UNIVERZITA KARLOVA

Právnická fakulta

Pavla Vavrečková

Zásada rozlišování a její promítnutí v konfliktu mezi Izraelem a teroristickými organizacemi působícími na území Gazy

Diplomová práce

Vedoucí diplomové práce: JUDr. Milan Lipovský, Ph.D.

Katedra: Katedra mezinárodního práva

Datum vypracování práce (uzavření rukopisu): 14. 12. 2021

CHARLES UNIVERSITY

Faculty of Law

Pavla Vavrečková

The principle of distinction and its implications for the conflict between Israel and the terrorist groups operating in the Gaza Strip

Master's Thesis

Thesis supervisor: JUDr. Milan Lipovský, Ph.D.

Department of public international law

Submitted on 14. 12. 2021

Prohlašuji, že jsem předkládanou diplomovou práci vypracovala samostatně, že všechny použité zdroje byly řádně uvedeny a že práce nebyla využita k získání jiného nebo stejného titulu.

Dále prohlašuji, že vlastní text této práce včetně poznámek pod čarou má 130 469 znaků včetně mezer.

Pavla Vavrečková

V Praze dne 14. 12. 2021

Acknowledgement

I would like to thank my supervisor JUDr. Milan Lipovský, Ph.D. for his patience and helpful insights and comments. Further, I would like to express great gratitude to The Herzl Centre for Israel Studies, which provided me with the possibility to work on my thesis in Israel by awarding me a scholarship. And last, but not least, I would like to thank my family and friends who greatly supported me during my studies.

Index

List of Abbreviations

HCJ	Supreme court of Israel sitting as High Court of Justice
IAC	International Armed Conflicts
ICRC	International Committee of Rec Cross
IHRL	International Human Rights Law
LoAC	Law of Armed Conflicts
NIAC	Non-international Armed Conflicts
PoW	Prisoners of War
US	The United States of America
The Hague Convention III	Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907.
The Hague Convention IV	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.
Convention for prevention and punishment of terrorism	LEAGUE OF NATIONS, Convention for prevention and punishment of terrorism of November 16, 1937.
First Geneva Convention	Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.
Third Geneva Convention	Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.
Fourth Geneva Convention	Convention (IV) relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August 1949.
Protocol I	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.
Protocol II	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.
Rome Statute	Rome Statute of the International Criminal Court, Rome, 17 July 1998.
Tadic Case	*Prosecutor v. Dusko Tadic a/k/a "DULE",* decision on the defense motion for interlocutory appeal on jurisdiction by International Criminal Tribunal for the former Yugoslavia from October 2, 1995, IT-94-1-AR72.
Kassem Case	*Military Prosecutor V. Omar Mahmud Kassem and others*, decision by Military Court sitting in Ramallah from April 13, 1969.

Quirin Case	*Ex parte Quirin et al.; United States ex rel. Quirin et. al. v. Cox Provost Marshal*, decision by The Supreme Court of the United States from July 31, 1942, 317 U.S. 1.
Public Committee Against Torture v. Government	Public Committee against Torture v. Government, decision by The Supreme Court sitting as the High Court of Justice from December 14, 2006, HCJ 769/02.
Iyyad v. State of Israel	Iyyad v. State of Israel, decision by The Supreme Court of Israel sitting as the High Court of Justice from June 11, 2008, CrimA 6659/06

Introduction

With the beginning of the new millennium, new challenges for the Law of Armed Conflict (hereinafter "*LoAC*") have surfaced. The wars, as we knew them from history, have transformed. The new wars are not fought by professional armies on both sides anymore, but rather a new actor, different than a state's army has appeared. The armed conflicts of today are more than often fought by a state on one side, and a non-state actor (e.g. a terrorist organization) on the other. Why is this such a significant shift? The laws governing armed conflicts on the international level have been adopted during the 19th and 20th century and account at large only for the traditional types of wars with clearly distinguishable combatants. They reflect the reality of many centuries of traditional wars as well as the two world wars, but now are being challenged by the transformation of the conflicts. With the appearance of an unconventional actor – terrorist groups – in the armed conflicts all around the world, a question of a terrorists' legal status under international, and particularly humanitarian, law arose.

In the centre of it all is the core principle of LoAC – the principle of distinction. The distinction that this principle sets forward presents an issue when dealing with the terrorist element in armed conflicts. The principle introduces a strict dichotomy – people that figure (both directly and indirectly) in any armed conflict must be either combatants or non-combatants (civilians). No in between category has been introduced by the international treaties. This strict categorization has been sufficient for the traditional wars, but once terrorist organizations with their specific form of fighting entered the scene, it was proved to be non-all-compassing. For this exact reason, there have been scholars and even states that called for (or authoritatively introduced) another, third category of persons in an armed conflict – quasi combatants.

The arising category of the so-called "unlawful" or "quasi" combatants, however, challenges current international law on many levels. The aim of this thesis is to explore the intricacies connected to the newly defined third status under the principle of distinction. What are the inadequacies in the classical LoAC that led to the creation of this third status? Does it have a place in the LoAC theory, or does it create an unsustainable legal issue?

This thesis aims to find answers to two questions, that are interconnected. Firstly, a more general question – Are quasi combatants a recognizable third group of persons under the LoAC? In the light of the answer to this question, the thesis will further look closely on selected techniques

used by the State of Israel against the terrorist groups operating in the Gaza Strip and evaluate their legality[1].

The thesis focuses on more general questions first. In the first part, an introduction to asymmetrical conflicts is made and their peculiarities are highlighted. Diving deeper into the topic, the principle of distinction is explored, with focus on the status of persons under the norms of the LoAC. In the final part, the findings from the previous chapters are applied to a specific situation – the military actions of Israel have been selected for an analysis in this thesis.

The literature relevant to this thesis is mostly foreign, therefore only a limited number of Czech sources has been used. The language of this thesis has been chosen in respect to the language of the sources.

Several different methods have been used in writing this thesis. The first part uses mainly descriptive method – especially the chapters 1 through 3. In the final chapter the findings from the previous chapters have been applied to a specific situation, and mostly the method of analysis has been used.

The question of quasi combatants and the status of terrorists has become very topical after the 9/11 attacks in 2001 in the United States of America. The topic is nevertheless still relevant, especially given the scope of this thesis and its focus on Israel and namely on the groups operating in the Gaza Strip. In February 2021 International Criminal Court in The Hague published a decision[2] regarding its jurisdiction and formally opened an investigation of the events and military actions that occurred in the West Bank, Gaza Strip and East Jerusalem from June 2014. The decision that will result from this investigation will also at large have to consider the status of the parties involved in the conflict. Therefore, also in the light of this decision, the discussed topic still prevails to be relevant and worthy of further analysis. Further, the military techniques that will be looked into in the final part of this thesis, have been continuously used by Israel throughout the years - most recently in May of 2021, during a wave of hostilities in between Israel and the terrorist groups operating in the Gaza Strip.

[1] Please note that due to the scope of this thesis the legality will be evaluated only in connection with the principle of distinction.

[2] INTERNATIONAL CRIMINAL COURT. *Situation in the state of Palestine* [online]., 2021. Accessed from: https://www.icc-cpi.int/CourtRecords/CR2021_01165.PDF [cit. 2021-11-14].

1. Asymmetric conflict and its challenges

Asymmetric conflict is a term that can be used to describe a large number of conflicts that arose especially in the 20th and more predominantly at the beginning of the 21st century. There has been a significant change in the nature of the armed conflicts – especially when it came to the parties to the conflict, but also in the tactics, places where armed conflicts are taking place etc.

Traditional conflicts have a few defining factors among them: the similarity in the parties to a conflict (armies) and for example the places where conflicts take place (battlefields removed from populated areas). Before the rise of asymmetric conflicts, the conflicts were traditionally fought in between "*parties of roughly equal status and capabilities*" [3], but that is not the situation nowadays. Especially in the time period after the Second World War, the conflicts underwent an enormous transformation when it came to the parties of conflicts. The traditional state-state conflicts have been moved to the background and less defined conflicts have become prevalent. Since the traditional conflicts – wars – have been led by states for so many centuries and since there was certainty about who the actual parties of the wars were, the wars have been waged by certain rules. How these rules and the power balance transformed will be more in detail discussed below.

The place where the conflicts take place has been transformed as well. The wars are generally no longer fought "*in a distinct "battlefield" removed from dense civilian settlements*" [4], but rather in the midst of the civilian settlements, taking advantage of the civilian presence and its protection under the LoAC.

1.1 Armed conflicts: characteristics, categorization

This thesis operates with two main terms that require a definition and distinction – the terms *war* and *armed conflict*.

In the past, the initiation of a war followed a given procedure – a declaration of war (eventually a conditional declaration of war)[5]. Similarly, the international treaties (Hague conventions of 1899 and 1907, and Geneva Conventions of 1864, 1906 and 1929) did not specify when their applicability was to be triggered, since it was assumed that they would apply once a war

[3] DERIGLAZOVA, Larisa. *Great powers, small wars: asymmetric conflict since 1945*. 1. Baltimore: Johns Hopkins University Press, 2014. ISBN 978-1421414126, p.2.
[4] ESTREICHER, Samuel. Privileging Asymmetric Warfare: Part I: Defender Duties under International Humanitarian Law. *Chicago Journal of International Law*. 2011, **11**(2), 425-438. ISSN 1529-0816, p. 426.
[5] The Hague Convention III, Art. 1.

was officially declared.[6] This nevertheless changed especially during the 20 th century and the beginning of wars was not so easily distinguishable. The newly adopted international treaties (Geneva Conventions) reacted to this reality and in order to grant rights and protections to both combatants and civilian official declaration of war was no longer necessary.[7] Since the application of the relevant LoAC treaties become triggered not only by a declaration of war, the term *armed conflict* found its way into the provisions concerning the applicability of the treaties. An armed conflict can be therefore firstly distinguished from war in a sense that it is lacking formality. Secondly, wars preceding the rise of armed conflicts typical for their asymmetries were more "*predictable, and […] focused on legitimate players, namely state actors*[8]". The term war therefore referred to clashes between two states. And lastly, term war was exclusively used for armed conflicts, that reached a certain level (even though not further specified) of intensity.[9]

Since the term armed conflict better captures the reality of nowadays clashes, even more so when it comes to the conflicts that include a lot of asymmetries, it will be used throughout the thesis.

A basic definition of the term *armed conflict* was provided by the Commentary to the Geneva Conventions as: "*Any difference arising between two States and leading to the intervention of members of the armed forces*" [10]. As the Commentary notes, in order to recognize the hostilities as an armed conflict, the duration of hostilities nor the number of victims is a decisive factor.[11] The term therefore covers a wide range of insurgencies occurring both within the country as well as internationally (as will be further explored below).

Similarly, an armed conflict is defined in by The International Criminal Tribunal for the former Yugoslavia – "*an armed conflict exists whenever there is a resort to armed force between States*"[12]. This definition, even though seemingly vague, narrows armed conflicts only to the cases

---

[6] INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. 1. Cambridge: Cambridge University Press, 2016. ISBN 978-1-107-17010-0, para 192.

[7] PICTET, Jean S., ed. *The Geneva Conventions of 12 August 1949, Commentary*. Geneva: International Committee of the Red Cross, 1958, p.20.

[8] RAVICHANDRAN, Sharanya. Non-State Conflict and the Transformation of War. *E-International relations*. 2011. ISSN 2053-8626. Accessed from: https://www.e-ir.info/2011/08/29/non-state-conflict-and-the-transformation-of-war/, p. 1.

[9] ČESKÝ ČERVENÝ KŘÍŽ. Ozbrojený konflikt - definice a druhy. *Český červený kříž: Oficiální stránky Českého červeného kříže* [online]. [cit. 2021-12-12]. Accessed from: https://www.cervenykriz.eu/files/files/cz/nsmhp_svbs/Pravidla_priloha_1.pdf, p.1.

[10] PICTET, op. cit., p. 20.

[11] *Ibid.*

[12] *Prosecutor v. Dusko Tadic a/k/a "DULE"*, decision on the defense motion for interlocutory appeal on jurisdiction by International Criminal Tribunal for the former Yugoslavia from October 2, 1995, IT-94-1-AR72, (hereinafter "*Tadic case*"), para 70.

when a conflict arises between states and disregards other possible non-state actors, which does not correspond to the contemporary usage and content of the term.

Armed conflicts can be divided into two groups – international armed conflicts (hereinafter "*IAC*") and non-international armed conflicts (hereinafter "*NIAC*"). The distinction is important for determining which set of norms will apply to each individual conflict.

1.1.1. International armed conflicts

Looking firstly at IAC, they can be defined from the scope of application of the Article 2 of the First Geneva Convention (also referred to as a common article 2 of Geneva Conventions) as follows:

> "*[…]cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them."*[13]

IAC can therefore take place only between *two or more of the High Contracting Parties,* meaning two or more states. As it was noted above, these kinds of conflicts are subsiding in the world nowadays. Nevertheless, what reflects the reality is the part of the provision, that confirms applicability of the Geneva Conventions even on the situations, when a war was not officially declared. This ties together with the explanation provided above, that the Geneva Conventions aimed to be triggered even without a formal declaration of war - in order to provide a greater protection for the persons involved.

Further, other types of armed conflicts can be under certain conditions subsumed under the IAC. The scope of application is extended also in the Common Article 2 to the Geneva Conventions, and the convention will apply also to the "*cases of partial or total occupation of the territory of a High Contracting Party […]*"[14].

To conclude, the discussed Common Article 2 precisely demarcates the scope of application of the Geneva conventions, when it comes to IAC. The IAC shall therefore be governed by the rules laid out in the Geneva Conventions. Further, 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 (hereinafter "*Protocol I"*), will govern IAC.

[13] First Geneva Convention, Art. 2.
[14] *Ibid.*

1.1.2. Non-international armed conflicts

Taking states' sovereignty as a starting point, NIAC, armed conflicts in principle without an international element, are primarily governed by domestic legislative of the state, on whose territory they take place. And so, before the adoption of the Geneva Conventions, "*[t]he fundamental assumption in international relations, and international law, was that the relationship between a State and its own citizenry was a matter for the domestic legal system alone."*[15] This was contested by the International Committee of the Red Cross [16], which objected the insufficient protection of persons in such armed conflicts. Looking at the international level, the norms of International human rights law (hereinafter "*IHRL*") shall apply to assure the basic rights for the persons involved. Originally, there was an assumed position, that the regimes of IHRL and International Humanitarian Law (in other words norms of LoAC) are mutually exclusive – in other words, that only one legal regime could apply at the given time. This has been nevertheless contested and the train of thought that there is a strict separation in between law of peacetime and law of war has been overcome – not all the norms that could be categorized as law of peace will cease to apply in the midst of armed conflicts.[17] Especially the norms that grant basic rights to the individuals will retain their effectivity also in the times when the LoAC will be the main legal system governing said situation.[18]

Nevertheless, a change came with the Geneva Conventions entering into force. The Conventions did not turn a blind eye to other types of conflicts (other than IAC) and in the Common Article 3 set minimum requirements of conduct also in conflicts not of an international character (NIAC). Firstly, the Geneva Conventions specify, what in fact constitutes a NIAC. According to the Article 3 of the First Geneva Convention is "*[an] armed conflict not of an international character occurring in the territory of one of the High Contracting Parties*"[19]. Since the Geneva Conventions have become universal, the requirement that the conflict must take place in the *in the territory of one of the High Contracting Parties* has become obsolete.[20]

[15] KRETZMER, David. Rethinking the application of IHL in non-international armed conflicts." 42.1 (2009): 8-45. *Israel Law Review*. 2009, **42**(1), 8-45, p. 13.
[16] *Ibid.*
[17] ONDŘEJ, Jan, Veronika BÍLKOVÁ, Pavel ŠTRUMA and Dalibor JÍLEK. *Mezinárodní humanitární právo*. 1. Prague: C.H. Beck, 2010. ISBN 978-80-7400-185-7, p. 21.
[18] *Ibid.,* p. 22.
[19] First Geneva Convention, Art. 3.
[20] INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC). *How is the Term "Armed Conflict" Defined in International Humanitarian Law?: Opinion Paper* [online]. 2008, 1-5 [cit. 2021-11-14]. Accessed from: https://www.icrc.org/en/doc/assets/files/other/opinion-paper-armed-conflict.pdf, p.3.

