends to breach the gap by stating that the breach of the IHL applicable to warfare are the most cause of fatalities to those not directly participating in armed conflict[21].

In his book titled, "Element of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary; Dorman had opined at page 171 that for an attack to be regarded as constituting military advantage, that it has to result from the encompassing series of military operation that constitute the attack. With respect to the learned author, the above submission suggest a lose understanding of "Definite Military" Advantage. The danger in adhering to this view of "encompassing series actions is that, it will become so broad as to dilute the concept of definite military advantage and the obligations deriving from this concept. This dissertation articulates that for an attack to provide a definite military objective and to retain any meaning at all, it must correspond to a concrete situation on the ground[22].

In his book, "Implementing Limitations on the Use of Force: The Doctrine of Proportionality Meeting", Kalshoven had argued in pages 44 thereof that most

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[20]. O Ramsbothan and T. Woodhouse, *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1999), 17.

[21]. K Dorman, *Elements of War crimes under the Rome Statute of the International Criminal Court*, Sources and Commentary, (Cambridge, Cambridge University Press, 2003) 171.

[22]. F Kalshoven; Implementing Limitation on the Use of Force, The Doctrine of Proportionality Meeting", The American Society of International Law 1992, 40 at 44.

applications of the principle of proportionality are not so clear cut. Though I agree with him this dissertation articulates that there should be test in determining the application of proportionality such as; is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof that would be excessive? if the answer is "yes", then the attack must be cancelled or suspended. This dissertation articulates that if this test is followed, the issues regarding the principle of proportionality may have been greatly achieved.

In his book titled "Development and Principles of International Humanitarian Law, Pictet in pages 59-60 merely discussed the issues of the protection accorded to civilians in times of war, and their properties with much reference to the Hague Convention. With respect, the book did not address the issue of targeting of military objectives. He never adverted his mind on the issues of contemporary warfare more especially now that drones are used in battlefield[23]. This dissertation clarifies the laws applicable to targeting in contemporary warfare and discussed when civilians could lose their protection and make recommendation on the use of drones in warfare so as to suit the challenges in contemporary warfare.

However, Ray Murphy, in his book titled "Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience" had alluded in pages 840 that 'the language of the international instruments relating to warfare is often obtuse and unintelligible" With respect to the learned author, the statement was made without deference to an exhortation of the 1972 Conference of Government Expert on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed

[23]. J Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985) at 59-60).

conflict which succeeded in laying down rules which were clear, precise and easily understood and applicable by combatants and by civilians alike. This dissertation demonstrates that IHL rules are very clear for understanding, however, its implementation is a different thing which is the responsibility of both the actors and non-actors in the battlefield[24].

Hampson in his article titled "Means and Methods of Warfare in the Conflict of Gulf" in Peter Rowe (ed). The Gulf war 1990-91 International and English Law stated in page 94 that consistent with the principle of distinction, attacks may only be conducted against military objectives including members of the armed forces and other organized armed groups participating in the conflict. This dissertation agreed with him but to add that even if there is an identifiable lawful target and permitted weapons, an attacker must take "feasible precautions" to minimize collateral damage[25].

Cerone in the journal "The Jurisprudence Contributions of the ICTR to the Legal Definition of Crimes against Humanity[26]. The Evolution of the Nexus Requirement, had observed in page 192 thereof, that the raison d'etre of the martens clause is to remind the international community that no legal lacunae can be used an excuse to perform actions contrary to the remaining principles of international law derived from established custom from the principles of humanity and from the dictates of public conscience. This dissertation agrees with that observation and however illustrates that the clause (matens

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[24]. R Murphy *International Humanitarian Law Training for Multinational Peace Support Operations* – Lessons from Experience (2000) 840.

[25]. F Hampson "means and method of warfare in the conflict of Gulf" in Peter Rowe (ed) the Gulf war 1990-91 *International and English Law* (London, Sweet & Maxwell, 1993 at 94.).

[26]. J Cerone "The Jurisdictional contribution of the ICTK to the Legal Definition of Crimes against Humanity – The Evolution of the Nexus Requirement", *New England Journal of International and Comparative Law*, Vol. 14, No. 2, 2008 at 192.

clause) must be understood as'gap filler' that can be applied when the humanitarian rules are silent or in circumstances when IHL is not sufficiently rigorous or precise.

1.8 Organizational Layout

This study considered the laws applicable when peace has failed and the military are engaged in armed conflict. It discussed principally the lawful use of force in an armed conflict against whom and against what force may be used, and the precautions that must be taken in exploring that force.

The first chapter of this work deals with the general introduction coupled with the issue of targeting and military objective which captures the topic of this dissertation.

Chapter two is a review of the law relevant to targeting, the main treaties are briefly set out, followed by a discussion on customary international law. The Martens clause[27] is discussed at some length, in particular, possible interpretations are discussed along with an argument for a preferred interpretation. The work discussed the continued relevance of human rights law during armed conflict. The chapter concludes with a discussion on definite military advantage and whose duty it is to assess definite military advantage, contentions targets, dual use targets, national targets and an argument on recent practice and war sustaining capability. In that chapter, the work further argued that there is a distinction between the political goals and military goals in a conflict; for a target to be lawful, only the advantage that serves a military goal can be assessed when determining whether a target is subject to lawful attack.

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[27]. The English translation of the original clause is: until a more complete code of the laws of war has been issued, the High Contracting parties deem it expedient to declare that, in case not included in the regulations adopted by them, the inhabitants and belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usage established among civilized people, from the laws of humanity, and the dictates of the public conscience".

Chapter three focuses on the rule of limiting collateral damage. It discusses attack considered as indiscriminate and the precautionary measures to be taken. I n chapter four, we considered rules regulating targeting. Chapter five discussed objects for humanitarian objectives as targets and the criteria for the qualification of military objective, specifically protected objects and how those objects ordinarily protected can loss their protection. This work in chapter six vigorously x-rayed objects regarded as lawful human targets during armed conflict. Chapter seven concludes the work with a summary of findings and recommendations

1.10 Definition of Terms

The following terms are defined accordingly;

1.9.1 International Humanitarian Law

International humanitarian law (IHL), also known as the laws of war and the law of armed conflict, is the legal framework applicable to situations of armed conflict and occupation. As a set of rules and principles it aims, for humanitarian reasons, to limit the effects of armed conflict.

1. The protection of persons who are not, or are no longer, participating in hostilities; and
2. The right of parties to an armed conflict to choose methods and means of warfare is not unlimited.[28]

[28]. GSDRC *International Legal Frameworks for Humanitarian Action*, Topic guide. Birmingham, UK: GSDRC, University of Birmingham, (2013). http://www.gsdrc.org./go/topic-guides/illfha. Accessed on 14 May, 2015

IHL is part of public international law. Public international law is a broad set of treaties, customary law, principles and norms. The framework traditionally regulated relationships only between states. It has evolved, however, to cover a broad range of actors. IHL is notable in this regard, as it recognizes obligations for both states and non-state armed groups that are parties to an armed conflict.

IHL regulates activity during armed conflict and situations of occupation. It is distinct from, and applies irrespective of, the body of law that regulates the recourse to armed force. This framework is known as the *jus ad bellum*, and is enshrined in the UN Charter. It regulates the conditions under which force may be used, namely in self-defense and pursuant to UN Security Council authorization. Once there is an armed conflict IHL applied to all the parties, whether or not a party was legally justified in using force under *jus ad bellum* principles.

1.9.2 Legitimate Military Target

The definition of legitimate target is central to the laws of armed conflict. Additional Protocol 1, Article 52 thereof, defines a legitimate military target as one " which by its nature, location, purpose, or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage". Any attack requires that, it be justified, in the first place, by military necessity. However, no object may be attacked if damage to civilians and civilian objects would be excessive when compared to that advantage. And if there doubts whether a normal civilian facility is contributing to military action, the object is presumed to be civilian.

Legitimate military targets include; armed forces and persons who take part in the fighting, positions or installations occupied by armed forces as well as objective that are directly contested in battle; military installations such as barracks, war munitions, or fuel dumps, storage yards for vehicles, air fields, rocket launch ramps and naval bases.

1.9.3 Means of Warfare

The term means of warfare generally describes the weapons being used by parties to an armed conflict in the conduct of hostilities. A weapon that is used for law enforcement purposes is not a means of warfare. The expression "means of warfare," appears often in combination with the expression 'method of warfare' in International Humanitarian Law (IHL) treaties. For instance, Part III, Section Geneva Conventions is entitled 'Methods and Means of Warfare. The International Committee of the Red Cross (ICRC) Commentary on Protocol I notes that the drafters preferred the term 'methods and means of warfare to the term methods and means of combat; which was used in the ICRC draft, for the reason that 'combat' might be construed more narrowly than warfare". It is clear that the term 'warfare' encompasses 'combat', a term that is used occasionally in the protocol.

1.9.4 Prisoners of War

Prisoners of War are persons, whether combatants or non-combatants, who are taken prisoner during a military conflict or immediately thereafter. Modern laws relating to the treatment of prisoners of war date back all the way to the Middle Ages. But, the most common source of modern International Laws pertaining to the treatment of prisoners of War may be found in the Geneva Convention (111) Relative to the Treatment of

Prisoners of War, of 1949. Under Article 12 thereof, prisoners of war are considered to be the captives of the enemy power, not the individuals or military units who actually take them into custody. As a result, the government of the enemy power, and not the individuals or military units are responsible for these prisoners treatment. This prevents authorities from turning a blind eye to the actions of their soldiers and makes them directly responsible for the treatment of prisoners of war. Under Article 13 of Geneva Convention (111) Relative to the Treatment of Prisoners of War of 1949, prisoners of war must always be humanely treated. Any unlawful act or omission causing death or seriously endangering the health of a prisoner of war is prohibited, and constitutes a serious breach of the Geneva Convention. This means that no prisoner of war may be subjected to torture, such as physical mutilation, or to medical or scientific experimentation of any kind that is not in the prisoner's best interests.

1.9.5 Targeting

The law of targeting lies at the heart of International Humanitarian Law (IHL), as such, it is the fulcrum around which discussion of combat operations revolve. This was the case during the recent war in Irag[29] and remains so with respect to the conflicts in Afghanistan[30] and Syria[31]. The precise applicability of the law of targeting has sparked a flury of recent reports about drone operations by UN Special Rapporteurs and Non-

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[29] See Human Right Watch on Target; The Conduct of the War and Civilian Causalities in Iraq (2003) http://www.hrw.org/sites/default/files/reports/usa1203-sumires.pdf (hereinafter HRW Irag Report, Michael N.Schmit, "The conduct of Hostilities during operation Irag Freedom: An International Humanitarian Law Assessment", 6 *Y.B. International Humanitarian Law* 73-109 (2003)

[30] . See Human Right Watch, Fatally Flame Cluster Bombs and their use by the United States in Afghanistan (2002) http://www.hrw.org/reports/2002/us-aghistan/: Michael N. Schnit, Targeting and International Humanitarian Law in Afghanistan, *85 Int'l Studies 307 (2009).*

[31] . See Human Rights Council, Rep. of the Independent Int'l Committee of Inquiry on the Syria Arab Republic, UN. Doc. A/HRC/25/65 (February 12, 2014)

governmental Organizations[32] and underpins the highly contentions debate over the legality of autonomous weapons systems.

Targeting simplicita is the process of selecting and prioritizing targets and matching the appropriate response to them, considering operational requirement. The law of targeting is from a theoretical and undeconstructed perspective, fairly straightword.[33] Consistent with the principle of distinction, attacks may only be conducted against military objectives, including members of the armed forces and other organized armed groups participating in the conflict[34]. Objects which by "nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage qualify as military objectives[35]. By the "Use" criterion, civilian objects may become military objectives when the enemy employs them for military ends. Analogously, civilians may be targeted should they "directly participate in hostilities". Attacks must not be indiscriminate; that is, they must be directed against a specific military objective and may not treat "as a single military objective, a number of clearly separated and distinct military objectives located in a city town, village or other area containing a similar concentration of civilians or civilian objects.

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[32]. Special Reporteur on the Promotion and Protection of Human Rights and Fundamental Freedoms while Countering Terrorism, Third Annual Rep. Pursuant to G.A. Res: 66/171 and Human Rights Council Res. 15/15, 19/19 and 22/8,24,55-56, 61-62, 65 (2013) (by Ben Emmerson), transmitted by Note of the Secretary General, U.N. Doc. A/68/389 (Sept. 18, 2013, (hereinafter Emmerson, 2013)

[33]. Michael N. Schmit, "Wired Warfare: Computer Network attack and Jus in bello" (2002) 84 *International Review of the Red Cross* 365 at 377.

[34]. Francoise Hampson "Means and methods of Warfare in the Conflict of Gulf" in Peter Rowe (ed), The Gulf War 1990-91 *International and English Law*, (London Sweet & Marxwell, 1993) at 94.

[35]. T Montgomery, "Legal Perspective from the EUCOM Targeting Cell" in Andra E. Wall, (ed), Legal and Ethical lesson of NATO' Kosovo Campagin, Volume 78, *US Naval War College's International Law Studies,* 189 at 490.

When engaging a lawful target, the attacks may be barred from employing certain weapons. Such restrictions derive either from the customary law forbidding the employment of indiscriminate weapons and those which cause unnecessary suffering or superfluous injury[36], or from specific treaty restrictions, such as the Dublin Treaty on Cluster munitions, for states party".

Even assuming a lawful target and permitted weapon, an attacker must take "feasible precautions" to minimize collateral damage. Specifically, 'the commander must decide in light of all the facts known or reasonably available to him, including the need to conserve resources and complete the mission successfully, whether to adopt an alternative method of attack, if reasonably available to reduce civilian causalities and damage".[37] Considerations include weapon and tactic options, as well as alternative targets that can be attacked to retain a "similar military advantage.

Finally, attacks that violate the principle of proportionality are unlawful. An attack will breach the standard if it is "expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated".[38] The rule of proportionality is often misconstrued as either prohibiting "extensive" collateral damage or as a test which balances collateral damage against military advantage. In fact, it bars attack only when no proportionality at all exists between the ends sought and the expected harm to civilians and civilian objects. Restated, the linchpin term, "excessive"

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[36]. W J Fenrick, "Targeting and Proportionality During NATO Bombing Campaign Against Yugoslavia (2001) 12 *E J L L.* 489 at 497.

[37]. Human Right Watch, Civilian Deaths in the NATO Campaign (2000) at 15.

[38]. J E Baker, "When Lawyers Advice Presdent in Wartime, Kosovo and the Law of Armed Conflict" (2002), 55 Naval War College Review 11 at 12, admist that an effects based concept of military objectives "sends the law hurting down the slippery slope toward collateral calamity".

indicates unreasonable collateral damage in light of the reasonably anticipated military advantage expected to result from the attack.[39]

1.9.6 Military Objectives

By virtue of Article 52(2) of Additional Protocol I, in so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization in the circumstances ruling at the time offers a definite military advantage. State practice establishes this rule as a norm of customary international law applicable to international and non-international armed conflicts, no reservation have been made with respect to the definition set forth in Article 52 (2) of Additional Protocol 1.[40]

At the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Article 52 was so essential that it cannot be the subject of any reservation whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis[41]. This definition of military objectives was found to be customary by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia[42]. In the narrow sense, a military objective can refer to a specific target for neutralization or destruction. The laws of war use the term in the latter sense, to identify and attack a locality, facility, or enemy personnel that

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[39] . O Bring, "International Humanitarian Law after Kosovo: Is Lex Lata Sufficient?" (2002) 71 *Nordic Journal of International Law* 39 at 50-54.

[40] . Additional Protocol I, Article 52 (2) (adopted in 1977 by 79 votes in favour, none against and 7 absentions)

[41] . Mexico, Statement at the Diplomatic Conference Leading to the Adoption of the Additional Protocols .

[42] . Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, *Final Report*. 365)

under the circumstances constitute a legitimate military target. Certain potential objects or individuals clearly are unlawful targets. For example, any direct attack upon the civilian population, or upon any place, localities, or objects used solely for humanitarian, cultural, or religious purposes such as hospitals, churches, mosques, schools, or museums are immune. On the other hand, such immunity is lost if they are used or employed for enemy military purpose. There is always a presumption in favour of the immunity. Additional Protocol I to the Geneva Conventions of 1994 provides in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used[43].

Again, Protocol I also outlaws carpet or area bombing tactics. It provides that it is unlawful to bomb "as a single military objective, an area clearly separated and distinct military objectives located in a city, town, village, or other area containing a similar concentration of civilians or civilian objects". This is a useful and humane rule that eliminates the territorial or mass-bombing attacks so frequently resorted to in World War II, and to a lesser degree in the Vietnam conflict[44].

The enormous fire-raising attacks by US forces over large urban areas in Japan in 1945 and the devastation wreaked city by city in Europe throughout World War II would be regarded today as flagrant violations of the modern rules and clearly prohibited by the Additional Protocols regardless of the nature or intensity of the conflict[45]. Many

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[43]. US Department of Defence, Conduct of the Persian Gulf War: Final Report to Congress note 29 (Chapter 3) 699

[44]. W Christopher, "Distinction: The Application of the Additional Protocols in the Theatre of War", *Asia Pacific Yearbook of International Humanitarian Law*, Vol. 2, 2006, pp. 36-45.

[45]. S Fedekico, "Targeting and Humanitarian Law, Current Issues", in ***IYHR***, vol. 34, 2004, pp. 59-105.

contemporary writers of the laws of war consider that the size and scope of the conflict affect the scope of the military objective – that is, as nations devote more of their resources to the war effort and become more heavily committed to a successful conclusion, economic activities such as transportation, supply and communications normally used only for civilian purposes may become legitimate target[46].

This is true but still would never today justify expansion of the legitimate target to include the civilian population or civilian areas as such. Protocol I also provides that any loss of civilian life incidental to the attack on legitimate military targets must be reduced to what is absolutely necessary to accomplish the mission. It would be indiscriminate and unlawful to cause civilian causalities that are excessive under the circumstances. The military target itself always must be identified and individually singled out for attack within the limits of available technology and weapons. Precision Guided Munitions (PGMs) were used in successful Vietnam air campaigns, such as Linebacker I and 11 and made a critical impact on the United States successful prosecution in operation Desert Storm. Where there is a high concentration of civilians, it is imperative to use PGMs, as opposed to "dumb bombs", when available and subject to military necessity.

Military operations in the Gulf War in 1991 demonstrated the precision with which military targets could be hit without injury or disruption of the civilian population. Tomahawk cruise missiles disabled power plants and missile sites and destroyed military headquarters in Baghdad with minimum loss to civilians and civilian structures[47]. F. 117 stealth fighters and F. 111 fighter-bombers were able to "thread" laser land-guided bombs through areas as small as doorways and air vents with surgical accuracy. The introduction

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46. M Nils, "Targeting killing in International Law", *Oxford, OUP*, 2008, 468.
47. H Joseph, "Military Objective and Collateral Damage, their Relationship and Dynamics" *YIHL*, Vol. 7 (2004), 2007, pp. 35-78.

of PGM and high technological systems for spotting targets make it even more necessary to isolate the target from the civilian population and dwellings. Of course PGMs are expensive, not always available for certain missions even to the technologically superior force, and often should be conserved for a later phase of the battle. However the operational decisions on their use cannot obscure the fact that state-of-the-art military combat has forever changed what and how much civilian loss is permissible. An operational decision to use gravity-driven weapons when more precise munitions are available can make the attack excessive and unlawful if civilians are killed who would have been spared with the use of more accurate weapons.

Therefore, the loss of civilians, even deliberately located in and around a military target must clearly be shown to be absolutely necessary[48]. Additional Protocol I specifically stipulated that feasible precautions in minimizing civilian loss includes the choice of weapons as well as the means and methods of attack. For example, bombing a military headquarters facility in a densely populated city would never justify the use of unguided bombs, if PGMs were available to the striking force and if it appears that innocent civilians within the vicinity would be injured or killed. However, the defending force cannot deliberately use civilians as a shield for their own military operations, such as moving them into a critical command and control center. An example of this principle is Iraq's use of the Amirya bomb shelter during the Gulf War.The United States attacked it, killing between two hundred and four hundred civilians, causing some to allege a violation of the laws of war. The fact that civilians were used as shield does not cause them to lose their normal protection. This means that the attacking forces should

[48] . B Alexandra, "The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare" *University Centre for International Humanitarian Law, Research Paper Series*, No. 2, 2006, 100.

nonetheless make particular efforts to avoid or at least minimize their injury or death. In armed conflict between two states where only one armed force has high-technology weapons systems, the humanitarian rules do not change. Each force is judged by the capabilities it possesses to defend itself or launch an attack. The high technology state cannot rely on the lack of PGMs by its enemy to justify its own resort to less than its own state of the art weaponry. At the same time, the defending force must use all means available to avoid attacks on, or excessive incidental damage to, the civilians when it launches its own defence or attack[49].

The military commander planning or executing the attack cannot be the final arbiter of whether the loss of civilian life and property is reasonably proportionate to the attacks on military advantage. Only by the independent assessment of non-participating entities or organizations can the strict rules for the limitation of unnecessary suffering and destruction be upheld.

In the final analysis, the loss of any civilian life or property as a result of an armed attack, regardless of the level of the war, or the intensity of the particular planned mission, must clearly be shown to have been unavoidable with the use of the most precise weapons available to the attacking force.

[49] . I Henderso, "The Contemporary Law of Targeting Military Objectives, Proportionality and Precautions in Attack under Additional Protocol II",(Teiden: Boston, M. Wishoff, 2009) 266.

CHAPTER 2

THE LAW APPLICABLE TO TARGETING

2.1 Nature of Targeting

Targeting is a military function by which targets are identified, selected and prioritized, and the best method and means to pursue them are devised in the context of the operational needs and capabilities, and in pursuance of the military objectives of an attacker. Military objective may be considered in both legal and military sense. Military objective in a legal sense refers to a lawful, material target of an attack. Military objective as commonly found in military doctrine, is indicative of the aim one's efforts or actions – in this context, the goal or purpose of military operations[1]. The term military objective is used in a legal sense in the majority of this work.

International human rights law permits the use of lethal force outside of armed conflict situation, if it is strictly necessary to save human life. In particular, the use of lethal force is lawful if the targeted individual presents an imminent threat to life and less extreme means, such that capture or non lethal incapacitation are insufficient to address that threat. The UN basic principles on the use of force and firearms by law enforcement officials provides that the "international lethal use of firearms may only be when strictly unavoidable in order to protect, in self defence of others against the imminent threat of death or serious injury" and "only when less extreme means are insufficient to achieve these objectives". Under this standard, individuals cannot be targeted for lethal attack merely because of past unlawful behaviour, but only for imminent or other grave threats to life when arrest is not a reasonable possibility.

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[1]. A Jachec – Neale; "The concept of Military Objectives in International Law and Targeting Practice" *Routledge Rersearch in the Law of Armed Conflict* (Newyork: Routledge 2009)101.

Where there is evidence that a targeted killing might have violated international human right standard, a state has an obligation to investigate. For instance, the UN principles on the effective prevention and investigation of extra-legal arbitrary and summary executions state that "men shall be thorough, prompt and impartial investigation of all subjected cases of extra-legal, arbitrary and summary executions, including cases where complaints by relatives or other reliable reports suggest unnatural death".

The lawfulness of targeted killing hinges in part on the applicable law, which is determined by the context in which it takes place. International Humanitarian Law (also known as the law of war) is applicable during armed conflicts, whether between states or between a state and non-state armed groups. Hostilities between a state and an armed group generally considered to be an armed conflict when violence reaches a significant threshold and armed group has the capacity to abide by the laws of war. Rules of International Humanitarian law are found in the Geneva Conventions of 1949 and its two Additional Protocols, the 1907 Hague Regulations, and the Customary Laws of War. Among other things, these rules regulate the conduct of hostilities including the targeting of combatants in all armed conflicts.

International human right law is applicable at all times, but during armed conflict, it may be superseded by the laws of war. International human law rights can be found in treaties such as the International Covenant on Civil and Political Rights and authoritative standards such as the Basic Principles on the Use of Force and Firearms by Law Enforcement officials. Human rights law upholds the right to life and provides rules for law enforcement on when the use of lethal force is permissible. Outside of armed

conflict, lethal force may only be used when strictly necessary to prevent imminent harm to life, when arrest is not reasonably possible.

2.2 History of Codification

The technological development of the late 19th and early 20th century, namely, the development of long-range weapons and air warfare, created a fundamental challenge to the rule of distinction. This led to the first attempt at translating the notion of military objective into operational language. In 1923, a group of experts who had been given a mandate at the Washington conference on Disarmament the preceding year gathered in the Hague and drafted a set of rules specific to air warfare[2]. The most important provisions related to aerial bombing and codified the principle that aerial bombardment to terrorize the civilian population or to destroy or damage private property is prohibited. Attacks were confined to military objectives, which the 1923 Hague rule defined as objects of which the destruction or injury would constitute a distinct military advantage to the belligerent[3].

The drafters drew up a list of legitimate military objectives which included military forces, military works, military establishments or depots, factories constituting important and well-known centres engaged in the manufacture of arms, ammunition or distinctively military supplies and lines of communication or transportation used for military purposes.[4] The commission of jurist then formulated a prohibition against targeting these objects when doing so would amount to an indiscriminate attack against

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[2]. Rules concerning the Control of Wireless Telegraph in Time of War and Air Warfare drafted by a Commission of Jurist at the Hague, December 1922 – February 1923

[3]. Hague Rules,Article 24(1) 1923

[4] *Ibid* Article 24(2) 1923

the civilian population without however defining what was meant by the term indiscriminate attack[5].

Although, they were never adopted in a binding legal instrument, the 1923 Hague rules were regarded "as an authoritative attempt to clarify and formulate rules of law governing the use of air crafts in war and a convenient starting point for any future steps in this direction.[6] Following three important international armed conflicts that involved the air force of major powers in the 1930s, namely the Italian invasion of Ethiopia (1935-1936), the German intervention in the Spanish Civil war (1936-1939), and the Japanese Invasion of China (1937-1939), new momentum gathered around the principles expounded by the Hague Air Rules. In 1938, the League of Nations unanimously adopted a resolution that recognized three fundamental principles of international law applicable to air warfare. These were directly inspired from the 1923 Rules;

(a) Direct attacks against civilian population are unlawful.

(b) Targets for air bombardment must be legitimate, identifiable military objectives, and

(c) Reasonable care must be taken in attacking military objectives to avoid bombardment of a civilian population in the neighborhood.

The 1923 attempt to distinguish civilian objects from military objectives failed to be further clarified in the 1949 Geneva Conventions, which were negotiated and drafted after the 2nd world war. Despite the obvious need to update and clarify the rules governing warfare, the question of nuclear weapons created a massive political obstacle

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5. *Ibid* Article 24(3)

6. L O Oppenheim, *International Law:* A Treatise, Vol. II, (7th ed, London, Longmans, Green and Co, 1952) of Armed conflicts" in M.N. Schmitt, ed, the Law of Military Operations – Liber Amicorum Professor Jack Grunawalt, Vol. 72 Newport, Rhode Island, U.S. Naval War College International Law Studies, 1998, 197 at 199.

to dealing with the rules regulating the conduct of hostilities at the 1949 Diplomatic Conference. The United States and its allies were determined not to allow a ban on nuclear weapons. As a result, the conference had to abandon its attempt to deal seriously with the rules on the conduct of hostilities, in particular air raids. It was difficult to see how this could be done without broaching the issue of nuclear weapons.[7] Despite this setback, the 1949 conventions were elaborated around the principle of distinction between combatants and military objectives on the one hand, and civilian objects on the other. "Military objectives" were explicitly referred to in two provisions. Article 19 of the First Convention which requires that the responsible authorities ensure that medical establishments and units are as far as possible, situated in such a manner that attacks against military objectives cannot imperil their safety, and Article 18 of the Fourth Convention contains a similar provision for the benefit of civilian hospitals.[8]

In 1954, the list of legitimate military objectives partially developed by the drafters of the Hague Convention for the Protection of Cultural Property in the event of Armed Conflict.[9] In this convention, special protection is granted to certain cultural property provided it is situated at an adequate distance from any large industrial centre or from any important military objective constituting a vulnerable point.[10] Examples of such 'vulnerable points' include an aerodrome, a broadcasting station, an establishment engaged upon work of national defence, a port or railway station of relative importance

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7. Y Sandoz, Role of the ICRC in the "Evolution and Development of International Humanitarian Law" in J Hasse, E. Muller & P. Schneider (eds) *Humanitares Volkerecht,Nomos*,(,Verlagsgesellschaft, Baden,2001) 110 at 115

8. Y Sandoz, C Swinarski and B Zimmerman, (eds), *Commentary on the Additional Protocols of 8th June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva, ICRC and Martinus Nijhoff, Publishers 1987) 2000.

9. Hague Convention for the Protection of Cultural Property in the Event of Armed conflict, 14 may 1954 (hereinafter 1954 Hague Cultural Property Convention), 371.

10 Hague Cultural Property Convention Article 8 (1) (a) 1954

or a main line of communication. While this reference to military objective in an international treaty instrument is worth citing, its importance is rather limited because of the absence of criteria for determining what makes an object a legitimate target. That is to say, the convention recognizes that certain objects are military objectives and provides examples of such objects, but it does not indicate what it is about these objects that makes them legitimate targets nor does it indicate how other objects might become 'vulnerable points' or military objectives.

It was the International Committee of the Red Cross (ICRC), in 1956, which finally moved things forward significantly. In a bid to clarify the principle of distinction and fill what it perceived to be a serious gap in the laws of armed conflict., the ICRC produced a document entitled "Draft Rules for the Limitation of Danger Incurred by the Civilian Population in Time of War[10] and in so doing, it proposed the following definition of military objective at Article 7:

> In order to limit the dangers incurred by the Civilian population, attacks may only be directed against military objectives. Only objectives belonging to the categories of objective which in view of their essential characteristics are generally acknowledged to be military importance may be considered as military objectives. However, even if they belong to one of those categories, they cannot be considered as military objective where their total or partial destruction in the circumstances ruling at the time, offers no military advantage.[11]

Though the General Assembly resolutions did not articulate the notion of military objective, growing international support for the principle of distinction accentuated the need for a workable definition. In 1969, the Institute of International Law produced a

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[10]. International Committee of the Red Cross 1956: available on line in the ICRC IHL Database, (http://www.icrc.orgg/ihl.nsf/webFUL?Open view> (hereinafter ICRC Draft Rules) Accessed on 10 June,2016

[11]. List of categories of Military Objectives according to Article 9(2) of the ICRC Draft Rules.

resolution entitled "the Distinction between Military Objectives and Non-Military Objects in general and included the following definition of military objectives:

> …… only those objects which by their very nature or purpose or use, make an effective contribution to military action, or exhibit a generally recognized military significance such that their total or partial destruction in the actual circumstances gives a substantial specific and immediate military advantage to those who are in a position to destroy them[12]

The final step in the process of codifying the notion of 'military objective' was taken by the International Community during the three year Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (CDDH), which took place in Geneva between 1974 and 1977, and which led to the adoption of the 1977 Additional Protocols to the Geneva Conventions of 12 August 1949.[13] The CDDH produced a definition of military objectives at Article 52(2) of the First Additional Protocol:

> In so far as objects are concerned, military objectives are limited to those objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage.

The provision integrates elements of the Hague Air Rules definition – the importance of establishing a military advantage and elements of the definition put

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[12]. Article 2, Resolution adopted by the Institute of International law at its session at Edinburgh, September 9, 1969, available online in the ICRC IHL Database: http:/www.icrc.org/ihl.nsf/webFULL? Open view (herenafter Edinburgh Resolution) Accessed on 10 June,2016

[13]. The Additional Protocols are credited for bringing together what was formally understood as being two subsets of the laws of armed conflicts: The so called "Hague Law", which dealt with means and methods of warfare and the "Geneva Law" which focused on the protection of victims of war. This development was confirmed by the International Court of Justice in the Context of its 1996 Advisory Opinion on the *legality of the Threat or use of Nuclear Weapons*. These two branches of the law applicable in armed conflict have become so closely inter-related that they are considered to have gradually formed one single complex systems, known today as International Humanitarian Law. The provision of the protocols additional of 1977 gives expression to the unity and complexity of that law, (1996) ICJ Reports 226 at 256 para 75 (hereinafter *Nuclear Weapons* Advisory Opinion)

forward by the institute of international law – the criteria of nature, purpose and use. However, the expected advantage is characterized as definite, which sets a higher threshold than 'distinct', the term employed by the 1923 proposal, yet less stringent than substantial, specific and immediate which were the adjectives chosen by the Institute of International Law in 1969.

One of the underlying assumptions of the negotiations that led to the adoption of the First Addition Protocol was the customary nature of the principle of distinction[14]. These facts tend to heighten the importance to the codification of the rules on targeting, generally, and to the definition of military objectives more specifically. The relevant provisions were drafted with the aim of creating a coherent normative edifice that would ensure that the principle of distinction could be translated into an operational reality.

Despite the principle's customary nature, Article 52 (2) continues to be one of the most heavily debated provisions of the First Additional Protocol[15]. It has been criticized among other things, for being "abstract and generic"[16], not very constructive and so "sweeping that it can cover practically anything"[17]. The Flip side of such criticism is that the definition offers the possibility of a flexible and future interpretation[18], which, while it heightens the importance of good faith implementation, may prove to be increasingly necessary as warfare moves beyond the traditional battlefield. The limits of the definition

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[14]. M Bothe "Targeting" Legal and Ethical Lessons of NATO's Kosovo Campaign, Vol. 78, New Port , Rhode Island, *U.S. Naval War College International Law Studies,* in A.E Wall (ed)2002, 173 at 175.

[15]. T Meron, *Human Rights and Humanitarian Norms as Customary Law,* (Oxford, Clarendon Press, 1989) 64-65.

[16]. S Oeter "Methods and Means of Combat" in D. Fleck (ed,) *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford; Oxford University Press, 1995) at 442 - 5

[17]. Y Dinstein, 'The Conduct of Hostilities under the Law of International Armed Conflict', Cambridge University Press, 2004, 13

[18]. E Rosenblad, 'Area Bombing and International Law *The Military Law of War Review* (1976) 25-1-2

of military objective are explored through a presentation of some of the divergent interpretations and criticism the notions has attracted. However, it is necessary to lay down what has come to be referred to as the two-pronged test of the military objective[19]

[19] . A Cassese, *International Law*, (Oxford: Oxford University Press ,2001) 339.

2.3 Treaty Law on Targeting

A treaty is any written international agreement between two or more states contained in one or more related instruments and governed by international laws. While the designation of the document is not determinative of its status as a treaty, targeting law treaties may be described by any one of a number of terms, such as treaty, conventions, protocol, regulations, declarations, and statutes.

It is undoubtful that the sources of international law are generally considered to have been incorporated in Article 38 of the Statute of the International Court of Justice[20]. For the purpose of this study, these sources can be summarized as treaties, customary International law, the general principles of law recognized by civilized nations and as a subsidiary means, judicial decisions and the writings of the learned authors or highly qualified publicists. Consequently, the burden is to ascertain from these sources the subset of International law applicable to targeting. A review of the literature reveals that the treaties that may affect targeting includes,

(a) The four Geneva conventions of 1949, which are;

(i) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed forces in the field, of 12 August, 1949.

Article 12 thereof states that, members of the armed forces and other persons mentioned in the following Article, who are wounded or sick shall be respected and protected in all circumstances. They shall be treated humanely and cared for by the party to the conflict in whose power they may be without any adverse distinction founded on sex, race, nationality, religion, political opinions, or any other similar

[20] . *Prosecutor v. Erdemovic*, (Appeals chamber) Case No IT-96-22 (7 October, 1997 (40) (Joint Separate Opinions of Justices McDonald and Vohrah) See also Ian Brownile, '*Principles of Public International Law'* (London: Oxford Press 2003) 5.

criteria. Any attempts upon their lives, or violence to their persons, shall be strictly prohibited. In particular, they shall not be murdered or exterminated, subjected to torture or to biological experiments, they shall not willfully be left without medical assistance and care, nor shall conditions exposing them to contagion or infection be created. Only urgent medical reasons will authorize priority in the order of treatment to be administered. Women shall be treated with all consideration due to their sex. If a member of the armed forces is wounded or sick, and therefore in no condition to take an active part in the hostilities, he is no longer part of the fighting force and becomes a vulnerable person in need of protection and care.

ii. Geneva Convention for the Amelioration of the Condition of Wounded, Sick ad Shipwrecked Measures of Armed Forces at Sea of 12 August, 1949

The present convention replaced Hague Convention (X) of 1907 for the Adaptation to Maritime Warfare of the principles of the Geneva Convention. It contains 63 Articles whereas 1907 Convention had only 28. This extension is mainly due to the fact that the present convention is conceived as a complete and independent convention whereas the 1907 convention restricted itself to adapting to maritime warfare of the principles of the convention on the wounded and sick in land warfare.

By Article 1, the High contracting parties undertake to respect and to ensure respect for the present convention in all circumstances. The sick, wounded and shipwrecked must be cared for adequately. Belligerents must treat members of the enemy force who are wounded, sick or shipwrecked as carefully they would their own. All efforts should be made to collect the dead quickly; to confirm death by medical

examination, to identify bodies and protect then from robbery. Medical equipment must not be intentionally destroyed and medical establishments and vehicles must not be attacked, damaged or prevented from operating even if for the moment, they do not contain patients.

iii. Geneva Convention Relative to the Treatment of Prisoners of War.

This covers members of the armed forces who fall into enemy hands. They are in the power of the enemy state, not of the individuals or troops who have captured them.

Prisoners of war must be;

- Treated humanely with respect for their persons and their honour
- Enabled to inform their next of kin and the central prisoners of War Agency (ICRC), the International Red Cross of their capture.
- Allowed to correspond regularly with relatives and to receive relief parcels.
- Allowed to keep their clothes, feeding utensils and personal effects.
- Supplied with adequate food and clothing
- Provided with quarters not inferior to those of their captor's troops.
- Given the medical care their state of health demands
- Paid for any work they do
- Repatriated if certified seriously ill or wounded, (but they must not resume active military duties afterwards).
- Quickly released and repatriated when hostilities cease.

Prisoners of War must not be;

- Held in close confinement except for breaches of the law, although their liberty can be restricted for security reasons.
- Compelled to give any information other than their name, age, rank and service number.
- Deprived of money or valuables without a receipt (and these must be returned at the time of release).
- Compelled to do military work, nor work which is dangerous, unhealthy or degrading.

iv. Geneva Convention Relative to the Protection of Civilian Persons in Time of War[21].

This covers all individuals "who do not belong to the armed forces, take no part in the hostilities and find themselves in the hands of the enemy or an occupying power" Protected civilians must be;

- Treated humanly at all times and protected against acts or threats of violence, insults and public curiosity.
- Entitled to respect for their honour, family rights, religious convictions and practices, and their manners and customs.
- Specifically protected for example in safety zones, if wounded, sick, old, children under 15, expectant mothers or mothers of children under 7.
- Enabled to exchange family news of a personal kind, helped to secure news of family members dispersed by the conflict.
- Allowed to practice their religion with ministers of their own faith. Civilians who are interned have the same rights as prisoners of war. They may also asked to

[21] . I Henderson,' The Contemporary Law of Targeting Military Objective, Proportionality and Precautions in Attack under Additional Protocol 11, (Teiden: Boston, M. Wishoff, 2009 *op cit* p. 23.

have their children interned with them, and whenever possible, families should be housed together and provided with the facilities to continue normal family life . Wounded or sick civilians, civilian hospitals and staff, and hospital transport by/and, sea or air must be specially respected and may be placed under protection of the red cross/crescent emblem.

Protected civilians must not be;

- Discriminated against because of race, religion or political opinion-forced to give information.
- Used to shield military operations or make an area immune from military operations.

- Punished for an offence he or she has not personally committed, women must not be indecently assaulted, raped, or forced into prostitution

(b) Additional Protocol 1 (API)

Protocol 1 is a 1977 amendment protocol to the Geneva Conventions relating to the protection of victims of international conflicts, where armed conflicts in which people are fighting against colonial domination, alien occupation or racist regimes[22] are to be considered international conflicts. It reaffirms the international laws of the original Geneva Convention of 1949, but adds clarifications and new provisions to accommodate developments in modern international warfare that have taken place since the Second World War.

Protocol 1 is an extensive document, containing 102 articles. Article 42 thereof outlaws attacks on pilots and aircrews who are parachuting from an aircraft in distress.

[22] . Protocol Additional to the Geneva Convention of 12 August 1949, and relation to the protection of victims of International Armed Conflict (Protocol 1), 8 June 1977, ICRC, *International Committee of the Red Cross*.

Once they landed in territory controlled by an adverse party, they must be given an opportunity to surrender before being attacked unless it is apparent that they are engaging in a hostile act or attempting to escape.

Articles 51 and 54 outlaws indiscriminate attacks on civilian populations, and destruction of food, water and other materials needed for survival. Indiscriminate attack include directly attacking civilian (non-military) targets, but also using technology such as biological weapons, nuclear weapons and land mines, whose scope of destruction can not be limited". A total war that does not distinguish between civilian and military targets is considered a war crime...

(c) The Hague Convention (iv) Respecting the Laws and Customs of War on Land of 1907

One of the purposes for which the First Hague Peace Conference of 1899 was convened was "the revision of the declaration concerning the laws and customs of war elaborated in 1874 by the conference of Brussels, and not yet ratified. The conference of 1899 succeeded in adopting a convention on land warfare to which regulations are annexed. The convention and the regulations wee revised at the Second International Peace Conference in 1907.

