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**CRITICAL ANALYSIS ON THE RIGHTS OF COMBATANTS
UNDER INTERNATIONAL HUMAN LAW**

**Dissertation submitted in partial fulfillment of the
Academic requirements for the award of Bachelor's
Degree in Law.**

By

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Kigali, August 2024

DECLARATION

I NTEZIRYAYO Innocent hereby declare that this dissertation entitled “**Critical analysis on the rights of combatants under international human law**” is my own work and it has never been submitted at Kigali Independent University ULK or in any other High learning Institution in Rwanda and elsewhere for the award of any degree. Wherever other works have been used, references are given in footnotes and a bibliography is presented.

NTEZIRYAYO Innocent

Signature:.....

Date:...../...../2024

APPROVAL

This is to approve that the research entitled “**Critical analysis on the rights of combatants during different circumstances under humanitarian law**” has been undertaken by NTEZIRYAYO Innocent under my supervision as a partial fulfillment of the academic requirements for the award of Bachelor’s Degree with Honors in Law in Kigali Independent University ULK. In my opinion, the work is worthy for public presentation.

Supervisor: Lecturer Bazungu Innocent

Signature:.....

Date...../...../2024

DEDICATION

To my Almighty God

To my Parents;

To my brothers and Sisters;

To my relatives and Friends.

ACKNOWLEDGEMENT

I want to thank the Almighty God for life, health and light of reason throughout these years. I similarly thank Good for the strength, fortitude and inspiration that enabled me to complete, not only this dissertation, but the entire LLB Degree. For sure things have not been easier to me and the completion of this work would not have been possible without the material and moral support, cooperation, kindness and guidance of a number of people who deserve special thanks.

My sincere gratitude is extended to the entire administration of Kigali Independent University ULK for providing to me an opportunity to expand my thoughts and my horizons in this amazing program. I am especially grateful to my supervisor **Mr. Bazungu Innocent** who with limited time invested a large amount of effort in guiding me through the entire work. His criticisms improved the focus of this dissertation and clarified some of the vague and uncoordinated sentences. Without him, this work would not fit for academic consumption.

NTEZIRYAYO Innocent

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LIST OF ABBREVIATIONS AND ACRONYMS

Art	: Article
Dr	: Doctor (PHD Holder)
DRC	: Democratic Republic of Congo
Ib	: Ibidem
ICC	: International Criminal Court
Id	: Idem
IHL	: International Humanitarian Law
ILC	: International Law Commission
ILO	: International Labour Law
IOM	: International Organization for Migration
ISIL	: Islamic State of Iraq
LLB	: Law Level Bachelor
NGO's	: Non-Governmental Organizations
No	: Number
P.g	: Page
POW	: A prisoner of war
ULK	: Université Libre de Kigali
UN	: United Nations
UNICEF	: United Nations Children's Fund
UNODC	: United Nations Office on Drugs and Crime
USA	: United States of America
WHO	: World Health Organization

GENERAL INTRODUCTION

The rules of international humanitarian law (IHL) try to regulate conflict to minimize human suffering, it reflects the balance between the military necessity in a conflict and the needs for humanitarian protection, this part of general introduction is made to demonstrate the background on the presented topic and to show the its implication, the current problem and its questions as well as the technics and methods that were used during the entire research.

1. Background of the study

In recent decades, armed conflict has blighted the lives of millions of civilians. Serious violations of international humanitarian and human rights law are common in many armed conflicts. In certain circumstances, some of these violations may even constitute genocide, war crimes or crimes against humanity¹. In the past 20 years, Governments, rebels, politicians, diplomats, activists, demonstrators and journalists have referred to international humanitarian law and human rights in armed conflicts. They are regularly referred to in United Nations Security Council resolutions, in United Nations Human Rights Council discussions, in political pamphlets of opposition movements, in reports of non-governmental organizations (NGOs), in the training of soldiers and in diplomatic discussions. International human rights law and international humanitarian law are now important parameters for many military commanders, advised on the ground by lawyers. Finally, they are often referred to by defense lawyers and prosecutors in international and a still limited extent domestic tribunals, and form the basis for well-reasoned verdicts².

International human rights law and international humanitarian law share the goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council have considered that, in armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. Although different in scope, international human rights law and international humanitarian law offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in

¹ Ninth periodic report of the United Nations High Commissioner for Human Rights on the situation of human rights in the Sudan”, 20 March 2008. Available from www.ohchr.org/EN/Countries/AfricaRegion/Pages/SDPeriodicReports.aspx

² international legal protection of human rights in armed conflict, New York and Geneva, 2011.p 114-117

the conflict. Indeed, as has been recognized, inter alia, by international and regional courts, as well as by United Nations organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection of the rights of combatants in war like other people³. The construction of International Humanitarian Law and the norms regarding protection of prisoners of war have evolved as a reaction to the horrors of war. After World War II and the following war on terrorism, the notion of POWs has been widely debated. The USA holds prisoners at the navy base at Guantánamo Bay, Cuba without granting them status as POWs; their rights were in critical treatment within a historical context⁴.

Article 82 of the Rome statute, stipulates, about war crimes, the Court shall have jurisdiction in respect of war crimes in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes. For the purpose of this Statute, "war crimes" means (a) Grave breaches of the Geneva Conventions of 12 August 1949, namely, any of the following acts against persons or property protected under the provisions of the relevant Geneva Convention: Willful killing; Torture or inhuman treatment, including biological experiments; Willfully causing great suffering, or serious injury to body or health; Extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly; Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power; Willfully depriving a prisoner of war or other protected person of the rights of fair and regular trial⁵

The norm concerning rights of POWs is today both internationalized and institutionalized, but that has not always been the case. This thesis illuminates how the norms have evolved during World War I, World War II and Vietnam War; finally, the war against terrorism and the treatment of the prisoners at Guantánamo Bay, the soldiers in Ukraine and Gaz in Pastina is analyzed⁶. The intention of my research is to use a historical overview of the evolution of International

³ Commission on Human Rights resolution 1999/S-4/1

⁴ Daniel Munoz-Rojas and Jean-Jacques Fre'sard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.

⁵ Article 82 of the Rome statute

⁶ Daniel Munoz-Rojas and Jean-Jacques Fre'sard, *The Roots of Behaviour in War: Understanding and Preventing IHL Violations*, ICRC, Geneva, October 2004.P-52-61

Humanitarian Law, and the rights of POWs in particular, to formulate a wider assumption about the implication of IHL in protection of rights of combatants at international level.

Armed conflicts, whether international or non-international, have long been a grim reality of human existence, often resulting in widespread devastation, loss of life, and profound humanitarian crises. In recognition of the need to mitigate the suffering caused by such conflicts, international humanitarian law (IHL) has emerged as a crucial framework aimed at protecting the rights of individuals affected by armed hostilities, including combatants. While much attention is rightfully directed towards safeguarding the rights of civilians during times of war, the rights of combatants themselves also warrant careful examination and analysis⁷. Combatants, defined broadly as individuals directly engaged in hostilities or military operations, are subject to a complex array of legal norms and regulations under humanitarian law. These regulations, which encompass both treaty-based conventions and customary international law, seek to balance the military necessity of armed conflict with the fundamental principles of humanity, distinction, proportionality, and chivalry. Yet, despite the existence of these legal protections, questions persist regarding the scope, application, and effectiveness of combatants' rights in practice⁸.

This research paper endeavors to undertake a critical analysis of the rights of combatants under humanitarian law, delving into the nuanced legal frameworks, practical challenges, and evolving interpretations surrounding this complex issue. By examining key provisions of IHL treaties, relevant case law, and contemporary developments in armed conflict, the study aims to shed light on the rights afforded to combatants and the extent to which these rights are upheld in various conflict settings. Through a comprehensive review and synthesis of existing literature and legal scholarship, this research seeks to contribute to a deeper understanding of the rights and protections available to combatants under the auspices of humanitarian law⁹.

This introduction sets the stage for the dissertation providing an overview of the topic, highlighting its importance, and outlining the objectives and scope of the study.

⁷Kenneth Watkin “the warriors without rights” Winter (2005). P12-34

⁸ J.M. Spaight, *Air Power and War Rights*, (London: Longmans, Green and Co, 1947), p. 76.

⁹⁹ Protocol I and Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, *opened for signature* Dec. 12, 1977

2. Significance of the study

Combatants, whether they belong to state armed forces or non-state armed groups, are entitled to certain fundamental human rights, even in the context of armed conflict. Studying their rights under humanitarian law ensures that these rights are recognized, respected, and protected, contributing to the broader framework of human rights law. Clear delineation of combatants' rights helps prevent abuses and atrocities during armed conflict by providing legal standards and norms that govern the conduct of parties to the conflict. Upholding combatants' rights contributes to mitigating the impact of conflict on civilian populations and reducing the likelihood of violations against combatants themselves.

By studying the rights of combatants under humanitarian law, scholars, policymakers, and practitioners can better understand the legal obligations and responsibilities of parties to armed conflict. This knowledge can facilitate compliance with international humanitarian law (IHL) norms, promoting accountability for violations and fostering a culture of respect for humanitarian principles. Research on combatants' rights contributes to the development and refinement of legal protections afforded to individuals engaged in armed conflict. It allows for the identification of gaps, ambiguities, and evolving challenges in existing legal frameworks, leading to the formulation of more robust and effective legal instruments and mechanisms for safeguarding combatants' rights.

The study of combatants' rights under humanitarian law contributes to broader efforts to promote international justice and accountability for violations of humanitarian norms. By examining the legal and ethical dimensions of combatants' rights, researchers and practitioners can support initiatives aimed at prosecuting perpetrators of war crimes, crimes against humanity, and other serious violations of IHL. Addressing the rights and needs of combatants is essential for achieving sustainable peace and reconciliation in post-conflict settings. Understanding and respecting combatants' rights can facilitate demobilization, disarmament, and reintegration processes, promoting social cohesion, stability, and the rule of law in conflict-affected societies.

The significance of studying the rights of combatants under humanitarian law lies in its potential to uphold human dignity, prevent atrocities, promote compliance with international legal standards, support peacebuilding efforts, and advance the cause of international justice in conflict-affected contexts.

2.1.The personal interest

The personal interest of the present work is that the author wants to contribute to the rights of combatants under humanitarian law in the process of building a World governed by the law and fairness as well as obeisance of the rules of procedure in the war by protecting combatants.

2.2.The academic interest

The academic interest is the requirement of the university's internal rules and regulations in conformity with High Education Council (HEC) that every student at the end of higher learning education should write a dissertation not only to show what She/He has learned during academic period but it will also serve as reference by other future researchers who will be interested in the same field.

2.3.The Scientific interest

The legal interest is to show gaps and challenges in which the rights of combatants in war are breached and that leads to the violation of their security granted to them as human being in General, especially as the combatants.

3. Scope of the study

The study shall be delimited in space, domain and time.

3.1.In space

In space the study is mainly limited at the international level this means that it is worldwide but it is also used a different case from different countries this means that it will use different domestic law and cases.

3.2.In domain

In domain the research is limited in International Humanitarian law

3.3.In time

In time this starts from 1945 after the World War II, from July 17, 1998 where the Rome Statute of the International Criminal Court established to punish the international crimes such as war crimes, genocide crimes and crime against humanity up to 2024.

4. Problem statement

To be entitled to Combatants in war status, captured persons must be lawful combatants entitled to combatant's privilege which gives them immunity from punishment for crimes constituting lawful acts of war such as killing enemy combatants. To qualify under the Third Geneva Convention, a combatant must be part of a chain of command, wear a fixed distinctive marking, visible from a distance, bear arms openly, and have conducted military operations according to the laws and customs of war. The Convention recognizes a few other groups as well, such as "inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units."¹⁰

Thus, uniforms and badges are important in determining prisoner-of-war status under the third Geneva Convention. Under additional Protocol I, the requirement of a distinctive marking is no longer included. *Francs-tireurs*, militias, insurgents, terrorists, saboteurs, mercenaries, and spies generally do not qualify because they do not fulfill the criteria of additional Protocol I.¹¹ Therefore, they fall under the category of unlawful combatants, or more properly they are not combatants. Captured soldiers who do not get prisoner of war status are still protected like civilians under the fourth Geneva Convention. Despite the existence of international humanitarian law (IHL) frameworks aimed at protecting combatants during armed conflicts, there remains ambiguity and controversy surrounding the extent and implementation of these rights. This research seeks to conduct a critical analysis of the rights afforded to combatants under humanitarian law, with a focus on examining the challenges, discrepancies, and practical implications encountered in ensuring their protection. By exploring key legal provisions, case studies, and evolving interpretations of International Humanitarian Law, this study aims to identify gaps in the protection of combatants' rights under international Humanitarian Law and propose recommendations for enhancing compliance and accountability within the framework of humanitarian law.¹²

¹⁰ Jaworski, Eric. "Military Necessity and Civilian Immunity: Where Is the Balance?" In *International Crime and Punishment, Selected Issues*, Vol. 2, edited by Sienho Yee, 87–127. Lanham, MD: University Press of America, 2004.

¹¹ <http://www.icrc.org/eng/assets/files/other/irrc-872-reports-documents.pdf> .

¹² Melzer, Nils. "ICRC Interpretative Guidance on the Notion of 'Direct Participation in Hostilities' under International Humanitarian Law." *International Review of the Red Cross* 872 (December 2008): 991–1047.

5. Research Questions

This research intends to overcome the following research questions:

1. What are the legal challenges on the rights of combatants in hostilities under international humanitarian law?
2. What are the mechanisms that should be undertaken to effectively enhance the rights of combatant in hostilities under international humanitarian law?

6. Research Hypotheses

Hypotheses are tentative responses to the research questions formulated previously within the problem statement; they are in conformity with the above-mentioned research questions. The following hypotheses, are formulated in accordance and in conformity with the questioned research questions within the problem statement.