The Common article 3 of the Geneva Conventions has been further developed and supplemented[21] by the Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (hereinafter "*Protocol II*"). The main characteristics of NIAC can be drawn from the scope of application of the Protocol II expressed in the Article 1 of the Protocol II. As NIAC are therefore considered conflicts,

> "*which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol."*[22]

International Committee of the Red Cross (ICRC) in its opinion paper issued in 2008 [23] notes, that the definition in Protocol II provides a narrower outlook on the NIAC, firstly constricting them only to the situations of conflict where a state (a High Contracting party) is one of the parties to the conflict (the Geneva Conventions on the other hand reflect also situations of conflict in between two non-state actors), and secondly, it adds a requirement that the party different from a state needs to exercise control over territory.

The distinction in between IAC and NIAC is significant for the application of the LoAC. When it comes to NIAC and Geneva Conventions, primarily the Common Article 3 of the First Geneva Convention will apply. This article sets out minimal requirements that shall be followed in NIAC, including humane and non-discriminatory treatment for persons taking no active part in hostilities or persons who laid down their arms and persons incapacitated to take further part in the hostilities (by sickness, detention or for other reason). [24] These categories of persons (i.e. persons taking no active part in the hostilities and members of armed forces who i) laid down their arms, ii) were placed *hors de combat*) receive a special level of protection by the Common Article 3. Especially forbidden are acts of violence to life and person, taking of hostages, degrading treatment and sentencing by irregular courts.[25]

Above the Common Article 3 of the First Geneva Convention, NIAC is at large governed (especially when it comes to protection of victims) by the aforementioned Protocol II.

---

[21] Protocol II, Art. 1 (1).
[22] Protocol II, Art. 1 (1).
[23] INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC). *How is the Term "Armed Conflict" Defined in International Humanitarian Law?:, op. cit.,* p. 4.
[24] First Geneva Convention, Art. 3 (1).
[25] *Ibid.*

Nevertheless, in order for the Protocol II to apply (in contrast to the Common Article 3), the hostilities must reach a certain level of intensity [26]. Said intensity can be seen in the factors mentioned above – in the fact that the non-state armed forces must reach a certain level of organization and must exercise a control over territory[27].

Above the spars regulation of NIAC by international treaties, the extensive customary law will apply and at large fill in the eventual legal vacuum.

1.2 Rise of asymmetric conflicts

As it was repeated throughout the opening chapters of the thesis, the asymmetric conflicts as we can see them in nowadays world are of a recent origin. There have been several factors in the recent history, that contributed to this shift. Deriglazova in her book *Great Powers, small wars*[28] makes a general observation and lists main conditions and factors that gave rise to asymmetrical conflicts in the world post the Second world war. This list is not exhaustive, but it is trying to look at the sources of the change from multiple angles. Firstly, she sees the asymmetry of the contemporary conflicts in "*a qualitative rather than quantitative disparity between the belligerent parties*"[29], meaning, that quantitate disparity (strength of the weaponry, size of the army etc.) is subsiding in its role of the decisive factor. What has come to the foreground are the restrictions taken up by the states (as parties to a conflict) resulting from their position in the international community (restrictions resulting from international treaties, economic ties and pacts, political ties etc.). States then can easily find themselves in a situation, where their internal security as well as overall sovereignty might be challenged, they do have effective tactics and weapons at their disposal, nevertheless they are not able to use them, if they want to uphold their international obligations. The disparity is therefore qualitative, meaning, that in asymmetric conflicts one actor is strictly bound by international law and committed to uphold it, whereas the opponent does not respect the LoAC norms.

Moreover, it can be added that the opponent at times does not only disrespect the norms of LoAC, but is actively taking an advantage of them and using – most often – the protection of civilians provided by the law as a shield for own hostile activities. Added to that, non-state actors, predominantly terrorist groups, are at large using the 'negative publicity' states were to get in case they are being provoked to overstep the lines drawn down by the LoAC, as a weapon in their

[26] JUNOD, Sylvie. Additional Protocol II: history and scope. *American University Law Review*. 1984, **33**, 29-40, p.29.
[27] JUKL, Marek. *Ženevské úmluvy, obyčeje a zásady humanitárního práva: (stručný přehled)* [online]. 1. Český červený kříž, 2020 [cit. 2021-11-24]. ISBN 978-8087729-31-1. Accessed from: https://www.cervenykriz.eu/files/files/cz/edicehnuti/Konvence20.pdf, p. 20.
[28] DERIGLAZOVA, op. cit., p. 2.
[29] *Ibid.,* p. 10.

arsenal. The more condemned the state actors are, the more sympathy (and eventually even funding) from the international community can be terrorist groups get.

Secondly, Deriglazova comments on the changed nature of military confrontations – the warfare itself (especially the strategies and tactics) have undergone a significant change in the past decades, trying to keep up with the reality. The same tactics used in the classical wars can hardly find their use in the fight against much less organized opponents. Further, the means of warfare have significantly transformed, enabling smaller actors (smaller in the number of involved persons as well as in the number of financial means available) to be an equal counterpart to big states in armed conflicts.

Under this point it is fit to underline the influence globalization and digitalization had on the access of smaller players into the player field. Nowadays the size of an army does not automatically mean a definitive advantage or disadvantage. To provide an example, in today's world countries can be effectively paralyzed by an attack on its systems connected to internet (e.g. governmental system, infrastructure, essential services etc.) – and for such an attack no large army is needed.

As a third factor that led to the transformation of the conflicts, the involvement of big state powers in third world countries is listed. The author sees this involvement important primarily because it brought forward "*the rhetoric of a struggle for ideals and justice*"[30], that has been later on continuously used in other asymmetrical conflicts.

In the next point, the author pays attention to the changed nature of the conflicts itself – a transition from traditional wars fought by state actors to conflicts with many asymmetries that in many cases cannot even be called wars (this change was also commented on in the Section 1.1. of this thesis). In the last point the author looks at the events that took place in the second half of the 20th century that step by step contributed to the transformation of the conflicts. As influential, the author sees three main streams of events. Firstly, the period of a fight for independence fought by colonized countries overseas. These wars themselves had a big asymmetrical factor in play, considering the difference in power in between the colonies and the colonizers – the big European powers. The next period was a period of Cold war, spanning from the 1960s, during which the United States of America and Soviet Union used their position and got involved in conflicts in the third world countries. And lastly, a period that begun with the dissolution of the Soviet Union and the collapse of the Eastern bloc, that was marked by growing cooperation in between individual states.

[30] DERIGLAZOVA, op. cit., p. 11.

All the described factors together, as the author puts it, "*raised the profile of asymmetric conflict*"[31]. Combined, they led to a significant shift in the sole nature of armed conflicts which step by step strayed further from the typical state-state wars and more towards conflicts with significant asymmetries.

The second half of the 20 th century was a significant period of transformation as it was described above, the beginning of the 21st century nevertheless brought even bigger challenge and change and shook the classical understanding of the armed conflicts to its core. The raise and impacts of international terrorism could be singled out as the most significant factor that made the international community of states understand that highly asymmetrical conflicts are something, that needs to be accounted for on the level of international law.

1.3 Asymmetry factors

Each armed conflict is imminently asymmetrical. There are no two armies that are the same in size, expertise, weapon power, effectivity of tactics etc. Therefore, even the classical wars can be described to a certain level as asymmetrical. For a distinction, the term *asymmetrical conflict* will be used in this thesis as described above – for the transformed conflicts, where one party is of a different status then a state. The 'new' conflicts have a war like characteristics, but are waged in between a state on one side and a non-traditional, not clearly defined player on the other side. These conflicts can be referred to as asymmetrical for number of reasons.

In general, there are several categories that create asymmetry in a conflict, for the most important factors it is necessary to mention "*power, resources, status, and interests of the parties to the conflict*"[32]. The imbalance of power, as a general term can therefore be considered as the first and perhaps the most obvious source of asymmetry. The power itself stems from different sources – firstly, it is a financial power (power of financial resources), secondly, power consisting of outnumbering the opponent, and thirdly, the power of available resources, especially when it comes to the access to innovations, extent of weapon inventory etc. Asymmetric conflicts under this perspective can be describes as "*violent conflicts in which one side possesses significantly greater military resources than does the other."*[33]

Secondly, and maybe more significantly, the asymmetry can be seen in the way how parties to a conflict are bound by the norms of LoAC, or better yet, in the way how much they abide by the LoAC. This correlates to their status in the international community. When a state is fighting

[31] DERIGLAZOVA, op. cit., p. 12.
[32] *Ibid.,* p. 8.
[33] SWENEY, Gabriel. Saving Lives: The Principle of Distinction and the Realities of Modern War. *International Lawyer*. American Bar Association, 2005, **39**(3), 733-758., p. 736.

against a non-state actor, e.g. a terrorist group, an interesting phenomena surfaces – a democracy, bound by the norms of LoAC and human right treaties is put into a position where it has to fight so to speak with one hand behind its back [34]. The tactics that are off limits for law abiding states (in traditional wars off limits for all the parties) are not a taboo for the opponent. Therefore, the position of the states becomes tricky – even in cases where the opponent is using all the off-limit tactics and techniques, the state shall indeed remember its international commitments and cannot retaliate in the same manner. Violations of the LoAC norms are present in almost all armed conflicts, needles to say, it is even more apparent in asymmetrical conflicts in which the non-state party often lacks accountability to the international community, and it can come to the situations where the asymmetry is highlighted to the level that "*the [s]tate fights while upholding the law, whereas its enemies fight while violating the law*" [35]. The opponents for the most part are very much aware of this dynamic and in most cases take an advantage of it either by sheltering behind the LoAC norms or by trying to provoke the states to an illegal action (in the cases in which such a provocation is successful, and the state indeed violates the norms of LoAC, the counterpart can benefit from the consequences by a combination of gaining sympathy from the international community and by the denouncement of the state actions that would follow).

The asymmetry therefore lays in the means that are at the disposition to the parties to a conflict – both material, as well as legal. In a symmetrical conflict, the means would be more balanced and the symmetry would "*imply potential reciprocity in the interaction: what A could do to B, B might likewise do to A.*" [36] This is nevertheless not applicable to asymmetrical conflicts – there an imbalance surfaces - while non-state players such as terrorists do not shy away from using means outside the scope of LoAC, the law-abiding countries have at their disposal only limited means that do not violate the binding international law. The main struggle can therefore be seen in the asymmetry of effectiveness of these tools, since "*not every effective means is a legal means*"[37], the states are therefore much more limited in their response to violence and need not only to protect their citizens, territory, and peace, but also stay mindful to the obligations and boundaries under international law.

[34] GÎRLA, Lilia a Jacob RUB. Fight against terrorism poses especially challenging questions for democratic countries. *Revista Naţională de Drept*. 2016, (3), 27-31., p. 27.
[35] *Ibid*.
[36] WOMACK, Brantly. *China and Vietnam: The politics of asymmetry*. 1. New York: Cambridge University Press, 2006. ISBN 978-0-521-85320-0, p. 78.
[37] GÎRLA, RUB, *op. cit.,* p. 27.

1.4 Non-state actors, terror groups

As it was described above, it is typical for asymmetrical conflicts that one of the parties is a non-state actor. In general, there is a variety of non-state actors (e.g. actors others than states) but for the purposes of the thesis, attention will be given to the armed non-state actors. For a closer definition, as the armed non-state actors can be considered organizations that are:

"(i) willing and capable to use violence for pursuing their objectives and

(ii) not integrated into formalized state institutions such as regular armies […].

They, therefore, (iii) possess a certain degree of autonomy with regard to politics, military operations, resources, and infrastructure."[38]

Focusing on terror groups, they can be categorized as a sub-category of armed non-state actors, nevertheless the aforementioned definition is not all all-encompassing. When it comes to terrorism, there are certain specifics that require a close look. Despite the efforts, the international community is lacking a universal definition of terrorism. Nevertheless, multiple definitions made by scholars as well as various international organizations can be found.

As early as in 1937, the League of nations in the Convention for prevention and punishment of terrorism defined acts of terrorism as "*criminal acts directed against a State and intended or calculated to create a state of terror in the minds of particular persons, or a group of persons or the general public*."[39] Almost seventy years later, in 2004, the United Nations Security Council in its Resolution 1566 defined terrorism as follows: "*criminal acts, including against civilians, committed with the intent to cause death or serious bodily injury, or taking of hostages, with the purpose to provoke a state of terror in the general public or in a group of persons or particular persons, intimidate a population or compel a government or an international organization to do or to abstain from doing any act* […]."[40]

What can be seen from the definitions is, that rather than focusing on defining what terrorism is (in the way armed non-state actors are defined), they provide a definition by the goals terrorists aim to achieve – and this is a common aspect among the efforts to define terrorism. What seems to be the factor that distinguishes terrorism from other form of insurgencies is that terrorists' goal is to intimidate using violence in order to reach their objectives. As Young in his paper states,

[38] HOFMANN, Claudia a Ulrich SCHNECKENER. Engaging non-state armed actors in state-and peace-building: options and strategies. *International review of the Red Cross*. 2011, **93**(883), 603-621, p.606.

[39] Convention for prevention and punishment of terrorism, Art. 1 (2).

[40] SECURITY COUNCIL OF THE UNITED NATIONS, Resolution 1566 (2004). October 8, 2004 [cit. 2021-11-17]. Accessed from: https://www.un.org/ruleoflaw/files/n0454282.pdf, para 3.

one of the common elements of the majority of definition efforts is a terrorists' motivation to cause intimidation or coercion.[41]

2. Principle of distinction

The purpose of this thesis is to explore the existence of another category under the principle of distinction – the thesis will therefore begin with a short excursus to the principle of distinction itself is and what is its place in the LoAC. As it was mentioned before, this principle truly stands in the core of the LoAC – it is even considered to be as one of the pillar principles of the LoAC[42]. In short, this principle "*introduces an obligation to discriminate during an armed conflict between combatants, who are appropriate targets of attack and destruction, and noncombatants (civilians), who are inappropriate targets*"[43].

The principle of distinction was first officially recognized in the St. Petersburg Declaration of 1868 (in particular in its preamble stating that "*the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy*"[44]). Chronologically after that, the principle found its projection in the Article 25of the Hague Conventions[45,46] and later on in the Geneva Conventions [47]. For the armed conflict nowadays, the core document in which are the basic limits of the principle of distinction set out is Protocol I. Protocol I focuses on the following areas – firstly it sets forth the basic humanitarian principles that apply to the wounded and sick in an armed conflict, secondly it poses restrictions as well as certain demands on methods and means of warfare, thirdly it deals with combatant and prisoner-of-war status, and lastly it focuses on the civilian population and its protection (as further described below).

