

## THE PROBLEM WITH INTERNATIONAL HUMANITARIAN LAW: DISTINGUISHING TARGETS IN ARMED CONFLICT<sup>1</sup>

### Abstract

*The main object of international humanitarian law (IHL) is the amelioration of the effect of armed conflict on the populace. It seeks to accomplish this by establishing rules that ensure that objects the destruction of which will not give military advantage e are protected; thus, such objects are not to be targeted or destroyed. International Humanitarian Law thus requires parties to the conflict to distinguish these objects, and not to attack them. The problem in the application of this rule is in both the blurring of the nature of the conflict, the military or non-military character of persons involved in the conflict and, the deceitful blurring of the character of objects and the blatant disrespect of this rule. In this paper, we adopt the doctrinal research method which is a legal research approach. The purpose of this paper is to manifest the problem of the application of the principle of distinction; and how it affects the implementation of international humanitarian law. The paper finds that States in armed conflict have violated the principle of distinction as a war strategy; but in contemporary conflicts, the advancement in technological warfare has made it even impossible to apply this very essential rule of IHL. The paper concludes by suggesting ways to curb these affronts, thereby making international humanitarian law more effective.*

**Key words:** *Distinction, armed conflict, attack, proportionality and international humanitarian law (IHL)*

### 1. Introduction

Conflicts continue to ravage humanity; the news of war continues to overbear the news headlines. Realizing the impossibility of totally eliminating conflicts in international intercourse, the international community, overtime, developed rules to regulate the use of force in the relationship between states. International Humanitarian Law is a set of rules which seek for humanitarian reasons, and as much as is possible, to limit the effects of armed conflict. It is said to be the limit set by international law within which the force required to overpower the enemy may be used, and the principles there-under governing the treatment of individuals in the course of war and armed conflict.<sup>2</sup> The essential purpose of these principles is not to provide a code governing the game of war, but for humanitarian reasons to reduce or limit the suffering of individuals, and to circumscribe the area within which the savagery of armed conflict is permissible.

International humanitarian law applies only to armed conflict; it does not cover internal tensions or disturbances such as isolated acts of violence<sup>3</sup>. It binds a state with respect to the actions of its armed forces. It also applies to paramilitary groups, which are somehow attached to the armed forces of a State<sup>4</sup>. The law also applies to rebels or other non-State parties who also take up arms against their own or another State. Persons who international humanitarian law applies have the right to be considered as combatants, that is, to legally participate in hostilities and to invoke the protection of the Geneva Conventions.

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<sup>2</sup> J G Starke, *Introduction to International Law*, (Butterworths, 1984, 9<sup>th</sup> ed.) P. 525 cited in E A OJI, "Responsibility for Crimes under International Law", (Lagos, Odade Publishers, 2013)

<sup>3</sup> Mohd Akram, *International Humanitarian Law*, (Selangor Darul Ehsan: International Law Book Services, 2005) p. 3

<sup>4</sup> Peter J. Van Krieken, *Refugee Law in Context: The Exclusion Clause*, (The Hague: T.M.C. Asser Press, 1999) p.86

The entire body of international humanitarian law is intended, in times of armed conflict, to restrict the use of violence to the lowest level compatible with military imperatives (proportionate use of force and a prohibition on indiscriminate attacks). In addition, it stipulates that respect for the dignity of the individual, even an enemy, must be preserved in all circumstances. In order to achieve this, IHL has developed a set of basic principles intended to guide states and parties in armed conflict:

**The Principle of Humanity:**

The principle of humanity represents the main basis of international humanitarian law. It was the absence of humanitarian treatment of the victims of the battle of Solferino in 1859 that inspired the founder of the International Committee of the Red Cross (ICRC), Henry Dunant to start the movement, which culminated in the emergence of a body of international humanitarian law. The principle stipulates that, “all humans have the capacity and ability to show respect and care for all, even their sworn enemies.” It is the notion of humanity that separates humans from animals. This principle of humanity is expressed in the body of the main IHL instruments.<sup>5</sup>