Here are the research hypotheses

1. They are different challenges in enhancing rights of combatant in war at international level such as targeted killings, torture and ill-treatment, denial of medical treatment, indiscriminate attacks, violations of detainee rights, use of child soldiers, lack of access to legal representation, these are just a few examples of the challenges that can potentially violate the rights of combatants under international humanitarian law. Addressing these challenges requires a concerted effort to uphold the principles and norms enshrined in IHL and ensure accountability for violations committed during armed conflict.
2. Legal and institutional mechanisms that should be undertaken to effectively enhance the rights of combatant in hostilities under international humanitarian law.

7. Objectives of the study

This research has general objectives and specific objectives

7.1. Generally, objectives

The general objectives of this study is to encompass a range of aims that aimed at deepening understanding, identifying challenges, and proposing solutions within this complex legal framework.

7.2. Specific objectives

Specifically, this study aims at:

1. Analyzing the root causes of violation of the Rights combatant in hostilities
2. Identify the challenges faced while enhancing the rights of combatant in hostilities

8. Research methodology and techniques

Methodology is the systematic, theoretical analysis of the methods applied to a field of study, or the theoretical analysis of the body of methods and principles associated with a branch of knowledge.

8.1. Research techniques

Techniques are the means and procedures that enable the researcher in the collection of information about a certain topic. To answer the fundamental questions raised in problem statement, the researchers used the documentary technique which helped the researcher to collect the data through the reading of the written works, scientific works and the international instruments relating to this topic of the study.

8.1.1. Documentary technique

This documentary technique consists in collecting data through the reading of the law documents containing the information relating to the research topic.¹³

It is quite obvious that for the law graduates or law researchers cannot escape this method of documentation since lawyers are to refer to legal facts and those legal facts are to be found within different documentations of law.¹⁴

The documentation technique is related to the historical technique which studies past events through traces they left behind.¹⁵

It is actually to use of outside sources, documents, to support the viewpoint or argument of an academic work. The process of documentary research often involves some or all of

¹³ Paul Lerner, *Hysterical Men: War, Psychiatry, and the Politics of Trauma in Germany, 1890–1930* (Cornell University Press: Ithaca and London, 2003), p. 8.

¹⁴ Ibid

¹⁵ <https://www.doi.org/index.html>

conceptualizing, using and assessing documents that I shall take into consideration to improve my research. According to my research topic it is obvious that I shall be using different reports on the rights of combatants worldwide.¹⁶

8.2. Research methods

The concept of method refers of theory which is a way to apprehend and to explain reality. The method is set of rights of the combatant which are enable to analyze, to understand and explain the analyzed reality or else to structure. It is also a way of making analysis in order to reach the result. In fact, that, the result has been meaningful and coherent text.¹⁷

According to Grawitz M, a method is the entire intellectual operations that knowingly coordinated; by which science seek to achieve the realities that it strives towards. Therefore, in this study the researchers made analysis and interpretation, the following methods was used:¹⁸

8.2.1. Analytical method

The exegetic is an adjective which from the world ‘exegesis’ in English derives from the Greek verb exegetist which means to lead or to show the way to expound, interpret or explain something, and the Greek noun exegesis, statement, narrative, explanation or interpretation. The task of exegesis involves looking at the biblical text and setting forth my understanding of the text in a way that is comprehensible to others and illuminating for myself and for them. Exegesis is a critical explanation or interpretation of a text, particularly a religious text. Traditionally the term was used primarily for work with the Bible; however, in modern usage biblical exegesis is used for greater specificity to distinguish it from any other broader critical text explanation. This method will help us to analyze and interpret the legal texts, different jurisprudence.¹⁹

¹⁶ <https://libguides.hec.ca/preparer-recherche-documentaire/operateurs>

¹⁷ gubrium, j. f., & holstein, j. a. (2000). analyzing interpretative practice. in n. denzin & y.s. lincoln (eds.), *the handbook of qualitative research* (2nd ed.), (pp. 487-508). thousand oaks, ca: sage publications.

¹⁸ ibid

¹⁹ c. black, c.a. 1965. methods of social science analysis. part 2. asa, 677 segoe rd s, madison, wi 53711.

8.2.2. Exegetic method

The Analytical method is a generic process combining the power of the Scientific method with the use of formal process to solve any type of problem. This method has enabled us to make the systematic analysis of information and data collected.²⁰

7.2.3. Synthetic method

Synthetic method is an adjective that comes from the verb to synthesize, which means to form a substance by combining parts or elements. In research sometime the data are found in global image and need to be synthesized so as to be oriented in accordance with the research purpose. This method will help us to summarize the collected data in a very clear and concise manner.²¹

8. SUBDIVISION OF THE STUDY

Besides the general introduction, the study is structured into three chapters, chapter one is conceptual and Theoretical framework, that shall be dedicated to conceptual and theoretical framework of the rights of combatants where it gives the definitions of major terms as they are used in the study, research instrument and other parts of the study where the terms need to be operationally defined in the research.

Chapter two is legal challenges on the rights of combatants in war under international humanitarian law, this chapter is about the challenges the combatants met in war at international level such as targeted killings, torture and Ill-treatment, denial of medical treatment, indiscriminate attacks, violations of detainee rights, use of child soldiers, lack of access to legal representation, these are just a few examples of the challenges that can potentially violate the rights of combatants under international humanitarian law.

Chapter three, is the mechanisms that should be undertaken to effectively enhance the rights of combatant during hostilities, this chapter aims to provide a comprehensive analysis of legal and institutional mechanisms that can be undertaken to effectively enhance the rights of combatants during hostilities, contributing to the broader discourse on International Humanitarian Law and humanitarian protection. As an academic work it shall have a general conclusion and recommendations and finally it will demonstrate the bibliograph.

²⁰ Krippendorff, K. (2004a). Content analysis: An introduction to its methodology (2nd ed.). Thousand Oaks, CA: Sage.

²¹<http://matthewlombard.com/reliability/#How%20should%20researchers%20calculate%20intercoder%20reliability%20What%20software%20is%20available>

CHAPTER I: CONCEPTUAL AND THEORITICAL FRAMEWORK

This chapter contains the definitions of conceptual frameworks regarding the rights and other concepts of combatants under international law such as

I.CONCEPTUAL FRAMEWORK

I.1.1.International Humanitarian Law

International Humanitarian Law also known as the law of armed conflict or the law of war, is a set of rules that seeks to limit the effects of armed conflict by protecting individuals who are not or are no longer participating in hostilities and by regulating the means and methods of warfare. It distinguishes between combatants and civilians and outlines their respective rights and obligations during armed conflict²².

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 Rights and its two Optional Protocols;
- ✓ The International Convention on the Elimination of All Forms of Racial Discrimination²³;

International humanitarian law is a set of rules that seek to limit the effects of armed conflict on people, including civilians, persons who are not or no longer participating in the conflict and even those who still are, such as combatants. To achieve this objective, international humanitarian law covers two areas: the protection of persons; and restrictions on the means and the methods of warfare.

²² Andrew, Rod, Long Gray Lines: The Southern Military School Tradition, 1839–1915 (Chapel Hill, NC: University of North Carolina Press, 2007)

²³ Austin, Jay E. and Bruch, Carl E., eds., The Environmental Consequences of War: Legal, Economic, and Scientific Perspectives (NY: Cambridge University Press, 2000)

International humanitarian law finds its sources in treaties and in customary international law. The rules of international humanitarian law are set out in a series of conventions and protocols. The following instruments form the core of modern international humanitarian law:

- ✓ The Hague Regulations respecting the Laws and Customs of War on Land;
- ✓ The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field;
- ✓ The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea;
- ✓ The Geneva Convention (III) relative to the Treatment of Prisoners of War;
- ✓ The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War;
- ✓ The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I); and
- ✓ The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)²⁴.

I.1.2. Geneva Conventions and Additional Protocols

The Geneva Conventions of 1949 and their Additional Protocols of 1977 are the primary legal instruments governing the conduct of armed conflict. They provide detailed rules on the treatment of combatants, including the humane treatment of prisoners of war (POWs), the protection of wounded and sick combatants, and the rights of civilians in occupied territories²⁵.

²⁴ Ibid

²⁵ Alexandrov, Stanimar A., *Self-Defense Against the Use of Force in International Law* (The Hague: Kluwer, 1996)

I.1.3. Combatant Status

Combatants are individuals who have the right to participate directly in hostilities during an armed conflict. They enjoy certain privileges, such as the right to engage in combat without being prosecuted for lawful acts of war. To qualify as combatants, individuals must meet specific criteria, such as being part of a military force, wearing a recognizable uniform or insignia, and carrying arms openly²⁶.

I.1.4. Prisoner of War (POW) Status

POWs are combatants who have been captured by the enemy during armed conflict. They are entitled to certain rights and protections under the Geneva Conventions, including humane treatment, access to medical care, and the right to communicate with the outside world²⁷.

I.1.5. Prohibited Acts

IHL prohibits certain acts during armed conflict, including targeting civilians, using weapons that cause unnecessary suffering, and employing tactics that fail to distinguish between combatants and civilians. Combatants must adhere to these rules, and violations can result in criminal liability²⁸.

I.1.6. States

International law recognizes that in general States, together with international organizations, are the primary subjects of international law. They acquire legal obligations by entering into international treaties and also have legal obligations deriving from customary international law. Thus, subject to lawful reservations dealt with below, States that have ratified international humanitarian law or human rights treaties are bound by their provisions. Moreover, according to the Vienna Convention on the Law of Treaties, States that have signed but not ratified a treaty are bound to act in good faith and not to defeat its object and purpose²⁹.

²⁶ Ambrose, Stephen E., *Band of Brothers* (NY: Simon & Schuster, 1992)

²⁷ Blumenson, Martin, *The Battle of the Generals* (William Morrow & Co., 1993)

²⁸ Bassiouni, M. Cherif, *The Legislative History of the International Criminal Court*, vol. 1 (Ardsey, NY: Transnational, 2005)

²⁹ Brownlie, *Principles of Public International Law*, pp. 58 ff., and *Reparation for Injuries*.

Beyond these general rules, there are some distinctions in the application of international human rights law and of international humanitarian law. International human rights law explicitly protects a very wide range of rights from the right to be free from torture to the right to education which can be affected, directly or indirectly, by armed conflict. These human rights obligations, whether positive or negative, apply to the State as a whole, independently from any internal institutional structure and division of responsibilities among different authority's international humanitarian law is primarily, although not exclusively, addressed to States parties to an armed conflict. The Geneva Conventions, for example, impose obligations on States and their forces participating in armed conflict and extend responsibility for violations to the direct participants and to their civilian leadership, where relevant. International humanitarian law further imposes on States the obligations to respect its rules and to protect civilians and other protected persons and property. These legal obligations do not cease to exist when the State delegates governmental functions to individuals, groups or companies. The State is, thus, responsible for ensuring that delegated activities are carried out in full conformity with its international obligations, particularly human rights obligations³⁰. Finally, as the primary subject of international law, the State's obligations under international human rights and humanitarian law include the duties to investigate alleged violations of international human rights and humanitarian law, and to prosecute and punish those responsible³¹.

I.1.7. Non-State Armed Groups (NSAGs)

While international law in general has developed in order to regulate mainly the conduct of States in their international relations, international human rights law and international humanitarian law have developed specific particularities aimed at imposing certain types of obligations on others, including individuals and non-State actors. For example, recent developments in international criminal law recognize that individuals may be responsible at the international level for gross human rights violations and serious violations of international humanitarian law which amount to crimes against humanity, war crimes and genocide. International Humanitarian Law also applies to non-state armed groups engaged in armed conflict, although their legal status and obligations may differ from those of state parties. NSAGs

³⁰ The Vienna Convention on the Law of Treaties indicates that “[a] party may not invoke the provisions of its internal law as justification for its failure to perform a treaty” (art.27).

³¹ Yearbook of the International Law Commission, 2001, vol. II, Part II, p. 26.

must respect the principles of IHL and adhere to fundamental human rights standards³².

Concerning international human rights obligations, the traditional approach has been to consider that only States are bound by them. However, in evolving practice in the Security Council and in the reports of some special rapporteurs, it is increasingly considered that under certain circumstances non-State actors can also be bound by international human rights law and can assume, voluntarily or not, obligations to respect, protect and fulfil human rights. For instance, the Security Council has called in a number of resolutions on States and non-State armed groups to abide by international humanitarian law and international human rights obligations³³.

I.1.8.State Responsibility

States are responsible for ensuring that their armed forces and agents comply with IHL and respect the rights of combatants. They may be held accountable for violations of IHL committed by their armed forces or for failing to prevent or punish such violations³⁴.

I.1.9.Human Rights Law

Human rights law complements IHL and provides additional protections to individuals, including combatants, during armed conflict. It prohibits arbitrary detention, torture, and other forms of ill-treatment, even in the context of armed conflict. Understanding these conceptual frameworks is essential for analyzing and evaluating the rights and protections afforded to combatants under international law³⁵.

I.2.THEORITICAL FRAMEWORK

The key theoretical frameworks regarding the rights of combatants under international law include

I.2.1.Geneva Conventions

Civilians are to be protected from murder, torture or brutality, and from discrimination on the basis of race, nationality, religion or political opinion. Hospital and safety zones may be established for the wounded, sick, and aged, children under 15, expectant mothers and mothers

³² New ' Non-State Actors in International Humanitarian Law,' (2006), 38 George Wash. Int'L. Rev. 551, p. 555.

³³ General comment No. 31 (2004), para. 10. See, moreover, ST/SGB/1999/13.

³⁴ Rights under International Humanitarian and Human Rights Law, ASIL Task Force Papers, (2002) p. 2.