As of today, 174 states are a party to the Protocol[48], nevertheless, two of the most significant countries (when it comes to the interpretation of the principle of distinction) – Israel

[41] YOUNG, Reuven. Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation. *Boston College International and Comparative Law Review*. 2006, **29**(1), 23-106, p. 56.
[42] SWENEY, *op. cit.,* p. 733.
[43] KASHER, *op. cit.,* p. 152.
[44] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 1868, preamble, as found in FLECK, Dieter. *The Handbook of International Humanitarian Law*. 3. Oxford: Oxford University Press, 2013. ISBN 978-0-19-965880-0, p. 168.
[45] The principle of distinction is not explicitly stated in the Article 25 of The Hague Convention IV, nevertheless it is the leading principle behind the provision that prohibits attacks on undefended civilian targets ("*towns, villages, dwellings, or buildings*").
[46] The Hague Convention IV.
[47] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949. Hereinafter "*Third Geneva Convention*"), Art. 4 (A) (6).
[48] 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.: Treaties, States Parties and

and The United States of America are not amongst the signatories. Even though these countries have not signed the Protocol I, it does not mean that the principle of distinction shall not apply to their actions in the armed conflicts. The continuous state practice till this day made this principle a norm of customary international law[49] and as a norm of customary law it is therefore binding for the contracting as well as non-contracting parties.

Paying attention especially to Israel, the principle of distinction has been recognized as an effective norm of customary international law in the number of court decisions. Firstly, in the Military prosecutor v. Omar Mahmud Kassem and others case, ruled on by the Military court sitting in Ramallah in 1969 [50] (hereinafter "*Kassem case* "), the court affirms, that the "*immunity of non-combatants from direct attack is one of the basic rules of the international law of war*" [51]. Looking at the newer case law, in the High Court of Justice (hereinafter "*HCJ*") Decision in the case Public Committee Against Torture v. Government[52], the court acknowledges, that even though Israel is not a party to the Protocol I, the customary provisions contained in the Protocol I are also binding for the country [53], the same is repeated by the Supreme Court of Israel sitting as the Court of Criminal Appeals in the case Iyyad v. State of Israel, judicated in 2008[54]. And further, for example, in 2009 the HCJ finds this principle to be "*one of the fundamental principles of international humanitarian law*"[55].

Commentaries. *International Committee of the Red Cross* [online]. [cit. 2021-11-17]. Accessed from: https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=470.

[49] HENCKAERTS, Jean-Marie a Louise DOSWALD-BECK. *Customary International Humanitarian Law: Volume I Rules*. 1. Cambridge: Cambridge University Press, 2005. ISBN 978-0-521-80899-6, p. 3.

[50] *Military Prosecutor V. Omar Mahmud Kassem and others*, decision by Military Court sitting in Ramallah from April 13, 1969, 4/69 as cited in SASSÒLI, Marco, Antoine A. BOUVIER and Anne QUINTIN. *How does law protect in war?: Volume III Cases and Documents* [online]. 3. Geneva: International committee of the Red cross, 2011 [cit. 2021-11-21]. ISBN 978-2-940396-12-2. Accessed from: https://archive-ouverte.unige.ch/unige:17803/ATTACHMENT02, case n. 126. See Chapter 2.1.1 for further analysis of the case.

[51] *Military Prosecutor V. Omar Mahmud Kassem and others*, op. cit., p.5.

[52] *Public Committee against Torture v. Government,* decision by The Supreme Court sitting as the High Court of Justice from December 14, 2006, HCJ 769/02, as found in THE SUPREME COURT OF ISRAEL and THE MINISTRY OF FOREIGN AFFAIRS JERUSALEM. *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* [online]. 3. 2009 [cit. 2021-11-15]. Accessed from: https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Fighting%20Terrorism%20within%20the%20Law%20(3).pdf, p. 88.

[53] *Public Committee against Torture v. Government, op. cit.*, para 20.

[54] *Iyyad v. State of Israel, decision by The Supreme Court of Israel sitting as the High Court of Justice from June 11, 2008, CrimA 6659/06, as found in THE SUPREME COURT OF ISRAEL and THE MINISTRY OF FOREIGN AFFAIRS JERUSALEM. Judgments of the Israel Supreme Court: Fighting Terrorism within the Law [online]. 3. 2009 [cit. 2021-11-15]. Accessed from: https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Fighting%20Terrorism%20within%20the%20Law%20(3).pdf,* para 9.

[55] *Physicians for Human Rights v. Prime Minister*, decision by The Supreme Court sitting as the High Court of Justice from January 19, 2009, HCJ 201/09, para 21, as found in THE SUPREME COURT OF ISRAEL and THE MINISTRY OF FOREIGN AFFAIRS JERUSALEM. *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* [online]. 3. 2009 [cit. 2021-11-15]. Accessed from:

The principle of distinction is set forth by the Article 48 of the Protocol I:

> *"Article 48 — Basic rule*
>
> *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."*[56]

This basic article is further expanded on in the Article 51 (2) of the Protocol I – protection of the civilian population, and Article 52 (2) of the Protocol I – protection of civilian objects.

As it can be seen from the Article 48 of the Protocol I, the core of the discussed principle is a strict distinction between those actively involved in an armed conflict – combatants, and civilians who are not taking part in hostilities – non-combatants. Protocol I further includes more detailed description as to who belongs to which group and what are the relevant rights and obligations of those groups (this will be more in detail discussed in the following part of this thesis).

The principle of distinction might seem to be straightforward; the character of modern armed conflicts has nevertheless changed. A big question arises – can it be upheld even under the circumstances of today's reality of armed conflicts? The armed conflicts are no longer fought by professional armies on both sides, but more and more often by a state as a recognized entity under international law on one side and a non-state actor (e.g. a terrorist group) on the other. How does the balance of power shift? Can the international community require of the state involved to uphold the principle of distinction with all its requirements or does the principle need to be modified to accommodate the new characteristics of asymmetrical conflicts? Before attempting to shed some light onto this issue, first a further description of the existing categories under LoAC will be provided, followed by an excurse into other possible approaches to the issue at hand. Importantly for the scope of this thesis, the status of terrorists under the effective LoAC is analysed in the Chapter 2.4.

2.1 Combatants

The Article 48 of Protocol I calls for a distinction "*between the civilian population and combatants*"[57]. The unavoidable question then arises – who are combatants, what conditions must

---

https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Fighting%20Terrorism%20within%20the%20Law%20(3).pdf, p. 323.

[56] Protocol I, Art. 48.

[57] *Ibid.*

one fulfil in order to be considered as combatant, and further, what are the implication of this status?

2.1.1. Who is a combatant?

The central question that one needs to find an answer to in order to continue with the analysis is *Who is a combatant?* according to the LoAC. As aforementioned, armed conflicts have significantly transformed in the past couple of years and decades, but it is important to note that the law from which we derivate the important definitions remined the same and has yet to catch up with the reality.

The definition of a combatant developed in the past through adoption of international treaties as well as through case law. The following is a brief chronological excurse into the development and aims to answer the question relevant for this thesis: Who is considered to be a combatant under the effective international law.

In order to fully grasp the intricacies of the combatant status as it is understood nowadays, two main documents need to be looked at – the Third Geneva Convention, and the Protocol I. It is nevertheless necessary to mention that the efforts to define combatants and distinguish their status in the armed conflict have not started by the adoption on the Geneva Conventions. The first efforts can be seen already in the 19th century during the Brussels Conference of 1874, where a definition of a combatant was included in the Project of an International Declaration concerning the Laws and Customs of War. [58] This definition consisted of four elements, which were later on adopted also by the Third Geneva Convention (see below). The Declaration from the Brussels was later on amended by the Oxford Manual on the Laws of War, which rather than listing conditions a person must fulfil in order to be considered as combatant, listed specific categories of armed forces whose members will then be considered as combatants. The elements from these two definitions were later on in adopted by the Hague Conventions.[59]

Due to the scope of this thesis the attention will be paid to the development of the definition during the 20th century, after the adoption of the Geneva Conventions. Further two court decisions will be addressed which will help to bridge over the development of understanding of the combatant status in between the Third Geneva Convention and the Protocol I.

[58] CRAWFORD, Emily. *The treatment of combatants and insurgents under the law of armed conflict*. 1. New York: Oxford University Press, 2010. ISBN 978-0-19-957896-2, p. 49.
[59] *Ibid.,* p. 50.

A) Third Geneva Convention

In the Third Geneva Convention, the definition of a combatant is found indirectly, from the list of persons entitled for the Prisoner of war (hereinafter "PoW") status. The list accounts for six different groups varying from the Party's armed forces, members of crews to inhabitants spontaneously taking up arms[60].

In this thesis the first two categories will be more closely inspected.

The first group consists of regular forces, "*members of armed forces of a Party to the conflict as well as members of militias or volunteer corps forming part of such armed forces*" [61]. This part of the definition is a classical way how combatants are described and does not constitute bigger interpretational issues.

The Article 4 (A) (2) of the Third Geneva Convention furthermore acknowledges an existence of another group of persons – combatants who might not be direct members of armed forces of a party, nevertheless who are under the LoAC considered to be combatants and who benefit from the protection the Third Geneva Convention provides. This group is defined as follows: "*other militias and members of other volunteer corps, including those of organized resistance movements, belonging to a Party to the conflict and operating in or outside their own territory, even if this territory is occupied*" [62]. The protection under the PoW status is provided to this group if the individuals cumulatively fulfil the following conditions:

> *"a) that of being commanded by a person responsible for his subordinates;*
> *b) that of having a fixed distinctive sign recognizable at a distance;*
> *c) that of carrying arms openly;*
> *d) that of conducting their operations in accordance with the laws and customs of war."*[63]

The second category did not appear for the first time in the Third Geneva Convention, the same list appeared already beforehand in relevant LoAC treaties (as mentioned above). Further, the same set of criteria can be also found in the Article 1 of the Annex Regulations concerning the Laws and Customs of War on Land to the Convention respecting the Laws and Customs of War on Land, The Hague, 18 October 1907 (annex to the Hague Convention IV).

This set of parameters was later commented on in the Kassem case. In the ruling (that is more in depth analysed bellow), the court notes that the second part of the definition of this group of combatants – the list of four parameters states the exact basic conditions irregular combatants must fulfil, in order to be recognized as lawful combatants. Therefore, using the court's

[60] Third Geneva Convention, Art. 4 (A) (6).
[61] *Ibid.*, Art. 4 (1).
[62] *Ibid.*, Art. 4 (2).
[63] *Ibid.*, Art. 4 (2).

terminology, this group of combatants entitled to the protection as PoW will be hereinafter referred to as *irregular forces*.

B) Development through case law

The definition of the irregular forces in the Article 4 (A) (2) of the Third Geneva Convention has been in the centre of attention in the years following the adoption of this Convention. The definition of the persons who fall into the category of irregular forces has undergone a significant development both in the subsequent case law and treaties (namely in the Protocol I). Following is a short discourse into the relevant case law.

In April 1969 in the ruling in the Kassem case it was pointed out that the list of conditions under which the members of irregular forces can gain a status of a lawful combatants is not, in fact, exhaustive. The four conditions listed in the article are indeed necessary to be cumulatively fulfilled, nevertheless, the court decision adds - or more accurately highlights - another condition that is inherently connected to the definition, and that is "*the condition that the irregular forces must belong to a belligerent party. If they do not belong to the Government or State for which they fight, then it seems to us that, from the outset, under current International Law they do not possess the right to enjoy the status of prisoners of war upon capture.*"[64]

This ruling has therefore effectively broadened the list of conditions that must be fulfilled in order to consider a member of irregular forces as a lawful combatant and in order for such person to enjoy the protections granted by the LoAC - in this case protection upon capture. The court views this additional condition to be necessary, especially after the two world wars, because only when this condition applies, there is a country, that will be held accountable under the LoAC for any transgressions of said groups against laws and customs of war.[65]

The court in its decision goes even further and develops a debate over the term of unlawful combatant. To find an answer to the question how to define an unlawful combatant, the court decided to cite von Glahn and his book The Occupation of Enemy Territories[66]. "*If an armed band operates against the forces of an occupant in disregard of the accepted laws of war […] then common sense and logic should counsel the retention of its illegal status. If an armed band operates in search of loot rather than on behalf of the legitimate sovereign of the occupied territory, then no combatant or prisoner-of-war rights can be or should be claimed by its members. […]*"[67].

---

[64] *Military Prosecutor V. Omar Mahmud Kassem and others*, op. cit., p. 3.
[65] *Ibid.*
[66] VON GLAHN, Gerhard. *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*. 1. Minneapolis: University of Minnesota Press, 1957. ISBN 978-0816660278.
[67] VON GLAHN, op. cit., p. 52, as found in *Military Prosecutor V. Omar Mahmud Kassem and others*, op. cit., p. 5.

The court in the end supports the existence of the group of unlawful combatants and goes even further to state that "*International Law is not designed to protect and grant rights to saboteurs and criminals*"[68] and does not award the defendant in this case any privileged status under international law.

The Kassem case decision therefore not only broadened the list from Article 4 (2) of the Third Geneva Convention, but also put a stern stance towards distinction of unlawful combatants (combatants that the Tribunal considers to be saboteurs and criminals) and combatants that form irregular forces recognized by the Third Geneva Convention.

C) Protocol I

Protocol I is the key document on the way to answer the question who is considered to be a combatant nowadays. The definition of a combatant is provided in the Article 43 of Protocol I. To get the full scope of the definition, the first two paragraphs of the Article 43 of Protocol I need to be looked at. According to the definition in the Article 43 (2) of the Protocol I combatants are *"[m]embers of the armed forces of a Party to a conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) […]"*[69]. *Armed forces* as defined by the paragraph 1 of the same Article "*consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct of its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party*"[70]. From this article it can be seen that as armed forces are considered to be governmental as well as non-governmental armed forces – the decisive factors are (a) that the forces are under a command responsible to the Party (even in the case of non-governmental armed forces) and (b) that the forces are "*subject to an internal disciplinary system which, 'inter alia', shall enforce compliance with the rules of international law applicable in armed conflict*"[71].

To fully illustrate the impact of the Protocol I one needs to dive deeper and look at the following article concerning combatants and prisoners of war. The Article 44 of the Protocol I is significant in the way it defines the persons eligible for protection under the PoW status. The PoW status is here granted not only to the combatants (Paragraph 1) as defined above, but also to the combatants that are a part of the *irregular forces* – the category was already included in previous treaties as well as in the Third Geneva Convention. The Paragraph 3 of the Article 44 of

[68] *Military Prosecutor V. Omar Mahmud Kassem and others*, op. cit., p. 5.
[69] Protocol I, Art. 43 (2).
[70] *Ibid.*, Art. 43 (1).
[71] *Ibid.*

Protocol I reacted to the reality that it is in certain cases impossible to distinguish combatants from the civilian population. In its Paragraph 3 Article 44 of the Protocol I states that:

> *"3. 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. Recognizing, however, that there are situations in armed conflicts where, owing to the nature of the hostilities an armed combatant cannot so distinguish himself, he shall retain his status as a combatant, provided that, in such situations, he carries his arms openly:*
>
> *(a) during each military engagement, and*
> *(b) 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."*[72]

From this article it can be seen that the fourth element of the combatant definition is defined here admittedly broadly. Protocol I reacted to the changing reality and in its Article 44 recognized that combatants are not at all times distinguishable from the civilian population. Even in these cases Protocol I grants the combatant status to the combatants that fulfil the requirements of the LoAC with all its advantages and disadvantages to the persons openly carrying arms in the situations described under letters a) and b) of the said Article.