**The Principle of Precaution:**

International Humanitarian Law requires an attacker to undertake “feasible precaution”, to avoid and/or minimize any incidental loss of civilian life, injury to civilians and damage to civilian objects.<sup>6</sup> Parties to a conflict are expected to do everything feasible to verify that targets are military objectives.<sup>7</sup> Parties must take all feasible precautions in selecting the means and methods they use, “with a view to avoiding, and in any event to minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects.”<sup>8</sup> Article 57(1) of the Additional Protocol I provides that in the conduct of military operations, constant care should be taken to spare the civilian population, civilians and civilian objects. To buttress the importance of this rule, where on advancement to attack, it becomes apparent that the attack may cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, the party must cancel or suspend the planned attack.<sup>9</sup> Each party to the conflict is expected to give effective advance warning of attacks which may affect the civilian population, unless the circumstances do not permit.<sup>10</sup> This obligation to take precaution is now included in a large number of military manuals.

**The Principle of Military Necessity:**

Military necessity serves in international humanitarian law as a justification for attacks on legitimate military targets that may have adverse, even terrible, consequences for civilians and civilian objects. The principle of necessity or military necessity requires that military action be both necessary for the achievement of a legitimate military purpose and not otherwise prohibited by international humanitarian law. The type and degree of force used must be necessary for the achievement of a legitimate military goal.<sup>11</sup> In armed conflict, the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict,

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<sup>5</sup> St. Petersburg Declaration 1868, paragraph 1, the 4<sup>th</sup> Hague Conference, Preambular paragraph, The Geneva Conventions of 1949, and their Additional Protocols.

<sup>6</sup> ICRC Customary International Humanitarian Law Study, Rule 15

<sup>7</sup> *Ibid*, Rule 16

<sup>8</sup> *Ibid*, Rule 17. See also, Convention Relative to Certain Restrictions with Regard to the Exercise of the Right of Capture in Naval War 1907, Article 2(3) which imposes a duty on the Commander of a Naval Force to take all due measures in order that the town may suffer as little harm as possible.

<sup>9</sup> ICRC Study *Op cit*, Rule 19.

<sup>10</sup> *Ibid*, Rule 20. Also Additional Protocol I, Article 57(2)(c).

<sup>11</sup> N Lelzer, *Targeted Killing in International Law* (New York, Oxford University Press, 2008) 289

and acts not directed towards a specific military objective but to civilians or civilian objects is an indiscriminate attack.<sup>12</sup>

### **The Principle of Proportionality:**

The principle of proportionality prescribes that parties to armed conflict do not inflict collateral damage that is excessive in relation to the military advantage they seek. It requires those involved to take every possible precaution with respect to the means and methods of warfare used so as to avoid or minimise incidental loss of life, injury to civilians and damage to civilian objects. The rule of proportionality is defined in Article 51 (5)(b) of Additional Protocol I. It states that violation of proportionality will be an attack which may be expressed to cause incidental losses of 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. Article 6(2)(b)(i-vi) of the Statute of the International Criminal Court criminalises such acts of intentional and indiscriminate attacks at civilians and civilian objects that are excessive.

### **The Principle of Distinction:**

The principle of distinction is arguably the most basic principle that determines the feasibility of the other principles of IHL. This principle requires that during armed conflict, parties distinguish, and make distinguishable all non-military targets. These would include civilians (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.

## **2. Statement of Problem**

The whole intention of international humanitarian law is to reduce the effect and consequences of armed conflict. To achieve this, IHL requires that the principles of humanity, proportionality, necessity and precaution stated above must guide the actions of parties to armed conflict. However, as shall be discussed, the success of the application of these principles depends largely on the principle of distinction. It is in the distinction of the nature of the conflict, that appropriate rules can be applied. It is in the ability to distinguish combatants from non-combatants that soldiers in conflict are able to apply proportionality, humanity, precaution and determine the necessity to attack or not.