Seventeen of the states which ratified the 1899 Convention did not ratify the 1907 version. For example, states like Argentina, Bulgaria, Chile, Italy, Spain, Turkey etc did not ratify the 1907 version but are formally bound by the 1899 convention in their relations with the other states thereto. As between the parties to the 1907 convention, this convention has replaced the 1899 convention.[23]

[23]. Article 4 of Hague Convention (IV), Respecting the Laws and Customs of War on land, 1907.

The provisions of the two conventions on land warfare, like most of the substantive provisions of the Hague Conventions of 1899 and 1907, are considered as embodying rules of Customary International Law. As such they are also binding on states which are not formally parties to them. Article 1 of the principles annexed to Hague Convention IV clarifies the laws, rights and duties of war apply not only to armies, but also to militia and volunteer corps fulfilling the following conditions;

- To be commanded by a person responsible for his subordinates;
- To have a fixed distinctive emblem recognizable at a distance;
- To carry arms openly; and
- To conduct their operations in accordance with the laws and customs of war.

(d) The Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict of 1954.

By article 1 thereof, for the purpose of the present convention, the term "cultural property" shall cover, irrespective of origin or ownership;

a. Movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture art or history, whether religious or secular; archaeological sites; groups of building which, as a whole, are of historical or artistic interest; works of art, manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or achieves or of reproductions of the property defined above.

b. Building whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries

and depositories of achieves, and refuges intended to shelter, in the event of armed conflict, the movable cultural property depend in sub-paragraph (a);

c. Centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b) to be known as "centres containing monuments.

The Hague Convention as this instrument is often referred to, is the first multilateral treaty to focus exclusively on the protection of cultural heritage, during hostilities. This convention specifically highlights the fundamental belief that the cultural heritage of each nation belongs to all of humankind.

Severally conflicts that erupted in the 1990s, particularly those in former Yugoslavia, revealed certain gaps. By Article 4, thereof, the High contacting parties are to refrain from using any of the property and its immediate surroundings or of the appliances in use for its protection for purposes which are likely to expose it to destruction or damage in the event of armed conflict and by refraining from any act of hostility, directed against such property. However, it is only weighable in cases where military necessity imperatively requires such a waiver. Parties to an armed conflict undertake to prohibit, prevent and, if necessary, put a stop to any form of theft, pillage or misappropriation of, and any acts of vandalism directed against, cultural property. They should refrain from requisition movable cultural property situated in the territory of another High contractility party.

2.3 General Principles of IHL

Rules of IHL attempt in broad terms to regulate conflict in order to minimize human suffering. IHL reflects this constant balance between the military necessity arising in a

state of war and the needs for humanitarian protection. IHL is founded upon the following principles;

- distinction between civilians and combatants
- prohibition of attacks against those *hors de combat*
- prohibition on the infliction of unnecessary suffering
- principle of proportionality
- notion of necessity
- principle of humanity

Each principle should be found within the specific rules and norms of IHL itself, but the principles may also help interpretation of the law when the legal issues are unclear or controversial. Depending on the issue, they balance between the principles and interest shifts. For example, during hostilities, military necessity may limit the notion of humanity by allowing for destruction, but in other situations such as the protection of the wounded and sick, the principle of humanity is at the heart of the legal rules.

(a) The principle of distinction between civilians and combatants

The principle of distinction underpinning many rules of IHL is that only fighters may be directly targeted. This is a necessary compromise that IHL provides for in order to protect civilians in armed conflict. Without the principle of distinction, there would be no limitation on the method's of warfare.

The principle of distinction is set out in Article 48 and 52 of Additional Protocol 1 to the Geneva Conventions. Any direct attack against a civilian or a civilian object is not only a violation of IHL but also a grave breach. Direct attacks against civilians and/or civilians objects are categorized as war crimes. Additionally, any weapon which is

incapable of distinguishing between civilians/civilian objects and fighters/military objects is also prohibited under IHL. The principle is also a rule of Customary International Law, binding on all states.

(b) The prohibition of attacks against those *horse de combat.*

The prohibition to attack any person horse de combat (those who are sick and wounded, prisoners of war) is a fundamental rule under IHL. For example, while a soldier could be targeted lawfully under normal circumstances, if that soldier surrender or is wounded and no longer poses a threat, then it is prohibited to attack that person. Additionally, they may be entitled to extensive protection if they meet the criteria of being a prisoner of war.

(c) The prohibition on the infliction of unnecessary suffering

While IHL does not permit violence, it prohibits the infliction of unnecessary suffering and superfluous injury. While the meaning of such terms is unclear and the protection may as such be limited, even fighters who may be lawfully attacked are provided protection by this prohibition. One rule that has been established based on this principle is the prohibition on the use of blinding laser weapons.

(d) The principle of proportionality

The principle of proportionality limits and protects potential harm to civilians by demanding that the least amount of harm is caused to civilians, and when harm to civilians must occur, it needs be proportional to the military advantage. Article 51(5)(b) of API prohibits attacks when the civilian harm would be excessive in relation to the military advantage sought. The principle cannot be applied to override specific

protections, or create exceptions to rules where the text itself does not provide for one. As with the principle of necessity, the principle of proportionality itself is to be found within the rules of IHL themselves. For example, direct attacks against civilians are prohibited and hence a proportionality assessment is not a relevant legal assessment as any direct attack against even a single civilian who is not taking part in hostilities is a clear violation of IHL. Proportionality is only applied when a strike is made against a lawful military target.

(e) The Notion of Necessity

A dominant notion within the framework of IHL is military necessity. This principle mostly clash with humanitarian protection. Military necessity permits armed forces to engage in conduct that will result in destruction and harm being inflicted. The concept of military necessity acknowledges that under the laws of war, wining the war or battle is a legitimate consideration.

However, the concept of military necessity does not give the armed forces the freedom to ignore humanitarian considerations altogether and do what they want, it must be interpreted in the context of specific prohibitions and in accordance with other principles of IHL.

(f) The Principle of Humanity

The principle of humanity, and its absence during the battle of Solferino of 1859, was the central notion that inspired the founder of the International Committee of the Red Cross (ICRC), Henry Dunant. The principle stipulates that all humans have the capacity

and ability to show respect and care for all, even their sworn enemies. The notion of humanity is central to the human condition and separates humans from animals

IHL, the principles of which can be found in all major religions and cultures, set out only basic protections, but ones which look to demonstrate that even during armed conflict, there is some common sense of and respect for humanity. Modern IHL is not naïve and accepts that harm, destruction and death can be lawful during armed conflict. IHL, simply looks to limit the harm, and the principle of humanity is very much at the heart of this ambition. Many rules of IHL are inspired by this notion, specifically those setting out protections for the wounded and sick.

2.4 Customary International Law on Targeting

A useful working definition of customary law would be that, it is when states in general do or refrain from doing in the belief that they are legally obliged so to act or refrain from acting. Customary International Law are those aspect of international law that study the principle of custom. Article 38 (1) (c) of the Statute of the International Court of Justice (ICJ) defines the law to be applied by the court as including "international custom, as evidence of a general practice accepted as law" and it seems proper to conclude that "accepted" here means accepted by states. So, states are critical to the formulation of customary law. While the initiative towards a particular development of the law may in the modern context come from special interest groups or non-governmental organizations (NGOs), it is the practice of states that has the capacity actually to cause customary law to develop.

The creation of a rule of customary law requires a generally consistent practice, but there is no particular rule as to the period of time during which such practice must

have maintained; generality and consistency of application of the suggested customary rule are the necessary features which must be established by evidence as to what state practice actually is. Inconsistency may arise between the statements and the battlefield practice of a single state, or may consist of a divergent practice as between different states.. To form the basis of a customary rule, state practice need not be universal or unanimous among states. The acid test is whether the parties is sufficiently wide, or extensive, and convincing.

The International Court of Justice Statute defines customary international law in Article 38 (1) (b) as "evidence of a general practice accepted as law". This is generally determined through two factors: the general practice of states and what states have accepted as law. There are several different kinds of customary international laws recognized by states. Some customary international laws rise to the level of *jus cogens* through acceptance by the international community as non-derogable rights, while other customary international law may simply be followed by a small group of states. States are typically bound by customary international law regardless of whether the states have codified these laws domestically or through treaties. Some international customary laws have been codified through treaties and domestic laws, while others are recognized only as customary law,

The laws of war, also known as *jus in bello,* were long a matter of customary law before they were codified in the Hague Conventions of 1899 and 1907, Geneva Conventions, and other treaties. However, these conventions do not purport to govern all legal matters that may arise during war. Instead, Article 1 (2) os Aditional Protocl 1

dictates that customary international law governs legal matters concerning armed conflict not covered by other agreements

Customary international law remains relevant to parties (along with non-parties) to it. There are various reasons that account for this purpose. First, Additional Protocol 1 (AP1) does not purport to be a complete codification of the relevant law (as could be deduced by the contemporary restatement of the Martens clause in Article 1(2) API). Secondly, it is explicitly stated that the rules in Article 48-67 API are additional to inter alia, "other rules of international law relating to the protection of civilians and civilian objects on land - against the effects of hostilities[24]. Nonetheless, there is no relevant customary international law concerning targeting decisions where a state is a party to all of the 1949 Geneva Convention, HCP and API[25]. .

The rule is that, parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects. State practice establishes this rule as a norm of Customary International law applicable in both International and Non International armed conflicts.

a. International Armed Conflict

This rule is codified in Article 48 and 52(2) of Additional Protocol I, to which no reservations have been made. At the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Article 52 was so essential that it cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim

[24]. P Rowe, *The Impact of Human Rights Law on Armed Forces* (Cambridge University Press, Cambrdge 2006), 146

[25]. T Meron, Customary Law, Crimes of War Project, (2006), 25.

and purpose of Protocol I and undermine its basis. In addition, under the Statute of the International Criminal Court, intentionally directing attacks against civilian objects, that is, objects which are not military objectives", constitutes a war crime in international armed conflicts[26].

The obligation to distinguish between civilian objects and military objectives and the prohibition on directing attacks against civilian objects is contained in a large number of Military Journal[27]. Particularly, Sweden's IHL manual identifies the principle of distinction as set out in Article 48 of Additional Protocol I as a rule of Customary International Law.[28] In their pleadings before the ICJ in the *Nuclear Weapons Case*, several states invoked the principle of distinction between civilian objects and military objectives. In its Advisory Opinion, the court stated that the principles of distinction was one of the cardinal principles of International Humanitarian Law and one of the intransgressible principles of international customary law.[29]

b. Non-International Armed Conflicts

The prohibition on directing attacks against civilian objects has been included in Amended Protocol II to the Convention on Certain Conventional Weapons[30]. The Statute of the ICJ does not explicitly define attacks on civilian objects as a war crime in non-international armed conflicts. It does, however, define the destruction of the property of an adversary as a war crime unless such destruction be imperatively demanded by the necessities of the conflict. Therefore, an attack against a civilian object constitutes a war

[26]. ICC Statute, Article 8(2)(b)(ii)
[27]. For example, the Military Manual of Nigeria, Cameroon, France, and Sweden
[28]. Sweden IHL Manual S.9.
[29]. *Nuclear Weapons Case*, Advisory Opinion (1996)ICJ REP.179
[30]. Amended Protocol II to the Convention on Certain Conventional Weapons , 2003,Article 3 (7)

crime under the Statute in as much as such an attack is not imperatively demanded by the necessities of the conflict. The destruction of property is subject to Rule 50 and the practice establishing that rule also supports the existence of this rule. It is also relevant that the Statute defines attacks against installations, materials, units or vehicles involved in a humanitarian assistance or peace keeping mission as a war crime in non-international armed conflicts, as long as these objects are entitled to the protection given to civilian objects under the international law of armed conflict[31].

The jurisprudence of the ICJ and of the ICT for the Former Yugoslavia provides further evidence that the prohibition on attacking civilian objects is customary in both international and non-international armed conflicts.[32] The Plan of Action for the years 2000-2003, adopted by the 27th International Conference of the Red Cross and Red Crescent in 1999 requires that all parties to an armed conflict respect the total ban on directing attacks against civilian objects. The ICRC has called on parties to both International and Non-International armed conflicts to respect the distinction between civilian objects and military objectives and not to direct attacks at civilian objects[33].

c The Martens Clause

The object and purpose of International Humanitarian Law is to protect the victims of armed conflicts and also to regulate the means and methods of warfare applied in the hostilities, based on a balance between military necessity and humanity[34]. Every single

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31. ICC Statute, Article 8(2)(e)(iii)
32. *Nuclear Weapons Case*, Advisory Opinion of the ICJ (Supra) and *Kordic and Cerkez Case*, Decision on the Joint Defence Motion and Judgement IT-95-14/2-T, Judgement,26 February,2001
33. See example, the Practice of the ICRC (op cit Ss 185-186 and 188-193)
34. The *Public Committee against Torture in Israel and the Palestinian Society for the Protection of Human Rights and the Environment V. The Government of Israel* Israel Supreme Court setting as the High Court of Justice, Judgment, HCJ 769/02, 11 December, 2005 at para. 22 (Targeted Killing Case)

humanitarian rule constitutes a dialectical compromise between these two apposing forces.

According to Nils Melzer;

> Keeping that balance is a difficult and delicate task, particularly in contemporary armed conflict marked by a continued blurring of the traditional distinctions and categories upon which the normative edifice of (international Humanitarian Law) has been built and upon which its functionality depends in operational practice[36]

Regardless of how hard it may be, the belligerent parties are legally obliged to pursue its military aims restricted by considerations of humanity. One of the strongest evidence of this legal duty is the notorious Martens clause. It was suggested for the first time by Fyodor Fyodorovich Martens (1845-1909)[37], Russia's delegate to the 1899 Hague Peace Conference. The clause aimed at handling a disagreement between the states which attended the conference regarding the status of resistance movements in occupied territories and their respective rights[38]. The majority of the attending nations decided that those who fought against occupying power did not fit into the combatant status codified in the Hague Regulations. The Belgian delegation and other small states, preoccupied with future occupations of their respective territories, openly opposed this proposal. The disagreement was so tense that it threatened to dissolve the conference. To avoid this, Fyodor Martens suggested that the Hague convention should not be seen as the final word on definition of the combatant status and that the people engaged on

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[36]. N Melzer, "Keeping the balance between military Necessity and Humanity; a response to four critiques of the ICRS's interpretative guidance on the notion of direct participation in hostilities" New York. *University Journal of International Law and Politics*, Vol. 42, No. 831, 2010, 831-916 at 833.

[37]. For a Biography of Fyodor Fyodorovich Martens and details of his professional life, cf. *Vladimir v. Pustogarov*, "Fyodor Fyodorovich Martens (1845-1909), A Humanist of Modern times", *International Review of Red Cross*, No. 312, 30 June 1996, 310-314.

[38]. *Legality of the Threat or Use of Nuclear Weapons,* Advisory Opinion, ICJ Rep. 1996, p.226 (Dissenting Opinion of Judge Weeramantry) at 483.

resistance movements were protected by principles of International Law derived from custom, laws of humanity and the requirements of the public conscience. This provision was unanimously accepted and reads as follows;

> until a more complete code of the laws has been issued, the High contracting parties deem it expedient to declare that, in cases not included in the regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples from the laws of humanity and the dictates of the public conscience[39].

The Martens Clause is considered as the most important achievement of the Hague conference and it aims to extend international protection to all individuals in all circumstances[40], even when these circumstances are not covered by positive law. The raison d'etre of the Martens clause is to remind the international community that no legal lacunae can be used as an excuse to perform actions contrary to the remaining "principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience[41]". For that reason, the clause must be understood as a "gap-filler" that can be applied when the humanitarian rules are silent or in circumstances when international humanitarian law is not sufficiently rigorous or

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[39]. A more recent version of the Martens Clause can be found in the Article 1(2) of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of International Armed Conflicts, as follows; in cases not covered by this protocol or by other International agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.

[40]. J Pictet, *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute, 1985) at 59-60.

[41]. J Cerone, "The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity – The Evolution of the Nexus Requirement", *New England Journal of International and Comparative Law*, Vol. 14, No. 2, 2008, 191-201 at 192 (Cerone)

precise[42]. That is to say that the clause provides a legal limitation of the discretionary power of the belligerents in favour of the irremovable protection of human beings.

Essentially, Martens clause demonstrates that international humanitarian law is excluded from any assertion to the effect that all which is not forbidden in international law is permitted. As a matter of fact, the Permanent Court of International Justice in the case of the *S.S. "Lotus"*[43], concluded the exact opposite. It ruled that a state action that is not expressly prohibited by an international norm cannot be rendered illegal. This case concerns a dispute between France and Turkey on the legality of the criminal trial and conviction of the captain of the French vessel S.S. Lotus, by Turkish authorities, after this ship was involved in collision in the high seas with the S.S. Boz-kourt, a Turkish steamer, resulting in the latter's sinking and the death of eight people on board. The permanent court concluded that as there was no prohibition for Turkey's actions, they must remain lawful.

Christopher Gregory Weevamantry, a former ICJ Judge, accurately clarifies that this *obiter dictum* was confined to the law of sea and, thus, the circumstances were very distant from those in which humanitarian law applies[44]. Therefore, the Martens clause was already a well-recognized principle at the time of the Lotus decision, but it was just not relevant to it. Moreover, at that time, international law was strictly segregated in two categories; the laws of war and the laws of peace. The permanent court's ruling was formulated exclusively within the context of the latter. However, the clause should be

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[42]. Charlotte Luif. "Modern Technologies and Targeting under International Humanitarian Law"., working paper of Thematic Network of European Studies.(2013) Accessed @ http/www.wptuihl.or. Accessed on 17th May, 2016.

[43]. The case of the *S.S. "Lotus" (France V. Turkey*), Judgement, PCIJ, Series A, No. 101, 1927 at 21.

[44]. Weevamantry, in *Nuclear Weapons case* Supra note 12 at 495.

seen as a tool to cover gaps in the humanitarian normative branch, but, it is far from clear how this role really works.

Conclusively, the clause reinforces that human being is the focus of International Humanitarian Law. It exists to ensure protection even against circumstances that are out of the legal domain. Consequently, it demonstrates that belligerents are not free to apply the means and methods of warfare that they want, since the simple lack of an express humanitarian norm does not necessarily justify an action on the basis of military necessity. The hostilities must equally respect the minimal consideration of humanity.

However, the international doctrine is unable to find a common rationale on how the clause fills these gaps or clarifies obscurities in the legal system. We believe the most accurate clause recognizes the normative nature and autonomy for the considerations of humanity and the public conscience. The clause acknowledges the existence of these two as sources of law. Other dissenting interpretations that can be found in the legal literature, even if sustained by renowned jurist, are persuasive. The clause cannot be read as a moral obligation (or a bridge between positive and natural law) or as a tie between customary and conventional law in the silence or inapplicability of the latter or at least as a source to replace the elements of the custom. The Martens clause's elements have a strong deontological value and must be independently applied from other sources of international law. Given the fact that the international legal system of our days is essentially homocentric, the normative elements that safeguard the interest of mankind and circumscribe the arbitrary behaviour of states must by logic enjoy legal self-sufficiency.

Consequently, the prohibition of non-regulated dehumanizing means and methods of warfare comes from the principle of humanity and the universal juridical conscience themselves, whose existence is merely reaffirmed (not created) by the martens clause.[45]

2.5 Human Rights Law and targeting

International human right is a system of international norms designed to protect and promote the human rights of all persons. These rights, which are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethic origin, colour, religion, language or any other status, are interrelated, interdependent and indivisible. They are often expressed and guaranteed by law, in the form of treaties, customary international law and general principles. Human rights entail both rights and obligations – international human rights and lays down the obligations of states to act in certain ways or to retrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individual or groups.

International human rights law is reflected, inter alia, in the Universal Declaration of Human Rights, as well as in a number of international human rights treaties and in customary international law. In particular, the core universal human rights treaties are;

- The international covenant on economic, social and cultural rights and its optional protocol;
- The international covenant on civil and political right and its two optional protocols;

[45]. Bruno de Oliveira Biazatti, 'The Martens clause'; A Study of its Function and Meaning, http://www.cedin.com.br/wp-content/uploads/2014/2015/Artigo-Bruno-Bizzate-e-Gustavo-vasconcellos-themarten-clause.pdf. Accessed on 20 June, 2016

- The international convention on the elimination of ALL forces of racial discrimination.
- The convention on the elimination of All Forms of Discrimination against women and its optional protocol.
- The convention against forture and other cruel, inhuman or degrading treatment of punishment and its optional protocol.
- The Convention on the Rights of a Child and its two optional protocols.
- The International Convention on the Protection of the Rights of All Migrant Workers and members of their families.
- The International Convention for the protection of All persons from Enforced Disappearance; and
- The Convention on the Rights of person with Disabilities and its optional protocol.

International human rights law is not limited to the rights enumerated in treaties, but also comprises rights and freedoms that have become part of customary international law, binding on all states, including those that are not partly to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely regarded to have this character[46].

Furthermore, some rights are recognized as having a special status as peremptory norms of customary international law (*ius cogens*), which means that no derogation is

[46]. See the Human Rights Committee's Observations-in its general comment No 24 (1994) on issues relating to reservations made upon ratification or accession to the covenant or the optional protocols thereto, or in relation to declarations under article 41 of the covenant and in its general comment No. 29 (2001) that same rights in the international covenant on civil and political rights also reflect norms of customary international law.

admissible under any circumstances and that they prevail, in particular, over other international obligations. The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self determination are widely recognized as peremptory norms, as reflected in the international law commission's draft articles on state responsibilities.[47]

Similarly, the human right committee has indicated that provisions in the international covenant on civil and political rights that represent customary international law (and custom when they have the character of peremptory norms) may not be the subject of reservations[48]. The committee added that "a state may not reserve the right to engage in slavery, to torture, to subject persons to cruel, in human or degrading treatment or punishment, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to pressure a person guilty unless he proves his innocence, to deny minorities the right to enjoy their own culture, profess their own religion, or use their own language. The committee, in line with Article 4 of the Covenant, has also reiterated that certain-rights contained in the covenant cannot be subject to derogation including right to life, prohibition of torture or cruel, in human or degrading punishment, or medical or scientific experimentation without consent recognition of every one as a person before the law, freedom of thought, and religion.[49]

However, this human right has seen domesticated by the Nigerian government. For example chapter IV of the 1999 Constitution of Federal Republic of Nigeria as

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[47]. Draft Articles on Responsibility of States for International Wrongly Acts, adopted by the International Law Commission at its fifty third sessions in 2001, reproduced in *Yearbook of the International Law Commission, 2001*, Vol. 11, Part 11 (United Nations Publication, Sales No. E. 04V.17 (Part 2)

[48]. The Human Rights Committee's Observations in its general comment No. 24 (1994) . 8.

[49] Human Rights Committee Observations- in its General Comment No.29 (2001) 7

Amended contained the various enforceable human rights. When a mention is made of the issue of status of human rights, one is referring to the legal position of rights in relation to the highest law of the land. In more precise terms, the issue about the status or standing of these rights links with their position in terms of legality, constitutionality and justiciability. In *Ransome-Kuti V.G. of Federation*[50], Kayode Eso, JSC emphasizing the status and position of human rights states that;

> … which stands above the ordinary laws of the land and which in fact is antecedent to the political society. It is a primary pre-condition to civilized existence … and what has been done by our constitution, is to have these rights enshrined in the constitution so that the rights could be immutable to the extent of the immutability of the constitution itself.

Again, in *Saude V Abdullahi*[51], Kayode Eso, JSc, held that "human rights are not just mere rights. They are fundamental. They belong to the citizen, these rights have always existed even before orderliness prescribed rules for the manner they are to be sought; these rights include;

(a) The rights to life

(b) Presumption of innocence

(c) Right to dignity of person

(d) Freedom of thought, conscience and religion[52]

(f) Right to personal liberty

The rights to life and right to dignity of human person deserve special deserve special mention as it reinforces the provisions of IHL on distinction and targeting

[50]. (1985)2NWLR (pt6) 211-SC
[51]. (1989) 4NWLR (pt116) 389-SC
[52]. See Chapter IV of the Constitution of the Federal Republic of Nigeria as Amended in 2010.

The right to life is by law recognized to attack to man at birth. It is a foremost right, and a foundation on which all other rights rest. This right is guaranteed in S. 33(i) of the Nigeria constitution, which states that, every person has a right to life, and no one shall be deprive intentionally of his life same in executive of the sentence of a court in respect of a criminal offence of which in has been found guilty in Nigeria".[53]

The African Charter also guarantees right to life to all humans interalia, without distinction of any kind such as rule, ethnic group, colour, sex, language, religion, political or any other opinion, national and social origin, torture birth or other states. Article 4 thereof clearly stipulates that human beings are inviolable. Every human being shall be entitled court held that, Article 2 ranks as one of the most fundamental provision in the convention indeed are which, in peace time, adults of no derogation under Article 15. Together with Article 3 of the convention (the prohibition of torture), it also enshrines one of the basic values of the democratic societies making up the council of Europe.[54]

Thus it is necessary that targets are distinguished in order to protect the right to life. Accordingly, its provisions must be strictly construed.

Dignity is admittedly an ethereal concept" which can mean many things[55] and therefore suffers from an inherent vagueness at its core[56]. Infact, since human dignity is a capacious concept, it is difficult to determine precisely what it means outside the context of a factual setting, the basis of self and a self-work that it is reflected in every human

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53. S. 33(i) of the Constitution of Nigeria, 1999 as amended
54. McCann GC Judgment Appl No: 7805/95, Judgment of 5 September, 1995 at 88.
55. R George Wright, Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection, 43 *San Diego L. Rev*. 527-528 (2006).
56. The European Court of Human Rights, which nonetheless Uses Dignity as a Yardstick within its Jurisprudence, noted that dignity is "a particularly vague concept and one subject to random interpretation" *Siliadin V. France* (No. 73316/01) Eur-Ct. H.U. (2005), 30.

beings right to individual self determination. It is thus universal and uninfringeable by the state or private parties.

This right has been domesticated by several nations as part of their customary law. For example, the Federal Republic of Nigeria has domesticate the right to dignity n chapter IV of their constitution.[57] By Section 34(1) thereof, every individual is entitled to respect for the dignity of his person, and accordingly;

(a) no person shall be subject to torture or to inhuman or degrading treatment

(b) no person shall be held in slavery or servitude, and

(c) no person shall be required to perform forced or compulsory labour.

This human rights justifies the provisions on the treatment of Prisoners of War

Further, the Nigeria constitution[58] equally provides three more grounds justifying deprivation of right to life by use of reasonable force resulting in death. Again, Article 15(2) of the European Convention of Human Rights (ECHN/States that "deaths resulting from lawful acts of war" do not constitute violations in its Grand Chamber (GC) judgment in the case of *McCann & Ors V. the United Kingdom.*

The jurisprudence of the International Court of Justice, which the court's statute recognizes as a subsidiary means for the determination of rules of law, is increasingly referring to states' human rights obligations in situations of armed conflict.[59] These decisions have provided further clarification on issues such as the continuous application

[57]. Section 34 of the Nigeria Constitution, 1999 as Amended.
[58]. S. 33 (2) of the Nigerian Constitution, 1999 as Amended.
[59]. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996, p. 226, Legal Consequences of the Construction of a Wall I the Occupied Palestine Territory, Advisory Opinion, I.C.J. Reports 2004, p. 136, and Armed Activities on the Territory of the Congo (*Democratic Republic of the Congo V. Uganda*), Judgment, I.C.J. Reports 2005, p. 168.

of international human rights law in situations of armed conflicts. In the context of the implementation of human rights obligations, the human rights treaty bodies established to monitor the implementation of core human rights treaties, such as the Human Right Committee or the Committee on Economic, social and cultural rights, regularly provide general comments, which interpret and clarify the content and of particular norms, principles and obligations contained in the relevant human rights conventions.

In certain exceptional circumstances, states are allowed to derogate from their accepted human rights obligations. The International Covenant on Civil and Political Rights, for example, recognizes that in time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the states parties to the present covenant may take measures derogating from their obligations under the present covenant[60]. Yet, derogations are subject to stringent conditions, such as; the existence of a public emergency. The European Court of Human Rights has defined public emergencies as an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organized life if the community of which the state is composed.[61]

Compared to IHL, International Human Rights law has developed and addressed a wide range of situation. This has been possible through the implementation of conventions, facts, treaties, declarations, and resolutions dealing with human rights[62]. Human rights and rules have expanded to touch almost all kinds of situations, dealing with both individual and collective rights, leading some scholars to describe this

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[60]. Derogation Clause can also be found in the American Convention on Human Rights (art 27) and in the European Convention for the Protection of Human Rights and Fundamental Freedoms (artist) Section of 1999 Constitution of the Federal Republic of Nigeria as Amended.

[61]. *Case of Lawless V. Ireland* (No3) Application No. 332/57, Judgment of 1 July, 1961, p. 28.

[62]. L Henkin: "The Age of Rights" New (York: *Columbia University Press* 1990) 2nd ed. 197

phenomenon as "proliferation of rights.[63] Agreed that Human Right Law applies as a set of standard rules that pervades both international and national law, what is worthy to say here is that international instruments on human rights law, also contemplates the possibility of derogation in some cases and under specific conditions. Derogation from some human rights treaties is permissible by the International Covenant on Civil and Political Rights (ICCPR)[64] and by regional instruments. Article 4 ICCPR refers to a situation of "public emergency which threatens the life of the nation" when a state party to the Covenant may take measures derogating from their obligations under the present covenant[65] That is to say that some HRL provisions can be suspended or derogated.

2.7 Military Necessity and Targeting

Military necessity, along with distinction, and proportionality are three important principles of International Humanitarian Law governing the legal use of force in an armed conflict.

Military necessity is a legal concept used in International Humanitarian Law as part of the legal justification for attacks on legitimate targets that may have adverse, even terrible, consequences for civilians and civilian objects. It means that military forces in planning military actions are permitted to take into account the practical requirements of a military situation at any given moment and the imperatives of winning. The concept of military necessity acknowledges that even under the laws of war, winning the war or

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63. C Wellman, 'The Proliferation of Rights': Moral Progress or Empty Rhetoric? in Philip Alston, *Conjuring up New Human Rights*: A Proposal for Quality Control, 78 *AM.J.INT'L .L* (1984)607

64. International Covenant on Civil and Political Rights. G.A. Res. 220 OOA (xxi), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966),999 U.N.T.S 171

65. See U.N Human Rights Committee, General Comments No. 29, State of Emergency U.N. Doc. CCPR/C/21/Rev. 1 (Add. 11, Aug. 31, 2001). This document replaced general comment No. 5 adopted in 1981 on the same subject.

battle is a legitimate consideration, though it must be put alongside other considerations of international humanitarian law.

It would be overly simplistic to say that military necessity gives armed forces a free hand to take action that would otherwise be impermissible, for it is always balanced against other humanitarian requirements of IHL. There are three (3) constraints upon the free exercise of military necessity;

First, any attack must be intended and tend toward the military defeat of the enemy, attacks not so intended cannot be justified by military necessity because they would have no military purpose.

Second, even an attack aimed at the military weakening of the enemy must not cause harm to civilians or civilian objects that is excessive in relation to the concrete and direct military advantage anticipated.

Thirdly, military necessity cannot justify violation of other rules of IHL[66]. Moreover, the action in question has to be in furtherance of a military, not a political goal. This poses obvious problems of characterization. Is persuading the enemy to surrender a military or political goal? Is persuading the enemy to surrender by aerial bombardment a military or political goal?

What constitutes a military objective may change during the cause of a conflict. As some military objectives are destroyed, the enemy will use other installations for the same purpose, thereby making them military objectives and their attacks justifiable under military necessity.

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[66] . F Hampson, "Military Necessity Crimes of War Education Project" (2001) available @www.wiki2.org. assessed on Aprill.2015

There is a similarly variable effect on the determination of proportionality. The greater military advantage anticipated, the larger the amount of collateral damage – often civilian causalities which will be "justified" or "necessary". This flexibility also appears with regard to the prohibition of the use of weapons that cause "super fluous injury or unnecessary suffering". The greater the necessity, the more suffering appears to be justified.

Luis Moreno-Ocampo, former Chief Prosecutor at the international *criminal* court investigated allegations of war crimes during the 2003 invasion of Iraq and he published an open letter containing his findings. In a section titled "allegations concerning war crimes", he did not call it military necessity but summed up the term.

Under the Geneva Conventions and the Rome statute, the death of civilian during an armed conflict, no matter how grave and regrettable does not in itself constitute a war crime. (HL and the Rome statute permit belligerents to carry out proportionate attacks against military objectives[67], even when it is known that some civilian deaths or injuries will occur. A crime occurs if there is an intentional attack directed against civilians (principle of distinction) Article 8(2)(b)(i) or an attack is launched on a military objective in the knowledge that the incidental civilian injuries would be clearly excessive in relation to the anticipated military advantage (principle of proportionality). Article 8(2)(b)(10) criminalizes intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread, long-term and severe damage to the natural environment which would be

[67] . Article 52 of Additional Protocol I to the Geneva Convention Provides a widely accepted definition of military objective

clearly excessive in relation to the concrete and direct overall military advantage anticipated.

Article 8(2)(b)(iv) of Additional Protocol 1 to the Geneva Convention draws on the principles in Article 51(5)(b) of the 1977 Additional Protocol I to the 1949 Geneva convention, but restricts the criminal prohibition to cases that are "clearly" excessive. The application of Article 8(2)(b)(iv) requires, *inter-alia*, an assessment of;

(a) the anticipated civilian damage or injury

(b) the anticipated military advantage

(c) and whether (a) was "clearly excessive" in relation to (b)[68]

The judgment of a field commander in battle over military necessity and proportionality is rarely subject to domestic or international legal challenges unless the methods of warfare used by the commander were illegal. For example, the case with Radislay Krstic who was found guilty as an aider and abettor to genocide by the international criminal tribunal for the former Yugoslavia for the Srebrenica Massacre. Military necessity also applies to weapons particularly when a new weapon is developed and deployed.

International law of war is not formulated on international feelings; it has as its basis both considerations of military necessity and effectiveness and humanitarian considerations and is formulated on a balance of these two factors. For instance, the provisions of the St. Petersburg Declaration of 1868 prohibiting the use of projectiles under 400 grammes which are either explosive or charged with combustible or inflammable substances. The reason for the prohibition is explained that, such projectiles

[68]. L Moreno-Ocampo OTP Letter to *Sendes vs Iraq* (PDF) 9 February,2006, see Section "Allegations Concerning War Crimes p. 45.

are small and just powerful enough to kill or wound only one man, as an ordinary need for using these inhuman weapons. On the other hand, the use of a certain weapon, great as its inhuman result may be, need not be prohibited by international law if it has a great military effect.

2.7 The Two-Pronged Test

By virtue of Article 52(2) of Additional Protocol I, two consultative conditions must be satisfied for an object to constitute a military objective;

(a) That it makes an effective contribution to the military action of the enemy by virtue of its nature, location, purpose or use, and

(b) That its capture, destruction or neutralization provides the attacking party with a definite military advantage.

Whilst, it is agreeable that the two-pronged test is cumulative, but in practice, once a party has established that an attack offers its side a 'definite military advantage", it requires no great leap to argue that the objective made an effective contribution to military action in the first place, and *vice versa*. The logic of this approach, however, endangers collapsing the two pronged test into one. The rationale is that if the second (definite military advantage) is satisfied, then a key component of the first (effective contribution to military action) is presumed to be satisfied.

Moreover, if it is presumed that the target did make an effective contribution to the defending party's military action, then demonstrating whether that was by virtue of its nature, location, purpose or use becomes simply a theoretical issue. The concern is primarily about civilian objects under a definite military advantage and could therefore

ship into the category of military objectives without proper consideration of their actual contribution to the enemy's action.

The integrity of the principle of distinction rests upon, first, an examination of the objects contribution to the military action of the defending party and second, the relation of its destruction, capture or neutralization to the definite military advantage of the attacking party.

The underlying purpose of the First Additional Protocol is to protect people and objects that are not involved in military action to focus the action on those that are militarily engaged. In doing so, it also builds on another judgmental paradigm of the laws of armed conflict which is the prevention of unnecessary destruction. This is an important aspect of definition of the military objective even though it may at first appear absent from the wording of Article 52(2) of Additional Protocol 1, which is primarily focused on identifying what can be attacked. Article 23(9) of the 1907 of Hague Regulations, the laws and customs of war on land respectively prohibits the destruction and seizure of the enemy's property unless such destruction or seizure is imperatively demanded by the necessities of war.[69] The drafters of the First Additional Protocol may have chosen a more positive formulation when they drafted Article 52(2) but the principle of restricting destruction to what is military necessary is part and parcel of the two-pronged test.

2.7.1 Effective Contribution to Military Action

The requirement of effective contribution relates to military action in general, and (that they need not be) direct connection with specific combat operations. Of greater concern is that the targeted object be connected to the military action of the enemy. Without this

[69] . Regulation Annexed to the Convention (IV) respectively, the Laws and Customs of War on Land for 18 October 1907 (hereinafter Hague regulation).

criterion, it becomes easy to justify that civilians and civilian objects that politically, financially or psychologically support the war machine should fall into the category of military objectives. Suffice it to say that the generally accepted view is that to qualify as a military objective, there must exist a proximate nexus to military action (or war fighting).

The first part of the test established in Article 52(2) is itself divided into two components: that the objective make an effective contribution to military action; and that this contribution be linked to the nature, location, purpose or use of the objective in question.

The criteria of nature, location, purpose or use can be distinguished as follows: nature refers to the intrinsic character of the object[70], location refers to the possibility for an object to become a military objective if it is situated in an area that has been identified as legitimate target[71], purpose refers to the belligerents intended future use of an object, and use refers to its current function. According to Article 52(2), the object must 'make' an effective contribution to military action. The use of the present tense, instead of the conditional "would make" or "could make", circumscribes the extent to which a belligerent can rely on the purpose of an object in deciding whether or not it is a military objective; "an intended future use may be sufficient but not a possible future use"[72]. The inherent difficulty with the idea of intended use' is that it is predicated on knowledge of the defending party's intention or *mens rea*. This introduces the need for a standard of

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70. The ICRC Commentary includes in this category any object that is directly used by the armed forces, such as weapons, equipment, transports, fortifications, depots, buildings occupied by armed forces, staff headquarters communication centers etc (ICRC commentary API para-2020).

71. A P V Rogers "Conduct of Combat and Risk Run by Civilian Population" (1982) *The Military Law and Law of War Review* p.53 explains that denying land to enemy forces is often a principal consideration in operations and that if an area of land has military significance for whatever reason, it becomes a military objective" (Law on the battlefield, Manchester)

72. M Sassoli, Targeting scope and utility of the concept of 'military objectives' for the protection of civilians in contemporary Armed conflicts". 1999 Available@http/www.cnosut.org.Accessed on 22nd July, 2016.

proof for determining when and how an intention is established. The only standard of proof available is that of reasonable belief in the circumstances ruling at the time. But, because so much turns on the reliability of available intelligence, caution is necessary.[73] Doubts as to the status of an object is apparently dealt with in paragraph 3 of Article 52;

> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school is being used to make an effective contribution to military action, it shall be presumed not be used.

The inclusion of this reputable presumption gave rise to considerable discussion during the negotiation where it was argued that its inclusion did not accurately reflect the reality of the battlefield where civilian buildings situated on the front line were inevitably part of the defensive works and should be presumed to be military objectives. Despite this criticism and a proposal to create an exception for objects located in the contact zone[74], the ensuing note favoured a presumption of civilian use in case of doubt.

Presently, Article 52(3) continues to be the subject of controversy with combat often taking place in urban environment where there is much co-mingling of civilian and military objects and, therefore, where it is particularly difficult for an attacker to establish with any degree of certainty, the military character of a target. This reality can be exploited by the defender. One can imagine a defending party constantly changing the purpose of buildings or relocating communication centres and key ministries ; in order to prevent the enemy from carrying out an attack. If in so behaving this party fails to separate the civilian population or civilian objects from military objectives, it may be in

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[73]. A Boivin "The Legal Regime Applicable to targeting Military Objectives in the context of Contemporary Warfare" 2006 Vol. 2, p 18.

[74]. The area where the most forward elements of the armed forces of both sides are in contact with each other" (definition taken from ICRC commentary API 2268 note 2).

breach of its obligations to take precautions against the effects of attack[75], However, even where this is the case, such a violation does not change the attacking party's obligation to do everything feasible to verify that the intended target is being used for a military purpose, an obligation that is widely recognized as being customary.[76] Verification does not yield a sufficiently clear picture of the object's character, the presumption of civilian use should prevail.

States that possess superior intelligence capabilities, such as the United States and Israel, believe that the rule of doubt imposes an unfair burden on the attacker since even after thorough verification, doubt may still subsist. As a result, both these states, neither of which are parties to the First Additional Protocol, have disputed the customary nature of Article 52(3). In 1992, the United States Department of Defence submitted a report to congress on the conduct of the Persian Gulf War. Relating to claims that its attack against the Al-Firdus Bunker in Baghdad was in breach of the rule of doubt, the United States argued that such a rule was contrary to the traditional law of war because it shifts the burden of determining the precise use of an object from the defender to the attacker.[77] This imbalance ignores the realities of war in demanding a degree of certainty of an attacker that seldom exists in combat. It also encourages a defender to ignore its obligation to separate the civilian populations, individual civilians and civilian objects from military objectives.[78]

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[75]. Article 58 of the First Additional Protocol set out the obligations of the defending party against the effects of attacks.