The significance of the Protocol I is that it opens the way to "*the recognition of other elements aside from the State, which are allowed the use of force in armed conflicts*"[73]. Especially the Paragraph 3 of the Article 44 has been a source of tension and disagreement – its opposers claim that the definition of a combatant laid out here is too vague and can lead to extending the combatants' protection to persons who according to the opposers' stance do not have the right for it. In other words it "*relates to the recognition of combatant status for guerrilla fighters*."[74] Further, before the adoption of the Protocol I, there have been hopes, that the new treaty would reflect the changing nature of the conflicts in a way that it would grant more protection to the civilians – in the eyes of many it nevertheless did the complete opposite – granted a higher

[72] Protocol I, Art. 44 (3).
[73] ZACHARY, Shlomy. Between the Geneva Conventions: where does the unlawful combatant belong? *Israel law review*. 2005, **38**(1-2), 378-417, p.381.
[74] GAUDREAU, Julie. The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims. *International Review of the Red Cross*. 2003, (849), 143-184. Accessed from: https://www.icrc.org/en/doc/assets/files/other/irrc_849_gaudreau-eng.pdf [cit. 2021-11-17], p. 10.

protection to guerrilla fighters raising them on the level of lawful combatants.[75] For those reasons, twelve countries, including France, Germany, United Kingdom and Italy made reservations towards this provision and limit its applicability mainly to the situations of occupation. [76,77] This was also one of the reasons why Israel as well as for example the USA did not ratify the Additional Protocol I[78], even though they are parties to the Hague treaties and Geneva Conventions.

2.1.2. Implications of the combatant status

If a person falls into the combatant category, he or she is granted a certain status under the LoAC and is provided with a particular set of rights. The first, and perhaps the obvious right of a combatant is the one set forth by the Article 43 (2) of Protocol I – a combatant has "*the right to participate directly in hostilities*" [79]. The right grants the combatants certain immunity [80], the combatants have the right to directly and actively participate in the hostilities granted their conduct is not in breach of the LoAC. That implies that the combatant cannot be (either during or once the armed conflict has ceased) persecuted for the acts committed during the hostilities. This 'legal license to kill' is nevertheless on the other hand accompanied by a certain degree of danger that the combatants must take on. If one has the right to directly participate in hostilities, one is inherently "*an appropriate target of attack and destruction*"[81].

The second main right of a person fitting into the combatant category is the right to be awarded a PoW status in case of falling *"into the powers of an adverse [p]arty*" [82]. The status of PoW is significant on its own and to whom it applies further sheds light on who is and is not a combatant, or in this case who is a regular and who is an irregular combatant.

The status of PoW is being 'automatically' granted to the so-called regular combatants – persons in compliance with conditions set forth by the Article 4 (A) of the Third Geneva Convention. Under the Third Geneva Convention nevertheless, the states are still the only entities allowed to use force – this changed only with the adoption of Protocol I (as described above). [83] According to the Protocol I Article 44 (3) the status of PoW is additionally being granted to a controversial group of irregular combatants.

---

[75] ESTREICHER, *op. cit.*, p. 428.
[76] GAUDREAU, *op. cit.*, p. 10.
[77] Some countries would also consider this Paragraph to be applicable in the conflicts of self-determination., GAUDREAU, *op. cit*., p. 10.
[78] ESTREICHER, *op. cit.,* p. 428.
[79] Protocol I, Art. 43 (2).
[80] BOMANN-LARSEN, Lene. License to kill? The question of just vs. unjust combatants. *Journal of Military Ethics*. 2004, **3**(2), 142-160, p.144.
[81] KASHER, *op. cit.,* p. 152.
[82] Protocol I, Art. 44 (1).
[83] ZACHARY, *op. cit.,* p. 381.

2.2 Non-Combatants

The aim of the principle of distinction is to protect uninvolved persons in an armed conflict – the civilian population. Civilians are a residual category – in other words, "he who is not a combatant is a non-combatant (civilian)"[84]. Protocol I in its Article 50 (1) therefore provides an *a contrario* definition and puts civilians in contrast to combatants as defined by the Third Convention as well as Protocol I itself.[85]

2.2.1. Legal implications of non-combatant status

The basis for the protection of the civilian population (all persons who are civilians [86]) is set forth in the Article 51 of Protocol I – the main principle can be found in the second paragraph: "*The civilian population as such, as well as individual civilians, shall not be the object of attack*"[87]. This paragraph sets out the basic rules of protection of the civilian population and while acknowledging that the civilian population cannot be one hundred percent protected in the midst of an armed conflict, it sets forth rules that aim to reduce the risks to a minimum.[88]

The protection of the civilian population is regarded to be one of the most basic principles under the LoAC and looking at the Protocol I only, it can be seen that the protection is constructed in several ways.

Firstly, it is the protection from indiscriminate attacks [89], attacks that do not sufficiently differentiate in between combatants/military objectives and civilians/protected civilian objects. Nevertheless, this does not mean that civilian population can never be attacked – it merely means that another principle, the principle of proportionality, will have to come into play. The principle of proportionality, in this case phrased in the Article 51 (5) (b) of the Protocol I states that attacks, that are expected to cause loss of civilian life, and/or damage to civilian objects need to be considered as indiscriminate – and therefore prohibited - if the loses "*would be excessive in relation to the concrete and direct military advantage anticipated*"[90].

Secondly, the protection of civilians is strengthened by the requirement of precautions in attack set forth by the Article 57 of the Protocol I. This Article lists a set of rules, that force the parties in combat to consider the civilian presence and the possible ways how civilians and civilian objects can be affected by a planned military operation.

---

[84] ZACHARY, *op. cit.,* p. 383.
[85] Protocol I, Art. 50 (1).
[86] *Ibid.*, Art. 50 (2).
[87] *Ibid.,* Art. 51 (2).
[88] INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit*., p. 617, para. 1935
[89] Protocol I, Art. 51 (4).
[90] Protocol I, Art. 51 (5) (b).

In connection with the provisions regarding precautions in attack, it is necessary to mention another complementary rule which can be found in the Article 51 (7) of the Protocol I. It is complementary, because as it was described above, civilians cannot be directly targeted and their presence needs to be accounted for when planning a military operation, but also, as this rule states, the civilian population cannot be used as a living shield. [91] The party to a conflict cannot take the advantage of the above outlined rules and move civilians, so that their presence would further make the military actions of the other party impossible or illegal.

Additionally to these rules whose purpose is to spare civilian lives, the Protocol I goes further and in its Article 51 (2) further prohibits "*acts or threats of violence the primary purpose of which is to spread terror among the civilian population*"[92]. The civilians are therefore protected not only from being purposely targeted, but also from acts that are primarily meant to spread fear.

It is necessary to mention that the consequences of breaching the provisions of the Protocol I - of targeting civilians, can amount to a war crime, as stated in the Article 8 (2) (b) (i) of the Rome Statute[93].

The principle of distinction is not the only principle governing armed conflicts and giving a distinction to who/what is a legitimate target and who/what is not. In addition to the principle of distinction, which is in the focus of this thesis, and to the principle of proportionality, which is briefly noted above, the principle of necessity cannot be omitted. The principle of necessity supplements the principle of distinction[94] and further concretize that an attack is permissible only when it is expected to offer a "*definite military advantage*" [95]. The principle of necessity can be found in the Article 52 (2) in connection with the Article 57 (2) (iii) of the Protocol I.

2.2.2. Civilians taking part in hostilities

As it was mentioned above, the core of the distinction between combatants and civilians is their involvement in combat. The general rule is that "*protected persons are not allowed to engage in combat*"[96]. Nevertheless, this does not sufficiently reflect the reality. In fact, the civilian population sometimes engages in the hostilities – and the international treaties account for it and award them with PoW protection. The basis of this protection can be found in the Article 4 (A) (6) of the Third Geneva Convention and it is awarded to "*inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without*

[91] Protocol I, Art. 51 (7).
[92] *Ibid.*, Art. 51 (2).
[93] Rome Statute, Art. 8 (2) (b) (i).
[94] SWENEY, *op. cit.,* p. 734.
[95] Protocol I, Art. 52 (2).
[96] ZACHARY, *op. cit.,* p. 383.

having had time to form themselves into regular armed units." [97] Also the following additional conditions need to be fulfilled, but in contrast to the irregular forces, a lower standard will apply – the inhabitants that have taken up arms have to (i) carry them openly and (ii) respect the LoAC [98].

Civilians are granted protection as so far as they do not take direct part in hostilities. Should they take a direct part in hostilities, as it is set forward by the Article 51 (3) of the Protocol I, the protection is for such time suspended. The commentary to the Protocol I calls this "*an overriding condition*"[99] – a condition, that once fulfilled, will for such time change the level of person's protection under the norms of LoAC. The civilians in such a case become a legitimate target of attack.

2.3 Additional provisions relevant to a person's status

The following are two presumptions contained in the Third Geneva Convention and in the Protocol I that further strengthen the status of protected persons – civilians, as well as combatants in case of capture by the adversary. These presumptions will be further relevant to the consideration of the status of quasi combatants, who, similarly to the persons protected by the following provisions, stand in between the categories, or better yet, their status may appear uncertain. Further, this chapter takes a look into the field of NIAC and elaborates on the status of persons in armed conflict of a non-international nature.

2.3.1. Presumption of civilian status

It is necessary to point out an additional provision relevant to the status of persons in an armed conflict. In case of doubt, a legal presumption contained in the Article 50 (1) of Protocol I will apply: "*In case of doubt whether a person is a civilian, that person shall be considered to be a civilian*." [100] This presumption will later come to play when assessing the existence of the third category of persons – quasi combatants (see Chapter 3).

2.3.2. Presumption of PoW status

In order to preserve the rights of those entitled to the protection as PoW, another presumption found its way into the relevant treaties. In the Article 5 of the Third Geneva Convention as well as in the Article 45 of the Protocol I, the general presumption states that in

[97] Third Geneva Convention, Art. 4 (A) (6).
[98] *Ibid.*, Art. 4 (A) (6).
[99] INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987. ISBN 90-247-3460-6, para 1942, p. 618.
[100] Protocol I, Art. 50 (1).

cases in which *"[a] person who takes part in hostilities and falls into the power of an adverse Party shall be presumed to be a prisoner of war,[…], if he claims the status of prisoner of war, or if he appears to be entitled to such status, or if the Party on which he depends claims such status on his behalf […]."*[101] A person in the said position holds this status "*until such time as his status has been determined by a competent tribunal*"[102].

2.3.3. Persons' status in NIAC

Persons' status under NIAC is primarily governed by the national (domestic) legal system of the concerned country, since first and foremost, respect shall be given to the sovereignty of states and their power to govern persons within the territory based on territorial principle.

On international level, Article 3 of the First Geneva Convention sets out one category of persons, "*persons taking no active part in the hostilities*" [103], whom it, during NIAC, grants a basic degree of protection. The distinction here is therefore made within those who take active part in the hostilities and those who do not (even when the persons in question are members of armed forces – as long as they laid down their arms or are placed *hors de combat*). The Protocol II provides protection to the victims of NIAC, but does not further acknowledge combatants neither it regulates their status.

The term *combatant* as it was introduced throughout this thesis (with the discussed complementary rights – combatant privilege and PoW status) therefore does not find its place within the international law norms regulating NIAC. As a result, *"[i]n non-international armed conflicts,[…], acts lawful under the laws of armed conflict, such as the killing of a member of the state armed forces or damage to, or the destruction of, a military objective, remain in principle punishable under domestic law*"[104]. To repeat, this can be seen as a reflection of respect of states' sovereignty. It was left up to the states to regulate their internal affairs and effectively uphold their "*monopoly of force*"[105]. It would not be desirable for states to legitimize individuals (citizens) and groups to engage in armed conflicts that would be aimed against the state itself. In the NIAC where one of the parties to a conflict is the state itself, an imbalance can be found – the armed forces fighting on behalf of the state hold a legal mandate to do so, on the other hand, actions of the

[101] Protocol I., Art. 45 (1).
[102] *Ibid*.
[103] First Geneva Convention, Art. 3 (1).
[104] KLEFFNER, Jann K. From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference. *Netherlands International Law Review*. 2007, **54**(2), 315–336, p. 322.
[105] *Ibid.*

members of the non-state party could (and in the majority of cases will) face a prosecution for their actions under the domestic criminal law.

Regarding the principle of distinction, which is being discussed as a core topic of this thesis, in NIAC, it "*cannot be conceptualised in the same way as in international armed conflicts. For, the law of non-international armed conflicts is deprived of the reference point for making that distinction between different categories of persons.*"[106] The fact, that the principle cannot be taken over in the same way as it is understood under law governing IAC does not nevertheless mean that the principle of distinction will not apply in NIAC. As it was noted in the commentary to The Manual on the Law of Non-International Armed Conflict: "*it is indisputable that the principle of distinction is customary international law for both international and non-international armed conflict.*"[107] This has been further affirmed by the court in Tadic case [108] and by the Commentary on the Additional Protocols[109].

Nevertheless, as seen for example from the Protocol II, avoiding the terms *civilians* and *combatants* is proving to be tricky, since for the purposes of awarding protection to one of the two groups, at least a basic distinction must be made. In order to distinguish in between the terminology of IAC and NIAC and its impacts on the reality and eventual prosecution, similar terms have been adopted – for example, looking at The Manual on the Law of Non-International Armed Conflict, the term *fighters*[110] is being used.

2.4 Terrorism in the light of LoAC

When considering the legal regime applicable to terrorists, one must first assess the situation in general – in particular, whether there is an armed conflict or not. In case the given situation can indeed be classified as an armed conflict, the applicability of LoAC norms will be triggered and the status of the persons will be assessed according to the distinction analysed above. If the situation, on the contrary, cannot be considered as an armed conflict, domestic legislation (together with general human rights protection contained in international law) will be primarily used, and persons persecuted and protected accordingly. Even after this initial distinction, this assessment is nevertheless still not an easy one, since, as Zachary puts it, "*terrorism will be*

[106] KLEFFNER, *op. cit.,* p. 324.
[107] SCHMITT, Michael N., Charles H.B. GARRAWAY and Yoram DINSTEIN. *The Manual on the Law of NonInternational Armed Conflict With Commentary* [online]. Sanremo: International Institute of Humanitarian Law, 2006 [cit. 2021-11-24]. Accessed from: http://humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf, p. 11.
[108] Tadic case, para 127.
[109] INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols, op. cit.,* para 1863, p. 598.
[110] SCHMITT, GARRAWAY, DINSTEIN, op. cit., p. 10.

perceived as a legally undefined state in between the classic states of 'war' and 'peace'"[111] and therefore trying to subsume the terrorists act under a certain existing category is proving to be complicated.

Further, even in the cases where the situation could be, in fact, qualified as an armed conflict, the status of terrorists can still be disputable. The actions caried out by terrorists are in their essence combat like, nevertheless not all the conditions, in order for the terrorists to be considered combatants, are fulfilled – among others, the lack of organization and overall distinction from the civilian population masks them as civilians and therefore potentially subject of civilian protection. Further the status of terrorism in general is disputable under the LoAC, since "*in legal terms, armed conflict is a situation in which certain acts of violence are considered lawful and others are unlawful, while any act of violence designated as "terrorist" is always unlawful*."[112] Considering this standpoint, acts of terrorism cannot become legal under the LoAC, deeming the acts of individual terrorists illegal.

2.4.1. Status of terrorists under the LoAC: Terrorists as combatants

Taking into account that only two categories of persons exist under the effective LoAC, the non-existence of the in between category of "*quasi combatant*" brings many issues as to how states should handle their fight against terrorism that is endangering their civilian population.