The problem lies in first, the party to the conflict accepting to comply with this rule and distinguishing its populace, and not abuse the principle to its advantage and disadvantage of its opponent; and in second, the other party not disregarding the distinguished targets, in total disregard of the principle of IHL. The third, and perhaps most worrying of the problems, is the inability of both parties to distinguish targets because of the nature and methods adopted. The ability of State Parties to abide by the principles of IHL and the international judicial institutions to hold both states and individuals responsible for breaches is significantly dependent upon the clarity and relevance of the distinction principle. This paper exposes these problems in applying the principle of distinction and seeks to find a standard for distinguishing what may appear, “undistinguishable”.

## **3. The Principle of Distinction in Armed Conflict**

The principle of distinction is basic to the fulfillment of the aspirations of IHL. As Fenrick put it, “military commanders are obligated to distinguish between civilian objects and military objectives and to direct their operations against military objectives”,<sup>13</sup> This rule is made to

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<sup>12</sup> <http://www.icrc.org>; accessed 10/1/13

<sup>13</sup> W Fenrick, “The Law Applicable to Targeting and Proportionality after Operating Allied Force: A View from the Outside: 3 *Yearbook of International Humanitarian Law* (2003) 53 at 66

protect civilians who do not take part in hostilities as their attack and destruction will not guarantee any form of military advantage. Thus, if a civilian takes direct part in hostility, he loses the protection guaranteed by IHL.<sup>14</sup>

The obligation to distinguish combatants from non-combatants has historically been recognized among cultures and nations. As early as the 2<sup>nd</sup> Century BC, Egypt and Sumeria had devised a complex set of rules governing the resort and conduct of war, which included the obligation to distinguish combatants from non-combatants<sup>15</sup>. In the 5<sup>th</sup> Century BC, Sun Tzu, the prominent Chinese Military General, wrote, “Treat the captives well and care for them ...generally the best policy is to take a state intact, to ruin it is inferior to this.”<sup>16</sup> Grotius, the father of international law had written that, “by the law of war, those who have taken up arms should pay the penalty, but the guiltless should not be injured.”<sup>17</sup> Just about the same time, Francis Lieber, a General in charge of Union Forces during the US civil war, was commissioned to propose a Code of Regulations governing armed conflict for the US soldiers. The Lieber Code, which was complete, humane and comprehensible, quickly became an authoritative text, impacting military codes around the world. The principle of distinction was codified as Article 22 of the Code. While the principle of distinction had long been recognised before the Lieber Code, it served as the basis for institutionalising the protection of non-combatants.

Significantly also, the principle was expressed in the St. Petersburg Declaration 1868 that, “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy.”<sup>18</sup> In other words, no military necessity justifies direct attacks on civilians or civilian objects. Thus, the principle of distinction was recognized long before it was codified in the 20<sup>th</sup> century treaties. Several key provisions of The Hague Regulations annexed to the 1907 4<sup>th</sup> Hague Convention, the 1949 Geneva Conventions and their Additional Protocols of 1977 enshrine the principle of distinction between civilians and civilian objects and military objects. Article 25 of The Hague Regulations prohibits the attack or bombardment, whatever means, of town, villages, dwelling or buildings which are undefended. Article 27 states:

In sieges and bombardments all necessary steps must be taken to spare, as far as possible, buildings dedicated to religion, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not being used at the time for military purposes.<sup>19</sup>

The whole thrust of the 4<sup>th</sup> Geneva Convention of 1949 is towards providing for the protection of civilians and civilian objects. Part II concerning the General Protection of Populations 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 with article 19 stipulating the condition on which such protection terminates.

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<sup>14</sup> Additional Protocol I, Articles 48, 51, 52, and 57; Additional Protocol II, Articles 13 – 16.

<sup>15</sup> J Picket, *Development and Principles of International Humanitarian Law* (Nijoff Publishers: Geneva 1985) 7-8

<sup>16</sup> S Tzu, *The Art of War* (New York, Oxford University Press, 1963) 75

<sup>17</sup> H Grotius, *The Law of Peace* (1625)

<sup>18</sup> Declaration Renouncing the Use, in Time of War, of Explosives Projectiles under 400 Grammes Weight, Reprinted in A Roberts and R Guelff, *Documents on the Laws of War* (2<sup>nd</sup> edn, Oxford, Clarendon Press, 1989) 30-31

<sup>19</sup> Regulations Respecting the Laws and Customs of War on Land, Annex to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land

Additional Protocol I augments these provisions of the Geneva Convention. Article 48 defines and codifies the principle of distinction. It states:

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.

