# The Principle of Distinction and Modern Armed Conflicts: A Critical Analysis of the Protection Regime Based on the Distinction between Civilians and Combatants Under International Humanitarian Law

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**by**

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## Table of Contents

## Declaration

I Lloyd Tonderai Chigowe declare that the work presented in this thesis is my own and has not been presented for degree or examination purposes at any other University. Where other people's works have been used, complete references have been provided.

Signed.....

Date.....

Supervisor: Professor L. Juma

Signed.....

Date.....

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## Abstract

This thesis interrogates the applicability of the principle of distinction in modern armed conflicts. The distinction between combatants and civilians and between civilian objects and military objectives has become blurred as a result of the changes that have taken place in modern armed conflicts. While the principle of distinction was tailor made to regulate traditional, conventional armed conflicts, an evolution in the nature, means and methods of warfare has made the application of the principle of distinction challenging.

One of the challenges that arise as a result of the changes that have taken place in modern armed conflicts include the difficulty of distinguishing civilians and civilian objects, which are entitled to protection under international humanitarian law from combatants and military objectives which are legitimate targets. This has compromised the protection that the law seeks to offer during armed conflicts since civilians and civilian objects have become constant targets. Another challenge is that the involvement of civilian persons in armed conflicts has made it difficult to determine the responsibility of these individuals as well as the states that hire them for violations of international law during armed conflicts. Furthermore, the emergence of new methods of warfare has resulted in many objects and facilities that are traditionally regarded as civilian objects becoming military objectives, thus losing their protection under international humanitarian law. This thesis will use the examples of the involvement of private military and security companies in armed conflicts as well as the emergence of drone and cyber warfare to illustrate these challenges.

The study will examine the application of the principle of distinction to the growing practice of outsourcing of military services to Private Military and Security Companies. Firstly, the study will examine the status of PMSC personnel under the principle of distinction, that is whether they qualify as combatants or civilians. The study will then examine the consequences of PMSC personnel's participation in armed conflicts. Importantly, the study will explore responsibilities of states that hire private military and security personnel, PMSC companies as well as superiors in charge of PMSC personnel for any violation of international law committed by contractors during armed conflicts. The study will also examine the application of the principle of distinction to drone and cyber warfare. The study

will examine the status of drone and cyber operators under the principle of distinction as well as the applicability of the principle of distinction between civilian objects and military objectives in drone and cyber warfare. The study will discuss some of the problems that arise as result of the introduction of these new methods of warfare, which makes the application of the principle of distinction to modern armed conflicts challenging.

The thesis concludes by arguing that while the principle of distinction remains an indispensable concept of international humanitarian law, it needs to be adapted for it to be applicable to modern armed conflicts. Therefore, suggestions shall be made on how the principle can be adapted to ensure that it remains relevant to modern armed conflicts.

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**International Tribunals**

International Court of Justice

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### National Legislation

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Rome Statute of the International Criminal Court of 10 November 1998.

United Nations, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997.

## List of Abbreviations

| | |
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| ARSIWA | Articles on Responsibility of States for Internationally Wrongful Acts |
| AUMF | Authorization for Use of Military Force |
| CIA | Central Intelligence Agency |
| CNE | Computer Network Exploitation |
| CAN | Computer Network Attacks |
| CPA | Coalition Provisional Authority |
| DoS | Denial of Service |
| EO | Executive Outcomes |
| ICJ | International Court of Justice |
| ICoC | International Code of Conduct for Private Security Service Providers |
| ICRC | International Committee of the Red Cross |
| ICTY | International Criminal Tribunal for the former Yugoslavia |
| IHL | International Humanitarian Law |
| JSOC | Joint Special Operations Command |
| PMC | Private Military Company |
| PMSC | Private Military and Security Company |
| PSC | Private Security Company |
| PoW | Prisoner of War |
| RUF | Revolutionary United Front |
| UAV | Unmanned Aerial Vehicle |
| UNITA | National Union for the Total Independence of Angola |

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|---|---|
| USA | United States of America |
| MPRI | Military Professional Resources *Inc* |

## Chapter 1: General Introduction

### 1.1 Description and Context

The principle of distinction is one of the founding principles of international humanitarian law.[1] In other words, it is the cornerstone upon which humanitarian law is based. This principle provides that parties to an armed conflict should always make a distinction between civilians and combatants and between civilian objects and military objectives and that all military operations should be directed against military objectives.[2] Article 51(1) of Additional Protocol I provides that "civilian population and individual civilians shall enjoy general protection against dangers arising from military operations".[3] Article 51(3) states that civilians shall enjoy protection under Article 51 "unless and for such time as they take a direct part in hostilities".[4] Accordingly, in exchange for their protection from attacks, civilians must desist from directly participating in hostilities. However, if civilians take direct part in hostilities, they become legitimate targets of attack for as long as they continue to take direct part in hostilities.[5] More so, when civilians directly take part in hostilities, they are not entitled to prisoner of war (PoW) status if captured and may be prosecuted for crimes committed during their involvement in armed conflict.[6] On the other hand, those who are

[1]International humanitarian law refers to "set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict". Therefore, humanitarian law is only applicable during armed conflicts. See ICRC "Advisory Service on International Humanitarian Law" https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf (accessed 4 February 2017). Since the principle of distinction is only applicable during armed conflicts, the study will not deal with other branches of law such as human rights law and international criminal law. For distinction between humanitarian law and other branches of law, see generally R Provost *International Human Rights and Humanitarian Law* (2002) Cambridge University Press: Cambridge.

[2]Article 48 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Additional Protocol I). See also A L Haruna *et al* "Principle of Distinction in Armed Conflict: An Analysis of the Legitimacy of 'Combatants and Military Objectives' As a Military Target" (2014) 3 *International Journal of Humanities and Social Science Invention* 15 at 16.

[3]Additional Protocol I

[4]Additional Protocol I.

[5]M Sassoli "Legitimate Target of Attacks Under International Humanitarian Law" *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003.* http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf (accessed 10 March 2015).

[6]K Watkin "Warriors without rights? Combatants, Unprivileged belligerents and the struggle over legitimacy" (Winter 2005) Number 2 *Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series* http://www.hpcrresearch.org/sites/default/files/publications/OccasionalPaper2.pdf. (Accessed 27 February 2015).

classified as combatants are legitimate targets of attack during armed conflicts.[7] This means that international humanitarian law does not protect them from attacks from their adversaries. However, these people have the right to take part in armed hostilities and cannot be punished for participating in armed conflicts.[8] Combatants are also entitled to PoW status if they fall under enemy captivity.[9] The principle also requires civilian objects to be spared from attacks during armed conflicts.[10]

The principle of distinction dates back from time immemorial, even though it existed in unwritten form. Recognition of the principle of distinction at an international level was first made in the St. Petersburg Declaration where the preamble states that "the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy".[11] Through state practice, distinction has gained the status of customary international law. Rule 1 of the customary international humanitarian law rules provides that parties to the armed conflict must at all times distinguish between civilians and combatants and that attacks may only be directed against combatants, not civilians.[12] Rule 7 states that "parties to the conflict must at all times distinguish between civilian objects and military objectives" and that attacks "must not be directed against civilian objects".[13]

The principle has also been codified in international legal instruments. As already mentioned, Article 48 of the Additional Protocol I to the Geneva Conventions (Additional Protocol I) provides that "in order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives".[14] Article 51(2) provides that "the civilian population as such, as well as individual civilians, shall not be the object of attack".[15] Furthermore, Article 52(1) provides that "civilian objects shall not

[7] *Ibid.*
[8] *Ibid.*
[9] A L Haruna *et al* 2014 *International Journal of Humanities and Social Science Invention* 18.
[10] Article 52(2) of Additional Protocol I.
[11] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight, Saint Petersburg, 29 November / 11 December 1868.
[12] J M Henckaerts, L D Beck *Customary International Humanitarian Law* Vol 1(2005) 3.
[13] J M Henckaerts, L D Beck *Customary International Humanitarian Law* 25.
[14] Additional Protocol I.
[15] *Ibid.*

be the object of attack or of reprisals".[16] There are no reservations to these provisions, which entails that all parties to the armed conflict are obliged to observe this principle.

The principle of distinction is also recognised in many other international legal instruments, which include Additional Protocol II to the Geneva Conventions.[17] Furthermore, failure to observe the principle of distinction during an armed conflict is a war crime under the Rome Statute of the International Criminal Court.[18] Article 8 (2)(e)(i) states that "intentionally directing attacks against civilian population or individual civilians not taking direct part in hostilities constitutes a war crime.[19] The significance of the principle of distinction was also highlighted by the International Court of Justice in *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion* where the Court described distinction as "one of the cardinal principles that constitute the fabric of humanitarian law".[20] The principle now applies to both international armed conflicts and non-international armed conflicts.[21]

In order for parties to an armed conflict to fulfil their obligation not to attack civilians or civilian objects, there is need for clear criteria which can objectively be used to distinguish civilians from combatants and civilian objects from military objectives. Additional Protocol I provides a negative definition of civilians. It defines a civilian as "any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol".[22] Therefore, a civilian is a person who is "neither a prisoner of war, a member of the armed forces, nor a combatant" as provided in the above Articles.[23] On the other hand, combatants are defined in Article 4A the Geneva Conventions, which deals with the prisoner of war status, read together with Article 43 of

[16]Article 52(1) of Additional Protocol I.
[17]Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (hereafter Additional Protocol II). Article 13 provides that "the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations".
[18]Rome Statute of the International Criminal Court of 10 November 1998.
[19]*Ibid.*
[20]*Threat of Use of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep. 226, paras 78-79.
[21]K Lannoy *Unlawful/unprivileged combatant, armed conflict and international law in the 21st Century: Slipping through the loopholes of the Geneva Conventions* (LLM Thesis, Ghent University, 2010) http://lib.ugent.be/fulltxt/RUG01/001/458/336/RUG01-001458336_2011_0001_AC.pdf (accessed 13 March 2015)
[22]Article 50.
[23]D Richemond-Barak "Private Military Contractors and Combatancy Status under International Humanitarian Law" Complementing IHL: Exploring the Need for Additional Norms to Govern Contemporary Conflict Situations" *An International Conference, Jerusalem, 2008* http://law.huji.ac.il/upload/Richmond_Barak_Private_Military_Contractors.pdf (accessed 7 March 2015).

Additional Protocol I.[24] According to Article 4A(1) of the Geneva Conventions, the first category of people who qualify as combatants are armed forces which belong to a part to the conflict as well as members of the militia or volunteer corps forming part of such armed forces.[25] Combatants also include members of other militia and members of other volunteer corps, including those of organized resistance movements, provided that they meet the requirements of being commanded by a person responsible for his subordinates,[26] of having fixed distinctive sign recognizable at a distance,[27] carrying arms openly[28] and conducting their operations in accordance with the laws and customs of war.[29] Article 4A of the Geneva Conventions also confers combatant status on members of regular armed forces who profess allegiance to a government or an authority not recognized by the detaining power[30] and inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces.[31] Thus in terms of international humanitarian law, where a person does not fulfil the requirements of a combatant, they automatically become civilians.

Civilian objects are defined as "all objects which are not military objectives".[32] This means that the definition of civilian objects needs to be read together with the definition of military objectives. Article 52(2) defines military objectives as limited to "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".[33] Thus, the principle is an indispensable concept of international humanitarian law since it defines what is protected and what is not protected by the law during armed conflicts. In other words, the protection of civilian population and civilian objectives hinges on the principle of distinction.

[24]Article 43 of Additional Protocol I to the Geneva Conventions contains similar requirements to those in Article 4A of the Geneva Conventions.
[25]Article 4A (1).
[26]Article 4A (2) (a).
[27]Article 4A (2) (b).
[28]Article 4A (2) (c).
[29]Article 4A (2) (d).
[30]Article 4A (3).
[31]Article 4A (6).
[32]Article 52(1) of Additional Protocol I.
[33]Article 52(1) of Additional Protocol I.

## 1.2 Problem Statement

The provisions dealing with the principle of distinction in the Additional Protocols were drafted with the concept of traditional warfare in mind. Traditional war refers to past conflicts where armed forces belonging to state actors "would face each other directly, man to man in situations of ground battle".[34] According to Schmitt, this positioning of armies "together with limited range and mobility of weapons systems rendered civilians relatively immune to direct effects of warfare" as they were "either distant from battle field or fled as hostilities drew near".[35] Furthermore, civilians played a minimal part in the hostilities. Thus, it was easy to draw a clear line between combatants and civilians.

However, the nature of armed conflicts in the 21st Century has drastically changed, as war is no longer confined to armed forces belonging to states and traditional battlefields. Modern warfare now involves "high-tech long –range strike capability which has resulted in a revolution in military affairs".[36] Schmitt argues that in modern armed conflicts, entire countries now comprise battle space, as war is no longer confined to battlefields and this has resulted in civilians becoming objects of attack.[37] More so, there has been a sharp increase in urban warfare in modern conflicts. While battles between armies traditionally took place in open space several kilometres from cities, urban areas are now considered a strategic area for warring parties thus further exposing civilians to attack.[38] Furthermore, modern conflicts have seen an increase in participation of civilians such as 'terrorists', private military contractors and mercenaries, among other groups who are taking over the traditional responsibilities previously confined to state actors. Most of these groups employ the use of guerrilla warfare tactics such as blending with civilians as well as launching attacks from a

[34]S Oeter "Comment: Is the Principle of Distinction Outdated?" in W Heintschel von Heinneg, V Epping *International Humanitarian Law Facing New Challenges* (2007) 53.
[35]M N Schmitt "Targeting and Humanitarian Law: Current Issues" *International Law Studies: Issues in International Law and Military Operations* https://www.usnwc.edu/getattachment/aa0dc109-7b43-4c3b-8874-b2dea632b8a2/Targeting-and-Humanitarian-Law--Current-Issues.aspx (accessed 23 March 2014).
[36]*Ibid.*
[37]*Ibid.*
[38]A Vautravers "Military operations in urban areas" (2010) Vol 92 Number 878 *International Review of the Red Cross* 835.

civilian environment.[39] More so, methods of warfare have shifted from the use of traditional kinetic weapons to the use sophisticated methods such as remote warfare. These developments have led to what is now referred to as civilianisation of warfare, which means that armed conflicts have shifted from being a predominantly military affair to involve civilians.[40]

These developments challenge the application of the principle of distinction. As already stated above the principle of distinction envisions the existence of two distinct groups, that is combatants and civilians. The involvement of other armed groups who are not traditionally regarded as combatants as well as the emergence of new methods of warfare creates challenges for the application of the principle of distinction to modern armed conflicts.

This thesis seeks to investigate the challenges created by modern conflicts for the principle of distinction, particularly the involvement of groups who do not have a clear legal status under international humanitarian law as well as the emergence of new methods of warfare. For example, Private Military and Security Companies (hereafter PMSCs) have become very influential in armed conflicts in the 21st Century. Private military contractors perform a number of functions that range from military to non-military functions.[41] Singer has categorised these functions into several categories, which include "provider firms supplying direct tactical military assistance such as involvement in combat battles, military consulting firms that provide strategic advice and training and military support firms that provide logistics, maintenance and intelligence services to armed forces".[42] A glance at the definition of a civilian and a combatant reveals that many actors in modern conflicts cannot be categorised as either civilians or combatants. The question therefore is, what is the status of actors such as PMSCs under the principle of distinction and what are their rights and obligations under international humanitarian law? Furthermore, what are the responsibilities

[39]M W Lewis and E Crawford *Drones and Distinction: How IHL Encouraged the Rise of Drones* https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00313001127.PDF. (accessed 22 March 2015).
[40]A Wenger, S J A Mason "The civilianization of armed conflict: trends and implications" (2008) 90 *International Review of the Red Cross* 835.
[41]J L Gomez del Prado "The Role of Private Military and Security Companies in Modern Warfare" 11 August 2012 *The Brown Journal of World Affairs* http://www.globalresearch.ca/the-role-of-private-military-and-security-companies-in-modern-warfare/32307. Accessed 27 March 2015).
[42]P Singer, *Corporate Warriors: The Rise of the Privatized Military Industry* (2003).

of the states that rely on the services of private actors to fight in armed conflicts and what are the measures that are in place to ensure accountability of these actors?

International humanitarian law does not recognise the category of *quasi* combatants hence groups such as private military contractors cannot be said to fall in-between combatants and civilians.[43] This renders classification of these new actors problematic. For example, in the case of private military contractors, they cannot be distinguished as combatants given that they do not meet the requirements of combatants as set out above.[44] On the other hand, classifying private military contractors as civilians will have far-reaching consequences for the protection of innocent civilians. For instance, this may promote the use of innocent civilians as human shields by private military companies to protect themselves from attack.[45] An attempt to classify private military contractors as mercenaries thereby making them criminals does not provide an answer since private military contractors do not meet the cumulative requirements that must be met in terms of Article 47 of Additional Protocol I for one to qualify as a mercenary.[46] Therefore, the challenge which this study seeks to tackle is the status of the new actors under the principle of distinction.

The failure of international law to clarify the status of these the new participants in modern conflicts results in a number of problems. The first problem relates to whether these groups are legitimate targets or not. One the one hand, if they are categorised as civilians then they are immune from attacks. On the other hand, if they are combatants they become legitimate objects of attack. However, at present, there is no answer to this question and this creates problems for a party to a conflict that is faced by such groups as adversaries. The second problem relates to the protection they should be accorded. It is not clear whether these groups should be accorded prisoner of war status or should be treated as criminals and be prosecuted

[43]S Bosch "Private security contractors and international humanitarian law – a skirmish for recognition in international armed conflicts" *African Security Review 16.4 Institute for Security Studies* http://www.google.co.za/url?sa=t&rct=j&q=&esrc=s&source=web&cd=6&ved=0CDcQFjAF&url=http%3A%2F%2Fmercury.ethz.ch%2Fserviceengine%2FFiles%2FISN%2F102201%2Fichaptersection_singledocument%2F4b56edbf-3688-40bd-b74a-a8316f04192c%2Fen%2F3.pdf&ei=t5AjVcSyLoPtUu-NhJAI&usg=AFQjCNFameZTSUOUh_wyX7g-vEHMMT3XdA&bvm=bv.89947451,d.d24 (accessed 28 March 2013).

[44]For example, private military contractors do not have a clearly articulated chain of command and some of them do not have a fixed distinctive sign recognizable at a distance.

[45]See generally L Cameron "Private military companies: their status under international humanitarian law and its impact on their regulation" (2006) *88 International Review of the Red Cross* 573

[46]Article 47 provides that a mercenary is a person who is specifically recruited locally or abroad to fight in armed conflict, does in fact take direct part in hostilities , is motivated to take part in the hostilities for private gain is neither a national of a party to the conflict nor a resident of territory controlled by a party to the conflict , is not a member of the armed forces of a party to the conflict and has not been sent by a state which is not party to the conflict on official duty as a member of its armed forces. These requirements must be met cumulatively.

for their involvement in armed conflicts. The third problem relates to accountability for violations of international humanitarian law. In other words, the question is who should be held accountable for the actions of these groups, as well as ensuring that they adhere to international law. For example, in relation to private military companies, Devon points out that "private companies and their personnel are not subject to strict regulations that determine to whom they are ultimately accountable".[47] Furthermore, some of the private military companies may be transnational companies, which may not fall under any specific jurisdiction. This therefore raises the question of who should ensure that these armed groups comply with international humanitarian law and who should hold them accountable in case of violations.

The emergence of new methods of warfare such as cyber warfare has made it difficult to apply the distinction between civilian objects and military objectives in modern armed conflicts. For example, cyber warfare involves the participation of civilian personnel. More so, this method of warfare also uses civilian infrastructure and their targets include purely civilian objects or dual use objects. In brief, new methods of warfare that are not capable of complying with the principle of distinction between civilian objects and military objectives have emerged and these have compromised the protective mandate which international humanitarian law seeks to offer during armed conflicts. The question this study will attempt to answer is, to what extent does the new means and methods of warfare comply with the requirement for distinction between civilians an combatants and between civilian objects and military objectives? In other words, the issue is whether international humanitarian law is adapted enough to regulate the new developments that have taken place in modern armed conflicts.

Therefore, as it stands, there appears to be a legal vacuum in international humanitarian law regarding the principle of distinction and this has far-reaching implications for the ability of international humanitarian law to regulate the conduct of armed conflicts. This study will therefore examine whether the present criteria used to distinguish civilians from combatants and civilian objects from military objectives is sufficient to ensure the achievement of the

[47]DB Devon "The Threat of Private Military Companies" *Centre for Research on Globalization* http://www.globalresearch.ca/the-threat-of-private-military-companies/24896. (accessed 30 March 2015).

international humanitarian law goal of sparing civilians population as well as civilian objects from violence associated with armed conflicts while at the same time ensuring that those who take part in hostilities are held accountable for their actions.

## 1.3 Goals of the research

1. To explore the application of the principle of distinction to modern conflicts with particular attention being paid to the changes in the nature of armed conflicts.
2. To demonstrate how the non-regulation of private military contractors under international law has resulted in difficulties in the application of the principle of distinction.
3. To demonstrate how the emergence of the new methods of warfare in modern armed conflicts has compromised the distinction between civilian objects from military objectives.
4. To suggest additional criteria to be used for distinguishing civilians from combatants and civilian objects from military objectives in order to strengthen the protection regime under international humanitarian law.

## 1.4 Significance of the Study

The principle of distinction between civilians and combatants and between civilian objects and military objectives is the cornerstone of international humanitarian law. It forms the basis upon which civilian protection is formed. In other words, the determination whether person or an object is entitled to protection during an armed conflict or not emanates from the ability to distinguish such person or object from legitimate military targets. Therefore, the protection that international humanitarian law seeks to offer mainly depends on the effectiveness of the principle of distinction. Furthermore, the principle of distinction also imposes limits on the category of persons who can take part in armed conflicts. For example, it requires a party to the conflict to ensure that persons who fight on their behalf meet the combatant status. This is meant to ensure that parties to the conflict remain in control of the people acting on their

behalf and to ensure that people who take part in armed conflicts can be held accountable for any violation of the law.

Despite the importance of the principle of distinction in regulating the conduct of hostilities, several developments have taken place that challenge the application of the principle of distinction. For instance, the practice of outsourcing of military services to private contractors as well as the development of new methods of warfare has resulted in the application of the principle distinction becoming very difficult. This has in turn threatened the protection that international humanitarian law seeks to offer to civilians during armed conflicts. Although these developments continue to take place, the principle of distinction has not been able to adapt in order to regulate the changes. These developments leave protected persons and objects vulnerable to attack during armed conflicts. This also allows parties to an armed conflict, particularly states to take part in armed conflicts without being held responsible for the activities of its agents. Therefore, this study will make recommendations on how the principle of distinction should be adapted in order to regulate these new developments.

### 1.5 Limitations of the Study

The challenges facing international humanitarian law in general and the principle of distinction in particular are multifaceted. As a result, this study will not be able to deal with all the new developments that challenge the principle of distinction. Only a few examples have been chosen to illustrate some of the challenges that international humanitarian law is facing. Furthermore, the study does not advocate for a complete overhaul of the principle of distinction. The study seeks to argue that currently, the principle of distinction is not well adapted to regulate some of the developments that have taken place in modern armed conflicts. Therefore, the study will advocate for the adaptation of the principle of distinction in order to deal with the new developments. Lastly, due to time constraints, the study will only focus on the application of the principle of distinction in international armed conflicts. The study will not deal with the challenges that the principle of distinction is facing in non-international armed conflicts.

## 1.6 Research Methodology

A doctrinal research methodology shall be used in this research. Doctrinal research asks what the law is on a particular issue.[48] This methodology shall be used to analyse the current position in international law regarding the principle of distinction. The study will make use of both primary and secondary sources of law. Various international conventions will be analysed which deal with the principle of distinction such as the Geneva Conventions, Additional Protocol I, International Customary Law, among other international legal instruments. The study will also make use of case law, textbooks, journal articles, non-binding soft law among other sources. This methodology will be used in order to expose the legal vacuum which currently exists in the principle of distinction in that it excludes certain people who do not have a legal status thus allowing them to operate without incurring obligations. The research will be literature based and will not involve interviews or human and animal experiments, hence it will not require ethical clearance from the University.

## 1.7 Structure of the Research

The research is divided into five distinctive chapters. Chapter 1 contains a general introduction to the thesis. It will introduce the research topic, goals to be achieved and the methodology to be used. The Chapter will outline the scope and limitations of the research.

Chapter 2 will examine the origins and rationale of the principle of distinction between combatants and civilians and between civilian objects and military objectives. The Chapter will deal with the history and development of the principle. The Chapter will also discuss the current criteria used to distinguish combatants from civilians and civilian objects from military objectives in armed conflicts as well as the consequences that arise as a result of this distinction.

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[48]Understanding Legal Research in Integration and Dissemination 1924, 20 http://econ.upm.edu.my/researchbulletin/artikel/Vol%204%20March%202009/1924%20Adilah.pdf. (Accessed 28 March 2015).

Chapter 3 will discuss some of the challenges that the principle of distinction is facing in modern armed conflicts using the example of private military and security companies (hereafter PMSCs). The Chapter will briefly discuss the origins of private military and security companies and the role they play in armed conflicts. Thereafter, the status of private military and security contractors under the principle of distinction shall be examined. The Chapter will analyse some of the consequences that arise as a result of outsourcing of military services to PMSCs during armed conflicts.

Chapter 4 will look at other developments that have taken place in armed conflicts that challenge the principle of distinction. Drone and cyber warfare shall be used as examples to demonstrate how the distinction between combatants and civilians and between civilian objects and military objectives has become blurred. The Chapter will also consider some efforts that have been made in order to ensure that the principle of distinction remains applicable to these developments.

Chapter 5 will begin by providing a summary of the findings in the preceding Chapters. It will conclude with recommendations on what can be done to ensure that the principle of distinction can be developed to ensure that international humanitarian law protects all parties involved in armed conflicts.

## Chapter 2: An Overview of the Principle of Distinction

### 2.1 Introduction

The main purpose of this chapter is to discuss the principle of distinction between combatants and civilians and between civilian objects and military objectives in armed conflicts in general. Since the principle of distinction is the central focus of this study, this Chapter seeks to discuss the meaning of the principle as well to trace its origins and development over the years. This discussion will lay a foundation for the discussion on how the principle of distinction is being challenged by developments that have taken place in armed conflicts.

This Chapter will begin with a brief introduction of what the principle of distinction entails. Thereafter, it will examine how the principle of distinction was recognised during armed conflicts by ancient states. A discussion of the attempts made to recognise the principle of distinction at an international level through international legal agreements and how these ideas influenced the evolution of laws of armed conflicts will be made. Thereafter, the criteria used to distinguish combatants from civilians as well as civilian objects from military objectives shall be discussed. The chapter will then conclude with a summary of the discussion made as well some of the consequences of the application of the principle of distinction to modern armed conflicts.

### 2.2 What is the principle of distinction?

According to Keck, the principle of distinction is the simplest albeit most fundamental rule of international humanitarian law (hereafter IHL).[49] Distinction has also been described as "the most significant battlefield concept" on which IHL is based.[50] The principle of distinction provides that parties to an armed conflict must distinguish "between civilian population and

[49]T A Keck "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare" in *From the Selected Works of Trevor Keck* http://works.bepress.com/trevor_keck/1/. (accessed 23 May 2015).
[50]G D Solis *The Law of Armed Conflict: International Humanitarian Law in War* (2010) 250.

combatants and between civilian objects and military objectives".[51] The principle further provides that civilians must not be subjected to deliberate attacks.[52] In other words, there should always be a distinction between civilians and combatants and between civilian objects and military objectives. In *Prosecutor v Galic*, it was held that the intentional violation of the principle of distinction is never justified even by military necessity.[53] Therefore, violation of the principle of distinction constitutes a violation of international law and is punishable.[54]

This distinction between civilians and combatants has far-reaching consequences on the conduct of armed hostilities and these shall be dealt with later in this Chapter. It is important at this point to discuss the origins of the principle of distinction as well as its development over the years to become an important principle of international humanitarian law.

### 2.3 Origins and Development of the Principle of Distinction

The laws of war are as old as war itself.[55] This means that the law regulating conduct of hostilities has always been in existence since time immemorial. While some scholars argue that ancient armed conflicts were conducted without having regard to civilian lives,[56] Jochnick and Normand argue that this view denies and distorts the historical record as "belligerents have throughout history created and recognised war codes".[57] Among the laws

[51]Article 48 of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 hereafter (Additional Protocol I) See also M Sassoli "Legitimate Targets of Attacks Under International Humanitarian Law"(January 27-29, 2003) *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge*http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf (accessed 30 May 2015)

[52]Article 48 of Additional Protocol I.

[53]*Prosecutor V. Galic*, IT-98-29-T, ICTY Trial Chamber Judgment and Opinion (2003), 44. The tribunal further stated that the principle of distinction incontrovertibly form the basic foundation of international humanitarian law.

[54]For example, Article8 (2)(e)(i) of Rome Statute of the International Criminal Court of 10 November 1998 makes deliberate violation of the principle of distinction a war crime.

[55]U C Jha *International Humanitarian Law: The Laws of War* (2011) 1.

[56]For example, J Pictet *Humanitarian Law and the Protection of War* Victims (1975) 6 argues that "in the earliest human societies, what we call the law of the jungle generally prevailed; the triumph of the strongest or most treacherous was followed by monstrous massacres and unspeakable atrocities".

[57]C Jochnick, R Normand "The Legitimation of Violence: A Critical History of the Laws of War" (Winter 1994) 35 *Harvard International Law Journal* 49 at 59-60 The authors further argue that ancient societies had legal codes with humanitarian provisions similar to those found in modern laws of war including the requirement that belligerents should distinguish between combatants and civilians.

regulating the conduct of hostilities was the recognition of the distinction between combatants and civilians during armed conflicts.

Laws of armed conflict were recognised in ancient times. For example, it has been argued that "as far as the Old Testament, leaders and societies imposed some limitations on the conduct of hostilities and these regulations were directed at reducing the violence visited on certain groups, such as women and children, or prisoners".[58] Furthermore, the wars between Egypt and Sumeria in the second millennium B.C were governed by set of binding rules.[59] Among these rules were the obligation for belligerents to distinguish "combatants from civilians and providing procedures for declaring war, conducting arbitration, and concluding peace treaties".[60] Hammurabi, the King of Babylon wrote the Code of Hammurabi, which provided for the "protection of the weak against oppression by the strong and release of hostages on payment of ransom".[61] Furthermore, the war between Egypt and the Hittites in 1269 B.C is said to have been ended in terms of the Hittites law, which provided for "a declaration of war and for peace to be concluded by a treaty, as well as for respect for the inhabitants of an enemy city that has capitulated".[62] Humanitarian law principles were also observed during the Greek city-states wars where Greeks "considered each other as having equal rights and in the war, respected the life and personal dignity of war victims as a prime principle".[63] Protection of civilian and religious objects such as temples, embassies during armed conflicts were also observed. The Christian writings of St. Augustine and St. Thomas Aquinas also confirmed the existence of "rules of chivalry that prohibited attacks on the sick and the wounded, women or children".[64] The Church also enforced the respect for holy places, created a right of refuge, or asylum in churches.[65]

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[58]L R Blank, G S Corn "Losing the Forest for the Trees: Syria, Law, and the Pragmatics of Conflict Recognition" (2003) 3 *Vanderbilt Journal of Transnational Law* 693 at 709.
[59]G P Noone "The History and Evolution of the Law of War Prior to World War II" (2000) 47 *Naval Law Review* 176 at 183.
[60]D Fleck *The Handbook of Humanitarian Law in Armed Conflict* (1995) 12.
[61]*Ibid.*
[62]D Fleck *The Handbook of Humanitarian Law in Armed Conflict* (1995) 13. King Cyrus 1 of the Persians also ordered the wounded Chaldeans to be treated like his own wounded soldiers.
[63]*Ibid.*
[64]*Ibid*
[65]*Ibid.*

International humanitarian law is not Eurocentric. The principle of distinction in particular and laws governing conduct of hostilities have been recognised in other cultures and across nations. The principle of distinction is documented in Chinese history as early as 5th BC.[66] For instance, Su Tzu, a Chinese military commander instructed his armies to "treat the captives well and care for them and that the best policy is to take a state intact as ruining the state will be inferior".[67] Although these rules of engagement do not mention distinction in particular, it can be argued that the principle informs the need to take the state intact without ruining it, which includes not killing its inhabitants. The Hindu civilization also prescribed a set of rules in the Book of Manu, which are similar to those in the Hague Regulation.[68] One of the rules observed is the prohibition of attacks on civilians.[69] Thus, one can argue that even though the principle of distinction was not stated in same terms as it is stated today, it was nevertheless observed and influenced the conduct of hostilities.

The development of the law of armed conflict was not only influenced by religion. Enlightenment scholars also contributed to the development of the law. For example, Grotius in *De jure Belli ac Pacis Libri Tres* argues that "the practice of respecting the principle of distinction by states reflected natural law through the reasoned judgment of men".[70] He argues that "Although there may be circumstances in which absolute justice will not condemn the sacrifice of lives in war, humanity requires greatest precaution to be used against involving the innocent in danger, except in cases of extreme urgency and utility".[71] While Grotius acknowledges that loss of lives is inevitable during armed conflicts, this should only be condoned in extreme cases and all necessary measures should be taken to spare civilian innocent lives.[72] Grotius further argues that the rationale to spare innocent lives of the dangers of war could be found on mercy, if not justice.[73] According to Grotius, violation of

[66]T A Keck "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare" in *From the Selected Works of Trevor Keck* http://works.bepress.com/trevor_keck/1/. (accessed 23 May 2015).
[67]S B Griffith *Sun Tzu: The Art of War* (1963) 76.
[68]Jochnick and Normand 1994 *Harvard International Law Journal* 60.
[69]*Ibid.*
[70]Jochnick and Normand 1994 *Harvard International Law Journal* 61.
[71]H Grotius *On the Law of War and Peace* (2001) 321.
[72] This implies that there should be a distinction between civilians and combatants. The civilians who are the "innocent" should be spared from the dangers of war.
[73]H Grotius *On the Law of War and Peace* (2001) 321.

these principles of natural law and equity could not even be justified even by necessity of retaliation or striking terror.[74]

Rousseau argues that the nature of things requires belligerent to distinguish combatants from non-combatants and limit attacks to armed enemies.[75] Rousseau further argues that:

> "Since the aim of war is to subdue a hostile state, a combatant has the right to kill the defenders of that state while they are armed but as soon as they lay down their arms and surrender, they cease to be either enemies or instruments of the enemy; they become simply men once more, and no one has any longer the right to take their lives...."[76]

Thus besides arguing that civilians should be distinguished from combatants, Rousseau also believed that combatants who have fallen under the captivity of the enemy should be treated in a humane way and should not be attacked.[77] This argument emphasises the notion that only those actively taking part in armed conflicts should be the legitimate objects of attack. Rousseau agreed with Grotius that these rules regulating the conduct of warfare are based on reason.

However, other scholars argue that there were limitations to the application of the law during armed conflicts. Cicero argues that *"inter arma silent leges"* which means that "in times of war, the law is silent".[78] Cicero's view is that during armed conflicts, law is not applicable. Franco de Vitoria, a Spanish philosopher argues that while deliberate slaughter of the innocent is never lawful, states could lawfully target innocent civilians if necessary to secure a military victory.[79] This meant that military necessities outweigh the obligation to distinguish combatants from civilians.

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[74]H Grotius *On the Law of War and Peace* (2001) 323.
[75]J Rousseau *The Social Contract* (1968) (1762) 57.
[76]*Ibid.*
[77]This view is consistent with the current view that combatants who have fallen under the captive of the enemy force should be granted prisoner of war status and that civilians can only be targeted when they take direct participation in hostilities.
[78]Jochnick and Normand 1994 *Harvard International Law Journal* 54.
[79]F de Vitoria "On the Indies and The Law of War" in L Friedman, *The Law of War: A Documentary History* (1972) 13.

Although the rules regulating the conduct of hostilities have been recognised for a long time, there was no internationally recognised treaty that codified these rules. Keck argues that until the 19th Century, the laws of war were only codified in bilateral treaties and reflected in state practice.[80] Therefore, the rules such as distinction between combatants and civilians, protection of prisoners of war and the prohibition of total destruction of cities could not be internationally enforced. As a result, states could choose when to apply these rules during armed conflicts. For example, while the Romans spared the lives of their prisoners of war, their approach to warfare "varied according to whether their wars were commenced to exact vengeance for gross violations of international law, or for deliberate acts of treachery".[81] Their respect for the rules of war also varied "depending on whether their adversaries were regular enemies or uncivilized barbarians and bands of pirates and marauders".[82]

Furthermore, the rules of armed conflict were also rendered ineffective by the widespread use of mercenaries during the middle ages. The mercenary armies "lacked regular pay, had inadequate supplies and were forced to ravage the countryside by living off the land".[83] Moreover, mercenaries treated war as a profession in which they took part in for private gains.[84] Therefore, the respect for rules governing the conduct of hostilities was not uniform. For example, during the Thirty Years War from 1618-1648, the German-speaking population was wiped out due to the failure to respect rules of armed conflict.[85] The conduct of mercenary armies gave rise to the regular soldiers "who did not have to forage for food and shelter".[86] This development resulted in an increase in respect for rules of hostilities, particularly the principle of distinction.[87] From the discussion above, it can be submitted that respect for laws of armed conflict in ancient times was not uniform as states could choose whether to comply with the rules or not. States only respected the laws when it suited their needs or when it did not threaten their interests. These experiences highlighted the need for

[80]T A Keck "Not All Civilians Are Created Equal: The Principle of Distinction, the Question of Direct Participation in Hostilities and Evolving Restraints on the Use of Force in Warfare" in *From the Selected Works of Trevor Keck* http://works.bepress.com/trevor_keck/1/. (accessed 23 May 2015).
[81]L C Green "The Law of War in Historical Perspective" (1996) 72 *International Law Studies* 39 at 42.
[82]D Fleck *Handbook of International Humanitarian Law in Armed conflict* 13.
[83]Noone 2000 *Naval Law Review* 187.
[84]*Ibid.*
[85]Noone 2000 *Naval Law Review* 187.
[86]*Ibid.*
[87]*Ibid.*

international norms that would ensure uniform and obligatory application of the laws of armed conflict.

### 2.3.1 The birth of humanitarian law: Towards uniform international law

The nineteenth century saw a number of developments taking place in the manner in which wars were conducted. The call for respect of laws of armed conflict and prohibition of inhumane practices during armed conflicts increased.[88] One of the main reasons behind this development was the increase in war correspondence.[89] For example when the activities of the Light Brigade in the Crimean War of 1854-1856 were reported to London from Balaklava, the public's perception of war changed.[90] The public became aware of the atrocities that take place at the war front as opposed to the "biased reports of bravery and heroism made by military commanders".[91]

However, one incident that undoubtedly changed the face of international humanitarian law came during the Italian War of Unification in 1859. During the Battle of Solferino, Henri Dunant, a Swiss businessman witnessed the suffering of 40, 000 Austrian, French and Italian men lying wounded in the battlefield with no medical assistance given to them by their armies.[92] Dunant organized the volunteers to "collect and provide for the wounded despite the fact that medical providers were left unprotected from attack or capture".[93] Later on, Dunant recorded his experiences in his book, A Memory of Solferino that became popular globally. In A Memory of Solferino, Dunant made proposals aimed at preventing a repetition of the suffering which he witnessed at Solferino.[94] Dunant's proposal was twofold. Firstly, he suggested the creation voluntary relief societies in all countries for caring for the wounded in

[88]See Generally Noone 2000 *Naval Law Review*.
[89]G P Noone "The History and Evolution of the Law of War Prior to World War II" (2000) *Naval Law Review* 190.
[90]A Neier *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice* (1998) 13-14
[91]*Ibid.*
[92]F Bugnion "The International Committee of the Red Cross and the Development of International Humanitarian Law" (2004-2005) 5 *Chicago Journal of International Law* 191 at 191-192.
[93]*Ibid.*
[94]Noone 2000 *Naval Law Review* 191.

wartime.[95] Secondly, he suggested the adoption of an international principle sanctioned by a convention, which would serve as the basis and support for the relief societies.[96] In pursuant of this, a committee, which was known as the International Committee of the Red Cross (hereafter ICRC), was formed in Geneva in 1863.[97] This organisation was to change the face of international humanitarian law. Among the ICRC's major accomplishments was convening international conferences that were aimed at establishing binding rules and norms that would regulate future armed conflicts.

In 1864, the government of Switzerland together with the ICRC convened a Diplomatic Conference in Geneva that was aimed at discussing ways in which the suffering of the wounded persons could be reduced during armed conflicts.[98] The European nations and kingdoms that were represented at the conference signed the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.[99] The Convention "defined the status of medical personnel and further provided that wounded soldiers should be cared for in the same way as members of friendly armed forces".[100] Although the Convention did not say anything about the principle of distinction, it paved way for further conferences that led to further development of IHL. From the conference also came resolutions, which gave rise to the International Red Cross, an organization dedicated to humanitarian work.[101]

### 2.3.2 The Lieber Code

As Dunant was busy working on ways that would help alleviate the suffering of people during armed conflicts, another important development was taking place in North America where the American Civil War was going on.[102] There were reports of devastating suffering

[95]Bugnion 2004-2005 *Chicago Journal of International Law* 191-192.
[96]*Ibid.*
[97]*Ibid.* The Committee was made up of General Guillaume-Henri Dufour, Gustave Moynier, Theodore Maunoir and Louis Appia who were both physicians, and Henry Dunant himself.
[98]Bugnion (2004-2005) *Chicago Journal of International Law* 193.
[99]Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. Geneva, 22 August 1864. States and kingdoms that signed include Baden, Belgium, Denmark, France, Hesse, Italy, the Netherlands, Portugal, Prussia, Switzerland, Spain, and Württemberg.
[100]*Ibid.*
[101]Bugnion 2004-2005 *Chicago Journal of International Law* 192.
[102]Noone 2000 *Naval Law Review* 191-192.

of men involved in the war and this prompted President Lincoln to order for the drafting of a code that would be used to regulate the conduct of the Union Army during the conflict.[103] Francis Lieber, a German scholar was appointed the principal draftsman and was tasked to draft a document entitled Instructions for the Government of Armies of the United States in the Field, officially known as the General Order No: 100 (hereafter Lieber Code).[104] The Union Army began to implement the Code in 1863 and it became the first modern codified military instrument that regulated the conduct of hostilities. The Code contained a number of modern principles of international humanitarian law that were praised as a humanitarian milestone for implementing the rule of law in an actual war.[105] The principle of distinction was laid out in Article 22 of the Code, which provided that:

> "Nevertheless, as civilization has advanced during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country and the hostile country itself, with its men in arms. The principle has been more and more acknowledged that the unarmed citizen is to be spared in person, property, and honour as much as the exigencies of war will admit."[106]

The Code recognised that persons who are unarmed (civilians) should be spared from the dangers of war.[107] This formulation forms the basis of the modern principle of distinction. Subsequent international conferences that were aimed at codifying the principles of humanitarian law borrowed from the Lieber Code.[108]

Despite its humanitarian achievements, the Lieber Code has been criticised for subjecting humanitarian principles to military necessity. For example, the Code made it permissible under military necessity to "direct destruction of life or limb of 'armed' enemies, and of other persons whose destruction is incidentally 'unavoidable' in the armed contests of the war,[109] and "starving of hostile belligerent, armed or unarmed in order to ensure speedier subjection

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[103] *Ibid.*
[104] Jochnick and Normand 1994 *Harvard International Law Journal* 65. The name Lieber came from the principal draftsman.
[105] *Ibid.*
[106] Instructions for the Government of Armies of the United States in the Field (The Lieber Code) of 1863.
[107] Jochnick and Normand 1994 *Harvard International Law Journal* 66.
[108] T Taylor, a Nuremberg Trials prosecutor describes the Lieber Code as a "germinal document of the laws of land warfare. T Taylor *Foreword* in L Friedman *The Law of War: Documentary History* (1972).
[109] Article 15 of the Lieber Code.

of the enemy".[110] The elevation of military necessity and the manner it triumphed humanitarian principles resulted in the Code failing to achieve its intended purpose. For example, government army generals are said to have committed atrocities such as "appropriation and destruction of civilian property, indiscriminate bombardment in populated areas, and general spreading of terror" with the justification that this was permissible under the Code.[111] Jochnick and Normand concur that "the Lieber Code subjected all humanitarian provisions to derogation based on an open ended definition of military necessity".[112] Therefore, despite its provisions providing for the protection of innocent people, the Lieber Code was not successful in preventing atrocities from being committed against civilians during American Civil War. However, the Code created a useful guide for future attempts towards codification of humanitarian rules during armed conflicts as shall be seen later in this chapter.