Looking within the scope of the LoAC applicable in IAC, were the terrorists to be considered as combatants (and gain a combatant status with all its subsequent rights and obligations), they would have to fit into one of the categories that were described in the Chapter 2.1.1.: combatants fighting on behalf of a state party including irregular forces as categorised above (Article 4 (1), (2) of the Third Geneva Convention and Articles 43 (2) and 44 (3) of the Protocol I). In order to use this qualification, one important element stands out and must be fulfilled – an element of belonging [113]. The terrorists would therefore have to belong to a party recognized under the LoAC. This requirement is presented as crucial also in literature as "*the requirement which immediately distinguishes between (i) those individuals fighting on behalf of a state party to the armed conflict, and who are thus participating in the international armed conflict as 'combatants', and (ii) those individuals who are simply fighting on a territory where an international armed conflict is taking place, but who are not fighting on behalf of a state party to*

[111] ZACHARY, *op. cit.,* p. 389.
[112] INTERNATIONAL COMMITTEE OF THE RED CROSS. *International humanitarian law and the challenges of contemporary armed conflicts: Report* [online]. Geneva, 2015, (32IC/15/11) [cit. 2021-11-24]. Accessed from: https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf, p. 17.
[113] DEL MAR, Katherine. The Requirement of 'Belonging' under International Humanitarian Law. *The European Journal of International Law*. 2010, **21**(1), 105-124.

the conflict, and are thus not fighting as 'combatants'[114]. Were the belonging criteria to be fulfilled, it would effectively open a way for terrorists to be considered as combatants – i.e. combatants performing terrorist acts.

In a situation of an ongoing NIAC the status of terrorists shall be governed by domestic law of the state concerned[115] – terrorists shall be subject to primarily domestic penal law, or possibly to emergency regulations instated by the state whose sovereignty or internal security might be endangered. As it was discussed above, in the set of international law concerning NIAC and applicable in the situations of NIAC, the status of *combatants* is not regulated [116]. Therefore, for the most case, in NIAC terrorists will be considered as criminals.

2.4.2. Status of terrorists under the LoAC: Terrorists as civilians

If the position claiming that the terrorists do not fulfil the requirements of the LoAC in order for them to be recognized as combatants were not to be accepted, using the argument *a contrario,* it would be necessary to view terrorists as a persons entitled to civilian protection, given there is in fact an ongoing armed conflict.

Treating the terrorists as civilians would have grave ramifications when it comes to the means at states' disposal. In case terrorists would be considered to be civilians, considering international law, higher protection would be granted to them. When it comes to the legal means that could be used against terrorists and to the forms of prosecution, if would be mainly left on the national law.

As Zachary notes, in the question of terrorism it is necessary to look at the level of individuals, since *"[t]errorism itself has no status under international law, but the individual terrorist has, since he is first and foremost a civilian. No one is born a combatant, whether lawful or not, without being a civilian first. Therefore, international humanitarian law does apply to the terrorist."*[117] This idea underlines that terrorists do not find themselves in a legal vacuum, but they indeed belong – at the minimum – to the civilian category with respective rights. Nevertheless, were the terrorists to be considered as civilians, one cannot disregard their participation in hostilities.

Looking withing the civilian category, a subcategory of *civilians taking part in hostilities* comes into mind. The status of civilians taking part in hostilities is set forth by the Article 4 (A) (6) of the Third Geneva Convention (as discussed above in Chapter 2.2.2.). Can terrorists

[114] DEL MAR, *op. cit.*, p. 110.
[115] KLEFFNER, *op. cit.,* p. 322.
[116] *Ibid.,* p. 321.
[117] ZACHARY, *op. cit.,* p. 390.

nevertheless fit into this category? In order to fit into this category, a requirement of spontaneity and lack of organization must be fulfilled – this is not the case for many terrorists who often operate under an organization and more importantly with a prior intent (moreover the intent to coerce, intimidate or provoke is one of the defining factors of terrorism itself that distinguishes them from both civilians as well as combatants). Further, the actions of the civilians must be directed against invading forces, which advance at such a speed that would not allow for a formation of regular armed units. This too does not apply to the cases of terrorism, as they are discussed in this thesis.

3. Above and beyond the principle of distinction: different approaches

The doctrine of the LoAC seems to provide a black & white point of view which does not always correspond with the reality on the ground – especially the reality of asymmetrical armed conflicts. A reaction to this uncertain situation came in the field of theory (with authors introducing more variable theories on how to classify an individual's involvement in an armed conflict), and also in practice (with countries actively reacting to the issue and introducing a third category of quasi combatants in their domestic legal systems).

Firstly, a third suggested category of quasi combatants will be explored. Secondly, looking on the theoretical approaches, two significant doctrine proposals will be mentioned. Kasher's [118] distinction based on person's involvement in a conflict will be described, and further a closer look will be paid to a principle of culpability introduced by Sweney[119]. The common factor is that both concepts pay special attention to individuals and their involvement in the armed conflict without indiscriminately grouping all the civilians together.[120]

3.1 Quasi combatants, unlawful combatants

On multiple occasions[121], the existence of a third category of persons – of so-called *quasi combatants or unlawful combatants* - has been discussed.

As it was mentioned above, there are only two recognized categories of persons in an armed conflict under the effective LoAC – combatants and civilians. In an armed conflict, every person can be qualified either as a combatant, if the person meets the set requirements, or as a civilian (non-combatant), in case the person is not a combatant. This is furthermore also affirmed in the

[118] KASHER, Asa and Amos YADLIN. Military ethics of fighting terror: an Israeli perspective. *Journal of Military Ethics*. 2005, **4**(1), 3-32.
[119] SWENEY, *op. cit.*
[120] *Ibid.,* p. 757
[121] To give an example, the term how it exists and is used in the USA and Israel will be discussed below.

Commentary of 1958 to the Convention (IV) relative to the Protection of Civilian Persons in Time of War from the August 12, 1949 (hereinafter "Commentary to the Fourth Geneva Convention"), which states that *"[e]very person in enemy hands must have some status under international law: he is either a prisoner of war and, as such, covered by the Third Convention, a civilian covered by the Fourth Convention, or again, a member of the medical personnel of the armed forces who is covered by the First Convention. 'There is no' intermediate status; nobody in enemy hands can be outside the law*." [122] In another words, there exists a strict dichotomy under the LoAC which leaves no space for another, third, in between category. And yet with time, as the nature of the conflicts, means of warfare, and actors of many armed conflicts have changed, the question of existence of another category arises.

As are the asymmetric armed conflicts becoming more and more frequent, there have been many pulls to create another category of so-called quasi-combatants. This status aims to bridge the possible gap in between the two existing ones and mitigate the impacts of the fact that there is a distinct group of persons, members of terrorist groups as well as individual terrorists, that do not properly fit into either of the aforementioned categories.

The third category is therefore proposed in order to encompass the terrorists since their behaviour and acts do not fully fulfil the requirements of the Protocol I to by recognized as full pledged combatants (and therefore awarded all the rights that come with this status), but they do not qualify for the civilian status either (not even as civilians taking part in the hostilities). The strict application of categories set out in the LoAC can lead to great imbalances.

The status of individuals, together with a question of lawful and unlawful combatants, in a sense of an extra category, has been opened by the Supreme Court of the United States in 1942 in the so called Quirin case [123]. In this case, several individuals have been captured by the US for acts consisting of espionage and sabotage. The question at hand in this case was, whether the individuals, who entered US territory secretly, under cover and without any distinguishing signs such as uniforms, and who were sent by a foreign power to carry out hostile acts on the territory of the US, come under jurisdiction of civil or military courts. The sought distinction was, whether these individuals must be considered as lawful combatants (and therefore awarded a PoW status with all subsequent rights), or unlawful combatants, who would be subject to civil proceedings.

[122] PICTET, *op. cit.,* p. 51.
[123] *Ex parte Quirin et al.; United States ex rel. Quirin et. al. v. Cox Provost Marshal*, decision by The Supreme Court of the United States from July 31, 1942, 317 U.S. 1.

Sixty years later, during the Bush Administration in the US, the unlawful combatants discussion was opened again, by the declaration of the "*global war on terror*"[124]. The persons who were considered to be as in between category between combatants in the classical LoAC sense and civilians, were labelled as *unlawful combatants*. This labelling aimed to deprive the persons of protection by the Third Geneva Convention (by not granting them PoW status) as well as the protection by the Fourth Geneva Convention (by not considering them as civilians) [125]. This enabled to hold such persons in a detention without set time limitations.

Another instance of a country introducing a special category supplementing LoAC is Israel, which introduced into its legislation a distinction of *unlawful combatants*. This will be further analyzed in the case study part of this thesis (Chapter 4).

3.2 Classification based on a degree of involvement

An innovative approach has been presented by Sweney in his paper *Saving Lives: The Principle of Distinction and the Realities of Modern War*. The author suggests that it is necessary to abandon the principle of distinction all together[126] and rather introduce a new principle – a *principle of culpability*, which is compared to the principle of distinction more nuanced and in the realities of the evolved nature of armed conflicts more attainable.

The newly introduced doctrine operates with two premises – firstly, that in certain cases a legitimate reason to attack civilians is present, and secondly, that the level of protection of civilians is dependent on the circumstances. [127] The proposed doctrine modifies the provision of general civilian protection (Article 51 of Protocol I) in the following way:

> *"It is impermissible to intentionally attack civilians or civilian objects unless the target voluntarily:*
>
> *a) enters or remains in a contested area or area of combat and*
>
> *b) performs actions intended to achieve military goals of the combatants"*[128]

This doctrine in effect lowers the protection of civilians voluntarily involved in the activities connected to the combat. The proposed system of distinction offers a completely new outlook that is supposed to be built on the free will of civilians. What seems to be highly

[124] MOFIDIT, Manooher a Amy E. ECKERT. Unlawful Combatants or Prisoners of War: The Law and Politics of Labels. *Cornell International Law Journal*. 2003, **36**(1), 59-92, p. 61.
[125] SASSOLI, Marco. "Unlawful combatants": the law and whether it needs to be revised. *Proceedings of the Annual Meeting (American Society of International Law)*. Cambridge University Press, 2003, **97**, 196-200, p. 196.
[126] SWENEY, *op. cit.,* p. 735
[127] *Ibid.,* p. 756
[128] SWENEY, *op. cit.,* p. 757

problematic is especially the paragraph a) which shifts the responsibility on the civilians themselves in a way that they become a legitimate target in case they do not leave a contested area or area of combat. Continuing this train of thought, civilians would be effectively stripped of their protection under the LoAC in cases when they would refuse to leave their homes upon warning, that the area where they are situated is now in the area where combat is going to take place.

The paragraph b) also strips civilians of their protection, in the cases when their actions serve military goals of the combatants. This significantly lowers the civilians' protection and opens a wide area for interpretation which actions can actually be subsumed under this category. Nevertheless, it better reflects the reality in asymmetric armed conflicts, in which the role distinction is not as clear.

Similarly to Sweney, Kasher and Yadlin[129] take a similar approach, distinctively focusing on terrorists' activities. In their paper they and pay attention to the degree of involvement in the hostilities rather than to the strictly dichotomic principle of distinction. The authors propose a whole new doctrine that should be used for evaluation of a person's status in the situations of fighting terror. They suggest that distinction should be based on morality and the principle of distinction itself should be in "*circumstances of fighting terror*"[130] all together replaced. For that purpose the authors introduce a fourteen-point scale on the basis of which person's involvement in a terrorist activity can be evaluated. The scale further divides in two – firstly listing nine categories of direct involvement (ranging from "*persons posing an immediate danger*"[131] to "*[p]ersons making general operational decisions related to acts or activities of terror*"[132]) and further five categories of indirect involvement (especially categories of persons planning attacks, recruiting and making operational decisions).

As the authors note, this scale has been specifically developed for armed conflicts that consist of a fight against terrorism. They do not see a similar scale being used for the purposes of evaluating involvement of armed forces in international armed conflicts.[133] The proposed scale introduces more variety and reacts to the intricacies of terrorist activities and to the fight countering them. Complementing the scale, the proposed doctrine further prioritizes the protection of the aforementioned groups of persons, allowing the states to take a stern stance against directly involved persons ("*injury as required to the liberties or lives of other persons (outside the state)*

[129] KASHER, YADLIN, *op. cit*.
[130] *Ibid.,* p. 15.
[131] *Ibid.,* p. 13, principle B.2 (b) (b.1) of the proposed doctrine.
[132] *Ibid.*, p. 13, principle B.2 (b) (b.9) of the proposed doctrine.
[133] KASHER, Asa. The principle of distinction. Journal of Military Ethics. 2007, 6(2), 152-167, p.162.

who are directly involved in terror acts or activities"[134]). This corresponds to the stance that would be taken again terrorists if they would be considered as combatants of a foreign state under the current principle of distinction. What differs is that the persons directly involved in terrorist activities are taken out of the civilian category and awarded lesser protection. On the other hand, protection of combatants is made greater following the reasoning that combatants are primarily still citizens and granting them a lesser protection the authors deemed immoral.[135]

The principle of distinction in the recent decades proved to be highly inflexible without the ability to accommodate new types of armed conflicts. This can on many occasions lead to great imbalances when it comes to the type of persons who are being protected and on the other hand given combatant privilege. This has been a reason for the newly developed approaches, even though they might stay for now in the field of theory.

4. Case study – Israel

The next part of the thesis is aiming to evaluate Israeli tactics used against terror groups in the view of the principle of distinction as it was analysed in the previous chapters. It is necessary to first define which law is applicable to the situation. The conflict in between Israel and the terrorist groups operating in (and from) the Gaza Strip will be discussed.

The Gaza Strip is under effective control of Hamas, an organization consisting of two sections – a political and a military wing. [136] Hamas (either as the organization as a whole, or its military wing) is listed as a group involved in terrorist acts (and because of that it is subjected to restrictive measures) on multiple lists – to take an example, one can look at the European Union Terrorist list[137], or U.S. Department of State's list of foreign terrorist organizations [138]. Due to the scope of this thesis the grounds for considering Hamas as a terrorist organization will not be further analyzed and it's listing on the aforementioned lists will be considered to be satisfactory.

Further, the terrorist organization called Palestinian Islamic Jihad operates on (and from) the territory of the Gaza Strip. This Organization is also listed on both aforementioned terrorist lists.

---

[134] KASHER, YADLIN, *op. cit.*, p. 15.
[135] *Ibid.,* p.17.
[136] MISHAL, Shaul and Avraham SELA. *The Palestinian Hamas: Vision, Violence, and Coexistence*. 2. New York: Columbia University Press, 2006. ISBN 0-231-14006-I, p. 105.
[137] THE COUNCIL OF THE EUROPEAN UNION. Council Common position 2009/468/CFSP of 15 June 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP. In: *Official Journal of the European Union* [online]. 16.6.2009 [cit. 2021-11-17]. Accessed from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009E0468&qid=1412596355797&from=EN, annex.
[138] Foreign Terrorist Organizations. *U.S. Department of State* [online]. Bureau of Counterterrorism [cit. 2021-11-17]. Accessed from: https://www.state.gov/foreign-terrorist-organizations/.

In order to evaluate the applicable law, the situation in between Israel and terrorist groups operating from the Gaza strip must be subsumed either under the category of international armed conflict (IAC) or non-international armed conflict (NIAC) [139]. It is necessary to make this distinction to use a correct legal regime to further analyse the used techniques.

The question of applicable law does not have a straightforward answer due to the complicated situation on the ground, with Gaza sovereignty being in the centre of the dispute. In general, there are two main stances towards the status of the Gaza Strip. It can either be considered as a sovereign state[140], or as a territory under occupation. Depending on the qualification, the conflict could be subsumed under the regime of IAC, in the following cases. Firstly, if both Israel and Gaza/Palestine are considered as sovereign states that are in an armed conflict. Due to the complexity of the situation, Gaza could be considered as a part of a sovereign entity – Palestine – in so much as the decisions made by Hamas can be attributed to the state of Palestine. This kind of attribution of Hamas's decisions is nevertheless disputable, especially after the conflict that took place in between Hamas and Fatah (rival Palestinian groups which prior to the conflict formed the same government) which occurred in the year 2007 and effectively caused political split in between the authorities in the West Bank area and a group that assumed control over Gaza Strip[141]. Therefore nowadays, the decision-making of Hamas, governing the Gaza Strip, and authorities governing the West Bank are virtually independent.