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. In particular, attempts to shield, favour or impede military operations by mixing civilians with military objects shall not protect such civilians or objects.

The definition of the principle of distinction is considered customary international law, despite the fact that a number of states have not ratified Additional Protocol I.<sup>20</sup> Resolution XXVIII adopted by the 20<sup>th</sup> International Conference of the Red Cross and the Red Crescent, held in 1965 in Vienna, also declared that all governments and other authorities responsible for action in armed conflict should, *inter alia*, conform to the principle that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the effect that the later be spared as much as possible.

Case law has adopted and applied the principle of distinction in armed conflict. In its advisory opinion in the *Nuclear Weapons case*, in 1996,<sup>21</sup> the International Court of Justice(ICJ) considered the principle of distinction between combatants and non-combatants to be one of the “cardinal” principles contained in the texts constituting the fabric of humanitarian law and also one of the ‘intransgressible’ principles of international customary law. In its judgment in the *Bla’ski’c case* in 2000, the International Criminal Tribunal for the former Yugoslavia (ICTY) held that “the parties to the conflict are obliged to attempt to distinguish between military targets and civilian person”.<sup>22</sup> The ICTY further has recognised and affirmed the customary law status of Article 56 of API in a number of cases, including *Prosecutor v. Kupreskic*,<sup>23</sup> *Prosecutor v. Galic*<sup>24</sup> and *Prosecutor v. Dragomir Milosevic*<sup>25</sup> affirming the obligation on the parties to a conflict to remove civilians, to the maximum extent feasible, from the vicinity of military objectives and to avoid locating military objectives within or near densely populated areas. In the case *Concerning the Events in La Tablada*, the Inter American Commission on Human Rights underlined the obligation of the contending parties, on the basis of common article 3 of the 1949 Geneva Conventions and customary principle applicable to armed conflicts, “to distinguish in their targeting between civilians and combatants and other lawful military alternatives”.<sup>26</sup>

State practice supports the existence of this principle. For instance, the US Air Force Pamphlet states that “in order to insure respect and protection for the civilian population and civilian

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<sup>20</sup> See ICRC Customary International Humanitarian Law Study.

<sup>21</sup> ICJ Advisory Opinion of 8<sup>th</sup> July 1996 Ss78-79

<sup>22</sup> Judgment of 3 March 2000 §.180

<sup>23</sup> Case No. IT-95-16T, Judgment, 524 (ICTY January 14, 2000)

<sup>24</sup> Case No. IT-98-29-T, Judgment 61 (ICTY December 5, 2003)

<sup>25</sup> Case No. IT-98-29/I-T, Judgment 949, (ICTY December 12, 2007)

<sup>26</sup> Case 11,137 (*Argentina*), Report, 18 November 1997, §177

objects, the parties to the conflict must at all-time distinguish between the civilian population and combatants.<sup>27</sup> Section 86 of the UK Military Manual (1958) refers to “the division of the population of a belligerent State into two classes, namely, the armed forces and the peaceful population”. Also, the Nigerian Military Manual (1994) in page 41 provides that the main aim for all commanders and individual combatants is to distinguish combatants and military objectives from civilian persons and objects at all times. Ireland’s Geneva Conventions Act of 1962 as amended, penalises any ‘minor breach’ of Additional Protocol I, including violations of Article 48 of the Additional Protocol I.<sup>28</sup> In the *Kassem case* of 1969, Israel’s Military Court at Ramallah recognised the immunity of civilians from direct attack as one of the basic rules of international humanitarian law.<sup>29</sup>

#### **4. Objects of Distinction in International Humanitarian Law**

Various forms of distinction are required in the application of IHL. First is the distinction of the conflict, to determine the regime of IHL that is to be applied, and second, the civilian and military targets in the armed conflict.