[76]. Article 57 (2)(a)(i) API and Rule 16, customary IHL, Vol. 1. note 29 at 55.

[77]. A Boivin *op cit* at 20.

[78]. US Department of Defence Report to Congress on the Conduct of the Persian Gulf War note 42 at 627

Israel, for its part, interprets the presumption of civilian status as only applying when the field commander considers that there is a significant doubt and not if there is merely a slight possibility of being mistaken[79].

The above lines of argument appear to suggest that the drafters of the First Additional Protocol intended Article 52(3) to require certainty on the part of the attacker. Yet, this is not so. What the law requires is a 'reasonable belief' that the target is a military objective, a standard of proof that was recently confirmed by the ICTY in the *Galic case* when it stated that;

> ……. An object shall not be attacked when it is not reasonable to believe in the circumstances of the person contemplating the attack, including the information available to the latter, that the object is being used to make an effective contribution to military action.[80]

This interpretation allows a decision maker to have an honest but mistaken belief as to the identity of the military objective without having to argue, as the United States did, that it is the defending party that has the burden of clarifying the character of objects under its control, or to introduce, as Israel does, new adjectives such as 'significant' and 'slight' in one's interpretation of the rule.

2.7.2 Definite Military Advantage

The second component of the text provided for in Article 52(2) establishes that even an object that makes an effective contribution to military action may nevertheless fail to qualify as a military objective if, in the circumstances, its "destruction, capture or neutralization" would not offer a definite military advantage. The argument here is that, this requirement is a *priori* satisfied in the case of objects that are military objectives by

[79]. Customary IHL, Vol. 1 supra note 29 at 36
[80]. *Prosecutor V. Galic*, IT – 98-29-T, Judgement of December, 2003 at para 51.

virtue of their nature. That is to say that, a piece of artillery, to take an obvious example, would always constitute a legitimate military objective because there is a presumption that its destruction, capture or neutralization offers the attacking party a definite military advantage. To assert to the contrary appears counter- intuitive to the extent that the law is concerned with limiting damage to civilians and civilian objects. Imposing where a target is clearly part of the enemy's arsenal diminishes the importance of this burden in cases where the status of the target is debatable. A definite military advantage could be seen as "concrete and perceptible" rather than "hypothetical and speculative[81].

This wording is similar to what is found in the provisions codifying the principle of proportionality, where the military advantage anticipated from an attack is weighted against the likelihood of civilian losses and damage. The proportionality formulation refers to collateral damage that "would be excessive in relation to the concrete and direct military advantage anticipated.[82] This latter wording appears to introduce an additional element of specificity. There is no indication in the documents of the CDDH as to why different expressions were chosen.[83] It can nonetheless be posited that at the stage of target selection, it is sufficient for an attacking party to determine that the object is capable of yielding a definite military advantage; whereas in the context of assessing proportionally, the military advantage anticipated must be established with more certainty and is also then qualified in relation to potential collateral damage. But either way ('definite' or 'concrete and direct'), the standard remains high and removed from something that is hypothetical. In practical terms, it requires the responsible commander

[81]. Solf, Article 52 in Bothe *et al Op cit.*
[82]. API Article 51 (5)(b) and API Article 57 (2)(a)(iii)
[83]. ICRC Commentary on API *op cit* p. 13 at 2027.

to be able to clearly articulate the nature of the military advantage expected from the attack and to produce evidence supporting this expectation.

Conversely, with respect to the second prong of the Article 52 (2) test, one of the issues that arises in attempting to define what constitute a 'definite military advantage' is whether it must accrue from a single attack. That is to say, must an attacking party demonstrate that destroying, capturing or neutralizing the targeted object will provide it with a definite military advantage or is it sufficient for it to show that attacking the object will contribute to obtaining a definite military advantage? The First Additional Protocol relies on a fairly specific concept of 'attack' at Article 49(1). If the advantage has to result from the specific military operation that constitutes the 'attack', this suggests a rather narrow understanding of 'definite military advantage.[84]

During the CDDH negotiations, several states indicated that they will consider the military advantage to be anticipated from a attack as a whole and not from parts thereof.[85] Although legal standard in the provisions dealing with the rule on proportionality, it is logical to conclude that it also applies to the wording in Article 52(2). But this interpretation is not unanimously agreed upon and remains a point of controversy.

The danger in adhering to the view that the term 'attack' can encompass a series of actions is that it will become so broad as to dilute the concept of definite military advantage and the obligations deriving from this concept. In order for the requirement that an attack provide a definite military object retain any meaning at all, it must correspond to a concrete situation on the ground.

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[84]. According to API Article 49(1) 'Attacks' means acts of violence against the adversary, whether in offence or in defence'.

[85]. K Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court, Sources and Commentary*, (Cambridge; Cambridge University Press, 2003),171.

Any civilian object can become a legitimate military target. This is by virtue of the criteria of location, purpose or use, together with the tactical and strategic goals that evolve throughout the duration of an armed conflict. The status of an object is therefore dynamic. This means that a target list must constantly be updated in order to accurately reflect changes in the legitimacy of military objectives. Recent conflicts raise the question of the extent to which belligerents consider the two-prong test of effective contribution to military action and definite military advantage in drawing up their target list. Civilian objects are making their way into the category of military objectives with little in the way of justification. This could be a function of advances in technology enabling precision attacks and limiting the risk of collateral injury.

Whatever the reason, the result is a potential for widening the category of objects that can be targeted and therefore, an increased level of risk of civilians and civilian property. In order to address this trend while at the same time exploring avenues for adapting the legal regime to new battlefield realities, some contentious targets that have so far only been alluded to deserve attention. These illustrate the penumbra of doubt in the definition of military objectives – the current state of debate about the edge of Article 52(2).

2.8 Contentious Targets

This can be discussed under two headings;

2.8.1 Dual Use Targets

Dual-use facilities are those that can have both a military and civilian application. In Iraq, the United States and United Kingdom considered electrical power, media and

telecommunications installations dual use and attacked examples of each[86]. A dual-use object may be legitimate military target because it makes an effective contribution to military action and its destruction offers a definite military advantage. Yet the harm to the civilian population in its destruction may be disproportionate to the expected 'concrete and direct military advantage rendering an attack impermissible. In assessing potential targets, military planners must carefully balance the concrete and direct military advantage of destroying these facilities against the expected death and injury to civilians and damage to civilian objects.

The crux of the issue lies in the inevitability of affecting objects.[87] When a power-generating station which is crucial for civilian access to clean water is also providing power to the war industry, it can become a legitimate military objective. The practical reality, however, is that it is difficult to evaluate;

(a) the extent to which a particular facility makes an effective contribution to military action, since it is simultaneously being used by the civilian population.

(b) Whether its destruction, capture or neutralization will provide a "definite military advantage', and

(c) the impact of the destruction or impairment of a facility on civilian lives.

Despite these difficulties, dual-use facilities are not recognized as a separate category of military objectives and, as such, they are subject to the rule of Article 52(2), regardless of how challenging it may be to establish the effective contribution they make to military action. Once the object in question has passed the test in Article 52(2), which

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86. U.K Ministry of Defence, "Operations in Iraq –First Reflections", July 2003, p. 24.

87. F J Hampson, "Means and Methods of Warfare in the Conflict in the Gulf" in P. Rowe, (ed) *The Gulf War 1990-1991 in International and English Law*, (London:Routhledge, 1993),94.

it often will, the rules limiting collateral damage represent the only means of ensuring that attacks against dual-use targets respect the principle of distinction.

2.8.2 Notional Targets

Article 52(2) refers to material and tangible things while defining military objectives. The inclusion of the words "so far as objects are concerned" in the provision excludes combatant personnel[88]. While this interpretation is not false since combatants fall outside the scope of Article 52(2), their status being dealt with in the First Additional Protocol,[89] it may appear misleading to the fact that it suggests that members of the armed forces are not military objectives. Combatants are at the heart of the category of military objectives. The ICRC commentary quotes the 1868 preamble of the Declaration of St Petersburg as the only legitimate object which states should endeavour to accomplish during war that is, to weaken the military forces of the enemy, for this purpose, it is sufficient to disable the greatest number of men.[90]

Notwithstanding the above, the issue in this work is how to deal with strategies that target immaterial objectives such as civilian morale and political will to wage war. The use of the word 'object' in Article 52(2) was motivated by a desire to exclude immaterial objectives such as victory, which is achieved, not attacked[91]. However, in recent conflicts, it is common to find belligerents radio and television installations,

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88. H Dasaussure, "Civilian Immunity and the Principle of Distinction" (1982) 31:4 *American University Law Review*, 883 at 885.

89. API, Article 43 defines Armed Forces and provides that Members of such forces are combatants. As Combatants, they have the right to participate directly in hostilities, the corollary is that they may be Objects of Hostile Acts".

90. ICRC Commentary API, 13 at para 2017, quoting the Declaration Renouncing the Use, in time of war, of Certain Explosive projectiles under 400 Grammes weight, 29 November – 11 December 1868, at para. 2 of the preamble reprinted in Roberts & Guelf at 53 (hereinafter St. Petersburg Declaration)

91. M Sassoli, "Targeting: Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts *op cit*

government ministries and electrical generating stations, with arguments that emphasies the advantage gained from striking at elements that will break civilian support for the war effort. Because it is somewhat of a legal fiction to treat such immaterial goals as military objectives, this study has coined the term notional targets to refer to attacks against doubtful military objects for the purpose of bringing the war home to the civilian population.

2.8.3 Effect-Based targeting and Centres of Gravity

According to sophisticated targeting theories that have recently been developed and applied by the U.S and its allies, military objectives are selected and prioritized according to their contribution to the overall objective of the war. During Operation Allied Force in Kosovo, NATO command developed the notion of 'effects-based targeting', directing attacks against specific links, nodes, or objects in order to cause an effect or a combination of effects that will achieve the desired objective[92]. If the ultimate goal is to topple a regime or obtain compliance from the leadership for a specific line of action, then target selection will be geared toward achieving this goal in the most cost-effective manner and the strategic importance of military forces may be diminished with the help of revolutionary advances in precision, stealth, and information technology those who have access to such resources can bypass some of the more traditional military objectives, such as fielded forces, in order to concentrate on those target deemed to be the most likely to create the desired effects.

[92] . T Montgomery, 'Legal Perspective from the Eucom targeting Cell' in A.E. Wall (ed), Legal and Ethical Lesson of NATO'S Kosovo Campaign" (Rhode Island: U.S Naval War College International Law Studies 2002). 189 at 190.

Targeting political will or civilian morale is not legitimate if what it entails is an attack against civilian lives or civilian objects.[93] Recent practice have indicated a willingness to extend the scope of targeting to include objects with doubtful military status on the basis that attacking such objects will get to the enemy's soul and lead him to back down.[94] During the Golf war of 1990-1991, it was reported that one of the justification given by the Coalition planners for degrading power supplies was "to paralyse the leadership, cause political turmoil and lead to the demise of Saddam Hussein".[95] Attacks against the empty Baath party headquarters were justified in terms of destroying Saddam Hussein's legitimacy as a Head of State. During operation Allied Force in 1999, it was alleged that NATO specifically targeted objects with the intention of undermining Serbian support for Milosevic's regime. In a radio interview of September 15, 1999, the Joint Forces Air Component Commander made the following comments, confirming such allegations;

> There can be doubt in your mind that with refrigerator not running and no water in your house and the public transportation system in Belgrade not running and no street lights, that the war was brought home, not just to the ruling elite, but to the average Serb on the street.[96]

The United States and NATO targets lists in the 1990-1991 and the 2003 wars in Iraq, as well as in the Kosovo civil campaign included media installations, because of the

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93. C J. Dunlap, Jnr "The End of Innocence: Rethinking Non-Combatancy in the Post-Kosovo Era" (2000) *Strategic Review*, 9 at 11-16.

94. J M Meyer, 'Tearing Down the Façade: A critical look at the current law on Targeting the will of the Enemy and Air Force Doctrine" (2001) 51 *Air Force Law Review*, 143 at 179.

95. J W Crawford, III, "The Law of Noncombatant Immunity and the Targeting of National Electric Power Systems" (1997) 21 Fletcher Forum of Word Affairs, 101 at 108-109

96. Lt. General Michael C. Short in an interview with Steve Inskeep, Morning Edition, national Public Radio, 15 September, 1999, audio version available online. NPR<http://www.npr.org/rundowns/rundown.php?prgld=38pre date = 15 - sep - 1999> Accessed on 12 April, 2016

role these played in supporting the enemy regime.[97] In defending this approach to targeting, reference was made to the ultimate objective of the war which in the case of Kosovo was Milosevic's ultimate compliance with the demands of NATO, and in the case of Iraq was the withdrawal of Iraq troops from Kuwait in 1990-1991 and the toppling of Saddam Hussein's regime in 2003. This resulted in a dangerous confusion of *jus ad bellum* and *jus in bello*, where the laws of war are being stretched in light of what one side perceives as a justified resort to force[98].

The fact may be that limiting attacks to military objectives obliges belligerents to adopt hypocritical justifications for their choice of targets but this is not a compelling argument for accepting the targeting of notional objectives such as political will and civilian morale while effectively abandoning they key notion of distinction.

Morale and political will have been and will continue to be an underlying force driving successful military strategy, and thus they may indeed be important to military action. Countering them will also continue to be a key part of war which is the continuation of the political process "by other means". However, the concern here is the rule of law and how wars are actually fought. Allowing targeting of civilian morale and political will by disregarding the obligation to shield civilians from attack is all too tempting today in a media rich world where public opinion and opinion polls can drive the political process. The danger with legitimizing this line of thought is clearly illustrated by the question as

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97. In the 1990-1991 Gulf War, attacking Iraq, radio and TV was meant to rupture Saddam Hussein's Link to the people and military, in all, 36 broadcast transmitters were attacked" (w.m. Arkin, "challenging the channel in Belgrade", The Washington post, special to Washington post.com, 24, May 1999, available online<http://www.washingtonpost, special to Washington post.com.wp-srv/national/dotmillarkin 052499.htm>). Accessed on 12 April, 2016

98. WS. Cohen & Genera H.H. Shelton, Joint Statement on Kosovo after Action Review, News release, office of Assistant Secretary of Defence (Public Affairs), Washington D.C, 14 October 1999, available on line: Air University, <ttp://www.an.af.mil/an/awc /awegate/ kosovoa/ jointsmt.htm> Accessed on 12 Aprill, 2016

to whether an American television network could have been a legitimate target of attack during the most recent war against Iraq. Beyond the legal challenges posed, it is arguable that the targeting of objects that predominantly benefit civilians will only serve to increase popular support for the enemy regime rather than cause demoralization.

Moreover, from a strictly strategic point of view, choosing targets on the basis of their direct or indirect effects on the leadership assumes that the attacking party understands what motivates the enemy and more importantly, that the enemy is a rational actor.

2.9 Is International Humanitarian Law Prohibitory or Permissive

Rules of IHL are often expressed in prohibitive language – i.e, the rules state what is not allowed. No Because of this, it is sometimes asked particularly in military circles, whether IHL is prohibitory or permissive in character[99] IHL is prohibitory in the sense that a humanitarian instrument should provide what is to be spared, and not expressly authorize violence. All means and methods of warfare in armed conflict are permitted (i.e., are lawful/unless prohibited by IHL[100]. Prohibitory here means that a particular practice of warfare has been prohibited. The prohibitions may be in customary law or in treaty law. Some treaty law prohibitions are very specific, while others – for example article 35 APL[101] provides general prohibition. However, in the absence of a

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[99]. A similar question can come up when considering military orders, and in particular, rules of engagement. Tactical level commanders will often want to know what they are prohibited from doing, and from there it is assumed that everything else is permitted. Strategic level commanders may meter the opposite approach and prefer to tell subordinate commanders only what they are permitted to do.

[100]. J M C Neil, "The International Court of Justice Advisory Opinion in the *Nuclear Weapons Case*. A First Appraisal" *International Review of the Red Cross*. (1997)316

[101]. A Protocol Addition to the general Convention of 12 August 1949, and relating to the Protection of victims of international armed conflict, opened for signature (2 December, 1977) enforced into force 7 December, 1978).

relevant treaty article or customary international rule, there is no prohibition on what is permitted in armed conflict.

The law is mandatory for nations bound by the appropriate treaties. There are also other customary unwritten rules of war, many of which were explored at the Nuremberg war trial. By extension, they also define both the permissive rights of the powers as well as prohibitions on their conduct when dealing with irregular forces and non-signatories. The doctrine of military necessity under International Humanitarian Law is controversial in so far as some consider it a permisable principle (allowing death and destruction) and others consider it a limiting principle (e.g. killing a certain person must be military necessity). Arguably, the better view is that military necessity is generally a permissable principle while the principle of humanity is inherently limiting.

CHAPTER 3

THE RULE OF LIMITING COLLATERAL DAMAGE

Collateral damage is a general term for unintentional deaths, injuries, or other damage inflicted incidentally on an unintended target. In military terminology, it is frequently used where non-combatants are unintentionally killed or wounded and/or non-combatant property damaged as a result of an attack on a legitimate military target[1].

Critics of the term see it as a euphemism that dehumanizes non-combatants killed or injured during military operations, used to reduce the perception of culpability of military leadership in failing to prevent non-combatant casualities[2]. Attacks that are expected to cause collateral damage are not prohibited per se, but the laws of armed conflict restrict indiscriminate attacks. Article 57 of the 1977 Additional Protocol 1 to the 1949 Geneva Conventions states that, in an International Conflict, "constant care shall be taken to spare the civilian population, civilians and civilian objectives. In addition, under Article 51, carpet bombing is prohibited as are attacks that employ methods and means of combat whose effects cannot be controlled. Attacks are prohibited if the collateral damage expected from any attack is not proportional to the military advantage anticipated. Military commanders in deciding on attacks have to be aware of these rules and either refrain from launching an attack, suspend an attack if the principle of proportionality is likely to be violated, or replan an attack so that it complies with the laws of armed conflict.

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1. USAF Intelligence Targeting Guide – Air Force pamphlet IV-2010 Intelligence February 1, 1998 p. 180
2. P Olsthoom . *Military Ethics and Virtues: An Interdisciplinary Approach for the 21sst Century*,(Routledge, 2 Sepember,2010)p. 125.

In internal conflict, civilians have little legal protection from collateral or incidental damage. Additional Protocol II requires that, so long as they do not take part in hostilities, the civilian population and individual civilians "shall enjoy general protection against the dangers arising from military operations" and shall not be the object of attack. Protocol II also prohibits acts or threats of violence whose primary purpose is "to spread terror among the civil population".

3.1 Indiscriminate Attacks

It is a war crime under the 1977 Additional Protocol I to the 1949 Geneva Convention to engage in indiscriminate attack. An indiscriminate attack is one in which the attacker does not take measures to avoid hitting non-military objectives, that is, civilians and civilian objects. Protocol I states that "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.

Military objectives are limited to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers definite military advantage. Although every instance of indiscriminate attack violates the law of armed conflicts, it is equally the case where attacking a military target may cause collateral damage to civilians or civilian objects. If the harm to civilians is proportionate to the military advantage expected, the attack, other things being equal, is a legal act of war. If the harm is "excessive in relation to the concrete and direct military advantage

anticipated", the attack is prohibited whether or not indiscriminate. (Concrete means perceivable by the senses, direct means having no intervening factor).

The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia provides further evidence of the customary nature of the prohibition of indiscriminate attacks in both international and non-international conflicts[3]. The 25th International Conference of the Red Cross in 1986 deplored "the indiscriminate attacks inflicted on civilian populations … in violation of the laws and customs of war"[4]. The ICRC has reminded parties to both international and non-international armed conflicts of their duty to refrain from discriminate attacks[5].

Rule 12 of Additional Protocol I defines indiscriminate attackss as ones;

(a) which are not directed at a specific military objective,

(b) which employ a method or means of combat which cannot be directed at a specific military objective or

(c) which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law, and consequently, in each such case, are of nature to strike military objectives and civilian objects without distinction. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

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3. *Tadic case*, International Appeal (Suprai, 103) *Kordic and Cerkez case*, Decision on the Joint Defence Motion p. 136 and *Kupreskic case*, judgment
4. 25th International Conference of the Red Cross
5. See. E.g. the practice of the ICRC

This definition of indiscriminate attacks is also set forth in military manuals which are applicable in or have been applied in non-international armed conflicts[6].It is also supported by official statement[7]. The 24th International conference of the Red Cross in 1981 urged parties to armed conflicts in general "not to use methods and means of warfare that cannot be directed against specific military targets and whose effects cannot be limited[8]. In order to instruct military commanders on how to carry out an attack within the confines of the laws of war, it is undesirable as a practical matter, to present indiscriminate attacks as a separate category of prohibited practices. What is necessary to know is the positive rules that enable an attacking party to avoid perpetrating an indiscriminate attack. To a large degree, these are the rules on precautions with a specific focus on means and methods that present a high risk of causing excessive civilian causalities. It is summarized as follows;

(a) ensuring that military objectives are clearly identified and verified

(b) ensuring that attacks are effectively directed at each selected targets; and

(c) ensuring that the means and methods selected have the capacity to respect the principle of distinction.

When a commander determined that a planned attack does no risk being indiscriminate in light of the above cited considerations, he still needs to take a number of precautionary measures in order to ensure that the targeting process yields an outcome that is both proportionate and of minimal consequence to the civilian population. Before an attack is launched, those planning the military action may be overly optimistic about the military advantage expected and they may also have high expectations with respect to

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6. See e.g The Military manuals of Australia, 1998. S.43
7. See. E.g The statements of India, 1986
8. 24th International Conference of the Red Cross, Res. Xiii. 1981

the precision ability of their weapons[9]. As a result, even though they may not be at risk of perpetrating an indiscriminate attack, which is very much about what is expected – they may nonetheless be unnecessarily putting the lives of civilians at risk. Hence, the importance of establishing clear precautionary measures that applies throughout the targeting process.

3.2 Precautionary Measure

Parties to the conflict must take all feasible precaution to protect the civilian population and civilian objects under their control against the effects of attacks[10]. This obligation was included in the draft of Additional Protocol II but was dropped at the last moment as part of a package aimed at the adoption of a simplified text[11]. As a result Additional Protocol II does not explicitly require precautions against effects of attack. Article 13(1) requires that the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations[12]. It would be difficult to comply with this requirement without taking precautions against the effects of attack. The requirement to take precautions against the effects of attack has moreover, been included in more recent treaty law applicable in non-international armed conflicts, namely, the second protocol to the Hague Convention for the Protection of Cultural Property[13]. The jurisprudence of the International Criminal Tribunal for the Former Yugoslavia in the *Kupreeskic case* provides further evidence of the customary nature of the requirement to take precautions against the effects of attacks in both International and non-International

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9. Rouse "Kosovo 1999: The Air Campaign – have the provisions of Additional Protocol I withstood the test? p.60 at 160
10. Additional Protocol I, Article 58 adopted by 90 votes in favour, none against and 8 abstention
11. Draft Additional Protocol II submitted by the ICRC to the adoption of the Additional Protocols, Article 24(2)
12. Additional Protocol II, Article 13(1) (adopted by consensus)
13. *Kupreskic case* Judgment, *Supra*

armed conflicts. In its judgment, the Tribunal considered that this rule was customary because it specified and flushed out general pre-existing norms[14]. It can be argued indeed that the principle of distinction, which is customary in international and non-international armed conflicts, inherently requires respect for this rule. The Tribunal also relied on the fact that this rule had not been contested by any state[15]. This study found no official contrary practice either.

While the obligation of due diligence applies to everyone involved in the targeting process, from the ministry of defence planning staff, through the commander in the field to the task commander; the specific measures of precautions are aimed at those who plan or decide upon an attack". This should be understood to address primarily commanders and staff officers who are directly responsible for specific operations and only to a lesser degree the individual soldiers participating directly in the attack. Infact, the type of warfare and the size of the armed forces involved in the conflict will alter the level at which targeting decisions are taken. There may be cases where individual officers and soldiers are in a position to plan and carry out attacks, at which point they may be required to satisfy some of the obligations. For example, the duty to suspend or cancel an attack is not only the responsibility of the decision-makers and the planners, it is also the responsibility of the pilot who is unable to identify a target with enough precision[16].

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14. *Ibid*

15. A P Rogers, "Law on the Battlefield", note 48 at 56 with reference to an ICKC report presented to the conference of Government Experts in 1971, entitled "protection of the C civilian population against the dangers of Hostilities".

16. During the 1990-1991 Persian Golf War, "aircrews attacking targets in populated areas were directed not to expend their ammunitions, if they lacked positive identification of their targets. When this occurred, aircrews dropped their bombs on alternate targets or returned to base with their weapons" (Report to congress on the conduct of the Persian Gulf War,

Indeed, the obligation apply at whatever level the regulated functions are being performed[17].

The commander who is deciding an attack and the staff officer who is planning an attack must;

(a) do everything feasible to verify that the objective to be attacked are military objectives[18].

(b) take all feasible precautions in the choice of means and methods of warfare[19].

(c) do everything feasible to access whether the attack may be expected to cause excessive collateral damage[20].

(d) do everything feasible to cancel or suspend an attack if it becomes apparent that the proportionality rule will be breached, or that the target is not a military objective or that it is subject to special protection[21].

(e) give effective advance warning prior to an attack that is likely to affect the civilian population, unless the circumstances do not permit[22], and

(f) where a choice between several military objective is possible, chose the one that will cause the least danger to civilian lives and civilian objects[23].

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17. At the time of signature, Switzerland made a declaration to the effect that the precautionary measures enumerated in Article 57(2) do not create obligation except for commanders of the level of battalion or group and higher echelons (W.A. Solf, "Article 57" in Bothe et al, Supra note 29 at 363 para 2.4.3 note 9). This illustrates the concern expressed by certain states that the provision lay too heavy a burden of responsibility on subordinate officers (ICRC commentary API, Supra note 13 at para 2197.
18. API art 57(2)(a)(i)
19. API art 57 (2)(a)(ii)
20. AP1 art 57 (2) (b) i
21. API art 57(a)(2)(ii)
22. API art 57 (2)(2)(iii)
23. API art 57 (2)(c). This rule was first codified in the Hague convention of 1907 – Article 26 of the Hague regulation requires the commander of an attacking force to do all in his power to warm the authorities before commencing a bombardment, except in cases of assault.

Every one of the above rules includes a subjective element in recognition of the fact that the measures can only be assessed in light of the circumstances ruling at the time. The obligation to take feasible precautions is generally understood as being limited to "those precautions that are practicable or practically possible, taking into account all circumstances prevailing at the time, including humanitarian and military considerations[24]. In its Final Report to the Prosecutor, the ICTY reviewed Committee substantiated the obligation to take feasible precautions in the following terms;

> A military commander must set up an effective intelligence gathering system to collect and evaluate information concerning potential targets. The commander must also direct his forces to use available technical means to properly identify targets during operations. Both the commander and the air crew actually engaged in operations must have some range of discretion to determine which available resources shall be used and how they shall be used[25].

It is unquestionable that targeting decision must be based on information and means that are available at the relevant time. Moreover, what is clear is that a commander who ignores available information is at fault. More difficult and controversial, however, are the following questions; what if the commander faces conflicting information? What if information is insufficient but time is lacking? What if the commander fails to use the most technologically – advanced means available? Feasibility is largely a factual question and the answer to most of these questions lie in a proper assessment of the circumstances ruling at the time. An examination of the principle of minimum feasible damage will provide additional insight into the standard to be applied. It will also be the occasion to reflect on one of the more contentions questions raised, namely whether a state that

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[24]. These are the exact terms used by protocol II and convention (Article 3(4) of the protocol on prohibitions or restrictions on the use of mines, Booby-Traps and other devices (protocol II) of 10 October 1980, reprinted in Roberts & Guelf, Supra note 3 at 528.

[25]. ICTY Final Report, p.31 at 498 para 29.

possesses means of combat that enables it to engage in more precise targeting has an obligation to use this capability[26].

3.3 Minimum Feasible Damage

Article 57(2)(a)(ii) of the 1977 Additional Protocol I provides that;

> with respect to attacks, the following precautions shall be taken, those who plan or decide upon an attack shall --- take all feasible precautions in the choice of means and methods of attack with a view to avoiding and in any event to minimizing incidental loss of civilian life, injury to civilians and damage to civilian objects

Article 7 of the 1999 Second Protocol to the Hague Convention for the Protection of Cultural Property states;

> without prejudice to other precautions in the choice of means and methods of attack with a view to avoiding and in any event to minimizing incidental damage to cultural property protected under Article 4 of the convention.

Based on state practice and the declarations made at the time of ratification for API, the term "feasible" is defined by the HPCR manual on International Law Applicable to Air and Missile Warfare as " that which is practicable or practically possible taking into account all circumstance prevailing at the time, including humanitarian and military consideration[27].

The notion of feasibility reflects a realistic conception of what is required in warfare in terms of precautions. It is not about expecting what is "objectively impossible" but it is also conceived as a more demanding constraint than just doing what is merely possible[28]. Based on this definition, the various precautionary obligations would only

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[26]. A Bolvin, 'The Legal Regime Applicable to Targeting Military Objectives in the Context Contemporary Warfare,No. 2(2006) p. 38

[27]. HPCR manual on International Law Applicable to Air and Missile Warfare, 2009, Definition, Section A para 1.

[28]. Y Sandoz, C Swinwski, and B Zimmeramann. (eds), Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August (Verlagsgeseeschaft:Baden,1987) 189

require those precautions that are practically possible given the circumstances ruling at the time.

International Humanitarian Law norms on precautions on attack spell out the general obligation that constant care shall be taken to spare the civilian population and detail the type of measures that must be taken, but only when these are feasible. Both this general obligation and specific precaution measures are relative in nature. In other words, international humanitarian law acknowledges that there are particular situations in which civilians cannot be spared and when precautionary measures cannot be taken. This means that the feasibility test is essential to establish that a violation of those international humanitarian law obligations occurred. On the other hand, this assessment must be done and cannot be done lightly without defeating the very purpose of those norms. Indeed, IHL dictates to take into account various considerations under the overarching duty to avoid or at least minimize harm to civilians.

The analysis of what is feasible under IHL has been deemed a matter of common sense and good faith[29]. As a result, experts involved in the drafting of the HPCR manual agreed that "there are currently no absolute standard applicable to any judgment on feasibility[30]. Nevertheless, it is necessary to stress that, like other norms on the conduct of hostilities, the way those precautionary obligations are designed and their application in practice requires considering various perspectives and elements, such as those regarding the attacker, the way weapons were used, the nature of the target, the effects of the attack and the defender. Most importantly, given contingent nature of the

[29]. Y Sandoz, C Swinarshi, and B Zimmeramann (eds), *op. cit*, Article 57, para 2198.
[30]. HPCR Manual on International Law Applicable to Air and Missile Warfare, *op. cit*,(commentary to Section A, para (4)

determination of the feasibility of precautions, based on information and circumstances prevailing at the time of the attack, establishing facts on allegations of violations of those norms and assessing the legality of certain conducts are two activities done *ex pos*t although they depend on an *ex ante* evaluation by the attacker.

As a way of illustration, the following elements have been identified as relevant to assess feasibility; the importance and the urgency of destroying a target; the range, accuracy and effects radius of available weapons; the conditions affecting the accuracy of targeting; the proximity of civilians and civilian objects; the possible release of hazardous substances, the protection of the party's own force (and the proportionality between the additional protection for those forces and the additional risks for civilians and civilian objects when a certain means or method is chosen; the availability and feasibility of alternatives; the necessity to keep certain weapons available for future attacks on targets which are militarily more important or more risky for the civilian population[31].

The UK military manual provides a more detailed list:

> Commanders should have regard to the following factors; a, the importance of the target when; and the urgency situation, b, intelligence about the proposed target-what is being, or will be used for and when; c, the characteristics of the target itself, for example, whether it houses dangerous forces; d, what weapons are available, their range, accuracy, and radius of effect; e, conditions affecting the accuracy of targeting, such as terrain, weather, night or day; f, factors affecting incidental loss or damage, such as the proximity of civilians or civilian objects in the vicinity of the target or other protected objects or zones and whether they are inhibited, or the possible release of hazardous substances as a result of the attack; g, the risks to his own troops of the various options open to him.[32]

[31]. M Sassoli, A Bouvier, and A Quintin *op. cit* chapter 9, pp. 25-26.
[32]. UK Ministry of Defence, Manual of the Law of Armed Conflict (2004), para 5. 32.5.

Against this backdrop, one anticipates the complexity, and potential controversy, in determining the expected minimum feasible measures to be taken when so many factors may come into play and must be measured based on circumstances ruling at the time.

However, like the definition of the direct and concrete anticipated military advantage in the application of the principle of proportionality, this complexity cannot serve for a party to evade its obligations. Similarly, one military consideration cannot result in negating humanitarian aspects, especially when considering the purpose of the protection of civilians underlying those norms. Additionally, some factors cannot be considered as relevant in this assessment. For example, with regard to whether there is choice between different types of weapons, financial considerations cannot be included in the feasibility evaluation as they are neither of a military nor of a humanitarian nature. A related issue is whether on the other hand the attacker would have an obligation as part of its precautionary obligations to acquire smart weapons more capable of avoiding harmful effect on civilians or if they have them, the obligation to use them. This debate is one of the reasons why states oppose the interpretation of considering the term feasible as imposing a higher standard on technologically advanced states.[33] While there is no obligation under International Humanitarian Law for states to acquire certain types of weapons or modern technology, as noted in the United Kingdom Military manual[34], the availability of certain types of weapons may play a role under the specific obligation to take all feasible precautions in the choice of means and methods of attacks.

[33]. M Sassoli Bouvier, and Ouintin, *op cit*.chapter 9,pp25-26
[34]. UK Manual, Para 12-15, quoted by Sassoli and Quintin, 2014,

In that regard, the consideration of the safety of the attackers armed forces is a topical example. It certainly constitutes an element to be taken into account in the feasibility equation. However, it cannot be used to justify not taking any precautionary measures at all, or to expose the civilian population to greater risk. This would run against the very purpose of the norms on precautions[35]. As noted by the ICRC, while under national military regulations, commanders are expected to protect their forces; under international humanitarian law, members of the armed forces are considered legitimate military targets[36]. As a result, this military consideration cannot lead to neglecting the humanitarian consideration of the protection of civilians and some level of risk has to be adopted for that purpose[37].

3.4 Proportionality

Article 51(5)(b) of the 1977 Additional Protocol prohibits "aa attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated. Under Article 85(3)(b) of the 1977 Additional Protocol 1, "launching an indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian is a grave breach.

The concept of humanity results in a specific prohibition against unnecessary suffering, a requirement of proportionality and a variety of more specific rules. The

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35. ICRC, International Humanitarian Law and the challenges of Contemporary Armed Conflicts, 28th International Conference of the Red Cross and Red Crescent, 2003, p. 13
36. *Ibid*
37. HPCR Manual on International Law Applicable to Air and Missile Warfare, Op Cit. Commentary to Section A, Para 1 (9).

concept of humanity also confirms the basic immunity of civilian populations and civilians from being objects of attack during armed conflict. This immunity of the civilian population does not preclude unavoidable incidental civilian causalities that may occur during the course of attacks against legitimate targets and that are not excessive in relation to the concrete and direct military advantage anticipated.

The principle of proportionality establishes a link between the concept of military necessity and humanity. This principle implies that collateral civilian damage arising from military operations must not be excessive in relation to the direct and concrete military advantage anticipated from such operations.

3.5 The Principle of Collateral Damage

As has early been stated, IHL is founded upon the following principles;

(i) Distinction between civilian and combatants

(ii) prohibition of attacks against those *horse de comba*t

(iii) prohibition of the infliction of unnecessary suffering

(iv) principle of proportionality

(v) notion of necessity

(vi) principle of humanity

Each basic principle should be found with the specific rules and norms of IHL itself, but the principles may also help interpretation of the law when the legal issues are unclear or controversial. Depending on the issue, the balance between the principles and interest shifts. For example, during hostilities, military necessity may limit the notion of humanity by allowing for destruction, but in other situations such as the protection of the

wounded and sick, the principle of humanity is at the heart of the legal rules. In deciding whether the principle of proportionality is being respected, the standard of measurement is the anticipated contribution to the military purpose of an attack or operation considered as a whole. The anticipated military advantage must be balanced against other consequences of the action, such as the adverse effect upon civilian objects. It involves weighing the interests arising from the success of the operation on the one hand, against the possible harmful effects upon protected persons and objects on the other[38]. There must be a rational balance between the legitimate destruction effect. As an example, one is not allowed to bomb a refugee camp if its only military significance is that refugees in the camp are knitting socks for soldiers. As a converse example, you are not obliged to hold back an air strike on an ammunition dump simply because a farmer is plugging a field beside it. Unfortunately, most applications of the principle of proportionality are not so clear cut[39].

The fact that an attack on a legitimate target may cause civilian causalities or damage to civilian objects does not necessarily make the attack unlawful, however, such collateral civilian damage must not be disproportionate to the concrete and direct military advantage anticipated from the attack. The proportionality test is as follows; is the attack expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination thereof (collateral civilian damage") which would be excessive in relation to the concrete and direct military advantage anticipated? If the answer is "yes", the attack must be cancelled or suspended. The proportionality test must be used in

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[38]. F Kalshoven: "Implementing limitations on the use of Force: The Doctrine of Proportionality Meeting", *The American Society of International Law*, 1992, 40 at 44.

[39]. J G Garden, Proportionality and Force in International Law" (1993) 87 *American Journal of International Law,* 391 at 407.

the selection of any target[40]. Indiscriminate attacks are those that may strike legitimate targets and civilians or civilian objects without distinction, they are prohibited[41]. For example, an attack which does not meet the requirement of proportionality, the question whether collateral civilian damage is acceptable is often referred in terms of proportionality. Unfortunately, there is no scientific scale of "proportionality" on which to measure the permissible amount of collateral civilian damage. International Law states that force should only be used against military objectives. The commanders (and in most cases field officers) must decide if the collateral civilian damage resulting from the use of force is excessive in light of the direct and concrete military advantage anticipated. In most cases, the assessment of what is an acceptable level of damage boils down to common sense. For example, the complete destruction of a town in order to eliminate a small pocket of opposing forces would be seen as unacceptable. In that case, the collateral civilian damage (numerous civilian causalities and widespread destruction of civilian property) would be excessive in the light of the military advantage anticipated. Depending upon the goal of the mission and the accuracy or destructiveness of certain weapons systems, commanders may limit the types of weapons subordinates may use, or restrict the circumstances under which those weapons can be employed. Such restrictions are often found in the ROE (Rules of Engagement). Those restrictions are put in place to ensure that decision with respect to use of force made at the local level do not interfere with the overall goals of the military mission. Achieving the commander's local objective by means, regardless of the consequences, cannot be allowed to place the overall mission

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40. C Greewood, "Customary International Law and the First Geneva Protocol of 1977 in P.Rowe (ed) , *The Gulf War 1990-91 in International English Law* (Routledge: London), 1993, 63 at 85.

41. M Sassoli," Targeting: Scope and Utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts" (Newyork: Transnational Publishers, 2005) p.31 .

at risk. The actions of each individual force member must fit within the plan and goals of the mission, including the commander's direction on the use of force[42].

3.5.1 Texture Interpretation of Collateral Damage

The IHL rule of proportionality in attacks holds that in the conduct of hostilities during an armed conflict, parties to the conflict must not launch an attack against lawful military objectives if the attack "may be expected" to cause excessive civilian harm (deaths, injuries, or damage to civilian objects, or a combination thereof compared to the "concrete and direct military advantages anticipated. If conducted intentionally, a disproportionate attack may constitute a war crime.The question of course is what is excessive? In the ICRC's commentary on Article 51(5) of the 1977 Additional Protocol 1, from where the text originates, it is stated that;

> Of course, the disproportion between losses and damages caused and the military advantage anticipated raises a delicate problem, in some situations there will be no room for doubts, while in other situations, there may be reason for hesitation. In such situation, the interest of the civilian population should prevail". Obviously, the factors in the equation cannot be easily quantified, the rule can really only be aimed at preventing breaches that are plain and manifest[43].

In its 2005 study of customary IHL, the ICRC affirms that "launching an attack in the knowledge that such attack will cause incidental loss of civilian life, injury to civilians or damage to civilian objects which would be clearly excessive in relation to the concrete and direct military advantage anticipated" constitutes a war crime

Under the Statute of the International Criminal Court, the word "excessive" is qualified by the adverb 'clearly' indicating that for the purpose of individual criminal

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42. WJ. Fenrick, "The Rule of Proportionality and Protocol 1 in Conventional Warfare" (1982)98 *Military Law Review* at 125.
43. Y Dinstein, *The Conduct of Hostilites under the Law of International Armed Conflict*;(Cambridge University Press, 2004)13 at 120

responsibility, the threshold is higher[44]. The terms 'concrete and direct', they indicate the military advantage required to satisfy the two pronged test for an object to be considered a military objective under Article 52(2)[45]. The word 'concrete' signifies an advantage that is both specific and perceptibility, in much the same way as the term 'definite'[46]. The standard differs with the term 'direct', which postulates the idea that the advantage is expected to accrue 'without intervening condition of agency[47]. That is to say that, it cannot be contingent upon other intervening variables, such as the anticipated success of another military operation which is being conducted elsewhere[48].The question is conceptually different from that of circumscribing the meaning and scope of 'attack' but in practice, the two are often confused. Many authors interpret the words 'concrete and direct' as requiring that proportionality be assessed in relation to each individual attack or military operation, rather than on a cumulative basis[49].