### 2.3.3 The Saint Petersburg Declaration

The first international conference held in an attempt to codify the international humanitarian law rules was called by Czar Alexander II of Russia at Saint Petersburg in 1868.[113] The aim of the conference was to alleviate as much as possible the calamities of war.[114] The Conference resulted in the adoption of the Declaration of Saint Petersburg, which mainly banned arms that aggravate human suffering such as explosive bullets.[115] However, the Conference did not do much in as far as protection of civilian life was concerned. The Declaration recognised that "the only legitimate object which States should endeavor to accomplish during war is to weaken the military forces of the enemy and that to achieve this, it is sufficient to disable the greatest possible number of men".[116] The signatories however acknowledged that the objective of disabling the greatest number of men "would be exceeded

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[110]Article 17 of the Lieber Code.
[111]J T Gratthaar *The March to the Sea and Beyond: Sheman's Troops in the Savannah and Carolinas Campaigns* (1985) 134-55.
[112]Jochnick and Normand 1994 *Harvard International Law Journal* 65.
[113]Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec 11, 1868.
[114]C Jochnick and R Normand, "The Legitimation of Violence: A Critical History of the Laws of War (1994) 35 *Harvard International Law Journal* 66.
[115]C Jochnick and R Normand, "The Legitimation of Violence: A Critical History of the Laws of War (1994) 35 *Harvard International Law Journal* 66.
[116]Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 Grammes Weight, Dec 11, 1868.

by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable".[117] While the Saint Petersburg Declaration constituted a significant step in the development of IHL, it did not attempt in any way to deal with the protection of civilians or the principle of distinction. All that was achieved was the banning of weapons that would result in the unnecessary suffering of people.

### 2.3.4 The Brussels Declaration

The next conference was held in Brussels in 1874 and the agenda was to draft a set of "more comprehensive regulations for warfare".[118] The Brussels conference made extensive use of the Lieber Code[119] resulting in the drafting of the Declaration Concerning the Laws and Customs of War (hereafter Brussels Declaration).[120] Besides affirming the principles of Saint Petersburg, the conference also came up with new rules regulating the conduct of warfare.[121] Of importance to the principle of distinction was the prohibition of bombardment of unfortified or open town.[122] Article 15 of the Brussels Declaration provides that "Fortified places are alone liable to be besieged".[123] It further provides that "Open towns, agglomerations of dwellings, or villages which are not defended can neither be attacked nor bombarded".[124] Although Article 15 does not mention the principle of distinction and protection civilians in particular, it can be argued that by protecting an undefended town, it indirectly protects civilians in such areas. This can be regarded as a recognition that civilian areas are immune from attacks during armed conflicts and that only places where there are military objectives can be targeted. However, just like the Saint Petersburg declaration, all the rules were subject to the principle of military necessity. This again meant that even though there was a prohibition against bombardment of undefended towns, a state could justify bombardment of a town based on military necessity. Despite the fact that the declaration did

[117] *Ibid.*
[118] C Jochnick, R Normand "The Legitimation of Violence: A Critical History of the Laws of War" War (1994) 35 *Harvard International Law Journal* 67. The conference was attended by representatives from Austria-Hungary, Belgium, Denmark, France, Germany, Great Britain, Greece, Italy, the Netherlands, Portugal, Russia, Spain, Sweden, Norway, Switzerland and Turkey
[119] Noone 2000 *Naval Law Review* 194.
[120] Project of an International Declaration concerning the Laws and Customs of War. Brussels, 27 August 1874.
[121] Jochnick R Normand 1994 *Harvard International Law Journal* 67.
[122] Article 15 of the Brussels Declaration.
[123] *Ibid.*
[124] *Ibid.*

not threaten the military necessities of armies, no state ratified the agreement.[125] Thus, the issue of military necessity proved to be an immovable force against acceptance of the laws of war as well as limiting their effectiveness.[126] This hugely compromised the development of the law as well as the protection of civilians.

### 2.3.5 The First Hague Conference of 1899

The Hague Conferences acquired much popularity for having contained most of the principles that influence IHL today. States continued with their efforts in abolishing war particularly because of the devastating effects of the Napoleonic Wars. At the First Hague Peace Conference in 1899,[127] Russia made a proposal for disarmament as well as peaceful settlement of disputes, which would result in the eradication of war.[128] However, the issue of arms reduction was overwhelmingly rejected by nations. States that attended the conference were preoccupied with protecting their military interests.[129] Thus from the beginning, the chances of success of this conference were slim.

The Conference failed to address the issue of military limitations as countries vehemently resisted this proposal by the Russian delegation. For example, the Unites States of America delegation and Great Britain delegates were under instructions to reject attempts to restrict the range of weapons.[130] The military delegate for United States of America criticised the banning of a weapon for humanitarian reasons before its value is tested on the field.[131]

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[125]Noone 2000 *Naval Law Review* 194.
[126]Jochnick and Normand 1994 *Harvard International Law Journal* 68.
[127]Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 (hereafter Hague Regulations of 1899).
[128]G D Solis *The Law of Armed Conflict: International Humanitarian Law in War* 51.
[129]Jochnick and Normand 1994 *Harvard International Law Journal* 69. The learned authors argue that the conference was only successful in banning means of and methods of combat that had no military utility.
[130]J B Scott *The Hague Peace Conferences of 1899 and 1907* (1909) 15.
[131]*Ibid.*

On a positive note, states agreed to prohibit attack or bombardment of towns, villages, dwellings, or buildings that are undefended.[132] It can be argued that this provision recognises the immunity of civilians particularly when they are in an undefended territory. However, this means that when an enemy belligerent or military objective was located in a territory mainly occupied by civilians, the territory could be attacked out of military necessity without having regard to proportionality.[133] The Conference was also successful in banning asphyxiating gas, expanding bullets and balloon-launched munitions.[134]

#### 2.3.5.1 Humanitarian achievements: The Martens Clause

Attempts to come up with rules that would ensure protection of civilians at the Conference was overshadowed by the decision of participating countries to uphold their military needs at the expense of humanitarian needs. Article 22 of the Convention provided that the right of belligerents to adopt means of injuring the enemy is limited.[135] Furthermore, states agreed to ban the employment of "arms, projectiles, or material of a nature to cause superfluous injury".[136] However, there was no guidance on how these provisions should be interpreted. As a result, states involved in war could interpret these provisions in a manner which would suit their military needs.

One notable achievement of the First Hague Conference which has influenced the development of the laws of armed conflict was the adoption of the Martens clause.[137] The clause provides that:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and

[132]Article 25 of the Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land (Hague Convention of 1899).
[133]Germany delegates declared that their interpretation of their country's understanding of Article 25 was that when military operations rendered it necessary, any building would be destructed by whatever means. See J B. Scott The Hague Peace Conferences of 1899 and (1907) 424.
[134]J B. Scott The Hague Peace Conferences of 1899 and (1907) 79-88.
[135]Article 22 of The Hague Convention of 1899.
[136]Article 23.
[137]The clause gets its name from its drafter Frederic de Martens, a Russian jurist.

> empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience."[138]

There has been debate as to the meaning, relevance and status of the Martens clause. For example, Greenwood opines that the clause is only a reminder that customary international law continues to be applied even after nations have adopted a treaty.[139] This view suggests that the contents of the clause cannot be relied upon as setting up a legal norm. The International Court of Justice (hereafter ICJ) also had the opportunity to consider the meaning of the Martens Clause in its *Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons*.[140] The Russian Federation submitted that the Geneva Conventions of 1949 and the Additional Protocols to the Geneva Conventions of 1977 were complete codes of the laws of war and this made the Martens Clause redundant.[141]

On the other hand, the United Kingdom interpreted the Martens Clause to mean that in the absence of a specific treaty prohibiting the use of nuclear weapons, it does not mean that the weapons are capable of lawful use.[142] However, the United Kingdom also pointed out that the Clause does not establish the illegality of nuclear weapons.[143] The ICJ acknowledged that the Martens Clause is an effective means of addressing the evolution of military technology.[144] The Court did not try to provide a clear interpretation or clear understanding of the Clause. However, Judge Shahabuddeen in a dissenting judgment provides an analysis on how the Martens Clause should be interpreted. The learned Judge argued that while it may be accepted that the Martens Clause is a rule of customary international law that lays down norms for state conduct, it is difficult to determine what norms of state conduct are laid down.[145] The Judge was of the view that the Clause has normative status in its own right and is not simply a reminder of the existence of other norms of international law. The Judge

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[138]Preamble, Hague Regulations of 1899.
[139]C. Greenwood, " Historical Development and Legal Basis " in Dieter Fleck (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (1995) 28.
[140]*Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons*, 8 July 1996.
[141]Russian Federation, written submission on the Opinion requested by the General Assembly, p. 13.
[142]R Ticehurst "The Martens Clause and the Laws of Armed Conflict" (1997) No. 215 *International Review of the Red Cross,* https://www.icrc.org/eng/resources/documents/article/other/57jnhv.htm (accessed 2 June 2015).
[143]*Ibid.*
[144]*Advisory Opinion on the Legality of the threat or Use of Nuclear Weapons,* 8 July 1996 Dissenting Judgment p 21.
[145]*Ibid.*

further argued that the principles of international law referred to in the Clause are derived from one or more of three different sources, which are usages, established between civilized nations, the laws of humanity and the requirements of the public conscience.[146] Ticehurst argues that this means that when determining the full extent of the laws of armed conflicts, "the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience".[147]

Despite the different interpretations given to the Clause, it is clear that the clause had influence in the development of humanitarian law and hence is the most important achievement of The Hague Conference. Although the clause does not specifically refer to the principle of distinction, it embodies a general recognition that means and methods used in warfare are subject to limits. The clause also acts as an important guide to the future attempts to codify the laws of war. For example, the denunciation clause common to the Geneva Conventions provides that any contracting party that denounces any of the Conventions shall remain bound by its obligations "by virtue of the principles of the law of nations as they result from the usages established among civilised peoples, from the laws of humanity and the dictates of public conscience".[148] The importance of the Martens Clause is also recognised in Article 1(2) of Additional Protocol I, which provides that "in cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience".[149] This provision highlights the relevance of the Martens Clause to the principle of distinction since it clearly points that the principles of international law, established custom, humanity and public conscience requires protection of civilians during armed conflicts. Therefore, although The Hague Convention failed to come up with sound and binding international norms which would ensure protection of civilians due to the delegates' decision to uphold military necessity over humanitarian principles, it gave birth to an important principle which positively influenced the future development of humanitarian law.

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[146] *Ibid.*

[147] R Ticehurst "The Martens Clause and the Laws of Armed Conflict" (1997) No. 317 *International Review of the Red Cross* , https://www.icrc.org/eng/resources/documents/article/other/57jnhy.htm (accessed 2 June 2015).

[148] Article 142 of Convention (III) Relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. The same clause is repeated in almost similar clause in Geneva Conventions I, II and IV.

[149] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

### 2.3.6 Opposition to the development of the law

Despite efforts to formulate rules that would regulate the conduct of hostilities and reduce unnecessary suffering, there was enormous resistance to these developments. Deliberate disregard of the rules of war was evident as the nature of warfare changed due to "technological advancement as well as heightened rivalries between states".[150] This resulted in wars becoming unregulated and the requirement to distinguish combatants from civilians being ignored. For example, Pictet points out that the advent of Napoleonic Wars brought with it an "epoch of unbridled ferocity" and this resulted in existing customary rules regulating the conduct of wars being useless.[151] The states were more inclined to ignore rules of armed conflict to maximise military advantage over their adversaries. The increase in technological advancement also resulted in civilians becoming more involved in hostilities, even though the involvement was indirect. For example, civilians were employed in industries supplying military equipment thus making them vulnerable to attacks.[152] O' Brien also argues that the mobilization of populations and industrial bases to support war effort by nations resulted in the line between combatants and civilians being blurred thus endangering civilian lives.[153] This therefore resulted in innocent civilians being exposed to attacks during armed conflicts.

One policy that was adopted in disregard of the customary law rules regulating the conduct of hostilities was the *kreigsraison* doctrine, which was propagated by German leaders.[154] This doctrine was based on the argument that "demands of military necessity should always override the obligations of international law".[155] Furthermore, it was argued, "ruthless war was quicker and more humane".[156] Other proponents of this doctrine argued that where victory in war made it necessary to violate international law, it would be unreasonable to prohibit such violations.[157] This meant that while German states acknowledged the obligations imposed upon them by international law, military necessities would always

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[150]*Ibid.*
[151]J Pictet *Development and Principles of International Humanitarian Law* (1985) 24.
[152]J Pictet *Development and Principles of International Humanitarian Law* 8.
[153]WV O'Brien "The Meaning of "Military Necessity" in *International Law, I World Polity* (1957) 132.
[154]G Best *Humanity in Warfare: The Modern History of the International Law of Armed Conflicts* (1983). The term derives from the German phrase "*kreigsraison gebt vor kreigsmanier*," which means "the necessities of war are prior to the customs of war".
[155]*Ibid.*
[156]J H Morgan *The War Book of the German General Stuff* (1915) 72.
[157]Jochnick and Normand 1994 *Harvard International Law Journal* 65.

override these international law obligations. For example, German Chancellor Otto von Bismarck once stated that a leader should not allow his country to be destroyed because of international law.[158] Thus when a country's success was at stake in an armed conflict, it was justifiable to disregard the rules of international law. The War Book of German General Staff states that "certain severities are indispensable to war, and that humanity was best served by the ruthless application of them".[159]

The *kreigsraison* doctrine faced criticism from scholars for its disregard of the attempts to cement the principles of humanitarian law.[160] After The Hague Conference, Germany came up with a military manual that had its influence from the *kreigsraison* doctrine. The manual provided that:

> "A war conducted with energy cannot be directed merely against the combatant forces of enemy and the positions they occupy, but it will and must be in like manner seek to destroy the total intellectual and material resources of the latter."[161]

This meant that humanitarian objectives could be achieved through allowing atrocities to take place in order for the war to be short. The Germany military manual also stated, "Humanitarian claims, such as the protection of men and their goals can only be taken into consideration in so far as the nature and object of war permit".[162] By adopting this stance, Germany made the application of humanitarian law, particularly the principle of distinction an exception rather than a norm.

Although there was widespread condemnation of Germany's move to frustrate attempts to codify laws regulating the conduct of warfare, the *kreigsraison* reflects states' conduct during armed conflicts at the time. Jochnick and Normand argue that "while the codification of the laws of war represented a formal rejection of *kreigsraison*, it did not signify a substantive advance towards the humanitarian goal of restraining war conduct".[163] The learned authors further argue that "the distinction paramount in the minds of legal scholars between

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[158] *Ibid.*
[159] J H Morgan *The War Book of the German General Stuff* (1915) 72.
[160] For example, see J Stone *Legal Controls of International* Conflict (1954) 3-18.
[161] J H Morgan *The War Book of the German General Staff* 68.
[162] *Ibid.*
[163] Jochnick and Normand 1994 *Harvard International Law Journal* 64.

*kreigsraison* and the laws of war disappears in the actual practice of war".[164] One can therefore conclude that there were contradictions between states' attempts to come up with laws governing the conduct of armed conflicts and how their armies conducted themselves during armed conflicts.

### 2.3.7 The Second Hague Conference of 1907

European powers convened another Conference in 1907 in order to discuss the laws of armed conflicts. However, there were no positive developments regarding the principle of distinction.[165] Instead, a naval code that allowed the bombardment of undefended places was drafted.[166] The participating states chose to elevate military necessity above humanitarian needs. Furthermore, attempts to ban aerial bombardment were opposed.[167] From this discussion, one can conclude that although efforts were made to come up with binding rules to regulate the conduct of warfare and ensure protection of civilians, these efforts did not have a major effect on the manner in which war was conducted. This was mainly because of the desire by states to uphold military necessity at the expense of humanitarian principles.[168] It should be reiterated that although the two Hague Conferences had no immediate impact on the protection of civilians, they carried the ideas that would form the core principles of IHL into the future.

### 2.3.8 The Principle of Distinction during World War 1

The success of attempts to regulate the conduct of war, particularly the need to distinguish between combatants and civilians was tested during the First World War. During this period,

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[164] *Ibid*
[165] Jochnick and Normand 1994 Harvard *International Law Journal* 77.
[166] See Article 2 and 3 of Convention Concerning Bombardment by Naval Forces in Time of War, October 18, 1907.
[167] Jochnick and Normand 1994 *Harvard International Law Journal* 77.
[168] Jochnick and Normand argue that "civilians were more vulnerable than ever to the scourge of combat". The further argue that "states agreed to restrict only those obsolete methods or means of warfare whose limitation did not put one or more states at a disadvantage". See Jochnick and Normand 1994 *Harvard International Law Journal* 77.

there was development of heavy industry specialising in military technology.[169] The military became more dependent on civilians who worked in military factories. This involvement of civilians put them at risk of attacks from enemy forces. Further, the development of military industries in civilian towns also exposed the residents of such towns from the dangers of war, as the industries became military targets.[170] Therefore, civilian environments were turned into battlefields. This development brought enormous challenges to the protection of civilians.

Another factor that contributed to the blurring of the line between combatants and civilians was the development of weapons that could be launched into civilian habitats. For example, the development of warplanes, long range naval and land artillery brought civilian towns and villages within the range of military attacks from enemy belligerents.[171] O'Brien argues that this resulted in the "advent of total war, fought by entire nations wherein all are considered combatants without any limitation on the means of injuring the enemy in order that he may be so utterly defeated that his entire system of life may be subordinated to the will and the system of the victor".[172] Consequently, civilians did not enjoy immunity from attacks during the First World War 1.

Another factor which contributed to the endangering of civilian lives was morale bombing. This refers to attacks directed against civilians in order for them to become demoralised and seize to support the war. These forms of indiscriminate attacks were justified under military necessity and were therefore legally justifiable.[173] Even though leaders of the belligerent states had given assurances that civilians would not be objects of attack and affirmed their respect for international law, particularly respect for the prohibition of aerial bombardment of undefended towns, these undertakings proved to be rhetorical as there was no compliance with the undertakings.[174] For example, one German Chief of Staff stated, "I hold the view that we should leave no means untried to crush England and that successful air raids on London, in view of the already existing nervousness of the people, would prove a valuable means to an end".[175] This resulted in indiscriminate attacks being carried out.

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[169]E Colby "Laws of Aerial Warfare" (1926) 10 *Minnesota Law Review* 207 at 227.
[170]Jochnick and Normand 1994 *Harvard International Law Journal* 77.
[171]C Webster, N Frankland, *The Strategic Air Offensive Against Germany* 1939-45 (1961) 67.
[172]W V O'Brien "The Meaning of "Military Necessity" in *International Law, I World Polity*134.
[173]Jochnick and Normand 1994 *Harvard International Law Journal* 80.
[174]*Ibid.*
[175]M W Royse *Aerial Bombardment and the International Regulation of Warfare* (1928) 131-32.

Furthermore, states involved in the war interpreted the existing rules in a way that made it possible for them to conduct military operations without hindrances. For example, 'undefended town' in Article 25 of The Hague Regulations, was interpreted by states as referring to areas without military objectives.[176] This interpretation was made possible by the ambiguous way the rule prohibiting bombardment of undefended towns was couched. For example, the phrase 'undefended towns' was not defined. Thus, belligerents could attack a town containing civilians only and justify their actions on grounds that there was a perceived military objective in the town. Additionally, since military commanders had agreed that "military objectives could be bombed wherever found, regardless of the injury to civilians and private property,"[177] the presence of a factories in a town rendered the inhabitants of such a town vulnerable to attacks even though the town was undefended.

The methods of war used during the First World War also contributed to a large number of civilian casualties. For example, use of gas as a weapon further led to the violation of the principle of distinction.[178] There were further allegations of genocide being committed against civilians. For example, the Young Turk government of the Ottoman Empire slaughtered thousands of Armenians in the Syrian Desert.[179] One can conclude that the existing international humanitarian law rules at the time were not sufficient or lacked enough force to protect civilian lives and as a result, many civilian lives were lost during the war. This was also made possible by lack of precision in the law in its prohibition of killing of civilians. The law was so vague that states could interpret it to justify any military tactic, which was to their advantage. More so, there was a lack of commitment by states to respect the existing law. The catastrophic death of civilians during the war highlighted the need for more binding international norms to regulate war.

[176]Jochnick and Normand 19945 *Harvard International Law Journal* 80.
[177]M W Royse *Aerial Bombardment and the International Regulation of Warfare* (1928) 193.
[178]Noone 2000 *Naval Law Review* 200.
[179]*Ibid.*

### 2.3.9 More attempts to reform the laws of war

The First World War brought untold human suffering and atrocities. The greatest number of casualties were civilians whom parties to the conflict had treated as legitimate military targets. At the end of the war, a series of conferences were called up in an attempt to come up with laws that would regulate armed conflicts and protection of civilian population was one of the main objectives of the conferences.[180] In 1922, states gathered at the Washington Conference and agreed to the Treaty of Washington.[181] The Conference sought states' commitment against the use of gas as a weapon during armed conflicts.[182] However, the negotiated treaty never came into force. The treaty required ratification by all five of the drafting States to come into force but France failed to ratify.[183]

The Washington Conference also attempted to draft laws which would regulate aerial bombardment as well as re-establish the line between civilians and combatants.[184] The conference resulted in rules that purported to place limits on sovereign power of states and prohibiting effective use of aircraft in war.[185] However, rules such as those that banned the bombardment of unfortified towns curtailed the power and ability of states to conduct warfare to their advantage and as a result, no one nation adopted the rules.[186] The failure of the conferences to come up with principles that would regulate the conduct of warfare has been attributed to the drafters' failure to acknowledge the need to balance humanitarian needs with military necessities.[187] The desire by states to protect their military advantages over their adversaries proved more important than humanitarian concerns.

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[180]Noone 2000 *Naval Law Review* 201. Noone argues that the cost of human lives during the First World War led to "a public outcry for new methods of controlling the consequences of war".
[181]Noone 2000 *Naval Law Review* 202. The Conference was attended by France, Great Britain, Italy, Japan, and the United States of America.
[182] Article 5 of the Treaty relating to the Use of Submarines and Noxious Gases in Warfare. Washington, 6 February 1922 outlawed the use in war of asphyxiating, poisonous and other gases. This failed attempt was followed by the Protocol for the Prohibition of the Use of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare. Geneva, 17 June 1925 which banned the use of gases during armed conflicts. This treaty is binding on states.
[183]Noone 2000 *Naval Law Review* 202.
[184]Jochnick and Normand 1994 *Harvard International Law Journal* 83.
[185]Jochnick and Normand 1994 *Harvard International Law Journal* 84.
[186]*Ibid.*
[187]*Ibid.*

In 1929, forty-seven states were represented in Geneva where states sought to negotiate and draft the Convention Relative to the Treatment of Prisoners of War as well as to revise the 1906 Geneva Wounded and Sick Convention.[188] The two Conventions were much more detailed and technically superior than the preceding conventions.[189] The 1929 Convention regarding the wounded and the sick replaced the 1899 and the 1906 Conventions between states that ratified it while the 1929 Convention on Prisoners of War only complemented its predecessors.[190]

More attempts were made to develop the law of armed conflict prior to the outbreak of the Second World War. In 1934, a draft Convention that was intended to regulate sanitary cities and localities was negotiated in Monaco.[191] The draft Convention dealt with the protection of towns and cities that were not involved in armed conflicts.[192] Furthermore, the Draft International Convention on the Condition and Protection of Civilians of Enemy Nationality who were on territory belonging to or occupied by a belligerent was also negotiated in Tokyo.[193] However, neither of these conventions was ratified. The most important attempt at developing the law of armed conflict as far as the principle of distinction and protection of civilian population is concerned was made in 1938 when the Draft Convention for the Protection of Civilian Populations against New Engines of War was negotiated.[194] The main objective of this Convention was the protection of the civilian population during armed conflict and establishment of safety zones for certain non-combatant classes of the population.[195] However, this Convention was never ratified and the idea of protecting civilians became the first casualty of the Second World War as shall be seen below.

From the above discussion, it is clear that although efforts were made after the end of the First World War to develop the laws of armed conflict in order to prevent the future

[188]The negotiations resulted in the coming into place of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field of 1929 and the 1929 Geneva Convention Relative to the Treatment of Prisoners of War of 1929.
[189]Noone 2000 *Naval Law Review* 203.
[190]*Ibid.*
[191]Noone 2000 *Naval Law Review* 203-204
[192]Noone 2000 *Naval Law Review* 204.
[193]*Ibid.*
[194]*Ibid.*
[195] *Ibid.*

occurrence of atrocities, nothing much was done as far as advancing the principle of distinction between combatants and civilians was concerned. Consequently, besides the prohibition of bombardment of undefended towns, there was no concrete law specifically meant to ensure the protection of civilians at the commencement Second World War. Furthermore, no clarity had been made regarding how a balance between military necessity and humanitarian principles should be made. Efforts to come up with humanitarian principles that would ensure protection of the civilian population before the outbreak of the Second World War were frustrated by the "Italian bombardment of Abyssinia, German bombardment of Durango and Guernica and Japanese indiscriminate air attacks in China".[196] Efforts were made at the World Disarmament Conference in Geneva to draft basic principles that would guarantee the protection of the civilian population and be observed in the "heat of a battle".[197] However, despite the participants' obsession with civilians, their efforts "fell victim to competing national states as states fought to preserve military advantages and limit the power of adversaries".[198] Therefore, when the Second World War began, states had not managed to agree on concrete rules that would have ensured protection of civilian population during the war.

### 2.3.10 The Principle of distinction during the Second World War

When the Second World War commenced, states involved promised to respect the laws of war as well as to minimise civilian casualties.[199] British Prime Minister Neville Chamberlain declared that:

> "I think we may say that there are, at any rate, three rules of international law ... applicable to warfare from the air .... In the first place, it is against international law to bomb civilians as such and to make deliberate attacks upon civilian populations. That is undoubtedly a violation of international law. In the second place, targets which are aimed at from the air must be legitimate military objectives and must be capable of identification. In the third place, reasonable care must be taken in attacking these military

[196]Jochnick and Normand 1994 *Harvard International Law Journal* 84.
[197]*Ibid.*
[198]Jochnick and Normand 1994 *Harvard International Law Journal* 85.
[199]British Prime Minister Chamberlain declared, "Bombardment aimed at demoralising the civilian population to be absolutely contrary to international law. President Roosevelt of the United States of America also called such acts "inhuman barbarism which has profoundly shocked the conscience of humanity.

objectives so that by carelessness a civilian population in the neighbourhood is not bombed."[200]

When the war commenced, President Franklin D Roosevelt of the United States of America appealed to all the parties involved to affirm their determination that their armed forces shall "in no event, and under no circumstances, undertake the bombardment from the air of civilian population or unfortified cities".[201] Britain, France and Germany among other states responded affirmatively to Roosevelt's requests and pledged to spare civilian lives during the conflict.[202] Jochnick and Normand argue that the pledge to respect the laws of war and to avoid inflicting civilian casualties bore little relation to one another as respect for the laws of war offered few substantive protections to civilians.[203] This is because the law as it stood immediately before the war did not offer much protection to civilians. Each side discovered that they could employ any military tactic and still operate within the confines of the limited law.

Civilians suffered horrendous atrocities during the World War II, many of which were a result of deliberate morale bombing by both warring parties.[204] At the commencement of the war, Germany launched direct aerial attacks against the British civilians in the Battle of Britain. German commanders argued that international law only prohibited attacks on cities for the sole purpose of terrorizing the civilian population and not attacks on the enemy population's will to resist.[205] Therefore, commanders believed that attacks should be directed against the British population's will to resist in order to reduce their support for the war.[206]

As the war progressed, allied powers also became involved in aerial bombardment for the purposes of demoralising the Axis powers. For example, the British argued that "all bombs that fall on Germans do 'a useful work' even if they miss their intended target".[207] Just like

[200]S J Goda, "The Protection of Civilians from Bombardment by Aircraft: The Ineffectiveness of the International Law of War" (1966) 33 *Military Law Review* 93.
[201]Jochnick and Normand 1994 *Harvard International Law Journal* 86.
[202]*Ibid.*
[203]Jochnick and Normand 1994 *Harvard International Law Journal* 85.
[204] See Generally G D Solis *The Law of Armed Conflict* 80.
[205] See Generally W. Hays Parks "Air War and the Law of War" (1990) 32 *The Air Force Law Review* 1
[206]M S McDougal, F P Feliciano "International Coercion and World Public Order: The General Principles of the Law of War" (1958) 67 *Yale Law Journal* 771 at 813.
[207]C Webster, N Frankland *The Strategic Air Offensive Against Germany, 1939-45* (1961) 195.

the Germans, the British made distinction between useful and gratuitous terror thus authorising unlimited discretion to bomb "civilians for useful purpose of breaking their morale".[208] Allied aerial bombing on civilian towns and cities intensified in 1943, with the Combined Chiefs of Staff of the Allied Command prioritizing "the undermining of the morale of the German people to a point where their capacity for armed resistance is fatally weakened".[209] Hiroshima and Nagasaki bombings by the United States of America in 1945 are an example of how Allied Powers targeted civilians of enemy states in order to demoralise them.

The unrestricted weapons and tactics used during the Second World War worsened civilian sufferings. For example, civilian towns, cities and industrial areas were treated as battlefields. Civilian morale and the will to fight became an important military target even though surveys conducted after the war revealed that "such terror attacks were of dubious military value and may have encouraged a spirit of resistance which in turn prolonged the war".[210] One can conclude that the laws of armed conflict in general were not sufficient to offer protection to vulnerable civilians during the Second World War. Instead, the law justified the atrocities directed against civilians. New weapons and tactics together with the liberal understanding of the term military objectives as well as the decision to uphold military necessity justified terror bombings on civilians.

### 2.3.11 The aftermath of the World Wars

The shortfalls of IHL, particularly in relation to the principle of distinction during Second World War were very clear. The large number of civilian casualties demonstrated that the law was not sufficient to provide protection to the civilian population. The law's failure to protect civilians during armed conflicts raised an urgent need for more binding and detailed rules to ensure protection of civilians. Before the end of the Second World War, the ICRC commenced work on revising and extending the Conventions in the light of experiences during the Second World War. Several expert conferences were convened and draft

[208]Goda 1966 *Military Law Review* 97-98.
[209]*Ibid.*
[210]Desaussure and Glasser "Air Warfare-Christmas 1972", in P D. Trooboffed *Law and Responsibility in Warfare: The Vietnam Experience (*1975) 125.

Conventions were presented and adopted at the VVII International Red Cross Conference at Stockholm in 1948.[211] The draft Conventions were presented at the Diplomatic Conference organized by the Swiss Federal Council.[212] Fifty-nine States were represented and four observers were present.[213] The Conference was successful in revising the previous Geneva Conventions that were already in force.[214] Of important significance to this thesis was the birth of the Geneva Convention Relative to the Protection of Civilian Persons in Time of War in 1949.[215] The Convention covered new ground such as protection of civilian hospitals and safety zones, legal status of foreigners on the territory of a party to a conflict and the treatment of civilian internees and populations of occupied territories. This was a clear indication of the international community's new commitment to the protection of civilians during armed conflicts. Two Additional Protocols were adopted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts in 1977 and these contain the core of the principle of distinction.[216]

Unlike previous international agreements, the Conventions and the protocols specifically refer to the principle of distinction and affirms in clear terms, the protection of civilians during armed conflicts. Distinction has also become part of customary international humanitarian law as shall be discussed later in this Chapter.

## 2.4 The modern formulation of the principle of distinction

The principle of distinction is established in Article 48 of the Additional Protocol I, which states that:

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[211]P Abplanalp "The International Conferences of the Red Cross as a factor for the development of international humanitarian law and the cohesion of the International Red Cross and Red Crescent Movement" (1995) No. 308 *International Review of the Red Cross* https://www.icrc.org/eng/resources/documents/article/other/57jmr9.htm *(accessed 3* July 2015)

[212]*Ibid.*

[213]*Ibid.*

[214]*Ibid.*

[215]Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.

[216]The Conference resulted in the adoption of Protocol Additional to the Geneva Conventions of 12 August 1949, relating to the Protection of Victims of International Armed Conflicts (hereafter Additional 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 (hereafter Additional Protocol II). This study shall mainly focus on Additional Protocol I.

> "In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives."[217]

The principle of distinction is an important concept under IHL. It goes a long way in determining the legal status of the two groups it creates, that is civilians and combatants. Firstly, the principle of distinction determines the primary status of persons during an armed conflict, which is whether they are civilians or combatants.[218] The primary status determines the secondary status.[219] Firstly, primary status determines whether a person has the combat privilege or not. This means that it determines whether a person is legally entitled to take part in armed conflicts or not.[220] Secondly, primary status determines the protection afforded to an individual under international humanitarian law. In other words, it determines whether a person can be a lawful target of attack.[221] Lastly, primary status determines what happens when a person who has been involved in the armed conflict falls into the hands of the enemy and the consequences that come about because of an individual's conduct during armed conflict, particularly concerning the violation of international law.[222]

The distinction between civilians and combatants applies to both international armed conflicts and non-international armed conflicts. The principle is made applicable to international armed conflicts through Additional Protocol I and the customary international humanitarian law rules. On the other hand, distinction between combatants and civilians is made applicable to non-international armed conflicts through Article 13(2) of Additional Protocol II, which prohibits the making of civilian population as well as individual civilians the object of attack.[223] The principle of distinction has also been recognised in other

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[217] Article 48 of Additional Protocol 1.
[218] D Fleck *The Handbook of International Humanitarian Law 2ed* (2008) 79. Therefore, international humanitarian law recognise the existence of two distinctive groups in an armed conflict, which are combatants and civilians.
[219] *Ibid.*
[220] *Ibid.* While combatants have the right to take direct part in hostilities, civilians do not have the right to take direct part in hostilities. This shall be discussed later on in this Chapter.
[221] *Ibid.* Combatants are by virtue of their combatant status legitimate targets during an armed conflict. This means that they can be attacked whenever and wherever they are found. On the hand, civilians are immune from attacks during an armed conflict, unless they take direct participation in hostilities.
[222] *Ibid.*
[223] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.

international legal instruments such as the Ottawa Convention Banning Anti-Personnel Landmines.[224] The Statute of the International Criminal Court also makes intentionally directing attacks against civilians a war crime.[225] It should be noted that international law does not recognise combatant status in non-international armed conflicts.[226] Thus while the term combatants may be used as a generic term to refer to persons who have the right to take part in armed conflicts in non-international armed conflicts, this does not suggest "combatant status or prisoner of- war status, as applicable in international armed conflicts".[227]

Protection of civilians and civilian objects during armed conflicts is entirely depended on the distinction between combatants and civilians. In other words, parties to an armed conflict will only be able spare civilians and civilian objects from attacks when they are able to distinguish them from combatants and military objects. Therefore, it is imperative to discuss in detail the criteria of distinguishing combatants from civilians and civilian objects from military objectives. This discussion will help in demonstrating how the binary distinction does not fit well with developments that have taken place in modern warfare. This Chapter will now turn to discuss the definition of combatants as well as the criteria for meeting combatant status. The Chapter will then discuss the definition of civilians as well as the consequences that come with the civilian status. The distinction between civilian objects and military objects will then be discussed. Customary International Humanitarian Law relating to the principle of distinction will also be discussed.

### 2.4.1 Combatants

Combatants are defined as "members of the armed forces of a party to the conflict other than medical personnel and chaplains and they have the right to participate directly in hostilities".[228] This means that for one to able to participate in armed conflicts legally, they should qualify as combatants. Fleck argues that the requirement of a combatant to belong to

[224]United Nations, Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997
[225]Article (8)(e)(i).
[226]J Henckaerts, L Doswald-Beck *Customary International Humanitarian Law Volume I: Rules* (2005)
[227]J Henckaerts, L Doswald-Beck *Customary International Humanitarian Law* 12.
[228]Article 43(2) of the Additional Protocol I.

armed forces of a party to the conflict is consistent with the tenet of international law that a party to the conflict being a subject of international law exercises the force of arms against another party to the conflict through the organ of its armed forces.[229] Therefore, only armed forces authorised by a party to the conflict that is subject of international law can take part in hostilities.

#### 2.4.1.1 Criteria for determining combatant status

Given that combatants have wide rights it is important that the criteria of determining combatant status be clear in order to ensure that those who are granted the right to take part in hostilities can be clearly identified. In other words, the criteria for determining combatant status should not leave any room for unlawful belligerents to take part in hostilities. An ambiguous criterion is subject to manipulation. Therefore, it is necessary to discuss the criteria of determining combatant status in this study.

The definition of combatants is provided for in the Third Geneva Conventions[230] and the Additional Protocol I.[231] In terms of these two instruments, a person can qualify as a combatant in two ways. Firstly, a person can qualify as a combatant in terms of Article 43 of Additional Protocol I. Article 43(2) provides that "members of the armed forces of a party to a conflict are combatants, that is to say they have the right to participate directly in hostilities".[232] The definition of armed forces is provided for in Article 43(1) which states that "armed forces of a party to a conflict consist of organized armed forces, groups and units under a command responsible to that Party for the conduct of its subordinates…."[233] This is the most straightforward way in which a person can qualify as combatant. For example, members of a national defence force of a state will qualify as combatants under this definition. Fleck points out that this provision recognise that "only states or other parties

[229]D Fleck *The Handbook of International Humanitarian Law* 80.
[230]Article 4 A.
[231]Article 43 of Additional Protocol I.
[232]Additional Protocol I. This definition excludes medical personnel and chaplains, who are protected in terms of Article 33 of the Third Geneva Conventions. See also C Pilloud *et al* Commentary on the Additional Protocols (1987) 515.
[233]Article 43 (1) of Additional Protocol I.

recognised as subjects of international law can be parties to an armed conflict" and these can act through its organs, including armed forces.[234]

According to Article 43(1), armed forces must comply with the requirements of being "under a command responsible for the conduct of its subordinates",[235] "subject to an internal disciplinary system" and "complying with international law applicable in armed conflicts".[236] Fleck points out that a party to the conflict recognised as a subject of international law has a duty under international law to comply with the law and a breach of international law by its organ will lead to that party being held responsible.[237] Therefore, a party to the conflict has direct interest in how its armed forces conduct themselves during an armed conflict. Consequently, the requirements in Article 43(1) are intended to ensure that states retain control over their armed forces.

The definition in terms of Article 43(2) is precise and rules out the possibility of other people who are not members of the armed forces claiming combatant status under this provision. Pilloud *et al* concurs that Article 43(2) "dispense with the concept of quasi-combatants, part-time status or semi-civilian".[238] The definition of combatant is not conduct-based.[239] This means that a person's duty within the armed forces does not determine whether he is a combatant or not. For example, a member of the armed forces who assigned to catering duties remains a combatant and therefore has the same rights and responsibility as an infantryman who engage in combat duties. Therefore, in brief, members of the armed forces of a party to the conflict qualify as combatants.

A second way through which one can become a combatant is through Article 4A of the Third Geneva Conventions, which deals with persons who are entitled to prisoner of war status.[240] It states that "Members of other militias and members of other volunteer corps, including

[234]D Fleck *The Handbook of International Humanitarian Law* 85.
[235]Article 43(1) of Additional Protocol I.
[236]Article 43(1) of Additional Protocol I.
[237]D Fleck *The Handbook of International Humanitarian Law* 85.
[238]*Ibid.*
[239]G D Solis *The Law of Armed Conflict: International Humanitarian Law in War* 188.
[240]Third Geneva Conventions. Although the main objective of this provision is to outline the requirements that must be met for a person to qualify as a prisoner of war, it is also used to define combatants.

those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied" will qualify as combatants provided that they meet the certain requirements.[241] The first requirement that must be met is that of "being commanded by a person responsible for his subordinates".[242] This means that the group must have a leader who is responsible for overseeing the conduct of the group. According to the de Preux *et al*, this requirement is meant to guarantee discipline among volunteer corps.[243] However, the requirement does not mean that the chain of command must be similar to the one in the regular armed forces.[244] Furthermore, the person in charge of the subordinates can be either civilian or a combatant.[245]

The second requirement is that of having a fixed distinctive sign recognisable at a distance.[246] This requirement is to ensure easy identification.[247] According to Solis, while for regular armed forces, a distinctive sign refer to uniform, for partisans, a distinctive sign refers to any emblem recognisable at a reasonable distance and this can refer to a sash, coat, badge or emblem.[248] De Preux *et al* argue that in order for the sign to be distinctive, it must be the same for all members of any one organisation.[249]

The third requirement that must be satisfied is that of carrying arms openly.[250] de Preux *et al*, cautions that one should not confuse between carrying arms openly and carrying them visibly.[251] The requirement of carrying arms openly entails that the "enemy must be able to recognize partisans as combatants in the same way as members of regular armed forces, whatever their weapons".[252] Dinstein argues that this requirement prohibits a lawful

[241] Article 4A (2) of the Third Geneva Conventions. Although Article 4 A (1) also provides that persons defined under it are combatants, this provision is similar to Article 43(1) of Additional Protocol discussed above. In order to avoid repetition, this provision will not be discussed.
[242] Article 4 A (2) (a).
[243] J de Preux *et al Commentary on the Third Geneva Convention* (1960) 59.
[244] G D Solis *The Law of Armed Conflict* 196.
[245] J de Preux *et al Commentary on the Third Geneva Convention* 59.
[246] Article 4A (2)(b).
[247] It should be recalled that international humanitarian law requires those persons who are combatants to distinguish themselves from civilians to ensure that they will not be confused with civilians. See Article 43(3) of Additional Protocol I.
[248] G D Solis *The Law of Armed Conflict* 196.
[249] J de Preux *et al Commentary on the Third Geneva Convention* 60.
[250] Article 4A (2)(b).
[251] J de Preux *et al Commentary on the Third Geneva Convention* 61.
[252] Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 38.

combatant from "creating a false impression that he is an innocent civilian".[253] The requirements of wearing fixed distinctive sign and that of carrying arms openly have been qualified by Article 44(3) of Additional Protocol I which provides that there are certain situations in armed conflicts where "due to the nature of the hostilities,"[254] an armed combatant cannot distinguish himself. In such situations, Article 44(3) provides that the combatant shall retain the combatant status if "he carries his arms openly during each military engagement,"[255] and during such time as "he is visible to the adversary while he is engaged in a military deployment preceding the launching of an attack in which he is to participate".[256] Article 44(3) therefore has the effect of relaxing the two requirements even though it does not get rid of them entirely.