Secondly, in case the sovereignty of Palestine would be disputed, IAC regime could still apply, if the situation would be qualified as "*war of national liberation, in which peoples are fighting against […] alien occupation […] in the exercise of their right of self-determination*" [142]. In the second case, further conditions would have to be fulfilled – namely a declaration filed with depositary of the Protocol I[143]. Taking a look at the decision practice of the Israeli Supreme Court, the Public Committee against Torture v. Government case can be cited. The court in this case drew a conclusion that indeed in the case of Israel and terrorists' groups operating in the territories ("*between a state that is occupying a territory in a belligerent occupation and guerrillas and terrorists that come from that territory*"[144]) there is a state of ongoing international armed conflict. Should the situation be considered as IAC the rules as described above together with the principle

[139] The characteristics of each category described in detail in Chapter 1.1. above.
[140] In this case a part of a sovereign state of Palestine.
[141] BROWN, Nathan J. The Hamas-Fatah Conflict: Shallow but Wide. *The Fletcher Forum of World Affairs*. 2010, **34**(2), 35-49, p. 41.
[142] Protocol I, art. 1 (4).
[143] *Ibid.*, art. 96 (3).
[144] *Public Committee against Torture v. Government, op. cit.,* para 18.

of distinction and its implications would apply and the status of terrorists would be assessed accordingly.

On the other hand, should we qualify Hamas as a non-State party and assess the situation as a NIAC, the way would open for application of domestic law (in this case internal legal system of Israel) complemented by human rights norms (as discussed in the Section 1.1.2.).

4.1 Unlawful combatants in Israeli legislative

The following section looks closely at the development of the term *unlawful combatant* throughout Israeli Supreme Court's decision-making practice to a special law that was adopted into the Israeli legal system in 2002.

The discussion about a special category started when the Supreme Court of Israel in the year 2000 freed a group of Lebanese citizens (hereinafter "Petitioners"), who were being held in an *administrative detention* ("*a form of detention used when criminal charges cannot be made*"[145]) for their involvement in a terrorist organization. Regardless the fact that the Petitioners served their sentence, they were further held in the administrative detention (even though there was a common understanding that they no longer pose a threat for the security of the State of Israel). This was believed to be a strategical political move. [146] The case got to the Supreme Court of Israel and the court in its decision made clear that "*it is forbidden to place in administrative detention a person who poses no threat for the sole purpose of serving as a bargaining chip*"[147]. This decision, upon which the Petitioners were freed, was heavily based on the set of rights set forth by the norms of the LoAC, especially by the Fourth Geneva Convention – in this case, the Petitioners were considered as civilians and no grounds for further detention were found.[148] This court decision has been later the moving force that led to adoption of the Incarceration of Unlawful Combatants Law, 5762-2002[149] (hereinafter "Incarceration Law" or "the Law"), since the Israeli legislator saw the need to add this third category of persons, that would provide basis for their detention.

---

[145] *John Does v. Ministry of Defence*, decision by The Supreme Court Sitting as the Court of Criminal Appeal from April 12, 2000, CrimFH 7048/97, para 1.

[146] Anonymous (Lebanese citizens) v Minister of Defence. *Oxford Reports on International Law in Domestic Courts*. Oxford University Press, 2009, (12) [cit. 2021-11-15]. Accessed from: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3B8E62D1B405B80AC125765100282A0D/CASE_TEXT/Israel%20-%20Anonymous%20(Lebanese%20citizens)%20v.%20Minister%20of%20Defence,%20Supreme%20Court,%202000%20%5BEng%5D.pdf, para F6.

[147] *John Does v. Ministry of Defence*, *op. cit.,* para 21.

[148] *Ibid.,* para 20.

[149] ISRAEL, Act. n. 5762, *Incarceration of Unlawful Combatants Law*, 2002, translation accessed from https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/7A09C457F76A452BC12575C30049A7BD/TEXT/IncarcerationLaw.pdf [cit. 2021-11-15].

For the discussed matter of unlawful combatants, the Incarceration Law is highly significant. This law is necessary to look at not only because it officially introduces the term *unlawful combatants* into the Israeli legal system, but also because it seemingly goes above the LoAC.

This piece of legislation defines unlawful combatant in its Article 2 as follows:

> *"unlawful combatant" means a person who has participated either directly or indirectly in hostile acts against the State of Israel or is a member of a force perpetrating hostile acts against the State of Israel, where the conditions prescribed in Article 4 of the Third Geneva Convention of 12th August 1949 with respect to prisoners-of-war and granting prisoner-of-war status in international humanitarian law, do not apply to him;*

From the definition it can be seen that the lawmakers distinguished the unlawful combatants from the group of persons that is granted PoW protection under the Third Geneva Convention – this piece of legislation is aimed at and concerns persons who either by the nature of their actions or by the nature of the conflict cannot hold the status of PoW. The Article 4 of the Third Geneva Convention, as mentioned above, sets forward a set of criteria that need to be fulfilled in order to consider a person a combatant. By contrasting that, the Law concerns persons who would be otherwise considered as non-combatants under the LoAC. This is further confirmed by the Public Committee against Torture v. Government Supreme Court decision, where the court underlines that "*the unlawful combatant is not a combatant but a 'civilian.' Notwithstanding, he is a civilian who is not protected against being targeted as long as he is taking a direct part in the hostilities. Indeed, the fact that a person is an 'unlawful combatant' is not merely a matter for national-internal criminal law. It is a matter for international law relating to international armed conflicts*"[150]. The stance of the Israeli Supreme Court is therefore the following: there is an ongoing international armed conflict and the LoAC shall apply; further terrorists under the norms of LoAC are considered to be civilians, and simultaneously under national law within the intentions of the Incarceration law they shall be considered as unlawful combatants.

The Incarceration Law gives power to the Chief of General Staff to incarcerate unlawful combatants in the cases where there is a belief that their release will harm Israel's security.[151] The persons do not need to be actively engaging in hostilities in the time of the incarceration, it is

[150] *Public Committee against Torture v. Government, op. cit.,* para 26.
[151] Incarceration Law, Art. 3 (a).

enough if they can be considered to be as members of "*a force perpetrating hostile acts against the State of Israel"*[152].

The Supreme Court of Israel paid a special attention to the discussed piece of legislation, especially in the case Iyyad v. State of Israel. [153] The court starts its analysis by stating, that the effective international law does not sufficiently reflect the realities of the nowadays conflict and holds the position that the law should be interpreted "*in a manner that is consistent with new realities and the principles of international humanitarian law*"[154]. Further the court tries to put the category of unlawful combatants (as set forth in the Incarceration Law) in the context of international law, to be more precise, in context of the Geneva Conventions. By looking at the definition of an unlawful combatant, as it is set forth in the Article 2 of the Law, it can be seen that the Law operates with a group of persons who are in fact not considered as combatants under the LoAC norms (persons who are awarded PoW protection). The court in the discussed case sheds light on this matter and reasons that the unlawful combatants category does not constitute a new group of persons under the existing dichotomy combatants-civilians, but rather it creates a sub category of civilians[155].

The fact that Israel respects the existence of only two existing categories of persons under the LoAC is further elaborated on in the case Committee against Torture in Israel v. Government of Israel, Case No. HCJ 769/02, adjudicated by the Supreme Court of Israel sitting as High Court of Justice.[156] This case is known as "*Targeted Killings Case*" and it among other matters discusses the legality of one of the Israeli tactics used against the terrorists and other militants – targeted killing.

Coming back to the definition of an unlawful combatant in the Article 2 of the Incarceration Law once more, the court draws a conclusion, that this Law is in fact applicable only to foreign parties – i.e. persons other than Israeli citizens or residents.[157] This conclusion was reached exactly because the definition in Article 2 references LoAC norms - the rules states that "*the rules of international humanitarian law were not intended to apply to the relationship between the state and its citizens*" [158], therefore the Law will concern the same parties as the LoAC norms [159], but introduces a new sub-catherization for the civilians category. The existence of this Law indicates

[152] Incarceration Law, Art. 2.
[153] *Iyyad v. State of Israel*, op. cit., p. 250.
[154] *Ibid.*, para 9.
[155] *Ibid.*, para 12.
[156] *Public Committee against Torture v. Government, op. cit.,* para 28.
[157] *Iyyad v. State of Israel*, *op. cit.*, para 11.
[158] *Ibid.*
[159] The initial draft of the Law in fact contained a provision that expressly stated that the Law is not applicable to Israeli residents. Nevertheless, this provision was not adopted to the Law that is currently in effect.

a specific stance Israel is continuously taking towards belligerents who do not fit in the LoAC categories all the way.

4.2 Israeli defence policies in the light of the principle of distinction

As it was mentioned above and repeated throughout, Israel is a country built on democratic principles. Since the country and its army are bound by international humanitarian law as well as by humanistic principles of democratic countries, Israel has over the years developed a number of warfare tactics whose primarily purpose is to avoid as many civilian casualties as possible - mainly roof knocks and targeted killing.

Roof knock tactics, as it will be analysed in this chapter, could be explored and evaluated from various angles – focusing each time on a different principle of the LoAC. The main principles that come into play are (i) principle of distinction (as more in detail discussed above), (ii) principle or proportionality, (iii) principle of necessity and (iv) prohibition on causing unnecessary suffering. In the following section, an emphasis will be given to the evaluation from the standpoint of the principle of distinction, since that is the focus of this thesis.

Furthermore, roof knocks are not the only disputable tactic used by the Israeli armed forces. To mind comes well discussed tactic of *targeted killing*, that has been instated as an official policy of eliminating chosen militants[160].

4.2.1. Roof knocks

As a preface to the analysis of the roof knock technique, it is necessary to shortly pay attention to the situation on the ground in Gaza, more specifically to the nature of the military targets. Gaza Strip is under an effective control of Hamas, an organization which widely takes advantage of so called "*dual use targets*"[161]. The term dual use targets refers to objects which have "*two kinds of uses, namely civilian and military*" [162], varying from roads and bridges (that can inherently serve as both civilian and military infrastructure), to objects that gained the dual use target classification based on a calculated placement of military objectives inside or to a close

[160] MELZER, Nils. *Targeted Killing in international law*. 1. New York: Oxford University Press, 2008. ISBN 978-0-19-953316-9, p. 28.

[161] STATE OF ISRAEL. *The operation in Gaza 27 December 2008 – 18 January 2009, op. cit., para 233.* And UNRWA Condemns placement of rockets, for second time, in one of its schools. *The United Nations Relief and Works Agency for Palestine Refugees in the Near East* [online]. 22 July 2014 [cit. 2021-12-05]. Accessed from: https://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools. And MCCOY, Terrence. Why Hamas stores its weapons inside hospitals, mosques and schools. *The Washington Post* [online]. July 31, 2014 [cit. 2021-12-05]. Accessed from: https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/.

[162] SHUE, Henry and David WIPPMAN, *op. cit.*, p. 562.

proximity of civilian structures (e.g. schools and hospitals). Dual-use targets are problematic, since their status under LoAC must be reassessed on a case by case basis, which can be unattainable in the midst of an armed conflict.

In the discussion about the dual use targets, the Article 52 Paragraph 2 of the Protocol I must be further elaborated on. The said Paragraph firstly states that "*Attacks shall be limited strictly to military objectives."* This limitation is seemingly straight-forward, nevertheless the Paragraph further continues and lists objects which in fact may be attacked: "*military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage*".[163] The purpose of defining which objectives can be legally attacked was to further strengthen the protection of civilians.[164] Nevertheless, this part of the paragraph shelters the permissible military objectives under a cloak of *military advantage,* which in effect pushes the objects' possible civilian function into the background. [165] This is significant predominantly when discussing the dual-use targets, since attacking these kind of objects brings a military advantage for the attacker. The discussed matter comes to play below, in the assessment of legality of roof knocks.

The so-called roof knocks are one of the most controversial Israeli warfare techniques. They can be described as an ultimate warning measure, that is supposed to warn civilian of an impending bombing, in order for them to evacuate (leave the targeted premises) in time. They were used by the Israeli Defense Forces (hereinafter "*IDF*") on multiple occasions, in this thesis, three of these occasions will be referenced. As a first reference, roof knocks appeared in the operation that took place from December 2008 to January 2009 (so called *Cast Lead* operation). Later on, it was widely used in the *Protective Edge* operation, that took place in the summer months of 2014. The Israeli Ministry of interior issued detailed official reports on those operations, that will be used as a reference (hereinafter referred to as "*the Reports*") [166,167]. The roof knocking technique was not solely used in the aforementioned operations, but also most

[163] Protocol I, Art. 52 (2).
[164] INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987. ISBN 90-247-3460-6, p. 635, para 2015.
[165] SHUE, Henry and David WIPPMAN. Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*. 2002, **35**(3), 559-579, p. 562.
[166] STATE OF ISRAEL. *The 2014 Gaza conflict 7 July – 26 August 2014: Factual and Legal aspects* [online]. 2015 [cit. 2021-11-14]. Accessed from: https://mfa.gov.il/ProtectiveEdge/Documents/2014GazaConflictFullReport.pdf, p. 170.
[167] STATE OF ISRAEL. *The operation in Gaza 27 December 2008 – 18 January 2009 Factual and Legal aspects* [online]. 2009 [cit. 2021-11-17]. Accessed from: https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/GazaOperation%20w%20Links.pdf

recently during the outbreak of hostilities in between Israel and Gaza militants in May 2021 (operation *Guardian of the Walls*)[168].

The technique is commonly used in the Gaza Strip, which is an extremely densely populated area, with approximately 1,957,062 inhabitants living on 360 sq km [169] (this equals to approximately 5,436 inhabitants per sq km, compared to Czech Republic, where the density of population is around 138 inhabitants per sq km [170]). Originally, in order to spare civilian lives during an airstrike, IDF vastly used warning calls. Using phone numbers provided by intelligence, in the cases when it was possible, IDF contacted inhabitants of targeted buildings before an airstrike and called on them to evacuate the premises. During the 2008 operation, the inhabitants nevertheless took an advantage of the knowledge of this strategy. Instances appeared when the civilians refused to leave the targeted premises, counting on the fact that Israel will not breach the LoAC and will not target the structures knowing about the presence of civilians. IDF therefore had to come up with an alternative technique, that would reach the desired goal – the evacuation of civilians before an airstrike. The solution was found in so called roof knocks.[171]

When Israel prepares to bomb a certain object especially in a densely populated area (as it is in the Gaza Strip), the army first drops a non-explosive bomb on the object. This bomb is as it was mentioned non-explosive and aims to cause as little damage as possible (nevertheless the impact can cause damage to the roof of the building). Following this initial bomb, in a few minutes time, a second bomb is fired that aims to destroy the building in its entirety. The purpose of the short time period is to warn the civilian population of an impending attack and give them sufficient time to clear out the premises and seek shelter. This tactic has been widely described in the media outlets[172] as well as in the Reports.

Roof knocks are viewed by Israel as a precautionary measure, that aims to fulfil an obligation set forth by the Article 57 of the Additional Protocol I. The obligation to take precautionary measures, as set forth by the aforementioned article, can be seen as an extension

---

[168] An official report on this operation concerning its factual and legal aspects has not been issued as of the day of submitting this thesis.