Yet, this ignores that when Article 52(2) refers to a 'definite' military advantage, it also excludes an evaluation that is based on something broader than a finite event. In either case, an attack need not be limited to the actions of an individual soldier, tank or aircraft. It might therefore be more useful to speak of the military advantage anticipated from a given tactical operation rather than from an attack, what then is meant by the adjective 'direct' in the formulation of the principle of proportionality? The drafters of the First Additional Protocol sought to circumscribe the scope of military consideration to

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44. Rome Statute, Art 8 (2)(b)(iv)
45. The ICRC commentary provides an explanation of these terms that fails to address the question of how concrete and direct differs from definite. It states that the advantage concerned should be substantial and relatively close, and that advantages which are hardly perceptible and those which would only appear in the long term should be disregarded (Supra note 13 at para 2209)
46. M Solf, Article 57 in Bothe *at el*
47. *Ibid*
48. A Boivin, The Legal Regime applicable to Targeting (supra) p. 43.
49. J G Garden, Proportionality and Force in International Law" *American Journal of International Law*, (1993)391 at 409.

be taken into account when performing a proportionality calculation. This must be reflected in any interpretation of the relevant provisions. By characterising the military advantage as 'direct', the articles that establish the principle of proportionality are not excluding the possibility of looking at the wider context of a tactical operation, but they are demanding that the concrete advantage be causally linked to the specific attack or operation. As such, it is rather unfortunate that the Statute of the International Criminal Court weakens the meaning of 'concrete' and 'direct' in such a way that an assessment of what is excessive is to be based on the 'overall' military advantage[50].

3.6 Interpretative Difficulties of Collateral Damage

The ICTY Review Committee Final Report to the Prosecutor which is one of the few authoritative pronouncement on the question of proportionality outlined the following four questions, presenting them as unresolved issues linked to the application of the proportionality principle:

(a) What are the relative values to be assigned to the military advantage gained and the injury to non-combatants and/or the damage to civilian objects?

(b) What do you include or exclude in totaling your sums?

(c) What is the standard of measurement in time or space and

(d) To what extent is a military commander obligated to expose his own forces to danger in order to limit civilian causalities or damage to civilian object[51]? The answers to these questions depend largely on the context. For example, as a

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[50]. Rome Statute Art 8(2)(b)(iv). At the Rome Conference on the Statute of the International Criminal Court, the ICRC made it clear that the addition of the word "Overall" to the definition of the crime could not be interpreted as changing existing law, see Statement of 8 July 1998, United Nation Doc. A/CONF. 183/INF/10.

[51]. Rome Statute Art 8(2)(b)(iv). At the Rome Conference of the International Criminal Court, the ICRC made a statement that the addition of the word "overall" to the definition of Crime could not be interpreted as changing existing law. See statement of 8 July, 1998, UN Doc, A/CONF. 183.

conflict evolves militarily and politically, the value accorded to targets will change. At the outset of hostilities, a military objective may rank low on the list but as other targets are taken out, its significance may increase thereby legitimising the ensuing likelihood of civilian causalities[52]. Moreso, if a political settlement is the horizon, a military objective that was initially ranked as having a lot of importance may be taken off the target list because an attack would frustrate the prospective political settlement. The challenging aspect to the universal application of the proportionality rule is the impact of the decision-makers' background or value system since these are neither predictable nor can they be standardized. An example is varying attitudes to military casualties and civilian life. Different armies do not prioritise the avoidance of own side military causalities in the same manner; different societies and cultures do not approach human suffering in the same way[53]. The International armed conflicts of the past fifteen years provide examples of clashing values that have obliged greater emphasis to be placed on the limits beyond which a certain amount of harm is considered an affront to the fundamental principle of distinction. Any attempt to establish a common understanding of the precise balance to be struck between military and humanitarian considerations is bound to be taught with difficulty. Nevertheless, such difficulties should not become an excuse for ignoring the

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52. F J Hampson, " Means and Methods of Warfare in the Conflict in P. Rowe (ed) *The Gulf War 1990-1991 in International and English Law*, (London,Routledge,1993),pp.89-110,The author gives the example of bridges in the 1990-1991 Persian Gulf War, which at the start of the war were classified as low priority. If the bridge became the only way of crossing a river because all the other bridges had been destroyed, then in military terms its importance would have increased. Professor Hampson points out that if the reason for accepting a higher level of causalities were primarily to keep the attacking force busy" whatever the actual usefulness of the bridge, such an attack would appear illegitimate.

53. M W Schmitt, the principle of Distinction in 21st century warfare",

principle or for failing to condemn its violation in cases that are clear to everyone. Among the questions that were posed by the Committee Established to Review the NATO Bombing Campaign, two merit special attention because they provide insight into valuation issues that are, on the one hand, particularly prevalent in contemporary warfare and on the other hand, capable of being addressed within the parameters of the laws of war. These are (i) the extent to which an attacking party can factor in risk to its own force, and (ii) whether it is possible to take into account damage over time and space, when performing a proportionality calculation.

3.7 Risk to One's Own Force

In the kinds of conventional wars that gave rise to the rules associated with the standard view, the risk to ones own force is largely manageable. Soldiers are not required to assume so much risk that the mission fails or that they would not be able to continue the fight. This limitation provides commanders sufficient latitude to balance mission requirement and soldiers' lives because it gives them somewhere else to displace the risk associated with a particular operation. While they are not permitted to directly target non-combatants, they can construct the operation to take advantage of long range fires and other protective measures, even if that means displacing some risks to non-combatant.

However, because of the close association between the support of the local population and victory, displacing that risk onto non-combatant in irregular warfare often places the mission at risk[54]. Indeed, it must be noted that the laws of war do not establish what degree of care is required of a soldier and what degree of risk to his or her life a

[54]. F Hampson, "Military Necessity Crimes of War Education Project", (2011), Available @http/www-crimeofwar,org.Accessed on 17th June,2016 p. 21.

soldier must take. The principle of proportionality offers little guidance in this matter except to prescribe that the protection of civilians requires a willingness to accept some own-side casualities[55]. Everything depends on the target, the urgency of the moment, the available technology and so on[56]. In recent years, a debate has arisen regarding the concept of 'zero-causality warfare. Governments that are responding to the pressure of their constituency's aversion to own-side causalities are being accused of valuing their military personnel more than the enemy's civilian population[57].

The 1999 NATO intervention in Kosovo brought the question of 'zero-causality warfare to the fore, with NATO forces incurring no combat casualties and there being a significant number of civilian casualties among the people of the Federal Republic of Yugoslavia. The incident that caused the most reactions was the attack on a convoy of Albanian refugees on April 14, 1999, in which approximately 75 civilians were killed and another 100 or so were injured. The NATO aircraft that launched the missles were flying at an attitude of 15,000 feet, in order to minimize danger to the pilots[58]. It has since been recognized that had the aircraft been flying at a lower attitude, the aircraft could have

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55. R Smith, *The Utility of Force, the Art of War in the Modern World* (New York: Alfred A. Knopf, 2007), 281. As retired British general Rupert Smith noted in the utility of force, in such conflicts, the loyalties, attitudes, and quality of life of the people do not simply impact the outcome they determine it.

56. W.J Fenrick, "the Law Application to Targeting and proportionality after Operation Allied Force: A view from the outside" *op cit.* According to the British defence doctrines definition of targeting, "there may be occasions when a commander will have to accept a higher level of risk to his own force in order to avoid or reduce collateral damage to the enemy's civil population"

57. A P V Rogers,"Conduct of Combat and Risks run by the Civilian Population " (1982) 21:1-2-3-4. *The Military Law and Law of War Review*, 293 at 310.

58 Nobody bags policy posed, and continues to pose, a moral dilemma. It implies that the lives of your own pilots are worth more than the lives of the innocent civilians on the ground, since the acceptance of some collateral damage relates to the 'others', while the aim of 'zero-casualty warfare' only relates to 'yourself – the discrepancy is troublesome (….) (bring, supra note 38 at 47-49.

better scrutinized the target and cancelled the attack upon realizing that the convoy was not a military objective[59].

The question here is whether a policy of 'zero-casualty warfare represents an affront to the proportionality principle. The reasoning is that by factoring the preservation of one's own forces into the evaluation of the military advantage anticipated from an attack, an attacking party justifies a greater likelihood of collateral damage, thereby unfairly skewing the proportionality calculation in favour of military considerations. In order to answer the question properly, it is necessary to clarify what is meant by the security of one's own force. When states assert their right to consider the security of their own forces in the targeting process, what is generally understood is that they reserve the right to attack military objectives on account of the need to protect their forces. In defining what constitute a legitimate military objective, Article 52 (2) requires that the destruction, capture or neutralization of the target offer a definite military advantage. In this context, military advantage is interpreted by many states as including increasing or maintaining security for the attacking forces or friendly forces[60]. For example, an attacking party may argue that destroying a bridge provides a definite military advantage on the basis that it will slow down the advances of the enemy and buy time for its own forces to re-establish themselves in an offensive position.

In the NATO attack that caused death and injury on account of a failure to properly verify the status of the Djakovica convoy, the main rule at issue is the obligation

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59. The attitude of 15pevoted placed pilots "out of range of most hand held surface-to-aid missles and anti-craft artillery" (Rogers, zero-casualty warfare" (2000)82.837 *International Review of the Red Cross*, 165 at 173.

60. ICTY Final Report on Committee Established to Review the NATO Bombing Campaign against the Federal Republic of Yugoslovia 1999

to take feasible precautions in attack[61]. The missile attack was not in itself motivated by the need to secure NATO forces and therefore it was inappropriate to assess the collateral damage from the perspective of whether or not it was proportionate to the NATO policy of flying at an altitude of 15,000 feet. The relevant incident is whether it was feasible for the aircrew in an action to verify the statutes of the target. While feasibility certainly involves a consideration of the pilots security, it does not follow that an attack can be launched even if the answer to the question is no. The laws of war state that if there is a reasonable doubt as to the status of the target, it will be presumed to be civilian[62].

What can be deduced from the fact that the political and military imperatives of certain state prioritize the safety of their own troops is that this type of policy demands precaution. This is particularly true when the technological superiority of an army renders its final victory doubtless. Rather than introducing an element of normative relativism, this conclusion is simply recognizing that the superiority that enables an attacking party to provide greater safety to its armed forces also broaden the range of precautions that can be feasibly be implemented. As for the specific case of NATO aircraft flying at an altitude of 15,000 feet, it may be necessary to add caveat to the ICTY Final Reports Statement to the effect that "there is nothing inherently unlawful about flying above the height which can be reached by enemy defenses[63] if it were ever established that by bombing from a certain height, combat aircraft increased the risk of causing collateral damage because there was a greater probability that the missiles they launched would

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61. APL art. 57 (2)(a)(i)
62. API Art 52(3), according to Stefan Octer, (t) the decision factor in that respect should be the perspective of the soldier acting on the ground, or of the military commander deciding on the attack; serious doubts must be obvious from his perspective before there is any reason to invoke the presumption contained in Art. 52, para. 3" Oeter, op cit
63. API Article 51(4)©

miss their intended target, then there would be something potentially unlawful about bombing from such a height. Arguably, attacks launched in this manner would risk being indiscriminate if it were established that they could not be directed at a specific military objective[64].

3.7.1 Factoring in Damage Over time and Space

Time and space are factors that mitigate casualty by multiplying the chance that a contingency of events intervenes to break the causal link, rendering the damage remote. The reality of certain type of damage that occur in armed conflicts, is however, that they only materialize over time or that they are experienced beyond the location of combat operations. An example is damage to the environment.

In recent years, there has been a growing understanding of the long-term effects of certain weapons or method of combat on the ecosystem as well as growing sensibility to the value of environmental considerations. Today, most states agree that the balance to be struck between military and humanitarian considerations must take into account the potential for damage to the environment that is not immediately apparent[65]. This is reflected in the prohibition on attacks that may cause widespread, severe and long-term damage to the natural environment, especially thus, long-term damages should be factored into proportionality calculations[66]. The risk posed by unexplored remnants of

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64. The legal position consistent with present-day customary law is that when an attack is launched, environmental considerations must play a role in the targeting process" (Distein, supra note 35 at 177.

65. Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 18 September, 1997, Reprinted in Roberts & Guelff, Ibid at 645.

66. These are known as submunitions. Submunitions are small bomblets that are delivered by a cluster bomb or artillery shell. They are dispersed in large numbers (varying from tens at a time to 600-700 per bomb) and have the Capacity to Spread Destruction over an Area as Large as a Football Field which is considered their military advantage (P. Herby & A.R. Nuiten, Explosive Remnants

war, which includes anti-personnel landmines, anti-vehicle mines, submunitions[67] from airborne cluster bombs or land-based systems as well as other unexplored ordinances (UXO) are examples of damage that materializes over time and space.

In November 2003, an international agreement was adopted in the form of a Fifth Protocol I to the 1980 Convention, which deals comprehensively with the use and clearance of unexplored munitions[68]. One of the core principles of the newly adopted conventional instrument is that states that insist on using munitions which remain after the end of hostilities have a responsibility to assist in its clearance. This type of approach is a useful and creative way to hold belligerents accountable for acts that pose a long-term threat to civilians. The suggestion whether proportionality as possessing the elements of time and as a dynamic requirement is particularly useful in dealing with the recent propensity to view attacks on dual-use infrastructure as indispensable to an effective wartime campaigns[69].

Derivative damage must factor into the proportionality calculation in that it highlights the 'insincerity' of those who refuse to admit the foreseability of long-term civilian causalities when targeting key facilities within the national infrastructure. Since the 1990-1991 Persian Gulf War, it has been established that neutralizing the national electric power grid and targeting water treatment facilities or sewerage plants is likely to result in major failures in the health sector, thereby affecting the most vulnerable

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of War: Protecting Civilians through an Additional Protocol to the 1980 Convention on certain Conventional weapons" (2001) 83:84.

67. International Review of the Red Cross, 195 1t 198

68. Protocol on Explosive Remnants of War (Protocol v to the 1980 Convention) of 28 November 2003, ICRC IHL Database, Available online <http://www.icrc.org/ihl-ngF/FUL?Openview? Accessed on 2 May, 2016

69. *Op cit*

segments of society[70]. Because so much turns on the casual link between the attack and the damage, it is clear that any move toward introducing derivative harm into the proportionality calculation would have to be limited to damage that is foreseeable or likely or that can be reasonably expected.

Among the options recently explored for dealing with the problem of excessive long-term damage caused by targeting dual-use facilities are two proposals worth considering briefly. The first proposes the establishment of a regime of special protection for dual-use facilities that are deemed indispensable to the survival of the civilian population.[71] The authors of this proposal draw an analogy between facilities that supply the power necessary for the necessities of life and the objects protected under Article 54 of the First Additional Protocol. Article 54 prohibits attacks against objects indispensable to the survival of the population for the specific purpose of denying them for their sustenance value to the civilian population or the adverse party, whatever the motive, power plants and other infrastructure that contribute directly to the survival of the population are rarely targeted for the specific purpose of starving the civilian population, making it impossible to slot these objects under Article 54. Given the potential harm caused by targeting basic infrastructure, the proposal calls for a more stringent proportionality test. Where the survival of the civilian population is of issue, not only must the military advantage anticipated be concrete and direct, but it must also be

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[70]. Prevailing military doctrine emphasis infrastructure attacks particularly attacks on the national power grid as an essential means to degrade an enemy's air defuse, telecommunication and control capabilities" (Crawford, supra note 90 at 108-109)

[71]. During the meeting of experts that was convened in May, 2005, one expert explained that in the planning of an attack, the following reverberating effects were taken into account when conducting a proportionality calculation: the risk of disease, access to clean water and climatic effects contents", aviation week & space Technology, interview with W.M. Arkin, 27 January 1992, accessed on Lexis Nexis. On20th July, 2016

compelling[72]. At the moment, no such additional criterion is applicable but in the event that states one day agree that a regime of special protection should apply to certain dual-use facilities, this proposal may constitute a helpful starting point.

The second proposal is with respect to unexploded remnants of war. This is a policy-oriented proposal, which may be especially appropriate in the case of interventionist conflicts, such as in Kosovo, in Afghanistan and in Iraq. It posits that victorious states and their allies have a responsibility to assist in the repair of the infrastructure and economy at the end of hostilities, in order to limit the long-term damage that may materialize as a result of their attack[73]. This is good example of searching for solutions beyond the letter of the law where it is clear that the existing regime faces new challenges because of new battle field realities. To be certain, a commitment to offer post-conflict assistance does not retroactively justify an act that constituted a violation of the *jus* in *bello* at the time it was committed.

3.7.2 The Principle of Distinction

The principle of distinction is arguably the most basic principle that determines the feasibility of the other principle of IHL. The principle requires that during armed conflict, parties distinguish and make distinguishable all non-military targets. These would include civilian (noncombatants), persons rendered *hors de combat,* objects that are for military use and those not for military uses and the nature of the conflict itself[74].

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72. Shine & Wippman,, The Authors call their Proposal Protective Proportionalityin, Can Might make Right? Building the Rule of Law after Military Interventions (2006) 45

73. R. Wedgwood, "Propositions on the Law of War after the Kosovo Campaign" in A.E. Wall, (*op,,cit*)189 at 440.

74. E A Oji, The Problem with International Humanitarian Law: Distinguishing Targets in Armed Conflict, *NAU Journal of International Law and Jurisprudence (JILJ)* 2013 Vol. 4 Available online www.ajol.ingo , 6th April, 2017.

The principle of distinction between civilians and combatants was first set forth in the St. Petersburg Declaration, which states that "the only legitimate objects which states should endavour to accomplish during war is to weaken the military forces of the enemy[75]. In the *Kassen 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[76]. There are, moreover, many official statements which invoke the rule, including by states not, or not at the time, party to Additional Protocol I[77]. The rule has also been invoked by parties to Additional Protocol I against non-parties[78].In their pleadings before the International Court of Justice in the *Nuclear Weapons case*, many states invoked the principle of distinction. In its Advisory Opinion in the *Nuclear Weapons case*, the court stated that the principle of distinction was one of the "cardinal principles" of international humanitarian law and one of the intransgressible principle of International Customary Law[79].

The principle of distinction is one of the foundation stones upon which the edifice of IHL rests. As Fenrick has stated: 'military commanders are obligated to distinguish between civilian objects and military objectives and to direct their operations against military objectives'[80].

The principle of distinction as expressed in the St. Petersburg Declaration recognizes that, no military necessity justifies direct attacks on civilians or civilian objects. Respect for the principle is what makes it possible for humanitarian law to fulfill

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75. St. Petersburg Declaration, Preamble (cited in Vol. 11, ch. 1, 8.83
76. Israel, Military Court at Ramallah, *Kasem Case* p. 2797
77. See example, the statements of Germany Vis-à-vis Turkey (Ibid S. 292) Spain vis-à-vis Iran and Iraq (Ibid S.315).
78. See the statement of Ecuader Military Manual (S. 39) Egypt Military Manual(S. 40 and 283.
79. *ICJ, Nuclear Weapons Case op,,cit* S. 434.
80. W Fenrick, The Law Applicable to Targeting and Proportionality after Operation Allied Force." *A view from the outside*; (2003), pp. 53 at 66.

its aim of protecting the civilian population from the consequences of armed conflict. According to Watkins, "The ability of combatants to plan and conduct their operations and defend the state, as well as the capacity of state or the international community to hold them accountable for failure, is significantly dependant, upon the clarity and relevance of the distinction principle[81].

Several key provisions of the Hague Regulations annexed to the 1907 Fourth Hague Convention, the 1949 Geneva Conventions and their Additional Protocols of 1977 enshrined the principle of distinction between civilians and civilian's objects and military objectives. The whole thrust of the Fourth Geneva Convention of 1949 is towards providing for the protection of civilians and civilian objects, in particular part II concerning the general protection of population against certain consequences of war, and a number of provisions provide specific protection from attacks against civilian objects, including Article 18 prohibiting attacks on civilian hospitals[82] and Article 33 concerning collective punishment and reprisals against protected persons and their property[83]. Besides being firmly anchored in various treaties, the principle of distinction is also established in customary law[84]. Further, it is applicable in international and non-international armed conflicts[85].

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81. See Watkin, 10c. cit. n.4, p.3

82. Article 19 of the Fourth Convention provides, the protection to which civilian hospitals are entitled shall not cease unless they are used to commit, outside their humanitarian duties acts harmful to the enemy. Protection may, however cease only after the warning has been given, naming in all appropriate cases, a reasonable time limit, and after such warning has remained unheeded.

83. Article 33 of the Fourth Convention provides; no protected person may be punished for an offence he or she has not personally committed. Collective penalties and likewise all measures of intimidation or of terrorism are prohibited. Pillage is prohibited. Reprisals against protected persons and their property are property are prohibited.

84. The rule that civilian population as such as well as individual civilians shall not be object of attack is a fundamental rule of international humanitarian law applicable to all armed conflicts".

85. See: e.g, *Prosecutor V. Tadic*, Case No IT- 9-1 AR72, Appeals chamber, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, para 87, *Prosecutor v. Martic*,

The ICJ description of the principle as "intransgressible[86] has been criticized since it fails to explain what this adjective means. Queguiner argues that the ICJ thereby meant "to indicate the *jus cogens* character of the principle of distinction[87]. There is no doubt that the very principle of distinction cannot be changed as it has reached the status of a *jus cogens* norm. That being said, what can clearly be modified is the definition of combatant and this is where the problem lies. Indeed, "the uncertainty within the principle of distinction emerges when probing the critical delineation between what constitutes a civilian and what constitute a combatant[88]". This work argues that despite perceptible changes in the reality on the ground and calls for reform proposals, IHL has been affected by these changes.

3.7.3 Can Targets Be Selected to Achieve the Political Goals of the Conflict?

3.7.4 Can Targets Be Selected to Achieve the Political Goals of the Conflict?

Targets cannot be selected to achieve the political goals of the conflict. While an armed conflict might be started for many reasons, IHL is not an absolute or unfettered licence to purse political or diplomatic goals by military force. Some might find this a difficult concept but "the destruction of the enemy's military apparatus is ….. never an end in itself"[89]. However, to argue that targets can be selected to obtain directly political goals

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Case No IT – 95-11-1, Trial Chmaber, 8 March 1996, para. 10 Rule 1 of the study on (International Humanitarian Law declares: The parties to the conflict must all times distinguish between civilians and combatants. Attack may only be directed against combatants attacks must not be directed against civilians;". See Henckaerts, supra note 19 at 198.

86. *Threat of use of Nuclear Weapons, Adivsory Opinion* (1996) ICJ Rep. 226, paras 78-79.

87. J F Queguiner,. The Principle of Distinction: Beyond an obligation of Customary International Humanitarian Law. In: Hense, H.M. (ed), the legitimate use of Military Force. The just war tradition and the customary law of armed conflict, 2008, 161 at 171.

88. M O Maxwell,. and R V Meyer,. The principle of distinction: probing the limits of its customariness 2007, *Army Law;* 1 at 3.

89. S Oeter, Method and Means of Combat in D Fleck (ed)*The Handbook of Humantarian Law in Armed Conflicts*,(Oxford, Oxford University Press,1992) 157

without reference to weakening an enemy's military force is in effect to argue that military force may legally be used to achieve political goals. As this is no longer the case under the *jus ad bellum*[90], clearly it cannot be the case under the *jus in bello*. The report on a 2005 meeting of experts of a conflict was always political, it may only be pursued by affecting the military assets of the enemy"[91]. So, how does this translate into the realities of an armed conflict?

Solf directly contrasts "national-strategic planning[92]" and the planning of a field commander. He writes that national-strategic planning is focused on the "attainment of the object for which the armed conflict is waged",[93] whereas, under API, the field commander's viewpoint is the "attainment of a definite military advantage"[94]. Accordingly, in target selection[95], it is important not to confuse seeking the ultimate surrender of the enemy[96] with political or national goals. The former is the goal of the military, the latter the goal of the state. A field commander quite rightly seeks the defeat of the enemy, including through surrender. Axiological targeting aimed at influencing the enemy to surrender, when limited, is legally permissible. However, following Solf's reasoning, it is my view that axiological targeting aimed at achieving national-strategic planning goals is impermissible. To restate the argument, this is because the achievements of national-strategic goals are not a military advantage and under Article 52(2) API, an attack on an object must offer a military advantage for that object to be a

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90. See Yoram Dinstein, *War, Agrression and Self-Defence* (4th ed, 2005) 82 and 87. Query whether a state may use force to achieve goals that consistent with the purpose use of force (2nd ed, 2004) 29.
91. Expert Meeting: Targeting Military objectives, above n27 (chapter 1), 3).
92. Golf, above note 90 (chapter 2) 128.
93. *Ibid*
94. *Ibid*
95. And for that matter, whenever use concepts like military advantage and military necessity need to be considered or any other form of causation of hostilities such as an armistice or compliance with a UN security council resolution.
96. Y Dinstein, The conduct of Hostilities under the Law of International Armed Conflict, *op,cit* 86

lawful military objective. As Dinsein [97]states, "the advantage gained must be military and not, say, purely political". A target cannot be selected purely to force a change in negotiating attitude[98], but an attack on an otherwise lawful military objective can be given a higher military priority to achieve this desired outcome.

An excellent case in point is the NATO bombing campaign in Kosovo. NATO's objectives for the conflict in Kosovo were set out in the statement issued at the extra ordinary meeting of the North Atlantic Council held at NATO on 12 April, 1999 and were reaffirmed by Heads of State and Government in Washington on 23 April, 1999. They include;

- A veritable stop to all military action and the immediate ending of violence and repression.
- The withdrawal from Kosovo of the military, police and paramilitary forces;
- The stationing in Kosovo of an international military presence.
- The unconditional and safe return of all refugees and displaced persons and unhindered access to them by humanitarian aid organization, and;
- The establishment of a political framework agreement for Kosovo on the basis of the Kambouillet Accords, in conformity with International Law and the charter of the United Nations[99].

Interestingly, these objectives were not set until April, yet the "NATO air and missile campaign in Kosovo began at 1400 EST (1900 GMT) on March 24[th],,[100]. These objectives are what Golf would describe a national-strategic objective. Accordingly,

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97. *Ibid*
98. *Ibid*
99. Cordesman, anove note 97 (Chapter 1) 23-24
100. *Ibid*, 16

targets could not be selected purely on the basis that attacking the target would assist in achieving NATO's objectives. To attack such a target, there would also have to be a military advantage to the attack.

What is and is not permissible under International Humanitarian Law can become confusing if the distinction that Golf makes between national-strategic objectives and the objectives of a field commander is not adhered to. For example, at a joint press conference with the NATO Secretary General, General Clark said;

> The military mission …. Is to attack Yugoslavia military and security forces and associated facilities with sufficient effect to degrade its capacity to continue repression of the civilian population and to deter further military actions against its own people[101].

The mission described is a national-strategic objective. Accordingly, targets could not be selected purely on the basis that attacking those targets would assist in the achievement of that mission. Of course, the priority for attacking the targets can be based on the national-strategic objectives. Oeter states the point succinctly when he writes that prohibited attacks include "attacks of a purely political purpose, whether to demonstrate military strength, or to intimidate the political leadership of the adversary[102]" The above statement is agreeable as long as the proper emphasis is placed on the word "purely". For example, it would be permissible to launch a forceful attack on otherwise lawful military objectives to convince other enemy military units to surrender. In this circumstance, the attack would not have been for a 'purely political purpose". Armed conflict inevitably involves killing people and destroying property – what is sometimes forgotten is that while IHL permits this to occur in circumstance when, but for a state of armed conflict,

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101. Wesley Clark, Waging Modern War: Bosnia, Kosovo, and the future of combat (2001), 203
102. *Op.cit.*

such actions would generally be illegal and punishable as such, this legalizing of the otherwise illegal is premised on the military actions being necessary and not merely convenient or even preferable. And, as recognized in the St. Petersburg Declaration, the only necessary thing to win is to weaken the enemy[103]. Kalshoven notes, "a situation of armed conflicts does not provide a 'licence to kill'[104]. Considering the above, there is no doubt that targets cannot be selected to achieve the political goal of the conflict.

[103]. Preamble of the St. Petersburg Declaration,

[104]. Frits Kalshoven, 'Remarks' in ASIL Proceedings, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity (1992) 41, 43.

CHAPTER 4

THE REGULATION OF MEANS AND METHOD OF WARFARE

The right of parties to a conflict to choose means or method of warfare is not unrestricted. IHL prohibits the use of means and method of warfare that are indiscriminate or that cause superfluous injury or unnecessary suffering.[1]

IHL also seeks to regulate development in weapons technology and the acquisition of new weapons by states. Articles 36 of Additional Protocol 1 requires each state party to ensure that the use of any new weapons, means or method of warfare that it studies, develops, acquires or adopts will comply with the values of International law that are binding on that state.

Assessments carried out to this end will contribute to ensuring that the state's armed forces can conduct hostilities in accordance with the states International obligations.

4.1 Traditional or Conventional Warfare

This is a form of warfare conducted by using conventional weapons and battlefield tactics between two or more states in open confrontation. The forces on each side are well defined, and fight using weapons that primarily target the opponent military. It is normally fought using conventional weapons, and not with chemical, biologically or nuclear weapons.[2]

The general purpose of conventional warfare is to weaken or destroy the opposite military, thereby negating its ability to engage in conventional warfare. In forcing

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1 Q Jean – Francois "Precautions under the Law Governing the Conduct of Hostilities" International Review of the Red Cross (2006) 763 - 821

2 MLR Smith "Guerrillas in the Mist re-assessing Strategy and Low Intensity Warfare Review of International Studies vol. 29 (2003) 19 - 37

capitulation, however, one or both sides may eventually resort to unconventional warfare tactics.[3]

4.2 Contemporary Warfare

This is also referred to as a modern warfare. It means using the concepts, methods and military technology that have come into use during and after World War 1 and 11. The concepts and methods have assumed more complex forms of the 19th and early 20th century antecedents, largely due to the widespread use of highly advanced information technology and combatants must modernize constantly to preserve their battle worthiness.[4] Although total war was thought to be the form of International conflicts from the experience of the French Revolutionary Wars to World War 11, the term no large describes warfare in which a belligerent use all of its resources to destroy the enemy's organized ability to engage in war. The practice of total war which had been in use for over a century, as a form of war policy, has been changed dramatically with greater awareness of tactical, operational, and strategic battle information.[5]

With the invention of nuclear weapons, the concept of full – scale war carries the prospect of global annihilation, and as such conflicts since world war 11 have by definition been "low intensity" conflict" typically in the form of proxy wars tough within local regional confines, using what are now referred to as "conventional weapons"

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3 S. Kalyvas 'The Sociology of Civil Wars warfare and Armed Groups. www. En. M.wikipedia.org Accessed on 11th June, 2018.

4 W. Murray. The Dynamics of Military Revolution (Cambridge: Cambridge University Press,2001)132

5 C Martin Van, Technology and War, the Oxford History of Modern War (New York: Oxford University Press, 2008) 206.

typically combined with the use of asymmetric war tactics and applied use of intelligence.[6]

4.3 Means and Method of Warfare

The term means of warfare generally describes the weapons being used by parties to an armed conflict in the conduct of hostilities. A weapon that is used for law enforcement purposes is not a means of warfare.

The expression "means of warfare" appears often in combination with the expression "method of warfare" in IHL treaties. For instance, Part 111, section 1 of 1977 Additional Protocol 1 to the Geneva Conventions is entitled 'methods and means of warfare'. Article 35 thereof, set out 'Basic rules, two of which explicitly mention 'means of warfare and Article 36 bears the title 'New weapons' and refers to the employment of a new weapon, means or method of warfare[7].

The ICRC commentary on Protocol 1 notes that the drafters preferred the term 'methods and means of warfare' to the term 'methods and means of combat' which was used in the ICRC draft, for the reason that "Combat might be construed more narrowly than "warfare". It is clear that the term 'warfare' encompasses 'combat' a term that is used occasionally in the protocol.[8] It is, however, doubtful that these expressions are given different meaning in practice today. The ICRC's commentary uses these terms inter

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6 E Newman, The New Wars Debate: A Historical Perspective is Needed, Security Dialogue (2004) www.ivoryresearch.com/writer Accessed on 11th June, 2018

7 Y Dinstein, The Conduct of Hostilities under the Laws of International Armed Conflict, (Cambridge: Cambridge University Press, (2004) 36

8 D Kretzmer 'Targeted Killings of Suspected Terrorist: Extra Judicial Execution or Legitimate means of Defence. (2005) European Journal of International Law, 171 - 212

– changeably in many instances. The term means of combat "or means of warfare" generally refers the weapons being used.[9]

Means of warfare and weapons are over lapping concepts. Weapons used outside of the conduct of hostilities are not means of warfare, whereas means of warfare is sometimes used in a broader sense that just referring to weapons.

The ICRC's commentary states that, the term 'means of combat' or 'means of warfare' generally refers to the weapons being used, while the expression 'methods of combat' generally refers to the way in which such weapons are used.[10]

This distinction evokes the difference often made in doctrine between 'inherently' unlawful weapons (weapons unlawful "per se" or by their native) and the unlawful use of weapons. The distinction between means and method is however, not always consistently upheld, and "means" sometimes has a broad meaning that is not limited to weapons in particular, in early, IHL Instruments. For instance, Article 101 of the 1863 Lieber code describes deception in war as a 'means of hostility', the 1899 and 1907 Hague regulations use the term 'means of injuring the enemy' to describe a range of military activities not limited to specific weapons. Article 21 of the 1922 /1923 Hague rules on Air Warfare refers to the use of aircraft for propaganda purposes as a 'means of warfare'

9 M John – Hopkins, "Regulating the conduct of Urban Warfare: Lessons from Contemporary Assimmetric Armed Conflicts (2010) International Review of the Red Cross, 469 - 493

10 M Muhammad, 'Suicide Attacks and Islamic Law" (2008) International Review of the Red Cross, 71 -89.

The important point here is that, a weapon effects, with which IHL is ultimately concerned, will always result from a combination of its designs and mannered in which it is used.

The use of a specific weapons in armed conflict can be completely prohibited and the weapons itself considered unlawful. For instance, anti – personnel mines, cluster munitions[11]and chemical weapons. Alternatively its use may be restricted to contain situations. For instance, the prohibition against the using air delivered incendiary weapons against a military objective situated in an area with a concentration of civilians.

4.3.1 Anti – Personnel Mines.

Anti – personnel mines are victim – activated exposure devices intended to kill or injure one or more persons. The main categories of anti – personnel mine are blast, fragmentation, bounding fragmentation, and directional fragmentation. Blast Mines are normally triggered in pressure whereas fragmentation mines are triggered by tripwire.

Most states prohibit anti – personnel mines use by citing their obligation under the Otawa Convention. The convention states that;

Each state party undertakes never under any circumstances (a) to use anti – personnel mines (b) to develop, produce, otherwise acquire stock pile, retain or transfer to any one, directly or indirectly, anti – personnel mines (c) assist, encourage or induce, in any way, any one to engage in any activity prohibited to a state party under this convention. (2) Each state party undertakes to destroy or ensure the distraction of all anti – personnel mines in accordance with the provisions of this convention."[12] The nature of

[11] Article 22 of the 1899 Hague Regulations

[12] Convention on the prohibition of the use, stockpiling, production and transfer of Anti- personnel mines and on their destruction (opened for signature 3 December, 1997, entered into force 1 March, 1999)

anti – personnel mines makes their employment and effect indiscriminate. It detonates their surface. No anti – personnel mine can currently differentiate between pressure applied by a lawful combatant and a civilian. Unlike a firearm, which can be aimed at a target, then hit the target with a projectile in milliseconds, an anti – personnel mines targeting system does not have such a short temporal relationship between the target and impact.[13] Anti – personnel mines are unique in terms of weaponry in that it is not possible to adjust the target once the anti – personnel mine is activated. The mines target is anything that applies the threshold amount of pressure to the space where the anti – personnel is laid.[14] These characteristics of anti – personnel mine makes them indiscriminate, which by their very nature cannot distinguish between a civilian or combatant when they are activated. When the anti – personnel mine has been laid, it continues to have the potential to kill long after the armed conflict has ended.[15] Although anti – personnel mines can be equipped with self – neutralization or self destruction mechanism as a measure of precaution and to decrease the indiscriminate effects of such mines over time they will still have an indiscriminate effect on civilians as long as they are armed.[16]

4.3.2 Cluster Muntions

The Convention on Cluster Munitions is a humanitarian imperative-driven legal instrument which prohibits all use, production, transfer and stockpliling of cluster

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13 R MC Grath and E Stover, 'Injuries from Land mines" (1991) British Medical Journal Vol. 303 at 1492

14 Ibid

15 M Grusicic, Js Snipers and B A chessman analysis of steel with composite material substitution in military vehicle will floors subjected to shallow – buried anti – personnel – detonation loads (2014) multi discipline modeling in materials and structures 10 at 418

16 Ibid p. 56

munitions. In addition, it establishes a frame work for co-operation and assistance to ensure adequate assistance to survivors and their communities, clearance of contaminated areas, risk, reduction, education and destruction of stockpiles.

Cluster munitions are weapons consisting of a container that opens in the air and scatters large numbers of explosives submunitions or bomblets' over a wide area.[17] Depending on the model, the number of submunition's can vary from several dozen to more than 600. Cluster munitions can be delivered by air craft, artillery and missiles.

Cluster bombs release many small bomblets over a wide area, they pose risk to civilians both during attacks and afterwards.[18] Unexploded bomblets can kill or main civilians and /or unintended targets long after a conflict has ended, and are costly to locate and remove. It is prohibited for those nations that ratify the convention on cluster munitions, adopted in Dublin, Ireland in May 2008.

The IHL position is that cluster bombs should not be against military objectives in civilian areas.[19] IHL acknowledges potential indiscriminate effects associated with cluster bomb use, associated failure rates and the ongoing hazard associated with explosive remnant of war.

Cluster bombs, although in a form of explosive remnant of war, are not specifically prohibited. Additional protocol v requires belligerent to take precautions in protecting

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17 Protocol on prohibition or restriction on the use of mines booby traps and other devices (protocol 11) Annexed to the convention on certain conventional weapons (1996) laws of Armed conflicts 196 (CCW) Article 3(5) – (6)

18 International committee of the Red Cross (ICRC), explosive remnants of war; cluster bombs and landmines in Kosovo (Geneva, 2001)6

19 P. Herby and A nuiton' explosive remnants of war; protecting civilians through additional protocol to the 1980 convention on certain conventional weapons' (2011) International review of the Red Cross 195 at 197

civilians to clear explosive remnant of war remaining post – conflict, and to assist in international efforts to deal with problems posed by explosive remnant of war.[20]

4.3.3 Drones

Drones are not specifically mentioned in weapon treaties or other legal instruments of IHL. This means among other things that, when using drones, parties to a conflict must always distinguish between combatants and civilian and between military objectives and civilian objects.

Under IHL, drones are not expressly prohibited, nor are they considered to be inherently indiscriminate or perfidious. In this regard they are not different from weapons launched from manned aircraft such as helicopter or other combat aircraft. It is important to emphasis however, that while drones are not unlawful in themselves, their use is subject to international law. Again, not all drones are actually armed and used to fight. Unarmed surveillance drones can be used for a range of civilian purposes. They can for instance, help detect fires and therefore save lives. They can also be used to collect vitally important information for relief personnel working in areas affected by natural disaster.

However, most of the current debate has been generated by the use of armed drones for combat operations in Afghanistan, Gaza or Yemen for example. Advocates of the use of drones argue that they have made attacks more precise and that this has resulted in fewer causalities and less destruction. But it has also been asserted that drones attacks have erroneously killed or injured civilians on too many occasions.

4.3.4 Chemical and Biological Weapon

The military use of chemical, bacteria, virus, toxins, or poisons to injure or kill soldiers or civilians is called chemical and biological warfare. The means by which the harmful

[20] Article 35(2) of Additional protocol 1to the Geneva Convention

substances are delivered to the enemy are called chemical and biological weapons[21]. The ICRC banned the use of chemical and biological weapons after the World War 1 and reinforced the ban in 1972 and 1993 by prohibiting the development, production, stockpiling and transfer of these weapons.

The misuse of science or of scientific achievements to create weapons that poison and spread disease has always provoked alarm and abhorrence in the public mind. The ICRC summed up the public horror at the use of such weapons in its appeal in February 1918, calling them "barbarous inventions' that can "only be called criminal. For centuries there have been taboos against such weapons but the use of poisonous gas in world war 1 led to the first international agreement that is the 1925 Geneva Protocol banning asphyxiating poisonous or other gases and bacteriological methods of warfare.[22] Chemical weapons often referred to as gases suffocate the victims or cause massive burning while Biological weapons are slower acting, spreading a disease such as authrax or small box through a population before the first signs are noticed.

The use of chemical weapons is war crime and is prohibited in a series of International treaties which include; the Hague Declaration concerning Asphyxiating Gases 1899, the Geneva Gas protocol etc. it is also a violation of IHL reflected in the Geneva Conventions, their Additional protocols, the Hague Regulations and in customary IHL. Such violations include the prohibition against targeting civilians, indiscriminant attacks and the infliction of unnecessary suffering.

[21] www. https://en-m-wikipedia.org. Accused on 10th June, 2018.
[22] https://www.icrc.org/en/document/chemical-bilogical - weapons, accused on 10th June, 2018

The Roman statute of the ICC criminalizes the use of chemical weapons as war crime in both International and Non – International armed conflicts.[23]

4.3.5 Nuclear Weapons

The right of parties to a conflict to choose means or methods of warfare is not unrestricted. IHL prohibits the use of means and methods of warfare that are indiscriminate or that cause superfluous injury or unnecessary suffering.