##### **4.1 Distinction of Conflicts: International and non-international Armed Conflicts**

It is important to distinguish between an international armed conflict and a non-international armed conflict. This is because the consequences and application of the law of international humanitarian law differ in relation to the type of armed conflict. A non-international armed conflict is distinct from an international armed conflict because the legal status of the entities opposing each other, that is, the parties to the conflict are not sovereign states, but the government of a single state in conflict with one or more armed factions within its territory<sup>30</sup>. All four Geneva Conventions of 1949 define an international armed conflict as one between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.<sup>31</sup> The Geneva Conventions also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if it meets with no armed resistance.

The problem of distinction here, is that an otherwise appearing internal armed conflict may become international if alongside an internal armed conflict, some of the participants act on behalf of another State. In the trial judgment in the *Prosecutor v. Dusko Tadic*<sup>32</sup> the International Criminal Tribunal for the former Yugoslavia (ICTY) ruled that one could only infer the existence of an international armed conflict in this case if one could establish that some of the participants in a seemingly internal conflict were in fact, ‘effectively controlled’ by another State. According to the Trial Chamber, it was necessary to prove that the rebel group was, for legal purposes, an organ of the government on whose behalf it was acting. The Appeal Chamber however rejected the requirement of ‘effective control’ over forces not its own, in order to be considered as the States’ agents. Instead, it found that the extent of the requisite state control varies. The control required by international law may be deemed to exist when a State has a role in organizing, coordinating or planning the military actions of the military group in addition to financing, training and equipping or providing operational support to that group. Acts performed by the group or members thereof may be regarded as acts of *de facto*

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<sup>27</sup> US Air Force Pamphlet (1976), S, 5-(3(b))

<sup>28</sup> Ireland’s Geneva Conventions Act (as amended), section 4(1) and (4)

<sup>29</sup> *Military Prosecutor v. Omar Mahmud Kassem and Others*, Judgment, 13 April 1969, published in International Law Report, Vol 42, 1971, p. 470

<sup>30</sup> Commentary to the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Geneva: ICRC, 1987, para. 4339 Cited in Van Krieken, *Ibid.* p.87

<sup>31</sup> Common Article 2 to the Geneva Conventions

<sup>32</sup> Case No. IT-1-A, Judgment of the Appeals Chamber, 15 July 1999, para 84

State organs regardless of any specific instruction by the controlling state concerning the commission of each of those acts.<sup>33</sup> Where the armed conflict is of a non-international nature, Common Article 3 will apply and Additional Protocol II.

The Geneva Conventions and Protocol I define a certain number of violations as “grave breaches”<sup>34</sup> and establish the principle of compulsory universal national jurisdictions over persons who have allegedly committed such crimes. It is to be noted that Protocol II is silent on the issue of grave breaches or criminalisation of such violations. This would imply that where one infringes the grave breaches provisions of the other conventions, a crime is committed, but where the same conduct is perpetrated within an internal conflict, then no crime is committed. Considering that most conflicts today are internal, it will encourage impunity by Governments. To forestall this, attempts have been made by the jurisprudence of international criminal tribunals and writers to criminalise and internationalise internal atrocities.

The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in its decision addressed this issue.<sup>35</sup> In order to try Dusko Tadic for grave breaches, it was crucial for both the Trial and the Appeals Chambers to qualify the conflict to which Tadic committed his crimes as international<sup>36</sup>. In *The Prosecutor v. Ivica Rajic*<sup>37</sup> (aka. *Viktor Andric*), because the crimes alleged by the prosecutor were directed against civilian persons and property, the Geneva Convention relevant to the case was Geneva Convention IV. Based on the provisions of this Convention, the Trial Chamber first had to consider whether the prosecution had shown sufficiently that the alleged attack on Stupni Do took place during an international armed conflict.

The Chamber found that, for the purposes of the application of the grave breaches provisions of Geneva Convention IV, the significant and continuous military action by the armed forces of Croatia in support of the Bosnian Croats against the forces of the Bosnian Government on the territory of the latter was sufficient to convert the domestic conflict between the Bosnian Croats and the Bosnian Government into an international one. There is no moral justification, and no truly persuasive legal reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars.