³⁵ Necessity in the Law of Armed Conflict and in International Criminal Law, Published online by Cambridge University Press: 09 May 2011

of children under seven. These are a set of international treaties that establish the humanitarian laws governing the conduct of warfare, including the treatment of combatants and non-combatants during armed conflict³⁶.

International humanitarian law (IHL) is a set of rules that seek for humanitarian reasons to limit the effects of armed conflict. IHL protects persons who are not or who are no longer participating in hostilities and it restricts the means and methods of warfare. IHL is also known as the law of war and the law of armed conflict. A major part of international humanitarian law is contained in the four Geneva Conventions of 1949 that have been adopted by all nations in the world. The Conventions have been expanded and supplemented by two further agreements: the Additional Protocols of 1977, relating to the protection of victims of armed conflicts, and the 2005 Additional Protocol III, relating to the adoption of an additional distinctive emblem³⁷.

These Conventions provide specific rules to safeguard combatants, or members of the armed forces, who are wounded, sick or shipwrecked, prisoners of war, and civilians, as well as medical personnel, military chaplains and civilian support workers of the military³⁸.

I.2.2.Hague Conventions

These are a series of international agreements that regulate the conduct of warfare, particularly regarding the rights and responsibilities of belligerents in armed conflict. The term Hague Conventions describes the treaties and declarations that were adopted in the Hague and that contain rules regulating warfare. These include a series of international treaties and declarations that were adopted at two international peace conferences in 1890 and 1907 and the 1954 Hague Convention on the Protection of Cultural Property in the event of armed conflict³⁹.

I.2.3.Human Rights Framework

This includes international human rights law, which sets out the fundamental rights and freedoms that apply to all individuals, including combatants. It emphasizes the protection of human dignity, non-discrimination, and the right to life, among others. International Humanitarian Law (IHL) or the law of armed conflict or the law of war, IHL is a branch of

³⁶ Cassese, Antonio, *Violence and Law in the Modern Age*, trans. Greenleaves, S.J.K. (Princeton, NJ: Princeton University Press, 1988)

³⁷ Arts. 13, 32 The Fourth Geneva Convention the Geneva Convention Relative to the Protection of Civilian Persons in Time of War of August 12, 1949

³⁸ Arts. 12, 18 of the same convention

³⁹ Dear, I.C.B., ed. *The Oxford Companion to the Second World War* (Oxford: Oxford University Press, 1995)

international law that seeks to limit the effects of armed conflict by protecting combatants and civilians who are not taking part in hostilities⁴⁰.

I.2.4. Just War Theory

This is a moral and philosophical framework that seeks to determine when and how the use of armed force can be justified. It addresses issues such as the just causes for war, the proportionality of military action, and the treatment of combatants and non-combatants. Just war is warfare that is justified by a moral or legal tradition. Just war theory presumes that there are legitimate uses of war but also sets moral boundaries on the waging of war. It deals with two fundamental questions concerning the ethics of war and peace, when is it morally and legally justified to go to war⁴¹.

I.2.5. State Sovereignty and Responsibility

This framework considers the role of states in upholding the rights of combatants and ensuring compliance with international law. It examines the balance between state sovereignty and international obligations in armed conflict situations. On the other hand, "sovereignty as a responsibility" requires that states provide the appropriate standard of political goods and services to ensure the protection and well-being of their citizens.³ If they refuse assistance there is a responsibility by the international community to react⁴². A treaty, or triggers an obligation of alliance. This is illustrated by United States Secretary of State Robert Lansing who when declining to pursue action against the leaders of Germany, Austria and Turkey at the conclusion of World War I for what would now be known as "crimes against humanity" said "the essence of sovereignty is the absence of responsibility". Reflecting the view of the time he said sovereign leaders should be immune from prosecution and that the United States could only judge those violations that were committed against American persons or property⁴³.

I.2.6. Transitional Justice

This framework focuses on addressing the legacies of human rights abuses and violations that occur during armed conflict, including issues related to the rights of combatants. It emphasizes

⁴⁰ Crane, Conrad C., *Bombs, Cities, and Civilians* (Lawrence, KS: University Press of Kansas, 1993)

⁴¹ Cassese, Antonio, *International Criminal Law* (Oxford: Oxford University Press, 2003)

⁴² Borsinger, Nicolas, ed., *125th Anniversary of the 1868 Declaration of St. Petersburg* (Geneva: ICRC, 1994)

⁴³ Ibid

accountability, truth-seeking, reparations, and institutional reform as mechanisms for promoting justice and reconciliation. Transitional justice refers to how societies respond to the legacies of massive and serious human rights violations. It asks some of the most difficult questions in law, politics, and the social sciences and grapples with innumerable dilemmas. Above all, transitional justice is about victims. Learn more by watching our video "Side by Side with Victims"⁴⁴.

Above all, transitional justice is about victims. It focuses on their rights and dignity as citizens and human beings and it seeks accountability, acknowledgment, and redress for the harms they suffered. By putting victims at the center and their dignity first, transitional justice signals the way forward for a renewed social contract in which all citizens are included and everyone's rights are protected⁴⁵.

I.2.7. Non-international armed conflict

International humanitarian law contains two different legal frameworks dealing with non-international armed conflicts, on the one hand, article 3 common to the Geneva Conventions stipulates that "in the case of armed conflict not of an international character" a series of minimum provisions of international humanitarian law shall apply. The Conventions do not define what "non-international armed conflict" means, but it is now commonly accepted that it refers to armed confrontations between the armed forces of a State and non-governmental armed groups or between non-State armed groups⁴⁶.

Protocol II to the Geneva Conventions provides that the Protocol applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol"⁴⁷. The International Criminal Tribunal for the former Yugoslavia's Appeals Chamber has indicated that an armed conflict exists whenever there is protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. It has further indicated that

⁴⁴ International Law and the War on Terror (Newport, RI: Naval War College, 2003)

⁴⁵ Jean Pictet et al., eds., Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field: Commentary (Geneva, ICRC, 1952), p. 32.

⁴⁶ Ibid

⁴⁷ Paul d'Estournelles de Constant. Concilier les nations pour éviter la guerre (1878-1924) (Rennes: PUR, 2015).

international humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a peaceful settlement is achieved. In the Haradinaj case, the Trial Chamber stated that the criterion of protracted armed violence is to be interpreted as referring more to the intensity of the armed violence than to its duration. In addition, armed groups involved must have a minimum degree of organization⁴⁸.

The Trial Chamber summarized the indicative factors that the Tribunal has relied on when assessing the two criteria. For assessing the intensity these include “the number, duration and intensity of individual confrontations; the type of weapons and other military equipment used; the number and calibre of munitions fired; the number of persons and type of forces partaking in the fighting; the number of casualties; the extent of material destruction; and the number of civilians fleeing combat zones⁴⁹. The involvement of the [United Nations] Security Council may also be a reflection of the intensity of a conflict.” On the degree of organization an armed group must have to make hostilities between that group and governmental forces a non-international armed conflict, the Tribunal has stated that an “armed conflict can exist only between parties that are sufficiently organized to confront each other with military means⁵⁰.

Indicative factors include the existence of a command structure and disciplinary rules and mechanisms within the group; the existence of a headquarters; the fact that the group controls a certain territory; the ability of the group to gain access to weapons, other military equipment, recruits and military training; its ability to plan, coordinate and carry out military operations, including troop movements and logistics; its ability to define a unified military strategy and use military tactics; and its ability to speak with one voice and negotiate and conclude agreements such as ceasefire or peace accords⁵¹. Similarly, ICRC proposes those two criteria of intensity of violence and organization of non-State parties as determining the lower threshold for the application of international humanitarian law of non-international armed conflicts⁵². First, the hostilities must reach a minimum level of intensity, this may be the case, for example, when the hostilities are of a collective character or when the Government is obliged to use military force

⁴⁸ ABBENHUIS, Maartje, BARBER, Christopher Ernest, HIGGINS, Annalise R., eds., *War, Peace and International Order: The Legacies of the Hague Conferences of 1899 and 1907* (London: Routledge, 2017).

⁴⁹ Ibid

⁵⁰ resolution 60/147, by which the General Assembly adopted the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law

⁵¹ International humanitarian law and the challenges of contemporary armed conflicts by Red Cross and Red Crescent, Geneva, Switzerland, 30 November 2007, page 32-56

⁵² Ibid

against the insurgents, instead of mere police forces;

“Second, non-governmental groups involved in the conflict must be considered as ‘parties to the conflict’, meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations⁵³.

I.2.8.Principle of Respect and protection

Rule 139 of international humanitarian law, stipulates that each party to the conflict must respect and ensure respect for international humanitarian law by its armed forces and other persons or groups acting in fact on its instructions, or under its direction or control⁵⁴. Additional Protocols I and II prohibit the participation of children in hostilities, the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child also contain this rule, under the Statute of the International Criminal Court, using children to “participate actively in hostilities” constitutes a war crime in both international and non-international armed conflicts, it is also included as a war crime in the Statute of the Special Court for Sierra Leone, the participation of children in hostilities is prohibited in military actions including those which are applicable in non-international armed conflicts, no official contrary practice was found, alleged practices of using children to take part in hostilities have generally been condemned by States and international organizations, including penal measures that taken to stop the participation of children in armed hostilities⁵⁵.

I.2.9.Principle of non-discrimination

Contemporary humanitarian law prohibits discrimination in many specific rules binding on parties to both international and non-international armed conflicts, thus, article 3 common to the Geneva Conventions applicable in non-international armed conflict - which is the prevalent type of armed conflict today - provides that persons taking no active part in hostilities and those placed hors de combat must in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth or any similar criteria, common article 3, which reflects customary international law and has been recognized as an elementary consideration of humanity", is further elaborated in additional protocol II to the

⁵³ Adam Roberts. the equal application of the laws of war: a principle under pressure, Vol.90 (2008). Page 76-109

⁵⁴ Rule 139 of common to the Geneva Conventions

⁵⁵ UN Secretary-General, Report on the establishment of a Special Court for Sierra Leone page 341.

Geneva Conventions, many rules governing international armed conflicts also prohibit discrimination, it should be noted, for example, that practices of apartheid and other inhuman and de-grading practices involving outrages upon personal dignity, based on racial discrimination constitute a grave breach of Additional Protocol I to the Geneva Conventions, the principle of non-discrimination is thus a basic tenet not only of international human rights law, but also of international humanitarian law, obliging parties to an armed conflict to treat victims without distinctions of any kind save those based on the urgency and specificity of their needs, article 48 of the 1977 Additional Protocol I provides: “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 civilian objects and military objective⁵⁶.”

I.2.10.Principle of prohibition of indiscriminate attack

A general prohibition of indiscriminate attack in international conflicts was established in the 1977 Additional Protocol I. During the diplomatic conference for the drafting of Protocol I, the possibility was referred to of distinguishing the rules applicable to the aggressor from the rules of the prohibition of indiscriminate attacks is set forth in Article 51(4) of Additional Protocol I, at the Diplomatic conference leading to the adoption of the additional protocols, France voted against Article 51 because it deemed that paragraph 4 by its “very complexity would seriously hamper the conduct of defensive military operations against an invader and prejudice the inherent right of legitimate defense recognized in article 51 of the charter of the United Nations⁵⁷”. Upon ratification of Additional Protocol, I, however, France did not enter a reservation with respect to the prohibition of indiscriminate attacks. At the Diplomatic Conference leading to the adoption of the Additional Protocols, Mexico stated that Article 51 was so essential that it “cannot be the subject of any reservations whatsoever since these would be inconsistent with the aim and purpose of Protocol I and undermine its basis”, the prohibition of indiscriminate attacks is also contained in Protocol II and Amended Protocol II to the Convention on Certain Conventional Weapons⁵⁸.

⁵⁶ article 3 of common to the Geneva Conventions

⁵⁷ Additional Protocol I, Article 51(4) (adopted by 77 votes in favour, one against and 16 abstentions) (cited in Vol. II, Ch. 3

⁵⁸ Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 677

CHAPTER II: LEGAL CHALLENGES ON THE RIGHTS OF COMBATANTS IN WAR UNDER INTERNATIONAL HUMANITARIAN LAW

This chapter is about the challenges the combatants met in war at international level such as targeted killings, torture and ill-treatment, denial of medical treatment, indiscriminate attacks, violations of detainee rights, use of child soldiers, lack of access to legal representation, these are just a few examples of the challenges that can potentially violate the rights of combatants under international humanitarian law.

The rights of combatants, specifically, are critical to the balance between military necessity and humanitarian considerations. However, the application and enforcement of these rights face several legal challenges.

II.1. Principles of international human rights law and international humanitarian law

Human rights are rights inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, color, religion, language, or any other status. These rights are all interrelated, interdependent and indivisible. They are often expressed and guaranteed by legal norms, in the form of treaties, customary international law, general principles and other sources of international law. International human rights law lays down the obligations of States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups⁵⁹.

Human rights entail both rights and obligations. States assume obligations under international law to respect, protect and fulfil human rights. The obligation to respect means that States must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires States to protect individuals and groups from human rights abuses. The obligation to fulfil means that States must take positive action to facilitate the enjoyment of human rights, as individuals, we are all entitled to human rights, but each of us should also respect the human rights of others. International humanitarian law limits the use of violence in armed conflicts to spare those who do not or who no longer directly participate in hostilities, while at the same time limiting the violence to the extent necessary to weaken the military potential of the enemy. Both in limiting the violence and in regulating the treatment of persons

⁵⁹ Hathaway, Paul K. Strauch, Beatrice A. Walton, Zoe A. Y. Weinberg. In: The Yale journal of international law, Vol. 44, issue 1, 2019, p. 53-113

affected by armed conflict in other respects, international humanitarian law strikes a balance between humanity and military necessity. While on the face of it, the rules of international human rights law and international humanitarian law are very different, their substance is very similar and both protect individuals in similar ways. The most important substantive difference is that the protection of international humanitarian law is largely based on distinctions in particular between civilians and combatant's unknown in international human rights law⁶⁰.