The last requirement that partisans must fulfil in order to qualify as combatants is that of "conducting their operations in accordance with the laws and customs of war".[257] According to the de Preux *et al*, this requirement embraces the other three requirements.[258] Furthermore, the partisans must also respect the Geneva Conventions as well as other international legal instruments that prohibit certain conduct during armed conflict.[259] Members of the group must meet each of the four requirements to qualify as combatants.[260]

In conclusion, it can be argued that the combatant status is restricted to members who are acting on behalf of a party to the conflict and this usually refers to a state. Fleck argues that the construction of Article 43 of Additional Protocol I and Article 4(A) of the Third Convention reflects that only subjects of international law, that is states or parties can be parties to an international armed conflict and they can only act through their organs, which are armed forces.[261] Furthermore, if a person does not qualify as a combatant, they automatically become civilians. Consequently, the argument that a third category of persons

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[253] *Ibid.*
[254] Additional Protocol I.
[255] Article 44(3)(a).
[256] Article 44(3)(b).
[257] Article 4A (2)(d).
[258] J de Preux *et al Commentary on the Third Geneva Convention* 61.
[259] *Ibid.*
[260] See generally F Francioni "Private Military Contractors and International Law: An Introduction" (2008) 19 *The European Journal of International Law* 961.
[261] D Fleck *The Handbook of International Humanitarian Law* 85.

exists under the principle of distinction, namely that of unlawful or *quasi*-combatants is not supported by international humanitarian law instruments.

### 2.4.1.3 The rights and duties of combatants

In order for the distinction between combatants and civilians to be meaningful, international humanitarian law requires combatants to distinguish themselves from civilians.[262] Article 44(3) provides that "in order to promote the protection of the civilian population from the effects of hostilities, combatants are obliged to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack".[263] The provision does not specify in what manner combatants should distinguish themselves. However, guidance can be found in Article 44(7), which refers to the accepted practice of wearing uniform by combatants of a Party to the conflict.[264] This view is supported by Fleck who argues that the requirement that combatants should wear uniform for the purposes of distinction had already become part of international customary law in the 19th Century.[265]

However, as stated above, Article 44(3) of Additional Protocol I relaxes the requirement for combatants to distinguish themselves all the time.[266] This provision recognises the use of specialised military units such as commandos whose operational needs may require them not to distinguish themselves. Article 43(7) however reiterates that the relaxation of the requirement for combatants to distinguish themselves at all times is not intended to change the accepted practice of states with respect to the wearing of the uniform by combatants of a party to the conflict.[267]

Failure to comply with the requirements for combatant status may result in two consequences depending on the nature of the failure. Firstly, if a combatant falls into the power of the

[262] Article 44 of Additional Protocol I.
[263] Additional Protocol I.
[264] Additional Protocol I. See also discussion on the requirement for members of the militia or volunteer corps to have a fixed distinctive sign recognizable at a distance in Section 2.4.2 above.
[265] D Fleck *The Handbook of International Humanitarian Law* 90.
[266] Article 44(3). See discussion on 2.4.2.
[267] Article 43(7).

opposing belligerents "while failing to meet the requirements of distinguishing "himself from the civilian population while he is engaged in an attack",[268] he forfeits his right to be prisoner of war.[269] The captured person may also be tried of perfidy.[270] However, if a combatant is captured while not distinguishing himself and is not conducting a military attack, he shall retain his prisoner of war status.[271] On the other hand, if combatants violate the rules of international law applicable in armed conflict, they should not be deprived of their right to be a combatant or prisoner of war if they fall into the power of an adverse party.[272]

Combatants have the right to take part in hostilities.[273] This means that they can kill or harm their adversaries during armed conflicts. Combatants cannot be punished for their participation in a conflict.[274] However, the right to participate in armed conflicts has to be exercised within the confines of international law governing armed conflicts.[275] In other words, combatants must conduct war within the parameters set by IHL. The primary responsibility to punish combatants who violate the law falls on the party responsible for the combatants.[276] If the combatants who have breached international law fall in the power of their adversary, they can be punished under the criminal law of the detaining power.[277] Furthermore, combatants are entitled to prisoner of war (PoW) status if they fall into the power of their adversary.[278] Combatants can be attacked during an armed conflict. This means that they are a legitimate military target and can be attacked unless they have surrendered.[279]

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[268]Article 44(4).
[269]See also Rule 106 of Customary International Humanitarian Law.
[270]Article 37 of Additional Protocol I
[271]Article 44(5).
[272]Article 44(2).
[273]Article 43(2) of Additional Protocol I.
[274]M Bothe "Direct Participation in Hostilities in Non-International Armed Conflict" ICRC Second Expert Meeting on the Notion of Direct Participation in Hostilities The Hague, 25 / 26 October 2004 https://www.icrc.org/eng/assets/files/other/2004-05-expert-paper-dph-icrc.pdf.
[275]D Fleck *The Handbook of International Humanitarian Law* 81. However, they can be punished for violating the laws of armed conflicts, for example by committing war crimes.
[276]*Ibid.*
[277]Article 99 of the Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (hereafter Third Geneva Convention).
[278]Article 4A of the Third Geneva Conventions.
[279]G D Solis *The Law of Armed Conflict* 188.

### 2.4.2 Non-combatants

Although the right to take part in hostilities is reserved for combatants, international humanitarian law acknowledges that armed conflicts may involve other persons who may accompany armed forces but are not necessarily combatants.[280] Article 4A (4) provides that "Persons who accompany armed forces without actually being members thereof, such as civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units" are entitled to PoW status "provided that they have received authorization from the armed forces which they accompany".[281] However, this category of persons does not qualify as combatants as already seen from the definition of combatants. Therefore, they cannot lawfully take direct part in hostilities. On the other hand, the definition of civilians excludes this group from being treated as civilians.[282] Therefore, civilians who accompany the armed forces to war without being members of the armed forces do not qualify as civilians for the purpose of PoW status. These non-combatants therefore are not immune from attacks during armed conflicts.[283] Furthermore, their presence in a military facility, which is a military objective, does not require the opposing belligerents to take precaution when attacking such a facility. [284]

### 2.4.3 Civilians

One of the main objective of the principle of distinction is to ensure that civilians are protected from the dangers of war. This therefore requires one to have a clear definition of civilians in order to differentiate them from combatants. Neither the Additional Protocols nor the Geneva Convention creates an obligation on the civilian to distinguish himself/herself. This therefore means that their immunity from attacks is not dependent upon their ability to

[280]This includes chaplains and medical personnel.
[281]Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949 (hereafter Third Geneva Conventions).
[282]Article 50 of Additional Protocol I and Article 4A (1), (2), (3) and (6) of the Third Geneva Convention. See discussion on civilians at 2.3.5 below.
[283]D Fleck *The Handbook of International Humanitarian Law* 100.
[284]*Ibid.*

distinguish themselves since the duty is on the combatants to distinguish themselves from civilians.[285]

### 2.4.3.1 Definition of civilians

Additional Protocol I adopts a negative definition of civilians. The definition of civilians is juxtaposed with the one for combatants. A civilian is defined as "any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of Additional Protocol I".[286] This means that civilians are people who are not combatants or non-combatants who accompany armed forces to war. According to Fleck, the negative construction of the definition of civilians, which is linked to that of members of the armed forces, has the advantage of being conclusive since traditionally, it used clear in war who was a member of the opposing armed forces and who was not.[287] de Preux *et al* argue that the negative definition was adopted as a "satisfactory solution to the lack in precision of the previous definitions of civilians".[288] Nations had different understandings of the term civilians and the various categories of civilians made defining each category difficult.[289] However, under Additional Protocol I, anyone who is not covered under the definition of combatants is considered a civilian. Furthermore, Article 50(2) defines a civilian population as comprising of "all persons who are civilians".[290] Again, this means that all the persons who are excluded in the above-mentioned provisions are civilians.

### 2.4.3.2 Rights and Obligations of Civilians

Civilians are entitled to general protection during armed conflicts. Article 51(1) provides that "civilian population and individual civilians shall enjoy general protection against dangers

[285]D Fleck *The Handbook of International Humanitarian Law* 239.
[286]Article 50. See also Rule 5 of Customary International Humanitarian Rules.
[287]D Fleck *The Handbook of International Humanitarian Law* 238.
[288]C Pilloud *et al Commentary on the Additional Protocols* (1987) 610.
[289]*Ibid.*
[290]Additional Protocol I.

arising from military operations".[291] This paragraph reiterates the main purpose of the principle of distinction, which is to protect civilians from harm that arise during armed conflicts. Article 51(2) prohibits attacks on civilians as well as "acts or threats of violence aimed at spreading terror among civilian population".[292] Article 27 of the Geneva Convention also imposes a positive duty on parties to the conflict to ensure protection of civilians. It provides that parties to the conflict may take measures of control and security concerning protected persons as may be necessary because of the war.[293]

Article 51(3) contains a key principle regarding the protection of civilians in armed conflicts. It provides that "civilians shall enjoy the protection afforded by this section, unless and for such time as they take a direct part in hostilities".[294] As pointed out above, only combatants have the right to take part in armed conflicts. Civilians do not have the right to take direct part in hostilities and their non-participation in hostilities is a pre-condition for their protection under IHL. Civilians lose their immunity from attacks if when they take direct part in hostilities.[295] This loss of immunity will occur for as long as they continue to take direct part in hostilities. Therefore, civilians remain legitimate targets for the duration of their direct participation in hostilities. More so, civilians who take part in hostilities are not entitled to PoW status upon their capture by their enemy belligerents.[296] This means that they are not entitled to the treatment accorded to prisoners of war by the Geneva Conventions. More so, by participating in armed conflicts, civilians become liable to criminal prosecution under the laws of the holding power's criminal justice. This is because they do not have the right to take part in hostilities.[297]

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[291] Article 51(1). See also Rule 2 of Customary International Law Rules.
[292] Additional Protocol I.
[293] Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949 (Third Geneva Conventions).
[294] Article 51(3) of Additional Protocol I.
[295] Fleck *The Handbook of International Humanitarian Law* 238.
[296] Fleck *The Handbook of International Humanitarian Law* 238.
[297] M Bothe "Direct Participation in Hostilities in Non-International Armed Conflict" ICRC Second Expert Meeting on the Notion of Direct Participation in Hostilities The Hague, 25 / 26 October 2004 https://www.icrc.org/eng/assets/files/other/2004-05-expert-paper-dph-icrc.pdf (accessed 10 June 2015).

### *2.4.4. Levee en masse*

It has been argued that the law regulating the conduct of war only grants persons who fall under the definition of combatants the right to fight in armed conflicts. This means that anyone who is not a combatant but nevertheless involves themselves in armed conflicts will be violating IHL and is liable to punishment as demonstrated above.[298] The only exception to this rule is found in Article 4A (6) of the Geneva Conventions, which deals with *levee en masse*.[299] Article 4A (6) provides that "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 unit forces shall be entitled to combatant status".[300]

This exception is a recognition of the right of the inhabitants of an area to self-defence. However, in order for them to attain this status, they should meet the requirement of carrying arms openly and respect the laws and customs of war.[301] An unoccupied territory refers to a territory that is not yet under "factual control of the enemy".[302] Furthermore, the resistance must be spontaneous in the sense that civilians must initiate the resistance without any organisation or planning in advance.[303] The requirement that the resistance should be spontaneous is intended to separate *levee en masse* from militia or volunteer corps since these latter groups require authorisation from a party to the conflict. Therefore, in order to ensure that private persons without the authorisation of a party to the conflict do not take part in hostilities under the guise of *levee en masse*, the Geneva Convention requires the resistance to be spontaneous. In the event of capture by the enemy belligerents, *levee en masse* is entitled to prisoner of war status. In short, they have the same rights and privileges as combatants.

[298]See Consequences of civilian participation in hostilities at 2.4.5.2 above.
[299]Third Geneva Conventions.
[300]Article 6(6).
[301]*Ibid.*
[302]D Fleck *The Handbook of International Humanitarian Law* 93.
[303]Article 4A (6).

## 2.5 Distinction between civilian objects and military objectives

As mentioned above, Article 48 of Additional Protocol I requires parties to the conflict to make a distinction between civilian objects and military objectives and operations to be directed only against military objectives.[304] This means the principle of distinction also protects civilian objects from attacks. This position is affirmed in Article 52(1), which states that "civilian objects shall not be the object of attack or of reprisals".[305] Article 52(2) also provides that attacks shall be limited strictly to military objectives.[306] This means that during an armed conflict, it is impermissible to direct attacks against civilian objectives. This also means that parties to a conflict must be able to distinguish civilian objects from military objectives in order to be able to direct their operations against legitimate military objectives. In order to be able investigate how the principle of distinction between civilian objects and military objectives has come under challenge in modern conflicts, it is important to discuss the criteria that is used to distinguish the two.

### 2.5.1 Civilian objects

Article 51(1) defines civilian objects as all objects which are not military objectives as defined in Article 51(2).[307] The reason for the adoption of the negative definition is that there are far more civilian objects than military objectives and this makes defining all civilian objects difficult.[308] This means that the definition of civilian objects has to be read together with the definition of military objectives.[309] In *Prosecutor v Tihomir Blaskic*, the International Criminal Tribunal for the Former Yugoslavia defined civilian property as any property that cannot be legitimately be regarded as military objectives.[310] Therefore, it is important to consider the definition of military objectives.

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[304]See section 2.4 above.
[305]Article 52(1).
[306]Article 52(2).
[307]Article 51(1).
[308]C Pilloud *et al Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (1987) 634.
[309]Haruna *et al* 2014 *International Journal of Humanities and Social Science Invention* 21.
[310]*Prosecutor Vs Tihomir Blaskic*, IT-95-14-T, ICTY, Trial Chamber I, Judgment of 3rd March 2000, para 180.

### 2.5.2 Military Objectives

Military objects are defined as "limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization offers a definite military advantage".[311] There are two requirements that must be fulfilled simultaneously for an object to be considered a military object.[312] Firstly, the nature, location, purpose or use of such an objective must enable it to make an effective contribution to military action.[313] Pilloud *et al* argues that this requirement covers all "objects directly used by the armed forces such as weapons, equipment, transports, fortifications, buildings occupied by armed forces, communication centres and staff headquarters".[314] The second requirement is that "the total or partial destruction, capture or neutralization of such a military objective must offer a definite military advantage".[315] According to Pilloud *et al*, the destruction, capture or neutralisation of the object must offer military advantage in the "circumstances ruling at the time" when the military operation is carried out.[316] Therefore, if one of these elements is not met, the object concerned is not a military objective and should be protected from attacks. Sassòli argues that the requirement for the object to make 'effective' contribution and for its destruction to offer 'definite' military advantage is meant to avoid a broad definition of military objectives.[317] In other words, the use of the words effective and definite is intended to ensure that objects that offer indirect contributions and whose destruction, capture or neutralisation may offer possible military advantages are excluded from the definition of military objectives.

Lastly, Article 51(3) provides that "in case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a

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[311] Article 52(2). Conversely, civilian objects are those objects which, by their nature, location, purpose or use do not make an effective contribution to military action and whose total or partial destruction, capture or neutralization does not offer definite military advantage. See Haruna *et al* 2014 *International Journal of Humanities and Social Science Invention* 21.

[312] C Pilloud *et al Commentary on the Additional Protocols* 635.

[313] Article 52(2).

[314] C Pilloud *et al Commentary on the Additional Protocols* 635.

[315] Article 52(2).

[316] C Pilloud *et al Commentary on the Additional Protocols* 636.

[317] M Sassòli "Legitimate Targets of Attacks under International Humanitarian Law" *Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003* http://www.hpcrresearch.org/sites/default/files/publications/Session1.pdf (accessed 10 August 2016).

school, is being used to make an effective contribution to military action, it shall be presumed not to be so used".[318] This presumption demonstrate that the priority of the drafters was to ensure that civilian objects receive as much protection from attacks as possible. This guards against "shoot first and ask questions later" approach that may be used by belligerents in armed conflicts.[319]

## 2.6. Customary International Humanitarian Law and the Principle of Distinction

The principle of distinction has become part of customary international humanitarian law. In a study of customary international humanitarian law done by the ICRC, the principle of distinction is among some of the rules that are considered as having developed into customary international humanitarian law. This means that states that have not signed or ratified the Additional Protocol I remain bound by the principle of distinction since it is considered part of customary international humanitarian law. The contents of these rules on the principle of distinction are similar to what is contained in the Additional Protocols.[320]

Rule 1 of customary international humanitarian law rules provides that "the parties to the conflict must at all times distinguish between civilians and combatants and that attacks may only be directed against combatants not against civilians".[321] Furthermore, Rule 6 provides that "civilians are protected against attack unless and for such time as they take a direct part in hostilities".[322] The principle of distinction is established by state practice as a norm of customary international law applicable in both international and non-international armed conflicts.[323] The customary status of the principle of distinction was confirmed at the diplomatic conference leading to the adoption of the Additional Protocols where the United

[318]Article 51(3).
[319]C Pilloud *et al Commentary on the Additional Protocols* 637.
[320]Therefore, in order to avoid repetition, these will not be discussed in detail. A discussion of these rules here is only to demonstrate that the principle of distinction is entrenched as an international norm.
[321]J M Henckaerts, L Doswald-*Beck Customary International Humanitarian Law* Vol 1: Rules (2005) 3.
[322]Rule 6 of Customary International Humanitarian Law.
[323]*Ibid.*

Kingdom stated that Article 51(2) was a "valuable reaffirmation of an existing rule of customary international law".[324]

Various international tribunals have also confirmed the customary law status of the principle of distinction. In *Prosecutor v Blaskic*, the International Criminal Tribunal for the former Yugoslavia Appeals Chamber emphasised that there is an absolute prohibition on the targeting of civilians under customary international law and this cannot be justified even by military necessity.[325] In the case of *Juan Carlos Abella v Argentina*, the Inter-American Commission on Human Rights stated that "customary law principles applicable to all armed conflicts require the contending parties to refrain from directly attacking the civilian population and individual civilians and to distinguish in their targeting between civilians and combatants and other lawful military objectives".[326]

### 2.6.1 Distinction between Civilian Objects and Military Objectives

The principle of distinction between civilian objects and military objectives has also developed into customary international humanitarian law. Rule 7 provides "parties to the conflict must at all times distinguish between civilian objects and military objectives and that attacks may only be directed against military objectives not against civilian objects".[327] The obligation to distinguish civilian objects from military objectives is also observed in state practice. For example, Sweden's International Humanitarian Manual identifies Article 48 of Additional Protocol I (which contains the obligation to distinguish between combatants and civilians) as customary international law.[328] The definition of civilian objects and military objectives under customary international humanitarian law is similar to the one adopted in Additional Protocol I hence it shall not be necessary to discuss this in detail. It is clear therefore that the principle of distinction has become part of customary international

[324]Henckaerts and Doswald-Beck *Customary International Humanitarian Law Vol 1* 25.
[325]*Prosecutor v. Tihomir Blaskic* (Appeal Judgement), IT-95-14-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 29 July 2004 para 109.
[326]*Juan Carlos Abella v. Argentina*, Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997) para 177.
[327]Henckaerts and Doswald-Beck *Customary International Humanitarian Law Vol 1: Rules* 25.
[328]Henckaerts and Doswald-Beck *Customary International Humanitarian Law* Vol 1: Rules 26.

humanitarian law. Therefore, states that ratified the Additional Protocol I and those that have not ratified are all obliged to observe the principle of distinction during armed conflicts.

## 2.7 Conclusion

From the discussion above, it can be concluded that the principle of distinction is a long established principle. Even though the principle did not exist in a codified form, ancient states observed that civilians should always be spared from the dangers of war. It has also been demonstrated that the idea of distinction faced resistance from time to time mainly due to states' unwillingness to compromise their strategies of warfare in favour of humanitarian principles. The principle of distinction as understood today creates two categories of people during armed conflicts, which are combatants and civilians.[329] As argued above, the principle of distinction determines a number of things during an armed conflict. In short, it determines the rights and obligations of both civilians and combatants during an armed conflict. More so, state responsibility for the conduct of its armed forces during an armed conflict is also grounded in the principle of distinction. The principle of distinction has far-reaching effects for parties to the conflict, hence the argument that it forms the cornerstone of IHL. Furthermore, the principle of distinction also enables parties involved in an armed conflict to determine which objects can be lawfully targeted and which ones are protected. Since the protection of civilians is based upon the principle of distinction, it can be submitted that there is need for a clear line that distinguishes civilians from combatants and civilian objects from military objectives. The blurring of the line between this distinction may result in IHL failing to fulfil its obligations. This study will move on to consider some of the new developments in modern armed conflicts that challenge the application of the principle of distinction.

[329]There have been academic debates surrounding the existence of a third category of unlawful combatants under the principle of distinction. This term has been used by the United States of America and Israeli governments to refer to members of "terrorists" organisations such as Al Qaeda and Taliban. However, the Geneva Conventions and the Additional Protocols does not make reference to unlawful combatants. The study will not go into academic debates surrounding the existence of a third since category since this is not vital to the study. Therefore the study will limit itself to discussing the criteria of distinction as it is agreed by states in the Geneva Conventions and the Additional Protocols. See C A Bradley "The United States, Israel & Unlawful Combatants" http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2760&context=faculty_scholarship (accessed 3 February 2017.

## Chapter 3: Private Military and Security Companies and the Principle of Distinction

### 3.1 Introduction

Chapter 2 dealt with general background of the principle of distinction and its development over the years. It has been argued that the principle of distinction forms the cornerstone of IHL. The main objective of IHL, which is alleviating human suffering during armed conflicts, particularly the protection of civilians and civilian objects can be achieved through the application of the principle of distinction. However, there are developments that pose challenges to the application of the principle of distinction in modern armed conflicts. This has in turn affected the extent to which civilians and civilian objects are protected. The developments have also resulted in individuals, groups and states getting involved in armed conflicts without being held accountable for violations of international law. These developments include the introduction of technologically advanced military weapons such as drones, increase of urban warfare and the involvement of civilians or persons who were traditionally not identified as combatants.[330] These developments also include the use of PMSCs, unmanned aerial vehicles and the emergence of cyber warfare.

This chapter seeks to demonstrate how the developments that have taken place in armed conflicts challenge the principle of distinction through the example of Private Military and Security Companies (PMSCs).[331] The Chapter will begin by defining what PMSCs are as well as tracing the history behind their emergence and involvement in armed conflicts. Thereafter, the chapter will outline some of the reasons behind the tremendous increase in state reliance on PMSCs to fight in armed conflicts. Importantly, it will discuss various functions performed by PMSCs, which result in them posing challenges to the principle of distinction. It should be admitted from the onset that not all activities performed by PMSCs challenge the principle of distinction. The discussion will only focus on PMSC activities that

[330]Haruna *et al* 2014 *International Journal of Humanities and Social Science Invention* 21. The authors refer to these developments as "civilianization" of modern armed conflicts due to the large involvement of civilians as well as civilian objects in armed conflicts.

[331]The term Private Military and Security Companies (PMSCs) shall be used in his thesis to refer to Private Military Companies and Private Security Companies that are contracted to offer military services that bring them under the regulation for international humanitarian law. See sections 3.3, 3.3.1 and 3.3.2 below.

bring the companies within the ambit of international humanitarian law.[332] The chapter will then move on to discuss how the involvement of PMSCs pose problems for the principle of distinction. The study will demonstrate that PMSC employees do not meet the status of either civilians or combatants as provided for under the principle of distinction. Additionally, the recent attempts that have been made in order to clarify the status of PMCs under IHL will be dealt with. The effectiveness of soft law and guidelines developed to clarify the status and responsibilities of PMCs shall be discussed.

## 3.2 Background: Why focus on Private Military and Security Companies?

There has been an ongoing debate regarding how PMSCs should be characterised.[333] While some have argued that these should be regarded as mercenaries, others have contended that there is a fundamental difference between PMSCs and mercenaries and as such, they should be viewed and treated differently.[334] However, the increased use of PMSCs in armed conflicts by states has resulted in more controversy arising regarding their status under the principle of distinction.

### 3.2.1 Historical background

Although the involvement of PMSCs in armed conflicts became an international concern at the turn of the millennium, this involvement begun earlier than that. At the end of the Cold War, millions of soldiers who had been assembled in anticipation of war became redundant.[335] As states began to disengage from conflict zones, there was a reduced demand for large standing armies.[336] Furthermore, maintaining these large armies proved too costly

[332]This means that the study will focus on situations where PMSCs get involved directly in armed conflicts or when they perform activities that amount to direct participation in hostilities on behalf of states.
[333]See S Percy "Regulating the Private Security Industry: A Story of Regulating the Last War" (Autumn 2012) 94 *International Review of the Red Cross* 941.
[334]United Nations Special Rapporteur for mercenaries maintained throughout his term that PMSCs are mercenaries. See Percy 2012 *International Review of the Red Cross* 941. However, scholars such as Percy argue that treating private security industry as mercenary is inaccurate and problematic.
[335]C Osakwe "Private Military Contractors, War Crimes and International Humanitarian Law" (2014) 42 *Scientia Militaria South African Journal of Military Studies* 64 at 64.
[336]*Ibid.*

for states. Consequently, professional soldiers who were being laid off from service found themselves jobless.[337] This created fertile grounds for the rise of PMSCs who incorporated laid off professional soldiers into their companies. Zarate argues that the rise of PMSCs was propelled by the end of inter-state wars which were replaced by "low-intensity, internal conflicts which world powers were not willing to get directly involved in".[338] This resulted in a power vacuum that led to the rise of sophisticated military professionals who "created the modern private international security companies" which provide "a wide range military and security services traditionally reserved for official militaries".[339]

The increased reliance on PMSCs services by states has been a result of the need to cut general spending towards supporting the military. For example, maintenance of large standing armies means that states would have to direct a significant amount of their budget towards training and remuneration of their personnel. In order to cut costs, states have resorted to outsourcing defence and security services to civilian contractors.[340] Growth of the PMSC industry was also influenced by the expansion in globalisation, which expanded opportunities for transnational business.[341] The expansion of markets for civilian contractors enabled PMSCs to acquire large clientele, thus making them reliable source of military force. For example, Gillard argues that governments, international organisations and multinational companies increasingly began to rely on PMSCs to perform services that were traditionally responsibilities of state armed forces.[342]

Moreover, as business entities, PMSCs tend to be very efficient in performing their services. They often have advanced military capabilities, which enable them to provide required military strength.[343] This is because its employees mainly constitute specially trained soldiers who may have served in the armed forces of a state, most of whom will possess experience of

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[337]P W Singer *Corporate Warrior: The Rise of the Privatized Military Industry* (2008) 53.
[338]J C Zarate "The Emergence of a New Dog of War: Private International Security Companies, International Law, and the New World Disorder" (1998) 75 *Stanford Journal of International Law* 75 at 79.
[339]*Ibid.*
[340] *Ibid.*
[341]P.W. Singer *Corporate Warriors Corporate warriors: The rise of the privatised military industry* (2003) 66.
[342]E C Gillard "Business goes to war: Private/Security Companies and International Humanitarian Law" (2006) 88 *International Review of the Red Cross* 525 at 526.
[343]E. L. Gaston "Mercenarism 2.0? The Rise of the Modern Private Security Industry and Its Implications for International Humanitarian Law Enforcement" (2008) 49 *Harvard International Law Journal* 221 at 235.

fighting in armed conflicts.[344] These reasons may also influence states to outsource military services to PMSCs. Furthermore, since PMSCs specialise only in rendering military assistance, they have abundant resources that makes them more capable militarily than state armed forces.[345] For example, they use advanced military technologies that state armed forces do not possess. This makes them attractive even to powerful states whose spending on modern military technology will be limited by their national budgets. Therefore, one can conclude that the abilities of PMCs to offer advanced military capabilities has resulted in states outsourcing military services to PMSCs rather than relying on their armed forces.[346]

State reliance on PMSC services during armed conflicts may also have increased due to the ability of PMSCs to operate independently of the hiring state, which enables states to make use of force while getting around domestic political constraints.[347] Through using PMSCs, states can acquire additional manpower and military capabilities while avoiding political obstacles such as obtaining legislative checks and approval on budgets and deployments, which they will encounter when using state armed forces.[348] Furthermore, the use of PMSC employees will help governments to avoid military call-ups, which will have political and economic implications. Moreover, the participation of PMSCs employees in conflict zones does not attract public attention in the same way state armed forces will do.[349] Gaston argues that death of PMSC employees during military operation does not attract media attention in the same way death of members of armed forces would do.[350] This therefore means that governments can avoid bureaucratic obstacles that are encountered when states try to acquire parliamentary authorisation for deployment of armed forces.

States may also employ services of PMSCs in order to avoid incurring responsibility under IHL. As already pointed out in the previous chapter, states are liable for the conduct of their

[344] For example, some of the employees of private military firms in Iraq were former members of the elite United States Navy Seals and the South African apartheid army.
[345] See generally Gaston 2008 *Harvard International Law Journal* 235-236.
[346] *Ibid.*
[347] Gaston 2008 *Harvard International Law Journal* 235.
[348] For example, Gaston points out that the Clinton Administration had to use PMSCs in its involvement in the Colombian anti-narcotic campaigns in order to avoid congressional troop ceilings. Furthermore, the Bush Administration used large number of PMCs in Iraq and this enabled it to avoid Congressional approval for more increased manpower in Iraq. See Gaston 2008 *Harvard International Law Journal* 235-236.
[349] Gaston 2008 *Harvard International Law Journal* 235.
[350] *Ibid.*

armed forces during armed conflicts.[351] More so, international law imposes an obligation on states to prevent violation of international law by its armed forces during conflicts.[352] However, given the presence of a *lacunae* in international law regarding the status and responsibilities of PMSCs when they participate in armed conflicts, states can escape liability for violation of IHL through contracting the services of PMSCs. This view is supported by Gaston who argues that the use of PMSCs by states enables such states to "carry out controversial activities which would attract legal and political implications if carried out by a state's armed forces".[353] It is submitted that states may resort to the use of PMSCs in order to avoid rigorous accountability and oversight measures that the law requires them to exercise over their armed forces in order to prevent violations of law.

In conclusion, it is submitted that there are many factors that influence states' decision to outsource military services to civilian contractors. Regardless of the justification for this trend, it can be argued that any use of PMSCs by states in armed conflicts should fall within the boundaries of the principle of distinction. In other words, the use of PMSCs in armed conflicts should not be in violation of the principle of distinction. This study will therefore investigate whether the use of PMSCs complies with the principle of distinction.

### 3.3 The definitional conundrum: Private Military Companies, Private Security Companies or Mercenaries

One issue of contention surrounding the discussion on private military and security industry has been how to categorise or define them. There has been an ongoing debate on whether to view PMSCs as a new form of mercenary force prohibited under international law or as new

[351] See Chapter 2, section 2.7

[352] See Common Article 1 to the Geneva Conventions. Furthermore, Articles on Responsibilities of States for Internationally Wrongful Acts further provides that states are responsible for the wrongful conduct of its organs or persons appointed to carry out certain activities on its behalf. This will be dealt with later in this this chapter.

[353] Gaston 2008 *Harvard International Law Journal* 222. For example, J D. Michaels, "Beyond Accountability: The Constitutional, Democratic, and Strategic Problems with Privatizing War" (2004) 82 *Washington University Law Quarterly* 1001 at 1028 argues that when the Unites States of America hired Military Professional Resources Incorporated (MPRI) to train Croatian forces during the conflict in Bosnia, MPRI reportedly provided direct planning, assistance and a military engagement on behalf of Croatia which later resulted in charged being raised against the Croat commanders. Therefore, instead of the United States of America being directly involved in controversial military activities, it hired civilian contractors to carry out such operations.

actors who operate within the confines of law. Confusion has also risen regarding the use of terms private military companies (PMCs) and private security companies (PSCs). While these terms may refer to different groups of private actors, it shall be argued that their functions are not mutually exclusive. Before discussing how private actors providing military force raise problems for the principle of distinction in IHL, it is important to deal with these definitional issues and the functions carried by each group. This is because not all activities of PMSCs are subject to IHL. In order to deal with the definitional issues, it is important to put the discussion in historical context and examine how the private military and security industry has evolved.

As already been alluded to, modern PMSCs began to emerge after the end of the Cold War and it is important to refer to some of the major events which highlighted the arrival of new actors on the international spectrum. In 1967, Sir David Stirling founded WatchGuard International with the aim of "training militaries of the sultanates of the Persian Gulf as well as providing support for their operations against rebel movements and dissidents".[354] The Company also provided Military Advisory Training Teams to foreign governments, particularly in the Middle East, Africa, Latin America and East Asia.[355] According to O' Brien, WatchGuard became "the model for all future PMCs".[356]

In the 1990s, the Angolan government was under siege from the National Union for the Total Independence of Angola (UNITA), a rebel movement led by Jonas Savimbi.[357] The government hired the services of Executive Outcomes, a private military company founded in 1989 by Eeben Barlow.[358] The company provided general security services, military training, infantry troops and air support.[359] Employees of Executive Outcomes were mainly former members of the South African Defence Force who were battle hardened professional

[354]K O' Brien "PMCs, Myths and Mercenaries: The Debate on Private Military Companies" (2000) *The RUSI Journal* http://www.tandfonline.com/doi/pdf/10.1080/03071840008446490 (accessed 10 February 2016).
[355]K O' Brien "PMCs, Myths and Mercenaries: The Debate on Private Military Companies" (2000) *The RUSI Journal* http://www.tandfonline.com/doi/pdf/10.1080/03071840008446490 (accessed 10 February 2016).
[356]*Ibid.*
[357]Zarate 1998 *Stanford Journal of International Law* 89.
[358]*Ibid.*
[359]*Ibid.*

soldiers.[360] Executive Outcomes also provided military services such as "infrared capabilities, which allowed night fighting, reconnaissance, fuel air bombs and advanced air power such as Mi-8, Mi-17 and Mi-24 helicopter gunships to the Angolan government troops".[361] Although the company insisted that its services were limited to training government forces and only engaged in defensive strikes, it has been claimed that the company's fighters were also involved in offensive operations, which ultimately led to the defeat of UNITA rebels.

After a successful campaign in Angola, Executive Outcomes was hired by the Sierra Leone government, which was battling the Revolutionary United Front (RUF), a rebel group that had unleashed a reign of terror on the public and seized valuable mineral deposits.[362] The company agreed to offer assistance in repealing the RUF and it is widely reported that the government offered mining concessions to the company in return of the military assistance.[363] Military instructors were sent to Sierra Leone and advanced military weapons were deployed. Company employees were also involved in air support operations. The company was also said to have been involved in supporting humanitarian work such as coordinating the return of children and teachers to school as well as preventing illicit diamond trading.[364] However, there were also reports of indiscriminate shooting of civilians as they pursued the rebels. More so, Executive Outcomes was accused of having hidden interests in the diamond mining activities that resulted in them being referred to as the "Diamond Dogs of War".[365] Elsewhere, PMSCs were also involved in the Balkans after the collapse of Soviet Union.[366] For example, Military Professional Resources Inc. (MPRI) assisted the Croatian Army in its fight for independence as well as in reclaiming its national territory from the Serb occupation.[367] The company had offered services of top-ranked retired generals as expert advisers.[368]

[360]Zarate 1998 75 *Stanford Journal of International Law* 93.
[361]*Ibid.*
[362]Zarate 1998 *Stanford Journal of International Law* 95.
[363]*Ibid.*
[364]Zarate 1998 *Stanford Journal of International Law* 97.
[365]*Ibid.*
[366]Zarate 1998 75 *Stanford Journal of International Law* 105.
[367]*Ibid.*
[368]*Ibid.*

The practice of outsourcing of military services attracted public attention and scrutiny at the turn of the millennium when PMSCs were hired on a massive scale to participate in the United States of America led invasion of Iraq and Afghanistan. As Singer points out the "events in Iraq and Afghanistan dragged PMSCs into the public limelight".[369] PMSCs were contracted to provide the much-needed manpower in the invasion and occupation campaign. Singer asserts that the numbers of PMSCs alone outnumbered the number of troops deployed by other members of the coalition except the USA.[370] These developments have raised debate regarding the status of PMSCs under the principle of distinction. While some scholars argue that PMSCs are a reincarnation of traditional mercenaries whose activities had been outlawed and were dressed in a corporate veil, others contended that PMSCs were a new phenomenon different from mercenaries and such were not outlawed by international law.[371] One person who maintained that PMSCs are mercenaries is Enrique Bernales Ballesteros, the United Nations Special Rapporteur for mercenaries who maintained that there "was absolutely no difference between mercenaries of the type operating in Africa during decolonization and PMCs".[372]

However, the debate on whether PMSCs forms part of mercenaries seems to have been settled. There appears to be consensus among scholars that PMSCs are former mercenaries who transformed themselves as well as their methods of operating in order to evade the bad perceptions publicity associated with mercenaries.[373] This transformation could also have been influenced by the development of anti-mercenary laws. Osakwe argues that PMCs transformed themselves into "properly structured corporate entities with the term PMCs increasingly coming into use and replacing the word mercenary".[374] Percy concurs that private military companies took advantages of the loopholes in the definition of mercenaries which still allowed private use of force and transformed themselves into corporations, which are different from mercenaries.[375] Therefore, it is submitted that the debate whether private

[369]P W Singer "The Private Military Industry and Iraq: What Have We Learned and Where to Next?" (2004) *Geneva Centre for the Democratic Control of Armed Forces* Policy Paper https://scholar.google.co.za/scholar?hl=en&q=The+Private+Military+Industry+and+Iraq%3A+What+Have+We+Learned+and+Where+to+Next&btnG=&as_sdt=1%2C5&as_sdtp= (accessed 20 February 2016).
[370]*Ibid.*
[371]Percy 2012 *International Review of the Red Cross* 949.
[372]*Ibid.*
[373] *Ibid.* See also Zarate 1998 *Stanford Journal of International Law* 75
[374]Osakwe 2014 *Scientia Militaria, South African Journal of Military Studies* 67.
[375]See generally Percy 2012 *International Review of the Red Cross* 946.

military contractors are a modern form of mercenaries is now over and PMSCs cannot be treated as mercenaries.

The involvement of PMSCs in armed conflicts however raises problems for IHL in general and the principle of distinction in particular as shall be argued later in this Chapter. As has been noted above, there is a developing trend in terms of which states outsource military functions to private military and security providers, service which involve direct participation in hostilities. This raises the question of whether private military and security companies personnel are civilians or combatants or not. Before dealing with this issue, it is important to deal with the terminology used to refer to PMSCs.

### 3.3.1 Private Military Contractors

The terms private military companies (PMCs) and private security companies (PSCs) have been used in the media interchangeably to refer companies that offer military and security services to governments, inter-government organisations or to big corporations. This has created confusion regarding whether these terms refer to similar groups of people or not. Therefore, it is important to deal with the definitional issues.[376]

There is no internationally recognised definition of PMCs. Existing treaties and international conventions do not refer to private military companies.[377] Goddard defines a PMC as:

> "A registered civilian company that specializes in the provision of contract military training (instruction and simulation programs), military support operations (logistic support), operational capabilities (special forces advisors and command and control,

[376]The determination of whether a given company is a private military company or private security company has been based on the functions that it performs. This approach will be used in this study.
[377]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" (2005) Occasional Paper No. 6 *Geneva Centre for the Democratic Control of Armed Forces* (DCAF) https://scholar.google.co.za/scholar?q=Privatising+Security%3A+Law%2C+Practice+and+Governance+of+Private+Military+and+Security+Companies&btnG=&hl=en&as_sdt=0%2C5 (accessed 22 February 2016).

communications and intelligence (functions) and or military equipment, to legitimate domestic and foreign entities."[378]

The Center for Public Integrity also defines a PMC as "a company that provides for a profit, services that were previously carried out by national military force, including military training, intelligence, logistics, and offensive combat, as well as security in conflict".[379] Singer defines PMCs as "business providers of professional services that are intricately linked to warfare".[380] From these definitions, it can be safely submitted that PMCs specialise in services that are closely related to combat activities, including fighting in armed conflicts. Therefore, PMCs have assumed functions that are traditionally reserved for armed forces.

PMCs' clientele includes states, multinational companies and inter-governmental organisations such as the United Nations.[381] The companies range from "small consulting firms to large transnational corporations that provide logistics support or lease out combat helicopters, fighter jets, companies, commandos or battalions".[382] Furthermore, while some companies are corporate business entities that exist permanently, others are "virtual companies which may not maintain standing forces and may even be small businesses with names which are designed to tell as little as possible about what the company does".[383]

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[378]S Goddard *The Private Military Company: A Legitimate International Entity Within Modern Conflict* (Master of Art and Military Science thesis, U.S. Army Command and General Staff College 2001) 8 http://www.globalsecurity.org/military/library/report/2001/pmc-legitimate-entity.pdf (accessed 10 January 2016)

[379]D. Brooks, "The Business End of Military Intelligence: Private Military Companies", *The Military Intelligence Professional Bulletin*, July-September 1999 http://fas.org/irp/agency/army/tradoc/usaic/mipb/1999-3/brooks.htm (accessed 1 March 2016).

[380]P W Singer "The Private Military Industry and Iraq: What Have We Learned and Where to Next?" *Geneva Centre For The Democratic Control of Armed Forces (DCAF) Policy Paper* Geneva, November 2004 http://www.dcaf.ch/Publications/The-Private-Military-Industry-and-Iraq (accessed 14 January 2016).
Although Singer use the term Private Military Firms instead of Private Military Companies, he admits in his categorization that PMFs offer direct, tactical military assistance which may include serving in front-line combat. He also concedes that these are commonly known as a Private Military Companies.

[381]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 2.

[382]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 2.

[383]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 20.