[169] The World Factbook: Gaza Strip. *Central Intelligence Agency* [online]. 16. 11. 2021 [cit. 2021-11-21]. Accessed from: https://www.cia.gov/the-world-factbook/countries/gaza-strip/#people-and-society.

[170] The World Factbook: Czechia. *Central Intelligence Agency* [online]. November 29, 2021 [cit. 2021-12-05]. Accessed from: https://www.cia.gov/the-world-factbook/countries/czechia/#people-and-society.

[171] KATZ, Yaakov. How the IDF invented 'Roof Knocking', the tactic that saves lives in Gaza. *The Jerusalem Post* [online]. March 25, 2021 [cit. 2021-12-09]. Accessed from: https://www.jpost.com/arab-israeli-conflict/the-story-of-idfs-innovative-tactic-to-avoid-civilian-casualties-in-gaza-663170.

[172] For example, KATZ, op. cit. , and TAYLOR, Adam. Video: This is what an Israeli 'roof knock' looks like. *The Washington Post* [online]. July 14, 2014 [cit. 2021-12-09]. Accessed from: https://www.washingtonpost.com/news/worldviews/wp/2014/07/14/video-this-is-what-an-israeli-roof-knock-looks-like/.

of the discussed principle of distinction, since its main purpose is to further protect the civilian population. The Article states that, in general, "*constant care should be taken to spare the civilian population, civilians and civilian objects*"[173] and further lists precautions that must be taken with respect to attacks[174].

One of the requirements of the Article 57 of the Additional Protocol I, is to give "*effective advance warning [...] of attacks which may affect the civilian population*"[175]. This is the key article under which the technique of roof knocks can be subsumed. The Report concerning the Protective Edge operation, in accordance with the Protocol I, lists two basic requirements, which need to be fulfilled in order for the warning to be considered as *effective* and *in advance*. Firstly, civilians must understand the warning, and second, they must be given sufficient time to evacuate.[176]

It can be argued from several angles that the Gaza population understands the meaning behind the roof knocks. Firstly, other means of warning are deployed prior to an attack. These include warning leaflets, radio and television broadcasted warning messages and phone calls to nearby businesses and on other numbers acquired through intelligence about the looming attack.[177] These messages contain not only information about the timeframe and location of the planned attack, but also map out evacuation routes and safe areas where civilians can seek shelter. Secondly, this technique is being widely and used by the IDF, which can be seen from the Reports. Another supporting argument that the Gaza population is familiar with the technique is the fact, that multiple videos can be found on the internet depicting if not the roof knock itself, then the subsequent attack. Since there videos are taken on professional cameras, that were set up, it further supports that the inhabitants of the Gaza strip know the consequences of a roof knock[178].

The fulfilment of the time requirement (i.e. of the requirement that civilians must be given sufficient time to evacuate) might be disputable. The time period in between the roof knock and the secondary bombing is not precisely set, nevertheless the reports speak about a time period of 9 and 13 minutes[179]. A number of variables comes into play when assessing whether this time limit is sufficient or not. A time limit, that would be sufficient for evacuation for a healthy adult, might not be sufficient for elderly people or families with young children, where they found themselves in the targeted building. On the other hand, the time period is supposed to provide time for persons

[173] Protocol I, Art. 57 (1).
[174] *Ibid.*, Art. 57 (2).
[175] *Ibid.*, Art. 57 (2) (c).
[176] STATE OF ISRAEL. *The 2014 Gaza conflict 7 July – 26 August 2014, op. cit.,* para. 293.
[177] STATE OF ISRAEL. *The operation in Gaza 27 December 2008 – 18 January 2009, op. cit.,* para. 264.
[178] See for example VOCATIV. Roof Knocking: Warning Shots In Gaza. *YouTube* [online]. 2014 [cit. 2021-12-13]. Accessed from: https://www.youtube.com/watch?v=69icTMgIjlw&ab_channel=Vocativ.
[179] STATE OF ISRAEL. *The operation in Gaza 27 December 2008 – 18 January 2009, op., cit.,* para 389.

to evacuate, but not for an evacuation of military objectives that are being stored in the said building. It is therefore a fragile balance in between providing enough time for persons to evacuate, but not providing enough time for the military objectives to be moved. It cannot therefore be unambiguously said whether the time in between the roof knock and the actual bomb is sufficient, or not, since two objectives must be simultaneously balanced.

Even though a conclusion can be reached when it comes to the effectiveness of the roof knocks, they nevertheless remain to be a complex matter from the point of view of LoAC and the principle of distinction. Warning shots in general are not prohibited under the LoAC, the issue concerning the roof knocks nevertheless lies in the fact that they are precisely targeted at buildings (at targets of the imminent attack).

Further, the status under the principle of distinction of these targeted structures appears to be problematic. Roof knocks may therefore satisfy the requirement of pre-emptive warnings set forth by the Article 57 of the Additional Protocol I, but part of the definition is what creates a dilemma. The pre-emptive warnings, as the second part of the Article 57 states, warn "*of attacks which may affect the civilian population*" [highlight added]. The question then becomes more complex, taking into account the way these pre-emptive measures are being carried out – by firing a directed missile, their legality must be considered also from the standpoint view of attacks that are permissible under the LoAC.

The Article 51 (2) of the Protocol I must be looked at.

> *"The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited."*[180]

The first sentence of this Article prohibits attacks directed at the civilian population. To find out whether the roof knocks constitute a technique prohibited under the Article 51 (2) of the Protocol I, two angles must be examined. Firstly, there is a question of the nature of the objects and whether the roof knocks target civilian population (first part of the provision), and secondly whether the roof knocks can be qualified as a form of an attack or need to be considered as a precautionary measure.

The following stream of thought should be considered: if there is a need to warn civilians in the building that will be consequently targeted and bombed, it can be concluded that civilians are in fact present in the said building, or the building itself is a civilian object and therefore the attack is prohibited by the LoAC. This circles back to the aforementioned reality of dual use targets

[180] Protocol I, Art. 51 (2).

– even though structures (material premises) are primary target of the roof knocks, the tactic in its core "*acknowledges that these premises include those that need warning, namely civilians."*[181]

The bomb that is being dropped on the roof of a structure, can be, when viewed in isolation, considered in its nature as an attack prohibited by the Article 52 (1) of Protocol I. What is problematic is the fact, that the bomb is directly targeted and directly hitting a structure, whose status (civilian/military structure) may not be clear. Especially in connection with the diction of the Article 52 (3) of Protocol I, which deals with the cases of doubt and forms a legal presumption 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 school, is being used to make an effective contribution to military action, it shall be presumed not to be so used*."[182]

On the other hand, as it is viewed by Israel, the warning bomb could be considered as a precautionary warning and therefore a means to fulfilment of the requirement set forth by the Article 57 (2) (c) of Protocol I. Said Article calls for *effective advance warning* before the attacks that *may affect civilian population*, which would be the case for attacks following the roof knock. As roof knocks were primarily developed to act as a form of warning, they (and therefore Israel) face several critiques. Firstly, even though the Article 57 of Protocol I calls for pre-emptive warnings, it nevertheless underlines, that such warnings cannot constitute an authorization to an attack against civilians (or civilian objects)[183]. Here one circles back to the material qualification of the bomb itself and the question whether it needs to be considered as a form of direct attack or not.

And finally, as Israel has also been accused, the usage of the roof knocks could be viewed as a technique that aims to spread terror amongst the civilians of Gaza and therefore it would constitute a breach of the second part of the discussed Article 51 (2) of the Protocol I. Nevertheless, as all the Reports state, and additionally used techniques affirm, the only purpose of the roof knocks is "*to signal the impending danger and give civilians in or near the target a last opportunity to seek safety before an attack*" [184]. In order to sufficiently assess the situation, assumptions must be made about the IDF's (i.e. Israel's) motivations. These can be judged only from the outside, from official statements made by the public officials and public offices (e.g. the aforementioned

[181] JORONEN, Mikko. "Death comes knocking on the roof": Thanatopolitics of Ethical Killing During Operation Protective Edge in Gaza. *Antipode.* [online]. 2016, **48**(2), 336–354 [cit. 2021-12-10]. ISSN 0066-4812. Accessed from: https://onlinelibrary.wiley.com/doi/pdf/10.1111/anti.12178?casa_token=DD1h_vdRPxQAAAAA%3A1Y-bJa27oNbjReA9Ft78CII0kfgNYBDglFt9VzRjfkz6JEHZDocL58-I3Gwc0WQ8nW1uTqkBVhgM-nw, p. 347.

[182] Protocol I, Article 52 (3).

[183] Protocol I, Art. 57(5).

[184] STATE OF ISRAEL. *The 2014 Gaza conflict 7 July – 26 August 2014,* para 313.

Reports) and further from the other actions (and precautions) carried out by the state. From the aforementioned sources it can be safely assumed that (at minimum) the *primary* purpose of the roof knock in fact is not to spread terror among civilians, but rather to provide a warning.

In conclusion, effectivity of the tactic seems to be in the centre of the assessment. In case the warning is issued in advance and its meaning is understood by those who are supposed to be warn of the impending attack, it could indeed be considered as a precautionary warning in the intentions of Article 57 of the Protocol I. Further, other accompanying techniques of warning should be utilized so that effectiveness would be assured and therefore requirements of the LoAC fulfilled.[185] Since the roof knocks could be also viewed as a form of attack, in order to stay within the intentions of the LoAC, the basic requirement of not targeting civilian population must be upheld. Should there be no military objective towards which the roof knocks are directed, the technique would be problematic from the standpoint of the LoAC[186] and would have to be without further discussion assed as direct attacks and therefore deemed illegal.

Similarly, van den Boogeard for this case lists a set of requirements that need to be fulfilled in order not to consider roof knocks as a form of attack – firstly, the roof knocks have to pass the test of effectiveness, secondly, other means of warning need to be employed and thirdly, there must be reasonable belief that the roof knock will save civilian lives. Only if the tactic passes all of the three criteria, it could be considered as legal under the LoAC (considered in the light of all the other principles inherently applicable within the LoAC).[187]

In the end, there are "*two contradicting legal obligations that share a common object and purpose*"[188] – to spare civilian lives in the midst of an armed conflict. The tactic itself therefore shall not be condemned all together, but rather it should be evaluated on case-to-case basis which of the relevant obligations in a particular case prevails – the obligation not to directly attack civilians and civilian structures or to give a pre-emptive warning in a situation where a structure posing as a military objective is targeted. The roof knocks in their nature can therefore be considered both – an unlawful form of attack as well as a lawful form of warning, the decisive factor does not lie in the roof knock bomb itself, but rather in other factors and considerations that took place before the launching of the bomb.

---

[185] VAN DEN BOOGAARD, Jeroen. Knock on the Roof: Legitimate Warning or Method of Warfare? *Amsterdam Center for International Law: Research papers series* [online]. 2017, **28**, 1-27, [cit. 2021-12-10]. Accessed from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062022, p. 11.
[186] *Ibid.,* p. 24.
[187] VAN DEN BOOGAARD, *op. cit.*, p. 24.
[188] *Ibid*., p. 17.

Conclusion

In this thesis the main implications of the changed nature of armed conflicts on the principle of distinction were discussed. With the raise of asymmetrical conflicts and appearance of terrorist groups as significant actors, a discussion about the status of their members needed to be opened and – possibly – their rights and obligations reassessed.

As it was described, the asymmetrical armed conflicts occur in between parties, whose status, power, and commitment to comply with international law, are highly asymmetrical. Nevertheless, these conflicts are still to be governed by the international law treaties that have been adopted in a time, when more classical state vs. state wars were the norm. The effective international law therefore does not sufficiently reflect the nature of today's conflicts. The modern world, globalization and high level of international cooperation opened a way for many non-state actors to enter into armed conflicts against states. Once this kind of situation occurs, the so-to-say playing field is far from being levelled. All of the sudden there is an armed conflict, in which, at least in theory, one party should fight with all the constrains the LoAC contains, and on the other hand, the second party is hiding in the grey area, not respecting the constrains of the law, but exploits its protection.

On this account, the principle of distinction was closely explored in order to provide an understanding, whether it is indeed able to encompass the nature of terrorists. It was discussed that the distinction under the effective LoAC is vastly black and white and assessing a situation solely on the provided dichotomy can lead to great imbalances and inequity.

Therefore, it seems to be necessary to reach an international agreement and open a way for the adoption of norms of international law, that would specifically react to the terrorism phenomena as it has surfaced and provide a legal framework that would enable State parties to react to the threats accordingly while maintaining the core principles of the LoAC as well as the human rights protection. Some of the efforts in this direction were presented in this thesis, nevertheless neither of them reached international recognition.

To include terrorism as a recognized factor into the LoAC norms, it would be first necessary to develop and agree on a universal definition of terrorism – only after completing this first step, the adoption of norms concerning terrorism (and for that matter other non-state actors) could be commenced. Even this step has nevertheless proven to be challenging, since a universal definition of terrorism has not been up to today agreed on.

Paying attention to Israel and its legislation and tactics used in an armed conflict, it can be seen that the country had to, within a relatively short time period, adapt to the ongoing struggle against the terrorist organizations performing acts of violence in (and near?) its territory. This thesis explored Israel's tactics both in the legal sphere (Incarceration Law) and on the battlefield (roof knock tactic). What seems to be the common element is the controversy of these adopted measures. This is mainly caused by the uncertain status of the involved entities. In order to carry out an in-depth legal analysis, the situation and the status of the main actors must be clarified. This has nevertheless proven to be, even after many years of efforts by the international community, difficult.

In the described case of Israel one can see the efforts that need to be taken and the ingenuity that a state needs to bring forward in order to, first, effectively combat terrorism, and second, try to comply with requirement of international law, must be enormous. It can be seen that the balance in between effectivity and legality is very fragile and many factors in the overall consideration come into play.

Used resources

Literature

CRAWFORD, Emily. *The treatment of combatants and insurgents under the law of armed conflict*. 1. New York: Oxford University Press, 2010. ISBN 978-0-19-957896-2.

FLECK, Dieter. *The Handbook of International Humanitarian Law*. 3. Oxford: Oxford University Press, 2013. ISBN 978-0-19-965880-0.

HENCKAERTS, Jean-Marie and Louise DOSWALD-BECK. *Customary International Humanitarian Law: Volume I Rules*. 1. Cambridge: Cambridge University Press, 2005. ISBN 978-0-521-80899-6.

INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*. Geneva: Martinus Nijhoff Publishers, 1987. ISBN 90-247-3460-6.

INTERNATIONAL COMMITTEE OF THE RED CROSS. *Commentary on the First Geneva Convention: Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*. 1. Cambridge: Cambridge University Press, 2016. ISBN 978-1-107-17010-0.

JUKL, Marek. *Ženevské úmluvy, obyčeje a zásady humanitárního práva: (stručný přehled)* [online]. 1. Český červený kříž, 2020 [cit. 2021-11-24]. ISBN 978-8087729-31-1. Accessed from: https://www.cervenykriz.eu/files/files/cz/edicehnuti/Konvence20.pdf

MELZER, Nils. *Targeted Killing in international law*. 1. New York: Oxford University Press, 2008. ISBN 978-0-19-953316-9.

MISHAL, Shaul and Avraham SELA. *The Palestinian Hamas: Vision, Violence, and Coexistence*. 2. New York: Columbia University Press, 2006. ISBN 0-231-14006-I.

ONDŘEJ, Jan, Veronika BÍLKOVÁ, Pavel ŠTRUMA and Dalibor JÍLEK. *Mezinárodní humanitární právo*. 1. Prague: C.H. Beck, 2010. ISBN 978-80-7400-185-7.