II.2.Protected rights

International humanitarian law is traditionally formulated in terms of objective rules of conduct for States and armed groups, while international human rights law is expressed in terms of subjective rights of the individual vis-à-vis the State, today, an increasing number of rules of international humanitarian law, in particular fundamental guarantees for all persons in the power of a party to a conflict and rules of international humanitarian law in non-international armed conflict, are formulated in terms of subjective rights, e.g., the right of persons whose liberty has been restricted to receive individual or collective relief or the right of families to know the fate of their relatives. Conversely, subjective rights have been translated by United Nations General Assembly resolutions into rules of conduct for State officials⁶¹.

For instance, the Basic Principles on the Use of Force and Firearms by Law Enforcement Officials, adopted at the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, provide an authoritative interpretation of the principles authorities must respect when using force in order not to infringe the right to life, and they direct, inter alia, law enforcement officials to “give a clear warning of their intent to use firearms, with sufficient time for the warning to be observed, unless to do so would unduly place the law enforcement officials at risk or would create a risk of death or serious harm to other persons, or would be clearly inappropriate or pointless in the circumstances of the incident⁶²”.

When comparing norms of international human rights law and international humanitarian law, it becomes apparent that the latter protects only some human rights and only to the extent that they are particularly endangered by armed conflicts, and is not, as such, incompatible with the very

⁶⁰ Protocol on Non-Detectable Fragments (Protocol I), 1980

⁶¹ David P. Forsythe. In: Global governance: a review of multilateralism and international organizations, Vol. 25, no. 3, p. 359-369

⁶² Idem

existence of an armed conflict. Thus, the right to social security, the right to free elections, freedom of thought or the right to self-determination are not covered by international humanitarian law⁶³.

In a number of situations, its rules could be, on the limited issues they deal with, more adapted to the specific problems arising in armed conflicts. Moreover, while the rules of international humanitarian law on the treatment of persons who are in the power of the enemy may be understood as implementing their human rights, taking military necessity and the peculiarities of armed conflicts into account, certain rules on the conduct of hostilities deal with issues not addressed by human rights, e.g., who may directly participate in hostilities and how such persons must distinguish themselves from the civilian population, or the rights and identification of medical personnel⁶⁴.

II.3. Modes of protection

International human rights law imposes obligations to respect, protect and fulfil that stretch across all human rights. These three terms make it possible to determine whether international human rights obligations have been violated. While these terms have not traditionally been used in international humanitarian law, the obligations resulting from its rules may be split up into similar categories⁶⁵.

Since States have obligations to do something (positive obligations) or to abstain from doing something (negative obligations) under both branches, they can be responsible for a violation of international human rights and humanitarian law through action, omission or inadequate action. In international humanitarian law they have an explicit obligation to respect and to ensure respect⁶⁶.

⁶³ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), 1980

⁶⁴ Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II as amended on 3 May 1996)

⁶⁵ Asia-Pacific perspectives on international humanitarian law ed. by Suzannah Linton, Tim McCormack [and] Sandesh Sivakumaran. - Cambridge: Cambridge University Press, 2020. - XLII, 889 p.

⁶⁶ Back in the game : international humanitarian lawmaking by states Yahli Shereshevsky. In: Berkeley journal of international law, Vol. 37, no. 1, 2019, 63 p.

II.4. The principle of distinction in international humanitarian law

Possibly the most important difference between international humanitarian law and international human rights law is that the substantive protection a person benefits from under the former depends on the category that person belongs to, while under the latter all human beings benefit from all human rights, although some human rights instruments establish and protect specific rights for specific categories of persons, e.g., children, persons with disabilities or migrants. In international humanitarian law, the protection of civilians is not the same as the protection of combatants⁶⁷.

This difference is particularly relevant in the conduct of hostilities, there is a fundamental distinction between civilians and combatants, and between military objectives and civilian objects. Combatants may be attacked until they surrender or are otherwise hors de combat, while civilians may not be targeted, unless and for such time as they directly participate in hostilities, and they are protected by the principles of proportionality and precaution against the incidental effects of attacks against military objectives and combatants⁶⁸.

II.5. Case laws

II.5.1 Malaysia, Osman v. Prosecutor Appeal Cases, pp. 430-455 (P.C.)

House of Lords privy council Osman bin haji Mohamed ali and another appellant and the public prosecutor respondent on appeal from the federal court of Malaysia on march 10, 1965.

On March 10, 1965, two girl secretaries at a bank in Singapore were killed by an explosion caused by a bag containing 25lb. of nitroglycerine, placed by the two appellants on the stairs of the building. The appellants were not wearing uniform and they had no identification papers nor were they wearing uniform when arrested. They were charged under the Penal Code with the murder of the two girl secretaries and of another person injured by the explosion who died later, and tried in the High Court of Singapore [...]. The appellants claimed to be members of the Indonesian armed forces and entitled to the protection of the Geneva Convention Relative to the Treatment of Prisoners of War, 1949. The trial judge ruled that they were not entitled to the status of prisoners of war and convicted them.

⁶⁷ Peter Maurer. In: Global governance: a review of multilateralism and international organizations, Vol. 25, no. 3, 2019, p. 351-358

⁶⁸ IHL and islamic law in contemporary armed conflicts : experts' workshop : Geneva, 29-30 October 2018 report prep. and ed. by Ahmed Al-Dawoody. - Geneva: ICRC, November 2019. - 84 p.

First, assuming that the appellants were members of the Indonesian armed forces, they had forfeited any right to treatment as prisoners of war under the protection of the Geneva Convention in that (a) they divested themselves of their uniforms; (b) they assumed civilian clothing; (c) they attacked a civilian target; and (d) they caused death and injury to peaceful civilians. The authorities on the Convention support the following propositions: (1) Members of the armed forces who divest themselves of their uniform for hostile purposes are not entitled to the status of “prisoner of war” under article 4A of the Convention or otherwise.

(2) Spies and saboteurs out of uniform are within the above category and so are not entitled to the status of “prisoner of war” on capture. (3) Spies and saboteurs out of uniform are not guilty of war crimes properly so called by being out of uniform for hostile purposes. (4) Spies and saboteurs out of uniform are subject to trial and punishment under the municipal law of the captor state. (5) The killing of peaceful civilians and attacking non-military buildings is contrary to the laws and customs of war. (6) Indiscriminate bombing and the use of V1 and V2 weapons is contrary to the laws and customs of war. (7) Saboteurs may be (a) ordinary civilian volunteers, (b) members of militias or volunteer corps organizations engaged in sabotage, and (c) members of armed forces under orders to commit sabotage. (8) The conditions prerequisite in article 4A (2) are also prerequisite in article 4A (1) by necessary implication.

II.5.2. Military Prosecutor v. Omar Mahmud Kassem And Others Israel, Military Court sitting in Ramallah April 13, 1969.

The first of the accused pleaded that he was a prisoner of war, and similar pleas were made by the remaining defendants. The defendants were asked by the Court whether they were prepared to testify so that it could be ascertained whether the conditions entitled them to be regarded as prisoners of war were fulfilled.

The second defendant was prepared to testify on oath, He claimed that he belonged to the ‘Organization of the Popular Front for the Liberation of Palestine’ and when captured was wearing military dress and had in his possession a military pass issued to him on behalf of the Popular Front, bearing “the letters J.T.F. Popular Front for the Liberation of Palestine, my name and my serial number.

We hold that we are competent to examine and consider whether the defendants are entitled to prisoner-of-war status, and if we so decide, we shall then cease to deal with the charge.

We shall now inquire into the kinds of combatants to whom the status of prisoners of war is accorded upon capture by enemy forces.

The principles of the subject were finally formulated in the Geneva Convention Relative to the Treatment of Prisoners of War of 12 August 1949. Whether we regard this Convention as an agreement between the Contracting Parties or whether we regard it as expressive of the position under customary International Law relating to the treatment of prisoners of war, we proceed on the assumption that it applies to the State of Israel and its armed forces; Israel in fact acceded to the Convention on 6 July 1951, Jordan did so on 29 May 1951.

Article 4A of this Convention defines all those categories of persons who, having fallen into enemy hands, are regarded as prisoners of war within the meaning of the Convention. For the purpose of deciding the status of the defendants before us, we shall consider paragraphs (1), (2), (3) and (6) of Article 4A. Without a shadow of doubt, the defendants are not, in the words of paragraph (1), 'Members of the armed forces of a Party to the conflict' or 'members of militias or volunteer corps forming part of such armed forces. Article 2, which prescribes the scope of its application, states that it applies to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. To comprehend the true intent of the Convention, let us quote Leland Harrison, representative of the U.S.A:

'The Convention would, therefore, be applicable to all cases of declared or undeclared war between States to the Convention, and to certain armed conflicts within the territory of a State party to the Convention' (Final Report, IIB, p. 12). This makes it clear that the Convention applies to relations between States and not between a State and bodies which are not States and do not represent States. It is therefore the Kingdom of Jordan that is a party to the armed conflict that exists between us and not the Organization that calls itself the Front for the Liberation of Palestine, which is neither a State nor a government and does not bear allegiance to the regime which existed in the West Bank before the occupation and which exists now within the borders of the Kingdom of Jordan. In so saying, we have in fact excluded the said Organization from the application of the provisions of paragraph (3) of Article 4.

Paragraph (6) of Article 4 is also not pertinent, since the defendants are not inhabitants of a non-occupied territory who, on the approach of the enemy, spontaneously take up arms to resist the invading forces without having had time to form themselves into regular armed units. We can be

brief. The Organization to which the defendants belong does not answer even the most elementary criteria of a levée masse.

II.5.3. European Court of Human Rights, Kononov v. Latvia Chamber Judgement, 24 July 2008

The applicant alleged, in particular, that his conviction for “war crimes” as a result of his participation in a punitive military expedition in the Second World War had violated Article 7 of the Convention. the facts

The circumstances of the case

On 22 June 1941 Nazi Germany attacked the Soviet Union, of which Latvian territory formed a part. The lightning advance of the German Army (Wehrmacht) forced the Red Army to leave the Baltic region and withdraw towards Russia. The applicant, who was living near the border at the time, followed. By 5 July 1941 the whole of Latvia had been overrun by the Wehrmacht. The three Baltic States and part of Belarus were joined to form a vast territory administered by the Reich Commissariat for the Eastern Territories (Reichskommissariat Ostland), which took orders directly from Berlin.

In 1942 (the applicant) was called up as a soldier in the Soviet Army

In March 1944 he was put in command of a platoon by his two immediate superiors, whose primary objectives according to the applicant were as follows: to sabotage military installations, communication lines and German supply points, to derail trains and to spread political propaganda among the local population.

B. Events of 27 May 1944

12. On 27 May 1944 the Red Partisans attacked the village of Mazie Bati (municipality of Mērdzene, district of Ludza), which at the time was approximately 80 kilometres from the front.

The facts as established by the domestic courts and acknowledged by the Government

In February 1944 the German Army discovered and wiped out a group of Red Partisans led by Major Chugunov who were hiding in a barn in the village of Mazie Bati. The applicant and his unit immediately suspected the villagers of having spied for the Germans and of having turned Chugunov's men in to the enemy. It was then decided to take reprisals against the inhabitants of Mazie Bati. Meanwhile, in constant fear of an attack by the Red Partisans, the male inhabitants of Mazie Bati – who up to then had not carried weapons – sought assistance from the German

military administration, which ultimately provided every man with a rifle and two grenades “for his own protection”.

On 27 May 1944 the applicant and his men, who were armed and wearing Wehrmacht uniforms to avoid arousing suspicion, entered the village where the inhabitants were preparing to celebrate Pentecost. The commando unit split up into a number of small groups each of which attacked a house on the applicant's orders. Several Partisans burst into the home of a farmer, Modests Krupniks, seized weapons they found there and ordered him out into the yard. When he pleaded with them not to kill him in front of his children, they ordered him to run towards the forest before opening fire when he did so. Krupniks was left, seriously wounded, on the edge of the forest, where he died the following morning from a massive haemorrhage. Although the surviving villagers heard his screams and groans, they were too afraid to go to his aid.

Two other groups of Red Partisans attacked the homes of two other farmers, Meikuls Krupniks and Ambrozs Buļs. Meikuls Krupniks was seized in his bath and savagely beaten. The Partisans took the weapons they had found in the two villagers' homes to Meikuls Krupniks' house. There they fired several rounds of bullets at Buļs, Meikuls Krupniks and Krupniks' mother. [...] Meikuls Krupniks and his mother were seriously injured. The Partisans then doused the house and all the farm buildings (including the barn and stable) with petrol and set them alight. Krupniks' wife, who was nine months pregnant, managed to escape, but was seized by the Partisans and pushed through a window of the house into the flames. The following morning the surviving villagers found the charred remains of the four victims. Mrs Krupniks' body was identified by the badly burnt skeleton of the baby lying next to her.

A fourth group of Partisans burst into Vladislavs Šķirmants' home, where they found him on his bed with his one-year-old son. After finding a rifle and two grenades hidden in a cupboard, they ordered Šķirmants who was still in his underwear to go out into the yard. They then bolted the door from the outside to prevent his wife following him, took him to a remote corner of the yard and shot him dead.

II.5.4. USA, *Jawad v. Gates* United States Court of Appeals, District of Colombia Circuit, *Jawad v. Gates*, 832 F.3d 364, 12 August 2016

N.B. As per the disclaimer, neither the ICRC nor the authors can be identified with the opinions expressed in the Cases and Documents. Some cases even come to solutions that clearly violate IHL. They are nevertheless worthy of discussion, if only to raise a challenge to display more

humanity in armed conflicts. Similarly, in some of the texts used in the case studies, the facts may not always be proven; nevertheless, they have been selected because they highlight interesting IHL issues and are thus published for didactic purposes.