There exists, at present, a corpus of customary international law applicable to all armed conflicts irrespective of their characterization as international or non-international armed conflicts. This corpus includes general rules or principles designed to protect the civilian population as well as rules governing means and methods of warfare.<sup>38</sup>

## **4.2 Combatants and Non-Combatants**

The whole essence of humanitarian law is that force may be employed only against those persons who themselves use or threaten to use force. Such persons taking part in war or hostilities are referred to as ‘combatants’. Those who are not combatants are, in so far as is possible, to be spared from attack or violence. This limitation seeks to achieve a reasonable

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<sup>33</sup> E A Oji, “*Responsibility for Crimes under International Law*”, (Lagos, Odade Publishers, 2013)

<sup>34</sup> First Geneva Convention, Art. 50, 2<sup>nd</sup>, Art. 51; 3<sup>rd</sup> Art. 130; 4<sup>th</sup> Art. 147 and Protocol I, Articles 11(4) 85 and 86.

<sup>35</sup> *Prosecutor V. Tadic* ICTY Appeals, Chamber 15/7/99

<sup>36</sup> Marco Sassoli and Laura M. Olson, “*The Judgment of the ICTY Appeals Chamber on the merits in the Tadic Case*” (September, 2000), IRRC, vol. 82 No. 839 p. 735 - 736

<sup>37</sup> Case No. 16 2, ICTY

<sup>38</sup> Paragraph 127, Decision of the Appeals Chamber in *Prosecutor V. Martić* (supra)

balance between the necessary destruction of the military resources of the enemy in time of war and the equally compelling need not to cause the unnecessary suffering, destruction, and loss of life which confer no clear military advantage.

According to the Third Geneva Convention, combatants are members of the armed forces of a party to the conflict as well as members of the militias or volunteer-corps forming part of the armed forces. It includes members of other militias and member of other volunteer-corps including those of organised resistance movements, belonging to a party to the conflict.<sup>39</sup>

Rule 3 of Customary International Humanitarian Law stated that all members of the armed forces of a party to the armed conflict are combatants, except medical and religious personnel. Article 43 of the Additional Protocol I in the same vein provide that:

The armed forces of a party to a conflict consist of all organised armed forces, groups and units which are under a command responsible to that party for the conduct of its subordinates, even if that party is represented by a government or an authority not recognised by an adverse party.

Article 44 of the same Protocol I provides that any combatant who falls into the power of an adverse party shall be a prisoner of war. This suggests that Article 43 defined a combatant. The importance of distinguishing a combatant from a non-combatant has very serious implications. First, it enables IHL achieve its purpose, and second, it affects the status and protection available to persons in times of armed conflict. Non-combatants are the largest category of persons who fall under the safeguards of IHL. Non-combatant personnel, who are not to be made the objects of attack, consist of two basic categories:

- a) within the armed forces, medical personnel and chaplains are regarded as non-combatants,<sup>40</sup>
- b) within the civilian population, non-combatants consist of all those persons who do not take up arms and do not engage in, or actively assist in the use of force against the adversary, and all persons who do not belong to one of the categories of persons referred to in article 4 (A) (1)-(3) and 6 of the Third Geneva Convention.

Thus IHL require the distinguishing of combatants from non-combatants. Whereas combatants are legitimate targets, non-combatants are not. The problem is ability to make this distinction in contemporary warfare.

### **4.3 Civilian and Military Objects**

During armed conflict, only military objects may be targeted. Rule 9 of the Customary International Humanitarian Law states that civilian targets are all objects which are not military objectives. Military objectives are defined by Article 52(2) of Additional Protocol I as those objects which by their nature, location, purpose or use make an effective contribution to military advantage and whose total or partial destruction, capture or neutralisation in the circumstances prevailing at the time, offers a definite military advantage. Therefore, any attack not directed on an object which by its nature, location, purpose or use or which partial or total

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<sup>39</sup> GCIII, Article 4A (2)

<sup>40</sup> GCI, articles 24-32.



destruction, capture or neutralisation offers no military advantage is an attack on a civilian object. As is already noted, the problem with the implementation of this principle is in the definiteness in the description of the objectives.