The use of nuclear weapons is prohibited not because they are or they are not called nuclear weapons. They fall under the prohibition of the fundamental and mandatory rules of humanitarian law (which long predates them) by their effects, not because they are nuclear weapons but because they are indiscriminate weapons of mass destruction.[24]When it comes to war and armed conflict, international law has always sought to balance military necessity with humanitarian consideration [25]. It has done so by constraining state behaviour through "regulating the conduct of belligerents and limiting the weapons that may be used"[26].

Nuclear weapons are illegal under IHL. Article 1 of the Geneva Conventions of which all nuclear states are a party states that the "High contracting parties undertake to respect and ensure respect for the present convention in all circumstances[27]. As such, IHL is binding on all the states and, due to the Mantens clause, can, by default, prohibit specific weapons system. This reasoning was also reached by the ICJ in their Advisory Opinion, when the

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23 www.hrf.chemical-weapons.org. Accessed on 10th June, 2018

24 D Warner; The Nuclear Weapons Decision by the International Court of Justice. Locating the Raison behind the Raison detat, Miliennium, Vol. 27 No.2 2000, P.311

25 J Burroughs, the Advisory Opinion of the International court of Justice and the statute of the International Criminal Court, June15, 199, Accused on 10th June, 2018.

26 Htt://www.cnduk.org lindex. Php/information/infor sheets/the – effects of nuclear weapons intel

27 EL Megrouwitz "the opinion of Legal Scholars on the Legal states of nuclear weapons; Stanford journal of international law, vol. 24 (1987 – 1988)114

court concluded that prima facie, the use of nuclear weapons would be a violations of IHL.[28]

Nuclear weapons are weapons of mass destruction, it contrast to conventional warfare, nuclear warfare can produce destruction in a much shorter time and can have long – lasting radiological warfare result.

4.4 Method of warfare

The term method of warfare generally describes the way in which weapons are used by parties to an armed conflicts in the conduct of hostilities. The expression method of warfare' appears often in combination with the expression means of warfare in IHL. It could also be seen as the tactics or strategy, used in hostilities against an enemy in times of conflict.

We shall herein proceed to discuss the prohibited methods of warfare.

4.4.1 Perfidy

By Article 37(1) of the 1977 Additional Protocol 1, "Act inviting the confidence of an adversary to lead him to believe that he is entitle to or is obliged to accord, protection under the rules of international law applicable in armed conflict, with the intent to betray that confidence, shall constitute perfidy.[29]

Perfidy constitutes a breach of the laws of war and so is a war crime, as it degrades the protection and mutual restraints developed in the interest of all parties, combatants and civilians. The following constitutes acts of perfidy;

a. The feigning of an intent to negotiate under a flag of truce or of a surrender
b. The feigning of an incapacitation by wounds or sickness.

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[28] Advisory opinion (legality of the threat or use of nuclear weapons) international court of justice 1996 accused June, 10, 2018

[29] 1977 protocol, Additional to the Geneva conventions of 12 August, 1949.

c. The feigning of civilian, non combatant status and;

d. The feigning of protected status by the use of signs, emblems or uniforms of the United Nations or of neutral or other states not parties to the conflict.

However, ruses of war are not prohibited. Such ruse are acts which are intended to mislead an adversary or to induce him to act recklessly but which infringe no rule of international law applicable to armed conflict and which are not perfidious because they do not invite the confidence of an adversary with respect to protection under that law. The following are examples of such ruses;

a. The use of camouflage

b. Decoys

c. Mock operations and,

d. Misinformation.

The IHL study recognize that killing, injuring or capturing by resort to perfidy is illegal under customary IHL, but only acts that result in serious bodily injury, namely, killing or injuring, would constitute a war crime. A corollary to this preposition is that any perfidy that does not lead to the killing, wounding or capture of an enemy is neither illegal nor criminal under IHL.[30]

4.4.2 Starvation

By Article 54(1) of the 1977 Additional Protocol 1, starvation of civilians as a method of warfare is prohibited. And by Article 8 (2) (b) (xxv) of the 1998 ICC statute, internationally using starvation of civilians as a method for warfare depriving them objects indispensable to their survival, including willfully impeding relief supplies as

[30] T Hall-Mary, False Colors and dummy ships; the use of ruse in naval warfare' international law force the naval war college Keview (1995) 491 - 500

provided for under the Geneva Convention constitutes a war crime in international armed conflict. It is prohibited to attack, destroy, remove or render useless, any items necessary for civilian survival. For example, food, land used to cultivate food, water irrigation works etc. regardless of whether the objective is to starve the civilian population, to cause them to move, or some other motive.

4.4.3 Pillage

Pillage is the systematic and violent appropriation by members of the armed forces of movable public or private property that belongs either to persons protected by humanitarian conventions (civilians, wounded and sick, shipwrecked, and prisoners of war) or to the adverse state or party itself. Parties to the conflict are under an obligation to take all necessary measures to protect the wounded, the dead, or any persons exposed to grave danger from pillage and ill treatments.[31] Pillage is a war crime, as established by the statutes and judgments of the Nuremberg and Tokyo Military tribunals as well as by the Rome statue of the ICC. It is a grave violation of the Geneva Conventions. It takes the form of "extensive destruction and appropriation of property not justified by military necessity and carried out unlawfully and wantonly"[32]. It is also forbidden in both international and internal conflict by the Geneva conventions and their Additional protocols as well as by customary IHL.[33]

It is important to distinguish between pillage which is always prohibited and requisition which is an authorized form of appropriating property.

In the Tutu and Stella case (*Prosecutor v. Miaden Naletilic*) the trial chambers of the ICTY considered that pillage was "lawful and unlawful appropriation of property" and

[31] Article 4 of the convention for the protection of cultural property in the event of armed conflict 1954
[32] Article 50 of the Geneva Convention of 1949
[33] Article 8 (2)(b)(xvi) Rome Statute of ICC

that it may affect both private and public property. It further explains that the term pillage is general in scopes, comprising not only large scale seizure of property within the frame work of systematic economic exploitation of occupied territory but also acts of appropriation committed by individual soldiers for their private gain.[34]

[34] Judgment of ICTY (2003), 12

CHAPER 5

LAWFUL AND NON-LAWFUL TARGETS

Parties to an armed conflict must at all times distinguish between civilian population and combatants and between civilian objects and military objectives. Customary law derived from the Hague Regulations of 1899 and 1907 dictates that in military operations all necessary steps must be taken to spare cultural property from damage, unless it is constitutes a military objective[1]. The statute of the International Criminal Court echoes this rule by branding it a war crime to intentionally direct "attacks against buildings dedicated to religion, education, art, science or charitable purposes, or historic monuments, provided they are not military objectives[2]. In the case of property of great importance to the cultural heritage of every people, the 1954 Hague Convention and the 1999 Second Hague Protocol dictate a prohibition on targeting or using such property for purposes which are likely to expose it to destruction or damage, unless doing so is imperatively required by military necessity.[3] All these demand that targets must be distinguished.

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1. Article 56 of the Hague Regulations refers to 'institutions dedicated to religion, charity and education, the arts and sciences" and prohibits "destruction or willful damage done to installations of this character, historic monuments, works of arts and science". The norm of Customary International Law is deemed applicable in International and Non-International armed conflict (Rule 38 A and Rule 39, Customary International Humanitarian Law, Vol. 1 Supra note 29 at 127 and 131.
2. Rome Statute Article 8 (2)(b)(ix)
3. 1954 Hague Cultural Property Convention Article 4 and 1999 Second Hague Protocol Article 6. There are minimal differences between the two regimes in the conditions established for waiving the immunity and they do not change the basic loss of protection that follows from any military use of the property. The differences relate to the level of command at which an attack has to be ordered, the warning to be given and the requirement that a reasonable time be given to the opposing forces to redress the situation. The prohibition against attacking property of great importance to the cultural heritage of every people unless imperatively requires by military necessity is deemed to be a norm of customary international law applicable in both international and non-international armed conflict (Rule 38B, customer IHL, Vol. Supra note 29 at 127).

5.1 Criteria for Becoming Military Objective

Attacks shall be limited to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage[4].

It is commonly understood that by virtue of Article 52.2 AP 1, any object has to satisfy two cumulative conditions in order to qualify as a military objective;

(a) the object has to make an effective contribution to the military action of the defender and

(b) its destruction, capture or neutralization has to offer the attacker a definite military advantage.[5]

A decision as to classification of an object as a military objective and allocation of resources for its attack is dependent upon its value to an enemy nations' war fighting or war sustaining effort (including its ability to be converted to a more direct connection) and not solely to its overt or present connection or use.[6] This includes "war-supporting, manufacturing/export/import" in the list of potential economic targets[7].Furthermore, the military Commission Instructions issued by the US Department of Defence to facilitate the conduct of military commissions to try captured enemy combatants, also use the term "war-fighting" when defining military objectives[8]. The 'nature' of an object symbolizes

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4. Article 52 of the First Additional Protocol
5. See for instance, the ICRC Conventionary to APL 2008, uttp://www.icrc.org/ihl.
6. Operational Law Handbook 2005, Chapter 2, ix A.4
7. *Ibid*. A 1(c)
8. See for instance U S Department of Defence, Military Commissioner Instruction No. 30 April 2003, 5(0)

its fundamental character. Examples of military objectives by nature includes military aircraft (including military UAC/UCAVs), military vehicles (other than medical transport), missiles and other weapons, military equipment, military fortifications, facilities and depots, warships, ministries of defence and armaments factories. Application of the 'location' criterion can result in specific area of land such as mountain pass, a bridge head or jungle trial becoming military objective.

'Location' is a somewhat more ambiguous criterion because certain objects form part of infrastructure that, in warfare, must either be seized or destroyed in order to prevent a site from being occupied by the enemy. The example given in the commentary to the First Additional Protocol is that of a bridge.[9] The problem with applying this criterion to cultural property, however, is that some of the most precious constructions forming part of the cultural heritage of mankind are situated in strategically important locations or are themselves sites that can easily be occupied under the pretext that their control makes an effective contribution to military action. There is reason to fear that 'location' could be interpreted in an abusive manner and hence greatly diminish the protection afforded cultural property. Moreover, it has been pointed out that it is really the use of the historic bridge – if one takes the example given by the ICRC commentary – that turns it into a military objective since its attack only becomes imperatively necessary once it is being used by the enemy[10]. This concern with the criterion of 'location' was expressed during the negotiations that led to the adoption of the Second Hague Protocol

[9]. ICRC Commentary APL, Supra note 13 at para 2021

[10]. J M Henckaerts, New Rules for the Protection of Cultural Property in Armed Conflict: The Significance of the Second Protocol to the Hague Convention for the protection of Culural Property in the event of armed conflict,,*Internatonal Review of the Red Cross* (1999)593 at 603

and in the end; a majority of the delegates rejected it as too broad[11]. Instead of relying on 'use', which some negotiating states felt was too narrow, the drafter introduced a new criterion, that of 'function[12]. The example that was given to illustrate situation where 'use' would be inadequate was that of retreating soldiers who destroyed a cultural wall blocking their retreat despite the fact that it is not used by the enemy. While the example may have some value, it appears rather far fetched and does not seem to justify introducing an entirely new criterion that is already subject to divergent interpretations. One of the commentator aptly states that;

> "In real life, the problem is that cultural property is attacked even when it is not used for any military action or is attacked indiscriminately. In real life, the rule should be simple, cultural property which is not used to make an effective contribution to military action and whose destruction, seizure or neutralization does not offer a definite military advantage cannot be attacked. It is difficult to imagine how military advantage cannot be attacked. It is difficult to imagine how military commanders could teach their solders anything else.[13]

The use of an objective relates to its present function, with the result that a civilian object can become a military objective due to its use by armed forces. "Use" is the customary law criterion that prevails in the legal regime applicable to targeting cultural property as provided by the First Additional Protocol of 1977. Article 53 prohibits the "use" of cultural property in support of military action. Though the provision does not include a waiver of immunity, it has been interpreted as establishing that it is only in case of the protected object "in support of the military effort that loss of

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11. For Critical analysis of the drafting history. See J M Henckaerts, at 602 .
12. 1999 Second Hague Protocol, Article 6(a)(1) "that cultural property has by its function, been made into a military objective.

13. J M Henkaerts, *op,cit* p 260 at 605.

immunity will ensue.[14] According to the commentary, "if protected objects were used in support of the military effort, this would obviously constitute a violation of Article 53 of the protocol[15]. The commentary explains that "it is not permitted to destroy a cultural object whose use does not make any contribution to military action, nor a cultural object which has temporarily served as a refuse for combatants, but is no longer used as such[16].

5.2 Works and Installations Containing Dangerous Forces as Military Target

By virtue of Article 56 of the 1977 Additional Protocol I;

> Works and installations containing dangerous forces, namely dams, dykes and nuclear electrical generating stations, shall not be made the object of attack, even where these objects are military objective, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population. Other military objectives located at or in the vicinity of these works or installations shall not be made the object of attack if such attack may cause the release of dangerous forces from the works or installations and consequent severe losses among the civilian population.

The special protection against attack provided above shall cease in the following circumstances;

(a) for a dam or a dyke only if it is used for other than its normal function and in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

(b) for a nuclear electrical generating station only if it provides electric power in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

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14 Y Dinstein, *Op. cit* p 35 at 162

15. ICRC Commentary API, op,cit p13 at para 2079

16. *Ibid.*

(c) for other military objectives located at or in the vicinity of these works or installations only if they are used in regular, significant and direct support of military operations and if such attack is the only feasible way to terminate such support.

The high contracting parties and the parties to the conflict are urged to conclude further agreements among themselves to provide additional protection for objects containing dangerous forces. A limitation on the prohibition is that it attaches only to attacks that cause the release of dangerous forces that may result in severe losses among the civilian population[17], the prohibition extends to destroying, removing or rendering useless, the specially protected objects[18]. However, the only acts that are prohibited are those that cause severe losses among the civilian population[19]. That is to say that, there is no rule against destroying dams, dykes or nuclear electric generating stations; rather, there is a rebuttable presumption of knowledge that an attack will cause severe damage to the civilian population. The attacking party can escape responsibility if the prohibited harm does not ensue.

The rationale for the rule prohibiting attacks on works and installations containing dangerous forces and attacks of military objectives in the vicinity of such objects is to restrict collateral damage. Because attacks of this nature entail an undeniable risk of high causalities, it is unreasonable to think that the normal precautionary measures will

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17. API Article 5(1). The provision uses the word may rather than "likely to' in order to raise the standard of care to situations where the release of dangerous forces is objectively foreseeable rather than probable (W.A. Solf, "Article 56" in Bothe et al, Supra note 29 at 353 para 2.5.2)
18. See above, Section 1.B Humanitarian relief and the war survival of the population.
19. API Article 54(2).

suffice. It is also arguable that deliberately accepting such a level of risk will in many cases qualify as a blatant violation of the prohibition against indiscriminate attcks[20].

The fact that attacks on such installations may cause severe damage to the civilian population and the natural environment implies that the decision to attack such installations, in case they become military objectives, requires that all necessary precautions be taken when attacking them.

5.2.1 Loss of Protection

Just like any others civilian objects, dams, dykes and nuclear generating stations lose their protection once they become military objectives. However, it is not enough that their function contributes to military activities for them to be legitimately targeted. Works and installations containing dangerous forces, as well as any military objectives in their vicinity, must be used in 'regular, significant and direct support of military operations and attacking them must be 'the only feasible way to terminate such support'.[21] These requirements go beyond the definition of military objective at Article 52(2) of the First Additional Protocol by combining a threshold of support that is higher than 'effective contribution' with a condition that is reminiscent of 'imperative military necessity'. There must be no other way to put to an end the contribution the object is making to the adversary's military operations. In the specific case of dams and dykes[22], they must be used outside their normal function, for example, outside the function of holding back, or

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[20]. The ICRC commentary describes "severe" as equivalent to "important" or "heavy" nothing that the concept requires good faith interpretation on the basis of objective elements such as the proximity of inhabited areas, the density of population, the ****** of the land etc "(ICRC commentary API, note 13 at para. 2154). In his commentary, W.A. Solf, describes "severe" as a absolute standard rather than the relational standard set by the rule of proportionality and go on to speak of "massive civilian losses" ("Article 56" in Bothe *et al*, at 353 para. 253).

[21]. API Article 56(2)

[22]. API Article 56(2)(a)

being ready to hold back, water.[23] While in some instances, it may be possible for a potential attacker to assess the legitimacy of targeting a dam or a dyke because the military appropriation of such facilities by the enemy will be obvious, this is not often the case and even less so when it comes to nuclear power plants. Nuclear electrical generating stations are generally the core source of energy for entire electricity supply networks.

Determining the nature and extent of the support provided to the military by this type of facility requires sophisticated intelligence and is bound to be difficult to ascertain with precision. Even if one were to accept the wider interpretation that considers, for example, the provisions of electricity to factories producing armaments, ammunition and military equipment as support to military operations. Article 56 demands that an attack be the only feasible way to terminate such support. In other words, there must be no feasible alternative such as "destroying the essential installation of the distribution network (transformer stations, or main circuit lines)"[24]. If the protection of a work or an installation containing dangerous forces ceases, the civilian population continues to be entitled to the protection accorded them by international law, in case of attack, all practical precautions shall be taken by all parties – to avoid the release of the forces[25].

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23. F Kalshoven & L Zeqveld, *Constraints on the Waging of War*, (3rd ed) Geneva, Internatonal Committee of the Red Cross, (2001)14 at 97, Citing the report on conference negotiations, see also, ICRC commentary API, at para 2161.

24. S Oeter, *Op cit* para 465-2. See also, ICRC commentary API, *Ibid* at para. 2166: "It may be added that in the case of nuclear electrical generating stations, it is relatively easy to stop electricity reaching its destination by attacking the electricity lines. In this way, the desired result is achieved without the risk of releasing dangerous forces".

25. API Article 56 (3).

5.2.2 Defensive Allowance

Parties to the conflict are to endeavour to avoid placing military objectives in the vicinity of dams, dykes and nuclear electrical generating stations. In recognition of the importance of such objects and the fact that even in peace time they are often already protected in some manner against sabotage, the paragraph goes on to allow a defensive military presence at the site. Personnel and equipment deployed for this purpose are not to be targeted as long as the armament used "is limited to weapons capable of repelling hostile action against the protected works or installations[26]. the ICRC Commentary recognizes that "if the works or installations are located within the combat area, the military guard and the anti-craft artillery protecting them will of course be part and parcel of the total military system, and it will be difficult to make a clear distinction between military deployments designed to defend the works and installations and other troops fighting in the areas[27]. This is primarily a matter for the defending party to address since it has the responsibility to keep this special deployment separate from its regular armed forces. If it fails to do so or if the defensive equipment is used to defend the installation against capture by enemy forces, it will be difficult to blame the attacker for any resulting causalities.

The defensive personnel may be shielded from attack when they are fulfilling their intended task but they remain men in uniforms bearing and/or operating weapons. Hence, it is surprising to find the argument being made that a party carrying out an attack against a work or installation containing dangerous forces which has lost its protection,

[26]. APL Art. 56(5)
[27]. ICRC Commentary API, (op,cit) at para 2176.

faces the unfair burden of having to avoid damaging the defensive apparatus[28]. Indeed, it seems that once a facility is being used in "regular, significant and direct support of military operations" and attacking it is the only feasible way to terminate such support", it is not only dam, dyke or nuclear electrical generating station that has lost its protection but the defensive personnel and equipment as well[29]. The special regime applicable to dams, dykes and nuclear generating stations is novel and as such, it is only opposable to states having ratified the First Additional Protocol. Article 56 are rules of customary international law that are opposable to all, namely the prohibition against indiscriminate attacks[30] and the duty to take all feasible precautions to avoid excessive civilian losses in attack.[31]

There is arguably a more tailored customary norm emerging, according to which a party who chooses to target an object containing dangerous forces,[32] or any military objective located in the vicinity of such an object, must take particular care to avoid the release of dangerous forces[33]. The standard of care is aimed at avoiding severe losses

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[28]. See Hays parks, "Air war and the Law of war". (1997) *27 Israel Yearbook on Human Rights* p.10 - 213 – By way of example the author posits the following. Assume the attack is launched, and the American special operations force is defeated and captured after performing gallantly. In the course of battle, a number of soldiers in the defending force are killed or wounded, could the captured American soldiers be charged with a violation of the law of war, to wit, paragraph 5 of article 56? The answer rather conclusively is yes" (emphasis added) one can read into the use of the adjective 'gallantly" that the author was intending to refer was initially justified.as the author was intending to refer to an attack that did not satisfy the criteria for loss of protection as codified in paragraph 2 of Article 56, then it is difficult to entertain his criticism of paragraph 5, which should only be read in light of the entire provisions.

[29]. Another criticism of paragraph 5 formulated by W Hays *Op cit*

[30]. API art. 51

[31]. API art. 57 (2)(a)(iii)

[32]. This includes any works or installations containing dangerous weapons

[33]. See the practice of the United Kingdom in the 1990-1991 Gulf war and the practice of the United States in the Vietnam War, following which both states justified their attacks as having been carried out with the greatest care possible. Also relevant is the statement made by the United Kingdom in its reservation to API art. 56, in which it comments to take all due precautions in military operations at or near the installations (…) in the light of the known facts, including any special marking which the installation may carry to avoid severe collateral losses among the civilian populations, direct attacks on such installations will be launched only on authorities at a high level of command (See KRC IHL Database, available online; United Kingdom

among the civilian population and it can be said to involve the following duties; (a) to ensure that the decision to attack is indispensable; and (b) to take all necessary precautions, which includes ensuring that the decisions is taken at a high level of command. These rules are without prejudice to the application of general international law where the release of dangerous forces may affect states not involved in the hostilities and entail the international responsibility of the attacking party.

Even though a more unequivocal ban against targeting works and installations containing dangerous forces is desirable from a humanitarian perspective, it is unrealistic to petition for a blanket prohibition. The importance of electrical power for command, control, communications and air defense systems of modern military machines means that hydro-electric facilities as well as nuclear electrical generating systems will continue to be key military objectives. The focus of the laws of armed conflict should therefore be on bolstering the requirement that precautionary measures be respected. This places the states with the most sophisticated military might at an advantage to the extent that they are the ones who have the know-how and the technology to carry out attacks against works and installations containing dangerous forces without causing severe civilian causalities. Such an advantage comes at a price. This is the price of having to employ means and methods that are costly and perhaps even of having to commit to restoring the capacity of a destroyed facility at the end of hostilities in order to limit the damage to the civilian population and the environment, in time and in space[34].

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zhttp://www.icrc.org/ihl.nsf/webPAYs?openview>). See also Rule 42, customary IHL, Vol. 1, Supra note 29 at 139.

[34]. During the 1990-1991 Persian Gulf War, the Coalition forces adopted "a policy of attacking switching stations rather than generating stations, to enable repair of the electricity system after the war" A P "*Rogers, Law on the Battlefield", Melland Schill Studies in International Law*,(Manchester,Manchester University Press,1966) 170.Two Iraqi nuclear power stations were

Article 56 of the First Additional Protocol has the merit of focusing the attention of belligerents on the immense harm that can be caused by attacks against certain works and installations. Unfortunately, it is somewhat arbitrarily limited in its scope of application. It is not adhered to by the United States among others, and it continues to be the subject of important reservations by some of the leading military powers. This suggests that future negotiations regarding the protection of this category of objects should emphasize ways in which to exclude long-term damage and mechanisms for ensuring accountability for such damage, as well as address the modalities of the special protection.

5.3 Natural Environment as a Target

The Final Declaration adopted by the International Conference for the Protection of War victims in 1992 urged all states to make every effort to;

> Reaffirm and ensure respect for the rules of international humanitarian law applicable during armed conflicts protecting … the natural environment, either against attacks on the environment as such or against wanton destruction causing serious environmental damage, and continue to examine the opportunity of strengthening them[35].

In its Advisory Opinion in the *Nuclear Weapons case* in 1996, the ICJ did not directly deal with the issue of the precise extent to which environmental treaties applied during armed conflict, but stated in general terms that;

> The court does not consider that the treaties in question could have intended to deprive a state of the exercise of its right of sell-defence under international law because of obligation to protect the environment.

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attacked during the course of the Gulf war hostilities with direct collateral causalities ensuing because the attacking forces successfully prevented radiation from escaping (Greenwood, 'Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict' 145 at 82).

[35]. International conference for the protection of war victims, Geneva, 30 August – 1 September 1993, Final declaration, S. 11 (10), ILM, Vol. 33. 1994, P. 301.

> Nevertheless, states must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for assessing whether an action is in conformity with the principle of necessity[36].

Even when targeting admittedly legitimate military objectives, there is a need to avoid excessive long-term damage to national environment with a consequential adverse effect on the civilian population. Indeed military objectives should not be targeted if the attack is likely to cause collateral environmental damage which would be excessive in relation to the direct military advantage which the attack is expected to produce.

In order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer a very substantial military advantage in order to be considered legitimate. At a minimum, action resulting in massive environmental destruction, especially where they do not serve a clear and important military purpose, would be questionable[37]. The targeting by NATO of Serbian petrochemical industries may well have served a clear and important military purpose.

The above considerations also suggest that the requisite *mens rea* on the part of a commander would be actual or constructive knowledge as to the grave environmental effects of a military attack, a standard which would be difficult to establish for the purpose of prosecution and which may provide an insufficient basis to prosecute military commanders inflicting environmental harm in the (mistaken) belief that such conduct was warranted by military necessity. In addition, the notion of "excessive" environmental

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36. *Nuclear Weapon Case*,ICJ Advisory Opinion, 8 July 1996 (supra)
37. ICTY Final Report, *op,cit*. The Report goes on to say that the "targeting by NATO of Serbian Petrochemical Industries may well have served a clear and important military purpose

destruction is imprecise and the actual environmental impact, both present and long term of the NATO bombing campaign is at present unknown and difficult to measure.

In the context of the rules applicable to targeting, "taking environmental consideration into account" means avoiding causing unnecessary damage to the environment as well as damage that breaches the proportionality rule. That is to say that, a decision to target a military objective is expected to include an evaluation of potential harm to the environment qua environment even if no civilians are in danger of being hurt and a planned attack "may have to be called off if the harm to the environment is expected to be excessive in relation to the military advantage anticipated[38]. The Rome statute attaches individual criminal responsibility to attacks that are intentionally launched in the knowledge that they will cause widespread, long-term and severe damage to the natural environment, which would be "clearly excessive" in relation to concrete and direct overall military advantage anticipated.[39] The problem of course, is that the proportionality rule does not indicate what kind of environmental damage will be considered "excessive" or "clearly excessive, for that matter.

The principle of proportionality also applies to direct attacks against parts of the environment that have become military objectives. While it may be counterintuitive to think that the environment itself can, in certain circumstances, become a valid military objective, the possibility exists, as evidenced by Article 2(4) of the Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons, which reads:

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[38]. Y Dinstein, *Op cit* at 177. See also L Doswald Beck, "International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the legality of the Threat or Use of Nuclear Weapons" (1997) No. 316 *International Review of the Red Cross* 35 at 52.

[39]. Rome Statute with the requirement that the attacking party combined with the requirement that the attacking party have the intention to cause harm, ensures that criminal responsibility only ensues where the excessiveness of the attack occcurs "Article 8(2)(b)(iv) "in O.Trifferer, ed, "Commentary on the Rome Statute of the International Court", Observers' Notes, Article by Article, *Nomos Verlagsgesells Chaft, Baden-Bade,* 1999, 197.

> It is prohibited to make forest or other kinds of plant cover the object of attack by incendiary weapons except when such natural elements are used to cover, conceal or camouflage combatants or other military objectives, or are themselves military objective.[40]

The customary rules and principles that treat the natural environment as a 'civilian object' and prevent belligerents from causing it disproportionate damage are supplemented by environment-specific treaty law. The two most notable are 1977 First Additional Protocol to the Geneva Conventions and the 1976 Convention on the Prohibition of Military and any other Hostile Use of Environmental Modification Techniques[41]. The First establishes an absolute ceiling beyond which environmental damage is unacceptable, regardless of proportionality calculations.

5.3.1 Widespread, Severe and Long Term Damage of the Environment

By Article 35(3) of the 1977 Additional Protocol I, it is prohibited to employ methods or means of warfare which are intended, or may be expected to cause widespread, long term and severe damage to the natural environment. Article 55(1) of the 1977 Additional Protocol I provide that; care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby prejudice the health or survival of the population. This provision brokers no-exception.

Accordingly, even a valid military objective of paramount importance could not be attacked if the only way to achieve its destruction or neutralization would require an

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40. Protocol on Prohibition or Restrictions on the Use of Incendiary Weapons 91980 Protocol III), 10 October 1980, Reprinted in Roberts & Guelff, Supra Note 3 at 544.

41. United Nations Convention on the Prohibition of Military or any other Hostile Use of Environment Modification Techniques, 2 September 1976 (hereinafter ENMOD Convention), reprinted in Roberts & Guelff, Ibid at 407 and Arguments of Military Necessity, while the Second set out Rules Prohibiting the use of the Environment as a Weapon.

attack that could be expected to have such consequences on the environment. Much like the prohibition against targeting works and installations containing dangerous forces that would cause severe losses among the civilian population, the rule against causing damage to the environment is concerned with the potential for incalculable harm that extends beyond the borders of a particular state. In an extreme case of environmental catastrophe caused by an attack against a chemical plant or a dam, the rules protecting the natural environment may partly compensate for what is not captured by Article 56 of the First Additional Protocol. Though some authors allege that the underlying norm contained in these provisions have achieved the status of customary international law, this view still appears contentious[42].

If one looks at the states that opposes the customary nature of the norm, namely; France, the United Kingdom and the United States, one finds that these states generally accept the rule provided that it applies to conventional weapons and not to nuclear weapons. This may explain why the International Court of Justice, in the context of its pronouncement on the legality of nuclear weapons, chose not to conclude that the provisions of the First Additional Protocol relating to the natural environment were applicable to non-signatory states.

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[42]. Writing in the Early 1990s, G.H Aldrich States, while these provisions of Article 35, and 55 are clearly new law (…) I would not be surprise to see them quickly accepted as part of customarily international law in so far as non-nuclear warfare is concerned" (prospects for United States Ratification of Additional protocol I to the 1949 Geneva Convention" 85 American Journal of International Law (1991) 1 at 14, see also, WA. Solf, "Protection of Civilians Against the Effects of Hostilities under International law and under protocol" (1986), the American University Journal of International Law and Policy 117 at 134. "Although the formulation is new and the protection granted protocol are greater, this prohibition is so basic that it must be construed as being inherent to a general principle of law and thus, Geneva International Law for a contrary view, see Distain, Supra note 35 at 185. For a Mitigated view, see ICT Final Report, Supra note 31 at 492 para 15: "Neither the USA nor France has ratified Additional Protocol I. Article 55 may, nevertheless, reflect customary law

The terms 'widespread, severe and long-term are nowhere defined, The only specification that was given by the drafters of the First Additional Protocol was that 'long term' damage would need to be measured in years rather than in months. Once the requirement that the damage last for a period of decades is combined with the fact that the three factors are cumulative, ie; environmental damage that is widespread and long-term but not considered severe is permissible, the threshold of application of the environmental provisions in the First Additional Protocol is high. The laws of war recognize that damage to the environment during warfare is unfortunately inevitable and, therefore, foreseeably result in damage over a large area lasting for decades. This goes beyond normal battlefield damage caused by conventional warfare[43], and is without prejudice to the application of the rules of general international law in cases where the damage affects states other than those engaged in hostilities.

There is a distinction between Article 55(1) and 35(3) in two respects. First, it includes a sentence requiring that parties to a conflict take care to protect the natural environment from damage. Second, it specifies that the widespread, severe and long term damage that is prohibited is one that prejudice the "health and survival of the population".[44] The explanation for the difference comes in great part from the different purpose that each provision serves. Article 35(3) illustrates the principle of "limited warfare" and therefore approaches the protection of the environment from the perspective of unnecessary injury, including transnational damage. Article 55 is featured in a chapter of the First Additional Protocol entitled 'civilian objects' which puts the reference to

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43. In referring to the obligations contained in articles 35 and 55, the court states; "these are powerful constraints for all the states having subscribe to these provisions" (Nuclear weapons Advisory Opinion, Supra note 25 at 242 para 31, emphasis added)

44. ICRC Commentary APL, Supra note 13 at para 1454

human health and survival in context; and articulates "a prescriptive standard measured by impact on human beings"[45]. It is interesting to know that the word 'civilian' does not appear in the provision. This omission was deliberate with a view to emphasizing the fact that damage caused to the environment and lasting for a decades will affect the whole population – combatants, civilians, born and unborn – without any distinction.[46] Another reason for what some may perceive as a discrepancy between Article 35(3) and Article 55(1) is ascribed to divergent views among the framers of the First Additional Protocol. There appears to have been some disagreement over whether the protection of the environment in armed conflict is an end in itself or whether the protection is only designed to guarantee the survival or health of human beings[47].

At the end, a workable compromise was achieved by explicitly referring to the heath or survival of the population. Article 55(1) gives pre-eminence to this concern without reducing its scope of application to environmental damage that will prejudice the population. For instance, if a part of the natural environment located in an area with little or no civilian population becomes a military objective, Article 35(3) might stand in the way of it being targeted where the foreseeable damage is widespread, severe and long-lasting. The texts do not indicate which provision sets the standard for which situation.

This ambiguity combined with the lack of agreement surrounding the normative meaning of the words 'widespread, severe and long-term' opens the door to confusion,

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45. Richards Schmitt, *Opcit* at 1063
46. ICRC Commentary, API, *op,cit* at p 2134.
47. Y Destein, *op,cit* at 182. A Solf, "Article 55" in Bothe *et al*, at 345 para 2.1.3, cites the following excerpts from the records of the conference "some delegates were of the view that the protection of the environmental in time of war is an end in itself which others considered that the protection of the environment has as its purpose, the continued survival of the Civilian population …. The first approach points towards the inclusion of a provision on the environment in Article (35) which already contains provisions with respect to … certain methods and means of warfare. The second looks to the inclusion of an article in Chapter III of part IV dealing with protection of civilian objects..".

interpretative variances and inconsistency of application, which raises the question of the extent to which the provisions of the First Additional Protocol can be applied in practice[48]

5.3.2 Using the Environment as a Weapon

Despite the protection afforded by several important legal instruments, the environment continues to be the silent victim of armed conflicts worldwide.

The toll of warfare today reaches far beyond human suffering, displacement and damage to homes and infrastructure. Modern conflicts also cause extensive destruction and degradation of the environment. In turn, environmental damage, which often extends beyond the borders of conflict affected countries, can threaten the lives and livelihoods of people well after peace agreements are signed.

Public concern regarding the targeting and use of the environment during wartime first peaked during the Vietnam war. The use of the toxic herbicide agent, orange, and the resulting massive deforestation and chemical contamination it caused, sparked an international outcry leading to the creation of two new international legal instruments. The Environmental Modification Convention (ENMOD) was adopted in 1976 to prohibit the use of environmental modification techniques as a means of warfare. Additional Protocol I to the Geneva Conventions, adopted in the following year (1977), included two articles (35 and 55) prohibiting warfare that may cause "widespread, long-term and severe damage to the natural environment"[50].The conduct prohibited by the ENMOD Convention must (a) be intentional, which means that mere collateral damage resulting from an attack against a military objective is not included; and (b) cause destruction,

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[48]. Y Destein, *Supra*.

[50]. See Rule 45, Customary IHL, Vol. 1, 29 at 151.

damage or injury to another state party to the convention. Arguably, both of these requirements illustrate the narrow scope of application of this treaty relative to the legal regime set up by Article 35(3), and 55(1) of the First Additional Protocol[51].

For the purposes of this study, it is sufficient to note that irrespective of whether the provisions of the ENMOD Convention have achieved the Status of Customary International Law, the general rule that prohibits the deliberate infliction of severe destruction to the environment will capture the most severe damage that the Convention seeks to prevent. If a party to a conflict uses the environment as an instrument of war and thereby causes damage that is sufficiently widespread, severe and long-term, it seems unlikely that the damage in question will not extend to the environment itself. Again, there are other provisions in the First Additional Protocol that may cover the damaging conduct. For example, if a party having ratified the ENMOD convention decided to modify the weather so as to cause a widespread and severe drought that lasted a season, Article 55 (1) could not be invoked because the damage is not long-lasting enough but Article 54, which prohibits the targeting of objects indispensable to the survival of the population might be applicable.

5.4 Objects involved in Peace Keeping Operation as Targets

As the number of violent incident involving peacekeepers has grown over the last two decades, the legal status of the personnel involved in peacekeeping missions has attracted significant attention. The debate has evolved on two fronts, the first front is the

[51]. For a good summary of the conditions of application that need to be met under the ENMOD Convention, see Dinstein, *op,cit* at 178-181.

elaboration of legal protection for peace keepers[52], focusing on the interpretation of the 1994 United Nations (UN) safety Convention[53]. The other is the scope of applicability of International Humanitarian Law to peacekeepers conduct and their accountability for violations committed during deployment[54] as set out in the 1999 UN Secretary – General's Bulletin[55].

Directing an attack against personnel and objects involved in a peacekeeping mission in accordance with the charter of the United Nations, as long as they are entitled to the protection given to Civilians and Civilian objects under International Humanitarian Law, is prohibited[56]. This principle is expressly reflected as criminal prohibitions in the statutes of the International Criminal Court (ICC)[57] and the Special Court for Sierra Leone (SCSL)[58] establishing the respective tribunals' jurisdiction to prosecute individuals responsible for intentionally directing such attacks.[59]

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52. H N Kindred, "The Protection of Peacekeepers', *33 Canadian Year Book of International Law* (19965) 257, C. Greenwood, protection of Peacekeepers: The Legal Regime; 70 *Uk Journal of Comparative and International Law* (1997), 185.
53. UN General Assembly, Convention on the Safety of United Nations and Associated Personnel, 9 December 1994.
54. M Zwanenburg, The Secretary- General's Bulletin on Observance by United Nations forces of IGH: A Phrrhic Victory? 39 *The Military Law and the Law of War Review* (2000) 13; J. Saura, "Lawful Peacekeeping; *Applicability of International Humanitarian Law to United Nations Peacekeeping Operations, 58 Hastings Law Journal* (2006-2007) 479.
55. 1999 UN Secretary-General's Bulletin on Observation by United Nations Forces of International Humanitarian Law" (1999 UN Secretary-general's Bulletin)
56. ICRC, Customary International Humanitarian Law Database, Rule 33; Personnel and Objects involved in a Peacekeeping Mission.
57. Arts 8(2)(b)(iii) and 8(2)(e)(iii)ICC Statute
58. Art. 4(b) SCSL Statute.
59. Both the ICC and the SCSL statutes provisions in question criminalize attacks on peace keepers as well as humanitarian assistance personnel. Since the two categories derive their protected status from different sources, a separate approach is necessary with regard to each of them. The following analysis is not necessary in applicable for the crime of attacking humanitarian assistance missions, even mutatis mutandis.

Consequently, for the conduct in question to constitute an international crime apart from the standard contextual elements for charges based on serious violations of IHL[60], the following elements are required;

(a) The perpetrator directed an attack against personnel installations, material, units or vehicles involved in peacekeeping mission in accordance with the charter of the UN and intended them to be the object of an attack.

(b) Such personnel, installations, materials, units or vehicles were entitled to protection given to civilians or civilian objects under the international law of armed conflict.

(c) The perpetrator had knowledge of the factual circumstances that established that protection, albeit it is unsettled whether that requires actual knowledge or whether constructive knowledge suffices[61].

Although, the illegality of attacking peacekeepers is undisputed, the consequential question remains whether it constitutes a particularization of the general protection of civilians under IHL or is a new offence deriving from the 1994 UN safety convention[62]. On the one hand, notwithstanding the absence of any statutory provision concerning peacekeeping personnel, a number of individuals have been accused of[63], or are currently

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60. Namely that the conduct took place in the context of, and was associated with, an armed conflict and that the perpetrator was aware of factual circumstances that established the existence of an armed conflict.

61. Arts 8(2)(b)(iii) and 8(2)(e)(iii), Elements of crimes, ICCST; Judgment, Sesan, Kallon, and Gbao ("Ruf") (SCSL-04-15-T), Trial Chamber 1, 2 March 2009 (Ruf Trial Judgment) 219; Decision on the Confirmation of Charges, Bahar Idriss Abu Garda (ICC-02/05-02/09), Precorrigendum of the Decision on the confirmation of charges' Abdallah Banda Abakaer Nourian and Saleh Mohammed Jerbo Jamus (ICC-02/05-09), pre-trial chamber 1, 7 March 2011 (Banda & Jerbo Decision) 62-65.

62. S Wharton, The Evolution of International Criminal Law Prosecuting "New" Crimes before the special court for Sierra Leone", 11 *International Criminal Law Review* (2011/217-239).