Background Note: This note is intended to provide domestic legal context to allow the reader to better extract the IHL principles found in this case. This note does not provide US legal advice.

US law can be unofficially grouped into two broad categories: civil (tort, contracts, commercial, family, administrative, estate law, etc.) and criminal. Depending on the relevant law, the nature of the parties, and the location of the parties, a person or entity may file a lawsuit in a state district court or federal district court. The Alien Tort Statute ("ATS") allows a non-US national ("alien") to bring a lawsuit in a federal district court when the alien claims he or she suffered damages in tort from a violation of international law. The Federal Tort Claims Act ("FTCA") allows an individual to bring a lawsuit against the US or its agencies for torts committed on behalf of the government. Here, Jawad brought a civil lawsuit under the ATS and FTCA against Robert Gates, the former US Secretary of Defense, claiming tort damages for torture and other mistreatment incurred while detained in Guantanamo.

While Jawad was detained, Congress established military tribunals through which Guantanamo detainees could be tried for violations of international humanitarian law through the Military Commissions Act of 2006 ("MCA"). The MCA also created an exception to the ATS and FTCA. Under the MCA, federal district courts no longer had jurisdiction over tort cases brought by enemy combatant detainees regarding their detention. In this opinion, the appellate court affirmed the district court's lack of jurisdiction because Jawad was found to be an enemy combatant and his claim arises from treatment during detention. This case will focus on the determination Jawad was an enemy combatant and his treatment in Guantanamo.

II.5.5. ICTY, The Prosecutor v. Prlić et al., IT-04-74-T, Trial Chamber, Judgement and Opinion, 29 May 2013

In this case, the International Criminal Tribunal for the former Yugoslavia (ICTY) sentenced the six accused for crimes committed within the context of the dissolution of the former Yugoslavia, on those parts of the territory of Bosnia and Herzegovina claimed as part of Herceg-Bosna. The accused were part of the Croatian Defence Council (HVO), the supreme executive, administrative and military body of Herceg-Bosna run by ethnic Croats that was involved in an

armed conflict with the mainly Muslim armed forces of Bosnia and Herzegovina (ABiH). Two IHL issues raised in this case will be in the focus of this discussion: First, the classification of the Muslim members of the HVO detained by the HVO, and second, the destruction of the symbolic Old Bridge of Mostar. While the Trial Chamber and the Appeals Chamber agree on the first issue, their disagreement on the second issue along with two dissenting opinions on the question opens the ground for an in-depth discussion of the protection of cultural heritage in armed conflicts.

II.6. Ambiguity and Interpretation of Laws

Vague Definitions, terms such as "combatant" and "unlawful combatant" are not always clearly defined, leading to varying interpretations by different states and non-state actors. This ambiguity can result in inconsistent application of rights. Evolving Nature of Warfare, as warfare evolves with new technologies and tactics, existing IHL provisions may become outdated, failing to adequately address contemporary combat scenarios such as cyber warfare and the use of autonomous weapons⁶⁹.

II.7. Non-State Actors and Asymmetric Warfare

Recognition of Combatants, IHL traditionally applies to conflicts between states, but many modern conflicts involve non-state actors, such as insurgent groups or terrorist organizations. Determining the combatant status of members of these groups can be complex and contentious. Compliance and Accountability, non-state actors may not feel bound by IHL, leading to widespread violations without clear mechanisms for accountability or enforcement⁷⁰.

II.8. Enforcement and Accountability

Jurisdictional Issues, international bodies like the International Criminal Court (ICC) have limited jurisdiction and face challenges in enforcing IHL, particularly against non-state actors or in conflicts where state sovereignty is asserted against international intervention. Impunity, many

⁶⁹ The impact of emerging technologies on the law of armed conflict [Ed. by] Eric Talbot Jensen and Ronald T.P. Alcalá. - Oxford : Oxford University Press, 2019. - XVIII, 389 p.

⁷⁰ International humanitarian law and the challenges of contemporary armed conflicts: ICRC. Geneva: ICRC, October 2019. P. 80.

violations of combatants' rights go unpunished due to political considerations, lack of evidence, or limited resources for investigation and prosecution⁷¹.

II.9. Detention and Treatment of Combatants

Prisoner of War (POW) Status, determining POW status can be contentious, especially in conflicts involving irregular forces. The rights afforded to POWs under the Geneva Conventions are often disputed or disregarded. Torture and Inhumane Treatment, despite clear prohibitions under IHL, instances of torture and inhumane treatment of detained combatants persist, with perpetrators often evading accountability⁷².

II.10. Right to a Fair Trial

Military Tribunals vs. Civilian Courts, combatants, particularly those deemed "unlawful," are often tried by military tribunals where fair trial standards may differ from those in civilian courts. This can lead to perceptions of injustice and violations of due process rights.

Access to Legal Representation, ensuring that detained combatants have access to adequate legal representation is a persistent challenge, particularly in conflict zones⁷³.

II.11. Protection from Reprisals

Prohibition of Reprisals, the IHL prohibits reprisals against combatants, but this rule is frequently violated, particularly in asymmetric conflicts where one side may not adhere to the laws of war.

Collateral Damage, the distinction between combatants and civilians can be blurred, leading to instances where combatants' rights are infringed upon as part of broader military operations that result in collateral damage⁷⁴.

⁷¹ Ordinances and articles of war before the Lieber code, 866-1863: the long pre-history of international humanitarian law Beatrice Heuser. In: Yearbook of international humanitarian law, Vol. 21, 2018, p. 139-164

⁷² Participation of non-state armed groups in the formation of customary international humanitarian law: arising challenges and possible solutions by Lizaveta Tarasevich. - Geneva: Geneva Academy of international humanitarian law and human rights, August 2019. P.29

⁷³ <http://www.prix-henry-dunant.org/wp-content/uploads/Research-2019-paper-TARASEVICH-Sassoli.pdf>

⁷⁴ Giovanni Mantilla. In: Journal of the history of international law, vol. 21, 2019, p. 181-211

II.12. Technological Advancements and Ethical Dilemmas

Use of Drones and Autonomous Weapons, the deployment of drones and autonomous weapons raises questions about accountability and the application of combatant rights, as these technologies can obscure responsibility for violations, and increase the victim of death and injuries which is among the big violations of Combatants who cease fire and take arms up⁷⁵.

Cyber Warfare, as cyber warfare becomes more prevalent, the application of IHL to cyber combatants remains an unsettled area, with significant implications for the rights and protections of those involved⁷⁶.

II.13. Humanitarian Access and Neutrality

Access to Healthcare and Aid, combatants are entitled to medical care, but ensuring access to healthcare and humanitarian aid in conflict zones can be extremely challenging, particularly when parties to the conflict restrict humanitarian operations. Neutrality of Medical Personnel, ensuring the neutrality and protection of medical personnel attending to combatants is a persistent challenge, often exacerbated by targeted attacks on medical facilities⁷⁷.

II.14. International Humanitarian Law and terrorism

If, as has been asserted above, IHL principles and rules have entered the public domain over the past few years, it is in large part owing to debate over the relationship between armed conflict and acts of terrorism. The question that is most frequently asked is whether IHL has a role to play in addressing terrorism⁷⁸.

II.14.1. Terrorist acts

An examination of the adequacy of international law, including IHL, in dealing with terrorism obviously begs the question, “What is terrorism. Definitions abound, both in domestic legislation and at the international level but, as is well known, there is currently no

⁷⁵ The protection of foreign investment in times of armed conflict Jure Zrilic. - Oxford : Oxford University Press. - XLII, p.268

⁷⁶ <https://library.icrc.org/library/docs/DOC/irrc-909-raboud.pdf>

⁷⁷ War by agreement : a contractarian ethics of war Yitzhak Benbaji and Daniel Statman. - Oxford: Oxford University Press, 2019. - XIII, p.215

⁷⁸ Elaine Korzak and James Gow. - In: Routledge handbook of war, law and technology. - New York : Routledge, 2019. - p. 65-75

comprehensive international legal definition of the term. The United Nations draft Comprehensive Convention on International Terrorism has been stalled for several years because of the issue, among others,

whether and how acts committed in armed conflict should be excluded from its scope. However, regardless of the lack of a comprehensive definition at the international level, terrorist acts are crimes under domestic law and under the existing international and regional conventions on terrorism and they may, provided the requisite criteria are met, qualify as war crimes or as crimes against humanity⁷⁹.

Thus, as opposed to some other areas of international law, “terrorism” although not universally defined as such – is abundantly regulated. The ICRC believes, however, that the very term remains highly susceptible to subjective political interpretations and that giving it a legal definition is unlikely to reduce its emotive impact or use⁸⁰.

IHL is the body of rules applicable when armed violence reaches the level of armed conflict, and is confined only to armed conflict, whether international or non-international. The relevant treaties are, of course, the four Geneva Conventions of 1949 and their two Additional Protocols of 1977, although IHL encompasses a range of other legally binding instruments and customary law as well⁸¹.

While IHL does not provide a definition of terrorism, it explicitly prohibits most acts committed against civilians and civilian objects in armed conflict that would commonly be considered “terrorist” if committed in peacetime. It is a basic principle of IHL that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives⁸².

II.15. General principles of International Humanitarian Law

The core fundamental principles of International Humanitarian Law (IHL) are, the distinction between civilians and combatants, the prohibition to attack those hors de combat (i.e. those not

⁷⁹ Tara Smith. In: *Leiden journal of international law*, Vol. 32, no. 4, December 2019, p. 759-779

⁸⁰ Christopher E. Bailey. “Cyber civilians as combatants” *Creighton international and comparative law journal*, Vol. 8, issue no.1, December 2016, p. 4-22

⁸¹ <https://library.icrc.org/library/docs/DOC/irrc-909-biller.pdf>

⁸² Jeffrey Biller. In: *International review of the Red Cross*, Vol. 100, no. 907/908/909, 2018, p. 165-183

directly engaged in hostilities), the prohibition to inflict unnecessary suffering as well as the principle of necessity.

II.15.1. The principle of distinction is a cornerstone

The rights of combatants under IHL are foundational to maintaining a balance between military objectives and humanitarian considerations in armed conflicts. However, legal challenges such as ambiguity in definitions, the involvement of non-state actors, enforcement difficulties, and the evolving nature of warfare pose significant obstacles to the effective protection of these rights. Addressing these challenges requires continuous adaptation of IHL, stronger enforcement mechanisms, and greater international cooperation to ensure that the laws of war are respected and upheld⁸³.

Once the threshold of armed conflict has been reached, it may be argued that there is little added value in designating most acts of violence against civilians or civilian objects as terrorist because such acts already constitute war crimes under IHL. Individuals suspected of having committed war crimes may be criminally prosecuted by States under existing bases of jurisdiction in international law; and, in the case of grave breaches as defined by the Geneva Conventions and, additional Protocol I, they must be criminally prosecuted, including under the principle of universal jurisdiction⁸⁴.

The explicit prohibition of acts of terrorism against persons in the power of the adversary, as well as the prohibition of such acts committed in the course of hostilities along with the other basic provisions mentioned above demonstrate that IHL protects civilians and civilian objects against these types of assault when committed in armed conflict. Thus, in current armed conflicts, the problem is not a lack of rules, but a lack of respect for them⁸⁵.

A recent challenge for IHL has been the tendency of States to label as terrorist all acts of warfare committed by organized armed groups in the course of armed conflict, in particular non-international armed conflict. Although it is generally agreed that parties to an international armed

⁸³ Valentin Jeutner. In: *Journal of international humanitarian legal studies*, Vol. 10, no. 1, 2019, p. 158-170

⁸⁴ Hilly Moodrick-Even Khen. In: *Journal of international humanitarian legal studies*, Vol. 10, issue 2, 2019, p. 303-336

⁸⁵ Ximena Galvez Lima. In: *Journal of international humanitarian legal studies*, Vol. 10, issue 2, 2019, p. 265-302

conflict may, under IHL, lawfully attack each other's military objectives, States have been much more reluctant to recognize that the same principle applies in non-international armed conflicts⁸⁶.

II.15.2. The distinction between civilians and combatants.

International humanitarian law is based on the principle of the distinction between civilians, civilian objects and combatants and military objectives, the civilian is defined in opposition to the combatant. Literally, a civilian person is any individual who is not a member of armed forces, the principle of distinction is set out in Article 48 and 52 of Additional Protocol 1 to the Geneva Conventions, the Conventions define who is a combatant and a military object that can be lawfully attacked⁸⁷. Any direct attack against a civilian or civilian object is not only a violation of IHL but also a grave breach, direct attacks against civilians and/or civilian objects are categorized as war crimes. Additionally, any weapon which does not allow for a distinction between civilians/civilian objects and fighters/military objects is also prohibited under IHL, the principle is also a rule of customary international law and therefore binding on all states⁸⁸.

II.15.3. The prohibition to attack those hors de combat (i.e. those not directly engaged in hostilities).

The prohibition to attack any person hors de combat (those who are sick and wounded, prisoners of war) is a fundamental rule of IHL. For example, while soldiers could be targeted lawfully under normal circumstances, it is prohibited to target them if they surrender or are wounded and no longer pose a threat. The prohibition to attack any person hors de combat (those who are sick and wounded, prisoners of war) is a fundamental rule of IHL, for example, while soldiers could be targeted lawfully under normal circumstances, it is prohibited to target them if they surrender or are wounded and no longer pose a threat, additionally, they may be entitled to more protection if they meet the criteria of a prisoner of war⁸⁹.

II.15.4. The prohibition to inflict unnecessary suffering.