Be that as it may, the problem with distinction is that the methods and means of warfare have drastically changed; blurring the distinction and the ability to distinguish conflicts, combatants and objectives in warfare. Tackling these problems will enhance the application of the principles of international humanitarian law.

## **5. Problems Confronting Distinction**

### **5.1 Asymmetrical Technological Advantages**

In situations of armed conflict, where one party to the conflict has asymmetrical technological advantage, it drives the disadvantaged side to adopt means and methods of its own that violate prescribed norms. Combating asymmetrical opponent involves avoiding enemy strengths, leveraging one's advantages, and exploiting enemy weaknesses and vulnerabilities. Such have occurred in Afghanistan and Iraq where US technological advantages drive the other party into adopting unlawful means of warfare.

### **5.2 The Civilianisation of the Military**

The involvement of civilians in military or former military tasks is making it difficult to determine the status of individuals. Civilians are increasingly being recruited to design, manufacture, maintain and operate several weapons systems and are involved in some tasks that could be considered as direct participation in hostilities when carried out in the context of an armed conflict. The Israeli Supreme Court in the 2006 case of *The Public Committee against Torture in Israel v. The Government of Israel*<sup>41</sup> identified certain categories of persons who could be considered as taking direct part in hostilities. These include:

- a) persons collecting intelligence on the armed forces;
- b) persons transporting unlawful combatants to or from the place where hostilities are occurring; and
- c) persons who operate weapons that unlawful combatants use, or supervise their operation, or provide service to them.
- d) persons involved in transporting ammunition to places for use in hostilities.

In contemporary armed conflict, civilians have been known to have been used to perform such activities.

### **5.3 The Privatisation of Military**

Many formerly military functions are being privatised. The government and sometimes the armed forces, enter into contracts with defence contractors, which provide an array of services. Some of the contractors may be civilians and former military personnel. According to Ricks:

Faced with the need to cut personnel, and seeking to preserve its war-fighting 'tooth', the post-cold war military has sought to privatize much of its support 'tail'. This privatisation, which promises to reduce the number of soldiers in civilian occupations, is occurring not only on

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<sup>41</sup> (2006) HCJ 769/02

US soil, where maintenance work is being farmed out to corporations, but also in other countries where US soldiers operate.<sup>42</sup>

This again, blurs the distinction of combatants and civilians, and military and civilian objectives.

#### **5.4 Use of Dual-Use Items**

Another problem with distinction in IHL is that many items used in warfare are dual-use, that is, they have both military and civilian purposes. This fact makes it difficult for combatants to distinguish weapons, weapon components and other military items from civilian equivalents. This affects the ability to distinguish civilian and military objectives.

#### **5.5 Use of Human Shield**

Human shielding is the practice whereby civilians seek to protect, either voluntarily or otherwise, military objectives from attack by gathering at the site of the objective and using their civilian immunity to deter attacks. Parties in armed conflict have employed both voluntary and involuntary human shields, feigned civilian status or civilian objectives in order to conduct surprise attacks, and exploited locations enjoying special protection under IHL. Such use of civilians to blur the military character of combatants and military objectives creates problems in the application of IHL.

Multiple provisions of the Geneva Conventions and Additional Protocol I prohibit the use of civilian population as a shield.<sup>43</sup> In *Prosecutor v. Karadzic & Mladic*,<sup>44</sup> The ICTY condemned the use of UN peacekeepers as human shields, finding that the accused physically secured or otherwise used UN peacekeepers as human shields to render their military locations immune from further NATO air strikes. In *Prosecutor v. Aleksovski*<sup>45</sup> the same ICTY characterised human shielding as “an outrage upon personal dignity”.

#### **5.6 Cyber Warfare**

Cyber warfare or a cyber-attack is a cyber-operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects<sup>46</sup>. Some military manuals regard cyber operations executed in the context of an armed conflict as subject to the laws of armed conflict<sup>47</sup>. Indiscriminate launch of computer attacks is the norm in cyber warfare and it is without distinction as to either friend or foe; thus beating the rule on distinction.