PMCs offer wide ranging services which vary "from company to company according to the degree of their specialisation".[384] Some PMCs provide combat force and support. For example in Operation Iraq Freedom and Afghanistan conflict, private military companies operated Unmanned Aerial Vehicles.[385] The United States of America forces also relied on civilians to run computer systems that generated the tactical air picture for the Combined Air Operations Centre.[386] More so, the United States Navy relied on civilian contractors for the operation of guided missile defence systems on its ships.[387] Other PMCs provide logistics and supply forces to armed forces such as building, operating and guarding camps.[388]

PMCs have also been involved in military operations or in providing services closely related to the war effort. For example, during the Ethiopian-Eritrea conflict, both sides made use of PMC services. Ethiopia contracted the services of Sukhoi, a Russian firm which provided fighter jets, and provided the service of 250 pilots, mechanics and ground personnel who operated and maintained the planes.[389] Singer points out that in Iraq, several thousands of PMCs were directly involved in fighting the insurgents in order to supplement the over-stretched coalition forces even though these were carried out under the pretext of security.[390]

Other services offered by PMCs include consulting, training, logistics support and maintenance operations. While it is admitted that some PMCs provide services that are far removed from the war effort, it is safe to conclude that the bulk of them are involved in providing services that directly contribute towards the war efforts and this makes their participation subject to IHL principles, particularly the principle of distinction. As Singer correctly points out, given that PMCs carry out these security

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[384]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 22.
[385]*Ibid.*
[386]*Ibid.*
[387]*Ibid.*
[388]*Ibid.*
[389] P W Singer *Corporate Warriors: The Rise of the Privatized Military Industry* 173.
[390]P W Singer "The Private Military Industry and Iraq: What We Have Learned and Where to Next?" Geneva Centre for the Democratic Control of Armed Forces (DCAF) Policy Paper Geneva, November 2004 http://www.dcaf.ch/Publications/The-Private-Military-Industry-and-Iraq (accessed 14 January 2016). Singer argues that an estimated 6000 contractors carried out armed roles resulting in 150 contractors getting killed and 700 wounded by September 2004.

operations in a warzone, and facing military threats, "they are clearly a far cry from security guards at the local shopping mall, no matter what they call themselves".[391]

### 3.3.2 Private Security Companies

The term PSC, just like PMC does not exist in international conventions.[392] Goddard defines a private security company as "a registered civilian company that specialises in providing contract commercial services to domestic and foreign entities with the intent to protect personnel, humanitarian and industrial assets within the rule of applicable domestic law".[393] According to Schreier and Caparini, PSCs have been in existence for a lot longer than PMCs.[394] This is also supported by O'Brien who points out that PSCs began to emerge on the world stage as long ago as the 16th century when rival commercial businesses hired security against each other to control businesses.[395] PSCs were also used during the colonisation period and continued to evolve over the years.[396]

PSCs can be divided into two categories.[397] On the one hand, there are small companies concerned with "crime prevention and ensuring public order, providing security and private guard services domestically".[398] These PSCs fall into different sectors such as the guarding sector, electronic security, sensor and surveillance sector and investigation and risk management sector.[399] Since these operate in a domestic setting devoid of armed hostilities, their activities are not likely to come within the regulation of IHL but human rights law. Therefore, this thesis will not deal with PSCs that provide services within a domestic setting during peace times. On the other hand, there are PSCs that

[391] *Ibid.*
[392] F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies".
[393] S Goddard *The Private Military Company: A Legitimate International Entity Within Modern Conflict* 8.
[394] F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 26.
[395] K A O'Brien (2000) "PMCs, myths and mercenaries: The debate on private military companies" (2010) *The RUSI Journal* http://dx.doi.org/10.1080/03071840008446490 at 62.
[396] *Ibid.* The author cites the British South Africa Company and, Dutch Jan Compagnie and British East India Company as examples of some of these PSCs which were used as security providers.
[397] F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 26.
[398] *Ibid.*
[399] *Ibid.*

are organized into large companies "sharing the same corporate attributes and command structures as PMCs".[400] These companies provide services at an international level and their clients include multinational corporations, governments, United Nations Institutions and Non-Governmental Organisation.[401] Examples of such private security companies include consulting (US DynCorp, Group4Securicor), training police, security and paramilitary forces (DynCorp was contracted to train new Iraq police), intelligence gathering, (UK Rubicon International in Iraq), securing key locations and headquarters (US Diligence LLC in Iraq among others).[402]

From the discussion above, it can be submitted that theoretically, PMCs and PSCs are separate entities, which provide different services. However, the question is whether there is a watertight separation between these companies in terms of the activities they perform in practice. For example, most PSCs claim that they do not get involved in combat activities.[403] However, history has shown that some companies that call themselves security companies actually get involved in the theatre of war performing combat operation. For example, between 2004 and 2007, Blackwater, which claimed to be a security company, was involved in a number of incidents in which they performed functions that are combat in nature. The company was involved in the shooting of civilians in market places, killing several of them.[404] Blackwater employees were also involved in an intense battle with insurgents who were attacking the Coalition Provisional Authority headquarters at Najaf in April 2003.[405] The company helicopters were also used to provide supplies during the battle.[406]

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[400]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 26.
[401]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 29.
[402]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 31-33.
[403]*Ibid.*
[404]P W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf (accessed 2 February 2016).
[405]MN Schmitt "Humanitarian Law and Direct Participation in Hostilities by Private Contractors or Civilian Employees" (2004-2005) 5 *Chicago Journal of International Law* 514.
[406]*Ibid.*

Further, Executive Outcomes, which claimed to be providing non-military services in Sierra Leone, was also reported to have been involved in combat operations. More so, even though PSCs do get involved in combat activities, some companies perform services that are closely associated with combat operations. For example, some companies that classify themselves as specialising in security services during the Iraq conflict performed tasks such as maintaining and loading weapons of sophisticated weapons system like B-25 stealth bomber and the Apache helicopter.[407] These activities by their nature are controversial since they can amount to direct participation in hostilities as shall be discussed later on.

In light of this discussion, it can be submitted that in practice, there is no clear line that separates some PSCs from PMCs. Schreier and Caparini argue that the distinction between PMCs and PSCs is blurred and artificial especially given the fact that the same companies perform multiple functions and offer both security and military services.[408] Moreover, some companies take offence to the term military thus preferring to be called private security firm.[409] In light of this conclusion, this Chapter shall proceed on two premises. The first premise is that PMCs provide combat services during armed conflicts and this raises the question of their status under the principle of distinction. The second premise is that some but not all PSCs get involved in fighting during armed conflicts, even though they claim to be security companies. Therefore, in order to accommodate both PMCs and PSCs which get involved in combat operations in the discussion, the term Private Military and Security Company (PMSCs) has been adopted in this thesis in order to discuss how the involvement of these groups create challenges for the principle of distinction.

[407]P W Singer "The Private Military Industry and Iraq: What We Have Learned and Where to Next?" Geneva Centre For The Democratic Control of Armed Forces (DCAF) Policy Paper Geneva, November 2004 http://www.dcaf.ch/Publications/The-Private-Military-Industry-and-Iraq (accessed 14 January 2016).
[408]Schreier and Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 30.
[409]*Ibid.*

## 3.4 Status of Private Military and Security Companies under International Humanitarian Law

The discussion above dealt with the terminology that is used when dealing with private companies that provide military and security services in situations of armed conflicts. It was argued that the involvement PMSCs in armed conflict where they perform combat related activities makes them subjects of IHL and in particular the principle of distinction. In other words, the status of PMSCs needs to be ascertained. Although the involvement of PMSCs in armed conflicts has been on the increase, the law has not provided answers regarding their status under the principle of distinction. This has resulted in PMSCs operating in a vacuum where their rights and responsibilities under IHL are unclear. Therefore, this Chapter needs to examine the status of PMSCs under the principle of distinction.

### 3.4.1 Combatants

The first enquiry is whether PMSCs employees contracted by states to perform military activities can be classified as combatants. This determination will help to answer four important questions. Firstly, this will enable one to determine whether contractors can lawfully take direct part in hostilities. Secondly, this will assist in answering the question whether such PMSCs are legitimate targets or not. Thirdly, the enquiry will answer the question regarding the consequences that must follow when contractors take part in armed conflicts. Lastly, this will assist in understanding the responsibilities of state for the conduct of PMSCs. Given the importance of these questions to IHL, it is crucial to determine whether PMSCs are combatants or not.

PMSC employees can acquire combatant status in two ways.[410] Firstly, they can acquire combatant status by meeting the requirements of Article 43 of Additional Protocol I to the Geneva Conventions, which defines combatant status.[411] In terms of this provision, a person

[410]Cameron 2006 *International Review of the Red Cross* 583.
[411]Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. See Chapter 2, section 2.4.2

qualifies as a combatant if they form part of the armed forces of a party to the conflict.[412] Thus, if PMSCs can prove that they are incorporated into the armed forces, are under a command responsible to the party for the conduct of its members and are subject to an internal disciplinary system, which enforces compliance with international law, then they can be accorded combatant status.[413] The second way in which PMSCs can acquire combatant status under IHL will be under Article 4A of the Third Geneva Convention.[414] In order to do so, they will have to demonstrate that they meet all the four requirements set in that provision.[415]

Article 43 is couched in such a way that any group which has been incorporated into the armed forces of a Party to the conflict including civilians can qualify as combatants. However, the provision does not provide criteria for determining whether a person forms part of a state's armed forces.[416] Gillard suggests various factors that may be taken into consideration to determine whether a person qualifies as a regular member of the armed forces of a party to the conflict.[417] These factors include whether there has been "compliance with national procedures for enlistment or conscription, where they exist, whether they are employees of the department of defence but bearing in mind that such departments employ civilians, whether they are subject to military discipline and justice…."[418] Other factors to consider include whether they form part of and are subject to the military chain of command and control, whether they form part of the military hierarchy, whether they have been issued with the identity cards envisaged by the Third Geneva Convention or other forms of identification similar to those of "ordinary" members of the armed forces; and whether they wear uniforms.[419] Article 43(3) further imposes the requirement that whenever a party to a conflict incorporates a paramilitary or armed law enforcement agency into its armed forces it shall notify other parties to the conflict.[420]

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[412]See Chapter 2, section 2.4.2
[413]Incorporation into the armed forces means formal inclusion in to the armed forces. This will mean the incorporated persons become part of the armed forces. This is usually carried out through a formal act.
[414]Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. See Chapter 2, section 2.4.2.
[415]See discussion in Chapter 2, section 2.4.2.
[416]Gillard 2006 *International Review of the Red Cross* 532.
[417]Gillard 2006 *International Review of the Red Cross* 533.
[418]Ibid.
[419]Gillard 2006 *International Review of the Red Cross* 533.
[420]Additional Protocol I.

The question therefore is whether PMSCs are regular members of the armed forces of a party to the conflict or whether they are incorporated into the armed forces of a party to the conflict. In answering this question, one needs to consider whether states comply with national procedures for enlisting or conscription procedures when they contract PMCS.[421] This means that for a person to qualify as a member of the armed forces, they will have to comply with these enlisting or conscription procedures.[422] Practice of states that have used PMSC services does not suggest that PMSCs are conscripted into these states' armed forces. For example, the United States of America has been acquiring services of PMSCs through contracts.[423] This means that management of the PMSC will enter into a contract of service in terms of which fully trained soldiers will render their services to the government. The PMSC personnel do not become employees of the department of defence. They remain employees of the PMSCs. On the other hand, United States Army does not recruit via contracts. Instead, it recruits civilians who are then trained and become employees of the department of defence.

Current practice does not support the idea that PMSCs may be integrated into the armed forces through a contract.[424] While states may use the contract to hire services of PMSCs to conduct operations that are normally carried out by its armed forces, it is argued that the contracts do not integrate PMSCs into the armed forces. This argument is supported by Schmitt who argues that there is need for a "more formal affiliation rather than a mere contractual relationship for these PMSCs to be members of armed forces".[425] However, when the Unites States of American contracted PMSCs in Iraq and Afghanistan, the there was no indication of formal affiliation of PMSCs to the United States Army. For example, sometimes PMSCs operations were detrimental to the United States Army operations.[426] Thus, the *modus operandi* of the PMSCs *vis-à-vis* US Army did not suggest any form of integration or at least coordination. This argument is supported by Schmitt who argues that "it would be incongruent to suggest that a group with a clearly distinct civilian identity could somehow

[421] Schmitt 2004-2005 *Chicago Journal of International Law* 524.
[422] *Ibid.*
[423] See generally E C Gillard 2006 *International Review of the Red Cross* 525.
[424] See generally Gillard 2006 *International Review of the Red Cross* 525.
[425] Schmitt 2004-2005 *Chicago Journal of International Law* 525.
[426] See generally W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf

transmogrify into an element of the armed services merely because of the function it performs".[427]

Furthermore, the argument that states that are making use of PMSC services incorporate PMSCs personnel into their armed forces, goes against the idea behind outsourcing of military services to private contractors.[428] As stated earlier in this chapter, one of the reasons behind outsourcing of security services is to reduce spending directed at maintaining large standing armies as well as to finance their operations.[429] Therefore, it is very unlikely that states would incorporate PMSCs into its armed forces to the extent that they can be granted combatant status under IHL since this will defeat the logic behind outsourcing. [430]

Lastly, the United States of America government has refused to prosecute PMSC personnel accused of committing torture and war crimes in terms of its military laws on the grounds they are civilians, not members of the armed forces.[431] This demonstrates that countries that use PMSCs themselves do not regard them as members of their armed forces. One can therefore conclude that while it is possible for PMSCs to be incorporated into the armed forces of a party to the conflict in terms of Article 43 of Additional Protocol I and therefore be treated as combatants, current practice demonstrates that this is not being done. Consequently, most PMSC personnel do not qualify as combatants through being members of the armed forces through this way.

The next question is whether PMSC personnel qualify as combatants in terms of Article 4A (2) of the Third Geneva Convention. Article 4 A (2) grants combatant status to "members of other militias and other volunteer corps, including those of resistance movements, belonging to a Party to the conflict…."[432] It further provides that such groups should fulfil the

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[427]Schmitt 2004-2005 *Chicago Journal of International Law 525*.
[428]Gillard 2006 *International Review of the Red Cross* 533.
[429]*Ibid.*
[430]*Ibid.*
[431]See generally W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf.
[432]See Chapter 2, section 2.4.2.

conditions of "being commanded by a person responsible for his subordinates,[433] having fixed distinctive sign recognisable at a distance[434], carrying arms openly[435] and conducting their operations in accordance with the laws and customs of war.[436] The question therefore is whether PMSCs can meet these requirements to qualify as combatants. In order to qualify as combatants, PMSC personnel should meet all the requirements in Article 4A (2) of the Third Geneva Conventions as a group.[437] Therefore, one would have to determine whether each private military company meets these requirements on a case-by-case basis.

The first question is whether PMSC personnel meet the requirement of having a responsible command, which is responsible for its subordinates.[438]As pointed out in Chapter 2 the requirement for a command is to ensure that there is discipline within the group.[439] Dinstein concurs that "lawful combatants must act within a hierarchic framework, embedded in discipline, and subject to supervision by upper echelons of what is being done by subordinate units in the field".[440] The Geneva Conventions do not require a military chain of command.[441] Instead, the issue is whether the person in charge has the necessary authority to ensure accountability.[442] It can be submitted that some PMSCs are capable of meeting this requirement since they are large corporations, which have a hierarchy. Schmitt concurs that "most PMSCs are organized and controlled along military lines, an unsurprising fact given that so many of their employees are ex-military".[443]

However, it is not definite that all PMSCs contracted by states will meet the first requirement. One problem that may arise is that the organisational structure of some PMSCs may be unknown to the outside world. This may make it difficult to ascertain whether there is a person responsible for the conduct of PMSC personnel. This argument can be supported by the Iraq and Afghanistan experience where the private military companies did not reveal any

[433]Article 4A (2)(a).
[434]Article 4A (2)(b).
[435]Article 4A (2)(c).
[436]Article 4A (2)(c).
[437]Article 4A (2).
[438]Article 4A (2)(a) of the Geneva Conventions.
[439]See Chapter 2, section 2.4.2.
[440]Y Dinstein *The Conduct of Hostilities under the Law of International Armed Conflict* (2004) 99.
[441]J de Preux *et al Commentary on the Third Geneva Convention* (1960) 59.
[442]Schmitt 2004-2005 *Chicago Journal of International Law* 529.
[443] MN Schmitt 2004-2005 *Chicago Journal of International Law* 530.

command structure that was responsible for the discipline of the PMSC personnel. Therefore, it can be concluded that while it is possible for PMSC personnel to meet these requirements, the actual existence of a command responsible for the conduct of PMSCs employees may remain a secret to the company and its employees.

The next question is whether PMSC personnel can meet the requirements of having fixed distinctive sign recognizable at a distance and carrying guns openly.[444] If one is to rely on the PMSCs' practice in Iraq and Afghanistan, most PMSCs will have problems in meeting this requirement. There were dozens of PMSCs operating in these two countries and performing wide-ranging functions.[445] One complaint that was raised during the course of war was that PMSC staff was difficult to identify since some "wore uniforms which were military-like uniforms while others operated in civilian clothing".[446] Schmitt concurs that "many private US Armies that work there wear a bewildering and amusing hodgepodge of 'tough guy' attire…."[447] This made it difficult to distinguish between armed forces of the Allies powers and combatants. Gillard argues that this also resulted in confusion, as civilians could not clearly distinguish between employees of different companies thus affecting their ability to file complaints against PMSC employees.[448] Once again, while it possible for PMSCs to meet these requirements, current practice demonstrates that most PMSCs do not comply with this requirement.

The next question is whether PMSCs personnel as a group will conduct their operations in accordance with the laws and customs of war.[449] In order to acquire combatant status, PMSCs must respect the laws and customs of war including complying with the previous three requirements discussed above. Although this does not appear to be a difficult requirement to

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[444]As discussed in Chapter 2, section 2.4.2, this requirement is intended for identification purposes
[445]See generally E C Gillard 2006 *International Review of the Red Cross* 525.
[446]Gillard 2006 *International Review of the Red Cross* 535.
[447]Schmitt 2004-2005 *Chicago Journal of International Law* 530.
[448]*Ibid.* In one incident, a Marine lieutenant described his encounter with private contractor employees from different companies as follows: "The place was crawling with Ambassador's and generals' personal security detail. The generals' are made up of Marines, but the Ambassador's is made up of private contractors. They looked exactly alike. Merrill low-top trail shoe-boots. REIL or J. Peterman light weight safari pants, a muted single colour t shirt, high speed rig/flack vest with lots of magazines ……" The incident highlights how PMSCs do not comply with the requirement of wearing uniforms. *See*. Schmitt 2004-2005 *Chicago Journal of International Law* 530.
[449]Article 4A (2)(d).

comply with, current practice indicates that some PMSCs do not comply with international law. A number of incidents have painted an inimical picture regarding the ability of PMSCs to comply with the requirement of conducting their operations in terms of international law. For example, Executive Outcomes in Sierra Leone became notorious for the indiscriminate killing of civilians.[450] Furthermore, cases of the wanton shooting, killing and torture of civilians by PMSCs in Iraq were reported.[451] Therefore, it can be concluded that even though it is possible for PMSCs to conduct their operations in terms of international law, practice so far has proved to the contrary.

From the above arguments, one can conclude that generally, most PMSC personnel do not qualify as volunteer corps or militia as stated in the Geneva Conventions. Schmitt concurs that it is highly unlikely that private contractors qualify as combatants in terms of Article 4A (2) of the Third Geneva Conventions.[452] Gillard adds that although not impossible, "it is likely to be only a small minority of PMC/PSC staff who could be considered combatants on the basis of Article 4A (2) of the Third Geneva Convention".[453] It can be concluded that most PMSCs are not combatants and therefore do not have the combat privileges.

### 3.4.2 Civilians accompanying Armed Forces

As pointed out in Chapter 2, the Third Geneva Conventions recognises that civilians may accompany armed forces to a conflict.[454] Such civilians may include civilian members of military aircraft crews, war correspondents, supply contractors, members of labour units or of services responsible for the welfare of the armed forces".[455] However in order to be accommodated under Article 4A (4), such civilians must have "received authorisation from

[450]Zarate 1998 *Stanford Journal of International Law* 105.
[451]See generally W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf. The learned author cites the incident of deliberate shooting the body guard to the Iraq Vice President in the Green zone by a Blackwater employee, two reported shootings of Iraqi civilians by the Blackwater contractors, including of an Interior Ministry employee and the Abu Ghraib torture incidents among others as examples.
[452] 2004-2005 *Chicago Journal of International Law* 531.
[453]Gillard 2006 *International Review of the Red Cross* 535.
[454]See Chapter 2, section 2.4.4.
[455]Article 4A (4) of Third Geneva Conventions.

the armed forces which they accompany, who shall provide them for that purpose with an identity card...."[456] The provision does not give an exhaustive list of service providers who are covered by this provision. As Gillard points out, the list in Article 4A (4) is indicative and not exhaustive and "neither the *travaux pre´paratoires* for this provision nor the Commentary shed light on the limits of the activities that may be carried out by this category of persons".[457]

It is possible that some PMSC personnel will qualify for prisoner of war status under this provision. For example, those contractors who supply services such as catering and laundry services would arguably qualify under this provision. This will solve the problem regarding the status of contractors who perform these services since the provision is clear that these are civilians who are entitled to POW status. However, this provision does not provide a permanent solution regarding the status of PMSCs. Since the persons covered by Article 4A (4) are civilians and not members of the armed forces, it follows that these persons are prohibited from taking part in hostilities.[458] This is supported by Gillard who argues that "the non-combatant status of civilians accompanying armed forces and the nature of the activities listed with the exception of civilian members of military aircraft seem to indicate that the drafters intended this category not to include persons carrying out activities that amount to taking a direct part in hostilities".[459] This reasoning leads to a conclusion that the provision does not cover PMSCs that are hired to take direct part in hostilities or those who perform services that are closely related to combat activities. For instance, PMSCs who are involved in loading bombs, maintaining tanks, operating missile defence systems and operated Unmanned Aerial Vehicles in Iraq would not be considered as civilians under Article 4A (4).

In light of the above discussion, it can be concluded that while it is possible that a few private military contractors will gain combatant status through Article 4A (4) depending on the services they provide, most PMSCs will not qualify as civilians accompanying armed conflicts due to their involvement in combat activities.

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[456] *Ibid.*
[457] Gillard 2006 *International Review of the Red Cross* 237.
[458] *Ibid.*
[459] Gillard 2006 *International Review of the Red Cross* 538.

### 3.4.3 Civilians

The next question that needs to be addressed is whether PMSC employees qualify as civilians as defined under the Additional Protocol I. Determining whether PMSC employees are civilians helps in answering several questions. Firstly, this will answer the question whether PMSC employees are protected persons under the laws of armed conflict. If it is found that PMSC employees are civilians, then they cannot be objects of attack unless and for such time as they take direct part in hostilities. Secondly, determining the status of PMSC employees will also answer the question of whether employees who take part in hostilities should be punished for their involvement in hostilities. As already mentioned above, civilians can be prosecuted for crimes committed during the time they take direct part in hostilities. Most importantly, the determination whether PMSCs employees are civilians will lead to another important question regarding the basis upon which states rely on the services of civilians to fight in armed conflicts since this is a violation of their obligations under the principle of distinction. More so, it will lead to another question regarding the rights and responsibilities of individuals, companies and states that are involved in the armed conflicts.

PMSCs such as Executive Outcomes and Sandline have argued that "they do not provide combat services and would only use force defensively".[460] Since PMSCs consider themselves to be offering non-combat services, this means that they allege their personnel to be civilians. This claim is also supported by the position that has been adopted by states that rely on the services of PMSCs, particularly the United States of America, which has asserted that PMSC personnel are civilians.[461] For instance, the Coalition Provisional Authority (CPA) in Iraq required PMSCs to comply with human rights law, "which would be solely inadequate if the United States, as occupying power, knew or believed that they were part of its armed forces".[462] Moreover, while the United States Army court-martialled soldiers who were involved in the Abu Ghraib torture incident, contractors who were involved were not court-martialled and this leaves an impression that the United States government treats PMSC personnel as civilians. Therefore, it is important to determine whether a conclusion that PMSC personnel are civilians is tenable under the principle of distinction.

[460]See Percy 2012 *International Review of the Red Cross* 941.
[461]See Cameron 2006 *International Review of the Red Cross* 573.
[462]Cameron 2006 *International Review of the Red Cross* 578.

Civilians are defined under Article 50 of the Additional Protocol I as "any person who does not belong to one of the categories of persons referred to in Article 4A (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol".[463] In theory, Article 50 resolves the problem regarding the status of PMSCs since anyone who does not qualify as a combatant automatically becomes a civilian. This means that private military and security personnel who do not qualify as combatants are civilians and therefore are protected persons. On the other hand, this means that they do not have the right to take direct part in hostilities.

The conclusion that PMSC employees are civilians will have far-reaching consequences that may affect the effectiveness of the principle of distinction. As has been pointed out in Chapter 2, civilians are immune from attacks unless and for such time as they take direct part in hostilities.[464] Furthermore, civilians who take direct part in hostilities do not benefit from the PoW status.[465] Lastly, civilians who take direct part in hostilities may be criminally prosecuted for the acts they commit during their participation.[466]

### 3.5 Private Military and Security Companies and the Concept of Direct Participation in Hostilities

A conclusion that PMSC employees are civilians will have far-reaching consequences for IHL. These consequences may have the effect of rendering the principle of distinction redundant. As pointed out above, civilians can only lose their protection during an armed conflict if they take direct part in hostilities. Therefore, it becomes important to determine the consequences that arise when PMSC employees that take direct part in hostilities are treated

[463]Article 50 of Additional Protocol I. See Chapter 2, section 2.4.5 for detailed discussion.
[464]See Chapter 2, section 2.4.5.
[465]Article 4A of the Third Geneva Conventions.
[466]For example, in David Hicks, an Australian detainee at Guantanamo Bay was tried for attempted murder by the Guantanamo Military Commission for attempted to murder American and Other Coalition forces. See Military Commission Charges, *United States V. David Matthew Hicks* (June 2004) https://www.lawcouncil.asn.au/lawcouncil/images/LCA-PDF/a-z-docs/Hicks_first_report.pdf (accessed 12 August 2016).

as civilians. In order to discuss these consequences, it is important to deal with the concept of direct participation in hostilities first.

### 3.5.1 Direct Participation in Hostilities under International Humanitarian Law

The concept of direct participation in hostilities (hereafter DPH) is one of the most controversial concepts in IHL. This is because the concept of direct participation in hostilities is fluid and dynamic and this makes it difficult to determine with certainty the type of activities that constitute direct participation in hostilities.[467] Direct participation in hostilities is mentioned in Article 51(3) of Additional Protocol I which provides that civilians shall enjoy the protection afforded in Article 51 "unless and for such time as they take a direct part in hostilities".[468] The Commentary on the Additional Protocols defines direct participation as "acts of war which by their nature or purpose are likely to cause actual harm to the personnel and equipment of armed forces".[469] The Commentary also cautions that there must be a clear distinction between "direct participation in hostilities and participation in the war effort".[470] Civilians may only lose their protection and become legitimate objects of attack when they take direct part in hostilities.[471] This means that civilians may not lose protection for contributing towards war effort by providing catering and construction of maintenance of bases.[472] Cameron also points out that "careful lines must be drawn with a view to how such categorizations may affect all non-combatants".[473]

One issue that has caused disagreement among scholars is the criteria of determining acts that amount to direct participation in hostilities. There is no list of activities that are regarded as amounting to direct participation in hostilities. Furthermore, treaties do not provide guidance regarding what constitutes direct participation in hostilities. The ICRC has come up with an

[467]Cameron 2006 *International Review of the Red Cross* 588.
[468]Additional Protocol I to the Geneva Conventions.
[469]C Pilloud *et al* Commentary on the Additional Protocols (1987) 619
[470]*Ibid.*
[471] Ibid.
[472]Cameron 2006 *International Review of the Red Cross* 588. Therefore, it will be admitted that PMSCs who offer services which are far removed from the battlefield such as laundry and catering do not directly participate in hostilities.
[473]Cameron 2006 *International Review of the Red Cross* 588.

initiative which is intended to provide guidance regarding the concept of direct participation in hostilities.[474] Melzer suggests three factors that must be considered in order to determine whether an activity amounts to direct participation in hostilities.[475] These factors are that: (i) the act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or alternatively inflict death, injury, or destruction on persons or objects protected against direct attack(threshold of harm); (ii) there must be a causal link between the act and the harm likely to result either from that act, or from a coordinated military operation of which that act constitutes an integral part (direct causation) and (iii) the act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another (belligerent nexus)".[476]

Without going into detail regarding the three factors suggested by the ICRC, it can be argued that most PMSCs take direct participation in hostilities.[477] For example, the maintenance of highly sophisticated weapons, supplying ammunition to the armed forces in the battlefield, search and rescue operations, intelligence gathering among other activities which are increasingly being outsourced to PMSCs may qualify as direct participation in hostilities.[478] Furthermore, in some instances, PMSC are directly involved in firing weapons in the battlefield.[479] If PMSC employees are regarded as civilians, this means that they can only lose their immunity when they take direct part in hostilities. However, it is important to examine some of the problems that arise if this position is considered correct.

[474]N Melzer "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" *International Committee of the Red Cross* https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (accessed 25 February 2016). It should be noted that the ICRC guidance is a long document which cannot be discussed in detail in this study. Therefore, the brief discussion is for illustrative purposes.
[475]N Melzer "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" *International Committee of the Red Cross* 46.
[476]*Ibid.*
[477]Schmitt 2004-2005 *Chicago Journal of International Law 534.*
[478]See generally Schmitt 2004-2005 *Chicago Journal of International Law* 536-545.
[479]For instance, Blackwater employees "engaged in an intense battle with insurgents who were attacking the CPA headquarters April at Najaf in April 2003". The company's helicopters were also used to provide supplies during the battle. See Schmitt 2004-2005 *Chicago Journal of International Law* 514.

### 3.5.2 The Challenges of relying on the concept of direct participation in hostilities to determine the rights and responsibilities of PMSCs

In light of the discussion of the concept of direct participation in hostilities above, the next step will be to discuss the challenges that arise if direct participation in hostilities is relied upon to determine the rights and obligations of PMSCs.

#### 3.5.2.1 The challenge of determining PMSCs activities that amount to Direct Participation in Hostilities

The first problem that is encountered when determining what conduct amounts to direct participation in hostilities in relation to PMSCs is that the companies perform many activities, which range from purely civilian to military activities. Schmitt points out that many activities lie between these two extremes.[480] The question then is how to determine with certainty the type of activities that amount to direct participation in hostilities. Melzer argues that the concept of direct participation in hostilities must be interpreted in accordance with the object and purpose of IHL, which is to ensure protection of civilian population.[481] This suggests that one should adopt a narrow interpretation of direct participation in hostilities. This approach is supported by Cameron, who argues that direct "participation cannot be understood so broadly as to include any acts that could be construed as helping one side or another".[482] On the other hand, Schmitt favours a liberal interpretation of direct participation in hostilities when dealing with activities that fall in the grey area. He argues that when dealing with an area that falls in the grey area, ones should find in favour of direct participation.[483] According to the learned author, "an interpretation that allows civilians to retain their immunity even though inextricably involved in the conduct of ongoing hostilities will engender disrespect for the law on the part of combatants endangered by the activities of the civilians concerned".[484]

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[480]Schmitt 2004-2005 *Chicago Journal of International Law 534.*
[481]N Melzer "Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law" 45.
[482]Cameron 2006 *International Review of the Red Cross* 588.
[483]Schmitt 2004-2005 *Chicago Journal of International Law* 535.
[484]*Ibid.*

Schmitt further argues that a liberal interpretation provides an incentive for civilians to remain as distant from the conflict as possible for fear of losing their protection.[485]

It is submitted that in determining whether an act by PMSC personnel amounts to direct participation in hostilities, a balance needs to be struck between not having too narrow or too wide interpretation. An interpretation that is too wide endangers civilians. Traditionally, civilians have always been found in a conflict zone, supporting the war effort directly or indirectly. If too wide a definition is chosen, a large number of civilian contractors will lose their immunity even though the nature of the service is purely civilian.[486] On the other hand, if a too narrow interpretation is used this may shield PMSCs who actively participate in hostilities from being held accountable. States are increasingly relying on PMSCs to perform various services in armed conflicts and an interpretation that is too narrow will shield these contractors from attacks thus making them immune. This may in turn frustrate opposing parties who are faced with an army of civilian contractors that are immune from attack most of the time. It is clear from the discussion that treating PMSC employees as civilians who can only be targeted when they take direct part in hostilities creates uncertainties regarding when they lose their protection. Consequently, states may adopt their own interpretation of direct participation in hostilities thus causing inconsistencies in the application of the law.

Another problem that arises if direct participation in hostilities is relied upon to determine whether PMSC employees are civilians is that the concept of direct participation does not make a distinction between defensive and offensive operations as both acts constitute direct participation in hostilities.[487] This creates problems for PMSCs who are contracted to provide genuinely non-combat services such as guarding oil refineries, oil pipelines water and electricity supply facilities among other facilities in a conflict zone such as Iraq. If these contractors are attacked by a party to the conflict, any exercise of self-defence amounts to direct participation in hostilities since a defensive act also constitutes direct participation. This means that PMSC personnel who are employed to provide *bona fide* non-military

[485] *Ibid.*
[486] This is especially the case in Iraq where proliferation of PMSCs made it difficult to identify one company from the other or ordinary civilians from PMSCs personnel.
[487] Cameron 2006 *International Review of the Red Cross* 589. Article 49(1) of Additional Protocol I defines attacks as "acts of violence against the adversary, whether in offence or in defence".

activities can lose their protection as civilians by merely exercising their right to self-preservation. Therefore, direct participation in hostilities by civilian contractors does not depend on whether a person intended to do so since circumstances may force them to take direct part in hostilities. This position may result in many civilian contractors becoming legitimate targets thus exposing them to harm even though they are genuinely contracted to perform civilian activities. Consequently, this compromises the protection IHL seeks to provide for civilians.

#### 3.5.2.2 Private Military and Security Companies and the Problem of 'Revolving Door'

Reliance on the concept of direct participation in hostilities to determine the rights and responsibilities of PMSC employees also raises the problem of the revolving door. In terms of Article 51(3) of Additional Protocol I, civilians lose protection for "such time as they take a direct part in hostilities".[488] This means that when civilians cease to take direct participation in hostilities, they regain their civilian status and therefore become immune from attacks again.[489] This requirement however is very difficult to apply in relation to PMSCs. If PMSCs are regarded as civilians, this means that even those companies contracted to perform combat operations are generally immune from attacks and can only be attacked when and for such time as they take direct part in hostilities. This means a party to the conflict that is fighting against an army of civilian contractors will be limited in terms of when they can launch military operations since they can only lawfully attack civilian contractors when they are taking direct part in hostilities. This situation will encourage states to rely on civilians in the knowledge that they can only be attacked during the time when they take direct participation in hostilities as compared to combatants who can be attacked at any given time and location. Schmitt argues that "a military force that faces attacks from civilians who can acquire sanctuary by returning home will soon conclude that their survival dictates ignoring the purported revolving door".[490] He further argues that this "may invite disrespect" for international law in general.[491] Therefore, it is submitted that relying on direct participation to

[488] Additional Protocol I.
[489] C Pilloud *et al* Commentary on the Additional Protocols (1987) 619.
[490] Schmitt 2004-2005 *Chicago Journal of International Law* 536.
[491] *Ibid.*

deal with PMSCs who get involved in hostilities may breed contempt for international humanitarian law.

Another problem that may arise if the concept of direct participation is used to determine whether PMSC personnel can be attacked is that one company may provide wide-ranging services during the same armed conflicts.[492] For instance, a company may employ weapon experts, cooks and drivers who deliver ammunition at the war front. The question is whether a cook who works for that company can be targeted on the basis that the company he/she works for also provide services that amount to direct part participation in hostilities. Schmitt argues that generally, such a person should not be attacked for merely being an employee of a particular company.[493] It is admitted that if one adopts a straight forward application of the concept of direct participation, such an employee cannot be attacked unless he/she takes direct participation in hostilities. However, this position ignores the reality of an armed conflict situation. It imposes an undue burden on the opposing forces that are required to ascertain all the factual issues before carrying out attacks.[494] Moreover, it may be difficult to ascertain all these facts in the heat of a battle. The position creates two undesirable consequences. Firstly, it disadvantages a party that is facing enemy belligerents made up of PMSCs since that part will have to go through a rigorous process to distinguish personnel who are employed to take direct participation from those who are performing purely civilian activities. This may in turn encourage such a party to completely ignore IHL. Secondly, this can also put individuals who are genuinely civilian contractors performing civilian functions in harm's way thus further compromising civilian protection and the principle of distinction.

#### 3.5.2.3 Direct Participation in Hostilities and the Doctrine of Human Shields

Another problem that may arise if the concept of direct participation in hostilities is used to deal with PMSCs relates to military objectives. The treaties do not provide a list of objectives that are considered military objectives and "an object can become a military objective

[492] *Ibid.*
[493] *Ibid.*
[494] For example, a party to the conflict which is facing an army of civilian contractors will have to make an effort to distinguish contractors who are employed to perform civilian tasks from those who take direct part in hostilities. This however may be made difficult given that many PMSCs do not wear anything that makes it possible to identify them.

according to their nature, location and purpose".[495] Some PMSCs are contracted to provide guarding services in an armed conflict. Even though these PMSCs are hired to protect civilian objects, these may turn into military objectives depending on what they are being used for. Cameron gives an example of PMSCs responsible for guarding a building that is used ordinarily for civilian purpose but which, unbeknownst to the PMSC personnel is temporarily housing combatants.[496] The issue that arises is whether, a civilian who continues to guard an object that has become a military objective is taking direct part in hostilities. Given that direct participation in hostilities may occur through both offensive and defensive action and that the object which the contractor is protecting is a military objective, one will conclude that PMSCs responsible for guarding a military object are directly participating in hostilities. However, another problem that may arise in this scenario relates to the doctrine of human shields. The doctrine of human shield does not make a distinction between voluntary and involuntary human shields.[497] All civilians who are close to a military objectives remain protected persons and "any possible injury to them must be taken into account when assessing the proportionality of an attack on a military objective".[498] The difficulty that arises for the commanders of the party that intends to attack the military objective is whether they should consider the civilian personnel guarding the building voluntary or involuntary civilians. This determination will require a great deal of intelligence gathering and imposes an onerous burden on the opposing parties which are faced by such a scenario. The overall consequence is that ordinary civilians going about their normal lives are put in danger since they may be confused for PMSCs employees.

Cameron further adds that the problem is also made even more difficult when the civilian object that has become a military objective reverts to being a civilian object.[499] This change in circumstances will be difficult for the opposing forces to detect and they may continue directing attacks against the civilian contractors even though they are no longer taking direct part in hostilities. This has serious ramifications for ordinary civilians since the extent of their

[495] Cameron 2006 *International Review of the Red Cross* 590.
[496] *Ibid.*
[497] *Ibid.*
[498] Cameron 2006 *International Review of the Red Cross* 591.
[499] W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf.

protection is similar to that given to persons some of who are employed to take direct participation in hostilities.

Furthermore, IHL, just like any national laws requires some degree of certainty. The principle of distinction is meant to ensure that parties to the conflict can know with certainty the type of persons as well as objects that can be attacked during an armed conflict. As has been argued throughout this chapter, states are increasingly outsourcing military services to PMSCs thus creating an army of civilian contractors. However, equating civilian contractors who perform military activities to ordinary civilians creates confusion for the opposing parties. As Cameron argues, "international humanitarian law must be applied in such a way as to make it reasonably possible for combatants to comply with it".[500] Cameron further adds that "if it becomes impossible for opposing forces to know which PMC employees are accurately perceived as having combatant status (and therefore as legitimate military objectives), and which PMC employees are civilians and possibly even protected persons (the shooting of whom could constitute a grave breach of the Geneva Conventions), the resulting confusion could discourage any attempt to comply with humanitarian law".[501] It submitted that treating PMSC personnel as ordinary civilians would render the principle of distinction obsolete since states will no longer have an incentive to respect it.

Lastly, the argument that private military contractors are civilians has serious consequences on the contractors themselves. Since PMSC employees are not combatants, they are not supposed to take direct part in hostilities. However, as has been argued above, contractors often take direct part in hostilities. This makes them liable to punishment for such involvement in hostilities. In other words, they can be treated like mercenaries or ordinary civilians and be punished through the criminal justice system. More so, if these contractors do not qualify as civilians under Article 4A (4) of the Third Geneva Conventions, they may also be denied PoW status. Cameron argues that such position may not be known to the contractors at the time of hiring.[502] Furthermore, even if the contractors are aware that they

[500]Cameron 2006 *International Review of the Red Cross* 584.
[501]*Ibid.*
[502]*Ibid.*

are liable to punishment for participating in hostilities, such knowledge may discourage them from observing IHL rules since they do not have an incentive to do so.[503]

### 3.5.3 Conclusion

In light of the above discussion, it is clear that treating all PMSC employees as civilians has serious ramifications for the protection of civilian population as well as the conduct of hostilities. The use of PMSCs cause inconveniences for states that are fighting against an army of civilian contractors who may be discouraged from observing the law. Furthermore, giving PMSCs personnel the same status as ordinary civilians appears to blur the definition of civilians thus making the application of the principle of distinction difficult. Therefore, it is concluded that treating PMSC employees as civilian compromises the protection which IHL seeks to offer to civilian population. This study will turn to discuss the regulatory mechanisms that can be used to deal with PMSCs.

## 3.6 Responsibility for Private Military and Security Companies during Armed Conflicts

As discussed in Chapter 2, the requirement that only combatants belonging to a party to the conflict have the right to take direct part in hostilities is also meant to ensure that states retain responsibilities for the conduct of its personnel during an armed conflict.[504] This requirement also ensures that states will take primary responsibility of punishing members of the armed forces who violate IHL during an armed conflict. Since it has been concluded that most PMSC employees are not combatants, it is important to investigate whether states can be held responsible under IHL or in any other way for the conduct of PMSC personnel in the same way they can be held responsible for the conduct of their armed forces. This enquiry is particularly important if it is accepted that PMSC personnel are civilians. It becomes important to ascertain whether there are measures in place to ensure that PMSC personnel conduct themselves in terms of the law of armed conflict as well as be held accountable for any violation of the law of armed conflict.

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[503] *Ibid.*

[504] See Chapter 2, section 2.4.3 and 2.7.

### 3.6.1 State Responsibility

Scholars have argued that states that hire PMSCs are responsible for the actions of PMSCs since IHL requires them to take responsibility for any violations of law done by persons acting on their behalf.[505] Article 3 of the Hague Convention provides that a belligerent party shall be responsible for the acts committed by persons forming part of its armed forces.[506] Article 91 of Additional Protocol I states that a party to the conflict is "responsible for all acts committed by persons forming part of its armed forces".[507] This provision is stated more clearly in Rule 149 of customary international humanitarian law rules which provides that "A State is responsible for violations of international humanitarian law attributable to it, including: violations committed by its organs, including its armed forces;[508] violations committed by persons or entities it empowered to exercise elements of governmental authority;[509] violations committed by persons or groups acting in fact on its instructions, or under its direction or control;[510] and violations committed by private persons or groups which it acknowledges and adopts as its own conduct".[511]

The Articles on Responsibility of States for Internationally Wrongful Acts (hereafter ARSIWA) contains provisions similar to those in Rule 149.[512] The Articles seeks to remind states of their responsibility for the wrongful acts they commit or those committed by organs acting on their behalf.[513] There are three possible provisions of ARSIWA that can be used to

[505] *See* for example L Doswald-Beck "Private military companies under international humanitarian law" in S Chesterman, C Lehnardt *From Mercenaries to Market: The Rise and Regulation of Private Military Companies* (2007). J Williamson "Private Security Companies and Private Military Companies Under International Humanitarian Law" in S Gumedze, Private Security in Africa: Manifestation, Challenges and Regulation (2007)Monograph Series No 139 http://www.gsdrc.org/document-library/private-security-companies-and-private-military-companies-under-international-humanitarian-law/ (accessed 3 March 2016).