⁸⁶ Lizaveta Tarasevich. Geneva: Geneva Academy of international humanitarian law and human rights, August 2019. P. 29

⁸⁷ The dictionary of the Spanish academy provides the first meaning of the term 'guerrilla': "A party of light troops for reconnaissance, and opening of the first skirmishes." *Id.*, p. 32.

⁸⁸ Article 48 and 52 of Additional Protocol 1 to the Geneva Conventions

⁸⁹ Arts. 4.a.1-3, 4.a.6; API Arts. 43, 50) of third Geneva Convention of 1949 was expanded in 1977 by Additional Protocol I

IHL permits violence, but it prohibits the infliction of unnecessary suffering and superfluous injury. The exact meaning of the terms, however, is unclear and the protection may as such be limited, one rule that has been established based on this principle is the prohibition on the use of blinding laser weapons⁹⁰.

II.15.5. The principle of necessity.

A dominant notion within the framework of IHL is military necessity, often the principle which clashes most with humanitarian protection. Military necessity permits armed forces to engage in conduct even when such action will result in destruction and harm. The concept of military necessity acknowledges that under the laws of war, winning 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 want⁹¹. The principle must be interpreted in the context of specific prohibitions and in accordance with the other principles of IHL, it is important to note that the rules of IHL include the principle. For example, Article 52 of Additional Protocol I lists objects that can be lawfully targeted. However, the notion cannot be applied to override specific protections or create exceptions to rules where the text itself does not provide for one⁹².

II.15.6. The principle of proportionality.

The principle of proportionality limits potential harm to civilians: the principle demands that the least amount of harm is caused to civilians, and when harm cannot be avoided, it needs to be proportional to the military advantage, the proportionality principle is most prevalent in Article 51(5)(b) of Additional Protocol I concerning the conduct of hostilities, this article prohibits attacks when the civilian harm would be excessive in relation to the military advantage sought, this is an area of hostilities where we often hear the term ‘collateral damage, 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, a proportionality assessment is therefore not necessary since any direct attack against

⁹⁰ all of GCIV, API Arts. 48–56, APII Arts. 13–18).

⁹¹ 1 ICRC, IHL in Action: Respect for the Law on the Battlefield; available at <https://ihl-in-action.icrc.org>.

⁹² Article 52 of Additional Protocol I of the third Geneva Convention of 1949 was expanded in 1977

even a single civilian would already be a clear violation of IHL, proportionality is only relevant when a military target is attacked⁹³.

II.15.7. 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 enemies, IHL, the principles of which can be found in all major religions and cultures, sets out only basic protections, but demonstrates some common sense of and respect for humanity even during armed conflict, modern IHL accepts that harm, destruction, and death can be lawful during armed conflict. The law seeks to limit 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 sick⁹⁴.

II.16. Doctrines of International Humanitarian law

International Humanitarian law (IHL) is a set of rules which seek for humanitarian reasons to limit the effects of armed conflict, it protects individuals who are not, or are no longer, participating in the hostilities and restricts the means and methods of warfare.

II.16.1. Concept and Purpose of International Humanitarian Law

As DAVID Eric, wrote, the Philosophy of International Humanitarian Law is to limit the use of violence in armed conflicts as ensure the protection of civilians, those who have surrendered (i.e., in international armed conflicts, prisoners of war) or can no longer participate (such as the wounded and sick), to protect anyone, it cannot consider merely any causal contribution to the war effort as participation, but only the contribution implementing the final element in the causality chain, i.e., the application of military violence, to ensure that state fighting in self-defence has only to weaken the military potential of the aggressor sufficiently to preserve its

⁹³ e Development of ‘Direct Participation’ Exception to Civilian Immunity.” International Review of the Red Cross 872 (December 2008): 853–81.

⁹⁴ Henckaerts, Jean-Marie, and Louise Doswald-Beck, eds. Customary International law. Vol. 1, The Rules. Cambridge: Cambridge University Press, 2005, esp. part5.

independence; the aggressor has only to weaken the military potential of the defender sufficiently to impose its political will; the governmental forces involved in a non-international armed conflict have only to overcome the armed rebellion and dissident fighters have only to overcome the control of the government of the country (or parts of it) they want to control, in order to win the war it is not necessary to kill all enemy soldiers; it is sufficient to capture them or to make them otherwise surrender, it is not necessary to harm civilians, only combatants, it is not necessary to destroy the enemy country, but only to occupy it, it is not necessary to destroy civilian infrastructure, but only objects contributing to military resistance⁹⁵.

II.16.2. Historical Development of International Humanitarian Law.

As from contribution of Louis Lafrance, who has master's degrees in psychology from the University of Montreal and in international law from the University of Quebec in Montreal. Mr Lafrance has spent time in many conflict countries, first as a journalist and then as a human rights specialist working for the United Nations, Public international law can be described as composed of two layers, a traditional layer consisting of the law regulating coordination and cooperation between members of the international society essentially the States and the organizations created by States and a new layer consisting of the constitutional and administrative law of the international community of 6.5 billion human beings, while this second layer tries to overcome the law's typical traditional relativity, international law still retains a structure that is fundamentally different from that of any internal legal order, essentially because the society to which it applies and which has created it is, despite all modern tendencies, infinitely less structured and formally organized than any nation or State⁹⁶.

II.17. Warriors without rights

Combatant has throughout the history of organized warfare been an exclusionary concept, distinguishing between combatants and civilians has long represented an important aspect of warfare and has been recognized as the indispensable means by which humanitarian principles are injected into the rules governing conduct in war, yet the protection of participants in warfare under international humanitarian law remains characterized by a certain level of uncertainty as regards the codified provisions for combatants and civilians, who qualifies as a combatant is a

⁹⁵ DAVID Eric, *Principes de droit des conflits armés*, Brussels, Bruylant, 3rd ed., 2002, pp. 921-922, p.23-349]

⁹⁶ Louis Lafrance, "Humanitarian ambition", in *IRRC*, Vol. 289, 1992, p. 371.

question that has plagued those seeking to establish a comprehensive normative regime governing participation in hostilities. Acting on behalf of a state has constituted the primary means of attaining combatant, and therefore legitimate, status⁹⁷.

As a result, a significant number of participants in warfare do not meet the established criteria and are, consequently, considered ‘illegitimate’ or ‘unlawful, this includes those fighting in international armed conflict as well as groups engaged in armed conflict not of an international character, the uncertain status of these ‘illegitimate’ warriors is evidenced by the variety of terms used to describe them. The traditional dual privileged status approach of dividing a population into combatants and civilians is only as effective as the accuracy with which the definition of ‘combatant’ is established and to the extent there is a clear understanding of when civilians lose the protection of their status by participating in hostilities, recently, the question of competency and the protection of captured enemy personnel has gained prominence due to the decision of the United States government in 2002 to deny prisoner of war status to the Taliban and Al Qaeda fighters, similarly, there is considerable controversy as to the standard of treatment to be applied to captured unlawful combatants⁹⁸.

Historically, a consistent result of being determined to be an unauthorized participant in hostilities has been harsh treatment at the hands of the captor, questions are asked whether civilian participants in combat are a type of ‘illegal’ combatant, fall under civilian status, or merit their own status under international humanitarian law, the idea of an intermediate status is rejected by many analysts. In order to address warfare comprehensively, international humanitarian law must tackle both its direct and indirect manifestations, efforts to advance humanitarian law in the twentieth century have not provided a simple solution to this complex problem, in defining lawful combatants, international humanitarian law has created an excluded group of participants in combat about whom many questions remain unresolved, the law surrounding the assessment of combatants has not yet attained the level of certainty that should be demanded of it to be considered properly to encompass all aspects of warfare and those who participate in it, it is perhaps inevitable that the increasingly complex nature of modern conflict will bring further pressure to advance this area of the law in the twenty-first century, a primary problem has been the linkage of the treatment of detainees to the concept of legitimacy, the

⁹⁷ *Revista española de derecho militar*, Vol. 108, 2017; P. Tavernier, above note 6, pp. 738–41.

⁹⁸ Interview with Eirini Giorgou, Legal Adviser, ICRC Arms and Conduct of Hostilities Unit, *International Review of the Red Cross*, Vol. 104, No. 2–3, 2022.

highest level of protection associated with prisoners of war remains tied to the concept of lawful combatant⁹⁹.

However, the imprecise criteria for attaining combatant status and the fact that the determination of legitimacy rests largely with the detaining power can mean that any claim to be a lawful combatant is subject to considerable uncertainty, the issue of whether ‘unprivileged belligerents’ are entitled to the protection associated with internment was decided over fifty years ago, the remaining question is why that protection is not extended to those belligerents who technically may be outside the reach of the 1949 Civilian Convention. This would ensure a consistent application of international humanitarian law protection based on the treatment standards associated with prisoners of war without introducing the emotive and often divisive issue of legitimacy.

II.17.1. Unprivileged Belligerents and the Struggle over Legitimacy

Article 65 [now 75] envisaged covering all the grey area which would always exist whatever might be done, between combatants in a strict sense, as defined in Article 4 of the third Geneva Convention of 1949 and the Protocol I, and the peaceful civilian population, an important detail should be emphasized here, namely that the new categories of persons thus protected would be protected within the framework of Article 75 only, this statement by the International Committee of Red Cross representative during the development of additional Protocol I2 concerning the grey area between the codified provisions for combatants and civilians highlights the uncertainty that has pervaded a fundamental aspect of international humanitarian law, the protection of participants in warfare. Additional Protocol I represent a significant advancement over 1907 Regulations Respecting the Laws and Customs of War on Land³ in terms of extending humanitarian protection, as James Spaight stated in 1911, the delegates to the 1907 Conference had “almost shirked their task a task of great difficulty, it must be admitted in attempting to define combatant status¹⁰⁰”.

However, the definition of combatants and the standards of treatment to be applied to captured personnel continue to dominate contemporary discussions, this occurs despite the fact that article 75 of Additional Protocol I, which has been recognized as reflecting customary international

⁹⁹ The Laws of War on Land, Oxford, 9 September 1880 (Oxford Manual).

¹⁰⁰ San Remo Manual on International Law Applicable to Armed Conflicts at Sea, 12 June 1994.

law,⁵ extends human rights protections to every detained belligerent, the question of combatants and the protection of captured enemy personnel have gained prominence recently due to the United States decision in 2002 to deny prisoner of war status to the Taliban and Al Qaeda fighter. However, the issue of who can be part of the privileged class of warriors, known as “combatants and which persons do not qualify has long plagued those seeking to establish a comprehensive normative regime governing participation in hostilities, much of the debate about combatant status over the past century has centered on the issue of legitimacy¹⁰¹.

In this regard, acting on behalf of a state has constituted the primary means of attaining combatant, and therefore legitimate, status, as a result, a significant number of participants in warfare do not meet the established criteria and therefore are considered illegitimate or unlawful, this includes not only those fighting in international armed conflict, but also groups engaged in armed conflict not of an international character, the uncertain status of these illegitimate warriors is evidenced by the variety of terms used to describe them such as unlawful combatants, unprivileged belligerents, insurgents, often these participants in conflict are referred to simply as criminals, not everyone considers these participants to be illegal, they are often provided an aura of legitimacy as participants in a people’s war or freedom fighters, these participants in conflict are also categorized as civilians who lose momentarily the protection of that status, unless and for such time as they take a direct part in hostilities, however, this civilian categorization can be problematic conceptually in dealing with unlawful participants in warfare since the term civilian carries with it an aspect of legitimacy, immediately following the September 11, 2001 attacks on the United States, there was even a denial that unlawful combatants exist as a legal category at all, however, increasingly there have been acknowledgments that these participants in hostilities have frequently been used at least since the beginning of the last century in legal literature, military manuals, and case law, similarly, there is considerable controversy as to the standard of treatment to be applied to captured unlawful combatants, perhaps the clearest example of that controversy is found in the allegations that detainees in the Guantanamo Bay camps are in a legal ‘black hole’ for which the international legal regime protecting persons who are hors de combat had no reach, clearly, efforts to advance humanitarian law in the twentieth century have not

¹⁰¹ UN General Assembly, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, Resolution 60/147, UN Doc. A/RES/60/147, 16 December 2005.

provided a simple solution to this complex problem, in defining lawful combatants, international humanitarian law has created an excluded group of participants in combat about whom many questions remain unresolved. Perhaps more difficult to understand is why after a century of attempting to regulate and codify international humanitarian law there remains so much confusion and controversy over how these participants in warfare should be treated¹⁰².

II.17.2. Combatant status

The following analysis of combatant status highlights the complexities and deficiencies of international humanitarian law regarding the identification of who may lawfully participate in combat, combatants is assessed in terms of the exclusive nature of the membership test, its intimate and continuing link to legitimacy, the sufficiency of criteria for determining combatant status, and the struggle to address all types of fighters including those who engage in unconventional warfare¹⁰³.

II.17.3. The privileged class of warriors

The idea that there is a privileged class of warriors who are bound by and benefit from the law of war finds its roots in the Codes of Chivalry of the Middle Ages, this body of law was linked to Just War theory as it developed in the fourteenth and fifteenth centuries, the conduct of war not only had to be public but also open, the open nature of public war is related to perfidy treachery, openness was seen partly as evidence of its public nature and partly as the antithesis of perfidy and cowardly assassination, actions repugnant to chivalry and the membership of the various knightly orders, this law was not necessarily humanitarian in character, being concerned more with the loss of personal honor or valuable ransom, however, it did carry a separation of military forces from the civilian population and in humane terms the civilian stands outside the lawful ambit of attack and capture, acts performed outside these public and open criteria were considered murders and brigandage, combatants therefore have a special status, they have the right to participate in hostilities and receive immunity from prosecution of combat immunity for killing carried out in accordance with the law. Further, combatants have a right to prisoner of war status, combatant status has not been designed or historically applied as an inclusive

¹⁰² www.globalprotectioncluster.org/gp20/fact-sheet-on-the-guiding-principles-on-internal-displacement.