63. At the International Criminal Tribunal for Kwanda (ICTR) Bernard Ntuyahaga was accused of murdering 10 Belgian peacekeepers as part of a widespread and systematic attack against civilian population, but the prosecution decided to withdraw the charges. Decision on the prosecutor's

standing trial for[64], attacking peacekeepers at the International Criminal Tribunals for the former Yugoslavia (ICTY) and for Rwanda (ICTR), the charges were based on the general provisions on the protection of civilians during an armed conflict[66]. The SCSL drew heavily on those tribunals' jurisprudence when it held that the prohibition of attacks on peacekeeping personnel can be seen as a particularization of the general and fundamental prohibition in IHL against attacks on civilians and civilian objects.[67] Yet, at least, one of the leading commentaries to the ICC statute argues otherwise, and maintains that "there can be no doubt' that the crime of attacking peacekeepers is a new criminal offence introduced by the 1994 UN Safety Convention[68]. Some went further concluding that the ICC must refer to the definitions contained in this treaty since otherwise the crime would be rather ill defined as the notion of peacekeeping mission is quite vague[69]. This last contention appears to have been already rejected by the ICC[70], but the issue of the crimes precise basis is still unsettled, and however, it resonates in the tribunals' jurisprudence, limited as it is.

Conclusively, when a situation of armed conflict develops, the laws of war prohibits the targeting of military personnel and objects involved in a peacekeeping and

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motion to withdraw the indictment, Ntuyahaga (ICTR – 98-04-T) Trial Chamber 1, 28 September, 1998.

64. Decision on Appeal from Denial of Judgement of Acuittal for Hostage taking Karadzie (IT-95-55/18-AR73-9), Appeals Chamber, 11 December 2012, (Karadz 10).

66. The International Criminal Tribunal for the former Yugoslavia (ICTY) Appeals Chamber recently upheld the Conviction of the killing of Belgian Peacekeepers as a serious violation of Art. 3 common to the Geneva Conventions and of Additional Protocol II in the Military 11 Case. Judgement, Ndindilitimana et al (ICTR-00-56), Appeals Chamber Judgment) 449.

67. Apeal Trial Judgment, p.11, 215

68. J Doria, H Gasser and M C Bassiouni, The Legal Regime of the International Criminal Court (Brill, 2009) at 497-500.

69. M Bothe, "War Crimes" In A. Cassese, p. Gaeta and J. R.W. & Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* (Oxford University Press, 2002) at 412.

70. Had the ICC adopted the 1994 UN Safety Convention definitions of terms, it would have to afford protection only to the UN peacekeepers, yet it decided that the attacks on the African Union (AN) Peacekeepers also fall within the scope of Art. 8(2)(e)(iii) ICC .

civilian objects because it may seem counterintuitive to treat men and women in uniforms as civilians. This rule requires the clarification of what is meant by "peacekeeping mission" and what actions qualify for loss of protection.

5.5 Distinction between Keeping and Enforcing Peace

Neither the Rome Statute nor the Elements of Crimes thereto provide a definition of a 'peacekeeping mission in accordance with the charter of the United Nations. Peacekeeping was not conceived as a part of a well-considered theoretical framework or a coherent doctrine. It was borne in practice, or rather the term peacekeeping was invented after the practice had already begun. Peacekeeping was developed during the cold war when, due to ideological differences, the Security Council was unable to perform collective security actions[71].

Although, there is still no single and authoritative UN definition of peacekeeping, there is an agreement regarding three constitutional principles that have traditionally governed UN peacekeeping operations; namely, consent of the parties to the conflict to the deployment of a peacekeeping mission, impartiality, and non-use of force except in self-defence and defence of the mandate[72].

These principles were derived from the experience of traditional cease-fire monitoring missions[73] and they are noted in the purposes and principles of the UN Charter. They are in line with the principles and political independence of states and non-intervention in matters that are essentially within their domestic jurisdiction. They also

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[71]. For a general discussion. See e.g O Schachter and C Joyner (eds), United Nations Legal Order (CUP) 1995).

[72]. See Second and Third Report of the Secretary-General on the Plan for an emergency International United Nations Force requested in resolution 998 (ES-1), adopted by the General Assembly on 4 November 1956)06 November, 1956), UN DOC A/3302.

[73]. *Certain Expenses of the United Nations* (Advisory Opinion) (1962) ICJ Rep. 151, 166, 177.

underline a conceptual and constitutional distinction between peacekeeping and (peace) enforcement. The clear demarcation line between these two types of operations was drawn by the ICJ in *certain Expenses of the United Nations Advisory Opinion* (1962) at the beginning of a peacekeeping practice[74]. Peacekeeping is conceptually different from (peace) enforcement because it does not involve "preventive or enforcement measures under chapter VII of the UN charter against a state. Enforcement action, on the other hand, is an exception to the prohibition of the use of force in Article 2 (4) of the UN Charter as it uses force against a culpable state or states to enforce peace or impose a political solution without their consent.

Traditional peacekeeping principles of consent, impartiality and non-use of force except in self-defence continue to apply despite the evolution and transformation that peacekeeping has undergone moving beyond traditional ceasefire monitoring.

The core business of peacekeeping is to create a secure and stable environment to facilitate the political process. Within this context, the primary distinction between peace enforcement and robust peacekeeping is thus more about the objective of the use of force and less about how much force is being used, although certain caveats apply[75].

Peace enforcement actions follow a determination by the Security Council that there exists a threat to the peace, a breach of the peace or an act of aggression that requires the military intervention of states on behalf of the international community. Once authorized by the Security Council, a peace enforcement intervention is either led by one or a

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74. N Tsagourias, "Consent, Neutrality/impartiality and the use of Force in Peacekeeping, their constitutional Dimension" (2007)11 *J Conflict Security Studies* 465; AJ Bellaming, P O Williams, Understanding Peacekeeping (2nd edn,London Polity Press, 2010) 173.

75. E.g. The Report of the Panel on United Nations Peace-Operations (October, 2000) UN Doc A/55/305-S/2000/809) (The Brahimi Report)

coalition of willing member states, under chapter VII of the UN chapter[76], or by regional forces acting under the aegis of a regional organization, under chapter VIII of the UN charter[77]. Either way, the military contingents involved in this type of mission are mandated to engage in combat operations and are therefore considered as combatants under the laws of war with no possibility of benefiting from the protection afforded to civilians.

In recent times, peacekeeping missions deployed on a non-interventionist and non-coercive basis have seen their mandates evolve toward something that looks more like peace enforcement as a result of unforeseen developments in the field[78]. This has meant that missions have stayed on the ground despite a withdrawal of consent on the part of the parties to the conflict, that they have been authorized to use force beyond self-defence, and that they have been instructed to intervene in favour of one party against the other. In such situations, with the cardinal principles having been compromised, the personnel and objects involved in peacekeeping missions no longer benefit from a blanket protection. Where then should the line be drawn?

5.6 Cultural Properties as Targets

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[76]. Chapter VII Operations were deployed in Korea (SC Res. 83 of 27 June 1950-US Command and control); Iraq (SC Res 678 of 29 November 1990-US Command and Control, Democratic Republic of Congo (SC Res. 1484 of 30 May 2003 – French Command and Control).

[77]. Chapter VIII Operations were deployed in Liberia (ECOMOG) (SC Res. 813 of 6 March, 1993 – ECOWAS Command and Control) Sierra Leone (SC Res. 1132 of 8 October, 1997 – ECOWAS Command and Control.

[78]. In 1993, the UN-led protection force in Bosnia and Herzegovina saw its mandate enlarged to encompass the authorization to use force in order to protect the Bosnia Muslin population placed in 'safe areas' and to ensure compliance with the fight ban (SC Res. 836 of 3 June 1993, SC Res. 844 of 18 June 1994 and SC Res. 816 of 31 March 1993). The same year, in Somalia, UNOSOM II was created offer the failure of UNOSOM I and US led UNITAF, with an enlarged mandate that involved the authorization to use coercive power in order to respond aggressively to attacks that were being perpetrated against UN troops by some Somali factions (SC Res. 814 of 26 March, 1993)

The most comprehensive regime protecting cultural property was set up in 1954 with the Hague cultural property convention, and complemented in 1999 by the Second Hague Protocol[79]. These treaties apply to a particular category of objects that are deemed to be of 'great importance to the cultural heritage of every people[80]. Within this regime, a line is drawn between a general category of objects and a special category of very important objects that benefit from so-called 'special' or 'enhanced' protection provided they are marked and registered as such with the appropriate authority. As one author explains, the registration of an object is comparable to an internationally recognized declaration establishing a non-defended locality[81]. Basically, the holder of the property registers or certifies a commitment not to use the property for military purposes, thereby signaling to potential adversaries that they need to be particularly aware of this fact.

The 1999 Second Hague Protocol makes it possible for other parties to recommend specific cultural property to be included in the registry but, as of yet, no one can impose the registration of an object on an unwilling state[82]. A state that wishes to can therefore set about destroying cultural property located within its borders. In light of the universal importance of certain sites and objects, this is an unfortunate gap in the law, which leaves the door open for tragic developments such as the destruction of the Banniyan Buddhas by the Taliban regime in Afghanistan, in the spring of 2001.[81]

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[79]. Second Protocol to the convention for the Protection of Cultural Property in the event of Armed Conflict the Hague, 14 May, 1954, the Hague, 26 March 1999 (hereinafter 1999 second Hague protocol) reprinted in Roberts 8 Guelft, supra note 3 at 699.

[80]. For the purpose of both these treaties 1 of the 1954 Hague cultural property convention.

[81]. J M. Henckaerts, "New Rules for the protection of cultural property in Armed Conflict: The significance of the Second protocol to the 1954 Hague Convention for the protection of cultural property in the event of armed conflict" 81-835. *International review of the Red Cross* (1999), 593 at 611.

[82]. 1999 Second Hague Protocol, art. 11(3)

[81]. The two Buddhas were destroyed on the basis that they were offensive to Islam. The earliest of the two statues is thought to have been carved into the sandstone cliffs of Bamigam in the third century A.D. at 53 Meters and 36 meters, the statues were the Tallest Standing Buddhas in the world.

The First Additional Protocol sets up what seems to be a separate regime covering three categories of objects; historic monuments, works of art, and places of worship, provided they constitute the cultural or spiritual heritage of 'people's (i.e Mankind)[82]. The criterion of spirituality was added in order to cover 'objects whose true value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of people[83]. Whereas the scope of the Hague convention and its second protocol extends to property that form part of the cultural heritage of "every people", the property covered by the First Additional Protocol must be of such importance that it will be recognized by everyone, even without without being marked or registered as such.

Each party to the conflict must respect cultural property. Special care must be taken in military operations to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historic monuments unless they are military objectives. Property of great importance to the cultural heritage of every people must not be the object of attack unless imperatively required by military necessity[84].

To the extent that cultural property is civilian, it may not be made the object of attack, it may only be attacked in case it qualifies as a military objective. The statute of the International Criminal Court, therefore, stresses that intentionally directing attack against building dedicated to religion, education, art, science or charitable purposes or historic monuments is a war crime in both international and non-international armed conflicts "provided they are not military objectives"[85]. The obligation to take special care

[82]. APL Article 53.
[83]. ICRC Commentary APL 13 at para. 2064.
[84]. The preamble to the 1954 Hague Cultural property convention
[85]. ICC Statute, Article 8(2)(b)(ix) and (e) (iv)

to avoid damage to buildings dedicated to religion, art, science, education or charitable purposes and historical monuments, provided they are not used for military purposes, is set forth in many military manuals[86].

Cultural property is seen as a symbol of the collective memory of people. In armed conflict, it is protected from incidental damage and, most importantly, it is protected from those who might seek to destroy it in order to harm the population whose identity is tied to its preservation. All too often, destruction is deliberate with damage being inflicted on present generations in order "to orphan future generations and destroy their understanding of who they are and from where they come[87]. The identity-based violence that took place in the former Yugoslavia in the 1990s extended to cultural property[88]. An essential part of the policy of ethnic cleansing included the repeated destruction of educational institutions and places of worship. The Trial Chamber of the ICT for the Former Yugoslavia found that destruction and damage of religious or educational institutions was evidence of the crime of persecution[89]. In a compelling passage of the *Kordic* decision, the chamber wrote;

> This act, when perpetrated with the requisite discriminatory intent, amounts to an attack on the very religious identity of a people. As such, it manifests a nearly pure expression of the notion 'crimes against humanity', for all of humanity is indeed injured by the destruction of a unique religious culture and its concomitant cultural objects. The Trial Chamber therefore finds that the destruction and willful damage of

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86. See. E.g Military manuals of Argentina, Section. 40, Burkina Faso Section. 47 Cameroon , Section.49, Congo Section. 53, Mali Section. 74 and Australia Sections. 41-42)

87. H Abthi "The protection of cultural property in Times of Armed Conflict: The Practice of the International Criminal Tribunal for the Former Yugoslavia*" (2001) 14 Harvard Human Rights Journal*, 1 at 2.

88. The most extensive attacks to have been perpetrated against cultural property during 1991-1995 wars in the Former-Yugoslavia were those that destroyed the old town of Dubrovnile in Croatia and the Mostar Bridge in Bosnia-Herzegovina.

89. See. *Blaskic.case* (*op,cit*) at 48 and ICTY, *Prosecutor V. Dario Kordic & Mario Cerkez*, IT-95-14/2-T, Judgment, 26 February, 2001 (hereinafter Kordic).

> institutions dedicated to Muslim religion or education coupled with the requisite discriminatory intent, may amount to an act of persecution[90].

The laws of international armed conflict prohibit the targeting of cultural property and provide special protection to objects falling within this category. One of the main challenges of this area of the law is the identification of what constitutes cultural property. Indeed, not only is cultural and spiritual value often established according to subjective criteria, but the relative importance of an object within a given community may change overtime or in light of certain circumstances. For example, a school with little artistic or historic value, which contains no significant collection of books or documents is unlikely to constitute cultural property. However, if its destruction fits within a systematic campaign of destroying places of education in order to annihilate the possibility for a people to learn its language and history, the school may be deemed to be cultural property because of the function it serves in preserving the identity of a "targeted" community. It becomes immediately apparent that the subjectivity and contextual analysis involved in determining when an object constitutes cultural property affects the ability of the law to be clear and predictable[91]. For this reason, it is imperative to understand the scope of application of existing conventional instruments; only then is it possible to identify the targeting rules that have arguably become customary in nature.

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[90]. Prosecutor v.Kordic & Mario Cerkez, IT-95-14/2-T. Judgement,26 February,2001 at 207. For an analysis of the relationship between the crime of persecution and damage inflicted to cultural property in the context of the work done by the ICTY, Se Abtahi, Supra note 253 at 20ff.

[91] Alexandra Bolvan "The legal regime applicable to targeting military objectives" 63.

CHAPTER 6

OBJECTS FOR HUMANITARIAN OBJECTIVES AS TARGETS

Certain categories of objects benefits from special measure of protection under the Laws of War. By virtue of Article 57 (2)(a) API, those who plan or decide upon an attack shall do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects and are not subject to special protection but are military objectives , and that it is not prohibited by the provisions of this protocol to attack them and to take all feasible precautions in the choice of means and methods with a view to avoiding, and in any event to minimizing damage to civilian objects.

What the law seeks to protect is the civilian population because, it is more likely to be harmed as a result of certain objects being targeted. Consequently, objects used for humanitarian purposes enjoy special protection from targeting during armed conflict. Thus, individuals whose continuous function involves the preparation, execution, or command of acts or operations amounting to direct participation in hostilities are assuming a continuous combat function, hence have lost the special protection he is entitled to.

6.1 Objective Necessary for the Provision of Medical Care and Humanitarian Relief

Generally speaking, hospitals, medical units and medical personnel are afforded “special protection” under IHL. As a result of their status, they have heightened protections, and parties to a conflict are under additional obligations when considering targeting, directly

or indirectly, hospitals, medical units and medical personnel[1]. They shall be protected, respected and may not be the object of attack[2]. As the commentary to Additional Protocol II explains, "it should be recalled that respect and protection imply not only the obligation to spare the people and objects concerned, but also to actively take measure to ensure that medical units and transports are able to perform their functions and to give them assistance where necessary[3]. The commentary goes on to affirm that this obligation applies at all times-even when the medical unit or hospital is not used to accommodate wounded or sick patients (provided, of course, that the medical unit is used exclusively for medical purposes)[4].

6.2 Medical Care

Medical units are defined as "establishments and other units, whether military or civilian, organized for medical purposes, namely; the search for, collection, transportation, diagnosis or treatment including first-aid treatment of the wounded, sick and shipwrecked, or for the prevention of disease. The term includes, for example, hospitals and other similar units, blood transfusion centres, preventive medical centres and institutes, medical depots and the medical and pharmaceutical stores of such Units[5].

Medical personnel are defined as permanent and temporary; the former encompasses" those assigned exclusively to medical purposes for an in determinate

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1. See, example,. Michael Boothby, The Law of Targeting 233 (2013) explaining that International Humanitarian Law requires protection or precautions that exceed that ordinarily afforded civilians and civilian objects for the specific class of civilian objects compromised of hospitals and civilian medical units).
2. See. E.g. Art II, Additional Protocol II
3. See. Commentary to Art II, Additional Protocol III, 4714
4. See Commentary to Art II, Additional protocol II, 4716.
5. See Art 8, Additional Protocol I, Rule 28 ICRC Customary International Humanitarian Law study

period. The later include "those devoted exclusively to medical purposes for limited periods during the whole of such periods". Included in this category are;

(i) Medical personnel of a party to the conflict, whether military or civilian, including those described in the first and Second Geneva Conventions, and those assigned to civil defence organizations;

(ii) Medical Personnel of the National Red Cross or Red Crescent Societies and other voluntary aid societies duly recognized and authorized by a party to the conflict, including ICRC;

(iii) Medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other state which is not a party to the conflict by a recognized and authorized aid society of such a state; or by an impartial international humanitarian organization[7].

The prohibition on directing attacks against hospitals and other medical units is not absolute. Under CIL applicable to NIACs, the special protections accorded to hospitals and medical units ceases when they are used, outside their humanitarian function, to commit acts harmful to the attacker[8]. Accordingly, an attack against medical units will be lawful only if two conditions are present;

1. The medical unit is used to commit harmful acts;
2. These harmful acts are not related to the humanitarian function.

[7]. Commentary to Rule 25, ICRC Customary International Humanitarian Law study
[8]. See, Rule 28, ICRC Customary International Humanitarian Law study.

6.3. Acts Harmful to the Enemy

Neither the Geneva Conventions nor their Additional Protocols define expressly "acts harmful to the enemy". Additional Protocol I, however, provides a non-exhaustive list of acts that are not to be considered harmful to the enemy;

(a) Personnel of the unit are equipped with light individual weapons for their own defence or for that of the wounded and sick in their charge

(b) Unit is guided by a picket or by sentries or by an escort;

(c) Small arms and ammunition taken from the wounded and sick and not yet handed to the proper service, are found in this unit;

(d) Members of the armed forces or other combatants are in the unit for medical reasons[9].

It is clear that a hospital does not lose its protected status if it were thought to become a military objective based on location or purpose (as might be the case with an"ordinary" civilian object). Thus, of the four criteria contained in the definition of military objective (found in both Rule 8 of the ICRC Customary International Humanitarian Law Study and Article 52 of Additional Protocol I ,only nature and use are left as possible bases to argue that a hospital has lost its protected status.

Generally, the International Commission of Inquiry and the *ad-hoc* International Criminal Tribunals have adopted the view that medical units lose their protected status if they are used for military purposes. For example, in assessing the legality of an attack against a medical facility by the Israeli Defence Force (IDC) during the 2006 conflict

[9]. Art 13, Additional Protocol I, it bears nothing that Additional Protocol I applies to IACs, not NIACs . The list, however, remains instructive for purposes of discerning what might amount to an 'act harmful to the enemy. See also Art 22 First Geneva Convention.

with Hezbollalh, the Inquiry Commission on Labanon condemned the attack because it was not able to find any evidence that the hospital was being "used for military puroses[10]. The commission was not persuaded by the IDF's general explanation that Hezbollah's fighters were using the medical infrastructure[11]. Similarly, in the *Galic case* decision of November 2006, the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("ICTY") concluded that the Fourth Geneva Convention and its Additional Protocols do not protect medical facilities that are used for military purposes[12.]

More significantly, however, the Appeal Chamber of the ICTY in *Galic case* provided a list of examples of acts that deprive hospitals of their special protection under International Humanitarian Law. These examples include;

- the use of hospital as a shelter for able-bodied combatants or fugitives
- the use of a hospital as an arms or ammunition dump
- the use of a hospital as a military post.
- The deliberate citing of a medical unit in a position where it would impede an enemy attack
- Heavy fire from every window of a hospital meeting an approaching body of troops[13].

Additionally, the *Galic case* decision listed the following examples of actions that do not justify attacks against hospitals;

- Nursing sick or wounded members of the armed forces

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10. See. Report of the Commission of Inquiry on Labanon Pursuant to Human Rights Council resolution S-2/1, United Nations Document A/HRC/3/2, 23 November, 2006 at 165.
11. *Ibid*, 170
12. *Galic Case* (Judgment), ICTY 98-29-A (30 November, 2006) 141.
13. *Ibid*, 342

- The presence of small arms and ammunition taken from such combatants which have not yet been handed to the proper service
- The personnel of the unit are equipped with right individual weapons for their own defence or for that of the wounded or sick in their charge
- The unit is guarded by a picket or by sentries or by an escort, and
- Members of the armed forces or other combatants are in the unit for medical reasons[14].

6.4 Harmful Acts unrelated to Humanitarian Duties

The fact that a medical unit is being used to commit harmful acts against a party to the conflict is not enough to deprive it of its special protection under customary international humanitarian law. There are situations in which a medical unit may interfere with military operations or become a tactical obstacle while carrying out its humanitarian function or duties. In such cases, where the harmful act is compatible with the humanitarian activities of the medical unit, attacks are prohibited. Although this may occur only in exceptional circumstances, the ICRC Commentary to Article 13 of Additional Protocol I[15] provide two examples of cases in which harmful act can be compatible with the humanitarian duties of the medical unit.

- A mobile medical unit accidentally breaks down while it is being moved in accordance with its humanitarian function, and thereby obstructs a crossroads of military importance and;

[14]. *Ibid*, 343
[15] ICRC Commentary on the Additional Protocols, 552

- Radiation emitted by x-ray apparatus interferes with the transaction or reception of wireless messages at a military location, or with the working of a radar unit[16].

6.5 Obligation to give Advance Warning

Article 11(2) of Additional Protocol II establishes that the protection of medical units does not cease automatically after a harmful act occurs. Under this provision, also considered to reflect CIL, "protection may, however, cease only after a warning has been given setting, whenever appropriate, a reasonable time-limit, and after such warning has remained unheeded[17]. In contrast with the general precautionary measure to give warning in order to spare the civilian population, "unless circumstances do not permit"[18], the parties in the conflict are obliged to give warnings in the case of attacks against hospitals or any other medical units. This means that an attack against a medical unit generally cannot be carried out if a warning has not been given[19]. A reasonable time limit is not defined in IHL, but is understood to be the "time (the opposing party) needs, depending on the circumstances, to change their approach, to explain themselves if a mistake has been made, or to evacuate the wounded and sick[20]. The commentary also provides a clear example of circumstances in which a time limit may not be appropriate when a "body of troops approaching a hospital (is met) by heavy five from every window[21].

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16. Commentary to Art. 13, Additional Protocol I
17. Art 11, Additional Protocol II. This requirement is considered to be Customary international Law. See e.g, commentary to rule 28, ICRC Customary International Humanitarian Law study.
18. Art. 57, Additional Protocol I
19. *Galic Case* (Judgment) ICTY – 98-29-A (30 November 2006) 344 (stating … "Loss of Protection is not Instantaneous: A warning period is required).
20. See Commentary to Art 11 Additional Protocol 11. 4727
21. See Commentary to Art !! Additional Protocol 4728

6.6 Humanitarian Relief and the Survival of the Population

International Humanitarian Law, which establishes fundamental protections for civilians in armed conflict, contains a patch work of provisions obliging belligerent parties to guarantee or allow for the provision of basic relief to civilian populations during international armed conflict, occupation, and to a lesser extent, non-international armed conflict. Objects involved in humanitarian relief operations are civilian objects that benefit from added protection under the laws of war because they are necessary for the survival of the civilian population. Not only is it illegal to target such objects, but it is also prohibited to destroy, misappropriate and loot humanitarian relief objects[22]. To this effect, any looting or other unjustified diversion of relief must be punished and armed forces must be clearly and strictly instructed on this matter[23].

Another prohibition, falling more generally in the category of prohibited methods of warfare but also involving a specific limitation on targeting, concerns objects that are indispensable to the survival of the civilian population. Article 54 of the First Additional Protocol states an absolute prohibition against starvation – understood as a method of warfare aimed at annihilating or weakening the civilian population[24] - and develops this

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22. GCIV Art. 59 requires that all states guarantee the protection of relief supplies intended for occupied territory. This rule is reiterated in API Art. 70(4), where it is stated that "the parties to the conflict shall protect relief consignments and facilitate their rapid distribution".

23. ICRC commentary API, Supra note 13 at para 2858. A division in the supply of relief is possible under conditions of imperative military necessity on the basis that relief operations must not be allowed to interfere with military operations, lest the safety of humanitarian relief personnel be endangered. These restrictions can only be limited and temporary and in no case may they involve violations of the laws of war.

24. ICRC commentary API, Ibid, at para. 2090. Further on the commentary mentions that "an action aimed at causing starvation… could be a crime of genocide if it were undertaken with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, according to the terms of the genocide convention (convention on the prevention and punishment of the crime of genocide of 9 December 1948, Art. 11(c)" (Ibid at para. 2097). The Rome Status makes it a war crime to intentionally use starvation of civilians as a method of warfare at Art. 8(2)(b)(xxv). The prohibition of starvation as a method of warfare is deemed customary in both international and

principle by specifically prohibiting the targeting (attack, destroy, remove or render useless) of objects indispensable to the survival of the civilian population for the specific purpose of denying their sustenance value[25]. Article 54(2) lists the following as falling into the protected category; foodstuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water installations and supplies, and irrigation works[26]. During the negotiation of the elements of crimes for the International Criminal Court, delegations agreed that the ordinary meaning of the word "starvation" covered only the more restrictive meaning of starving as killing by deprivation of water and food, but also the more general meaning of deprivation of insufficient supply of some essential commodity such as medicines and perhaps even blankets if "such blankets were indispensable for survival owing to the very low temperature in a region[27]. This wider interpretation of the term "starvation" also coincides with the notion of "supplies essential to the survival of the civilian population" used in Article 69 of the First Additional Protocol[28].

In order to target an object that is essential to the survival of the population, it is not sufficient to apply the two-pronged test of Article 52(2) as this would not guarantee sufficient protection against civilian casualties. There are only three situations that could justify waiving the prohibition, two of which involve the objects becoming military objectives due to the use that is being made of them by the enemy.

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non-international armed conflicts. (Rule 53, Customary International Humanitarian Law, Vol. 1 note 29 at 186)

25. API Art. 54(1) and (2), See Rule 54, customary International Humanitarian Law, Vol. 1, Ibid at 189

26. ICRC Commentary API, Supra note 13 at para, 2103

27. K Dormann, Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part 11, other serious violations of the laws and customs Applications in International and Non-International Armed Conflicts; (2001) 83:842 *International Review of the Red Cross*, 461 at 475.

28. API Art. 69 establishes the obligation of the occupying power to ensure the survival of the civilian population and mentions medical supplies, clothing, bedding and means of shelter as necessary for meeting the basic needs of civilians.

The first exception to the rule is the case of supplies of foodstuffs intended for the sole use of the armed forces[29]. The second exception is the case of the armed forces using an object for a purpose other than the subsistence of their members but in a manner that is in direct support of military action, such as a water tower being used as an observation post[30]. Here, an attack against water tower would be legitimate as long as it did not deprive the local population of access to water in a manner that caused people to starve or force them to move. Article 54 only prohibits targeting objects indispensable to the survival of the civilian population, for the specific purpose of denying their sustenance value. The third exception to the rule against targeting objects indispensable to the survival of the civilian population is unrelated to any military use of the objects by the defending party. This is the case of a party that is facing invasion or a similar situation of imperative military necessity and decides to resort to a 'scorched earth' policy by, for example, destroying its crops. Articles 54(5) codifies this exception, requiring that the territory on which such a policy is to be carried out be the national territory of the party in question. It therefore cannot be involved by an occupying power as it withdraws from occupied territories. Moreover, even on one's own territory, the 'scorched earth' policy is only available to a party in retreat and cannot be resorted to by a party seeking to expel the enemy or reoccupy its own territory[31].

The system set up by Article 54 of the First Additional Protocol is, to say the least, complex and one can question the extent to which its formulation hinders its practical application by field commanders. The spirit of the rule is to prevent the

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[29]. API Article 54 (3)(a)

[30]. API Article 54 (3)(b)
L C Green, *The Contemporary Law of Armed Conflict*, *Melland Schill Studies in International Law*, 2nd ed, (Manchester, Manchester University Press, 2000) 144.

[31]. *Ibid*.

"starvation" of the civilian population. Yet, by effectively limiting the prohibition to blatant cases of willful denial of sustenance, it fails to capture acts that may amount to starvation, leaving it up to the rules prohibiting indiscriminate attacks and the requirement of precautions in attack to prevent devastating collateral damage.

6.7 Undefended Areas and Protected Zones

Directing an attack against a zone established to shelter the wounded, the sick and civilians from the effects of hostilities is prohibited. State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts.

The first and fourth Geneva Conventions provide for the possibility of setting up hospital and safety zones, and a draft agreement for the establishment of such zones is attached thereto[32]. In addition, the fourth Geneva Convention provides for the possibility of setting up neutralized zones[33]. Both types of zones are intended to shelter the wounded, the sick and civilians from the effects of conflict, but the hospital and safety zones are meant to be far removed from military operations, whereas neutralized zones are intended for areas in which military operations are taking place.

The relevant provisions of the Geneva Conventions are incorporated in many military manuals, which emphasises that these zones must be respected[34]. Under the

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[32]. First Geneva Convention, Article 23 (Cited in Vol. 11, Ch. 11, Fourth Geneva Convention, Article 14, First Paragraph (Ibid, S.2)

[33]. Fourth Geneva Convention, Article 15

[34]. See. E.g. The military Manual of Argentina ,Section. 8), The Military Manual of Cameroon Section .9, The Military Manual of Canada, Section.10, Military Manual of Nigeria S. 22) Military Manual of United Kingdom Sections. 28-29, Military Manual of United States , Sectionss,30-31) and Military Manual of Yugoslavia , Section. 34).

legislation of several states, it is an offence to attack such zones[35]. While the concept of non-defended locations was specifically developed for international armed conflicts, it applies to non-international armed conflicts as well. This is especially so since the idea of prohibiting attacks on non-defended localities is based on the more general concept of military necessity, there is no need to attack a town, village, dwelling or building that is open for occupation. This rule is an application of the principle that no more destruction may be wrought upon an adversary than absolutely necessary, a rule which is also applicable in non-international armed conflicts. In Kenya's LOAC manual, under customary law "undefended localities that can be occupied cannot be bombarded[36]".

The UK Military Manual provides a useful description of an open or undefended town as one; which is so completely undefended from within or without that the enemy may enter and take possession of it without fighting or incurring causalities. It follows that no town behind the immediate front line can be open or undefended for the attacker must fight his way to it. Any town behind the enemy front line is thus a defended town and is open to ground or other bombardment subject to the limitation imposed on all bombardments, namely, that … the later must be limited to military objectives… Thus, the question of whether a town is or is not an open town is distinct from whether it does or does not contain military objectives. A town in the frontline with no means of defense, not defended from outside and into which the enemy may enter and of which he may take possession at any time without fighting or incurring causalities, is undefended even if it

35. See. E.g, The Legislation of Colomba , Section.36) Legislation of Italy Sestion. 37, See also the draft legislation of Argentina Section. 35
36. Kenya, LOAC Manual Section. 209.

contains munitions factories. On the other hand, all defended towns whether situated in the frontline or not may be subjected to bombardment[37].

Article 59(2) of Addition Protocol I defines the concept of a non-defended location as an "inhabited place near or in a zone where armed forces are in contact which is open for occupation by an adverse party"[38]. This is essentially the same definition as that of an open town or undefended area under traditional customary international law. Article 59(2) of Additional Protocol I has clarified the procedure for declaring a location to be undefended. This procedure is different from that of zones set up by agreement in that a party to the conflict may unilaterally declare a locality to be non-defended provided that;

(1) all combatants, mobile weapons and mobile military equipment have been evacuated.

(2) no hostile use is made of fixed military installations or establishments;

(3) no acts of hostility are committed by the authorities or by the population; and

(4) no activities in support of military operations are undertaken. The other party shall acknowledge receipt of such declaration and shall treat the locality as non-

[37]. United Kingdom, Military Manual ,2004 Section. 192

[38]. Additional Protocol I, Article 59(2) (adopted by consensus) .

defended unless these conditions are not (or no longer) fulfilled[40]. This procedure is set forth in many military manuals[41], including those of States Protocol I[42].

Article 59(5) of Additional Protocol I, nevertheless provides that the parties to the conflict may establish non-defended localities even if the above-mentioned conditions are not fulfilled[43]. It is obvious that the conclusion of an agreement provides greater certainty and allows the parties to establish the conditions as they see fit. Kenya's LOAC manual explains; (non-defended localities) can be established through a unilateral declaration and notification given to the enemy party. However, for greater safety, formal agreements should be passed between the two parties under customary law and the Hague regulations undefended localities that can be occupied, cannot be bombarded even if there is no notification[44].

An attack against an area or locality without it being militarily necessary to do so would constitute a violation of the prohibition on destroying the property of an adversary unless required by imperative military necessity. With respect to protected zones, in a resolution adopted in 1970 on basic principles for the protection of civilian populations in armed conflicts, the UN General Assembly stated that "places or areas designated for the

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40 Additional Protocol I, Article 59(4) (adopted by consensus), which states that "the declaration made under paragraph 2 shall be addressed to the adverse party and shall define and describe, as precisely as possible, the limits of the non-defended locality. The party to the conflict to which the declaration is addressed shall acknowledge its receipt and shall treat the locality as a non-defended locality unless the conditions laid down in paragraph 2 are not in fact fulfilled in which event it shall immediately so inform the party making the declaration. Even if the conditions laid down in paragraph 2 are not fulfill, the locality shall continue to enjoy the protection provided by the other provisions of this protocol and the other rules of international law applicable in armed conflict".

41. See e.g. the military manual of Argentina (cited in Vol. 11, S. 204, Australia (Ibid, S. 205) Canada (Ibid, S. 206).

42 Rome Statute, Article 8 (2) (b) (v)

43 Directing an attack against a non-defended locality by a norm of CustomaryInternational Law applicable in both International and non- International armed conflict (Rule 37, Customary IHL, Vol.1,at 122

44 L C Green, T*he Contemporary Law of Armed Conflict, Melland Schill Studies in International Law, 2nd ed* (Manchester, Manchester University Press, 2000) 144

sole protection of civilians, such as hospital zones or similar refuges, should not be the object of military operations"[45].

Zones providing shelter to the wounded, the sick and civilians have been agreed upon in both international and non-international conflicts, for example, during Bangladesh's war of independence, the war in the South Atlantic and Nicaragua, Lebanon, Sri Lanka and the former Yugoslavia[46]. Most of these zones were established on the basis of a written agreement. These agreements were premised on the principle that zones established to shelter the wounded, the sick and civilians must not be attacked. The neutralized zones established at sea during the war in the South Atlantic (the so-called "Red Cross Box") was done without any special agreement in writing. A zone which contains only wounded and sick, medical and religious personnel, humanitarian relief personnel and civilians may not be attacked by application of the specific rules protecting these categories of persons, applicable in both international and non-international armed conflicts.

Making a demilitarized zone, the object of attack is a grave breach of Additional Protocol I[47]. A demilitarized zone is generally understood to be an area, agreed upon between the parties to the conflict, which cannot be occupied or used in military operations. Under the legislation of many states, it is an offence to attack non-defended

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45. N General Assembly, Res. 2675 (XXV) adopted by 109 votes in Favour, none against and 8 absentations

46. See e.g. Memorandum of understanding on the application of International Humanitarian Law between Croatia and the SFRY, Agreement between Croatia and the SFRY on a protected zone around the Hospital of Osijek, Articles 1, 2, (1) and 4(1) . the practice concerning the war in the South Atlantic Sri Lanka. See also Francois Bugnion, The International Committee of the Red Cross and the protection of War victims, ICRC, Geneva, 2003, pp 756-759 (providing examples from the conflicts in Bangladesh, Cyprus, Cambodia, Nicaragua, Chad and Lebanon among others.

47. Additional Protocol II, Article 85(3)(d) (adopted by Consensus) Ch. 11, S. 106 (Cited in Vol. 11, Ch. S. 106.

localities in any armed conflicts[48]. In 1997, in the Perisic and other case, in which several persons were convicted of having ordered the shelling of Zadar and its surroundings, Croatia's District Court of Zadar applied Article 25 of the Hague Regulations alongside common Article 3 of the Geneva Convention and Articles 13-14 of Additional Protocol II[49].

[48]. See, e.g, The legislation of Armenia, Section 279. See also the legislation of the Czech Republic Section. 295, the application of which is not excluded in time of non-international armed conflict, and the draft legislation of Argentina, Section. 278.

[49]. Croatia, Distinct Court of Zardar, *Perisic and others case Supra*

CHAPTER 7

LAWFUL HUMAN TARGETS

The fundamental principle underlying the legal framework applicable to conduct of hostilities is that of distinction. Parties to a conflict must at all times distinguish between civilian objects and military objectives, and between civilians and combatants[1]. Operations may be directed only against military objective and combatants; it is prohibited to target civilian objects or civilians[2]. Thus, any targeting operation directed at a civilian object or civilian is prohibited unless the protections have been suspended due to the civilian directly participating in hostilities or the civilian object being used to engage in acts "harmful to the enemy"[3].

As has already been noted, civilian objective is defined in contradiction to military objective. Civilian objects are all objects that are not military objectives[4]. while military objectives are those objects which "by their nature, location, purpose or use make an effective contribution to military action and whose partial or total destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage"

7.1 Combatants

The definition of 'combatant is based on the traditional view of a state's armed forces and militias. Combatants are defined in the Third Geneva Convention as;

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1. See Article 48 Additional Protocol I; Rules 1,7, ICRC Customary International Law Study.
2. International Committee of the red Cross, '*Increasing Respect for International Humanitarian Law in Non-International Armed Conflict*" 19 (2008).
3. Amos Guiova, Targeted Killing as Active Self-Defence (2004) 36 Case W. Res. J. Int'll 320 at 232 (Guiora)
4. Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135 (entered into force 21 October 1950) at Art. 4A(1)8(2) (GCII)

(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 own 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 in accordance with the laws and customs of war[5].

The definition of a civilian is framed in the negative. Any person that is not a combatant within the above definition is a civilian. If there is any doubt as to a person's status, they must be considered a civilian[6]. While there is frequent reference to "unlawful combatants" by states, contemporary International Humanitarian Law does not recognize any status other than combatants and civilians[7]. Terrorists that are likely to be targeted for killing do not meet the requirements to be considered combatants. They are not members of the armed forces of a state participating in the conflict. While organized terrorist groups may have a command structure with an individual responsible for his

[5]. See Article 43(2) of the 1997 Protocol Additional to the Geneva Conventions of 12 August, 1949, and relating to the protections of victims of International Armed Conflicts (Protocol II)(P1).

[6]. Inter-American Commission on Human Rights, Report on Terrorism and Human Rights, OEA/Sevil/V/116 Doc. 5 rev. 1 corr., 22 October 2002, para. 68.

[7]. Robert Wagne Gehring, Protection of Civilian Infrastructures (1978) 42:2 Law and Contemporary Problems 86 a6 105-109, with numerous further references to practice and doctrine.

subordinates, none of the other requirements are met. There is no fixed distinctive symbol, arms are not carried openly and operations are not conducted in accordance with laws and customs of war. In most instances, terrorist groups strive to achieve the opposite of these requirements.

In international armed conflicts, the term "combatants" denotes the right to participate directly in hostilities[8]. Inter-American Commission has stated, "the combatants privilege is in essence a license to kill or wound enemy combatants[9]" and destroy other enemy military objectives. Consequently, combatants cannot be prosecuted for lawful acts of war in the course of military operations even if their behaviour would constitute a serious crime in peace time. They can be prosecuted only for violations of IHL in particular for war crimes.

Once captured, combatants are entitled to prisoner-of-was status and to benefit from the protection of the Third Geneva Convention. Combatants are lawful military targets. Generally speaking, members of the armed forces (other than medical personnel and chaplains) are combatants. Under International Humanitarian Law, there may be no category of "quasi-combatants", i.e of civilians contributing so fundamentally to the military effort or the war effort (e.g., workers in ammunition factories) that they lose their civilian status although not directly participating in hostilities. If the civilian population shall be protected, only one distinction is practicable. The distinction between those who (may) directly participate in hostilities, on the one hand, and all others, on the other hand, who do not, may not, and cannot hinder the enemy military from obtaining control over

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[8]. Those specially protected objects, may not be used by those who control them for military action and should therefore never become military objectives. If they are however used for military purposes, even they can under restricted circumstance become military objectives.

[9]. APL, Article (2). Hostile acts include not just combatactions but also destroying installations or military equipment

their country in the form of a complete military occupation – regardless of whatever their contribution to the war effort may be. To allow attacks on persons other than combatants would violate the principle of necessity, because victory can be achieved by overcoming only the combatants of a country-however efficient its armament producers and however genial its scientists, and politicians may be. The suggestion that some civilians may be targeted because of their fundamental contribution to the war effort, although they do not directly participate in hostilities may be based on a misunderstanding or a failure to distinguish between objectives that may be attacked and persons who may be the target of an attack.

Military objectives, such as armament factories, may be attacked and subject to the principle of proportionality, the attack on military objectives does not become unlawful because of the risk that a civilian who works or is otherwise present in a military objective may be harmed by such an attack.