[506] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907. The same statement is repeated in Article 91 of Additional Protocol I.

[507] Additional Protocol I.

[508] J Henckaerts, L Doswald-Beck *Customary International Humanitarian Law Volume I: Rules* (2005) Rule 149 (a).

[509] Rule (149 (b).

[510] Rule 149 (c).

[511] Rule 149 (d).

[512] International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts*, November 2001.

[513] Article 1 of Responsibility of States for Internationally Wrongful Acts. While ARSIWA does not deal with international humanitarian law per se, its discussion is meant to explore other avenues that can be used to hold states accountable for violation of international law by PMSC personnel acting on states' behalf.

hold states accountable for the actions of PMSC personnel they hire. Article 4 provides that "the conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions".[514] Article 5 provides that "the conduct of a person or entity which is not an organ of the State under Article 4 but which is empowered by the law of that State to exercise elements of the governmental authority shall be considered an act of the State under international law".[515] Lastly, Article 8 provides that states will be held responsible for the conduct of a person if the person or group of persons "is in fact acting on the instructions of, or under the direction or control of that State in carrying out the conduct".[516] Is it important to consider whether these provisions are applicable to the practice of outsourcing of military services to PMSCs by states.

#### 3.6.1.1 State responsibility for violation of International Humanitarian Law by Private Military and Security Companies

Faite argues that the provisions discussed above can be used to hold states that hire PMSCs accountable for any violation international law.[517] According to Faite, this will include instances where a party to the conflict hires private contractors to run its prison services.[518] Article 1 Common to the Geneva Conventions, provides that "the High Contracting Parties undertake to respect and to ensure respect for the present Convention in all circumstances".[519] In other words, states should take positive steps to ensure that armed forces or organs carry out military operations on its behalf do not violate the law. Doswald-Beck argues that some of the obligations that states should fulfil include "ensuring that PMSCs are properly trained and that their contract contains clear rules of engagement".[520]

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[514]Article 4.
[515]Article 5.
[516]Article 8.
[517]A Faite "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law" *International Committee of the Red Cross* https://www.icrc.org/eng/resources/documents/article/other/pmc-article-310804.htm (accessed 29 February 2015).
[518]*Ibid*. The party to the conflict that hires private contractors to conduct such actors will be liable for violations that take place during the arrests, interrogation and detentions of prisoners by the contractors.
[519]Common Article 1 to the Geneva Conventions. Article 1 common to the Geneva Conventions is now considered customary international law.
[520]L Doswald-Beck "Private Military Companies under International Humanitarian Law" 18.

Faite further argues that if states "omit to act or do not exercise due diligence in preventing or punishing violations committed by private persons or entities that are operating within its jurisdiction and territorial control", they can be held responsible.[521]

Therefore, it is important to consider whether states can be held responsible for the conduct of PMSCs under the Article 91 of Additional Protocol I read together with Rule 149 of Customary International Law Rules and Articles on Responsibility of States for Internationally Wrongful Acts.[522] The first enquiry is whether states can be held responsible for conduct of PMSCs under Rule 149 (a) which deals with violations committed by state organs or armed forces.[523] It is submitted that PMSCs are not organs of states. Furthermore, most PMSCs do not qualify as armed forces of the state unless they meet the requirements set in the Additional Protocols and the Geneva Conventions.[524] Therefore, it is highly unlikely for states to be held responsible for the conduct of PMSCs under this provision since PMSCs are not an organ of the state.

The most probable provision that can be used to hold states responsible for the conduct of PMSCs is Rule 149 (b) which provides that "a state is responsible for violations committed by persons or entities empowered to exercise elements of governmental authority".[525] PMSCs perform a number of activities that may amount to exercise of governmental authority and these include fighting in the armed conflict, support services and detention of prisoners.[526] However, for a state to be held responsible under this provision, the person or entities must have been empowered under the state's internal law, to exercise elements of governmental authority.[527] This requirement creates an obstacle, which prevents states from being held accountable for the conduct of PMSCs. The relationship between states and PMSCs so far

[521]A Faite "Involvement of Private Contractors in Armed Conflict: Implications under International Humanitarian Law".
[522]Since the provisions of Rule 149 and Articles on Responsibility of States for Internationally Wrongful Acts are similar, they shall be discussed together.
[523]This provision corresponds with Article 4 of Articles on Responsibility of States for Internationally Wrongful Acts.
[524]See discussion in section 3.4.1 above.
[525]Article 149(b) of Customary International Humanitarian Law. This provision corresponds with Article 5 of Articles on Responsibility of States for Internationally Wrongful Acts.
[526]See Gillard 2006 *International Review of the Red Cross* 525.
[527]*Ibid.* Article 5 of Articles on Responsibility of States for Internationally Wrongful Acts provides that states will be held responsible only for acts empowered by the law of that State.

have been established through contracts.[528] The question therefore is whether a contract of service between a state and PMSCs can be regarded as internal law that authorises PMSCs to act on behalf of states. Gillard argues that the existence of a contract between the state and the company is not sufficient to bring PMSCs within the scope of this provision.[529] The provision does not specify the manner through which the law should empower a person or entity to exercise government authority.[530] More so, it does not specify whether such authority can be delegated to another person, for example in the case of sub-contracting or whether the internal law should specifically identify the person empowered to exercise government authority.[531] It can be can be submitted in their current state, these provisions are not fully capable of holding states responsible for the conduct of PMSCs. Alternatively, it can be argued that this provision is not clear enough to provide guidance on how states can be held responsible for the conduct of PMSCs.

The last provision that can be relied upon to hold a state responsible for the conduct of PMSCs is Article 149(c) which states that a state will be held responsible for "violations committed by persons or groups acting in fact on its instructions, or under its direction or control".[532] In *Nicaragua v United States of America* (Merits Case), it was held that for the United States of America to be responsible for the violations of international human rights and humanitarian law committed by the *Contras* in Nicaragua, it should have had "effective control over the military or paramilitary operations in the course of which the violations occurred".[533] However, in the *Tadic* case, it was held that "the extent of the requisite State control varies".[534] The International Criminal Tribunal for the former Yugoslavia (hereafter ICTY) further stated that "the conduct of a single private individual or a group that is not militarily organized is attributable to the state only if specific instructions concerning that conduct were given".[535] On the other hand, "conduct of subordinate armed forces, militias or

[528]For instance, the relationship between Executive Outcomes and Angolan and Sierra was based on contracts not internal law. See Section 3.3 above. Furthermore, United States relationship with PMSCs during Iraq and Afghanistan conflicts was based on contracts.
[529]Gillard 2006 *International Review of the Red Cross* 532.
[530]*Ibid.*
[531]*Ibid.*
[532]Rule 149 (c).
[533]*Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America)*; Merits, International Court of Justice (ICJ), 27 June 1986 at 61.
[534]*Prosecutor v. Dusko Tadic* (Appeal Judgement), IT-94-1-A, International Criminal Tribunal for the former Yugoslavia (ICTY), 15 July 1999 at 63.
[535]*Ibid.*

paramilitary units is attributable to a State which has control of an overall character".[536] Moreover, "such control would exist where a state has a role in organizing, coordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group".[537]

The question that needs to be answered is whether PMSCs can be said to be acting under instructions or control of the state. It is possible that a contract of service will create a form of control by state over PMSCs. However, events involving PMSCs so far do not suggest that states have control or give instructions to PMSCs. For instance, PMSCs such as Blackwater in Iraq ran operations parallel and sometimes detrimental to the United States and Coalition operations. Additionally, while the Coalition tried to win the hearts of Iraqis in the fight against insurgents, PMSCs in their performance of duties "went out intimidating and offending locals, making enemies" thus hurting counterinsurgency efforts.[538] Therefore, it can be argued that the PMSCs were clearly not acting on instructions from the Unites States. Gillard further adds that "Article 8 of Articles on Responsibility of States for Internationally Wrongful Acts requires that the instruction, direction or control by the state be related to the conduct which is said to have amounted to an internationally wrongful act".[539] The learned author adds that responsibility under Article 8 only arises if the state directed the company to commit violations of IHL.[540] Therefore, the ambit of Article 8 is too narrow to ensure that states are held responsible for the conduct of PMSCs.

### 3.6.1.2 Conclusion

In conclusion, it is submitted that while it may be possible in certain instances for states to be held responsible for the violation of international humanitarian law by PMSCs under the Additional Protocol I or Customary International Law Rules and Articles on Responsibility of

[536] *Ibid.*
[537] *Ibid.*
[538] W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf.
[539] Gillard 2006 *International Review of the Red Cross* 825.
[540] *Ibid.*

States for Internationally Wrongful Acts, the current provisions dealing with state responsibility are too narrow and vague to deal with all the cases where states outsource military services to PMSCs. More so, the law has many loopholes which states can take advantage of to escape responsibility. Therefore, it is concluded that the law dealing with state responsibility is not clear enough to ensure that states are held responsible for the conduct of PMSCs. As a result, it is most likely that states will be able to escape responsibility for the conduct of PMSCs.

### 3.6.2 Individual Responsibility

Other scholars have argued that PMSC personnel can be held individually responsible for crimes committed during their involvement in armed conflicts.[541] International law, including IHL provides for the prosecution of individuals who commit crimes during armed conflicts. Rule 157 of Customary International Humanitarian Law Rules creates universal jurisdiction for war crimes, also referred to as grave breaches.[542] Grave breaches are defined as "crimes involving any of the following acts, if committed against persons or property protected by the Convention".[543] These include "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly".[544] The Geneva Conventions and Additional Protocols require state parties to enact national legislation that prohibits and punishes grave breaches, either through adopting a separate law or by amending existing laws as well as well as to prosecute or to extradite alleged perpetrators.[545]

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[541] J Williamson "Private Security Companies and Private Military Companies Under International Humanitarian Law" in S Gumedze *Private Security in Africa: Manifestation, Challenges and Regulation* (2007) Institute for Security Studies Monograph Series No 139 http://www.gsdrc.org/document-library/private-security-companies-and-private-military-companies-under-international-humanitarian-law/ (accessed 3 March 2016).

[542] J Henckaerts, L Doswald-Beck *Customary International Humanitarian Law Volume I: Rules* (2005) Rule 157 Universal jurisdiction is also created in Article 85 of Additional Protocol I to the Geneva Conventions.

[543] Article 50 of Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (hereafter First Geneva Conventions).

[544] Article 50 of the First Geneva Conventions.

[545] See also J Williamson "Private Security Companies and Private Military Companies under International Humanitarian Law" 95.

### 3.6.2.1 Challenges of holding PMSC personnel individually responsible for violation of International Humanitarian Law

The first obstacle is that there is no clear mechanism to hold individual PMSCs personnel accountable. As discussed under state responsibility above, whereas members of a state's armed forces can be prosecuted in national courts, military tribunals and International Criminal Court, such avenues are not readily available for prosecuting PMSCs. This is made worse by the fact that a country's justice system may be reluctant to prosecute PMSCs especially where the crimes were committed abroad. Furthermore, the justice system in the country hosting private PMSCs could have collapsed due to the intensity of the armed conflict to such as extent that it is unable to investigate and prosecute individuals for violations of law.

Another problem that may arise in relation to holding PMSCs personnel individually accountable for violation of the law is that states acquiring services of PMSCs may take active steps to ensure that PMSC personnel are not held accountable for their conduct. In other words, states may put in place measures that will frustrate any attempt to prosecute PMSCs employees. The most famous and unfortunate example is the promulgation of the Order 17 by the Coalition Provisional Authority (CPA) in 2003.[546] Order 17 was promulgated two days before the CPA was dissolved and it granted immunity to a number of PMSCs who were actively involved in providing certain services in Iraq from prosecution under Iraqi laws. This resulted in the Iraqi justice system not being able to prosecute PMSC personnel individually for the violation of the law. Singer argues that PMSCs "saw themselves as above the law" because of the immunity the CPA gave them.[547] The CPA effectively protected civilian contractors as very few and isolated cases were prosecuted after its promulgation. For instance, after a shooting incident involving Blackwater contractors that killed 20 Iraqi civilians in Mansour district, Baghdad, it was announced that Blackwater's license to operate in Iraq was going to be cancelled and that any contractors found to have been involved in the

[546]Coalition Provisional Authority Order Number 17 Status of the Coalition, Foreign Liaison Missions, their Personnel and Contractors CPA/ORD/26 June 2003/17 http://www.usace.army.mil/Portals/2/docs/COALITION_PROVISIONAL.pdf (accessed 3 March 2016).

[547]W Singer "Can't Win Without 'Em', Can't Go to War Without 'Em': Private Military Contractors and Counterinsurgency" *Foreign Policy at Brookings Policy Paper Number 4*, September 2007 https://www.brookings.edu/wp-content/uploads/2016/06/0927militarycontractors.pdf.

shooting would be prosecuted.[548] However, one of the reasons why the prosecutions did not go on is that Blackwater was believed to be exempt from Iraq law under the Order 17.[549] Therefore, the CPA prohibited Iraqi government from holding civilian contractors accountable for violation of the law.

Another problem that may prevent employees of PMSCs from being held individually responsible is the fact that the companies hire their personnel from all over the world. For example, United States of America companies operating in Iraq employed personnel from different countries including South Africa, Fiji, Chile and Iraq itself.[550] After completing their mission, such personnel return to their countries. Even if the United States government was willing to prosecute private contractors for violating the law in Iraq, only those who are United States of America citizens would likely be prosecuted resulting in many other contractors escaping prosecution.

Even if a country whose citizens committed grave breaches want to punish them, this may not be possible without cooperation from the company that employed the personnel, the country that was receiving services and the country where operations were being carried out. For example, thousands of South African citizens were hired by PMSCs during the Iraq war. South Africa has legislation that criminalise the involvement of South African citizens in foreign military operations.[551] Although South Africa was willing to prosecute the individuals who took part in the Iraq conflict as contractors,[552] such prosecutions were not possible without cooperation from United States of America. or Iraqi authorities.[553] Gaston argues that "without coordinated efforts, the home states and client countries cannot hope to constrain the misconduct of businesses that operate thousands of miles away in zones of weak legal accountability".[554] Further, countries whose citizens get involved in foreign military

[548] *Ibid.*
[549] *Ibid.*
[550] Guns for Hire: Private Military Companies and their Status under International Humanitarian Law Professional Overseas Contractors http://www.your-poc.com/guns-for-hire-private-military-companies-and-their-status-under-international-humanitarian-law/ (accessed 7 March 2016).
[551] Regulation of Foreign Military Assistance Act 15 of 1998.
[552] Integrated Regional Information Networks (IRIN) "South Africa: Authorities Target Alleged Mercenaries" Feb. 4, 2004 http://www.irinnews.org/fr/node/216281 (accessed 12 August 2016).
[553] Gaston 2008 *Harvard International Law Journal* 241.
[554] *Ibid.*

operations may not have the necessary resources to investigate violations of law in another country or bring witnesses for the purposes of punishing its citizens.

It can thus be submitted that as it stands, it is difficult for PMSC personnel to be prosecuted individually for grave breaches due to the different attitude which states have taken with regards to PMSCs as well as the manner in which the private security industry operates.

### 3.6.3 Superior/ Company Responsibility

Some scholars have argued that commanders or superiors of PMSCs can be held accountable for any violation of the law committed by their employees during armed conflicts.[555] Criminal responsibility of commanders for violation of IHL by their subordinates is provided for in Article 86(2) of Additional Protocol I which states that "the fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility".[556] It further provides that in order for commanders to be liable, they should have had, or actually "had information which should have enabled them to conclude in the circumstances at the time, that a breach was being committed or was about to be committed".[557] Lastly, for commanders to be held responsible, they should have failed to take all "feasible measures within their power to prevent or repress the breach".[558] Commanders or superiors does not only refer to military command but also to civilians command and superiors. Responsibility of commanders and other superiors is also affirmed in Article 28 of the Statute of the International Criminal Court.[559]

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[555]Jamie Williamson "Private Security Companies and Private Military Companies under International Humanitarian Law".
[556]Article 86(2) of Additional Protocol I.
[557]*Ibid.*
[558]Article 86(2) of Additional Protocol I. This rule forms part of Customary International Law. Rule 153 of Customary International Humanitarian Law Rules provides "Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent their commission, or if such crimes had been committed, to punish the persons responsible". The only difference is that under Customary International Humanitarian Law Rules, commanders can also be punished for failure to take steps to punish persons responsible for violations.
[559]Rome Statute of the International Criminal Court.

### 3.6.3.1 Challenges of holding Superiors/Companies responsible for violation of International Humanitarian Law by PMSC personnel

Applying these provisions to PMSCs, it is submitted that commanders of the armed forces of a party to the conflict cannot be held liable for the actions of PMSC employees unless such employees fall under the armed forces of a party to the conflict. Therefore, the only alternative will be to hold senior employees of PMSCs accountable. However, the first difficulty in holding PMSC commanders or superiors accountable is that unlike armed forces, PMSCs lack transparency on how they operate. The organisational set up of most PMSCs is not known to the outside world. As Schreier and Caparini argue, "the military and security industry's standard policy of confidentiality precludes transparency".[560] Doswald-Beck concurs that the problem with PMSC command or superiors is to ascertain the identity of the person within the organization would be considered to be such a commander.[561] Therefore, in the absence of information on the organisational structure of a PMSC, it is difficult to ascertain the identity of commanders or superiors. Consequently, this makes it difficult to hold anyone accountable if the PMSC concerned does not reveal its command structure.[562]

To exacerbate the problem discussed above, the owners of the company who may be known to the outside world may not be in a position to control the day-to-day activities of PMSC employees such that their control over the company employees may not be sufficient to impose liability for violation of international law on them. Gillard argues that the range of superiors covered under the command responsibility may be very limited.[563] This is because responsibility is "limited to direct superiors who have a personal responsibility for the subordinates within their control".[564] Moreover, the absence of monitoring mechanism in most situations where PMSCs are operating or the ineffectiveness thereof makes it difficult to hold commanders or superiors responsible for the conduct of their subordinates since some of the incidents involving violations of international law may be covered up by the PMSCs

[560]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" 67.
[561]L Doswald-Beck "Private Military Companies under International Humanitarian Law". 23.
[562]This problem could be resolved if international humanitarian law could recognise the practice of outsourcing. Such a recognition could encourage transparency. This will be dealt with in the concluding chapter.
[563]Gillard 2006 *International Review of the Red Cross* 545.
[564]*Ibid.*

themselves. One can conclude that although it is not entirely impossible to hold PMSC commanders or superiors responsible for the conduct of their subordinates, current practice demonstrates that the current international legal regime is not adapted enough to deal with these issues. Therefore, it is very difficult to hold PMSCs superiors accountable.

Lastly, the manner in which PMSCs operate also makes it difficult to hold the company responsible for the conduct or violation of the law by its personnel. Schreier and Caparini argue that PMSCs, like transnational companies "do not confine their activities within the borders of any single state and if a nation puts too much pressure on a firm, it can simply 'shop around' for alternative , more permissive environment in which to base itself".[565] For example, when South Africa came up with mechanisms to regulate the conduct of PMSCs in its territory, Executive Outcomes migrated out of the country to escape oversight from the government.[566] This means that national laws alone may not be able to adequately regulate the activities of PMSCs. More so, states have had different approaches and attitudes to PMSCs. For instance, while South African has attempted to ban them, other countries such as Britain and United States of America have moved from prohibition to regulation.[567] Consequently, PMSCs may easily migrate to countries where the legal regime is more accommodative thus escaping liability. Therefore, it can be concluded that the nature of PMSCs, together with the contrasting approaches taken by states in relation to dealing with PMSCs makes it difficult to hold companies responsible for its employees' actions.

### 3.6.3.2 Conclusion

From the discussion above, it can be concluded that the law regarding individual state and superior responsibility for violation of the law during armed conflicts is not is not well suited to apply to PMSC activities during armed conflicts. This is also made difficult by the unclear relationship between states and PMSCs. Furthermore, the manner in which PMSCs operate makes it difficult to hold commanders of the companies or companies themselves responsible

[565]F Schreier, M Caparini "Privatising Security: Law, Practice and Governance of Private Military and Security Companies" *Geneva Centre for the Democratic Control of Armed Forces (DCAF) Occasional Paper* 66.
[566]P W Singer *Corporate Warriors: The Privatized Military Industry* (2008) 118.
[567]Gaston 2008 *Harvard International Law Journal* 241.

for the conduct of their employees. It can therefore be concluded that while it is not entirely impossible to rely on states, individual or company responsibilities to deal with violation of the law by PMSCs, these mechanisms are only applicable in few instances and do not cover all PMSCs. Thus, there is need for a well-adapted legal regime to deal with the practice of outsourcing of military services by states.

### 3.7 Recent developments of Law Regarding Private Military and Security Companies

In an attempt to deal with the loopholes in IHL regarding the status, rights and responsibilities of PMSCs in armed conflicts, various steps have been taken at company level and state level to come up with the rules that will ensure proper regulation of PMSC activities during armed conflicts. These attempts have been made in response to the bad publicity which PMSCs have received as a result of the uncontrollable behaviour of their personnel in Iraq, particularly the wilful and wanton killing of civilians and the resultant failure by the states, notably the United States of America to prevent or punish violations of the law. These efforts have culminated in the adoption two non-binding documents namely the Montreux Document[568] and the International Code of Conduct for Private Security Service Providers (hereafter ICoC).[569] Although these documents are not legally binding, it is important to examine the extent to which they resolve the problems regarding the status of PMSCs under the principle of distinction as well as state responsibilities for hiring PMSCs.

#### 3.7.1 Montreux Document

The Montreux Document (hereafter the Document) is a product of the efforts by the ICRC, Government of Switzerland and other countries who came together to discuss legal means of regulating activities of PMSCs.[570] It is directed at states and it seeks to ensure increased

[568]The Montreux document - on pertinent international legal obligations and good practices for States related to operations of private military and security companies during armed conflict Montreux, 17 September 2008 https://www.icrc.org/eng/assets/files/other/icrc_002_0996.pdf (accessed 27 February 2016) (hereafter Montreux Document)
[569]International Code of Conduct for Private Security Service Providers, August 2013 http://www.geneva-academy.ch/docs/publications/briefing4_web_final.pdf (accessed 27 February 2016).
[570]Montreux Document.

control over PMSCs as well as to ensure that there is accountability for PMSC activities.[571] The Document defines PMSCs as "private business entities that provide military and/or security services, irrespective of how they describe themselves".[572] According to the Document, military and security services include " the guarding and protection of persons and objects, such as convoys, buildings and other places, maintenance and operation of weapon systems; prisoner detention; and advice to or training of local forces and security personnel".[573] The Document claims that it should not be construed as endorsing the use of PMSCs but seeks to recall legal obligations and to recommend good practice if the decision has been made to contract PMSCs.[574]

The Montreux Document consists of two parts. Part one deals with international legal obligations relating to PMSCs.[575] It seeks to acknowledge and affirm existing rules of international law, including IHL that regulates the relationship between states and PMSCs. It also imposes various obligations on contracting states,[576] territorial states[577] and home states.[578] The obligations in Part one are a restatement of the existing binding rules on states. Therefore, it does not create any new obligations. Since the obligations are almost similar for the three groups of states, they shall be discussed at the same time for brevity.

States are required to retain their obligations under international law, even if they contract PMSCs to perform certain activities.[579] This means that states are prohibited from using PMSCs to escape liability under IHL. States are also not required to contract PMSCs to carry out activities that are explicitly assigned to state agents or authority, for example "exercising

[571]See generally Percy 2012 *International Review of the Red Cross* 941.
[572]See paragraph 9 (a) of Preface of the Montreux Document 9.
[573]*Ibid.*
[574]Montreux Document 9.
[575]See generally Montreux Document.
[576]See Paragraph 9 (c) of Preface of the Montreux Document. Contracting states are defined as states "that directly contract for the services of PMSCs, including, as appropriate, where such PMSC subcontracts with another PMSC".
[577]Paragraph 9 (d) of Preface of the Montreux Document. Territorial States are defined as "states on whose territory PMSCs operate".
[578]Paragraph 9 (e) of the Preface of the Montreux Document. Home states are "states of nationality of PMSC that is where a PMSC is registered or incorporated; if the state where the PMSC is incorporated is not the one where it has its principal place of management, then the state where the PMSC has its principal place of management in the home state".
[579]Paragraph 1 of Part One, Montreux Document 11.

the power of the responsible officer over prisoner-of-war camps or places of internment of civilians in accordance with the Geneva Conventions".[580] Other states obligations include ensuring that the PMSCs they contract respect IHL. These include the obligation to "ensure that contracted PMSCs are aware of their obligations and trained accordingly, not to encourage or assist in, any violations of IHL by personnel of PMSCs and to take measures to suppress violations of IHL committed by PMSC personnel".[581] These measures may include military regulations, administrative orders and other regulatory measures, administrative, disciplinary or judicial sanctions.[582]

More so, states are required to enact legislation necessary to provide "effective penal sanctions for persons committing, or ordering to be committed, grave breaches of the Geneva Conventions".[583] The Document also requires states to prosecute, extradite or surrender persons suspected of having committed other crimes such as torture, or hostage taking.[584] Contracting states will be responsible for violations of international law by PMSCs or their personnel.[585] Finally, states are required to "provide reparations for violations of IHL and human rights law caused by wrongful conduct of the personnel of PMSCs when such conduct is attributable to the state in accordance with international law".[586]

Part Two of the Montreux Document deals with the good practices that signatory states must observe when hiring the services of PMSCs.[587] It requires states to consider a number of factors when determining which services to contract out. Firstly, states must consider whether a particular service could cause PMSC personnel to become involved in direct participation in hostilities".[588] States are also required to make an assessment about the "capacity of PMSCs to carry out its activities in conformity with international law, taking into consideration the inherent risk associated with the services to be performed".[589] In doing so,

[580]Montreux Document 11.
[581]*Ibid.*
[582]Montreux Document 11.
[583]*Ibid.*
[584]Montreux Document 12.
[585]*Ibid.*
[586]*Ibid.*
[587]These shall be discussed briefly below.
[588]Montreux Document 16. This is one of the main issue that will be dealt with later in this section.
[589]Montreux Document 17.

states must "acquire information relating to the principal services the PMSC has provided in the past, obtain reference from clients for whom the PMSC has previously provided similar services, acquiring information relating to the PMSC and its superior personnel and its relationship with subcontractors, subsidiary corporations and ventures".[590] States are also required to ensure transparency and supervision in the selection and contracting of PMSCs.[591]

States are required to take into consideration good practice that would ensure the monitoring compliance and accountability of PMSCs contracted.[592] Some of these good practices include providing criminal jurisdiction in their national legislation over crimes under international law and their national law committed by PMSCs and their personnel.[593] In addition, states must consider establishing corporate criminal responsibility for crimes committed by the PMSC, criminal jurisdiction over serious crimes committed by PMSC personnel abroad.[594] Furthermore, states can adopt practices which provide for "non-criminal accountability mechanisms for improper or unlawful conduct of PMSCs and their personnel and these include contractual sanctions such as immediate or graduated termination of the contract, financial penalties, removal from consideration for future contracts and removal of individual wrongdoers from the performance of the contract among others".[595] Contracting states, Territorial States and Home States are also required to "cooperate with each other in matters of common concern regarding PMSCs".[596]

#### 3.7.1.1 Weaknesses of the Montreux Document

The question that needs to be answered is whether the Montreux Document can be relied upon to provide answers regarding the status, rights and responsibility of PMSC personnel under the principle of distinction. The Montreux Document has been hailed as a step in the

[590] *Ibid.*
[591] Motreux Document 17. Such mechanisms include "public disclosure of general information about specific contracts, publication of an overview of incident reports of complaints, and sanctions taken where misconduct has been proven" and "oversight by parliamentary bodies, including through annual reports or notification of particular contracts to such bodies".
[592] Montreux Document 19.
[593] *Ibid.*
[594] *Ibid.*
[595] Montreux Document 20.
[596] Paragraph 20.

right direction in ensuring that PMSCs can be held accountable, especially after the serious incidents of violation of law in Iraq. Percy argues that the neutral approach taken by states of not endorsing or condemning PMSCs and "treating them as regular actors on the battlefield" facilitated negotiation and agreement.[597] Although the Document does not invent new norms, it has been argued that it reaffirms the existence of state obligations without creating new obligations for states that hire PMSCs.[598] Percy also argues that the approach taken by the negotiators is a low-cost solution for states.[599] It can also be argued that Part Two of the document can provide some guidelines for states that want to employ the services of PMSCs to prevent violation of IHL as well as holding PMSC personnel who violate the law accountable.

### 3.7.1.2 The Montreux Document does not create new legal regime to clarify the status of PMSCs

As already stated above, the Montreux Document does not create any new rules but instead seeks to clarify the application of existing rules to the practice of outsourcing of military services to PMSCs by states. Therefore, it is submitted that challenges that arise as from the practice of outsourcing of military functions to PMSCs by states are not resolved by the Document. The Document does not bring clarity on the status of PMSC personnel under the principle of distinction. For instance, the document regards PMSCs employees as civilians. It states that personnel of PMSCs "are protected as civilians under international humanitarian law".[600] Therefore, in terms of the Document, PMSCs are protected persons unless they take direct participation in hostilities. The only exception to this position is when PMSC personnel are incorporated into the regular armed forces of a State, are members of organized armed forces, groups or units under a command responsible to the State, or otherwise lose their protection as determined by international humanitarian law.[601] Therefore, it can be submitted that the Montreux Document does not introduce anything new to the principle of distinction

[597]Percy 2012 *International Review of the Red Cross* 953-954.
[598]Percy 2012 *International Review of the Red Cross* 953-954.
[599]*Ibid.*
[600]Montreux Document 14.
[601]*Ibid.*

that is not dealt with in the Geneva Conventions and the Additional Protocols. For the purpose of clarity, some of the challenges shall be noted below.

The Montreux Document does not make a distinction between ordinary civilians and PMSC personnel. As already argued above, it is undesirable to equate all PMSCs employees with ordinary civilians since this endangers the protection that the principle of distinction seeks to offer for ordinary civilians.[602] Therefore, it is submitted that the Montreux Document's treatment of PMSCs as civilians endangers the protection of ordinary civilians as has been argued above.

#### 3.7.1.3 The Montreux Document does not address the challenges raised by PMSC personnel's direct participation in hostilities

The Montreux Document appears to circumvent the issues of PMSCs' involvement in combat operations or the possibility thereof. The Document states that military and security services include "armed guarding and protection of persons and objects, maintenance and operation of weapons systems among other things".[603] Although the list is not exhaustive, the Document does not deal with activities that amount to combat functions or fall in the grey area. The only instance the Document appears to admit the possibility of PMSCs taking part in combat duties is when it deals with PMSCs incorporated in to the armed forces in which case they are combatants and when PMSCs personnel take direct part in hostilities in which case the consequences that apply to ordinary civilians who take direct participation in hostilities will apply. Therefore, despite the fact that some PMSCs can be hired to perform functions that exclusively amount to combat activities, the Document requires the concept of direct participation in hostilities to be applied in relation to these persons. As discussed above, the treatment of PMSCs who are hired to take direct participation in hostilities as civilians who can only be attacked when they are taking direct participation in hostilities puts a party fighting against an army of civilian contractors at a disadvantage since they become limited

[602]See discussion in section 3.5 at 37 above.
[603]Montreux Document 9.

in their operations. This may in turn breed disrespect for the law, including the principle of distinction itself.

The Document does not take into account the fact that the definition of direct participation under Additional Protocol I does not make a distinction between defensive and offensive operations as both acts constitute direct participation in hostilities.[604] Therefore, the Document does not address the problem of civilian contractors who may lose their protection as civilians for exercising self-defence during an armed conflict.[605] More so, the Document does not address the challenges that may be raised by 'revolving door' when PMSCs are treated as civilians.[606]

In light of this discussion, it can be concluded that the Montreux Document is not capable of addressing the problems regarding outsourcing of military services to PMSCs. In other words, the document does not bring clarity regarding the status of PMSCs under the principle of distinction. More so, it does not invent any new rules that can be used to hold states and PMSCs accountable for the violation of the law during armed conflicts.

### 3.7.2 The International Code of Conduct for Private Security Service

After the adoption of the Montreux Document, a group of companies calling themselves Private Security Companies came together to draft the International Code of Conduct for Private Security Service (hereafter ICoC) which can be used by companies when they are hired by states to offer services.[607] The drafters acknowledge that private contractors' activities have "potentially positive and negative consequences for clients, the local population in the area of operation and the enjoyment of human rights and the rule of law".[608] ICoC signatories endorse the Montreux Document and commit themselves to responsible provision of security services "so as to support the rule of law, respect the human rights of all

[604]See section 3.5 at 33 above.
[605]*Ibid.*
[606]*Ibid.*
[607]The International Code of Conduct for Private Security Service (signed in 2010).
[608]*Ibid.*

persons, and protect the interests of their clients".[609] The signatory companies also acknowledge their "responsibility to respect the human rights of, and fulfil humanitarian responsibilities toward, all those affected by their business activities".[610]

The Code defines PSCs and Private Security Providers as "any company whose business activities include the provision of security services either on its own behalf or on behalf of another, irrespective of how such Company describes itself".[611] The signatory companies seek to develop an independent governance and oversight mechanism that will monitor the implementation of the ICoC and company activities in the field.[612] The ICoC also claims to complement existing "control exercised by competent authorities and does not limit or alter applicable international law or relevant national law".[613] Article 14 provides that the Code does not create legal obligations or legal liabilities on the signatory companies beyond those which already exist under national or international law".[614] Other undertakings made by signatory companies include compliance with applicable law, which may include IHL as imposed by applicable national or international law.[615] Other undertakings made by signatory companies include to "take all reasonable steps to avoid the use of force, and if force is to be used, it must be used in a manner consistent with applicable law".[616] Article 31 requires personnel of signatory companies not to use firearms against persons except in self-defence or defence of others against the imminent threat of death or serious injury or to prevent the perpetration of a particularly serious crime involving grave threat to life". [617]

Companies also make commitments concerning the management and governance of the companies. Article 45 provides that companies will exercise due diligence in the selection of its personnel.[618] In Article 47, companies undertake to "assess and ensure that personnel are able to perform their duties in accordance with the ICoC while in Article 55, companies

[609] *Ibid.*
[610] ICoC 18
[611] ICoC 5
[612] ICoC 21.
[613] Article 14.
[614] *Ibid.*
[615] Article 21.
[616] Article 30.
[617] Article 31.
[618] ICoC 18.

undertake to ensure that personnel receive initial and recurrent professional training and are fully aware of the Code and all applicable international and national laws".[619] Companies also under take to "prepare incident reports documenting any incidents involving its personnel that involve the use of any weapon, under any circumstances or any escalation of force, damage to equipment or injury to persons" among other incidents.[620]

### 3.7.2.1 Weakness of the International Code of Conduct for Private Security Service

The ICoC can be said to be a development towards the right direction. Percy argues that the Code it is "a significant accomplishment given the very slow pace of regulation and the problems of creating international regulation".[621] Percy further argues that the ICoC takes a tough stance on human rights questions and this demonstrates their willingness to obey the law.[622]

However, the issue is whether the ICoC provides answer regarding the status of PMSCs under the principle of distinction as well as the challenges that arise because of PMSCs' participation in armed conflicts. The terminology used by drafters in the ICoC suggests that the drafters avoided reference to private companies that are employed to take direct part in armed conflicts. Whereas the Montreux Document used the term PMSC, the Code only refers to Private Security Companies and Private Service Providers. Through using this terminology, the ICoC suggests that it does not regulate private military companies. Furthermore, the nature of services providers covered by the ICoC as well as the obligations imposed on states appear to suggests that it deliberately avoided any reference to PMSCs or does not deal with PMSCs which get involved in combat activities. For example, the ICoC stance on the use of firearms appears to suggest that it only applies to companies that only use firearms in exceptional circumstances. The ICoC requires personnel to avoid the use of force except in self-defence.[623] However, it has been demonstrated in this chapter that PMSCs are involved in many operations that involve the use of force, not only in self-defence but also in offensive operations. Thus, it can be concluded that the ICoC cannot be relied on

[619] *Ibid.*
[620] Article 63.
[621] Percy 2012 *International Review of the Red Cross* 954.
[622] *Ibid.*
[623] Article 30.

to regulate the conduct of civilian contractors who provide military force. More so, the ICoC does not regulate the involvement of security companies in armed conflicts. Therefore, it does not provide guidance on the status of PMSCs.

Some scholars have raised scepticism over the effectiveness of the self-regulation system. Article 9 of the ICoC contemplates an independent governance and oversight mechanism. The concern is whether there will be proper regulation given that there will be no state involvement and companies will regulate themselves.[624] Williams argues, "No other industries are allowed to regulate themselves entirely and the incentive structures run against a trade group acting as a strict enforcement and punishment agent for members of its own industry".[625] Percy notes that while the "industry currently has an interest in strong regulation, it may not always do so, and it may respond differently to new developments than would states or formal regulators".[626] It therefore remains to be seen whether self-regulation will work for the private security industry and if so, for how long. However, it can be submitted that the ICoC cannot be relied on to resolve the issues of status and accountability of PMSCs during armed conflicts.

### 3.8 Conclusion

This Chapter sought to demonstrate the challenges that the principle of distinction is facing as a result of changes that have taken place in modern armed conflicts. The key question was whether PMSCs' involvement in armed conflicts fits in within the framework of the principle of distinction between combatants and civilians. It was argued that a bulk of PMSCs are contracted to perform functions that are at the heart of armed conflicts, which make their activities subject to IHL.

[624]Article 9 of ICoC
[625]O F Williams "The UN Global Compact: The Challenge and the Promise" in (2004)14 *Business Ethics Quarterly* 755.
[626]Percy 2012 *International Review of the Red Cross* 955.

In light of the arguments made throughout this Chapter, it can be concluded that while some PMSCs qualify as combatants as defined under Additional Protocol I and the Geneva Conventions, the bulk of PMSCs do not meet the combatant status for various reasons. Furthermore, treating PMSCs as civilians is not a viable option as it breeds contempt of IHL by states and threatens the protective mandate IHL has on civilians. The gaps that are currently present in the law allow states to rely on PMSC services in armed conflicts without incurring any responsibilities that come with such participation in armed conflicts. This therefore creates impunity for PMSCs, companies and states. More so, the option of dealing with PMSCs activities under individual, superior and state responsibility does not seem to be available due to the complex relationship between PMSCs and states, the complicated manner in which PMSCs operate and the loopholes in the provisions which deal with individual, superior and state responsibilities. Furthermore, recent attempts that have been made to deal with PMSCs activities, namely Montreux Document and the ICoC do no resolve the challenges posed by the involvement of PMSCs in armed conflicts, as they do not invent any new rules to deal with challenges created by PMSCs. Therefore, it can be concluded that there is need for the adaptation of the principle of distinction for it to be applicable to the practice of outsourcing of military services to PMSCs during armed conflicts.

## Chapter 4: Other Developments That Challenge the Application of the Principle of Distinction in Modern Armed Conflicts

### 4.1 Introduction

Chapter 3 dealt with the challenges of applying the principle of distinction to PMSCs in armed conflicts. It has been demonstrated that the criteria of distinguishing combatants from civilians does not provide answers regarding the status of PMSCs under IHL. It was concluded that there is need for the adaptation of the principle of distinction in order to ensure that PMSC personnel's status under the principle of distinction becomes clear. However, it is useful to note that PMSCs are not the only ones that challenge the application of the principle of distinction to modern armed conflicts. There are a number of other developments that have also resulted in the application of the principle of distinction being questioned. This chapter will discuss some of these developments. It should also be re-emphasised that the developments that challenge the principle of distinction are so many and range from the involvement of certain persons or category of persons in armed conflicts; the weapons used and the methods of warfare used during armed conflicts. Not all the challenges envisaged here can be discussed in this study. However, I have singled out the use of Unmanned Aerial Vehicles (hereafter UAV), also referred to as drones[627] as well as the emergence of Computer Network Attacks, commonly referred to as cyber-warfare for discussion in this chapter, in order to illustrate the anomaly mentioned above.

Drones and cyber warfare have been selected for discussion because they offer a unique perspective to the discussion of the challenges the principle of distinction is facing. As pointed out by Crawford, "technology has shaped and changed the ways in which armed conflicts have been fought for decades, if not centuries".[628] At the heart of these technological developments are drone and cyber warfare. Firstly, drone and cyber warfares are relatively a new phenomenon that is not specifically dealt with under IHL. The rules regulating these methods of warfare are still developing and it becomes important to explore the kind of

[627] The term 'drones' has been widely used in the media and scholarly articles. Therefore, the term drones shall be used more often in this study.
[628] E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* (2015) 126.

challenges these developments present for the principle of distinction. Furthermore, unlike the problems presented by PMSCs, which are only centred on whether PMSC personnel qualify as combatants, the challenges posed by drone and cyber warfare go beyond the status of the persons in charge of the operations. These methods of warfare are classified as remote warfare.[629] Although they are operated by humans, they are not technically human since they are partly self-executing machines. Furthermore, unlike in conventional warfare where armed conflict takes place in a confined battlefield, drone and cyber war weapons are operated away from the geographical location where the armed conflict it taking place. As a result, the battlefield is not confined to a specific area. These factors present unique challenges to IHL when it comes to compliance with the principle of distinction as shall be elaborated. Since the laws of armed conflict, including the principle of distinction were drafted with traditional, kinetic warfare in mind, it is important to examine how drone and cyber warfare developments comply with these laws.

Secondly, a discussion of drone and cyber warfare allows me to deal with the second part of the principle of distinction, which is the requirement for distinction between civilian objects and military objectives. As started earlier in this study, armed conflicts are increasingly becoming civilianised such that is has become difficult to draw a line between what is civilian and what is military. Therefore, a discussion of drone and cyber warfare offers an opportunity to deal with the challenges modern armed conflict create for the principle of distinction between civilian objects and military objectives.

This chapter is divided into two sections. The first section will deal with drone warfare while the second section will deal with cyber warfare. This section will begin by discussing the rise of drones and their use in armed conflicts. It should be noted from the onset that this discussion is not concerned with the general arguments on the legality of use of drones during armed conflicts. The discussion is limited to the challenges of applying the principle of distinction to drone warfare. Moreover, this discussion is concerned with the use of drones in situations of armed conflicts. Thus, the discussion will not deal with the use of drones for targeted killings, spying or other civilian purposes outside armed conflict situations. The key

[629] *Ibid.*

question is whether the manner in which drones are being used in armed conflicts comply with the principle of distinction.