¹⁰³ African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), 23 October 2009 (entered into force 6 December 2012).

concept, in a system designed to provide order and outline standards of conduct, this status is ultimately linked to legitimacy, as will be outlined below, the link to legitimacy is found in the relationship between the fighters and a Party to the conflict, it is also evident in the obligation to comply with the laws and customs of warfare, further, participation in warfare is not viewed as the act of an individual, but rather combatants are ‘instruments’ of the state¹⁰⁴.

II.17.4. Legitimacy and the jus ad bellum controversy

The impact of history on the development of combatant status is not limited to notions of chivalry or the separation of combatants from the civilian population, there continues a fundamental but rarely acknowledged connection to Just War theory, in particular, claims to be a lawful combatant rest fundamentally on an association with the right authority¹⁰⁵.

II.17.5. The interaction between jus ad bellum and jus in bello

Contemporary legal thinking includes interpretations that pre-existing bases for the recourse to war have not survived the Kellogg Briand Pact of 1928 and United Nations Charter, although it has been noted in contemporary political thought that there has been a veritable renaissance of writing and thinking about the just war tradition, however, the connection between legitimate fighters and a party to a conflict provides perhaps one of the most interesting and undoubtedly controversial aspects of combatant status since it exposes a continuing link between jus ad bellum and jus in bello principles, despite their common origins¹⁰⁶.

These two categorizations of legal principles are considered often to operate independently of one another, this latter view is reflected in the preamble to additional Protocol I, which states that it must be fully applied in all circumstances to all persons who are protected by those instruments, without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict, importing issues related to the justness of a cause when assessing jus in bello can indeed lead to an unequal application of international humanitarian law, in this regard, concern over mixing jus ad bellum with jus in bello appears to have concentrated on the just cause principle, notwithstanding the laudable goal

¹⁰⁴ <https://iihl.org/wp-content/uploads/2018/04/Copenhagen-Process-Principles-and-Guidelines.pdf>.

¹⁰⁵ Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017.

¹⁰⁶ Michael N. Schmitt (ed.), *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations*, Cambridge University Press, Cambridge, 2017.

of reinforcing the equal application of the law in bello, the idea that there is complete separation is coming under increasing scrutiny, the view that jus ad bellum operates separately from jus in bello is open to challenge given the relatively modern genesis of the terms, while the broader issues of the law governing the recourse to war (jus ad bellum) have been separated conceptually from the law governing the conduct of hostilities (jus in bello), the status of participants in conflict hinges ultimately on their association with “lawful” parties to a conflict¹⁰⁷.

II.17.5.1.The right authority

In respect of combatant, the influence of jus ad bellum on jus in bello does not arise from the just war principle of just cause, but rather because of a connection between combatant status and the right or competent’ authority as James Turner Johnson points out, the jus ad bellum criteria are not of equal importance, the concepts of competent authority, just cause, and right intention have priority over the remaining four criteria: last resort, reasonable hope of success, overall proportionality, and a goal of peace, even among these three criteria the right authority appears to occupy a predominant position as the principle that presupposes the rest of the just war criteria since it determines who is primarily responsible for judging whether the other criteria are met¹⁰⁸.

II.17.5.2.Challenges of contemporary treaty-making

The progressive codification of IHL over the last century and a half, which continues to this day, means that this part of international law is highly codified, this codification has not been without its difficulties, and, at the time of writing, faces challenges, as is generally the case with every branch of law, be it domestic or international, questions of how and why IHL develops are closely intertwined. This means that the reasons that prompt legal developments determine, or at the very least influence, to a significant degree the manner methodologically speaking in which such developments take place.

¹⁰⁷ Eyal Benvenisti and Doreen Lustig, “Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874”, *European Journal of International Law*, Vol. 31, No. 1, 2020, p. 129.

¹⁰⁸ C. Pede and P. Hayden, *ibid.*; Paul Ney, “Remarks at the Israel Defense Forces 3rd International Conference on the Law of Armed Conflict”, *Just Security*, 28 May 2019

CHAPTER III: LEGAL AND INSTITUTIONAL MECHANISMS THAT SHOULD BE UNDERTAKEN TO EFFECTIVELY ENHANCE THE RIGHTS OF COMBATANT IN WAR

This chapter aims to provide a comprehensive analysis of legal and institutional mechanisms that can be undertaken to effectively enhance the rights of combatants in war, contributing to the broader discourse on International Humanitarian Law and humanitarian protection.

III.1. Legal mechanisms for Protecting Combatants' Rights

The protection of combatants' rights during armed conflict is a crucial aspect of international humanitarian law (IHL). Combatants, defined as members of the armed forces of a party to a conflict, are granted specific rights and protections under various legal instruments. However, the dynamic nature of modern warfare, coupled with the emergence of non-state actors and asymmetrical warfare, presents significant challenges in ensuring these rights are upheld. Strengthening legal frameworks is essential to address these challenges and enhance the protection of combatants' rights¹⁰⁹.

III.1.1. Geneva Conventions and Additional Protocols

The cornerstone of IHL, the Geneva Conventions of 1949 and their Additional Protocols of 1977, provide comprehensive protections for combatants. These include humane treatment, protections for prisoners of war, and the prohibition of torture and other forms of inhumane treatment. But these meet with the challenges, which despite their comprehensive nature, the applicability and enforcement of these conventions can be limited, especially in conflicts involving non-state actors who may not adhere to the same legal obligations, and international judicial bodies face many barriers while investigating and prosecuting such related crimes¹¹⁰.

- ✓ Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field which covers the Protection of wounded and sick soldiers on land during war and ensures humane treatment without discrimination. It also covers medical personnel, establishments, and transport.

¹⁰⁹ Marco Roscini. - In: Routledge handbook of war, law and technology. - New York: Routledge, 2019. - p. 88-100

¹¹⁰ War crimes Committee of the International Bar Association. London: International Bar Association, November 2019. - 18 p.

- ✓ Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea which extends protections similar to the first Convention to wounded, sick, and shipwrecked military personnel at sea. It also covers hospital ships and medical personnel.
- ✓ Convention relative to the Treatment of Prisoners of War which establishes standards for the treatment of prisoners of war (POWs), ensuring that they are treated humanely, provided adequate food, shelter, and medical care, and are protected from violence, intimidation, and public curiosity.
- ✓ Convention relative to the Protection of Civilian Persons in Time of War which Provides protections to civilians during times of war, including those in occupied territories, ensuring humane treatment and basic human rights¹¹¹.

The Additional Protocols to the Geneva Conventions were adopted in 1977 to address issues that were not sufficiently covered in the original Conventions and to adapt the laws to the realities of modern warfare¹¹².

- Protocol I is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts and it expands protections for victims of international conflicts, including rules on the conduct of hostilities, protection of civilian populations, and treatment of persons in occupied territories. It emphasizes the distinction between combatants and civilians and prohibits attacks on civilian targets¹¹³.
- Protocol II is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts that covers the protections for victims of non-international conflicts (civil wars), setting standards for humane treatment, and prohibiting acts such as murder, torture, and hostage-taking¹¹⁴.
- Protocol III, is the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem which establishes the Red Crystal as an additional protective emblem, alongside the Red Cross and Red Crescent, to enhance the

¹¹¹ Helene Højfeldt Jakobsen. In: International review of the Red Cross, Vol. 100, no. 907/908/909, 2018, p. 315-336

¹¹² Frédéric Mégret ; Chloe Swinden. In: Journal of international humanitarian legal studies, Vol. 10, issue 2, 2019, p. 337-370

¹¹³ Noura Erakat. In: International criminal law review, Vol. 19, no. 5, 2019, p. 783-818

¹¹⁴ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, Article 48. Article 48 was adopted by consensus. CDDH, Official Records, Vol. VI, CDDH/SR.41, 26 May 1977, p. 161.

protection of medical services and personnel in armed conflicts¹¹⁵.

The Geneva Conventions and their Additional Protocols are critical for protecting individuals who are not or no longer participating in hostilities, ensuring humane treatment and basic rights, they form the legal basis for international humanitarian law and set the standards for conduct during war. Rather they faced many challenges such as enforcement that can be difficult, particularly with non-state actors in modern conflicts, the compliance that relies on the political will of states and non-state groups, and violations often occur despite the legal framework, that is why the strengthening mechanisms for monitoring, enforcement, and accountability is essential for the effectiveness of these laws, to ensure that the rights of combatants are efficiently and effectively adhered under international humanitarian law¹¹⁶.

III.1.2. Customary International Law

Customary IHL consists of unwritten rules derived from the consistent practice of states and other international actors, which they follow out of a sense of legal obligation, hence they meet with the challenges, such as the identification and interpretation of customary rules which can be contentious, leading to varied implementations and protections, therefore, this variate may be considered like it is inconsistent¹¹⁷.

III.1.3. Clarifying Definitions and Status

Clear Definitions, clarify the definitions of "combatant," "non-combatant," "unlawful combatant," and related terms to reduce ambiguities and ensure uniform application across different jurisdictions and conflict scenarios. Combatant Status Determination, establish clear procedures for determining combatant status, including mechanisms for review and appeal to prevent arbitrary or erroneous classifications¹¹⁸.

III.1.4. Updating Legal Instruments

¹¹⁵ first convention of any kind to be signed by every country involved, taking effect in 1988 and reaching universal ratification in 2009.

¹¹⁶ Who is a civilian: perceptions of "civilianness" in the Central African Republic
Rebecca Sutton. - [Fiesole] : European University Institute, [July 2019]. P. 13

¹¹⁷ Back in the game : international humanitarian lawmaking by states Yahli Shereshevsky. In: Berkeley journal of international law, Vol. 37, no. 1, 2019, p.63

¹¹⁸ Sabrina Henry. In: International review of the Red Cross, Vol. 100, no. 907/908/909, 2018, p. 267-285

Modernizing IHL, update existing IHL instruments, such as the Geneva Conventions, to address contemporary forms of warfare, including cyber warfare, drone warfare, and autonomous weapon systems. Codifying Best Practices, incorporate best practices and lessons learned from recent conflicts into IHL to ensure that the legal framework remains relevant and effective¹¹⁹.

III.2. Enhancing Institutional Mechanisms

Institutional mechanisms are the processes by which things are invested with institutional or stimuli functions, the study of these mechanisms is an essential feature of social psychology, since it informs us first of the origin and disappearance of one of the fundamental features of social psychological data, namely institutions, secondly, the investigation of cultural mechanisms teaches us much concerning the development of cultural personality, for as our study of culturalization has disclosed, the person's contact with institutions determines the nature of his particular complement of behavior equipment regarding the hostilities under international humanitarian law.

III.2.1. Duty bearers in international human rights law and international humanitarian law

International human rights law and international humanitarian law have different rules regarding the type of actors that bear responsibilities and can be bound by the law. They also contain specific provisions for the protection of persons and of specific groups of persons who are considered to be more exposed to the risk of violations, particularly in an armed conflict. Despite their differences, both bodies of law are increasingly understood as imposing obligations on both State and non-State actors, albeit in different conditions and to differing degrees¹²⁰.

III.2.2. States

International law recognizes that in general States, together with international organizations, are the primary subjects of international law, they acquire legal obligations by entering into international treaties and also have legal obligations deriving from customary international law. Thus, subject to lawful reservations dealt with below, States that have ratified international

¹¹⁹ Ilana Rothkopf. In: Journal of conflict and security law, Vol. 24, no 2, Summer 2019, p. 271-296

¹²⁰ Sigrid Redse Johansen. the military commander's necessity: the law of armed conflict and its limits .Cambridge, Cambridge University Press, 2019. -p.428

humanitarian law or human rights treaties are bound by their provisions¹²¹.

Moreover, according to the Vienna Convention on the Law of Treaties, States that have signed but not ratified a treaty are bound to act in good faith and not to defeat its object and purpose, beyond these general rules, there are some distinctions in the application of international human rights law and of international humanitarian law. International human rights law explicitly protects a very wide range of Rights from the right to be free from torture to the right to education which can be affected, directly or indirectly, by armed conflict. These human rights obligations, whether positive or negative, apply to the State as a whole, independently from any internal institutional structure and division of responsibilities among different authorities. International humanitarian law is primarily, although not exclusively, addressed to States parties to an armed conflict¹²².

III.2.3. Non-State actors

While international law in general has developed in order to regulate mainly the conduct of States in their international relations, international human rights law and international humanitarian law have developed specific particularities aimed at imposing certain types of obligations on others, including individuals and non-State actors¹²³.

For example, recent developments in international criminal law recognize that individuals may be responsible at the international level for gross human rights violations and serious violations of international humanitarian law which amount to crimes against humanity, war crimes and genocide. Similarly, it is generally accepted that international humanitarian law related to non-international armed conflicts, in particular the provisions contained in common article 3 of the Geneva Conventions and, when applicable, Protocol II, applies to parties to such a conflict, whether State or non-State armed groups¹²⁴.

It is also recognized that rules of customary international law related to non-international armed conflicts, such as the principles of distinction and proportionality, are applicable to non-State armed groups. As mentioned above, those customary rules tend to become increasingly similar in

¹²¹ Pouria Askary; Katayoun Hosseinnejad. In: Journal of international humanitarian legal studies, Vol. 10, issue 2, 2019, p. 240-264

¹²² Lizaveta Tarasevich. Geneva: Geneva Academy of international humanitarian law and human rights, August 2019.p. 29

¹²³ Matthew T. Zommer. In: Journal of political and military sociology, Vol. 46, no. 1, 2019, p. 27-51

¹²⁴ Dale Stephens. In: Journal of international humanitarian legal studies, Vol. 10, no. 1, 2019, p. 58-75

international and in non-international armed conflicts¹²⁵.