There is therefore no military necessity that the armament worker or the weapons development scientist might be targeted individually, e.g. through aerial bombardment of the residential area where he lives or by enemy ground forces capturing his factory. In the latter example, the question would furthermore arise as to how he could "surrender. To allow such attacks would further put the rest of the civilian population at risk. Similar thoughts must be expressed concerning politicians, civil servants, scientists and propaganda officials[10]. In addition, it would be very difficult to draw a line why should, e.g. international law professors who justify the legitimacy of a war (or of violations of International Humanitarian Law) be less legitimate targets than foreign ministry officials

[10] . M Bothe, K J Patsch and W A Solf, New Rules for Victims of Armed Conflict: Commentary on the two 1977 Protocols Additional to thr Geneva Conventions of 1949, (The Hague, Martinus Nishoff Publisher, (1982) 746

or TV speakers? In both world wars, German and British men could not have been incorporated so extensively into the armed forces if they had not been replaced by women in their functions essential for the society and the continuation of the war. Now, were those women all quasi-combatants?

7.2 Is *Hors De Combat* the Only Limitation on attack on Combatant?

Hors de combat, literally meaning "outside the fight" is a French term used in diplomacy and international law to refer to combatants who are sick, wounded, detained or otherwise disabled. Combatants *hors de combat* are normally granted special protections according to the laws of war, sometimes including prisoner-of-war status, and therefore officially become non-combatants. It is unlawful to attack a combatant when that person is *hors de combat*. A combatant is *hors de combat* if the person;

(a) In the power of an adverse party

(b) Clearly expresses an intention to surrender,

(c) has been rendered unconscious or is otherwise incapacitated by wounds or sickness, and therefore is incapable of defence;

Provided that in any of these cases, the person abstains from any hostile act and does not attempt to escape.[11] The rational behind the *hors de combat* exception to a combatant being a lawful target would appear to be a combination of military necessity and humanity.

This definition *of hors de combat* gives substance to the idea that necessity does not require harming a person who is no longer a threat. It provides protection during the difficult interim period between when a person is an active combatant and when he gets

[11]. See CE/4b

the full protection accorded prisoners of war.[12] If it is partly because of the application of the principle of military necessity that a combatant who is *hors de combat* is exempt from attack, then, are there any other general circumstances when due to a lack of military necessity, a combatant may not be attacked, e.g. when defenceless, asleep or on leave.

Bothe, Partsch and Solf respectively suggest that the customary international law definition of *hors de combat* includes when a combatant is no longer capable of resistance due to having been overpowered or being weaponless.[13] However, a rule to this effect was considered but not adopted during the drafting of AP1. The draft rule was put in terms of being an elaboration or supplement to existing rules.[14] Also, the recent comprehensive work on customary International Humanitarian Law by Henckaerts and Doswald-Beck does not state this to be a rule of customary international law.[15] With due respect to Bothe, Partsch and Solf, while the principle of humanity may dictate that where feasible a defenceless combatant should be captured rather than killed, this is not a strict rule of international humanitarian law. Accordingly, a combatant is not *hors de combatant* merely due to being no longer capable of offering effective resistance. It is also suggested that in certain cases the overwhelmed and/or unarmed might actually be *hors de combat.*[16] For example, it has been argued that the meaning of "in the power of an adverse party" at Article 41(2)(a) AP1 is broader than the meaning of "fallen into the power of the enemy" as used in Article 4(1) GC III to define prisoners of war.[17] The

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12. J M Henckaerts and L Doswald-Beck (eds), Customary International Humanitarian Law, Vol. 1 87. None of the Military Manuals review imposed such a requirement, but the penal loders Ethiopia and Lithunia made it a criminal offence to kill an unarmed combatant.
13. Ian Henderson, the Contemporary Law of Targeting
14. Sandoz, Swinarski and Zimmerman (eds/
15. The argument is partly predicated on the basis that "the rules of some armies purely and simply prohibit any form of surrender even when all means of defence have been exhausted.
16. CE 1972 Report Vol. 132
17. *Opcit*

argument is that Article 41(2)(a) AP1 applies to persons other than just prisoners of war, with an overwhelmed enemy and unarmed combatants being given as examples.[18] As argued above, this is over-stretching the natural meaning of the words used in the Article. It is particularly notable that the 1972 draft of an Article defined any "disarmed combatant unable to defend himself"[19] as having "falling into the power of an enemy"[20].

This definition is not reflected in AP1. It is not appropriate to re-write back into a treaty by way of interpretation a position that was discussed and not adjusted. Reference should also be made to the relevant rule of Hague Resolutions, which states that it is forbidden to "kill or wound an enemy who … having to longer any means of defence, has surrendered at discretion". This rule clearly states that it is still incumbent upon a defenceless adversary to actually surrender; surrender is not inferred by the mere fact of defencelessness. The state practice referred to in customary international humanitarian law on this point varies slightly, but the majority of state practice is consistent with this interpretation.[21] In appraising the above view, the Human Rights Watch state that "International Humanitarian Law does not prohibit soldiers from killing enemy combatants – even if the opposing fighters are in retreat – so long as they are not wounded, captured or otherwise out of combat (*horse de combat*)[22]. I concur with Human Right Watch. This conclusion is not contradicted by any of the state practice referred to by Henkaerts and Doswald-Beck, and is specifically supported by the cited state practice

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18. Hague Regulations , Article 23(c) (emphasis added)
19. Henckaerts and Doswald – Beck (eds) Customary International Law (supra) Vol. 11, 942-945.
20. Humpson, proportionality and necessity in the Gulf conflict, 53.
21. Legal Issues Arising from the war in Afghanistan and Related Article – Terrorism Efforts (2002), Human Right Watch Chttp://www.hrw.org/canpaigns/September 11/ihlgna.htm> 2 March, 2005. See also Y Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (Cambridge, Cambridge University Press, (2004)94.
22. J M Henckaerts and L Doswald-Beck (eds), *Customary International Humanitarian Law, Vol. 11 Practice, International Committee of the Red Cross,* (Cambridge, Cambridge University Press, (2005) 4411

of Israel and the Netherlands[23]. Conclusively, combatants are lawful targets except where they are afforded protection from attack under Article 41 AP1[24]. Accordingly, once the rules on attack on combatants and the limitations thereon are considered, the effect of the principle of military necessity is spent.

Again, there is no need for an enemy combatant to be posing a direct threat or be taking part in hostilities at the time of an attack on that combatant.[25] Rather, it is always permissible due to military necessity to attack the enemy's combatants. This is so because, an individual soldier will always be adding to the military capability of the enemy until the point that they are *hors de combat*-be that through surrender, capture or wounding. Even though "evidence shows attrition levels of 20 to 50 percent usually render a military force combat ineffective[26], the individual soldiers can still fight and may form up with other units to reconstitute or strengthen those units. Accordingly, the principle of military necessity does not impose a limitation on attacking combatant who are not *hors de combat*. Therefore, and for example, soldiers asleep in their barracks remain legitimate targets.

It has also been suggested that the principle of humanity enjoins that capture is to be preferred to wounding, wounding to killing[27]. While as a moral principle, this may well be correct, it is not a legal principle or rule of International Law[28].

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23. See generally Expert meeting: "targeting military objectives" 13. V.(26) US Department of Defence Conduct of the Persian Gulf War Crinal report Congress 146.
24. *Ibid*
25. See CE 1972 Report Vol. 1, 131, which a draft rule that some experts considered migh be interpreted as an obligation to capture was considered unacceptable. The adopted rule in API, art 4(3) differs significantly from the 1972 draft.
26. *Supra*
27. Barber, (supra) 690
28. J M Henckaerts and L Dowaldf – Beck (eds) Customary International Humanitarian Law, Vol. 1, (Ibid) 168.

7.3 Inviting or Offering an Opportunity to Surrender

The question here is, does International humanitarian Law require an attacker to either invite an offer of surrender or at least present an opportunity for a combatant to surrender, particularly where the enemy is overwhelmed or unarmed? The 1991 Gulf War experience will be helpful in these circumstances;

A controversial incident involving coalition forces occurred on the last day of the ground campaign, as an entire column of Iraqi troops was retreating from Kuwait. These troops had not surrendered, making them legitimate military targets. Yet, they put up only minimal resistance, while coalition aircraft dropped Rockeye fragmentation bombs and other antipersonnel arms, killing thousands. The ICRC concluded that the attacks "caused unnecessary suffering and superfluous injury" and that they were tantamount to "a denial of quarter". Many other observers, however, counter that the concept of denial of quarter does not apply to forces that have not surrendered.[29]

The starting point in analyzing this type of situation is that the standard requirement is not to attack a combatant who either is recognized or in the circumstances should have been recognized, as clearly expressing an intention to surrender. Therefore, attack by snipers is lawful as is attacking a retreating enemy. According to Barber, retreating soldiers are "neither in the power of the adverse party nor clearly expressing an intention to surrender, so attacking them would appear legitimate on these two grounds.[30] The legal view of the United State is that a retreating enemy may be attacked even if

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[29]. Se CE/43 *op,cit* and annex 11,10

[30]. The decisive test for any rule of humanitarian law is whether to the solder in an active combat situation, it would appear to be an instinctively apparent and reasonable rule" (Robbie Sabel, Civalry in the Air", Article 42 of the 1977 protocol 1 to the Geneva Conventions in Michael Schmitt (ed), International Law across the Spectrum of Conflict. Essays in Honour of Professor L L C.Green on the Occasion of his Eightieth Birthday (2000) 439.

defenceless, and there is no legal obligation to offer an opportunity to surrender.[31] Again, whether there should be a legal obligation to offer an opportunity to surrender was expressly considered during the drafting of the AP1 but is not expressed as a requirement in any Article of AP1.[32] The reason proffered by some authors about the existence of a rule that prohibits the attack on a retreating enemy or a surrounded enemy is that it is contrary to military sense[33]. From the military point of view, it is obviously better to attack a retreating enemy than an enemy putting up a defence; and it is better to attack an enemy who is surrounded by your forces than one who has freedom of maneuver. However, this does not mean that a defending combatant has no protection under International Law. As argued above, the defending combatant is protected from attack if he or she expresses an intention to surrender and International Humanitarian Law also imposes a positive obligation on an attacker to respect the right of an enemy to surrender[34]. A retreating enemy is not a surrendering enemy-not even if flying a white flag.[35] If not attacked, the retreating enemy will presumably come back and fight another day, or at the very least, be in a position to do so.

The same reasoning applies where an enemy is clearly overwhelmed but has not retreated (perhaps because they are surrounded or have no avenue for retreat). The options available to the defending enemy is to surrender (and thereby become *hors de combat*) or not surrender and thereby remain combatants. This option available to the

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31. Note that the obligation is to not attack a surrounding person, there is no strict obligation under IHL to capture a surrounding person party and take that person as a prisoner of was
32. See Paul Walker; "U.S Bombing: The Myth of Surgical Bombing in the Gulf War" (1992) http://deoxy.org/we/wc-myth.htm Accessed on 11August,2015
33. "Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of Victims of International Armed Conflict (Protocol I), 8 June 1977, "International Committee of the Red Cross
34. "The Hague Rules of Air Warfare.
35. Alexander Gillespire A History of the Law of War. Volume 1: T*he Customs and Laws of War with Regards to Combatants and Captives,(* London Hart Publishing. Septemer 6,2011) P. 56.

attacker depends upon the defending party's actions. If the defending party surrenders, the combatant becomes *hors de combat* and therefore, is protected from attack. If they do not surrender, they remain combatants and are subject to attack. To say otherwise would be to confuse the law relating to attacking combatant (i.e. IHL) with domestic law concerning self-defence and murder.

7.4 Parachutists

Attacks on parachutists, within the law of war, are when pilots, aircrews, and passengers are attacked while descending by parachute from disabled aircraft during armed conflicts. This practice is considered by most militaries around the world to be inhumane, barbaric, and unchivalrous; that it is unnecessary killing (the attacked personnel would eventually become prisoners of war if parachuted over enemy territory), that it is contrary to fair play, and that military pilots have to be held to a higher standard. Attacking people parachuting from an aircraft in distress is a war crime under Protocol I in addition to the 1949 Geneva Conventions. However, it is not prohibited under the Protocol to open fire on airborne troops who are descending by parachutist, even if their aircraft is in distress.[36]

After the First World War, a series of meetings were held at the Hague in 1922-23. Based on experiences and stories from fighter pilots who participated in the First World War, a Commission of Jurist attempted to codify this practice with the Hague Rules of Air Warfare. Article 20 thereof prescribed that; "when an aircraft has been disabled, the occupants when endeavoring to escape by means of parachute must not be

[36] . Philip Kaplan "Fighter Aces of the RAF in the Battle of Britain" – *Pen & Sword Aviation, First Edition* (2007) 240

attacked in the course of their descent.[37] However, the Hague Rules of Air Warfare never came into force, and despite the strong feelings of chivalry regarding this issue, there was no legal prohibition on shooting at parachuting enemy airmen before or during the Second World War.[38] In 1949, as a result of widespread practices and abuses committed during the Second World War, the newly modified and updated versions of the Geneva Conventions came into force providing greater protections to protected persons but there was still no explicit prohibition on the shooting of parachuting enemy pilots. However, despite this, military manuals around the world contained prohibitions on attacking enemy pilots parachuting from an aircraft in distress.

Paragraph 30 of the United States Army's Field Manual published by the Department of the Army on July 18, 1956 (last modified on July 15, 1976), under the title "the Law of Land Warfare", states; "the Law of War does not prohibit firing upon paratroops or other persons who are or appears to be bound upon hostile missions while such persons are descending by parachute. Persons other than those mentioned in the preceding sentence who are descending by parachute from disabled aircraft may not be fired upon[39].

This practice was finally codified in Protocol 1 in addition to the 1949 Geneva Convention which in Article 42 thereof, states that;

1. No person parachuting from an aircraft in distress shall be made the objective of attack during his descent.

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[37]. Appeal by the International Committee of the Red Cross on the 20th Anniversary of the Adoption of the Additional Protocols of 1977. "International Committee of the Red Cross.

[38]. Additional Protocol I, Article 50 (adopted) by Consensus (cited) in Vol. 11, Ch. 1, 705.

[39]. See e.g, The Military Manuals of Benin, Section, 714, Cameroon Section 715) France Section 722 Togo Section 734)

2. Upon reaching the ground in territory controlled by an adverse party, a person who has parachuted from an aircraft in distress shall be given an opportunity to surrender before being made the object of attack, unless it is apparent that he is engaging in a hostile act.

3. Airborne troops are not protected by this Article.

Not many states have ratified Protocol I but it is an accepted principle of IHL that targeting persons, other than airborne troops, parachuting from an aircraft in distress is a violation of the customary laws of war and is binding on all belligerents, whether or not they have ratified them[40].

7.5 Civilians

Civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. The definition of civilians as persons who are not members of the armed forces is set forth in Article 50 of Additional Protocol I, to which no reservations have been made[41]. It is also contained in numerous military manuals[42]. It is reflected in reported practice[43]. This practice includes that of states not or not at the time, party to Additional Protocol I[44]. In its judgment in the *Blaskic Case* in 2000, the International Criminal Tribunal for the Former Yugoslavia defined civilians as "persons who are not, or no longer members of the armed forces[45]. Some practice adds the condition that civilians are persons who do not participate in hostilities. This additional requirement merely reinforces the rule that a civilian who participates directly in

[40]. See, e.g. reported practices of Israel Section 726, Rewarda Section 746.
[41]. See e.g., the practices of France Section, 722 and Kenya Section728
[42]. ICTY, *Blaskic* , Judgment *op,cit*, 751
[43]. Lieber Code, Articles 49 and 51, Brussel Declaration, Article 10.
[44]. See, e.g, the military manuals of Benin Icited in Vol. 1, 714), Cameroon (Ibid, 715)
[45]. Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds), *New Rules for Victims of Armed Conflicts*, (Martinus Nijhoff. , 1982), p. 672.

hostilities loses protection against attack. However, such a civilian does not thereby become a combatant entitled to prisoner of war status and upon capture, may be tried under national law for the mere participation in the conflict, subject to fair trial guarantees.

An exception to this rule is the *levee en masse* provided in Article 4 (a) (6) of the 1949 Geneva Convention 111, whereby inhabitants of a country which has not yet been occupied on the approach of the enemy, spontaneously take up arms to resist the invading troops without having time to form themselves into an armed force. Such persons are considered combatants if they carry arms openly and respect the laws and customs of war. This is a long-standing rule of Customary International Humanitarian Law already recognized in the Lieber Code and Brussels Declaration[46]. Although of limited current application, the *levee en masse* is still repeated in many military manuals, including very recent ones[47]. The argument is that the terms "dissident armed forces or other recognized armed groups …. Under responsible command" in Article 1 of Additional Protocol II inferentially recognize the essential conditions of armed forces, as they apply in international armed conflict, and that it follows that civilians are all persons who are not members of such forces or groups[48]. While state armed forces are not considered civilians, practice is not clear as to whether members of armed opposition groups are civilians subject to Rule 6 on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of Rule 6.

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[46]. See e.g, The Military Manuals of Benin (op,cit 763) Kenya (op,cit, 774) and Togo (op,cit, 784).
[47]. Inter-American Commission on Human Rights, Case 11:137 Argentina) , 810.
[48]. Inter-American Commission on Human Rights, Third report on Human Rights in Colombia 81.

The rule that civilians are not protected against attack when they take a direct part in hostilities is included in many military manuals which are applicable in or have been applied in non-international armed conflicts[49]. In the case concerning the events at La Tabloda in Argentina, the Inter-American Commission on Human Rights held that civilians who directly take part in fighting, whether singly or as members of a group, thereby become legitimate military targets but only for such time as they actively participate in combat[50].

To the extent that members of armed opposition groups can be considered civilians, this rule appears to create an imbalance between such groups and governmental armed forces. Application of this rule would suggest that an attack on members of armed opposition groups is only lawful for "such time as they take a direct part in hostilities" while an attack on members of governmental armed forces would be lawful at any time. Such imbalance would not exist if members of armed opposition groups were, due to their membership, either considered to be continuously taking a direct part in hostilities or not considered to be civilians. It is clear that the lawfulness of an attack on a civilian depends on what exactly constitutes direct participation in hostilities and, related thereto, when direct participation begins and when it ends. To my view, the meaning of direct participation in hostilities has not yet been clarified, however, whatever meaning been ascribe to these terms, immunity from attack does not suggest immunity from arrest and prosecution.

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[49]. See e.g., The Military Manuals of Australia 820 Ecuador , 822.

[50]. See e.g., The Military Manuals of Togo Articles 3 745, Additional Protocol 1, Article 51(3) adopted by 77 votes in favour, one against and 16 abstentions) (Ibid, 755) Agreement on the Application of IHL between parties to the conflict in Bosnia and Herzegovina, para. 2-5 , 762.

7.6 Direct Part in Hostilities

There is no precise definition with respect to the term "direct participation in hostilities". The Inter-American Commission on Human Rights has stated that the term "direct participation in hostilities" is generally understood to mean "acts which by their nature or purpose are intended to cause actual harm to enemy personnel and material[51]". Loss of protection against attack is clear and uncontested, as evidenced by several military manuals, when a civilian uses weapons or other means to commit acts of violence against human or material enemy forces[52]. There is a lot of practice which gives little or no guidance on the interpretation of the term "direct participation", stating, for example, that the assessment of direct participation has to be made on a case-by-case basis or simply repeating the general rule that direct participation causes civilians to lose protection against attack[53]. The military manuals of Ecuador and the United States give several examples of acts constituting direct participation in hostilities, such as serving as guards, intelligence agents or lookouts on behalf of military forces[54]. The report on the practice of the Philippines similarly considers that civilians acting as spies, couriers or lookouts lose their protection against attack[55].

In a report on human rights in Colombia, the Inter-American Commission on Human Rights sought to distinguish "direct" from "indirect" participation.

> Civilians whose activities merely support the adverse party's war or military effort or otherwise only indirectly participate in hostilities cannot on these grounds alone be considered combatants. This is because indirect participation, such as selling goods to one or more of the armed parties,

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51. Ecuador, Naval manual Article 52 United States Naval Handbok , 830.
52. Report on the Practice of the Philippines Manual, Article 49
53. Inter-American Commission on Human Rights, Third Report on Human Rights in Colombia (Ibid, 811).
54. UN Commission on the Human Rights, special Representative on the situation of Human Rights in El Salvador, Final Report ,853
55. See e.g, The Military Manuals of Australia (cited in Vol. 11, Ch. 2, 635), Colombia 637

> expressing sympathy for the cause of one of the parties does not involve acts of violence which pose an immediate threat of actual harm to the adverse party[56].

The distinction between direct and indirect participation had previously been developed by the Special Representative of the UN Commission on Human Rights for El Salvander[57]. The point here is that international law does not prohibit states from adopting legislation that makes it a punishable offence for anyone to participate in hostilities, whether directly or indirectly.

But, outside the few uncontested examples mentioned above, in particular use of weapons or other means to commit acts of violence against human or material enemy forces, a clear and uniform definition of direct participation in hostilities has not been developed in state practice. Several military manuals specify that civilians working in military objectives, for example, munitions factories, do not participate directly in hostilities but must assume the risks involved in attack on that military objective[58]. The injuries or death caused to such civilians are considered incidental to an attack upon a legitimate target which must be minimized by taking all feasible precautions in the choice of means and methods, for example, by attacking at night. The theory that such persons must be considered quasi-combatants, liable to attack has no support in modern state practice.

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[56]. (Supra) Article 33
[57]. *Op cit*
[58]. Article 4 of the Columbia Military Manual

7.7 Terrorizing Civilians

International Humanitarian Law is the body of international law applicable when armed violence reaches the level of armed conflict, whether international or non-international. The law of armed conflict or law of war does not provide a definition of terrorism, but prohibits most acts committed in armed conflict that would commonly be considered "terrorist" if they were committed in peace time. The basic principle of IHL is that persons fighting in armed conflict must, at all times, distinguish between civilian and combatants and between civilian objects and military objectives. The "principle of distinction", as this rule is known, is the cornerstone of IHL. Derived from it are many specific IHL rules aimed at protecting civilians such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks or the use of human shield". In situation of armed conflict, there is no legal significance in describing deliberate acts of violence against civilians or civilian objects as "terrorist" because such acts would already constitute war crimes. Under the principle of universal jurisdiction, war crimes subject may be criminally prosecuted not only by the state in which the crime occurred, but by all states.

IHL specifically mentions and infact prohibits "measures of terrorist" and "acts of terrorism". The Fourth Geneva Convention states that "collective penalties and likewise

all measures of intimidation or of terrorism are prohibited,[59] while Additional Protocol II prohibits "acts of terrorism" against persons not or no longer taking part in hostilities[60]. The main aim is to emphasis that neither individuals nor the civilian population may be subject to collective punishment, which among other things, obviously induce a state of terror. Both Additional Protocols to the Geneva Conventions prohibits acts aimed at spreading terror among the civilian population. These provisions are a key element of IHL rules governing the conduct of hostilities, that is, the way military operations are carried out. They prohibit acts of violence during armed conflict that do not provide a definite military advantage. It is important to bear in mind that even a lawful attack on military targets can spread fear among civilians. However, those provisions outlaw attacks that specifically aim to terrorize civilians, for example campaigns of shelling or sniping of civilians in urban areas. States have the obligation and right to defend their citizens against terrorist attacks. This may include the arrest and detention of persons suspected of terrorist crimes. However, this must always be done according to a clearly defined national and/or international legal framework. Persons detained in relation to an international armed conflict involving two or more states as part of the fight against terrorism – the case of Afghanistan until the establishment of the new government in 2002 – are protected by IHL applicable to international armed conflicts. Persons detained in relation to a non-international armed conflict waged as part of the fight against terrorism – as is the case with Afghanistan since June 2002 – are protected by Article 3

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[59] . 1977 European Convention on Suppression of terrorism (Strasbourg, January, 1977), Treaty on Cooperation among states members of the commonwealth of Independent states in combating Terrorism (Minsk; June 1999). Inter-American Convention against Terrorism AG/RES. 1840 (xxxii-0/02) Bridge Town, June 2002) organization of African Union Convention on the Prevention and Combating of Terrorism (Algiers, July 1999) and the Protocol to that Convention Addis Ababa July 2004) (as of 30 August 2005, the protocol was not yet in force).

[60] . J E Crambo, ." To End the Scourge of War: the story of UN peacekeeping", *The United Nations: Confronting the challenging of Global Society*,(Lynne, Rienner Publishers Inc,2004) 61

common to the Geneva Conventions and the relevant rules of customary IHL. The rules of international human rights and domestic law also apply to them. If tried for any crimes they may have guarantees of international humanitarian and human rights law.

What is important to know is that no person captured in the fight against terrorism can be considered outside the law; there is no such thing as a "black hole" in terms of legal protection if the fight against terrorism takes the form of a non-international arm conflict. The ICRC can offer its humanitarian services to the parties to the conflict and gain access to persons detained with the agreement of the authorities involved. Outside of armed conflict situations, the ICRC has a right of humanitarian initiative under the statutes of the International Red Cross and Red Crescent Movement. Thus, many persons regularly visited by the ICRC have been detained for security reasons in peace time.

Some of the existing international conventions on terrorism include specific provisions providing that states may allow ICRC access to persons detained on suspicion of terrorist activities[61]. These provisions, as well as the ones included in IHL treaties and in the Statutes of the International Red Cross and Red Crescent Movement are in recognition of the unique role played by ICRC based on its principles of neutrality and impartiality.

7.8 The *Jus in Bello* is Independent of *Jus Ad Bellum*

Under International Law, there are two distinct ways of looking at war; the reasons you fight and how you fight. In theory, it is possible to break all the rules while fighting a just war or to be engaged in an unjust war while adhering to the laws of armed conflict. For this reason, the two branches of law are completely independent of one another.

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[61] . United Nations, 1995, General Guidelines for Peacekeeping Operations, UN Department of peacekeeping operations. http://www.un.org/depts/dpko/training>/tespublications/books/ peacekeepingtrainng/genguideen. Accessed on 18 May, 2016

Jus in bello, is the set of laws that come into effect once a war has begun. Its purpose is to regulate how wars are fought without prejudice to the reasons of how or why they had begun. So, a party engaged in a war that could easily be defined as unjust (for example, Irags aggressive invasion of Kuwait in 1990) would still have to adhere to certain rules during the prosecution of the war as would the side committed to righting the initial injustice. This branch of law relies on customary law, based on recognized practices of war, as well as treaty laws (such as the Hague Regulations of 1899 and 1907)[62], which set out the rules for conduct of hostilities. Other principal documents include the four Geneva-Conventions of 1949, which protect war victims – the sick and wounded (first); and civilians in the hands of an adverse party and to a limited extent all civilians in the territories of the countries in conflict (fourth) and the Additional Protocols of 1977, which define key terms such as combatants, contain detailed provisions to protect non-combatants, medical transports, and civil defence, and prohibits practices such as indiscriminate attack.

Jus (or ius) ad bellum is the title given to the branch of law that defines the legitimate reasons a state may engage in war and focuses on certain criteria that render a war, just. The principal modern legal source of *jus ad bellum* derives from the charter of the United Nations, which declares in Article 3 that "all members shall refrain in their international relations from the threat or the use of force against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the United Nations, and in Article 51" Nothing in the present charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a member of the United nations".

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[62]. *Ibid*

There is no agreement on what to call *Jus in bello* in every day language. The ICRC and many scholars, preferring to stress the positive, call it International Humanitarian Law (IHL) to emphasis their goal of mitigating the excess of war and protecting civilians and other non-combatants. International Humanitarian Law applies to the belligerent parties irrespective of the reasons for the conflict or the justness of the causes for which they are fighting. "Belligerency" is a term used in international law to indicate the status of two or more entities, generally sovereign states, being engaged in a war.[63] A belligerent is one that has control of a territory in the state against which it was rebelling; it has declared independence and if its goal is secession, it had well-organized armed forces, it began hostilities against the government, and importantly, the government recognized it as a belligerent. .An individual obtains a belligerent status by becoming a member of a party to a conflict, and he does not lose that status until he renounces his membership. If it were otherwise, implementing the law would be impossible since every party would claim to be a victim of aggression. Moreover, IHL is intended to protect victims of armed conflicts regardless of party affiliation. That is why *Jus in bello* must remain independent of *jus ad bellum*.

However, it is commonly accepted that there must be a fundamental separation between the two war law regimes[64]. This means that the '*jus ad bellum* and *jus in bellum* are separate areas of international law that do not affect the application of each other[65]and

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63 . Chisholm, Hugh, ed , "Bellingerency, Encyclopedia Britannica 3 (11th ed), Cambridge University Press 1911) 53.

64 . See e.g., T Mousa, '*Can Jus ad bellum* override *Jus in bello*? Reaffirming the Separation of the two Bodies of law, 90 *International Review of the Red Cross* 92008), p. 63. More generally, see. M Walzey, *Just and Unjust Wars and War Argument with historical Illustration*, 4th edition (New York Basic Books,2006), pp. 21-22.

65 . S Lehmann, All Necessary means to protect Civilians What the Intervention in Libya says about the Relationship between Jus in bello and Jus and Bellum. .

that even when a lawful party and an unlawful party are distinguished in terms of *jus ad bellum, jus in bello* applies equally to them during armed conflict.[66]

Traditional supporters of this clear *ad bellum/in bello* distinction have long thought it dangerous to admit of any overlap between the categories[67]. The concern has been from the perspective of protecting victims of armed conflict; the justness or lawfullness of the cause should have no impact on the way and extent to which law controls the means and methods of warfare employed by the aggressor and the victim (even if one can tell them apart definitely, which is not always the case).[68] Viewed from this perspective, reserving a military targeting requirement to the *jus in bello* has the advantage of avoiding any further unnecesary blurring of the categories. IHL retains its primacy in respect of protection as soon as the very first shot is fired, and certainty and predictability in the law prevails.

However, it is worth noting that several writers have criticized the notion that the *jus ad bellum* and *jus in bello* categories can or should be waterfight. Alexanda Orakheleshvili, taking a positive approach, suggest that aggressors as defined under the *jus ad bellum* (following the 1928 Pact of Paris on the outlawry of war) do not have all the same rights and priviledges of other belligerents under the *jus in bello*[69]. While he limits his analysis of "aggressor discrimination" to states and not states nationals (and therefore does not challenge the equal application of the principle of distinction in targeting), he demonstrates through jurisprudence and treaty law that with respect to

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66. A. Orakhelashivili Overlpa and convention. The Inter-relational between *Jus ad bellum* and *Jus in bello*, 12 *Journal of conflict and Security law* (2007), p. 157.

67. For example, he argues that aggressor state do not have the same right to inspect neutral shipping as victim states", *Ibid*.

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69. S K Shorma, "Reconsidering the Jus and Bellum/ Jus in bello Distinction, in C Stahn and J.K Klefner (eds) Jus post Bellin "*Towards a Law of Transition from Conflict to Peace* (Cambridge, Cambridge University Press, 2008) p.9.

occupation and neutrality, among other things, aggressors are not on an equal footing within victims in a *jus in bello* framework[70]. Others approached the issue from an ethical perspective. Serena Shama, for example, has argued that the overly 'juristic, distinction between the categories is untenable as it excludes morality from the equation. In her view, the party that has justness of cause should have more freedom of action in terms of the *jus in bello*[71]. Consequently, our view with respect to whether *jus in bello* is independent of the *jus ad bellum* is that their categories are logically separate, and that this separation is probably for the best in terms of maximizing human protection, it must be recognized that the interaction between the two categories is not necessarily a bad thing, at least in the context of targeting military objective which is the topic of this thesis. Afterall, the two branches of war law do not, and should not operate entirely in vacuum, they deal with a common subject matter.[72] If the military targeting requirement seeps into the *jus ad bellum*, then perhaps there is no harm done. The necessity and proportionality criteria do not for example, prospectively tell us how to define a military target. IHL can do this, and this definition will inform the way that we apply the *jus ad bellum* principle even in rare cases where IHL may be inapplicable. The respective rules are reaffirmed rather than weakened. Highlighting cumulative application and content (and possible variance) helps to reaffirm that IHL defined modalities on military targeting remain the first port of call whenever "war law" is implicated. Far from being the loser in

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71 . More generally on the possibility of Jus in bello expanding at the expense of Jus and bellum, see A Osterdahl, "Dangerous Liason? The disappearing Dichotomy between Jus and Bellum and in Bello, 78, *Nordic Journal of Journal of International Law* (2009) p. 553.

72 Supra

any interaction of the categories, as is the usual fear, the *jus in bello* may emerge stronger overall[73].

7.9 Application of International Humanitarian Law to UN Forces

Over the years, the responsibilities and tasks assigned to United Nations forces have transcended their traditional duties of monitoring cease fires and observation of fragile peace settlement. Indeed, the spectrum of operations in which United Nations Forces (hereinafter 'peace operations' or 'multinational operations') be they conducted under United Nations (UN) auspices or under UN command and control has steadily widened to embrace such diverse aspects of conflict prevention, peacekeeping, peace making, peace enforcement and peace building. The mission of the multinational forces in Afghanistan, the Democratic Republic of Congo (DRC), Somalia, Libya or Mali are no longer confined to ensuring cease fires or monitoring buffer zones but are characterized by their involvement in military operations aimed at eradicating threats from various quarters, especially from non-state armed groups engaged in a Non-International Armed Conflict (NIAC). Currently, the multifaceted nature of these peace missions and their increasingly difficult and violent environment in which their personnel operate make it all the more necessary to develop a coherent framework, including a legal dimension. New aspects of multinational forces operations increase the likelihood of their being called upon to use force, the question of when and how International Humanitarian Law (IHL), applies to their action becomes all the more relevant.

Having already established the essential distinction between *jus ad bellum* and *jus in bello* in this work, it becomes imperative herein to clarify the conditions under which

[73] ICTY, Trial Chambers Case No. IT04-82-T,10July,2008

IHL becomes applicable to UN forces. The conditions determining IHL applicability to UN forces is a question of facts. Whether or not UN forces are engaged in an armed conflict must be determined solely on the basis of the prevailing facts. This view besides being widely held by academic writers, is also reflected in recent international judicial bodies decisions and in certain military manuals.

Numerous International Tribunal decisions confirm the applicability of IHL on the basis of prevailing facts. For instance, the United Nations, International Criminal Tribunal for Former Yugoslavia (ICTY) and the United Nations International Criminal Tribunal for Rwanda (ICTR) have handed down many decisions in which they have stressed that IHL applicability should be determined according to the prevailing circumstance and not to the subjective views of the parties to the armed conflict. For instance, the Trial Chamber of the ICTY stated in *Boskovoski's case* that 'the questions of whether there was an armed conflict at the relevant time is a factual determination to be made by the Trial Chamber upon hearing and reviewing the evidence admitted at trial. In a similar vein, the ICTY underlined in *Milutinovic's case* that 'the existence of an armed conflict does not depend upon the views of the parties to the conflict'.

Some military manuals also make it clear that the existence of an armed conflict depends on the circumstances of the particular case. In this regard, the 2006 Australian Law of Armed conflict manual stresses that 'whether any particular factual situation meets the threshold so as to become an armed conflict will depend on all circumstances surrounding a particular events. The legal classification of a situation involving multinational forces therefore depends on the facts on the ground and on the fulfillment of criteria stemming from the relevant provisions of IHL, in particular Common Article 2

of the Geneva-Conventions in the case of International Armed Conflicts and Common Article 3 in the case of NIACS.

Presently, as multinational forces are frequently deployed in conflict zones during peace operations, the likelihood of their involvement in hostilities has increased. For this reason, it has become essential to determine the conditions under which those situations constitute an armed conflict within the meaning of IHL, especially as it is still hard to fix the precise moment at which multinational forces become a party to an armed conflict. This is all the more important given attempts to up the threshold of IHL applicability.
First, deployment in a conflict zone does not necessarily mean that multinational forces become a party to the armed conflict affecting the area in question. Multinational forces will not become a party to an armed conflict of either an International or a Non-International character and will not be bound by the applicable IHL norms in the course of their operations unless the conditions for IHL applicability are met.

According to Common Article 2 of the 1949 Geneva Conventions, an International Armed Conflict exists whenever there is recourse to armed force between two or more states. An evolving interpretation of the law could be employed to contend that an International Armed Conflict exists whenever two or more entities possessing international legal personality resort to armed force in relations between them. Such an interpretation would make it possible to bring within the scope of IHL military action undertaken by international organizations, provided it reaches the threshold for the application of that body of law.

The threshold for determining the existence of an international armed conflicts is very low, and factors such as duration and intensity do not enter into the equation; the

mere capture of a soldier, or minor skirmishes between the forces of two or more states, may spark off an international armed conflict and lead to the applicability of IHL, in so far as such acts evidence a genuine belligerent intent.

Belligerent intent may be deemed to exist when it can be objectively observed that international organizations and/or TCCs are effectively involved in military operations or any other hostile action armed at neutralizing the enemy's military personnel and resources, hampering its military operations, subduing it or inducing it to change its course of action. Belligerent intent must therefore be deduced from the facts. Existence of such belligerent intent is very important since it permits to rule out the possibility of including in the scope of application of IHL situations that arise as a result of a mistake or of individual acts not endorsed by the TCCs or the international organization involved in the peace operation.

It has sometimes been argued that the mere involvement of UN forces in an armed conflicts is sufficient to make it an International Armed Conflict and to trigger the application of the law governing international armed conflicts irrespective of the legal status of the belligerents (i.e. states, international organizations or non-state armed groups). However, this view is far from widely accepted, the question whether the legal framework of reference should be the law governing International Armed conflicts or that applicable to NIAC is still debated. While in practice, there is probably no difference in the rules regulating the conduct of hostilities, because most treaty-based rules applicable in International Armed conflict are also generally applicable in NIAC as customary law. The issue is important for example when it comes to the states of persons deprived of

liberty, the legal basis for ICRC activities or the geographical scope of application of IHL.

In order to answer questions pertaining to the classification of situations, the ICRC has followed a fragmented approach to the relationship between belligerents, similar to that adopted by the ICJ in the decision which it rendered on 27 June 1986 in the case of *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua V. United State of 16 America).* This approach is showed by the ICTY and the ICC. It involves examining and defining every bilateral relationship against the forces of a state. It is the rules governing International Armed Conflict which will apply, since the conflict is between two entities endowed with international legal personality. On the other hand, if the UN forces are combating a non-state organized armed group, it is the rules governing NIAC that will apply. They will also apply when in the context of a pre-existing NIAC, multinational forces intervene in support of the armed forces of a state against non-state armed group(s).

The UN Charter gives the Security Council primary responsibility for the maintenance of international peace and security. In fulfilling this responsibility, the Council can establish a UN peacekeeping operation. UN peacekeeping operations are deployed on the basis of mandates from the United Nations Security Council (UNSC). Their tasks differ from situation to situation, depending on the nature of the conflict and the specific challenges it presents[74].

The Charter of the United Nations is the foundation document for all UN work. The UN was established to save succeeding generations from the scourge of war" and

[74]. Sommaraga Cornelio "Humanitarian action and Peacekeeping Operations", *International review of the Red Cross* No 317, p. 178-186, 30-04-1997, http://www.icrc.org/web/eng/siteengO.nsf/html/57JNJ7 (Accessed 27-10-2015).

one of its main purposes is to maintain international peace and security. Peacekeeping, has evolved into one of the main tools used by the United Nations to achieve this purpose. In fulfilling this responsibility, the council may adopt a range of measures, including the establishment of a UN peacekeeping operation. Although each UN peacekeeping operation is different, there is a considerable degree of consistency in the types of mandated tasks assigned by the Security Council. Depending on their mandate, peacekeeping operations may be required to;

- Deploy to prevent the outbreak of conflict or the spill-over of conflict across borders;
- Stabilize conflict situations after a cease fire, to create an environment for the parties to reach a lasting peace agreement etc[75].

Although the UN is not a party to any international humanitarian law treaty, there is broad support in literature for the view that it is bound by customary international law, including customary international humanitarian law. The UN itself for a long time did not take a clear position on the applicability of international humanitarian law to forces under its command and control. After the establishment of the first UN peace operation, the United Nations Emergency Force, in 1965, the ICRC, and the UN corresponded on this issue. The UN wrote that the force has been instructed to observe the principles and spirit of the general international convention concerning the behaviour of military[76] personnel".

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[75]. Annan Kofi, Secretary-General of the United Nations, In Larger Freedom; Towards Development, Security and Human Rights for All, (United Nations, New York 2005)34.

[76]. Harrroff-Tavel, Marion, 2003, Principle under Fire; does it still make sense to be neutral? 31-12, Press article, International Committee of Red Cross http://www.blackwell-snergy.com/doi/pdf/10-1111/j0361-3666.2004-00252. x? cookie set=1 (Accessed 25-10-2015).

These instructions were included in the regulations for the United Nations Emergency Force issued by the UN Secretary-general.

The undertaking by troop-contributing States to ensure that their contingents respect international humanitarian norms was included in the Model Agreement between the United Nations and member states contributing personnel and equipment to United Nations peacekeeping operations (Model Agreement). The Model Agreement states in its Article 28 that "the peace operation shall observe and respect the principles and spirit of the general international conventions applicable to the conduct of military personnel and that the troop-contributing state shall therefore ensure that the members of its national contingent serving with the United nations peacekeeping operation be fully acquainted with the principles and spirit of these conventions.