## 4.2 Unmanned Aerial Vehicle/Drones and the Principle of Distinction

### 4.2.1 Origins of Drone Warfare

Drones appeared in the early 1990s when the United States of America used them for reconnaissance purposes in the Bosnia and Kosovo conflicts.[630] Since then, other countries such as China, Russia, Italy, Turkey and France have developed drones whose use is currently limited to surveillance purposes.[631] However, at the turn of the millennium, especially after the September 11 2001 attacks on United States of America, there were series of changes to the US drone program, which introduced the concept of drone warfare. Drones were now armed with laser guided missiles and could be used for combat operations, particularly targeting militants linked to al Qaeda and the Taliban.[632] In 2002, combat drones began to carry AGM-114 Hellfire missiles.[633] Pursuant to the Authorization for Use of Military Force (AUMF) passed by the Congress, the then President of the United States of America, George W Bush authorised the use of drones against al-Qaeda leaders.[634] President Bush also signed a "secret Memorandum of Notification" which gave the Central Intelligence Agency (CIA) the right to hunt down and kill members of al-Qaeda in anticipatory self-defence.[635]

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[630]D Brunstetter and M Braun, "The Implications of Drones on the Just War Tradition" (2011) 25 *Ethics & International Affairs* 337 at 340.
[631]*Ibid.*
[632]*Ibid.*
[633]S Wuschka, "The Use of Combat Drones in Current Conflicts- A Legal Issue of a Political Problem" (2011) 3 *Goettingen Journal of International Law* 891 at 892.
[634]Brunstetter and Braun 2011 *Ethics & International Affairs* 340.
[635]*Ibid.*

### 4.2.2 Reasons for reliance on drones as weapons

A number of reasons have been put forward to explain the USA's resort to use of drones. Brunstetter and Braun argue that the number of troops for the USA has waned, resulting in an increase in the number of drones being used for combat operations.[636] Instead of committing personnel to fight the global war on terror, the USA has deployed drones to carry out strikes on persons perceived as enemies of the USA. Kreps and Kaags also argue that the United States resorted to the use of drones since they offer the advantage of penetrating more adversarial environments than piloted aircraft.[637] This is because drones are unmanned and remote controlled, thus avoiding putting any personnel in danger. Therefore, it can be argued that one of the reasons why the United States of America resorted to the use of drones as weapons is to protect the lives of members of the armed forces as well as to cover up for the reduction in the size of their armed forces.

Lewis and Crawford argue that the development of drones was promoted by the principle of distinction.[638] The authors argue that while the principle of distinction provides clear rights and obligations for combatants during armed conflicts, the non-state actors who take direct part in hostilities such as Taliban and al-Qaeda militants deliberately avoid complying with the principle of distinction.[639] For example, while the principle of distinction requires parties to the conflict to distinguish themselves from civilians, militants deliberately disguise themselves as civilians in order to avoid easy identification and targeting. Furthermore, these non-state actors are known for using the civilian population as shields from attacks as well as keeping their weapons in civilian environment. While the principle of distinction prohibits such acts, Lewis and Crawford argue that "the obligations of irregular armed forces have not been interpreted nearly as rigorously as those that apply to state militaries".[640] For example, the authors argue that "determinations of whether irregular armed groups improperly

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[636]Brunstetter and Braun 2011 *Ethics & International Affairs* 341.
[637]S Kreps, J Kaag "The Use of Unmanned Aerial Vehicles in Contemporary Conflict: A Legal and Ethical Analysis" (2012) *Northeastern Political Science Association* http://s3.amazonaws.com/academia.edu.documents/15484619/Polity.pdf?AWSAccessKeyId=AKIAJ56TQJRTWSMTNPEA&Expires=1471363806&Signature=9pcwZafSJ9GymmA7kTk7PFpQ%2Bn8%3D&response-content-disposition=inline%3B%20filename%3DEthics_of_Drones.pdf (accessed 27 March 2016).
[638]See Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1127.
[639]*Ibid.*
[640]Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1151.

intermingled themselves with the civilian population have mainly been centred on whether the irregular armed groups subjectively had an intention for the civilian population to act as a shield, not on their proximity to the civilian population when they initiated offensive operations".[641] The learned authors further argue that even though the use of civilians as shields by irregular armed groups is unlawful and punishable under IHL,[642] this produces effective results since the unlawful conduct of irregular armed groups "does not release the attacker from his obligations with respect to the civilian population".[643] In other words, if irregular armed groups blend with civilians in order to prevent regular armed forces from attacking them, the regular armed forces are effectively barred from proceeding with the attack. More so, the regular armed forces cannot justify an attack which causes disproportionate civilian casualties if they knew that an irregular armed group they were attacking was using civilians as shields.[644] Therefore, the widespread use of human shields by irregular armed groups has the effect of hindering military operations by regular armed forces. This practice swings the pendulum in favour of irregular armed forces since they can violate the law by using human shields in order to get protection from the rule that prohibits indiscriminate attacks.

States fighting asymmetric conflicts have reacted to the restrictions imposed by use of human shields in two ways.[645] While some states have ignored the requirement of not attacking irregular armed groups that have blended with civilians (thus ignoring the principle of distinction), others have attempted to comply with the IHL restrictions by changing the weaponry and tactics used in armed conflicts.[646] Use of drones is one of the measures.[647] According to the authors, drones offer two advantages to their users, particularly in relation to irregular armed forces who use human shields.[648] Firstly, drones provide robust intelligence by flying above the enemy for long hours while "accurately identifying the individual targets

[641] *Ibid.*
[642] Use of human shields is prohibited under Article 51(7) of Additional Protocol I to the Geneva Conventions which provides that "the Parties to the conflict shall not direct the movement of the civilian population or individual civilians in order to attempt to shield military objectives from attacks or to shield military operations".
[643] Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1151.
[644] *Ibid.*
[645] Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1152.
[646] *Ibid.*
[647] *Ibid.*
[648] *Ibid.*

as well as establishing their patterns of movement".[649] This would provide commanders with more information in determining whether to attack or not. Further, drones are equipped with missiles which provide armed forces with small weapons that can be used in a way that would target individuals without causing too many civilian casualties as compared to conventional weapons.[650] Therefore, in terms of this theory, the development of drone weapons was encouraged by the principle of distinction's failure to address the challenges raised by irregular armed groups in armed conflicts.

It is plausible that the above reasons could have led to the rise of drone warfare. The conduction of war using drones reduces the number of personnel that can be deployed by a party to the conflict as well as save the lives of personnel who could be deployed in hostile environment during armed conflicts. More so, with the increase in asymmetrical wars where irregular armed forces tend to violate the principle of distinction by conducting war in civilian environment or blending with the civilian population, it may be true that drones offer a more precise weapon that minimises the number of civilian casualties. Whatever the reasons behind the rise of drone warfare is, this method of warfare should comply with IHL, particularly the principle of distinction. While states have the right to introduce new weapons and means of warfare, this needs to be done within the bounds of IHL. Therefore, the question which this chapter will attempt to answer is whether drone warfare is capable of complying with the principle of distinction.

### 4.2.3 Expansion of the Drone Program

As the USA global war on terror expanded to countries such as Afghanistan and Iraq, reliance on the use of drones drastically increased. For example, Brunstetter and Braun argues that USA fleet of drones increased from 167 in 2001 to more than 5 500 in 2009.[651] Additionally, while 33 drone strikes were reported in 2008 during President Bush's administration, 118 drone strikes were recorded in 2010 under President Obama's administration and this

[649]Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1153-1154.
[650]*Ibid.*
[651]Brunstetter and Braun 2011 *Ethics & International Affairs* 341.

demonstrates an escalation in the use of drones in combat operations.[652] The USA runs two parallel drone programs. One program is run by the United States Air Force under the Department of Defence while the other one is run by the CIA.[653] Mayer points out that the military drone program is publicly acknowledged and operates in recognised war zones where it targets enemies of the USA troops while the CIA run program is aimed at terror suspects around the world, including in countries where USA troops are not based.[654] The CIA run drone program has been the most popular and the one that has resulted in questions being raised regarding the drones' compliance with the principle of distinction. It is therefore important to examine how the development and expansion of the drone as a weapon interact with the principle of distinction. Although several countries have developed drone technology, only the USA, Britain and Israel have armed drones that have been used for combat operations.[655] However, this discussion shall mainly refer to the USA drone program as it is the one that has raised major concerns under IHL.

### 4.2.4 The United States Drone Program: An overview

As pointed out above, the United States of American runs two parallel drone programs. The U.S Air Force under the Joint Special Operations Command (JSOC) runs the Department of Defence drone program. [656] Drone operations have been targeting al-Qaeda and Taliban militants in several countries. The second drone program is run by the CIA. Although The United States government has been reluctant to acknowledge the existence of the program, it is now common knowledge that it exists. For example, former Secretary for Defence Donald Rumsfeld once stated that the "CIA played a role in armed drone attacks in Afghanistan".[657] Leon Panetta, the former Director of CIA once stated that drones were "the only game in

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[652]*Ibid.*
[653]J Mayer "The predator War: What are the risks of the CIA'S Covert Drone Program? The New Yorker http://.newyorker.com/reporting.2009/10/26.091026fafactmayer Oct 26, 2009 (accessed 28 March 2016). See also M Sterio "The United States' use of Drones in the War on Terror: The (Il) legality of Targeted Killings under International Law" (2012) 45 (1) *Case Western Reserve Journal of International Law* 198.
[654]J Mayer "The predator War: What are the risks of the CIA'S Covert Drone Program? The New Yorker http://.newyorker.com/reporting.2009/10/26.091026fafactmayer Oct 26, 2009 (accessed 28 March 2016).
[655]Brunstetter and Braun 2011 *Ethics & International Affairs* 337.
[656]A Burt, A Wagner "Blurred Lines: An Argument for a More Robust Legal Framework Governing the CIA Drone Program" (2012) 38 *Yale Journal of International Law Online* 1.
[657]Statement by Donald Rumsfeld, Secretary of Defense, Department of Defense, (Feb. 8, 2002) http://www.defense.gov/transcripts/transcript.aspx?transcriptid=2636 (accessed 30 March 2016).

town", thus highlighting the importance as well as the involvement of the CIA in the drone activities.[658] According to Burt and Wagner, the CIA authority derived from Title 50 of the United States Code allows it to "conduct covert international operations".[659] Covert means activities designed to "influence political, economic, or military conditions abroad, where it is intended that the role of the United States Government will not be apparent or acknowledged publicly".[660] The power to conduct such covert operations is derived from the Agency's "Fifth Function" which permits the CIA to "perform such other functions and duties related to intelligence affecting the national security as the President or the Director of National Intelligence may direct".[661] Chesney argues that the phrase "other functions and duties" constitutes the legal basis upon which the CIA has used lethal force.[662]

The CIA has been conducting covert operations in armed conflicts for some time. For example, in the 1990s, the CIA was involved alongside the military in failed attacks directed at Osama bin Laden after the attacks on U.S embassies in Kenya and Tanzania.[663] Therefore, their involvement in military-like operations is not a new phenomenon. According to Burt and Wagner, these operations were carried out only in self-defence. However, the USA's position changed after it was attacked by terrorists on 11 September 2001. As mentioned above, the AUMF expanded the role of CIA in armed conflicts. The AUMF authorised the US President to "use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harboured such organisations or persons, in order to prevent any future acts of international terrorism against the USA by such nations, organisations or persons".[664] According to Burt and Wagner, AUMF constitutes legal authorisation for CIA operations in the fight against al Qaeda".[665] The question that arises is whether the US drone programs comply with the principle of distinction. Since the principle

[658]Director's Remarks at the Pacific Council on International Policy 2009 https://www.cia.gov/news-information/speeches-testimony/directors-remarks-at-pacific-council.html (accessed 30 March 2016).
[659]Burt and Wagner 2012 *Yale Journal of International Law Online* 5.
[660]*Ibid.*
[661]*Ibid.*
[662]R Chesney "Military-Intelligence Convergence and the Law of the Title 10/Title 50 Debate" (2012) 5 *Journal of National Security Law and Policy 539* at 586-587.
[663]Burt and Wagner 2012 *Yale Journal of International Law Online* 6.
[664]*Ibid.*
[665]*Ibid.* The CIA has been carrying out drone strikes in Afghanistan and wherever al Qaeda thus the conflict with al Qaeda militants has been termed global war on terror.

of distinction between combatants and civilians and between civilian objects and military objectives only applies in situations of armed conflict, the discussion shall focus on the use of drones for combat purposes in countries where the USA has been engaged in armed conflicts, namely Iraq and Afghanistan.[666]

### 4.3 Drones and the principle of distinction

The first issue that needs to be dealt with is whether drones, as weapons comply with the principle of distinction. This question requires one to consider the way in which drones operate and whether this complies with the principle of distinction. The principle of distinction requires parties to the conflict to ensure that civilian casualties "are avoided to the greatest extent possible".[667] Up to now, drones have been used in asymmetrical wars to target small groups of people. The question that arises relates to who constitutes the target of drone attacks given the tendency of irregular armed groups to reside in civilian environments or fuse with civilians in order to avoid being easily targeted. The main concern here is whether drone strikes are capable of distinguishing between civilians and combatants and between civilian objects and military objectives.

Some scholars have argued that drones are capable of complying with the principle of distinction.[668] It has been argued that drones allow one to limit civilian casualties compared to situations where conventional warplanes are used.[669] Furthermore, drones can conduct surveillance on the potential target for a long time as compared to warplanes thus allowing operators to ascertain threats as well as the amount of collateral damage that may be affected if the strike are carried out. More so, due to small weapons and the increased precision rate of drone strikes, drones have the capacity to attack on a "small scale compared to an aerial bombing campaign or invasion, thus reducing overall military impact on the ground".[670] *Prima facie*, drones appear to be the ultimate weapons of choice in asymmetrical warfare since they appear to comply with the principle of distinction.

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[666]Drones have also been used to attack fleeing Taliban militants and their leaders in Pakistan. It is not clear whether this hot pursuit of militants is an extension of the US-Taliban conflict or not.
[667]Brunstetter and Braun 2011 *Ethics & International Affairs* 437.
[668]Lewis and Crawford 2012-2013 *Georgetown Journal of International Law* 1127.
[669]*Ibid.*
[670]Brunstetter and Braun 2011 *Ethics & International Affairs* 349.

### 4.3.1 Drones and the Separation Factor

Despite the arguments in favour of the use of drones, counter-arguments can be made to demonstrate that drone strikes do not comply with the principle of distinction as has been claimed. Brunstetter and Braun argue that although drones help in reducing collateral damage, there is the problem of "separation factor".[671] The authors do not define separation factor. However, from their discussion of the concept, it can be deduced that separation factor relates to the fact that the personnel who control drones and conduct airstrikes are far removed from the battlefield where the drones will be carrying out airstrikes.[672] The learned authors argue that while separation factor "increase control over decisions that ought to reduce errors, the removal of drone operators from combat zone may have psychological effects that magnify the challenges of adhering to the principle of discrimination".[673] Since drone operators operate in a safe environment, where he/she receives the information and make assessments, his/her ability's ability to assess threats may be affected.[674] The authors give an example of a drone operator in Nevada controlling a drone that is providing cover to United States troops. If the operator "sees a video feed of an oncoming truck, the principle of distinction does not require the operator to fire at the vehicle or give an order to the person in the field to fire unless it represents a threat to the soldiers in the area".[675] While the lack of risk to the operator should lead him/her to be more cautious in assessing the danger, the authors argue that this is not the case.[676] Major Matthew Morrison of the US Air Force states that "when you're on the radio with a guy on the ground, and he is out of breath and you can hear the weapons fire in the background, you are every bit as engaged as if you were actually there".[677] The authors further argue that drone operators may be affected by the "same psychological stress as their comrades in the battlefield".[678] Since the lives of the people on the ground depend on the decision of the operator and the operator is of the view that there is a danger, which troops in the battlefield are facing, the operator may be induced into erring

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[671] *Ibid.*
[672] *Ibid.*
[673] *Ibid.*
[674] I*bid.*
[675] *Ibid.*
[676] *Ibid.*
[677] Associated Press, "Predator Pilots Suffer War Stress," August 8, 2008 www.military.com/news/article/predator-pilots suffering-war-stress.html?cpl=1186032310810&wh=news (accessed 20 March 2016).
[678] Brunstetter and Braun 2011 *Ethics & International Affairs* 349.

on the side of protecting one's troops thus striking the perceived danger without making thorough assessments.

The effect of the separation factor is that the psychological stress that drone operators suffer from will likely lead them to make mistakes resulting in drone strikes being directed on wrong targets. For example, it has been reported that 90 percent of the people that have been killed in drone strikes were not the intended targets.[679] More so, cases of drone strikes targeting civilians going about their normal lives such as attending weddings, funerals or anything that involve gatherings have been frequent.[680] Such incidents demonstrate the fact that drones as weapons are not always capable of distinguishing civilians from combatants as has been claimed. Instead, the absence of the operator in a battlefield where drone strikes are carried out appears to cause more collateral damage than previously thought thus violating the principle of distinction.

Another reason why the drone program may fail to comply with the principle of distinction is that the drone operator and those in charge of taking the decision whether to strike or not may not have an incentive to take all precautionary measures before striking their target. This is because in some instances, the party carrying out such attacks may not have its personnel in the battlefield.[681] Brunstetter and Braun argue that the "the separation factor removes one of the biggest handicaps in carrying out aerial attacks that minimise civilian casualties which is the risk to one's own soldiers".[682] When parties to the conflict use drones in areas where troops have not been deployed, there is no risk of mistakenly striking their own troops. More so, since drones are unmanned, there is no danger of any personnel being killed during the strikes as compared to manned warplanes.

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[679]"Nearly 90 Percent Of People Killed In Recent Drone Strikes Were Not The Target" *The Huffington Post* http://www.huffingtonpost.com/entry/civilian-deaths-drone-strikes_us_561fafe2e4b028dd7ea6c4ff (accessed 20 March 2016)

[680]"Drone strikes kill, maim and traumatize too many civilians, U.S. study says" CNN September 26, 2012 http://edition.cnn.com/2012/09/25/world/asia/pakistan-us-drone-strikes/ (accessed 22 July 2016).

[681]Brunstetter and Braun 2011 *Ethics & International Affairs* 350.

[682]*Ibid.*

Bellamy concurs that since the USA has not deployed enough ground troops in the combat zone, it is not making every effort to avoid civilian casualties.[683] This point can be illustrated through the example of United States of America's pursuit of Al Qaeda leader Ayman Zawahari. Attempts to kill Zawahari have been carried out unsuccessfully since 2006 and until now, seventy-six children and twenty-nine civilian adults, have been killed.[684] Furthermore, the USA's attempt to kill Qari Hussain, deputy commander of the Taliban who was eventually killed in 2010 resulted in the death of 128 people who were not the intended targets.[685] It is submitted that the USA could have taken more precaution in its drone strikes had its own personnel been involved in the battlefield where the strikes were carried out. The ability of drones to carry out strikes without own personnel being put on danger takes away the incentive to exercise precautionary measures from the drone operators. One can therefore conclude that the use of drones directly affects the requirement for belligerents to distinguish between combatants and civilians. Since there is no danger of accidentally bombing own personnel on the ground where the war is being fought, drone operators may be tempted to exercise less caution when carrying out air strikes, thus increasing the danger of targeting civilians.

### 4.3.2 Drone operators and the principle of distinction

The other important and perhaps more controversial issue surrounding US drone program as far as the principle of distinction is concerned relates to the status of drone operators. As mentioned earlier in this study, the principle of distinction recognises the existence of two distinct groups during an armed conflict, which are civilians and combatants. The USA has been running two parallel drone programs, with the first one being operated by the United States Air Force and the other one by CIA. Since the US Air Force is integral part of the United States of America Department of Defence, their involvement in drone operations does not raise problems since these are combatants and can legally take part in armed conflicts.

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[683] A Bellamy "Is the War on Terror Just?" http://ire.sagepub.com/content/19/3/275.abstract (accessed 13 April 2016).

[684] "41 men targeted but 1,147 people killed: US drone strikes – the facts on the ground" The Guardian Monday 24 November 2014 https://www.theguardian.com/us-news/2014/nov/24/-sp-us-drone-strikes-kill-1147 (accessed 22 March 2016).

[685] *Ibid.*

The problem arises when it comes to the CIA run drone program. The question is whether CIA drone operators can be classified as combatants under the principle of distinction. The USA previously insisted that the CIA drone strikes have only been carried out in Pakistan, Yemen and Somalia where the USA is not involved in armed conflict.[686] However, Crawford argues that "recent reports confirms that the CIA has been integral in the "oversight and orchestration of the military drone programme involving the United States Air Force".[687] Furthermore, the Assistant General Counsel at the CIA John Radsan has also confirmed that decisions to fire a missile from a drone are made by the CIA at their headquarters in Virginia.[688] Therefore, despite the USA's denial that the CIA has been taking direct participation in hostilities, there is ample evidence that CIA drone strikes have been carried out in aid of the ongoing armed conflicts in Iraq and Afghanistan. Consequently, the CIA drone operators were taking direct part in hostilities.

#### 4.3.2.1 Status of CIA Personnel under the principle of distinction

It cannot be disputed that CIA personnel are not part of the US armed forces. As Wuschka argues, the CIA is a civilian agency and not a branch of the U.S Armed Forces.[689] Furthermore, it is difficult to argue that the CIA can be combatants through being militia or volunteer corps belonging to the United States since it is difficult for them to meet the requirements set out Article 4A of the Third Geneva Conventions or Article 43 of Additional Protocol I. CIA operatives do not wear fixed signs or uniforms. More so, they do not carry their weapons openly. Although the CIA has a hierarchy of command, it is difficult for anyone to ascertain whether the chain of command can enforce the law of armed conflicts. As Sterio argues, "no particular information regarding the specifics of the drone program has ever been publicly disclosed".[690] For example, since drones are remote controlled from CIA bases thousands of miles from the battlefield, the outside world will not know the individuals

[686]E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 129. In the case of Pakistan, it is difficult to determine whether drone strikes are being carried in aid of an armed conflict. This is because while the US troops are not officially waging a war in Pakistan's territory, they pursue militants who escape into Pakistan from Afghanistan in execution of the so called global war on terror. This makes it difficult to determine whether the drone strikes carried out in Pakistan's territory against militants who have escaped from Afghanistan ae carried out in the course of an armed the armed conflict or not.
[687] *Ibid.*
[688]*Ibid.*
[689]See Wuschka 2011 *Goettingen Journal of International Law* 891.
[690]Sterio 2012 *Case Western Reserve Journal of International Law* 212.

responsible for any violation of the law such as deliberate attack on civilians. The outside world may never know information regarding individuals behind a particular violation of international law. Therefore, even though the CIA has a chain of command, the lack of transparency in the organisation makes it very difficult to entrust them with enforcing IHL. Similarly, the secrecy under which the CIA operates makes it difficult for the outside world to determine whether the drone operators comply with the customs and laws of war when they carry out drone strikes.[691] In light of this discussion, one can conclude that CIA drone operators do not qualify as combatants.

#### 4.3.2.2 Legal Consequences of CIA's direct participation in drone strikes

The fact that civilian personnel are authorised to conduct drone strikes in situations of armed conflict means that the principle of distinction is being continuously violated. As Crawford points out, even though the targets of drone strikes can be considered as taking direct participation in hostilities, the CIA operatives will equally be violating the principle of distinction since they are taking direct participation in hostilities too.[692] However, unlike the militant groups that the US drone strikes attack, the USA has obligations to respect IHL rules including the principle of distinction.

It follows that in theory, the consequences that fall on civilians who take direct participation in hostilities will apply to CIA personnel. This means that CIA operatives can be targeted wherever they are found as long as they are taking direct participation in hostilities. Alston argues that intelligence personnel do not have prosecution immunity under domestic law for their conduct.[693] This means that they can be punished for taking direct part in hostilities as well as for crimes committed during the course of direct participation. Alston further points out that the involvement of CIA personnel in armed conflicts may also render them liable to

[691] *Ibid.* Sterio also argues that because the drone program is operated covertly by the CIA, it has been impossible to determine the precise contours of the program, its legal and normative framework, and whether its operators have been lawfully implementing the program".
[692] E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 131.
[693] See P Alston "The CIA and Targeted Killings Beyond Borders" (2011) 2 *Harvard National Security Journal* 283.

criminal prosecution under domestic laws.[694] This means that the CIA personnel taking part in drone program are unlawful combatants, just like the Taliban and al-Qaeda militants they are targeting. Furthermore, the CIA personnel will not be entitled to PoW if captured by the party they are fighting. In short, all the consequences that apply to PMSC personnel as discussed in Chapter 3 will apply to CIA drone operators.

The question however is whether CIA personnel will ever be held accountable for their unlawful involvement in armed conflicts. This does not appear to be the case for various reasons. Firstly, the United States of America is less likely to prosecute CIA drone operators given that they act under State order and in pursuit of US interests, even though they can be indicted and prosecuted in foreign courts.[695] Indictment in foreign courts also does not seem to be a possibility. Drone warfare, unlike traditional warfare does not involve physical deployment of personnel in the battlefield. Operations are carried out in the comfort of CIA headquarters away from the battlefield where strikes are being carried out. This makes it difficult to identify the exact person who is in charge of conducting airstrikes. Consequently, it is virtually impossible for countries that want to prosecute CIA personnel to come up with the exact identity of the person conducting the airstrikes. This is made difficult by the secrecy surrounding CIA operations. Therefore, CIA personnel taking direct part in hostilities are unlikely to face prosecution.

Furthermore, the involvement of CIA personnel in drone strikes means that they become legitimate objects of attack for as long as they continue to take direct part in hostilities. However, as stated above, remote warfare does not involve deployment of personnel in the battlefield. Crawford questions whether CIA drone operators can therefore be targeted in Langley, Virginia or even in their homes, thousands of miles away from the streets and countryside of Iraq and Afghanistan where their strikes target militants.[696] This may not be possible in asymmetrical warfare because the targeted militants do not possess long-range weapons to attack positions that are far away. Therefore, it should be admitted that although theoretically CIA operatives become legitimate objects of target when they run lethal drone programs, their geographical location gives them an advantage such that they cannot be

[694] *Ibid.*
[695] Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 133.
[696] Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 137.

attacked. However, one cannot rule out the possibility that in future, these civilian personnel will become liable to attack wherever they are found. Alston points out that around forty countries are in the process of developing armed drones and "the rules being set today are going to govern the conduct of many States tomorrow".[697] This highlights that drone warfare is likely to cause more challenges for IHL particularly the principle of distinction in the future. Furthermore, the continuous justification of the use of civilians as well as civilian facilities to launch drones to carry out lethal attacks is an open violation of the principle of distinction that needs to be addressed before the current bad precedent being set by the USA is accepted as a norm.

## 4.4 Conclusion

In conclusion, the application of the principle of distinction to drone warfare faces enormous challenges. As discussed above, the question whether drone strikes are capable of complying with the principle of distinction between civilians and combatants and between civilian objects and military objects is debatable. However, it has been demonstrated that drone strikes present challenges to the principle of distinction. Furthermore, the use of civilian personnel to conduct drone strikes further violates the principle of distinction. Since drone warfare is still a developing phenomenon and the rules surrounding the use of such weapons are still developing, it is concluded that IHL should respond by setting binding rules that regulate drone warfare in order to avoid bad precedent being adopted as accepted practice. It is therefore submitted that the principle of distinction needs to be adapted for it to regulate the challenges that arise from drone warfare.

## 4.5 Cyber Warfare

Computer Network Attacks (CNA), commonly referred to as cyber warfare is another development that pose challenges to the principle of distinction. This section will begin with a brief introduction to the concept of cyber warfare and how cyber-attacks are generally

[697] P Alston "The CIA and Targeted Killings Beyond Borders" (2011) 2 *Harvard National Security Journal* 441.

carried out. This discussion will be general and limited, as I do not have the expertise in the field of computer science. The discussion is intended to set a foundation for discussing how cyber warfare relates to the principle of distinction. The chapter will then move on to discuss how cyber warfare interact with the laws of armed conflict, particularly the principle of distinction. Questions that need to be answered are firstly, whether IHL regulates cyber warfare at all, secondly, what constitutes an attack under cyber warfare, thirdly, the relationship between cyber-attacks and the concept of direct participation in hostilities. This discussion will pave way for the main discussion of the challenges of applying the principle of distinction to cyber warfare.

### 4.5.1 Cyber Warfare: Background

In the modern world, many everyday activities are performed using computer system and the internet. For example, computers control communications, power systems, sewage regulation, health care systems, economic activities such as banking among other things.[698] Computers and the internet are also used for military purposes. As Antolin-Jenkins puts it, the internet "provides universal interconnectivity of computer networks without distinction between civilian and military uses".[699] Given the dual purpose that computers and the internet serve, there is need for harmonious use by civilians and the military and any attempt to disrupt the use of internet for one purpose will affect the other. This raises concerns regarding whether it is practically possible for cyber warfare to comply with the principle of distinction. Cyber warfare came into the limelight recently as a result of the "highly publicized cyber-attacks against Georgia, Estonia and Iran".[700] These developments raised questions regarding the application of international law. This section will explore the application of the principle of distinction to cyber warfare.[701]

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[698] J T G Kelsey "Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare" (2008) 106 (7) *Michigan Law Review* 1427 at 1432.

[699] V M Antolin-Jenkins "Defining the Parameters of Cyber War Operations: Looking for Law in All the Wrong Places?" (2005) 51 *Naval Law Review* 132 at 137.

[700] E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 138. It is important to note that strictly speaking, the Estonia and Iran attacks have not been dealt with as cases of cyber warfare.

[701] See R Wedgwood "Proportionality, Cyberwar and the Law of War" (2000) *76 International Law Studies* 219.

### 4.5.2 The Concept of Cyber Attacks

Ottis defines cyber-attacks as "the malicious use of information systems in order to influence the information, systems, processes, actions or decisions of the target without their consent".[702] Cyber-attacks are divided into two groups, which are Computer Network Attacks (CNA) and Computer Network Exploitation (CNE). CNAs are "operations to disrupt, deny, degrade or destroy information resident in computer networks, or the computer and networks themselves".[703] On the other hand, CNE is the "ability to gain access to information hosted on information systems and the ability to make use of the system itself".[704] Cyber warfare has been classified as a subset of what is commonly known as information operations/warfare and this involves the "employment of information-related capabilities in concert with other lines of operation to influence, disrupt, corrupt or usurp the decision-making of adversaries and potential adversaries while protecting our own".[705]

Cyber warfare covers a wide range of hostile techniques that cannot be fully discussed in this study.[706] Several 'weapons' are used to execute cyber-attacks.[707] These include denial of service (DoS), in which the target computer is flooded with a "large amount of legitimate traffic to the effect of rendering it inaccessible to other users".[708] These types of attacks result in disruption and inconveniences and have not caused known physical harm to persons or property.[709] Where DoS attacks are conducted using numerous computer systems, "they are referred to as distributed denial of service attacks" (DDoS).[710] DDoS were used in the 2007 attacks on Estonia where pro-Russian messages encouraged readers to download software to allow their own computers to participate in the attacks against Estonian websites.[711] DDoS were also used to bombard Georgian government websites during the brief Georgian-Russian

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[702]R Ottis "On Definitions: Conflicts in Cyberspace". 14 July http://conflictsincyberspace.blogspot.co.za/ (accessed 1 April 2016).
[703]E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 139.
[704]*Ibid.*
[705]US Joint Chiefs of Staff, Joint Publication 1-02 Department of Defense Dictionary of Military and Associated Terms, 8 November 2010 (as amended to 15 January) see page 140.
[706]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 140.
[707]*Ibid.*
[708]P Shakarian *et al, Introduction to Cyber-Warfare: A Multi*-Disciplinary *Approach* (2013) 12-13
[709]E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 140.
[710]*Ibid.*
[711]J Davis "Hackers Take Down the Most Wired Country in Europe" Wired Business http://www.wired.com/2007/08/ff-estonia/ (accessed 18 July 2016).

conflict in 2008.[712] Other sophisticated weapons that can also be used in cyber-attacks are called logical weapons.[713] These are used in conducting reconnaissance of vulnerable opponent networks and attacking the targets found.[714] This will result in the information being retrieved from the targeted networks or "the targeted network being disrupted to render it inoperative or defective".[715] Logical weapons can also cause damage to systems and hardware dependent on the software being attacked.[716] An example of a cyber-attack using logical weapons is the attack on Iranian nuclear facility at Natanz in 2010.[717] In this incident, the "Stuxnet worm was inserted into the closed network of the nuclear facility with the intention of disrupting the network through malware".[718] The attack caused the "IR-1 centrifuges used for enriching uranium to spin at higher or lower frequencies and consequently causing mechanical damage to some centrifuges and sub-optimal performance of other centrifuges".[719] Crawford points out that while weapons such as DoS are easily accessible, logical weapons are more complex and therefore are likely to be only available to states that can invest more time in the production of such weapons.[720] However, the scope of cyber-attacks is "extensive and whichever definition is used, cyber-warfare encompasses a range of actions which are available to military planners".[721]

### 4.6 Cyber Warfare and the Laws of Armed Conflict

One question that has been raised is whether the laws of armed conflict apply to cyber warfare. The Geneva Conventions and the Additional Protocols do not refer to cyber warfare and it appears as if drafters of the Conventions did not contemplate a situation where armed

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[712]S Korns, J Kastenberg 'Georgia's Cyber Left Hook' 2008/2009) 38 *Parameters* 60 at 60. http://search.proquest.com/openview/6e25e711ef5871bd77cd13635fc7ca1f/1?pq-origsite=gscholar (accessed 18 July 2016).
[713]E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 141.
[714]*Ibid.*
[715]J Andress and S Winterfeld *Cyber Warfare: Techniques, Tactics and Tools* for Security Practitioners (2011) 83.
[716]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 141.
[717]*Ibid.*
[718]*Ibid.*
[719]*Ibid.*
[720]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 142.
[721]E Kodar "Applying the law of armed conflict to cyber-attacks: from the Martens clause to Additional Protocol I" (2012) *The Law of Armed Conflict: Historical and Contemporary Perspectives, Tartu University Press: Tartu* " http://www.ksk.edu.ee/wp-content/uploads/2012/12/KVUOA_Toimetised_15_5_Kodar.pdf (accessed 7 April 2016).

conflicts will be fought from computers in the comfort of offices. The United States of America has argued that the "current IHL framework can be applied to cyber warfare by analogy".[722] The White House in its International Strategy for Cyberspace point out that cyberspace can be regulated through existing law and that "there is no need for re-invention of customary international law to control state behaviour".[723] The White House further states that "international norms guiding state behaviour in times of peace and conflict also apply in cyberspace".[724] However, others have argued that IHL as it stands is inadequate to deal with cyber-warfare hence they have suggested a negotiation of convention to deal with cyber-warfare.[725] For example, Brown has suggests that an international convention dealing with cyber warfare should be promulgated.[726]

Despite the arguments that the law of armed conflict is not applicable to cyber warfare, it is submitted that this position could be mediated. Although the Geneva Conventions and the Additional Protocols do not specifically refer to cyber-warfare, it should be remembered that the drafters of the Conventions and treaties that were negotiated before acknowledged that means and methods of warfare are not static and may develop beyond the regulation of the existing rules and principles. This is reflected in the Martens Clause, which was first included in the First Hague Conferences of 1899.[727] The Martens Clause provides that in cases not dealt with in the Hague Regulations, belligerents and population remain under protection of the "principles of international law, as they result from the usages established between civilised nations, from the laws of humanity and the requirements of the public conscience".[728] The Martens Clause has been repeatedly re-affirmed in Conventions which succeeded the Hague Regulations and this confirms its relevance in providing guidance in dealing with challenges that arise from the emergence of new means and methods of warfare

[722]"An Assessment of International Legal Issues in Information Operations" *Department of Defense Office of General Counsel* May 1999 http://www.au.af.mil/au/awc/awcgate/dod-io-legal/dod-io-legal.pdf (accessed 5 April 2016).
[723]"International Strategy for Cyberspace: Prosperity, Security and Openness in a Networked World" *The White House*, 2011 Washington https://www.whitehouse.gov/sites/default/files/rss_viewer/international_strategy_for_cyberspace.pdf (accessed 5 April 2016).
[724]*Ibid.*
[725]Kelsey 2008 *Michigan Law Review* 1430.
[726]D Brown "A Proposal for an International Convention to Regulate the Use of Information Systems in Armed Conflict" (2006) 47 (1) *Harvard International Law Journal* 179.
[727]See discussion in Chapter 2, section 2.3.6.1.
[728]T Meron "The Martens Clause, Principles of Humanity, and Dictates of Public Conscience" (2000) 94 (1) *The American Journal for International Law* 78 at 79.

that are not dealt with under the existing legal principles. For instance when the International Court of Justice dealt with the nuclear weapons case, it relied on the Martens Clause in coming to its conclusion that IHL applies to nuclear weapons.[729] Kodar argues that the "principle reaffirms that even without the explicit mention of cyber-attacks in modern treaties or customs, certain fundamental restrictions derived from law of armed conflict still apply".[730] It is submitted that the law of armed conflicts is applicable to cyber warfare by virtue of the Martens Clause.[731]

IHL scholars support the view that the current IHL rules apply to cyber warfare. For example, at the 60 Years of the Geneva Conventions and the Decades Ahead conference organised by the ICRC to discuss the new challenges faced by IHL, the "majority view was that the Geneva and Hague laws can give guidance on matters relating to cyber warfare".[732] Furthermore, the Tallinn Manual on the International Law Applicable to Cyber Warfare (Tallinn Manual), a product of 3 years of work by international law experts also affirms the position that IHL rules are applicable to cyber warfare.[733] The Tallinn Manual lays down 95 non- binding rules that the drafters think are applicable to cyber-warfare.[734] Rule 20 of the Tallinn Manual provides that cyber operations executed in the context of an armed conflict are subject to the law of armed conflict".[735] However, it acknowledges that given the unique challenges that cyber warfare presents, this method of warfare may not be fully compatible with the old IHL rules.[736] Legal scholars concur that it cannot be legitimately claimed that

[729]*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion,* I.C.J. Reports 1996, p. 226, International Court of Justice (ICJ), 8 July 1996, available at: http://www.refworld.org/docid/4b2913d62.html [accessed 13 April 2016].
[730]E Kodar "Applying the law of armed conflict to cyber-attacks: from the Martens clause to Additional Protocol I" (2012) *The Law of Armed Conflict: Historical and Contemporary Perspectives, Tartu University Press: Tartu* " http://www.ksk.edu.ee/wp-content/uploads/2012/12/KVUOA_Toimetised_15_5_Kodar.pdf (accessed 7 April 2016).
[731]See Chapter 2, section 2.3.6.1 detailed discussion of the Martens Clause and its effect on the application of the laws of armed conflicts.
[732]*Ibid.*
[733]M N Schmitt (ed) "Tallinn Manual on the International Law Applicable to Cyber Warfare" *Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence* Cambridge University Press: New York http://www.peacepalacelibrary.nl/ebooks/files/356296245.pdf (accessed 10 April 2916).
[734]E Kodar "Applying the law of armed conflict to cyber-attacks: from the Martens clause to Additional Protocol I" (2012) *The Law of Armed Conflict: Historical and Contemporary Perspectives, Tartu University Press: Tartu* " http://www.ksk.edu.ee/wp-content/uploads/2012/12/KVUOA_Toimetised_15_5_Kodar.pdf (accessed 7 April 2016).
[735]Rule 20, Tallinn Manual.
[736]Tallinn Manual 3.

there is an absolute vacuum when it comes to regulation cyber-warfare.[737] One can therefore be conclude that IHL rules as they stand generally apply to cyber warfare. The question this thesis is seeks to answer is whether cyber warfare complies with the requirement to distinguish between civilians and combatants one the hand and civilian objectives and military objectives on the other.

### 4.6.1 Tallinn Manual on the International Law Applicable to Cyber Warfare

The Tallinn Manual provides guidance on how the law applies to cyber warfare both in peacetime and during armed conflicts.[738] The Manual is not legally binding on states and it is a "product of a group of independent experts acting in their own personal capacity".[739] Although the Tallinn Manual is non- binding on states, it is important to discuss the position adopted since it may set the tone for future attempts to regulate cyber warfare.[740] It should be noted from the onset that the Tallinn Manual mainly deals with cyber-to-cyber operations and therefore cannot be relied on to regulate kinetic-to-cyber hostilities.[741] Thus, the application of law in the latter situation remains to be explored. The discussion of the Tallinn Manual shall mainly focus on the application of the principle of the principle of distinction in cyber warfare. Since the principle of distinction only applies in situations of an armed conflict, it is also important to discuss how the Tallinn Manual defines cyber armed conflict.

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[737] *See* Kelsey 2008 *Michigan Law Review* 1427 and K Bennelier-Christakis, "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias, R Buchan *Research Handbook on International Law and Cyberspace* Research Handbooks in International Law series (2015).

[738] M N Schmitt (ed) "Tallinn Manual on the International Law Applicable to Cyber Warfare" Prepared by the International Group of Experts at the Invitation of the NATO Cooperative Cyber Defence Centre of Excellence http://www.peacepalacelibrary.nl/ebooks/files/356296245.pdf. (2013) 9 (accessed 7 May 2016). However, its reference to *jus ad bellum* is very limited as the focus in on *jus in bello*

[739] Tallinn Manual 29.

[740] Furthermore, the Manual is the only Document at the moment that has been produced by international experts that deals with cyber warfare.

[741] Tallinn Manual 18.

### 4.6.2 The definition of armed conflict under cyber warfare

Cyber operations carried out in "the context of an armed conflict are subject to the law of armed conflict".[742] Therefore, for IHL to be applicable to cyber warfare, there should be an existence of an armed conflict.[743] The Tallinn Manual defines cyber armed conflict as "a situation involving hostilities, including those conducted using cyber means".[744] Therefore, cyber warfare may take place where there are cyber-to-cyber hostilities or in situation where there are ongoing kinetic hostilities. According to the Commentary that accompanies the Tallinn Manual, the phrase "in the context of an armed conflict" is intended to mean that there should be "a nexus between the cyber activity and the armed conflict for IHL to be applicable".[745] The Tallinn Manual further provides that "the law of armed conflict does not embrace activities of private individuals or entities that are unrelated to the armed conflict".[746] Thus, where an individual or groups of people attack a certain target and the attack is unrelated to the armed conflict, such a situation is not regulated by the law of armed conflict. This is an important inclusion since there is need to differentiate cyber-criminal activities from cyber armed conflict. Therefore, this discussion will not deal with cyber-criminal activities that are not related to an armed conflict. For example, the study will not deal with cyber espionage that is not carried out within the context of an armed conflict.

The Tallinn Manual further provides that the law of armed conflict applies to both international and non-international armed conflicts.[747] It is important to address one obstacle that may arise in relation to classification of armed conflict. The manual acknowledges that the application of the law of armed conflict to cyber operations is problematic due to the difficulties of identifying the "existence of a cyber-operations, its originator, intended object of attack, and its precise effects".[748] In the few cyber operations that have been experienced, not one state has taken responsibility for the attacks.[749] This therefore makes it difficult to

[742]Tallinn Manual Rule 20.
[743]Tallinn Manual, Commentary to Rule 20 para 2.
[744]*Ibid.*
[745]Tallinn Manual, Commentary to rule 20 para 5.
[746]Commentary to Rule 20 para 7.
[747]Tallinn Manual, Rule 22 and 23.
[748]Commentary to Rule 20 para 9.
[749]For example, no state accepted responsibility for the cyber-attack on Estonia. Even though it was widely believed that Russia was being the attacks, no evidence was put forward to prove such claims. Furthermore, no

ascertain the original source of the attack in order to classify the armed conflict. As Cavelty correctly puts it, in cyber warfare, "the nature and origin of the threat are oftentimes unknown and the enemy becomes a faceless and remote entity, a great unknown that is almost impossible to track".[750] This problem raises a danger of misattribution of an attack, resulting in an attacked state directing its counter-attacks against a wrong state. For example, in 1998, the United States Department of Defence suffered a series of cyber-attacks that were initially attributed to foreign powers, including Iraq.[751] However, investigations later revealed that two teenagers were responsible for the attacks.[752] Hollis concurs, "Anonymity in cyberspace not only leads to issues of attribution and doubts as to the nature of the attack, it also contributes to insecurity as to the appropriate legal framework".[753] Therefore, unless states begin to take responsibility for their cyber operations, the characterisation of an armed conflict shall remain problematic. Despite this problem, the Tallinn Manual provides that "these questions of fact do not prejudice the application of the law of armed conflict".[754] Therefore, despite the challenges of applying the law to cyber warfare, it remains applicable in both international and non-international cyber armed conflicts.