III.2.4. Peacekeeping and peace enforcement operations

The fact that States provide military personnel to operations put under the authority of the United Nations should not exonerate their personnel from observing international humanitarian law and human rights obligations. Where United Nations peacekeepers have a role as parties to an armed conflict, they should be bound by the applicable provisions of international humanitarian law in the same way as other parties to the conflict¹²⁶.

The Secretary-General's Bulletin on observance by United Nations forces of international humanitarian law includes and summarizes many, but not all, rules of international humanitarian law and instructs United Nations forces to comply with them when engaged as combatants in armed conflicts¹²⁷.

III.2.5. International Criminal Court (ICC)

The Rome Statute of the ICC allows for the prosecution of individuals for war crimes, including those committed against combatants, and it meets with the challenges such as political and practical limitations often hinder the ICC's effectiveness, including issues of state sovereignty and non-cooperation by certain states in such situations¹²⁸.

III.2.6. Strengthening International Bodies

International Criminal Court (ICC), enhance the jurisdiction and enforcement capabilities of the ICC to prosecute violations of combatants' rights, including those committed by non-state actors¹²⁹.

United Nations (UN), strengthen the role of the UN in monitoring compliance with IHL,

¹²⁵ Richard Mackenzie-Gray Scott. In: *Journal of conflict and security law*, Vol. 24, no. 2, Summer 2019, p. 373-407

¹²⁶ All the regard due to their sex": women in the Geneva Conventions of 1949 Anna Crowe. Human rights program, Harvard Law school, December 2016. P.18

¹²⁷ Marco Longobardo. In: *International criminal law review*, Vol. 19, issue 4, 2019, p. 600-634

¹²⁸ Ben Holmes. In: *International review of the Red Cross*, Vol. 100, no. 907/908/909, 2018, p. 115-141

¹²⁹ Ergun Cakal. In: *Journal of international humanitarian legal studies*, Vol. 10, no. 1, 2019, p. 7-40

providing technical assistance to states, and facilitating dialogue between conflicting parties¹³⁰.

III.2.7. National Implementation and Enforcement

Domestic Legislation, encourage states to incorporate IHL provisions into national laws, ensuring that combatants' rights are protected under domestic legal systems. Independent Oversight Bodies, establish or strengthen independent bodies to oversee the enforcement of IHL, investigate violations, and hold perpetrators accountable¹³¹.

III.2.8. Improving Training and Awareness

Improving Training and Awareness, refers to the process of enhancing the knowledge, skills and understanding of individuals or groups through targeted education and information dissemination, this can involve developing and delivering training programs, workshops, seminars, or campaigns designed to raise awareness about specific issues, best practices, or new developments in a particular field.

III.2.8.1. Training for Military Personnel

IHL Training Programs, implement comprehensive training programs for military personnel at all levels on IHL and the rights of combatants, emphasizing the importance of compliance.

Simulation Exercises, conduct regular simulation exercises and drills to prepare military units for scenarios involving the application of IHL¹³².

III.2.8.2. Public Awareness Campaigns

Educational Initiatives develop public education campaigns to raise awareness about IHL and the rights of combatants among civilians, journalists, and other stakeholders. Media Engagement, collaborate with media organizations to disseminate information about IHL and highlight instances of both compliance and violations¹³³.

¹³⁰ Elina Almila. In: Journal of international humanitarian legal studies, Vol. 10, issue 2, 2019, p. 217-239

¹³¹ War crimes Committee of the International Bar Association. - London : International Bar Association, November (2020), p.18 -67

¹³² Noura Erakat. In: International criminal law review, Vol. 19, no. 5, 2019, p. 783-818

¹³³ Major Tzvi Mintz. In: Military law review, Vol. 227, 2019, issue 3, p. 275-319

III.2.8.3. Strengthening Judicial Mechanisms

War Crimes Tribunals, support the establishment and functioning of war crimes tribunals to prosecute serious violations of combatants' rights. Transitional Justice Mechanisms, implement transitional justice mechanisms, such as truth commissions and reparations programs, to address past violations and promote reconciliation¹³⁴.

III.2.8.4. Improving Investigative Capabilities

Fact-Finding Missions, strengthen the capacity of international and national bodies to conduct thorough and impartial fact-finding missions in conflict zones. Forensic Investigations, invest in forensic capabilities to gather and analyze evidence of violations, ensuring that cases brought before courts are robust and credible¹³⁵.

III.2.8.5. Securing Humanitarian Corridors

Safe Zones, establish and secure humanitarian corridors and safe zones to ensure that combatants, especially the wounded and sick, receive necessary medical care and assistance. Coordination with Humanitarian Organizations: Facilitate coordination between military forces and humanitarian organizations to ensure timely and effective delivery of aid¹³⁶.

III.2.8.6. Protecting Medical Personnel and Facilities

Neutrality and Protection, reinforce the principles of neutrality and protection for medical personnel and facilities, ensuring they can operate without interference or attack. Accountability for Attacks, hold accountable those responsible for attacks on medical personnel and facilities, including through international judicial mechanisms¹³⁷.

¹³⁴ Christopher E. Bailey. In: Creighton international and comparative law journal, Vol. 8, issue no.1, December 2016, p. 4-22

¹³⁵ Alice Priddy. - Geneva: The Geneva Academy of International Humanitarian Law and Human Rights, April 2019.p.98

¹³⁶ Joshua G. Hughes. In: Yearbook of international humanitarian law, Vol. 21, 2018, p. 99-135

¹³⁷ The 1949 Geneva Conventions after seventy years : the fate of charity in turbulent times
David P. Forsythe. In: Global governance: a review of multilateralism and international organizations, Vol. 25, no. 3, p. 359-369

III.2.9. Addressing the Needs of Special Groups

Addressing the Needs of Special Groups, denotes to the process of identifying, understanding, and responding to the unique challenges faced by specific segments of the population who may be vulnerable, marginalized, or have particular requirements, these groups can include combatants who raise up their hands, warriors in hostilities, children, women, people with disabilities, the elderly, minority communities, refugees, or individuals with chronic health conditions, among others.

III.2.9.1. Child Soldiers

Rehabilitation and Reintegration, develop programs for the rehabilitation and reintegration of child soldiers, providing them with education, vocational training, and psychological support. Prevention and Protection, strengthen measures to prevent the recruitment and use of child soldiers, including through international advocacy and national legislation¹³⁸.

III.2.9.2. Female Combatants

Gender-Sensitive Policies, implement gender-sensitive policies and programs to address the specific needs and rights of female combatants, including protection from sexual violence and access to healthcare. Empowerment and Inclusion, promote the inclusion of female combatants in peacebuilding and post-conflict reconstruction efforts, ensuring their voices and experiences are heard¹³⁹.

The effective enhancement of the rights of combatants in war requires a multifaceted approach that includes strengthening legal frameworks, enhancing institutional mechanisms, improving training and awareness, ensuring accountability and justice, securing humanitarian access and protection, and addressing the needs of special groups. By implementing these measures, the international community can better protect combatants' rights and uphold the principles of International Humanitarian Law¹⁴⁰.

¹³⁸ Legal-policy challenges of armed drones and autonomous weapon systems Kenneth Anderson and Matthew C. Waxman. - In: Routledge handbook of war, law and technology. - New York: Routledge, 2019. - p. 154-168

¹³⁹ The sovereign right to kill: a critical appraisal of Israel's shoot-to-kill policy in Gaza Noura Erakat. In: International criminal law review, Vol. 19, no. 5, 2019, p. 783-818

¹⁴⁰ Smadar Ben-Natan. In: Journal of international humanitarian legal studies, Vol. 10, no. 1, 2019, p. 41-57

IV.CONCLUSION AND RECOMMENDATIONS

IV.1.Conclusion

The critical analysis of the rights of combatants under humanitarian law underscores the complex and multifaceted nature of protecting those engaged in armed conflicts. The Geneva Conventions and their additional protocols provide a comprehensive legal framework designed to ensure humane treatment and safeguard fundamental rights, even amidst the chaos of war. However, several key conclusions emerge from my research

❖ Adequacy of existing Legal Framework

The Geneva Conventions and their additional Protocols are robust in their scope and detailed in their provisions, they cover a wide range of scenarios and offer protections to combatants, including the wounded, sick, and prisoners of war. The legal framework sets clear standards for humane treatment, medical care, and the overall conduct of hostilities.

Despite the comprehensive nature of international humanitarian law (IHL), enforcement remains a significant challenge. The effectiveness of these laws heavily relies on the compliance and cooperation of states and non-state actors. Violations often occur, highlighting the gap between legal standards and practical implementation, therefore ensuring accountability and adherence to International Humanitarian Law is essential for the protection of combatants' rights.

❖ Impact of Modern Warfare

The evolving nature of warfare, including the rise of non-state actors and asymmetrical conflicts, poses new challenges to the application of International Humanitarian Law, where by traditional distinctions between combatants and civilians can become blurred, complicating the enforcement of protections, that why the adapting International Humanitarian Law is highly needed to address these modern realities that is crucial for maintaining its relevance and effectiveness.

❖ Need for Enhanced Monitoring and Accountability

Strengthening mechanisms for monitoring compliance and holding violators accountable is imperative, where the international bodies and tribunals play a vital role in this regard, but there is a need for more robust and efficient systems to ensure that those who breach International Humanitarian Law face consequences. That why this would enhance the deterrence effect and promote adherence to the laws.

❖ **Role of Education and Training**

Education and training for military personnel and other actors involved in armed conflicts are essential for the effective implementation of International Humanitarian Law, therefore ensuring that those on the ground are aware of their obligations and the rights of combatants that can significantly reduce violations. Indeed, the continuous efforts in this area can foster a culture of respect for humanitarian principles and create a positive impact.

❖ **International Cooperation and Support**

International cooperation is vital for the advancement and enforcement of International Humanitarian Law; hence the states must work together to support the institutions and mechanisms that uphold humanitarian law, like providing resources, sharing best practices, and collaborating on enforcement efforts as well as positive solidarity and collective action as the key to strengthening the protection of combatants' rights.

Lastly, while the existing humanitarian legal framework provides a solid foundation for the protection of combatants' rights, practical challenges and evolving conflict dynamics necessitate ongoing efforts to enhance compliance, accountability, and adaptation. By addressing these findings mentioned as issues, the international community can better uphold the principles of humanitarian law and ensure the humane treatment of all individuals involved in armed conflicts especially the combatants.

IV.2.Recommendations

a) To International Institutions

- ✓ Strengthening Compliance Mechanisms, they must establish and enhance monitoring and compliance mechanisms to ensure that states adhere to the Geneva Conventions and Additional Protocols. Implement a robust international reporting system where states must regularly update on their compliance with humanitarian laws.
- ✓ Promoting Universal Ratification and Implementation, they should enhance the advocacy for the universal ratification of all Geneva Conventions and their Additional Protocols. Provide technical assistance and capacity-building programs to states to help them implement these conventions effectively.
- ✓ Enhancing Training and Education, they must develop comprehensive training programs for military personnel and combatants on the principles and rules of international humanitarian law (IHL) by engaging state actors and non-state actors. Facilitate regular workshops and

seminars for policymakers and legal practitioners on the rights of combatants and obligations under IHL help the who is combatant.

- ✓ Improving Accountability and Justice Mechanisms, they might strengthen international judicial mechanisms such as the International Criminal Court (ICC) to hold violators of IHL accountable in all corners and encourage all states to increase their political will while enforcing the decisions from International Criminal Court (ICC) to hold violators of IHL accountable and establishment of special tribunals or truth commissions to investigate and prosecute war crimes and violations of combatants' rights.

b) To National Governments

- ✓ Incorporating IHL into Domestic Legislation, they must ensure that national laws are fully aligned with international humanitarian law, including the Geneva Conventions and their Additional Protocols. Introduce or amend national legislation to incorporate comprehensive protections for the rights of combatants.
- ✓ Establishing National Monitoring Bodies, they might create independent national bodies tasked with monitoring and reporting on the treatment of combatants and the implementation of IHL. Encourage regular investigations and inspections of military detention facilities by these national bodies.
- ✓ Providing Adequate Training for Military Forces, mandate regular and compulsory training sessions on IHL for all military personnel, emphasizing the protection of combatants' rights. Incorporate IHL training into the standard curriculum of military academies and training institutions.
- ✓ Ensuring Proper Treatment and Protection, they should enforce strict guidelines for the humane treatment of combatants, particularly prisoners of war, in accordance with IHL. Establish clear protocols for the investigation and prosecution of allegations of mistreatment or abuse of combatants.
- ✓ Facilitating Cooperation with International Bodies, they should promote active cooperation with international humanitarian organizations such as the International Committee of the Red Cross (ICRC). Allow access for international observers and humanitarian organizations to monitor compliance with IHL in conflict zones.

c) To Non-Governmental Organizations (NGOs)

- ✓ Advocacy and Campaigns, they should launch campaigns to raise public awareness about the

rights of combatants under IHL and the importance of adhering to these laws. Advocate for stronger protections and legal frameworks at both national and international levels.

- ✓ **Monitoring and Reporting**, help actively monitor conflict zones and report on violations of combatants' rights, providing reliable data to international bodies and the public. Publish regular reports and updates on the status of combatants' rights and compliance with IHL in various conflicts.
- ✓ **Providing Support**, they should offer legal aid, psychological support, and reintegration programs for former combatants and prisoners of war. Collaborate with governments and international bodies to ensure that combatants receive necessary medical care and humane treatment.
- ✓ **Capacity Building**, they should conduct training programs for local NGOs, community leaders, and other stakeholders on IHL and the protection of combatants' rights. Develop resource materials and toolkits to aid in the dissemination and implementation of IHL principles.
- ✓ By implementing these recommendations, international institutions, national governments, and non-governmental organizations together should enhance the protection of combatants' rights under international humanitarian law, ensuring humane treatment and accountability in times of hostilities.

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