#### **5.7 Terrorist Acts of Combatants**

International humanitarian law outlaws terrorism. Article 33 of Geneva Convention IV prohibits “all measures of intimidation or of terrorism”. Article 4(2)(e) of Additional Protocol II prohibits acts or threats of violence the primary purpose of which is “to spread terror” among the civilian population. Terrorists’ actions are taken in total disregard to the principle of distinction.

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<sup>42</sup> T. Ricks, “The Widening Gap between the Military and Society”, (July 1997) *The Atlantic Monthly* <http://www.theatlantic.com/issues/97july/milisoc.htm>. Access 29/2/2013

<sup>43</sup> Additional Protocol I, Article 51(7)

<sup>44</sup> Case No: IT-95-14-A

<sup>45</sup> Case No: IT-95-14-1

<sup>46</sup> E Crawford, “Virtual Battlegrounds: Direct Participation in Cyber Warfare”, *Journal of Law and Policy for the Information Society*, 2007

<sup>47</sup> Rule 20 of the Tallin Manual

### **5.8 Use of Drones in Warfare**

Drone is the name given to an unmanned aerial vehicle (UAV). It is an aircraft without a human pilot aboard and is controlled either autonomously by onboard computers or by a remote control of a pilot on the ground or in another vehicle.<sup>48</sup> The military use drones for surveillance, to drop bombs in combat areas and other items. The advantage of employing drones in armed operation is that no foot soldier's life is lost as it is most times controlled from the station. A disadvantage is that carefree handling of the drones can result in harms or injury to the civilian populace which would amount to a breach of the doctrine of distinction.

### **5.9 Disguising of Combatants and Military Objectives**

IHL has stated who and what is to be targeted and not. However, combatants in acts of deceit, disguise as civilians; use civilian objectives for military objectives to gain military advantage. It is precisely because of the lack of boundaries between conflict areas and civilian areas; between those who are actively participating in hostilities and those who are not, that today's conflict pose particular challenge for distinction.<sup>49</sup> The emblems of the International Committee of the Red Cross and Crescent have also been abused.

### **5.10 Non-Ratification of the Protocol**

The principle of distinction is established and provided for in the Additional Protocol I of the Geneva Conventions; however, some countries have not ratified the Protocol and therefore cannot be bound by its provisions. This is a problem for the implementation of the principles enshrined within.

## **6. Conclusion**

It is often said that a problem identified is half solved. We have found in this paper the very laudable objectives of international humanitarian law, to, for purposes of humanity and respect for human life, reduce the effect of armed conflict. This cannot be done effectively without first, the possibility of distinguishing targets. Combatants only are to be targeted; what then happens where combatants appear in civilian apparel to attack. Civilian objectives are not to be targeted; what of where civilian objectives become militarised? These questions resound and are made manifest by the itemised problems with the principle of distinction. Solution for this problem lies heavily with the self-discipline of the military and of states. States must ensure that their combatants who violate the principle of distinction, by blurring the distinctions are prosecuted. Accountability for breach of IHL will curb its breach.

More still, accountability should be extended to states, making them responsible for breaches of IHL through the blurring of targets. Before applying the sledge hammer of accountability through prosecution, States must ensure that their military are properly trained and brought to the knowledge of the norms of international humanitarian law. States should, in a Convention, delimit and specify civilian roles in armed conflict. The civilianisation of the military should be controlled; in such a manner that it becomes apparent, what roles are and can be performed by civilians. The use of Autonomous Weapon System (AWS) and drones should also be controlled and regulated. Where permitted, operators must be clearly designated 'combatants', and subject of attack. Dual-use facilities should be clearly distinguished with identifiable marks. Member states to the various IHL instruments should work out a legal framework that defines a civilian, for all intents and purposes. Finally, States who have not ratified the Additional Protocol I should be encouraged to do so, to enable it achieve the near universal application of the Geneva Conventions.

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<sup>48</sup><http://www.telegraph.co.uk/news/uknews/defence/9552547/the-air-force-men-who-fly-drones-in-Afghanistan-by-remote-control.html>, accessed 29/2/2013

<sup>49</sup> L Blank, "Taking Distinction to the next level: Accountability for fighters' failure to distinguish themselves from civilians (2012) 46 *Valparaiso University Law Review*, 774