### 4.6.3 Cyber warfare and the definition of 'attacks'

Before examining how the principle of distinction applies to cyber warfare, one should deal with the preliminary question of whether distinction applies to cyber warfare at all. This is because the principle of distinction only applies when an act constitutes an attack as defined in Article 49(1) of Additional Protocol I. In other words, parties to an armed conflict are required to adhere to the principle of distinction when they are carrying out 'attacks' as defined in the Additional Protocols. This is highlighted in Rule 1 of Customary International Law Rules, which provides that "parties to the conflict must at all times distinguish between civilians and combatants and attacks may only be directed against combatants not

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state accepted responsibility for the 2010 Stuxnet attack on Iran's nuclear plant even though it also believed that the United States of America was behind the cyber-attacks.

[750]See M D Cavelty "Unravelling the Stuxnet Effect: Of Much Persistence and Little Change in the Cyber Threats Debate" (2011) 3 *Military and Strategic Affairs* 11.

[751]"U.S. Studies a New Threat: Cyber Attack" *Washington Post* Sunday, May 24, 1998; Page A01 http://www.washingtonpost.com/wp-srv/washtech/daily/may98/cyberattack052498.htm (accessed 9 May 2016).

[752]*Ibid.*

[753]D.B. Hollis, 'An e-SOS for Cyberspace' (2011) 52 (2) *Harvard International Law Journal* 374 at 378.

[754]Commentary on Rule 20 para 20, Tallinn Manual.

civilians".[755] Therefore, in order for the principle of distinction to apply to cyber warfare, one needs to consider whether cyber operations amount to attacks.

Article 51(2) provides that "civilian population as well as individual civilians shall not be the object of attack,"[756] while Article 52(1) states that "civilian objects shall not be the object of attack or reprisals".[757] From these provisions, it is clear that these provisions protect civilians and civilian objectives from 'attacks'. Dormann argues that "the definition of the term 'attack' is of decisive importance for the application of the various rules giving effect to the principle of distinction and for most of the rules providing special protection for certain objects".[758] It is only after ascertaining whether cyber operations constitutes attacks that one can determine whether parties to the conflict needs to observe the principle of distinction when conducting cyber operations.[759] I will turn to examine whether cyber operations qualify as attacks.

Article 49(1) of Additional Protocol I defines attacks as "acts of violence against the adversary, whether in offence or in defence".[760] Article 49(2) provides that "the provisions of this Protocol with respect to attacks apply to all attacks in whatever territory conducted,"[761] while Article 49(3) provides that the provisions of Article 49 apply to "any land, air or sea warfare which may affect the civilian population, individual civilians or civilian objects on land".[762] Bothe *et al,* who were some of the drafters of the Additional Protocol point out that:

> "The term 'acts of violence' denotes physical force. Thus, the concept of 'attacks' does not include dissemination of propaganda, embargoes, or other non-physical means of psychological or economic warfare."[763]

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[755]J M Henckaerts, L Doswald-Beck *Customary International Humanitarian Law Vol 1: Rules ICRC* (2005) 3.
[756]Additional Protocol I.
[757]Article 52(1) of Additional Protocol I.
[758]K Dormann "Applicability of the Additional Protocols to Computer Network Attacks" https://www.icrc.org/eng/assets/files/other/applicabilityofihltocna.pdf (accessed 20 April 2016).
[759]*Ibid.*
[760]*Ibid.*
[761] Article 49(2) of Additional Protocol I.
[762]Article 49(3) of Additional Protocol I.
[763]M Bothe, K J Partsch, W A Solf, *New Rules for Victims of Armed Conflicts* (1982) 289.

Some cyber operations have the potential of inflicting violence and therefore constitute attacks under IHL. This means civilians should be protected from the effects of such violence. Examples of cyber operations that can inflict violence on civilians include an attack intended to cause malfunction of the civilian air traffic control system in order to cause a plane crash, deliberate attack on medical database resulting in "civilians or wounded soldiers to receiving transfusions of the incorrect blood type,"[764] or a cyber operation directed at works or installations with the intention of causing the release of dangerous forces.[765] Since these activities involve the use of force, one would conclude that they are undoubtedly subject to the provisions of Additional Protocol I including the principle of distinction.

However, a strict reliance on the word 'violence' to determine whether a cyber-operation constitutes an attack for the purpose of the principle of distinction may have catastrophic and consequences. Schmitt argues that "since Article 49 appears to require violent acts for qualification as an attack, by strict textual interpretation, non-kinetic operations, that is those operations which do not involve the use of physical force would be excluded".[766] This interpretation is problematic since it leaves civilians and civilian objects vulnerable to all forms of attacks that are not carried out in a violent manner. For example, Dinstein argues that "the acid test of an attack in the law of armed conflict frame of reference is that acts of violence are committed and when devoid of violence act however detrimental to the enemy does not count as attack".[767] Unlike conventional attacks, most cyber-attacks are carried out in a non-violent manner. For example, cyber-attacks may involve a non-violent infiltration of the targeted computer system. However, this does not imply that the attack will have non-violent consequences. Cyber operations carried out in a non-violent manner may have detrimental consequences similar to those that result from the deployment of conventional kinetic weapons. As Bannelier- Christakis argues, "a definition of attack strictly focused on the act itself could exclude from the principle of distinction a wide range of cyber-

[764]Kelsey 2008 *Michigan Law Review* 1438.
[765]Article 56 of Additional Protocol I prohibits attacks directed at "works or installations containing dangerous forces" such as dams and nuclear electrical generating stations.
[766]M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues," *Naval War College International Law Studies* http://ssrn.com/abstract=1801176 (accessed 21 March 2016).
[767]Y Dinstein "The Principle of Distinction and Cyber War in International Armed Conflicts" (2012) 17 (2) *Journal of Conflict & Security Law* 261 at 264.

operations".[768] Adopting this position will render the principle of distinction inapplicable in most cases of cyber warfare.

In order to avoid this dilemma, scholars have argued that violence should not be the determinant factor in deciding whether the law of armed conflict is applicable or not. Schmitt is of the view that in order to avoid this dilemma, an interpretation method that will ensure that IHL offers maximum protection to civilians during cyber warfare in the same manner it does in conventional kinetic warfare should be adopted.[769] He argues that although "treaties should be interpreted in accordance with the ordinary meaning to be given to their terms, such interpretations must be made in context and in light of their object and purpose".[770] Schmitt further argues, "While Article 49 is framed in terms of the nature of the act amounting to an attack, the drafters must have been primarily concerned with its consequences for the civilian population".[771] As the learned author argues, "the central object and purpose of Additional Protocol I is the protection of the civilian population and violence constituted useful prescriptive shorthand for use in rules designed to shield the population from harmful effects".[772] Therefore, Schmitt suggests that purposive interpretation should be adopted in order to interpret the concept of 'attack' under IHL. One should not focus on whether a cyber-attack on civilians was carried out through violent means or not. Instead, one should be concerned with whether such an attack has the effect of violating the protection that IHL seeks to confer on civilian population. If a cyber-operation has the effect of endangering civilian protection, then it will be a violation of IHL and therefore prohibited. This approach is supported by Bannelier- Christakis who argues that the "identification of an attack should not be based on the nature of the act but rather its consequences".[773] Instead of focusing on violence as a determinant factor, Bannelier- Christakis argues that the Kinetic

[768]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias, Russell Buchan (eds*) Research Handbook on International Law and Cyberspace* (2015) 7.
[769]M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues," *Naval War College International Law Studies* http://ssrn.com/abstract=1801176 (accessed 21 March 2016).
[770]*Ibid.*
[771]*Ibid.*
[772]*Ibid.*
[773]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias and R Buchan (eds*) Research Handbook on International Law and Cyberspace* (2015) 3.

Effects Equivalency Test should be used in order to determine whether a cyber-operation falls under the definition of attack.[774]

#### 4.6.3.1 The Kinetic Effects Efficiency Test

According Kinetic Effects Efficiency Test (KEE test), "violence should be evaluated in terms of effects rather than of the means used".[775] This means that in order for one to determine whether cyber operations directed on civilians are prohibited under the principle of distinction, the effects of violence on the civilians should be the determining factor, rather than the manner in which the attack was carried out. Melzer points out that in terms of the KEE test, acts of violence will be acts that cause "death or injury of persons or the physical destruction of objects".[776] This approach ensures that cyber operations that are carried out through non-violent means but whose effects are violent qualify as attacks under IHL. This in turn ensures that civilians receive maximum protection from all forms of harmful attacks. For example, an infiltration of a computer system controlling a nuclear or chemical plant or electricity supply using a cyber worm that results in death or injury to people will be prohibited under the principle of distinction even though it is carried out in a non-violent manner.

#### 4.6.3.2 The Tallinn Manual

The Tallinn Manual adopts a similar approach to the one discussed above. Section 2, which deals with attacks, provides that IHL principles of distinction, necessity and proportionality applies to cyber operations as they do to other means and methods of warfare.[777] Rule 30 state that a cyber-attack is a "cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons, damage, or destruction to objects".[778] The Tallinn KEE test. It provides that an act must be characterised in terms of the effects it

[774]*Ibid.*
[775]*Ibid.*
[776]N Melzer "Cyber warfare and International Law" http://unidir.org/files/publications/pdfs/cyberwarfare-and-international-law-382.pdf (accessed 4 April 2016).
[777]Tallinn Manual 91.
[778]Rule 30.

causes rather than the means employed.[779] It further provides that "violence must be considered in the sense of violent consequences and not limited to violent acts".[780] Furthermore, the Tallinn Manual states that IHL protect "loss of civilian life, injury to civilians, damage to civilian objects or a combination of these and that *de minimis* damage or destruction does not meet the threshold of harm required".[781] It also states that an act will constitute an attack if it causes serious illness and severe mental suffering that are tantamount to injury.[782] The experts agree that the law of armed conflict does not characterise cyber operations that do not cause the type of damage discussed above as attacks. For example, cyber operations that cause large-scale inconveniences such as blocking e-mail communications will not meet the threshold of harm required in order to constitute an attack for the purpose IHL.[783] The majority of experts were of the view that the law of armed conflict do not extend this far. In other words, the laws of armed conflicts do not apply to cyber operations that do not cause harm or injury. On the other hand, the minority argued that if armed conflict resulting in large-scale adverse effect that however do not amount to an attack breaks out, the international community would generally regard them as attacks.[784] Furthermore, if cyber operations do not cause harm to the targeted object but cause foreseeable collateral damage, it will amount to an attack".[785] The Tallinn Manual provides that "a cyber operation need not actually result in the intended destructive effect to qualify as an attack".[786] Instead, an act constitute an attack when its intended consequences meet the requisite threshold of harm.[787] Therefore, it seems most scholars support the KEE test as the appropriate test for determining whether a cyber operation constitute an attack under IHL.

[779]Tallinn Manual, Commentary on Rule 30 para 3.
[780]*Ibid.*
[781]Tallinn Manual, Commentary on Rule 30 para 4.
[782]Tallinn Manual, Commentary to Rule 30 para 8. The drafters argue that this is in line with Article 51(2) of Additional Protocol I that prohibits "acts of threats of violence the primary purpose of which is to spread terror among the civilian populations".
[783]Commentary to Rule 30 para 12.
[784]*Ibid.*
[785]Tallinn Manual, Commentary on Rule 30 para13.
[786]Tallinn Manual, Commentary on Rule 30 para 14.
[787]*Ibid.*

#### 4.6.3.3 Criticism of the KEE Test

The KEE test resolves some but not all of the problems. There are some issues regarding the protection offered to civilians and civilian objects from cyber-attacks under the principle of distinction that remain unresolved. The first problem relates to the fact that the KEE test only protects civilians from injury or death but not necessarily from other consequences that may result from cyber-attacks. Since cyber-operations' compliance with the principle of distinction is judged from its effects, this means that civilians will have no protection from other operations that do not cause injury or death. For example, a cyber-operation that neutralises or interferes with the normal functioning of a civilian installation will not constitute an attack as long as it will not result in death or injury to persons.[788] The drafters of the Tallinn Manual attempted to address this concern by stating that for an interference or neutralisation of an installation to qualify as an attack, the restoration of functionality of such an installation should require replacement of physical component.[789] This means that an "operation resulting in the suspension of the normal activity of a plant will not constitute an attack unless the resumption of operation of the system requires the physical replacement of certain components".[790] This reasoning leads to a conclusion that the civilian population is not protected from discomfort or inconveniences that may be caused by cyber warfare. For example, if the large-scale cyber-attack on Estonia in 2007 had taken place in the context of an armed conflict and the principle of distinction was applicable, civilians would not have protected from all the disruption and inconveniences that arose from the shutdown of government websites, media, communication and banking services.

The position adopted by the Tallinn Manual leaves many civilians exposed to cyber-attacks intentionally directed at civilian population or civilian objects. In other words, states will be free to target civilians in the knowledge that such attacks will not attract condemnation as long as they do not result in death. Kelsey argues that these "potential non-lethal nature of cyber weapons may cloud the assessment of an attack's legality, leading to more frequent

[788]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias, Russell Buchan (eds) *Research Handbook on International Law and Cyberspace* (2015) 10.
[789]Tallinn Manual on the international Law applicable to Cyber warfare 108.
[790]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias and R Buchan (eds) *Research Handbook on International Law and Cyberspace* (2015) 10.

violations of the principle of distinction than in conventional warfare".[791] This point can be illustrated through the example of the cyber-attacks that were carried out on Georgia in 2008. The attack on Georgia resulted in the shutting down of government websites; domestic and foreign media; banks; and private internet servers and blogs among other things".[792] According to Schmitt, if one relies on the interpretation of 'attacks' discussed above, especially the KEE test, the operations against Georgia do not constitute attacks and therefore are permissible since they did not cause physical harm of or injury".[793] One would need to imagine a situation where a party to the conflict constantly bombard civilians of the opposing party with cyber operations similar to those experienced in Georgia in order to harass and demoralise citizens. Although these operations may not be considered attacks since they do not result in harm or injury, one can argue that IHL should come to the rescue of such civilians by prohibiting such acts since this may amount to terrorising civilians, something that is prohibited under IHL. It is submitted that IHL would have failed its purpose if it fails to protect civilians in such cases. This may also open floodgates of cyber-attacks directed at civilians by parties to an armed conflict in the knowledge that they will not face condemnation for violating the principle of distinction.

The second problem that the KEE test cannot solve is that the effects of cyber-attacks are not as apparent as the test assumes. As discussed above, KEE test requires violence to be evaluated in terms of effect rather than means used. While some effects of cyber-attacks may be direct, others are likely indirect. For example, an attack on an electricity power station may not in itself kill or injure a person directly but it may affect a person who is on life support machine in hospital or affect patients undergoing operations in hospitals. Similarly, carrying out cyber operations directed at communication system of a country may appear to cause mere inconveniences that do not cause harm or damage but this may affect the provision of emergence services such as ambulance and fire- fighting services. It is not clear whether the KEE test takes into consideration these indirect violent effects when assessing the violent effects of an attack. Not all cyber-attacks have visible or tangible effects and it may be a very difficult task to assess the amount of damage caused by an attack. As

[791]Kelsey 2008 *Michigan Law Review 1436.*
[792]M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues"
[793]M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues," *Naval War College International Law Studies* http://ssrn.com/abstract=1801176 (accessed 21 March 2016).

Bannelier-Christakis rightly puts it, the proof of the existence and the precise extent of the damages caused by cyber operations could become a real *probatio diabolica*, which is difficult to prove.[794] Therefore, if the KEE is relied on, any cyber operation will be justified under IHL in the absence of proof of harm or injury to civilian or damage or destruction of civilian objects. Once again, this renders civilians more vulnerable under cyber-attacks than under conventional kinetic attacks where the damage caused is visible, tangible and immediate.

The last difficulty that arises if one relies on the KEE test to determine whether civilians are protected from a specific cyber operation is that the test seems to rely on an *ex post facto* determination of the effects of attacks to determine whether it is permissible or not. In other words, if the effects of an attack are to determine whether an attack violates the principle of distinction or not, this will mean that one will have to wait for the attack to take place in order to determine whether it violated the law or not. This appears to expose civilians to attacks in cyber warfare than in conventional attacks where kinetic weapons are used. This is because determining whether an operation constitute an attack after the attack has been carried out leaves it open for states to launch cyber operations targeting civilians in the belief that the attack will not cause harm or injury. This approach will contradict the spirit of the principle of distinction. IHL seeks to lay down uniform rules, which all parties to the conflict must know with certainty and must educate their armed forces on in order for them to adhere to those rules during an armed conflict. However, if the legality of cyber-operations is to be determined based on its results, the will lack legal certainty and states will not have binding guidelines on how their armed forces should conduct themselves.

One way of avoiding reliance on *ex post facto* evidence to determine whether an attack is permissible is for states to agree on activities (other than those that *prima facie* constitutes attacks under IHL) that have the potential of inflicting harm, injury or death on civilian population and civilian objectives and therefore prohibit such acts. Thus, a list of prohibited acts will be drawn based on the potential harm they may cause on civilians. This however has its own problems. Firstly, the types of cyber operations that fall in the grey area between

[794]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias and R Buchan (eds) *Research Handbook on International Law and Cyberspace* (2015) 8.

those that cause injury, death or damage to civilian population or civilian objects and those that will not cause any harm do not always produce the same results. Turns uses the example of cyber-attacks on Georgia and Estonia to illustrate this point.[795] In both incidents, there were widespread attacks on the computer network system including shutting down of internet servers.[796] Turns argues that even though the two countries suffered a similar kind of attack, a more internet reliant Estonia is more likely to have suffered harm than Georgia, which is less reliant on computers.[797] Bannelier-Christakis concurs that "the magnitude and seriousness of these injuries are extremely variable and depend on parameters as different as the dependence of a society toward certain system or the appropriateness of human responses to these events".[798] Thus, the question whether a cyber-attack will cause harm or injury largely depends on how the targeted state relies on computers.

#### 4.6.3.4 Other approaches to defining Attacks

Dörmann suggests a solution in order to address the failure by the KEE test to define operations that result in inconveniences as attacks.[799] He notes that the definition of military objectives in Article 52(2) of Additional Protocol I does not only include objects whose total or partial destruction or capture offers military advantage.[800] In terms of Article 52(2), military objectives also include objects whose neutralisation will offer military advantage.[801] Dörmann argues that since the definition of military objectives includes those whose neutralisation offer military advantage, it is irrelevant whether an object is disabled through destruction or in any other way.[802] This means that for him, the requirement for damage, destruction, death or injury is not relevant to qualify as an attack since neutralisation alone will be sufficient to make it an attack. This therefore means that cyber operations targeting

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[795]D Turns "Cyber warfare and the Notion of Direct Participation in Hostilities" (2012) 17 (2) *Journal of Conflict and Security Law* 279 at 287.
[796]*Ibid.*
[797]*Ibid.*
[798]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias and R Buchan (eds*) Research Handbook on International Law and Cyberspace* (2015) 9.
[799]K "Dörmann, "Applicability of the Additional Protocols to Computer Network Attacks*" Paper delivered at the International Expert Conference on Computer Network Attacks and the Applicability of International Humanitarian Law, Stockholm, Nov. 17–19, 2004*) https://www.icrc.org/eng/assets/files/other/applicabilityofihltocna.pdf (accessed 24 May 2016).
[800]*Ibid.*
[801]*Ibid*
[802]*Ibid.*

civilian objects with the intention of neutralising them and does not offer military advantage constitute a violation of the principle of distinction.

However, Dörmann's approach has its own problems. While Dörmann attempts to address the problem of under-inclusiveness of the KEE test, Schmitt argues that his approach "poses the opposite risk of over inclusivity".[803] He argues that Dörmann's approach "would encompass all denial of service attacks, including those in which mere inconvenience are caused, for example because of blocking a television broadcast or university website".[804] Schmitt further argues that there is no state practice to demonstrate that IHL prohibits causation of inconveniences on civilians.[805] Instead, Schmitt argues that inconveniences and interference with the daily lives of civilians are a frequent result of armed conflict and psychological operations directed against the civilian population are common".[806] Dörmann's approach therefore has the effect of prohibiting all forms of cyber activities no matter how minor inconveniences they will cause.

In light of the discussion above, one can conclude that besides the obvious cases where cyber-attacks are carried out through violent means or result in clear harm or injury, there is no consensus as to when cyber operations will constitute attack attacks under IHL. As discussed above, the principle of distinction only applies to acts that qualify as attacks. Therefore, in the absence of clarity regarding the criteria of determining whether a certain cyber operation is an attack or not, it will remain difficult for parties involved in cyber warfare to know the circumstances they are required to apply the principle of distinction when carrying out operations. IHL needs to find a balance between protecting civilian population and civilian objects on the one hand and ensuring that cyber military operations are not unreasonably limited on the other hand. There question of what operations qualify as attacks needs to be clarified in order for states to know what operations are permissible and what operations are not permissible under the law. In the absence of this clarity, it may be difficult to apply the principle of distinction to cyber warfare.

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[803]M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues," *Naval War College International Law Studies* http://ssrn.com/abstract=1801176 (accessed 21 March 2016).
[804]*Ibid.*
[805]*Ibid.*
[806]*Ibid.*

## 4.7 Application of the principle of distinction in cyber warfare

Having discussed the definition of attacks in IHL, it can be argued that there are many cyber operations that fall under the definition of attacks as provided for in Additional Protocol I. Consequently, the principle of distinction is applicable to cyber warfare. I will move on to discuss the challenges of applying the principle of distinction to cyber warfare, which is the main objective of this section. This section will investigate application of the principle of distinction between civilians and combatants and between civilian objects and military objectives to cyber warfare.

### 4.7.1 Distinction between combatants and civilians in cyber warfare

Rule 31 of the Tallinn Manual is the main section that deals with the general principle of distinction. It provides that "the principle of distinction applies to cyber- attacks".[807] According to the Tallinn Manual, a cyber operation is prohibited under the principle of distinction if it is directed against civilians or civilian objects and rises to the level of an attack.[808] Further, the Tallinn Manual states that "certain operations against the civilian population such as psychological operations are lawful".[809] The protection of civilians is repeated in Rule 32, which provides that civilian population as well as individual civilians shall not be the object of attack.[810] However, this protection is subject to the requirement that civilians do not take direct part in hostilities. Furthermore, where it is foreseeable that a cyber-attack directed against a military objective will cause incidental damage, destruction, death or injury of civilians or civilian objects, such civilians and civilian objects do not become objects of attack.[811] In such instances, the attacker should apply the principle of proportionality in determining whether to launch an attack. Rule 33 deals with a situation

[807]Rule 31. The rule draws from Article 48 of Additional Protocol I, which provides that "Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives".
[808]Commentary of Rule 31 para 5.
[809]*Ibid.* An example of a cyber operation that would be lawful is transmitting email messages to the civilian population.
[810]Rule 32.
[811]Tallinn Manual, Commentary on Rule 32 para 6.

where there is doubt regarding the status of persons. It provides that "In case of doubt as to whether a person is civilian, that person shall be considered to be a civilian".[812]

#### 4.7.1.1 Combatants

The Tallinn Manual adopts an approach almost similar to that of the Geneva Conventions and the Additional Protocol I regarding the principle of distinction. Rule 26 provides that there are two categories of combatants. These are the "armed forces of a party to the conflict as well as members of militia or volunteer corps forming part of such armed forces".[813] The second category consists of members of other militia and members of volunteer corps, including those of organised resistance movements, belonging to a Party to the conflict provided that they meet the requirements set out in Article 4A (2) of the Third Geneva Convention.[814] The Tallinn Manual further provides that "every state organ meets the requirements to belong to a party to the conflict".[815] More so, it provides that a party to a conflict may incorporate a paramilitary or armed law enforcement agency into its armed forces but this provision does not extend to intelligence or other government agencies not entrusted with law enforcement.[816] Therefore, the definition of combatants in the Manual is similar to the one in Additional Protocol I.

#### 4.7.1.2 Civilians

Civilians are defined under Rule 29 of the Tallinn Manual. The negative definition in the Additional Protocol I that civilians are persons who are not members is adopted.[817] However, the experts disagreed on the consequences of civilian participation in hostilities. While the majority were of the opinion that persons who take direct participation in hostilities do not

[812] Tallinn Manual, Rule 33.
[813]Tallinn Manual, Rule 26 para 4.
[814]These are the requirements of being commanded by a person responsible for his subordinates, wearing a distinctive emblem or attire that is recognisable at a distance, carrying arms openly and conducting operations in accordance with the law of armed conflict.
[815]Tallinn Manual, Rule 26 para 7.
[816]Tallinn Manual, Rule 26 para 15.
[817]Tallinn Manual, Rule 29.

lose their protections, the minority view was that civilians who take direct participation in hostilities "qualify as neither combatants nor civilians and therefore do not benefit from the protections of the Geneva Conventions".[818] Therefore, the Manual does not change the position of the Additional Protocols regarding the definition of civilians.

#### 4.7.1.3 Challenges of applying the principle of distinction to cyber warfare

The drafters of the Tallinn Manual tried to adhere to the traditional definition of civilians and combatants as provided for in the Additional Protocols. However, the first challenge is that the Tallinn Manual does not shift from the traditional principle distinction in that it does not deal with the use of private contractors hired by states to perform cyber operations on its behalf. This creates a major problem in cyber warfare where the probability of states contracting civilian experts to carry out cyber operations on its behalf is very high. In other words, just like in drone warfare, states are more likely to rely on civilian contractors or civilian intelligence personnel to carry out cyber operations on their behalf. For example, Kelsey points out that "a significant amount of both the operation and maintenance of military-owned network segments in the United States of America is currently handled by civilians on a contracted- out basis".[819] Bannelier-Christakis notes that militaries outsource the expertise of civilians to perform functions such as maintenance of networks to exploitation of weaknesses of computer system.[820] This means that the involvement of persons who do not qualify as combatants may be greater in cyber warfare than in any other forms of warfare.

However, while states are using civilian contractors to perform military operations usually reserved for armed forces they may not be willing to incorporate these contractors into their armed forces in accordance with the Geneva Conventions and Additional Protocol I. These reasons may include the need to reduce costs of a large standing army and the general

[818]Commentary to Rule 29 para 3.
[819]Kelsey 2008 *Michigan Law Review 1432.*
[820]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias, Russell Buchan (eds*) Research Handbook on International Law and Cyberspace* (2015) 20.

downsizing of the armed forces among other reasons.[821] This means that the principle of distinction will face the similar challenges to those it faces when PMSCs or civilian drone operators are contracted by states to carry out attacks in armed conflicts on behalf of the state. Just as the Montreux Document that deals with PMSCs, the Tallinn Manual appears to go against the tide by failing to acknowledge the changing state practice whereby states rely on civilian contractors to perform essential military services that were traditionally provided by members of the armed forces. This situation will result in states deliberately ignoring the principle of distinction since it does not suit the emerging new practices in cyber warfare. Just like PMSCs and drone operators, these personnel do not meet the combatants test and therefore are civilians who are entitled to protection. This creates a problem for IHL since it amounts to violation of the principle of distinction. This raises the question of accountability or responsibilities of these personnel when they take part in armed conflicts. More so, the civilians hired to perform cyber operations are also left in a difficult position since they are not entitled to protection like their fellow members who are part of the armed forces even though they are acting on behalf of a state.

Besides the above challenges, there are certain challenges of applying the principle of distinction that are unique to cyber warfare and these shall be discussed below. Cyber warfare, by its nature has the potential of involving civilians in combat activities intentionally or unintentionally. The first challenge is that it is difficult to identify the identity of a person who is carrying out specific operation in cyber warfare. Under traditional kinetic warfare, it is easy to identify people involved in an armed conflict because they have to be involved physically in the battlefield. As Brenner and Clarke put it, the assumption that there is a segregation between war-space and civilian space in kinetic warfare does not exist in cyber warfare.[822] The possibility of maintaining this segregation ensures that the laws of armed conflicts, including the principle of distinction are enforced and applicable. Under cyber warfare, there is no physical war-space or civilian space. The authors also argue that cyber warfare takes place in cyber-space, "which is a domain characterised by the use of electronics to store, modify and exchange data and is not a physical place but a virtual interactive

[821] See discussion in Chapter 3, section 3.4.1.
[822] S W Brenner and L Clarke "Civilians in Cyberwarfare: Conscripts" (2010) (43 (4) *Vanderbilt Journal of Transnational Law* 1011 at 1027.

experience accessible regardless of geographic location".[823] Since cyber warfare does not involve the deployment of humans in a physical battlefield, combatants in this kind of war are faceless. This makes it extremely difficult to ascertain the identity of the person responsible for attacks. The well-known cases of cyber-attacks on states can be used to illustrate this point. No state, group or individuals have admitted responsibility for the cyber- attacks on Estonia, Georgia and Iran, even though some states were accused of having carried out the attacks. Assuming that these attacks were carried in the course of an armed conflict and the principle of distinction is applicable, it is difficult to ascertain the identity of the attackers and consequently to determine whether the attackers meet the requirements of combatant status. Therefore, whilst one can insist that only combatants can participate in cyber operations, implementing this principle will be very difficult, given the unique nature of cyber warfare as discussed above. Anonymity in cyber warfare makes it difficult to ascertain whether states are complying with the principle of distinction or not.

### 4.7.2 Cyber Warfare and the Concept of Direct Participation in Hostilities

If one accepts that civilian contractors employed to perform cyber operations during an armed conflict do not meet combatant status, then the consequences that arise when civilians take direct part in hostilities apply.[824] One of the consequence is that civilian contractors lose their protection as civilians and therefore become legitimate targets when they take direct participation in hostilities. However, one of the biggest challenges that cyber warfare presents relates how to apply direct participation in hostilities to this method of warfare.

Direct participation is an important aspect to the principle of distinction since it draws the line between when civilians are entitled to protection and when they lose the protection. Therefore, in order to ensure that only those civilians that have taken direct participation in hostilities lose protection from IHL, it is important to clarify what types of activities amount direct participation in hostilities under cyber warfare and at what point civilians lose their protection for taking direct participation in hostilities. These issues will be discussed below.

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[823] *Ibid.*

[824] See discussion in Chapter 3, section 3.4.3.

Rule 29 of the Tallinn Manual attempts to address the issue of direct participation in hostilities in cyber warfare. It states that civilians are not prohibited from directly participating in hostilities, but forfeit their protection from attacks for such time as they take direct part".[825] The Tallinn Manual defines a cyber-attack as a "cyber operation, whether offensive or defensive, that is reasonably expected to cause injury or death to persons or damage or destruction to objects".[826] This definition excludes cyber operations that are non-violent, for example psychological cyber operations or cyber spying.[827] Additionally, the Tallinn Manual provides that care should be taken when identifying the originator of an attack.[828] The Tallinn Manual acknowledges that where a person unintentionally causes damage through cyber means such as forwarding an email containing a malicious software (malware) that causes harm to the recipient of such an email, that person is not taking direct part in hostilities since there is no intent in their actions.[829]

Given the definition of direct participation in hostilities, it is evident that there will be some cases where it is not debatable whether a person is taking direct participation in hostilities or not. For instance, civilian contractors employed by the armed forces to conduct cyber-attacks will be taking direct part in hostilities. However, there are certain situations when it will be difficult to determine whether civilians are taking direct participation in hostilities. For example, when civilians are contracted by states to provide services as a cyber expert, they may perform wide-ranging activities. The questions that arise relates to the point at which will these civilians be considered to be taking direct part in hostilities.

The Tallinn Manual does not outline any particular test for the threshold for direct participation.[830] Crawford argues that civilians employed to maintain computer networks for example, will not likely be considered as taking direct part in hostilities, while those employed to conduct cyber-attacks will be taking direct part in hostilities.[831] However, the activities that lie in the grey area will present problems. The ICRC Guidance of the notion of

[825]Tallinn Manual.
[826] Rule 30, Tallinn Manual.
[827]Tallinn Manual, Commentary to Rule 30, Tallinn Manual.
[828]*Ibid.*
[829]*Ibid.*
[830]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 143.
[831]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 147.

Direct Participation in Hostilities mainly focuses on direct causation as a determining factor and rules out indirect effects as amounting to direct participation in hostilities.[832] More so, the harm that arise from a person's involvement in an armed conflict must be objectively foreseeable in order for the act to constitute direct participation in hostilities.[833] As Owen *et al* argue, cyber-attacks are dependent on chains of causality and there is high likelihood of intervening effects between initial cause and ultimate effect.[834] For example, a civilian who writes a malware programme and gives it to the armed forces or party to the conflict but does not execute the malware him/herself will not be taking direct participation in hostilities because there is absence of causal proximity".[835] The effect of this position is that "many cyber activities performed by civilians will fall outside the direct participation in hostilities".[836] This means many civilians will remain protected despite the fact that they play a pivotal role in the execution of cyber operations. Turns argues that this will result in "civilians engaging in cyber warfare with impunity".[837] The impunity of civilian contractors may further encourage states to rely more on civilian contractors to conduct cyber warfare since this will enable them to circumvent their responsibilities under international law. This further undermines the principle of distinction. This therefore calls for IHL to come up with rules that explains the application of direct participation in hostilities in cyber warfare since this also impacts on the principle of distinction.

More so, the principle of distinction states that civilians may lose their protection for such time they take direct part in hostilities.[838] When civilians cease to take direct part in hostilities, they re-gain their protection. The phrase 'for such time' creates a very difficult challenge in cyber warfare.[839] For instance, it is not clear whether civilians can only be targeted when they press a button to release the attack or whether they can be targeted as long

[832]N Melzer *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law* International Committee of the Red Cross at 1017 https://www.icrc.org/eng/assets/files/other/icrc-002-0990.pdf (accessed 9 March 2016).
[833]*Ibid.*
[834]W Owens, K Dam, H Lin (ed) "Technology, Policy, Law, and Ethics Regarding US Acquisition and Use of Cyberattack Capabilities" (National Academics Press, 2009) http://www.nap.edu/catalog.php?record_id=12651 (accessed 19 July 2016).
[835]Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 148.
[836]*Ibid.*
[837]D Turns "Cyber warfare and the Notion of Direct Participation in Hostilities" (2012) 17 (2) *Journal of Conflict and Security Law* 288.
[838]For more discussion on this, See Chapter 3, section 3.4.3 above.
[839]K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias and R Buchan (eds*) Research Handbook on International Law and Cyberspace* 22.

as the attacks are still ongoing.[840] Schmitt notes that "cyber operations last only a few minutes and if the targeted state is only allowed to attack the civilians launching the attack, it extinguish the right to strike at direct participants".[841] This is because the nature of the operations involve a belligerent sitting in an office thousands of miles away from the targeted party the targeted party may not anticipate the attack until the effects of such an attack manifest themselves in a malfunction or damage to their own computer system. Therefore, such an approach will result in civilians who take part in cyber warfare becoming immune from attacks since it is practically impossible for the attacked part to respond and strike at the civilian attacker.

Adopting the approach that the phrase 'for such time' means the entire period during which a participant is engaging in repeated cyber operations may render civilians permanent targets even if they have stopped taking part in hostilities.[842] Bannelier-Christakis notes that if one adopts the approach that civilians who took direct part in cyber-attacks can be attacked as long as the effects of attack exists , "a replication of a worm may also constitute a repeated cyber operation thus rendering the civilian who launched the initial cyber operation a legitimate target thus making the concept of direct participation unlimited".[843] Therefore, treating civilian cyber operators as civilians who can only be targeted when they take direct part in hostilities can further threaten protection that IHL provides during armed conflicts.

The suggestion in the Tallinn Manual that a person should have intention to cause harm for him/her to be regarded as having have taken direct participation in hostilities is problematic. It creates the problem of establishing with certainty whether a person or party that forwarded a harmful malware actually had the intention to cause harm. For example, during cyber-attacks on Georgia, Russian websites and blogs "posted instructions on how to set up computers to run distributed denial of service attacks (DDoS) while some offered downloadable DDoS programs which would then be directed towards Georgia's

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[840] *Ibid.*

[841][841] M N Schmitt "Cyber Operations and the Jus in Bello: Key Issues," Naval War College International Law Studies http://ssrn.com/abstract=1801176 (accessed 21 March 2016).

[842] *Ibid.*

[843] K Bannelier-Christakis "Is the Principle of Distinction Still Relevant in Cyber Warfare?" in N Tsagourias, Russell Buchan (eds) *Research Handbook on International Law and Cyberspace* 22-23.

computers".[844] This meant that individual civilians became involved in cyber-attacks against Georgia resulting in Georgian computers being flooded with traffic, which in turn made them inaccessible to other users. The question then is, if Georgia was to retaliate, how does it determine whether a particular internet user intentionally took part in the DDoS attacks or not? While some people may have directed DDoS to Georgian servers willingly and intentionally, it is probable that other people could have unwittingly and innocently participated in the attacks. The priority of the party that is being attacked will be to defend itself and possibly retaliate in order to stop the attacks. In such a situation, it may not be practical in, to ascertain the intention of every person who took part in the attacks before retaliating. Therefore, it can be argued that even though the requirement of intention helps to ensure that only civilians who deliberately take direct participation in cyber-attacks lose protection, it is very difficult, if not impossible to apply and adhere to the requirement in practice. This makes the application of direct participation in hostilities very difficult in cyber warfare. Consequently, this makes all civilians who are caught between cyber-attacks potential targets regardless of the extent and motive of their involvement. These complications discourage compliance with the principle of distinction at all.

In conclusion applying the principle of distinction between civilians and combatants in cyber warfare is not an easy exercise. Due to the high likelihood of civilian involvement in cyber conflicts, applying the principle of distinction to cyber warfare as it is traditionally understood may exacerbate the problems that IHL seeks to eliminate. From the above discussion, if one applies the principle of distinction as it stands, most personnel in charge of conducting cyber operations will not qualify as combatants and therefore should be treated as civilians. However, this will have far reaching implications since the rights and responsibilities of such personnel is not clear. This therefore calls for the principle of distinction to be revisited and adapted so that it becomes applicable to cyber warfare.

[844]E Morozov "An Army of Ones and Zeroes: How I Became a Soldier in the Georgia-Russia Cyber Warfare" http://www.slate.com/articles/technology/technology/2008/08/an_army_of_ones_and_zeroes.html (accessed 15 July 2016).

### 4.8 Distinction between Civilian Objects and Military Objectives under Cyber Warfare

Perhaps the most difficult challenge that cyber warfare pose to the principle of distinction relates to the requirement for distinction between civilian objects and military objectives. Computers and the internet are used for both military and civilian purposes. Droege states that in cyber space, the entire cyber infrastructure, which include computers, routers, cables, and satellites, is used for both civilian and military communications.[845] For example, it has been argued that in the United States of America, the internet provides nearly universal interconnectivity of computer networks without distinction between civilian and military uses and that approximately ninety-five percent of the telecommunications of the Department of Defence travel through the Public Switched Network.[846] More so, military owned segments of the telecommunications are operated and maintained by civilians on a contractual basis.[847] The principle of distinction requires attacks to be limited to military objectives.[848] The question is whether it is possible to make a distinction between civilian objects and military objectives in cyber warfare, given the reality that both civilians and the military use cyber space. Brenner and Clarke argue that the principle of distinction is mainly based on the assumption that there is a geographical separation between battle-space and civilian-space and secondly, that there is a separation between the role played by combatants and the role played by civilians.[849] However, these assumptions only applied in traditional conventional warfare and does not exist in cyber warfare.[850] As argued above, cyber operations do not have a confined battlefield. This makes it difficult for a party to the conflict to determine whether a target is a military objective or civilian object or whether a network belongs to the military or to civilians. Thus, all computers may be rendered legitimate targets since the interconnectedness of the cyber-space makes it "difficult if not impossible to maintain the combatant and non-combatant distinction".[851] Thus, one can conclude civilians and civilian

[845]C Droege "Get off my cloud: cyber warfare, international humanitarian law, and the protection of civilians" (2012) 94 (886) *International Review of the Red Cross* 533 at 541.
[846]Kelsey 2008 *Michigan Law Review 1432.*
[847]Droege 2012 *International Review of the Red* 541.
[848] As discussed above, military objectives are objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage
[849]S W Brenner and L L Clarke "Civilians in Cyberwarfare: Conscripts" (2010) (43 (4) *Vanderbilt Journal of Transnational Law* 1036.
[850]*Ibid.*
[851]*Ibid.*

objects face more threats and less protection under cyber warfare hence the need for more clear rules on how to make the principle of distinction more applicable to the cyber warfare.

The second challenge that arises when applying the principle of distinction between civilian objects and military objectives in cyber warfare relates to the issue of dual use objects. Dual-use objects refer to "objects that are used for both civilian and military purposes".[852] As already alluded to, cyber-space is used for both military and civilian purposes. For example, although power plants and electricity grids are used for civilian purposes, they can also be used for military purposes. More so, some military networks travel through civilian infrastructure. This means there is high likelihood that most infrastructure may become dual use objects during cyber warfare. The question therefore is whether these objects become legitimate objects of attack or not. There is no IHL rule that specifically deals with the problem of dual-use objects. Furthermore, an object under the principle of distinction must either be a civilian or military objective but it cannot be both.[853] The dominant view is that the moment an object is used for military purpose, it becomes a military objective in its entirety.[854] Droege argues that it is generally accepted that "the object becomes a military objective even if its military use is only marginal compared to its civilian use".[855] The ICRC's position in relation to dual-use objects is that the "nature of any object must be assessed under the definition of military objectives provided for in Additional Protocol I".[856] This means that "even a secondary military use may turn such an object into a military objective as long as the attack complies with the principle of proportionality".[857] One can therefore conclude that the presence of many dual-use objects in cyber warfare makes it difficult to distinguish civilian objects from military objectives. As a result, many objects that are traditionally regarded as civilians are likely to be rendered permanent targets during cyber warfare.

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[852]Droege 2012 *International Review of the Red Cross* 562.
[853]See generally Brenner and Clarke 2010 *Vanderbilt Journal of Transnational Law*.
[854]The Commander's Handbook on the Law of Naval Operations, Department of the Navy/Department of Homeland Security, USA, July 2007, para. 8.3; Tallinn Manual, above note 27, Commentary on Rule 39, para 1.
[855]Droege 2012 *International Review of the Red Cross* 563.
[856]International Humanitarian Law and The Challenges of Contemporary Armed Conflicts Report prepared by *The International Committee of the Red Cross 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003 International* https://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf (accessed 13 July 2015)
[857]*Ibid.*

It can be submitted that given the increased reliance on computer networks in the modern world to run and control infrastructure, communication, economy and even trade, there is high likelihood that civilians and civilian objects will become more vulnerable to attacks than before. Unless a part conducting an attack is able to direct its attacks against a specific part of the network that is used for military purposes, all civilian infrastructure and networks become vulnerable. IHL therefore needs to respond to these challenges by adapting the principle of distinction in order to deal with these challenges.