IHL by its own term applies in situations of armed conflict. There is no treaty-based definition of what constitutes an armed conflict. There is agreement that a determination whether there is an armed conflict or not must be made on the basis of factual criteria. The actual situation on ground is decisive and the reasons for the parties to take part in the conflict and the cause espoused by them are not relevant. This is reflected in the working of the preamble to Protocol I. In Literature, there is widespread support for the view that the same factual criteria that apply to states and armed groups also apply to UN forces. Unless and until UN operation becomes a party to an armed conflict, the members of the operation enjoys the protections afforded by IHL to civilians. Individual members of an operation may also lose these protections without the force itself becoming party to an armed conflict. This is the case when they take a direct part in hostilities against a party to an armed conflict. This possibility is reflected in the

wording of the UN Secretary-General's Bulletin, which states that its rules are applicable to UN forces when they are actively engaged in an armed conflict as combatants to the extent and for the duration of their engagement[77]. This means that when in this situation, members of an operation cease to be engaged in hostilities, they are no longer considered to be directly participating in hostilities and go back to being protected from attack.

If a UN operation becomes involved in an armed conflict with state armed forces, the International Humanitarian Law regime of international armed conflict clearly applies. There is some debate on the regime that applies when there is an armed conflict with an armed group, particularly if the UN supports the government forces. Opinions are divided between those who consider that an armed conflict between a UN force and an armed group is a non-international armed conflict and those who consider that a UN operation by definition internationalizes the conflict.[78] The former view appears nowadays to enjoy more support than the latter. The UN Secretary-General's Bulletin does not distinguish between the two types of conflicts, but provides for one set of rules that applies to UN forces in every type of armed conflict. This is a reflection of the increasing convergence between the legal regime which apply to International and Non-International armed conflicts. Such convergence results at least in part from the increasing acceptance that rules from the international armed conflict regime have achieved customary law status also in relation to non-international around conflicts. Enforcement of IHL in UN operations is mainly left to the authorities of the troop-contributing countries. The UN does not have disciplinary or criminal jurisdiction over members of its military contingents in its operation. Status of Forces Agreement

[77]. See para. 48(b), Model Status of Force Agreement for Peacekeeping operations.

[78]. Convention (4v) respecting the Laws and Customs of War on Land and its annex regulations Concerning the Laws and Customs of War on Land 1907, Article 25.

concluded between the United Nations and the host State of an operation normally provide that, the troop-contributing States retain exclusive jurisdiction over members of military contingents[79]. Considering the above, one will not have qualms to state that the UN operation does not distinctly operate outside the law of targeting. Again, the UN is not only an actor to which IHL may apply. The organization plays an important role in the promotion of and ensuring compliance with the law by other actors. This role has gradually developed.

However, the ICRC's current position is not shared by some academic writers. It favoured the option of the internationalization of a conflict by the mere presence of international forces. From this view point, whenever international forces are involved in an armed conflict, it necessarily becomes international and therefore calls for the application of IHL in its entirety. This position appears attractive in terms of protection, since it means that victims and persons *hors de combat* would benefit from the more numerous and detailed protective provisions of IHL.

It is inconsistent, however, with certain operational and legal realities, indeed, the position that the law governing International Armed Conflict applies as soon as UN forces or multinational forces are involved in armed conflict runs up against some fair in surmountable objections. First, of all, the *Travaux Preparattories* of the 1949 Geneva Conventions show that the delegates viewed the law of NIAC as a residual body of law which would apply only when armed violence did not involve two or more states. From that view point, it may be concluded that when a conflict sets an entity possessing international legal personality against a non-state armed group, such as rebel groups, the law of NIAC applies. It is also difficult to locate the precise legal basis of the position

[79] . K Okimoto, *Jus ad bellum and Jus in bello* (Oxford,Hart 2011) pp. 63-80.

adopted by legal writers who support the application of the law governing International Armed Conflict to the context of UN forces or multinational NIACs. This uncertainty is also confirmed in practice, as it cannot be claimed that the doctrine advocated by some scholars is borne out of operational realities. Indeed, the prevailing view of the peace operation in Afghanistan against the Afghan armed opposition is that it constitutes a Non-International Armed Conflict (NIAC).

CHAPTER 8

CONCLUSION AND RECOMMENDATIONS

8.1 Findings

This work focused mainly on two themes, rule of targeting of military objectives and the challenges in contemporary warfare. To start on a positive note, there is no doubt that today, due to the development of customary law, the rules applicable in armed conflict are much less rudimentary than in 1977 when Additional Protocol II was negotiated. The legal frame work is clear and should, if properly applied, enhance the protection of the civilian population and civilian objects.

However, many rules are formulated in rather general terms, thus sometimes casting doubts as to their concrete application in practice. The sometimes diverging interpretations of concepts such as military objectives and proportionality in attack that arise in international armed conflicts generate the same, if not more queries in non-international armed conflicts. There is definitely a need for clarification of the law. The customary law study does not provide definitive answers in this regard, but the wealth of experience collected from military manuals in particular, may contribute to such a clarification.

Somewhat linked to the problem of clarification is another challenge, namely, how the general rules on the conduct of hostilities have to be applied to specific weapons in the absence of special treaty law. The application of the principle of distinction between the civilian population and persons taking a direct party in hostilities generates specific problems in situations of non-international armed conflicts. It often happens that

persons who mostly lead normal lives may indulge in guerilla activities from time to time. Can they be attacked in any place, at any time?

When looking at Additional protocol II, it only determines those exceptional circumstances under which civilians lose their entitlement to protection against direct attacks. It stipulates that "civilians enjoy protection, unless and for such time as they take a direct part in hostilities". Practice as to the understanding of this definition is not absolutely clear. There is general agreement that the term "direct participation in hostilities" covers acts which cause actual harm to enemy personnel and material. At the other end of the spectrum, in general cases, practice has indicated that supplying food and shelter to combatants, and generally speaking 'sympathizing' with them, is insufficient reason to deny civilians protection against attack. Between these extreme, the situation is far less clear.

Conscious that the law and practice in these areas are not clear, and that more research and thoughts were needed, the ICRC in collaboration with the TMC Asser institute in the Hague launched in 2003 a process of clarification of the notion of direct participation in hostilities and its legal consequences. Further, because the United Nations is an embodiment of all relevant institutional arrangements for harmonizing international humanitarian laws, not only in the area of coordinating intervention or peacekeeping operations but, also capable of conducting preventive diplomacy and conflict resolution when they ultimately occur, we observe the need for the repositioning of the United Nations as to meet the challenges of the new millennium. The breath taking changes in the area of military maneuvering and weapons of mass destruction, call for new rules and regulation for the conduct of warfare. This will be aimed at bridging the Lacuna (grey

area) in existing humanitarian laws. Occupational set-backs despite concerted efforts have come to characterize observance of humanitarian law.

8.2 Conclusions

Much has been written about how conflicts arise or is executed but, really very little is said about how the conflicts end or should stop. The old adage holds that "all is fair in love and war". While one should never presume to commend on the subterranean mysteries of love, the adage does not obviously apply to the conduct of warfare,

The modern law of armed conflict provides a necessary bulwark against humankind's most destructive tendencies and is rightfully championed by both humanitarian and military stakeholders. The law of armed conflict, as it presently exists, provides a useful and essentially stable framework for ameliorating the horrors of war and promoting humanitarian goals. Through this work, we have situate the law within the context of targeting strategies employed by the humanitarian movement through the 20th century to make the law "stick"

The enunciation of humanitarian standards, as contained within the broad legal principles of distinction and proportionality, allows for greater flexibility and coveted relevancy. These principles are derived from shared goal and basic common sense. They do, however, also have their limits. As has been highlighted in this work, notwithstanding the shared conversation between the military and humanitarian camps, there exists the real possibility of divergent results. This work believes that a more transparent and participatory mechanism be adopted to balance the interpretations of military objectives, proportionality in attack even on the application of the principles of distinction between the civilian population and persons taking direct part in hostilities. These standards are

very important and pose challenges in contemporary warfare. Where such standards are lacking during an armed conflict, it gives the contracting parties particularly the military the lay-way or excuses in the violation of the laws applicable to targeting during armed conflict as parties will lay claim to have acted within the confines of its military advantage.

Consequently, to active the harmonization of this principles, that is ; principle of proportionality, military objectives, distinction between civilian population and persons taking a direct in hostilities, Additional Protocol 1requires an amendment to encapsulate a definite meaning, interpretation and standard for these most important principle of International Humanitarian Law. This would put a legal check to the would be violators in any further armed conflict

As the law espouses broad standards that incorporate value judgements about the military significance of targets and relativism with regard to the value of lives that will be lost in securing such targets, it is unexpected that there should be disagreement as to the value assigned. What has been contended in this work is that, there should be recognition of the limits of the existing laws and, especially in the current paradigm of fighting war. It is a mutual goal of the humanitarian and the military camps that victory in warfare should be achieved swiftly and with least amount of suffering. We further contend that the existing principles of distinction and proportionality do not always secure these laudable goals especially in the new " battle-space" in which we find ourselves, and that new concepts dealing with effect based operations may promise a better alternative. The goals of the early 20th century humanitarian advocates have been achieved. The principles of the modern law of armed conflict are firmly embedded in the military psyche, and

victory for the relevancy of law when engaging in conflict has been established. The test for us all in the 21st century should be to disenchant the principles of the existing law and, thus, permit space for a rational assessment of whether the law of armed conflict is still truly effective in securing its noble goal of ameliorating suffering while allowing for military success

The power vested in the United Nations Secretary General in the management of conflicts is, by far, enormous when compared to those of the Commander or Commanders. Similarly, the powers vested in the Security Council going by Article 53 (1) of the Charter of the United Nations in calling out action by United Nations, on the whole, appears far too wide when compared to those of the General Assembly of the United Nations..

The debate must equally display sensitivity to IHL's underlying logic. As noted at the outset, the law of targeting is designed to balance the military necessity of being able to conduct operations effectively while minimizing harm to civilians, civilian property, other protected persons and objects, and, to some extent, even combatants. Lack of sensitivity to this balancing act will engender interpretations of the law that play out on the battlefield in ways that do not reflect the equilibrium. When that happens, IHL's prescriptive effect is inevitably weakened, as states will no longer see it in their interest to comply with its constituent norms. Therefore, not only must IHL principles and rules be grasped with precision, but they must be applied with strict fidelity to their object, purpose, and underlying foundational balance.

Again, the primary purpose of IHL is to protect non-combatant and the facilities that sustain their endurance and survival. This goal is universally accepted by all states

and international organizations even though there are obviously some differences of interpretation and outright violations in particular cases. Any action that threatens the principle of civilian immunity violates both the spirit and intent of the laws of armed conflict.

Again, while political leaders and media organizations express horror at flagrant violations of civilian immunity by states that deliberately targets non-combatants, the subtle exploitation of the collateral damage exception by law-abiding states has undergone far less scrutiny[1]. In this sense, research on what scholars call "one sided violence" is limited by the narrow conception of what constitutes attacks against civilians during armed conflicts. Yet even if one focused solely on fatalities (that is, excluding injuries and damage to facilities vital to the survival of the population), the level of collateral damage in contemporary international armed conflict is troubling, if not alarming.

As explained above, in order to best protect civilians and other individuals not taking part in the hostilities, IHL imposes obligations not only on states but also on non-state actors, such as individuals and organized armed groups. But it is hard to identify the IHL obligations to bind for example Hamas during their conflict because of the difficulties involved in classifying the Israel-Hamas conflict as international or non-international. Some normative development may be needed to clarify the state of the law in this respect. In addition, contemporary means and methods of warfare may require further normative and institutional developments in order to better achieve the goals of International Humanitarian Law (IHL).

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[1]. See D Alexander, "Restraint or Propellant? Democracy and Civilian tactise in interstate wars", *Journal of Conflict Resolution,* (2007)51(6), 872-904.

8.3 Recommendations

There is an emerging challenge to the concept of International Humanitarian Law and, given the modernization and advance in technology of the arms machines and the sweeping changes in war tactics and strategies, the United Nations must be repositioned, if this world body has to stay relevant. No doubt, the methods and means of war have changed, so also are the attendant humanitarian problems. The rules governing the conduct of war must also be modified to meet present day realities. War has become an integral part of the international system, therefore, the laws regulating the conduct of War must become a settled principle of Modern International Law. As UN forces have become increasingly active in areas traditionally reserved for states, allegations of misconduct have increased. Yet a lacuna exists in the regulation of UN-sponsored Peace Support Operations (PSO) and peace enforcement forces. The UN must proactively confront lack of regulation in order to maintain compliance with IHL, the spirit of the UN charter, and the mission of promoting the rule of law.

International state responsibility, national jurisdiction, human rights mechanism, the ICC and claims Commissions will not adequately enforce compliance of IHL by UN forces. Accordingly, a permanent Peace Support Operations and Peace Enforcement Ombudsperson should be created to ensure compliance with the law[2]. The mandate of the UNMIK Ombudsperson allowed wide discretion to investigate alleged abuse. A paramount ombudsperson must also be free from political influence and able to compel

[2]. See M Wanenburg, *Accountability of Peace Support Operations* (Martinus Nijoff 2004) at 3100-12 (arguing for the creation of a peacekeeping ombudsperson to oversee all UN operations). The ombudsperson should have the authority to issue final findings, and the respondent should be obliged to respond to the findings. Howver, Wanebury also argues for a separate and distinct claims commission whereby victims could request compensation for alleged violation.

state and UN compliance with enforceable and binding decisions[3]. This permanent ombudsperson should be given the authority to promote and protect the rights, freedoms, and protections provided by IHL of all individuals and legal entities operating in areas of peace enforcement operations without interference from member states.

In addition to the ombudsperson, the UN should establish a permanent claims commission to work with the ombudsperson to compensate victims of armed conflicts. While this commission may based on state referral or consent, it would be valuable in ensuring the rights of victims by establishing clear procedures for referral by victims if the state government does not have the capacity.

The UN peace keeping commission should have investigate capabilities like the World Bank inspection panel so that it does not have to rely on only one source of information in evaluating claims. Furthermore, whenever a mission is established, representatives of this commission should be deployed to the host states to ensure that victims are aware of their rights of compensation. The decision of this commission should be binding on both the UN and the troop-contributing states so that victims of abuse are guaranteed redress. This permanent position could be responsible for all claims against UN PSO and peace enforcement forces and could serve to help increase the credibility of the UN forces amongst the local population and promote the rule of law.

The UN plays an invaluable role around the word promoting peace, however, the organization must do more to ensure compliance of its forces with IHL. Such compliance with the laws of war will limit civilian causalities, help felicitate the transition to peace, and encourage representative government based on the rule of law. A permanent ombudsperson and claims commission could do much to promote this accountability.

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[3]. Supra

After about three decades of the last review of laws relating to war or armed conflict, there is the need for conferences to examine the suggestions and claim of gray areas. There are also existing LACUNA following enhanced knowledge in war fare and technology of weaponry.

Alan Beasley, Head of Canada's Law of the Sea Obligation captured this vividly in a statement to the United Nations General Assembly thus;

".....Multilateral treaty law must, of course, be develop primarily by multilateral action, 'drawing as necessary .... which often consist of both a codification of existing principles of International Law and progressive development of new principles[4].

As part of the activities that marked the 50th anniversary of the United Nations, the organization sponsored conferences in Geneva that discussed this subject, but, the recommendation is yet to see the light of day[4].

One of the reasons advanced for the increase in the violation of Humanitarian Law is the ignorance and indifference to the whole gamut of this all important branch of Law. Given the explosive nature of the international system, governments all over should be concerned with the import of war, and the impact of same on the quality of life. Thinking along this line, a program that would centre on "Humanitarian Law" should form the bed rock for public enlightenment campaign, like the campaigns on polio and Aids, among others. As Umezurike rightly noted:

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[4]. M A. Ajomo Proceedings of the 7th , 8th and 9th Conference of Nigerian Society of International Law 1975- 78 (Lagos: The Nigerian Institute of International Affair, 1981) P. 180

"It is now widely recognized that humanitarian law should be given the widest dissemination and publicity as are the reporting of breaches and verification of the observance of existing instrument"[5].

The values of Humanitarian Law should be taught in all post primary schools and made a compulsory course in tertiary institutions. Governmental and non Governmental Organizations (NGOs) should pursue an aggressive campaign of enlightening the populace on the dangers of war. This must involve all the citizenry as well as all forms; formal and informal. Of particular note, the military should be taught that what is important in war is not causing fatal injuries to the enemies but fighting with humility to save as many lives as possible so as to be seen and remembered by many as a hero.

Seen from whichever angle, International Humanitarian Law never envisaged deadly weapons of mass destruction. The danger of Snipers attacks in the Balkan war was caught by Newsweek Magazine when it stated in its January 1994 edition that "if the war continues for another 20 months, at the present rate, everyone in Sarajevo will have been wounded at least once[6]". A United Nations Conference in Geneva provided new rules specifically banning snipers attack in whatever form. But, banning snipers attack alone does not on its own preclude the chances of production of new deadly weapons of mass destruction, especially by military blocks; USA, France and China, themselves permanent members of the United Nations Security Council. It is a statement of fact that possession of nuclear weapon poses greater threat to international peace and security than any other consideration. Although except for the concept of "principle of humanity or principle of

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[5]. U O Umezuruike "the Present State of International Humanitarian Law," (Ibadan: Ibadan University Press, 1982) P. 2

[6]. Parker Maynas, "Blood bath in Bosnia", Newsweek Magazine (New York: January 1994) P. 37

immunity of civilians[7] which prohibits genocide in whatever form, and the Nuclear Weapons Convention which outlaw the use, possession, development, and transfer of nuclear weapons, as well as mandate internationally verifiable dismantlement of nuclear arsenals, there does not-exist an international legal regime banning weapons or missiles with sub-kiloton yield.

The United Nations in recent years, has concluded the treaty that bans further production and test of weapons of mass destruction. By this, it is explicitly made a criminal offence for nation - states to possess weapons in the kiloton range, but this should be extended to read that, those already in possession of these be destroyed under the supervision of the relevant United Nations agency or body. This is when the present call on North Korea and Iran to stop their nuclear enhancement program will be meaningful.

This, in turn, would mean a review of the United Nations Charter and position in a unipolar world. Having shifted from collective Security to collective defense under the expressions; Peace keeping, Peacemaking and Peace enforcement, it is high time these terms found expression in the Charter, to answer the call that:

"Suggest a serious review of the United Nations Charters especially Charter VII to embody a clear-cut definition of what constitutes threat to international peace and security. Breach of peace also requires clear understanding. The evidence of such a breach must have a meaning any reasonable man can understand to avoid manipulation by trigger happy office holders[8]".

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[7]. L Keri, War Crimes in Bonia Herzegovina, (New York Times Warner Publication, 1992) P.2

[8]. L Onoja Lawrence, Peacekeeping and International Security in a changing world 9Jos Mono Expression, 1997), P.279

It is strongly recommended that the current laws relating to armed conflict such as Additional Protocol 1 to the Geneva Convention and the Hague Conventions needs to undergo the difficult task of reforms and subsequent amendments so as to cope with the contemporary warfare.

Moreso, the use of drones in an armed conflict has posed a serious challenge in the contemporary warfare. It was never contemplated by the IHL. By its nature, when drones are deployed to targets, nobody knows its proper identity (whether man or woman and as such likely to be mistaken) and it is mostly used by the world super powers like, USA, Russia, China etc. Here, we recommend that a new Convention be quickly constituted to address the issue of the use of drones in warfare so as to regulate the use and determine when it can be deployed in an armed conflict.

During armed conflict, especially when the super powers are not contracting parties, they should remain neutral and eschew any clandestine support (atimes in exchange of Miners or oil) to either of the contracting parties. The result is that, the super power giving the said support will supply sophisticated weapons against the unpriviledge party. That is a way of creating more casualties during armed conflict. We recommend here that, that there should be review to the UN Charter so as to empower the Security Council to investigate and punish any state not being a contracting party but it is involved in supporting either of the contracting parties either by providing weapons or logistics to be used in battlefield during armed conflicts

Again, in the light of the analysis so far, it is recommended that emphasis should be placed more upon the prevention of an armed conflict from occurring because where there is no armed conflict, the issue of military objective, proportionality and direct part

in hostilities will not arise. Learned authors, jurist and the military should channel their energy much on prevention by fashioning out mechanisms that could encourage peace. One need to be reminded that war is war; not a chess game. There is always a price tag in human suffering. Rather than focusing on the unrealistic goal of eliminating civilian casualities, the goal should be on their mitigation (or avoidability)- understanding their inevitability and the reality of mistakes, accidents and just sheer bad luck

Both sea and land mines have caused significant destruction to lives and property. For instance, large areas of the Mediterranean, Adriatic and Pacific seas have been rendered non navigable while aquatic lives in much of "common heritage of mankind[9]" are under the threat of extinction. It is now estimated that 1,000 people are maimed or killed daily by land mines in 60 countries of the world. Against this disturbing backdrop therefore, there is the need for a moratorium on mines. This is why the historic Ottawa Conference of October 20,2016 is timely and a welcomed relief. The point however, is for the United Nations to initiate prompt implementation of the agreement. More importantly, the developed countries, particularly United States and UK should know that wiring the world definitely cannot be in their best interest.

[9]. M A Ajomo, Proceedings of the 7th, 8th and 9th Conference of Nigerian Society of International Law 1975-78. Lagos: The Nigerian Institute of International Affair, 1981 - 213.

BIBLIOGRAPHY

Books

Agwu, F. A. *World Peace through World Law; The Dilemma of the United Nations Security Council (Ibadan: Ibadan University Press, 2007)*

Ajomo, M. A. Proceedings of the 7th, 8th and 9th Conference of Nigerian Society of International Law 1975-78 (Lagos: The Nigerians Institute of International Affairs, 1981) P. 180.

Amos, G. *Targeting Killing as Active Self Offence* (Res International, 2004).

Best, G. *War and Law Since 1945*, (Oxford; Clarendon Press, 1994).

Blix, H. *Means and Methods of Combat in International Dimensions of Humanitarian Law, (Geneva: Paris Institute Henri – Dunant, unesco, 1988).*

Boivin, A. *The Legal Regime Applicable to Targeting Military Objectives in the Context of Contemporary Warfare*, 2006).

Bothe, M., Partsch, K.J. & Golf, W.A. New Rules for Victims of Armed Conflict: *Commentary on the two 1977 Protocols Additional to the Geneva Conventions of 1949*, (The Hague, Martinus Nishoff Publisher, 1982).

Bothe, M. *Targeting in A.E. WALL, ed, Legal and ethical lessons of NATO's Kosovo Campaign, Vol. 78, New Port, Rhode Island*, (U.S. Naval War College International Law Studies, 2002),

Bouvier, A. & Sassoli, M. *How does Law Protect in War*? *Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Geneva, International Committee of the Red Cross*, (1999)

Carl, W. *The Proliferation of Rights: Moral Progress or Empty Rhetoric*?, (1991).

Cassese, A. *International Law,(Oxford*, Oxford University Press, 2001).

Chavlotte, L. *Modern Technologies and Targeting under International Law*. (*Working Paper*, 2013)

Chisholm, H, *Bellingerency, Encyclopedia Britannica 3 (11th ed), (Cambridge: University Press 1911).*

Crawford, J W. III, *The Law of Noncombatant Immunity and the Targeting of National Electric Power Systems* (21 Fletcher Forum of Word Affairs, 1997),

David, E. *Principles de droit des Conflicts Armed*, (3rd ed, Bruxelles, Bruyland, 2002).

Dinstein, Y. *The Conduct of Hostilities under the Law of International Armed Conflict'*, (Cambridge: Cambridge University Press, 2004),

Distein, Y. *The Conduct of Hostilities under the Law of International Armed Conflict*, (Cambridge, Cambridge University Press, 2004)

Dormann, K. *Elements of War Crimes under the Rome Statute of the International Criminal Court*, Sources and Commentary, (Cambridge: Cambridge University Press, 2003)

Dormann, K. *Elements of War crimes under the Rome Statute of the International Criminal Court*, Sources *and Commentary*, (Cambridge: Cambridge University Press, 2003)

Doswald-Beek, L. *San Remo Manual on International Law Applicable to armed Conflicts at Sea*, (Cambridge: Cambridge University Press, 1995).

Fenrick, W. *The Law Applicable to Targeting and proportionality after Operation Allied Force*.(A view from the outside; 3 year back of International Humanitarian Law, 2003).

Findlay, T. *The Use of Force in UN peace operations (OUP, 2002) 4. W.J. Durch, M.L. England, the Purposes of Peace Operations* (center on International cooperation) 2009),

Fleck, D. (ed), *Hanbook of Humanitarian law in Armed Conflict*, (Oxford: Oxford University Press, 1995).

Fritz, M, *History of the Laws of War, in R. Bernhardt* (ed, Encyclopedia of Public International Law. IV, 1986)

Green, L.C. The Contemporary Law of Armed Conflict, Melland Schill Studies in Internation Law, (2nd ed, Manchester: Manchester University Press, 2000),.

Hampson, F. *Military Necessity*, (Crimes of War Education Project. 2011).

Hampson, F.J. Means and Methods of Warfare in the Conflict in the Gulf in P. Rowe, (ed), The Gulf War 1990-1991 in *International and English Law*, (Routhledge: London 1993)

Henckaerts, J.M. & Doswald-Beck, L. *Customary International Humanitarian Law, Volume 11: Practice, International Committee of the Red Cross*, (Cambridge: Cambridge University press, 2005).

Henckaerts, J.M. *New Rules for the protection of cultural property in Armed Conflict: The significance of the Second protocol to the 1954 Hague Convention for the*

protection of cultural property in the event of armed conflict,.(International review of the Red Cross 1999).

Henderson. I, *'The Contemporary Law of Targeting: Military Objectives, Proportionality and Precautionsin Attacksunder Additional Protocol 1 (Leiden Martinus Practice, (NewYork: Routledge 2009).*

J. Mac-Mahan, *The Ethics of killing in War*", (34 Philosophic 2006).

Jachec, N. *The Concept of Military Objectives in International Law and targeting Practice*, (2009)

Jacob, K. *International Humanitarian Law at the Beginning of the 21st Century*, (2002)

Kal-Shoven, F. & Zequeld, L. *Constraints on the Wagging of War*, (*3rd ed, Genev: International Committee of the Red Cross*, 2001)

Khadduri, M. *War and Peace in the Law of Islam*, (New York: NY, Handbook Exchange. 2006)

Lavoyer, J.P. "International Humanitarian Law, Protected Zones and the use of Force" in W. Biermann & M. Vadset, eds, UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia, (England: Ashgate, 1998).
Louis, H. *The Age of Rights(* 2nd ed. 1990).

Meron, T. *Human Rights and Humanitarian Norms as Customary law*, (Oxford: Clarendon Press, 1989).

Montgomery, T., "Legal Perspective from the EUCOM Targeting Cell" in H.E. *Wall, ed, Legal and Ethical Lessons of NATO's Kosovo Campaign",* vol. 78, (Rhode Island; U.S. Naval War College International Law Studies, (2002).

Murphy, J.F. "Some Legal (A Few Ethical Dimension of the Collateral Damage Resulting from NATO's Kosovo Campaign In A.E. *Wall, ed. Legal and Ethical Lessons of NATO's Kosovo Campaign",* Vol. 78, (Rhode Island: U.S. Naval War College International Law Studies, 2002).

Oeter, S. *Methods and Means of Combat in D. Fleck* (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, (Oxford: Oxford University Press, 1995)

Oji, E A *Responsibility for Crimes under International Law* (Lagos: OdadePublishrs, 2013)

Oppenheim, L O. *International Law: A Treatise, Vol. II, 7th (ed), London, Longmans, Green and Co, 519, cited in H.B Robertson Jnr. "The Principle of the Military Objectives in the Law of Armed conflicts" in M.N. Schmitt, ed, the Law of*

*Military Operations – Liber Amicorum Professor Jack Grunawalt, (*72 Newport, Rhode Island, U.S. Naval War College International Land Studies, 1998).

Oppenhein, L. *International Law: A Treaties Volume 111*, (7th ed, London: Longmass, Green and Co, 1995),.

Picket, J. *Development and Principles of International Humanitarian Law, Dordrect, Geneva*, (Martinus: Nijhoff Publishers, Henry Dunant Institute, 1985)

Picket, J. (ed) *Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* (Geneva, International Committee of the Red Cross, 1952),.

Pictet, J. *Development and Principles of International Humanitarian Law* (Geneva: Henry Dunant Institute1985).

Ramsbothan, O and Woodhouse, T. *Humanitarian Intervention in Contemporary Conflict* (Cambridge: Polity Press, 1999)

Roberts, A. *Failure in protecting the Environment in the 1990-91 Gulf War" in P. Rowe, ed, The Gulf War 1990-91 in International and English Law*, (Routledge: London, 1993).

Robertson, H B, Jr. *"The principle of the Military Objective in the Law of Armed Conflict" in M.N. Schmitd ed, The Law of Military Operation Liber Amicorum Professor Jack Grunawalt, vol. 72, Newport, Rhode Island*, {US naval War College International Law Studies, 1998)

Rogers, A.P.V. *Law on the Battlefield, Melland Schill Studies in International Law*, (Manchester; Manchester University Press, 1966).

Rowe, P. (ed) *The Gulf War 1990-1991 in International and English law*, (London: Routledge, 1993)

Sandoz, Swinarski & Zimmerman (eds) *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August* (ICRC Convention1987),

Sandoz, Y.*Role of the ICC in the Evolution and Development of International Humanitarian Law" in J. Hasse, E. Miller & P. Schneider,* (eds, Humanitarres Volkerecht, Nomos, Verlagsgesellschaft, Baden, 2001),

Sassoli, M. *Targeting: Scope and utility of the Concept of Military Objectives for the Protection of Civilians in Contemporary Armed Conflicts" in D. Wippman & M. Evangelista, eds, New Wars, New laws?* (Ardsley, New York, Transnational Publishers, 2005)

Shorma, S.K. *Reconsidering the Jus and Bellum/ Jus in bello Distinction, in C, Stahn and J.K Klefner (eds) Jus post Bellin Towards a Law of transition from conflict to peace* (Cambridge: University Press, Cambridge, (2006), 9.

Sperotto, F. *Targeting and Humanitarian Law*, (Current Issues. 2004).

Tsagourias, N. *Consent, Neutrality/impartiality and the use of Force in Peacekeeping, their constitutional Dimension (2007)11, J Conflict Security Studies* 465; *AJ Bellaming, P.O. Williams,* (Understanding *Peacekeeping* (2nd edn, Polity Press, 2010).

Solis, G D. *The Law of Armed Conflict ofInternational Humanitarian Lawin War, (*London: Cambridge University Press, 2006)

Umezuruike, U. O. *The Present State of International Humanitarian Law,* (Ibadan: Ibadan University Press1982)

Wanenburg, M. Accountability of Peace Support Operations (Geneva Martinus Nijoff 2004),

Yves, S. Humanitarian Law: *Priorities for the 1990s and Beyond in William Maley* (ed, Shelters from the Storm – Developments in International Humanitarian Law, 1995)

Journals

Abtahl, H. "The Protection of Cultural Property in Times of Armed Conflict: The practice of the International Criminal Tribunal for the Former Yugoslavia", (2001) 14, *Harvard Human Right Journal*, 1-32.

Adams, R. & Richard, G., "Documents on the Laws of War" (3rd ed, 2000)1, UK Ministry of Defence, *The Manual of the Laws of Armed Conflict*, (2004), 1-2.

Aldrich, G. "Prospects for United States Ratification of Additional Protocol I to the 1949 Geneva Conventions" (1991) 85-1, *America Journal of International Law*,. 1-21

A W Solf, The Status of Combatants in Non-International Armed Conflicts under Domestic Law and Transactional Practice, *American University Law Review*, (1983), Vol. 33, p. 53-56

Blix, H. "Means and methods of Comba in International Dimensions of Humanitarian law", *Geneva, Paris, Institute Henri-Dunant, UNESCO*, 1988, pp. 135-151.

Bonaparte in Geoffrey best, "The Restraint of War in Historical and Philosophical Perspective in Astria Delissen and Gervard Tanja (eds), Humanitarian Law of Armed Conflict: Challenges Ahead"*: Essays in Honour of First Kalshaven, (1991), 315.*.

Brown, B.L., "The proportionality Principle in the Humanitarian Law of Warfare Recent Efforts at Codification" (1977) 10 *Cornell International Law Journal*, pp. 134-155.

Carl, W. *The Proliferation of Rights: Moral Progress or Empty Rhetoric*?, (1991).

Cerone, J., "The Jurisprudential Contributions of the ICTR to the Legal Definition of Crimes against Humanity – The Evolution of the Nexus Requirement", *New England Journal of International and Comparative Law*, (2008), 14, 2, 191-201 at 192

Dasaussure, H., "Civilian Immunity and the Principle of Distinction", *American University Law Review*, (1982), 883 at 885.

Dormann, K. "Preparatory Commission for the International Criminal Court: The Elements of War Crimes Part 11, other serious violations of the laws and customs Applications in International and Non-International Armed Conflicts" 83:842 *International review of the Red Cross*, (2001), 461 at 475.

Fenrick, W.J, "Targeting and Proportionality during the NATO Bombing Campaign against Yugoslavia" (2001) 12 *European Journal International Law*, pp. 489.

Fenrick, W.J. *The Rule of Proportionality and Protocol 1 in Conventional Warfare*, (*Military Law Review,* 1982)

Findlay, T, "The Use of Force in UN Peace Operations" (OUP, 20042)4. W.j. Durch, M.L. England,

Fyodor, F. M., "Details of his professional life, cf. Vladimir v. Pustogarov, "Fyodor Fyodorovich Martens (1845-1909), a humanist of modern times", *International Review of Red Cross*, (1996), 312, 310-314.

Garden, J G. "Proportionality and Force in International Law", *American Journal of International Law*, (1993), 391 at 409.

Greenwood, C. "Customary International Law and the First Geneva Protocol of 1977 in the Gulf Conflict" in P. Rowe, ed, The Gulf War 1990-1991 in International and English Law, London, Routledge, 1993, pp. 63-88.

[

Greig, D. "The Underlying Principles of International Humanitarian law" (1985) 9, *The Australian Year Book of International Law*, Pp. 46-85.

Hampson. F.J. "Which dual use Civilian Objects are Legitimate Military targets and under what Circumstances? Working Paper, the Car Center for Human Rights Policy, Humanitarian Issues in Military Targeting, Workshop" *March 7-8, 2002, Washington D.C.*

Hays Parks, W. "The Protection of Civilian from Air Warfare" (1997) 27 *Israel Yearbook on Human Rights*, pp. 65-111.

Herby, P. & Nutten, "Explosive Reminants of War: Protecting Civilians through an Additional Protocol to the 1980 Convention on Certain Conventional Weapons" (2001) 83:841, *International Review of the Red Cross*, Pp. 195-2005.

Henckaerts, J.M. "New Rules for the protection ofcultural property in Armed Conflict: The Significance of the Second protocol to the 1954 Hague Convention for the protection of cultural property in the event of Armed conflict" (*International Review of Red Cross 1999).*

Holland, J., "Militry Objective and Collateral Damage their Relationship and Dynamics" *in YIHL, 7 2007, 35-78.*

Kalshoven, F, "Implementing Limitations on the Use of Force: The Doctrine of proportionality and Necessity" in Proceedings of the 86th Annual Meeting", *The American Society of International Law,* 1992, Pp. 40-48.

Kindred, H N., "The Protection of Peacekeepers', 33 Canadian Year Book of International Law 257, C. Greenwood, protection of Peacekeepers: The Legal Regime" *70 Uke Journal of Comparative and International Law*, (1996), 185.

Lavoyer, J.P. "International Humanitarian law, Protected Zones and the Use of Force" in W. Biermann & M. Vadset, eds, UN Peacekeeping in Trouble: Lessons Learned from the Former Yugoslavia", *Aldershot, England, Ashgate, 1998, pp. 262-279.*

Matherson, M.J. "The United States position on the Relation on Customary Law to the 1977 Protocols Additional to the 1949 Geneva Conventions" (1987) 2:2, *The American University Journal of International Law and Policy*, Pp. 419-431.

Meyer, J.M. "Tearing Down the Façade: A critical look at the current law on Targeting the will of the Enemy and Air Force Doctrine", *51 Air Force Law Review*, (2001), 143 at 179.

Montgomery, T., "Legal Perspective from the EUCOM Targeting Cell" in H.E. Wall, ed, Legal and Ethical Lessons of NATO's Kosovo Campaign", vol. 78, *Newport, Rhode Island, U.S. Naval War College International Law Studies*, (2002):. 189-197

Murphy, J.F. "Some Legal (A Few Ethical Dimension of the Collateral Damage Resulting from NATO's Kosovo Campaign In A.E. Wall, ed. Legal and Ethical Lessons of NATO's Kosovo Campaign", Vol. 78, *Newport Rhode Island, U.S. Naval War College International Law Studies,* 2002, Pp. 229-255.

Nils, M., "Keeping the balance between military Necessity and Humanity; a response to four critiques of the ICRS's interpretative guidance on the notion of direct participation in hostilities" New York. *University Journal of International Law and Politics*, (2010), 42, 831, 831-916 at 833.

Orakhelashivili, O., "Convention. The International between Jus and bellum and Jus in bello:, 12 *Journal of conflict and Security law*, (2007), 157.

Oswald, B M. "The Creation and Control of Places of Protection during United Nations Peace Operation" (2001) 83:844, *International Review of the Red Cross*, 1013-1035.

Ray, M., "International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience" (2000),

Robert, K. "Origin of the Twin Terms Jus ad bellum/Jus in bello" *International Review of the Red Cross Society.* (1997),

Rogers, A P V. "Conduct of combat ad risks run by the civilian population" . *The military law and law of war review, (1982), 293 at 310.*

Roseenblad, E. “Area Bombing and International Law” (1976) , *The Military Law and law of War Review*, 53-111

Rowe, P. “Kosovo 1999: The Air Campaign have the Provision of Additional Protocol I withstood the test?” (2000) 82:837 *International Review of the Red Cross,*147-164,

Solf, A. W, The Status of Combatants in Non – International Armed Conflicts Under Domestic Lawand TransactionPractice, *American University Law Review, (1983),33, 53-56.*

Sperotto, F, Targeting and Humanitarian Law, (Current Issues, 2004).

Tsagourias, N. Consent, Neutrality/Impatiality and the use of Force in peacekeeping, their Constitutional Dimension *(2007)11, J Conflict Security Studies 465.*

Wals Christopher, “Distinction: The Application of the Additional Protocols in the Theatre of War, in Asia Pacific” Yearbook of *International Humanitarian Law*, 2, 2006, 36-45

Reports/Other Documents:

Chavlotte, L. Modern Technologies and Targeting under Interntional Law. (Working Paper, 2013.

Final Report of the Committee Established to review the NATO Bombing Campaign against the Federal Republic of Yugoslavia, 1999.

Final Report of the US Department of Defence, Conduct of the Persian Gulf War: Final Report to Congress, 1991.

Hampson. F.J. “Which dual use Civilian Objects are Legitimate Military targets and under what Circumstances? Working Paper, the Car Center for Human Rights Policy, Humanitarian Issues in Military Targeting, Workshop” *March 7-8, 2002, Washington D.C.*

Report International Committee of the Red Cross, Conference of Government Experts on the Reaffirmation and Development of I*nternational Humanitarian Law Applicable in Armed Conflicts*, I, Report on the Work of the Conference (1972)

Oji, E.A The problem with International Humanitarian Law Distinguishing Targets in Armed Conflict. Available@http//www.ajolingo, 6th April,2017

Hampson, F. Military Necessity, (Crimes of War Education Project. 2011).

Ray, M., “International Humanitarian Law Training for Multinational Peace Support Operations – Lessons from Experience” (2000),

U.N Human Rights Committee, General Comments No. 29, State of Emergency U.N. Doc. CCPR/C/21/Rev. 1 (Add. 11, Aug. 31, 2001). This document replaced general comment, 5 adopted in 1981

Yves, S Humanitarian Law Priorties for the 1990Ss abnd Beyond in William Maley (ed) Shelters from the Storm- Developmment in International Humanitarian Law(1995)

Internet (Electronic Materials)

Bruno de Oliveira Biazatti, 'The Martens clause'; A Study of its Function and Meaning, http://www.cedin.com.br/wp-content/uploads/2014/2015/Artigo-Bruno-Bizzate-e-ustavo-vasconcellos-themarten-clause.pdf.. Accessed on 20 June 2016

Oji, E A, *The problem with international humanitarian law: distinguishing targets in armed conflict* available online www.ajol.ingo , 6th April, 2017.

GSDRC *International Legal Frameworks for Humanitarian Action*, Topic guide. Birmingham, UK: GSDRC, University of Birmingham, (2013). http://www.gsdrc.org./go/topic-guides/illfha. Accessed on 14 May, 2015.

Keany, T, "Collateral Damage in the Gulf War; Experience and Lessons". The Carr Center for Human Rights Policy, Understanding Collateral Damage, Workshop June 4-5, 2002 Washington DC, available online, http://www.ksq-hardvard-edu/cchvp/Useof Forcepapersshtml.

Rizer, K R., "Bombing Dual-Use targets: Legal, and Doctorial Perspectives" (2001) Air & Space power Chronicles, available online http//www.airpower.maxwell.af.millairchronicles/cc/rizer.html.

Schmitt, M.W. "The Impact of High and Low-Tech Warfare on the Principle of Distinction", Briefing paper, November 2003, Program on Humanitarian Policy and Conflict Research at Harvard University, pp. 1-16, Available online: http://www.inlresearch-org/portalihli/alabamn.ph.p.