PICTET, Jean S., ed. *The Geneva Conventions of 12 August 1949, Commentary*. Geneva: International Committee of the Red Cross, 1958.

SASSÒLI, Marco, Antoine A. BOUVIER a Anne QUINTIN. *How does law protect in war?: Volume III Cases and Documents* [online]. 3. Geneva: International committee of the Red cross, 2011 [cit. 2021-11-21]. ISBN 978-2-940396-12-2. Accessed from: https://archive-ouverte.unige.ch/unige:17803/ATTACHMENT02.

VON GLAHN, Gerhard. *The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation*. 1. Minneapolis: University of Minnesota Press, 1957. ISBN 978-0816660278.

WOMACK, Brantly. *China and Vietnam: The politics of asymmetry*. 1. New York: Cambridge University Press, 2006. ISBN 978-0-521-85320-0.

Journal Articles

BOMANN-LARSEN, Lene. Licence to kill? The question of just vs. unjust combatants. *Journal of Military Ethics*. 2004, **3**(2), 142-160.

BROWN, Nathan J. The Hamas-Fatah Conflict: Shallow but Wide. *The Fletcher Forum of World Affairs*. 2010, **34**(2), 35-49.

DEL MAR, Katherine. The Requirement of 'Belonging' under International Humanitarian Law. *The European Journal of International Law*. 2010, **21**(1), 105-124.

GAUDREAU, Julie. The reservations to the Protocols additional to the Geneva Conventions for the protection of war victims. *International Review of the Red Cross*. 2003, (849), 143-184. Accessed from: https://www.icrc.org/en/doc/assets/files/other/irrc_849_gaudreau-eng.pdf [cit. 2021-11-17].

GÎRLA, Lilia a Jacob RUB. Fight against terrorism poses especially challenging questions for democratic countries. *Revista Naţională de Drept*. 2016, (3), 27-31.

HOFMANN, Claudia a Ulrich SCHNECKENER. Engaging non-state armed actors in state-and peace-building: options and strategies. *International review of the Red Cross*. 2011, **93**(883), 603-621.

JORONEN, Mikko. "Death comes knocking on the roof": Thanatopolitics of Ethical Killing During Operation Protective Edge in Gaza. *Antipode.* [online]. 2016, **48**(2), 336–354 [cit. 2021-12-10]. ISSN 0066-4812. Accessed from: https://onlinelibrary.wiley.com/doi/pdf/10.1111/anti.12178?casa_token=DD1h_vdRPxQAAAAA%3A1Y-bJa27oNbjReA9Ft78CII0kfgNYBDglFt9VzRjfkz6JEHZDocL58-I3Gwc0WQ8nW1uTqkBVhgM-nw.

JUNOD, Sylvie. Additional Protocol II: history and scope. *American University Law Review*. 1984, **33**, 29-40, p.29.

KASHER, Asa a Amos YADLIN. Military ethics of fighting terror: an Israeli perspective. *Journal of Military Ethics*. 2005, **4**(1), 3-32.

KASHER, Asa. The principle of distinction. *Journal of Military Ethics*. 2007, 6(2), 152-167.

KLEFFNER, Jann K. From 'Belligerents' to 'Fighters' and Civilians Directly Participating in Hostilities: On the Principle of Distinction in Non-International Armed Conflicts One Hundred Years After the Second Hague Peace Conference. *Netherlands International Law Review*. 2007, **54**(2), 315–336.

KRETZMER, David. Rethinking the application of IHL in non-international armed conflicts." 42.1 (2009): 8-45. *Israel Law Review*. 2009, **42**(1), 8-45.

MOFIDIT, Manooher a Amy E. ECKERT. Unlawful Combatants or Prisoners of War: The Law and Politics of Labels. *Cornell International Law Journal*. 2003, **36**(1), 59-92.

RAVICHANDRAN, Sharanya. Non-State Conflict and the Transformation of War. *E-International relations*. 2011. ISSN 2053-8626. Accessed from: https://www.e-ir.info/2011/08/29/non-state-conflict-and-the-transformation-of-war/.

SASSOLI, Marco. "Unlawful combatants": the law and whether it needs to be revised. *Proceedings of the Annual Meeting (American Society of International Law)*. Cambridge University Press, 2003, **97**, 196-200.

SHUE, Henry and David WIPPMAN. Limiting Attacks on Dual-Use Facilities Performing Indispensable Civilian Functions. *Cornell International Law Journal*. 2002, **35**(3), 559-579.

SWENEY, Gabriel. Saving Lives: The Principle of Distinction and the Realities of Modern War. International Lawyer. *American Bar Association*, 2005, **39**(3), 733-758.

VAN DEN BOOGAARD, Jeroen. Knock on the Roof: Legitimate Warning or Method of Warfare? *Amsterdam Center for International Law: Research papers series* [online]. 2017, **28**, 1-27, [cit. 2021-12-10]. Accessed from: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3062022.

YOUNG, Reuven. Defining terrorism: The evolution of terrorism as a legal concept in international law and its influence on definitions in domestic legislation. *Boston College International and Comparative Law Review*. 2006, **29**(1), 23-106.

ZACHARY, Shlomy. Between the Geneva Conventions: where does the unlawful combatant belong? *Israel law review*. 2005, **38**(1-2), 378-417, p.381.

International Treaties

Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949.

Convention (III) relative to the Opening of Hostilities. The Hague, 18 October 1907.

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.

LEAGUE OF NATIONS, Convention for prevention and punishment of terrorism of November 16, 1937.

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.

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.

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

Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949.

Collections of Judicial Decisions

THE SUPREME COURT OF ISRAEL a THE MINISTRY OF FOREIGN AFFAIRS JERUSALEM. *Judgments of the Israel Supreme Court: Fighting Terrorism within the Law* [online]. 3. 2009 [cit. 2021-11-15]. Accessed from: https://mfa.gov.il/MFA_Graphics/MFA%20Gallery/Documents/Fighting%20Terrorism%20within%20the%20Law%20(3).pdf

Anonymous (Lebanese citizens) v Minister of Defence. *Oxford Reports on International Law in Domestic Courts*. Oxford University Press, 2009, (12) [cit. 2021-11-15]. Accessed from: https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/3B8E62D1B405B80AC125765100282A0D/CASE_TEXT/Israel%20-%20Anonymous%20(Lebanese%20citizens)%20v.%20Minister%20of%20Defence,%20Supreme%20Court,%202000%20%5BEng%5D.pdf.

Judicial Decisions

Ex parte Quirin et al.; United States ex rel. Quirin et. al. v. Cox Provost Marshal, decision by The Supreme Court of the United States from July 31, 1942, 317 U.S. 1.

Iyyad v. State of Israel, decision by The Supreme Court of Israel sitting as the High Court of Justice from June 11, 2008, CrimA 6659/06.

John Does v. Ministry of Defence, decision by The Supreme Court Sitting as the Court of Criminal Appeal from April 12, 2000, CrimFH 7048/97.

Military Prosecutor V. Omar Mahmud Kassem and others, decision by Military Court sitting in Ramallah from April 13, 1969, 4/69.

Physicians for Human Rights v. Prime Minister, decision by The Supreme Court sitting as the High Court of Justice from January 19, 2009, HCJ 201/09.

Prosecutor v. Dusko Tadic a/k/a "DULE", decision on the defense motion for interlocutory appeal on jurisdiction by International Criminal Tribunal for the former Yugoslavia from October 2, 1995, IT-94-1-AR72.

Public Committee against Torture v. Government, decision by The Supreme Court sitting as the High Court of Justice from December 14, 2006, HCJ 769/02.

Others

ČESKÝ ČERVENÝ KŘÍŽ. Ozbrojený konflikt - definice a druhy. *Český červený kříž: Oficiální stránky Českého červeného kříže* [online]. [cit. 2021-12-12]. Accessed from: https://www.cervenykriz.eu/files/files/cz/nsmhp_svbs/Pravidla_priloha_1.pdf.

ISRAEL, Act. n. 5762, *Incarceration of Unlawful Combatants Law*, 2002, translation accessed from https://ihl-databases.icrc.org/applic/ihl/ihl-nat.nsf/xsp/.ibmmodres/domino/OpenAttachment/applic/ihl/ihl-nat.nsf/7A09C457F76A452BC12575C30049A7BD/TEXT/IncarcerationLaw.pdf [cit. 2021-11-15].

SECURITY COUNCIL OF THE UNITED NATIONS, Resolution 1566 (2004). October 8, 2004 [cit. 2021-11-17]. Accessed from: https://www.un.org/ruleoflaw/files/n0454282.pdf.

Foreign Terrorist Organizations. *U.S. Department of State* [online]. Bureau of Counterterrorism [cit. 2021-11-17]. Accessed from: https://www.state.gov/foreign-terrorist-organizations/.

The World Factbook: Czechia. *Central Intelligence Agency* [online]. November 29, 2021 [cit. 2021-12-05]. Accessed from: https://www.cia.gov/the-world-factbook/countries/czechia/#people-and-society.

INTERNATIONAL COMMITTEE OF THE RED CROSS. *International humanitarian law and the challenges of contemporary armed conflicts: Report* [online]. Geneva, 2015, (32IC/15/11) [cit. 2021-11-24]. Accessed from: https://www.icrc.org/en/download/file/15061/32ic-report-on-ihl-and-challenges-of-armed-conflicts.pdf.

UNRWA Condemns placement of rockets, for second time, in one of its schools. *The United Nations Relief and Works Agency for Palestine Refugees in the Near East* [online]. 22 July 2014 [cit. 2021-12-05]. Accessed from: https://www.unrwa.org/newsroom/press-releases/unrwa-condemns-placement-rockets-second-time-one-its-schools.

MCCOY, Terrence. Why Hamas stores its weapons inside hospitals, mosques and schools. *The Washington Post* [online]. July 31, 2014 [cit. 2021-12-05]. Accessed from: https://www.washingtonpost.com/news/morning-mix/wp/2014/07/31/why-hamas-stores-its-weapons-inside-hospitals-mosques-and-schools/.

KATZ, Yaakov. How the IDF invented 'Roof Knocking', the tactic that saves lives in Gaza. *The Jerusalem Post* [online]. March 25, 2021 [cit. 2021-12-09]. Accessed from: https://www.jpost.com/arab-israeli-conflict/the-story-of-idfs-innovative-tactic-to-avoid-civilian-casualties-in-gaza-663170.

TAYLOR, Adam. Video: This is what an Israeli ‘roof knock’ looks like. *The Washington Post* [online]. July 14, 2014 [cit. 2021-12-09]. Accessed from: https://www.washingtonpost.com/news/worldviews/wp/2014/07/14/video-this-is-what-an-israeli-roof-knock-looks-like/.

SCHMITT, Michael N., Charles H.B. GARRAWAY a Yoram DINSTEIN. The Manual on the Law of NonInternational Armed Conflict With Commentary [online]. *Sanremo: International Institute of Humanitarian Law*, 2006 [cit. 2021-11-24]. Accessed from: http://humanrightsvoices.org/assets/attachments/documents/The.Manual.Law.NIAC.pdf.

VOCATIV. Roof Knocking: Warning Shots In Gaza. *YouTube* [online]. 2014 [cit. 2021-12-13]. Dostupné z: https://www.youtube.com/watch?v=69icTMgIjlw&ab_channel=Vocativ.

THE COUNCIL OF THE EUROPEAN UNION. Council Common position 2009/468/CFSP of 15 June 2009 updating Common Position 2001/931/CFSP on the application of specific measures to combat terrorism and repealing Common Position 2009/67/CFSP. In: *Official Journal of the European Union* [online]. 16.6.2009 [cit. 2021-11-17]. Accessed from: https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32009E0468&qid=1412596355797&from=EN.

The World Factbook. *Central Intelligence Agency* [online]. 16. 11. 2021 [cit. 2021-11-21]. Accessed from: https://www.cia.gov/the-world-factbook/countries/gaza-strip/#people-and-society.

Zásada rozlišování a její promítnutí v konfliktu mezi Izraelem a teroristickými organizacemi působícími na území Gazy

Abstrakt

Diplomová práce diskutuje důsledky změněné povahy ozbrojených konfliktů na princip rozlišování. V úvodu se práce zaměřuje na změněnou povahu ozbrojených konfliktů a na důsledky z toho plynoucí. Popisuje jejich postupný vývoj a odlišnosti od klasických válek. Následně je pozornost věnována povaze stran účastnících se asymetrických ozbrojených konfliktů. S nárůstem asymetrických konfliktů a nástupem teroristických skupin jako významných nestátních aktérů bylo potřeba otevřít diskusi o postavení jejich členů, a případně přehodnotit jejich práva a povinnosti. Bez ohledu na jejich asymetrickou povahu se tyto konflikty stále musí řídit mezinárodními smlouvami, které byly přijaty v době, kdy byly normou zejména klasické války vedené mezi státy na obou stranách. Platné mezinárodní právo tedy dostatečně nereflektuje povahu dnešních konfliktů. Z tohoto důvodu je v této práci podrobně popsán a analyzován princip rozlišování, aby bylo možné pochopit, zda je skutečně schopen obsáhnout povahu teroristů. Postavení kombatantů a nekombatantů (civilistů) je dopodrobna rozvedeno. Práce upozorňuje, že princip rozlišování podle platného práva ozbrojených konfliktů je značně černobílý a že nastalá dichotomie může v důsledku vést k situacím nerovnováhy a nespravedlnosti. Poslední část práce je věnována Izraeli - jeho legislativě a taktikám používaným v ozbrojených konfliktech. Tato kapitola zkoumá strategie Izraele jak v právní sféře (zákon o věznění nezákonných kombatantů), tak na bojišti (taktika „klepání na střechu“). Na popsaném případě Izraele je vidět úsilí a vynalézavost, které je třeba vyvinout, aby daný stát za prvé účinně potíral terorismus a za druhé splnit požadavky mezinárodního práva. V závěru diplomová práce zdůrazňuje, že rovnováha mezi efektivitou a legalitou je velmi křehká a pro komplexní posouzení situace je nutné zvážit mnoho faktorů.

Klíčová slova: terorismus, Izrael, zásada rozlišování

The principle of distinction and its implications for the conflict between Israel and the terrorist groups operating in the Gaza Strip

Abstract

In this thesis the main implications of the changed nature of armed conflicts on the principle of distinction are being discussed. The thesis opens with a look into the changed nature of armed conflicts and the implications of thereof. Further it concentrates on the parties involved in asymmetrical conflicts. With the raise of asymmetrical conflicts and appearance of terrorist groups as significant non-state actors, a discussion about the status of their members needed to be opened and – possibly – their rights and obligations reassessed. Regardless of their asymmetrical nature, these conflicts are still to be governed by international law treaties that have been adopted in a time, where more classical state vs. state wars were the norm. The effective international law therefore does not sufficiently reflect the nature of today's conflicts. On this account, the principle of distinction is being closely explored in this thesis in order to provide an understanding, whether it is indeed able to encompass the nature of terrorists. The thesis discusses that the distinction under the effective LoAC is vastly black and white and assessing a situation basely on the provided dichotomy can lead to great imbalances and inequity. The last part of the thesis is paying attention to Israel and its legislation and tactics used in an armed conflict. It explores Israel's tactics both in the legal sphere (Incarceration Law) and on the battlefield (roof knock tactic). In the described case of Israel one can see the efforts that need to be taken and the ingenuity that a state needs to bring forward in order to, first, effectively combat terrorism, and second, try to comply with requirement of international law. It can be seen that the balance in between effectivity and legality is very fragile and many factors in the overall consideration come into play.

Key words: terrorism, Israel, principle of distinction