### 4.9 Cyber warfare and prohibition of indiscriminate attacks

The last challenge that will be dealt with, which arises when applying the principle of distinction to cyber warfare relates to indiscriminate attacks. IHL requires parties to the conflict to take all necessary precautionary measures to avoid indiscriminate attacks that may result in the violation of the principle of distinction. Indiscriminate attacks are "those attacks that are not directed at a specific military objective,[858] and those "which employ a method or means of combat, which cannot be directed at a specific military objective".[859] Indiscriminate attacks also include attacks that "employ a method or means of combat the effects of which cannot be limited as required by the Additional Protocol I and consequently, are of a nature to strike military objectives and civilians or civilian objects without distinction".[860] Indiscriminate attacks are prohibited during armed conflicts.[861]

Due to a number of reasons, the prohibition of indiscriminate attacks is difficult to adhere to under cyber warfare. Firstly, as discussed above, civilians and the military share the same infrastructure in cyber space. Secondly, some objects, even though they may be predominantly civilian in nature, they can also be used for military purposes thus rendering them dual-use of objects. Thirdly, unlike in conventional warfare where the battlefield is limited in terms of the geographical location, cyber warfare can take place anywhere without geographical constraints. This means the battlefield in cyber warfare is unlimited as all

[858] Article 51(4) (a) of Additional Protocol I.
[859] Article 51(4) (b).
[860] Article 51(4) (c).
[861] Article 51(4) of Additional Protocol I.

computer networks that are connected to the targeted network can be affected. This can be illustrated through the example of the cyber-attacks at Iran's nuclear plant in 2010. Although the Stuxnet worm was only targeted Iran's nuclear facilities at Natanz, the worm infected over 60 000 computers both inside Iran and in other countries such as Indonesia, China, Finland, Germany and Azerbaijan among other countries.[862] This is a clear demonstration that even though cyber-attacks are capable of being directed against specific objects, there is high likelihood of the attacks becoming indiscriminate since there could be unintended and unforeseen collateral damage. Dinstein concurs that "the desire to avoid an indiscriminate effect of the CNA, with a view to confining the ensuing harm to military objectives, may be stymied by the common phenomenon of the interconnectivity of computers".[863] In light of this discussion, it can be argued that except in few circumstances where cyber-attacks can be directed specifically against a military objective, indiscrimination is an inherent weakness of cyber warfare in that it is difficult to confine the cyber-attacks to specific objects. Therefore, one can conclude that most cyber operations are likely to be considered indiscriminate and therefore a violation of the principle of distinction.

## 4.10 Conclusion

The evolution of war has resulted in the introduction of new means, methods of warfare that did not come to the imagination of the drafters of the legal instruments regulating the conduct of hostilities. Although IHL rules are couched in such a way that they can cater for both old and new situations, it must be admitted that the elasticity of the rules is not limitless. It has been admitted that IHL principles and legal instruments are applicable to cyber warfare. However, as has been demonstrated, the law has not been able to cope with all the developments that have taken place. Applying the existing laws to the emerging situations leaves some gaps that can result in IHL failing to fulfil its objectives. In this chapter, it has been demonstrated that drone and cyber warfare have blurred the traditional distinction between civilians and combatants, and between civilian objects and civilian objectives. The changing nature of armed conflicts has resulted in many states relying on civilians for

[862]JP Farwell and R Rohoziski (2011) Stuxnet and the Future of Cyber War, Survival https://www.cs.duke.edu/courses/common/compsci092/papers/cyberwar/stuxnet2.pdf (accessed 10 July 2016)
[863]Dinstein 2012 *Journal of Conflict & Security Law* 267.

military related services. This challenges one of the core principles of IHL. One can therefore conclude that there is need to adapt IHL rules and principles to accommodate or regulate new developments in armed conflicts if IHL is to remain relevant and applicable to conflict situations.

## Chapter 5: Conclusion and Recommendations

### 5.1 Summary of the Study

This study sought to investigate the challenges that arise when applying the principle of distinction to modern armed conflicts. It challenged the assumption that the principle of distinction, which is the cornerstone of IHL, is well adapted to regulate all forms, means and methods warfare. Chapter 1 set out a general introduction to the study by broadly analysing the challenges that the principle of distinction is facing in modern armed conflicts. It was highlighted that although the principle of distinction remains relevant and applicable to modern armed conflicts, the challenges it faces undermines its application and effectiveness.

Chapter 2 traced the history of the principle of distinction. It began by noting that the principle existed since time immemorial even though it was not in codified form. The chapter then explored the development of the laws of armed conflict with particular attention to the principle of distinction. It was argued that even though the principle of distinction was not specifically referred to in early international treaties and conventions regulating conduct of warfare, the rules such as prohibition of aerial bombardment and undefended towns were made in recognition that there was a limit to what can be done to obtain victory in an armed conflict. In addition, the rules demanded that civilian population and objects should be spared from violence during armed conflicts. However, the development of the principle of distinction was stifled by the states' desire to give more priority to military necessity at the expense of humanitarian concerns. This was particularly the case during the First and Second World Wars where states openly violated the principle of distinction in the name of military necessity.[864]

The Chapter then discussed the development of the laws of armed conflict after the Second World War, particularly the adoption of the Geneva Conventions in of 1949 and the Additional Protocol I, which, for the first time referred unequivocally to the principle of

[864]See Chapter 2, section 2.3.9 and 2.3.11.

distinction. Thereafter the Chapter discussed how the principle of distinction has developed to become part of customary IHL, thus making it binding on states that are not signatories to the Additional Protocol I. The rest of the Chapter discussed the criteria used in distinguishing combatants from civilians as well as civilian objects from military objectives.

Chapter 3 sought to substantiate the claim that the principle of distinction is facing challenges in modern armed conflicts through the example of PMSCs. The Chapter traced the history of the rise of PMSCs and the reasons why they have become states' preferred choice when engaging in armed conflicts. It was noted that their involvement in combat operations has increased at an alarming rate and this challenges the application of principle of distinction, which prohibits the hiring of civilians to conduct combat activities unless they are incorporated in to the armed forces of a party to the conflict. The chapter considered the question whether PMSCs that are contracted to take direct part in hostilities qualify as combatants under the principle of distinction. It was concluded that although it is possible to classify some PMSCs as either combatants or civilians, there are some companies in the grey area, which do not qualify under either category. It was also argued that although it is possible for PMSCs contracted by states to meet the combatant status, states are reluctant to incorporate these personnel into their armed forces for various reasons.[865] The chapter then explored the consequences that arise because of PMSCs' failure not to comply with the principle of distinction. It was argued that one of the consequence is the lack of individual and state accountability for violations international law as witnessed by the events in Iraq and Afghanistan.[866] It was further demonstrated that even though there are mechanisms outside IHL to hold PMSC personnel accountable for violations of IHL committed during armed conflicts, the manner in which the companies operate render these mechanisms ineffective.[867] The chapter then dealt with the development of soft law as an attempt to regulate private military and security companies' activities. The Montreux Document was singled out in this regard. However, its shortcomings were noted.[868] In addition, the negotiation of the International Code of Conduct for Private Security Service Providers by actors in the private

[865]See Chapter 3, section 3.4.1.
[866]See Chapter 3, section 3.5.1.
[867]See Chapter 3, section 3.6.1, 3.6.2 and 3.6.3. For example, it was argued in Chapter 3 that provisions of Articles on Responsibility of States for Internationally Wrongful Acts do not apply to all PMSCs due to the obscure relationship between states and PMSCs who hire them. See discussion on individual and state responsibility of PMSCs in Chapter 3.
[868]See Chapter 3, section 3.7.1.

military and security industry was noted as a welcome development as it demonstrates that companies are willing to be regulated. However, the Code also has its shortcomings since it does not provide any answers concerning the status of private military and security personnel under the principle of distinction. It was concluded that the current law does not provide answers regarding the status of PMSCs as regards the principle of distinction.

Chapter 4 expanded the discussion in Chapter 3 by interrogating other forms of warfare that challenge the application of the principle of distinction to modern armed conflicts. New methods of warfare such as drone and cyber warfare also create challenges to the application of the principle of distinction during armed conflicts. The chapter discussed the rise of drone warfare and their use in the war on terror. It also discussed the application of the principle of distinction to drone warfare and concluded that drone warfare violates principle of distinction in two ways. Firstly, drone strikes are not as accurate as has been claimed by states currently using them. As a result, they do not distinguish civilian targets from military targets. Secondly, contracting civilians such as CIA personnel to take part in drone strikes violates the principle of distinction because these individuals do not meet the combatant status. As with PMSC personnel, CIA personnel do not have clearly defined rights and responsibilities under IHL.

It was further argued that cyber warfare also challenges the application of the principle of distinction to modern armed conflicts. The discussion traced the origins of cyber warfare and how it is carried out. The Chapter also dealt with the question whether cyber operations are capable of complying with the principle of distinction. It was argued that currently, it is very difficult to apply the principle of distinction to cyber warfare hence the need for the adaptation of the principle.

## 5.2 Lessons

In light of the investigation done in this study, the following lessons can be drawn regarding the application of the principle of distinction to modern warfare.

### 5.2.1 Generally, the principle of distinction is applicable to all forms of armed conflict in modern warfare

The first valuable lesson is that the principle of distinction is applicable to all forms of conflict, at least in principle. Although new means and methods of warfare continue to emerge, international humanitarian law is flexible enough to apply to new methods of warfare. As Swanson argues, IHL rules currently in place can address the "ever-changing nature of warfare".[869] Therefore, despite the changes that have taken place in the nature of armed conflicts, the principle of distinction is flexible enough to apply to all forms of armed conflict. This is a reassuring finding since it means that states do not need to invent new rules to regulate each development that takes place in armed conflicts.

However, the principle of distinction needs some adaptation for it to be applicable to new forms of warfare and the developments that have taken place in armed conflicts. As highlighted in this study, the emergence of new means and methods of war such as drone and cyber warfare as well as the involvement of new participants in armed conflicts such as private military and security contractors and intelligence personnel raise challenges to the application of the principle of distinction to modern armed conflicts. Therefore, while the framework of the principle of distinction cannot be faulted, the criteria of distinguishing civilians from combatants and civilian objects from military objectives needs to be adapted in order to ensure that the law caters for the new developments that have taken place as shall be argued below.

### 5.2.2 States are increasingly outsourcing military functions to civilian personnel instead of relying on their armed forces

The second lesson that can be drawn from the study is that states are increasingly relying on civilian contractors to perform functions that were previously performed by armed forces.

[869]L Swanson "The Era of Cyber Warfare: Applying International Humanitarian Law to the 2008 Russian-Georgian Cyber Conflict" (2010) 32 Loyola of *Los Angeles International and Comparative Law Review* 303 at 332.

This means that the practice of outsourcing military services is on the increase. Since the turn of the millennium, the number of civilian personnel hired to perform military functions on behalf of states has been staggering.[870] Reasons for this development include the downsizing of standing armies, desire to reduce budget directed towards maintaining a standing army among other reasons.[871] The changing methods of warfare have also demanded the increased hiring of civilian experts to take part in these forms of warfare.[872] Since these experts are not in armed forces, states have resorted to outsourcing the services.

As a result of the increased involvement of civilians in the theatre of war, the application of the principle of distinction to modern armed conflicts has become very challenging. Chapters 3 and 4 demonstrated how the phenomenon makes it possible for persons whose status is not clearly defined to take direct part in hostilities. These persons do not have clearly defined rights and responsibilities under IHL since it is not clear whether they are combatants or not. The problem that arises here is exacerbated by the fact that some states outsource military services to civilian contractors to escape liability for violations of law. As argued in Chapters 3 and 4, states remain unaccountable and escape responsibility for violations of the law by persons performing military functions on their behalf. Moreover, it is difficult for these contractors to be held individually accountable given that there is no clarity regarding how they operate. For instances, no information can be obtained in order to prosecute individuals in the absence of cooperation from states hiring them.[873] This is worsened by lack of uniform international norms regulating civilian contractors hired to perform military activities. More so states have adopted contradicting approaches towards civilian contractors such as PMSCs.[874]

[870]See Chapter 3, section 3.2.1.
[871]*Ibid.*
[872]See generally Chapter 4.
[873]For example, even though South Africa has legislation which it could be used to prosecute thousands of its citizens who were hired by PMSCs in Iraq, this was not possible given the refusal by the companies as well as the United States of America and Iraq governments to cooperate.
[874]This has resulted in difficulties on how to hold civilian contractors accountable. For example, South Africa has been strict with PMSCs and has the Regulation of Foreign Military Assistance Act 15 of 1998 that purports to ban these companies. However, PMSCs have reacted by migrating to countries where the laws are favourable to PMSCs.

It is submitted that the principle of distinction is not flexible enough to accommodate the practise of outsourcing. As argued above, the principle of distinction between combatants and civilians does not extend to situations where states outsource military functions to civilian contractors. Consequently, states violate the principle of distinction when they hire civilians to participate in armed conflicts. This requires the principle of distinction to respond to this development either by banning the practice or by adapting the principle of distinction to accommodate situations of outsourcing. As Crawford notes, "it seems unlikely that States will willingly give up using PMSCs in combat situations given the increase in the downsizing of armies".[875] This observation can be applied in relation to outsourcing of military services in general. States are coming up with mechanisms that are meant to ensure regulation of civilian contractors and this suggests that the practice of outsourcing is there to stay.[876] In other words, states are inclined towards recognising outsourcing than abstaining from the practice. Given the reality that outsourcing is here to stay, it is submitted that the principle of distinction needs to be adapted in order to accommodate the practice of outsourcing of military services as shall be argued below.

### 5.2.3 New methods of warfare and increased civilian participation in armed conflicts have blurred the lines between civilian objects and military objectives

Another lesson that can be drawn from the study is that the developments that have taken place in armed conflicts have blurred the distinction between civilian objects and military objectives. In other words, there is no longer a clear line that separates military objectives and civilian objects. This is a result of several factors. Firstly, the hiring of civilian contractors to perform military functions does not only create problem to the principle of distinction

[875]E Crawford *Identifying the Enemy: Civilian Participation in Armed Conflict* 170

[876]For example, the Montreux Document seeks to provide non-binding guidelines for the use of PMSCs while the International Code of Conduct provides rules for self-regulation by PMSCs. As of November 2015, 54 countries, including the major customers of PMSCs had become participating states of the Montreux Document. This demonstrates that states are increasingly tolerating the idea of the use of PMSCs. The United Kingdom government came up with a Green Paper in 2002 that was intended at ensuring regulation of PMSCs. In relation to the CIA drone operators, the United States Congress blocked attempts by the Obama administration to transfer the drone program from the CIA to the Department of Defence. See Participating States of the Montreux Document Federal Department of Foreign Affairs https://www.eda.admin.ch/eda/en/fdfa/foreign-policy/international-law/international-humanitarian-law/private-military-security-companies/participating-states.html (accessed 28 July 2016), E L Gaston "2008 *Harvard International Law Journal* and Congress Block Plan to Transfer Drone Control from CIA to Pentagon" *Wired* 16 January 2014 https://www.wired.com/2014/01/drone-strikes-likely-stay-cia/ (accessed 22 July 2016).

between persons but also creates problems for distinction between civilian objects and military objectives. For example, the use of civilian objects by civilian contractors creates problems concerning whether these objects remain civilian objects or not.[877] This is made worse by the proliferation of civilian contractors in the same conflict zones where different types of security and military companies operate in the same environment but performing different types of activities. In such situations, it becomes difficult to determine what objects are civilian and what objects are military.

The second reason why the line between civilian objects and military objectives has become blurred is the change in the means and methods of warfare. Kelsey argues that while the principle of distinction was based on the principle "that the aim of a conflict is to prevail politically and acts of violence were aimed at overcoming the military forces of the enemy",[878] this has drastically changed. In modern conflicts, "overcoming the military forces of the enemy is no longer the sole object when military's capabilities are largely dependent on the private sector, and where a well-placed psychological blow can topple an opposing regime".[879] This situation has resulted in many objects that are traditionally regarded as civilian becoming crucial military targets thus blurring the distinction between military and civilian objects.

The introduction of new methods of warfare has also made the application of the principle of distinction between civilian objects and military objectives. For example, it has been argued that cyber warfare, by its nature makes it difficult to distinguish civilian objects from military objectives because of the dual-use nature of computers and the internet, which are the weapons as well as the targets of cyber-attacks. This means that any civilian object may become legitimate military target. Furthermore, despite the claims that drone strikes are more accurate and selective as compared to conventional weapons, it has been demonstrated that this argument is far from true.[880] The use of drones as weapons makes it difficult for the operators to distinguish civilian objects from military objectives.

[877] See Chapter 3, section 3.5.1.
[878] Kelsey 2008 *Michigan Law Review* 1447.
[879] *Ibid.*
[880] See Chapter 4, section 4.3.

The overall effect of these developments is that distinguishing civilian objects from military objectives has become difficult in modern armed conflicts. The methods of warfare that are now being used and the new objectives of war have made civilian population an integral part of armed conflicts thus making them constant targets. It is submitted that the criteria of distinguishing civilian objects from military objectives is not well adapted to apply to the new methods of warfare. In the absence of clear rules on how states should conduct themselves using these new methods of warfare, protection of civilian objects remains compromised. This calls for the development of the principle of distinction in order to accommodate these changes. Suggestions of possible ways in which the principle of distinction can be developed shall be made below.

### 5.2.4 Direct participation in hostilities is of limited use in determining status under the principle of distinction

Another valuable lesson that can be drawn from this study is that the concept of direct participation is of limited use in determining the status of civilians in armed conflicts. As pointed out in Chapter 3, the US Department of Defence's refusal to prosecute contractors who committed crimes in Iraq and Afghanistan was mainly because they regarded them as civilians.[881] If the USA's position is accepted as correct, civilian contracted by states will be treated as civilians who can only lose protections when they take direct participation in hostilities. This means that, direct participation in hostilities becomes a key factor in determining the rights and responsibilities of civilian contractors. This entails that until these contractors take party in activities that amount to direct participation in hostilities, they remain protected as civilians despite that they are employed to perform combat related activities. Bosch concurs that if United States of America's position is accepted as correct, civilian contractors would most likely be "categorised as civilians and their degree of participation in hostilities will determine whether they retain their civilian status or are considered to be unlawful belligerents".[882] While relying on direct participation in hostilities to determine rights and obligations under international humanitarian law is the standard

[881] Chapter 3, section 3.4.1.
[882] S Bosch "Private security contractors and international humanitarian law – a skirmish for recognition in international armed conflicts" *African Security Review*, 16:4, 34-52, https://www.issafrica.org/uploads/16NO4BOSCH.PDF (accessed 25 July 2016).

procedure in relation to ordinary civilians, it is submitted that the same approach cannot be used in relation to civilian contractors that are hired by states to provide military services for the reasons discussed below.

The first reason why direct participation in hostilities has limited application in these situations is that is has the effect of making the principle of distinction redundant. The principle of distinction is the only determinant in deciding whether a person has combatant privileges under IHL.[883] It is only when a person qualifies as a combatant that they have combatant privilege. Traditionally the combatant status is reserved for members of the armed forces or persons affiliated to a party to the conflict, provided they meet certain requirements.[884] The requirement for persons acting on behalf of states to comply with the combatant status under the principle of distinction is to ensure that states can remain responsible for the actions of its armed forces as well as to ensure discipline and compliance with laws of armed conflict. Once this position is accepted as true, then it is clear that states have an obligation to use persons who meet the combatant status during armed conflicts. The concept of direct participation in hostilities does not produce the same effects as the principle of distinction if used to determine status of civilian hired by states to fight in armed conflicts.[885] If direct participation in hostilities is relied upon to determine status of state actors, states can easily escape their responsibilities under IHL. Moreover, the concept of direct participation in hostilities does not apply to people carrying out military operations on behalf of state on regular basis because these are, by virtue of their status liable to attack anytime and anywhere during the course of the armed conflict. Therefore, it is submitted that states cannot side step their obligations under the principle of distinction and hire civilians who are not under the direct control of the state to carry out military functions on their behalf.

As stated above, the concept of direct participation is meant to determine when a person is a civilian, and anyone who does not have combat status loses his/her protection during armed conflicts. This only happens when directly participating in hostilities. Allowing states to rely

[883]Article 43(2) of Additional Protocol I.
[884]Article 4A (4).
[885]For example, direct participation does not ensure that states will only use persons it has control over. More over direct participation does not create obligations for people comply with the law of armed conflict or to have a chain of command that enforces discipline.

on direct participation in hostilities to determine whether civilian contractors hired to perform military services can be attacked will create an anomaly where a party to the conflict is prohibited from targeting their enemy belligerents until it is satisfied that the civilian contractors are taking direct participation in hostilities. This position will have the effect of encouraging states to hire civilian contractors in the knowledge that they will only be attacked when they take direct part in hostilities. By so doing, the party relying on civilian contractors will limit the opposing forces' ability to wage war. This also has the effect of frustrating the opposing forces who will have to go through a thorough assessment in order to determine whether civilian contractors belonging to the enemy are directly participating in hostilities. This may in turn result in states ignoring the principle of distinction completely.

Another reason why direct participation in hostilities cannot be relied upon to determine whether civilian contractors hired to provide combat functions is that the meaning of concept of direct participation in hostilities is difficult to define precisely. The definition of what constitutes direct participation in hostilities and the activities that amount to direct participation in hostilities is controversial and subject to debate.[886] There is no clear state practice that provides guidance regarding what acts constitute direct participation in hostilities. This lack of certainty makes it difficult to ascertain when civilian contractors can be subject to attack since each party may use its subjective understanding of the concept. Therefore, if direct participation in hostilities is used to determine whether civilians hired by states to fight in armed conflicts on its behalf can be attacked, it may result in civilians who perform genuinely non-combat duties risking being attacked since it is not clear which activities amount to direct participation in hostilities. More so, such a reliance on direct participation in hostilities will cause uncertainties in humanitarian law.

In addition, when states hire civilian contractors to operate in the same conflict zone, the battlefield becomes swarmed with persons who look similar and their status is considered the same yet they perform different functions.[887] The proliferation of people whose status is not clear in a conflict zone makes it difficult to identify one group of civilian contractors from the other. As Schmitt notes, "allowing protected status in grey areas will jeopardise the absolute

[886]See Chapter 3, section 3.7.1.
[887]For example, in the Iraq War, several civilian contractors were present in the conflict zone. These ranged from those who were hired by states to provide services that amount to DPH to those who were genuine civilians employed as security guards by big co-operations.

protection status afforded to civilians and not discourage participation by civilians".[888] Schmitt further argues that if civilian status is still granted to civilian armed forces, "the concepts of distinction and direct participation are going to come under fire".[889] Therefore, in order to ensure protection of genuine civilian as well as ensuring the effectiveness of the principle of distinction, direct participation in hostilities should not be used to determine the status of civilian contractors hired to carry out combat activities on behalf of states.

In light of the above arguments, it can be concluded that that the status of persons hired to assist in combat operations should never be determined through the concept of direct participation in hostilities as this will result in IHL losing the protective mandate it has in armed conflicts. More so, this will render the principle of distinction irrelevant thus opening up floodgates for everyone to take direct part in armed conflicts. It is thus submitted that the principle of distinction should remain the determining factor in deciding whether civilians hired by states to provide take part in combat related activities are combatants or not.

### 5.3 Specific Conclusions

From the investigations made in this study, the following specific conclusions are made:

1. The principle of distinction between civilians and combatants and between civilian objects and military objectives, in principle remain relevant in modern armed conflicts. However, the principle of distinction is not well adapted to apply to the developments that have taken place in armed conflicts. Consequently, the framework of the principle of distinction must be used to adapt the law to the new challenges facing international humanitarian law.
2. Practices have emerged in armed conflicts that do not strictly fall under the regulation of the principle of distinction. These norms include the outsourcing of military functions traditionally performed by state armed forces to civilian contractors. These

[888]S Bosch "Private security contractors and international humanitarian law – a skirmish for recognition in international armed conflicts". See Generally Schmitt 2004 *Chicago Journal of International Law* 511.
[889]*Ibid.*

new developments challenge the application of the principle of distinction between combatants and civilians

3. The practice of outsourcing and the use of new methods of warfare such as drone and cyber warfare have resulted in the distinction between civilian objects and military objectives being blurred thus threatening the protection that IHL traditionally offers during armed conflicts.
4. The practice of outsourcing is slowly establishing itself into a state practice and states have begun to react in order to establish rules and measures in order to regulate the practice. Consequently, IHL needs to respond in a manner that complements state practice in order to align the principle of distinction to the developments that have taken place in modern armed conflicts.
5. Direct participation in hostilities is of limited use in determining status under the principle of distinction. Therefore, states cannot rely on the concept of direct participation to circumvent their obligations under the principle of distinction.

## 5.4 Recommendations

In light of the discussion made in this study and the conclusions reached, the following recommendations are made:

### 5.4.1 Expanding the definition of combatants to accommodate outsourcing

It is submitted that the principle of distinction between civilians and combatants must be adapted in order to recognise situations where states outsource military services to civilian contractors. This means the definition of combatants should be expanded to include situations where states hire civilian contractors such as PMSCs or intelligence personnel to carry out military operations on their behalf. It should be recalled that as the law stands, civilian contractors could qualify for combatant status if they are incorporated into the armed forces of a party to the conflict or if they constitute a militia belonging to a part to the conflict.[890] However, state practice on outsourcing so far indicates that states are reluctant to incorporate

[890]See discussion in Chapter 3.

civilian contractors they hire into their armed forces and this could be because of the same reasons why they resort to outsourcing in the first place.[891] Expansion of the definition of combatants will be in recognition of the right of states to determine who can act on their behalf when engaging in armed conflicts.

Instead of requiring states to incorporate private contractors into their armed forces, the principle of distinction can recognise persons who have been contracted by a state to provide military services as combatants on *ad hoc* basis. This means that civilian contractors involved in combat operations are recognised as combatants for the duration of the armed conflict in which they participate. In order to meet the combatant status, it is submitted that civilian contractors will have to satisfy the requirements in Article 4A (2) of the Third Geneva Convention.[892] These requirements will help to ensure that civilian contractors hired by states operate in an organised way and are capable of maintaining discipline and conducting themselves in terms of international law. For instance, the requirements of wearing fixed distinctive sign and carrying arms openly will assist in distinguishing civilian contractors hired by states to provide military services from other contractors who will be performing genuine civilian duties in the conflict zone.[893]

States that choose to hire civilian contractors to fight in a specific armed conflict should be required to notify the other parties to the conflict. This notification can be similar to the one that must be made when a party to the conflict incorporates paramilitary or law enforcement agencies into its armed forces in terms of Article 43(3) of Additional Protocol I. The notification will serve several purposes. Firstly, it will ensure that the opposing forces are aware of the fact the party that it is fighting is making use of civilian contractors. Once a notification has been made, there will be no confusion on the other party to the conflict as they will be aware of the nature of the enemy they will be facing. This will help to eliminate

[891] See Chapter 3, section 3.6.1

[892] The requirements are that of "being commanded by a person responsible for his subordinates; having a fixed distinctive sign recognizable at a distance; carrying arms openly and conducting their operations in accordance with the laws and customs of war.

[893] These requirements will also ensure transparency and accountability on the part of civilian contractors. The requirements will apply in the same way they apply to militias or law enforcement agencies that are incorporated in the armed forces of a part to the conflict. The only exception will be that the management of the company together with the supervisors who accompany the personnel into the armed forces will be responsible for the conduct of their personnel. Alternatively, the issue of command of the civilian contractors can be left to be decided by contracting state as an internal arrangement. Where the latter option is chosen, the notification discussed below will have to specify the arrangement regarding the control of civilian contractors.

incidences where civilian contractors present in the conflict zone to perform purely civilian purpose are attacked. Consequently, the notification will bring some certainty which helps to protect civilians since there will be a clear distinction between civilians and combatants.

Furthermore, a notification will also serve as a party to the conflict's express acceptance of responsibility for the conduct of civilian contractors it has hired during the course of the conflict, including responsibility to punish contractors for violation of international law.[894] In other words, a notification by a party to the conflict will serve to confirm that they have delegated military functions to civilian contractors who will carry out military functions on behalf of a state. Therefore, the effect of recognition of civilian contractors hired by states as combatants, together with the notification will ensure that states will not escape liability for any violation of international law during the course of the war. For example, a party to a conflict that hires civilian contractors in terms of the recommendation will assume responsibility under Articles on Responsibility of States for Internationally Wrongful Acts. In other words, recognition of civilian contractors as combatants will make it possible for the Articles on Responsibility of States for Internationally Wrongful Acts to apply to situations where states hire civilian contractors to perform military functions on its behalf.[895] For instance, the expansion of the definition of combatants to civilian contractors will make states responsible for the wrongful conduct of civilian contractors they hire under Article 4(1) or Article 5 of Articles on Responsibility of States for Internationally Wrongful Acts.[896] Therefore, international legal instruments such as Articles of Responsibility of States for Internationally Wrongful Acts will serve to reinforce a provision recognising civilian contractors as combatants. Gaston concurs that creating a principle permitting states to use civilian contractors under IHL may trigger full state responsibility for the actions of PMSCs.[897] In light of this discussion, it is submitted that recognition of outsourcing under the

[894]Since most problems relating to the use of civilian contractors have been a result lack of accountability, this move will ensure that state will not deny responsibility for the actions of the personnel it hired.
[895]It should be recalled that discussion in Chapter 3 concluded that currently, the provisions of Articles on Responsibility of States for Internationally Wrongful Acts do not apply to all situations where states hire civilian contractors to perform military functions mainly because the provisions of the Articles currently do not cover the practise of outsourcing of military services. See Chapter 3, section 3.6.1.
[896]Article 4(1) hold state responsible for conduct the conduct of any state organ which exercises" legislative, executive, judicial or any other functions". Since the recommendation proposes the recognition of civilian contractors as combatants, states that rely on civilian contractors will be held responsible under this provision. Alternatively, states can be held responsible under Article 5, which deals with the conduct of "entities empowered by internal law to exercise governmental functions".
[897]Gaston 2008 Harvard International Law Journal 241.

principle of distinction will help to ensure that states retain responsibility for the conduct of civilian contractors they hire.

In addition to the general IHL principle that recognises civilian contractors as combatants, states can be encouraged to enact domestic legislation that will be used to regulate the civilian contractors. For example, domestic regulation can be used to regulate registration of civilian companies that offer military related services, accountability and reporting mechanisms that must be followed by the companies. This may also include disciplinary codes that the companies will follow in case of violation of IHL.[898] These internal regulatory mechanisms can be modelled along the lines of the Montreux Document and the International Code of Conduct, which provide seemingly adequate regulatory mechanisms to states that hire civilian contractors.[899] These mechanisms will help to ensure tight regulation of civilian contractors' activities, hence ensuring accountability.

This approach has several advantages. Firstly, it resolves the problem of the status of civilian contractors hired by states to take part in hostilities since they will now be regarded as combatants. Once the issue of status is resolved, the rights and responsibilities of civilian contractors will be clear, as they will be treated in the same way as traditional combatants. Although this approach may sound radical, it takes into consideration the growing international practice where states outsource security services to civilian contractors instead of relying on their own armed forces. This approach strikes a balance between ensuring that IHL principles are upheld on the one hand and that the rules and principles are flexible enough to accommodate state practice on the other. More so, the recommendation will also restore the effectiveness of the principle of distinction by ensuring that states will only rely on persons who are legally recognised at combatants under IHL.

Secondly, the recognition of outsourced civilian personnel as combatants under the principle of distinction is likely to have political support from states. This is because the move to

[898]As already pointed out in this study, states have begun to put in place legislative measures to ensure regulation of military service providers.
[899]See Chapter 3, section 3.7.1 and 3.7.2.

recognise civilian military contractors as combatants does not create an entirely new norm that requires fresh negotiations between states. For example, while some states traditionally regarded PMSCs as mercenaries, the attitude of states towards PMSCs has shifted in recent years. As mentioned above, fifty-four countries have already endorsed the Montreux Document, a non-binding document that seeks to provide guidance on the use of PMSCs and this includes South Africa, which previously had attempted to outlaw the practice.[900] This is an indication that states are more likely to embrace a humanitarian law principle recognising outsourcing. It can therefore be concluded that the move to recognise outsourcing of military services is likely to receive support from states who will now have flexibility on who they can entrust with performing military activities on their behalf.

Thirdly, recognition of outsourcing under the principle of distinction is likely to create uniform norms regarding the rights and responsibilities of both civilian contractors as well as states that rely on their services. This will ensure that states take responsibility for the acts committed by the persons who are acting on their behalf. Currently, there is no international standard of dealing with outsourcing. States are resorting to practices that are convenient to them. For examples, in relations to PMSCs, while the United States of America and Britain have been trying to regulate PMSCs, countries like South Africa have been trying to ban the activities of PMSCs.[901] This problem has resulted in both civilian contractors and the states hiring them failing to be held responsible for violations of the law. For example, while South Africa passed legislation banning citizens from taking part in what it termed mercenary activities and enacted strict licensing restrictions for foreign military assistance, thousands of South Africans worked for PMSCs in Iraq.[902] Although South Africa has legislation which could theoretically be used to prosecute its citizens who went to work for PMSCs in Iraq and elsewhere, such prosecutions were not possible due to the lack of cooperation from the United States of America and Iraq who were the making using of the PMSCs services.[903] Therefore, in the absence of an international norm regulating civilian contractors, national legislation will not be sufficient to regulate the activities of PMSCs since effectives of such

[900]Gaston 2008 *Harvard International Law Journal* 241. South Africa enacted the Regulation of Foreign Military Assistance Act 15 of 1998 in order to ban its citizens from engaging in mercenary as well as to place restrictions on other forms of foreign military assistance by its citizens.
[901]Gaston 2008 *Harvard International Law Journal* 241.
[902]*Ibid.* Furthermore, South Africa had not promulgated requisite regulations under the Act which would have enabled it prosecute cases of violations of the law.
[903]*Ibid.*

of regulation will depend on cooperation from other states that may have conflicting laws. Therefore, it is submitted that the creation of a norm recognising outsourcing under the principle of distinction will go a long way to ensure that states practice towards civilian contractors is harmonious.

In conclusion, it is submitted that this recommendation will help to restore the distinction between combatants and civilians thus ensuring protection of civilians during armed conflicts. This will also help to ensure that those who take part in armed conflicts are held accountable for violations of international law that may take place.

### 5.4.2 Expanding the definition of military objectives to include some civilian objects

It was concluded above that the difficulty of distinguishing civilian objects from military objectives has been caused two main developments. The first development is the use of civilian contractors by states in armed conflicts, which then raises questions whether the infrastructure and equipment they use become military objectives. The second development is that the emergence of new methods of warfare, has changed the objectives of military operations to include targeting non-military infrastructure, thus making distinction difficult. It is submitted that these problems can be resolved in two ways

Firstly, the expansion of the definition of combatants to civilian contractors hired by states to perform combat functions as recommended above automatically makes their infrastructure and equipment military objectives that can be legitimately targeted. In other words, recognising civilian contractors as combatants will also mean that any objects belonging to them becomes military objectives. For example, the vehicles and installations used by PMSCs, their bases during armed conflict, buildings owned by civilian drone operators or civilians hired to conduct cyber operations will become military objectives that can be attacked during an armed conflict. Therefore, the general rules that apply to targeting of military objectives such as necessity and proportionality become applicable to these objectives. This solves the difficulties caused by the involvement of civilian contractors in armed conflicts, of distinguishing civilian objectives from military objectives.

This approach will have an advantage of ensuring certainty regarding what constitutes military objectives especially in conflict zones such as Iraq where different types of security and military companies operate in the same conflict zone. This recommendation will go a long way in restoring the distinction between civilian objects and military objectives, thus strengthening civilian protection. This approach will also ensure that offices and installations used to launch cyber-attacks and drone attacks will become legitimate attacks wherever they are. For drone operators, this will mean that the CIA headquarters as well as the several airbases where drones are based will become military targets subject to other IHL rules as already mentioned.[904]

Secondly, as noted earlier in this Chapter, changes in the methods of warfare have also resulted in the main objectives of war changing. For example, the introduction of potentially non-lethal methods of warfare such as cyber warfare has resulted shift in a shift in the objectives of war from killing opposing enemy belligerents to causing inconveniences in the economic, social political and economic lives of the opposing state.[905] These have resulted in civilian objects becoming important military targets. Although cyber warfare seems to be at its infancy, it is foreseeable that it may become a preferred method of warfare in future. Given this probability, it is submitted that IHL should seek a balance between allowing states to use methods of warfare that are convenient to them as well as ensuring respect for the principle of distinction.

It is recommended that the definition of military objectives under cyber warfare or any potentially non-lethal method of warfare should be expanded to include some civilian objects. In other words, IHL should recognise the reality that civilians and civilian objects are an

[904]This means that civilian contractors will have to comply with all the other rules that make it easy to identify military objectives from civilian objects. For example, civilian contractors will be prohibited from disguising their infrastructure as civilian objects.

[905]Although it has been argued in this study that methods of warfare such as drone and warfare have created challenges to the principle of distinction between civilian objects and military objectives, it is submitted that the principle of distinction is capable of dealing with all kinetic attacks such as drone strikes. States should be encouraged to do more to adhere to the principle of distinction when conducting drone strikes. The recommendation made at 5.3.2.2 will therefore apply to non-kinetic and non-lethal attacks forms of attacks whose targets include those facilities that are traditionally regarded as civilian objects. Since cyber warfare is the most common and perhaps the only method of warfare, which has the above mention characteristics, the recommendation will constantly refer to cyber warfare as an example. However, the recommendation will apply to future methods of warfare that will have the same effects as cyber warfare.

indispensable part of cyber-warfare and as such are bound to be inconvenienced during the war. This recommendation does not advocate for a return to indiscriminate attacks but instead seeks to ensure that there are some guidelines that can balance states' choice to resort to cyber warfare and IHL's obligation, particularly the obligation to protect civilian population from injury or death are put in place. It is recommended that for the purpose of potentially non-lethal cyber-attacks, the definition of military objectives could be extended to include power stations, economic infrastructure banking and communication systems. However, this extension should remain subject to the principle of proportionality and necessity in order to avoid unnecessary loss or injury to civilians.

This recommendation has a number of advantages. Firstly, it seeks to create a regulatory mechanism in terms of which the principle of distinction can be applied to cyber warfare. Currently there are uncertainties on how the principle of distinction is to be applied in cyber warfare. An attempt to apply the principle of distinction as it stands to cyber warfare in the same way it applies to conventional warfare will result in the majority of cyber operations being prohibited. This will make it almost impossible for states to engage in cyber warfare. The effectiveness of international law rules depends on good will of states to comply with it. When the law is completely out of touch with state practice, states may be inclined to ignore it. Therefore, if states find cyber warfare to be a convenient and useful method of warfare, which however is prohibited under IHL, they may be inclined to ignore the rules completely. Such a situation will mark a return to indiscriminate attacks. This recommendation therefore attempts to make it possible for states to engage in cyber warfare while at the same time ensuring that this can be done within the confines of the law.

Another advantage that the recommendation has is that attacks under cyber warfare, unlike kinetic attacks, are mostly non-lethal. Several cyber-attacks can only cause inconveniences without causing injury or death.[906] The non-lethal potential of cyber warfare makes it a safer method of warfare as compared to conventional warfare. Therefore, states should be encouraged to pursue this method of warfare by making the rules of IHL such as the principle

[906]See Generally Kelsey 2008 *Michigan Law Review* 1427.

of distinction flexible to accommodate cyber warfare.[907] One way of relaxing the principle of distinction to accommodate cyber warfare is to expand the definition of military objectives to objects that "provides effective war-sustaining capabilities or indirectly contributes to military action".[908] This adaptation of the law may result in states moving away from the costly and destructive conventional warfare to cyber warfare. This does not however suggest that death or injury will not result from cyber operations. It t is submitted that the application of the principle of distinction, together with necessity and proportionality will deal with cases of lethal cyber-attacks and still be able to reduce the number of casualties in armed conflicts.

### 5.4.3 State Practice and Soft Law is essential in the development of the principle of distinction

It has been stressed throughout the study that some methods of warfare such as drone and cyber warfare are recent phenomenon and there is no well-established state practice regarding the rules applicable to these methods of warfare. It is submitted that development of IHL principle of distinction should take into account state practice. For example, it can be argued that it is now easier for states to negotiate rules that will recognise civilian contractors such as PMSCs as combatants under the principle of distinction because of the fair amount of state practice that can guide states during negotiations.[909] State practice ensures that states will take a realistic approach based on their experience when negotiating the law. However, the same cannot be said about cyber warfare. States have not yet begun to openly acknowledge their involvement in cyber warfare hence there is no sufficient state practice that can be used for guidance during negotiations.

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[907]Kelsey argues that "IHL should offer greater flexibility in deploying cyber weapons rather than regulating cyber warfare with the same restrictive rules that apply to conventional weapons. See Kelsey 2008 *Michigan Law Review* 1448.

[908]*Ibid.*

[909]For example, state practice and soft law has developed which can be used to give some guidance on how states should contact themselves. These can be used to guide the adaptation of the principle of distinction. This will help to ensure that states do not engage in negotiations forever. More so, states will also be deliberating on something that they have seen in practise. As a result, international law rules will not be negotiated in vacuum since there will be state practice to guide the negotiations

Soft law can be very useful in the development of the principle of distinction in order to regulate the developments that have taken place in armed conflicts. For example in relation to PMSCs, states have negotiated the Montreux Document, which provides useful guidance on states that want to use PMSCS.[910] Firstly, soft law will provide some guidance to states on the possible options they have when developing the law. Secondly, if soft law is developed with the involvement of states, the negotiation on the development of the law may be less contentious and less time consuming than in situations where states have to engage on the issues for the first time. Therefore, while I still maintain that the recommendations made above are capable of resolving the challenges that the principle of distinction is facing in modern armed conflicts, it is submitted that state practice and soft law should be considered when adapting the principle of distinction to modern armed conflicts.

## 5.5 Concluding Remarks

The nature of armed conflicts has drastically changed. New means and methods of warfare that stretch the laws of armed conflict to their limits have emerged. Although the framework that makes international humanitarian rules, including the principle of distinction remain relevant and applicable modern conflicts, it has been demonstrated that the law is not adapted enough to apply to these developments. International law, including IHL's effectiveness relies on states' goodwill to abide by the law. As a result, law should adapt to the changes in state practice in order for it to remain effective. In conclusion, the principle of distinction between combatants and civilians and between civilian objects and military objectives need to adapt to the changes that have taken place in modern armed conflict in order for it to remain relevant and for it to maintain its purpose of ensuring that the rights and duties of all persons are protected during armed conflicts.

[910] Although the Tallinn Manual can be used for guidance in relation to cyber warfare, its negotiation did not involve participation of states hence states may be reluctant to have their practice guided by it. However, it may be used to further develop soft law where states get involved

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