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IHL AND WAR ON TERRORISM: THE CASE OF

AL-SHABBAAB

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JANUARY 2017

IHL AND WAR ON TERRORISM: THE CASE OF AL-SHABBAAB

**SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR
THE LL.M DEGREE IN PUBLIC INTERNATIONAL LAW**

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SCHOOL OF LAW**

JANUARY 2017

Declaration

I, Tewodros Alamrew, hereby declare that this work is an original work and has not been presented in any other institution before. All referred materials are duly acknowledged.

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Acknowledgments

First and foremost, praise is to the Almighty God without His grace I would not have accomplished this work.

I am indebted to my supervisor Dr. Mizanie Abate who encouraged me and tirelessly read my research work and quickly responded with constructive, encouraging and lesson full critical comments. However, the responsibility for any remaining mistakes is solely mine.

I would like to thank W/ro Firehiwot Worku ERCS Secretary General who allowed me and created a favorable condition at work place to pursue the program.

Finally, my gratitude goes to my family and friends who helped me one way or another for the successful completion of the research.

Thank you all!

List of Acronyms

AMISOM	African Mission in Somalia
AU	African Union
IAC	International Armed Conflict
ICJ	International Court of Justice
ICRC	International Committee of Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
ILA	International Law Association
ISIS	Islamic State in Iraq and Syria
KDF	Kenyan Defense Force
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
OAU	Organization of African Unity
POW	Prisoner of War
SC	Security Council
TFG	Transitional Federal Government
UIC/ICU	Union of Islamic Court
USA	United States of America
UN	United Nations

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Chapter One

Introduction

1.1 Abstract

Currently armed conflicts are becoming more complex and difficult to regulate. Technological developments sophisticated the means of warfare with immense destructive capacity of military weapons which pose a challenge on the purpose of international humanitarian law to ensure compliance on the protection of civilians and regulate means and methods of warfare. The sophistication of military powers particularly state military powers makes international armed conflict a rare business of states. On the contrary there is a high increment of non-international armed conflict. Political, ethnic, national or religious grievances and the struggle for access to critical resources remained as the source of many ongoing cycles of armed conflict, and have sparked recent outbreaks of hostilities. However, great military power of states makes fruitless the efforts of non-state parties to achieve their objective on the traditional means and methods of armed conflict. Because of this impasse a number of non-state armed group use all sorts of means and methods of warfare to the extent to compromise the basic principles of IHL. Moreover, in contemporary armed conflict it is possible to easily identify a large share of the armed conflict is NIAC. These situations corroborated with insufficient regulation of IHL over NIAC increase the suffering of civilian and make them vulnerable to military attacks.

1.2 Background of the Study

International humanitarian law as it exists today is a law that regulates the conduct of hostilities and protects civilians and persons who are no longer party to a conflict.¹Under IHL generally there are two types of armed conflict. i.e IAC and NIAC.²Criteria have been established in order to identify the beginning of application of IHL; though distinguishing armed conflict particularly with other situations of violence is difficult.

"War on terrorism" or fighting of terrorism is an emerging concept which is more attached to international politics than law.³From the concept itself there are diverging views. Conceptually

¹ICRC Advisory Service on International Humanitarian Law, "What is International Humanitarian Law?",2004 available on:- https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf accessed on 6/5/2016

² Ibid

³ Lt. Col. Godard Busingye, "The Global Fight against Terrorism and the Application of International Humanitarian Law" Uganda's Paper series on International Law Volume I No. I (August 2013), pp.123

terrorism may be defined as “a deliberate creation and exploitation of fear through violence or the threat of violence in the pursuit of political change”.⁴ However, some writers define terrorism as a social phenomenon with many aspects which vary from case to case.⁵

During armed conflict, “terrorism” is specifically prohibited in article 33 of the Fourth Geneva Convention, as well as in article 4 (2),(d) of Additional Protocol II.⁶ Moreover, the principle of distinction which is one of the cardinal principles of IHL attained the status of *jus cogens*,⁷ specifies that combatants must distinguish themselves from civilians. As a result, combatants must neither deliberately target nor indiscriminately or disproportionately harm civilians.⁸ However, non-state actors and transnational armed groups engaged in terrorism violate this cardinal principle of IHL.

Particularly the issue of terrorism acquired international attention after Al Qaeda operatives attacked the Twin Towers and the Pentagon on September 11, 2001, which resulted a swift response by US and caused President George Bush to declare a “global war on terror,” led by the United States but supported by many States with varying roles.⁹

Subsequently, in several places there are fights against the so called "terrorism" either nationally or internationally like ISIS, Al-Qaida, Boko haram, Al-Shabaab. Major states also declared that they are fighting against terrorism. Likewise, these "terrorist" organizations conduct their attack not only through hit and run or suicide bomber techniques but also conduct their attack like the typical armed conflict which is known both in the IAC and NIAC. What makes different the nature of these groups is the ultimate goal of their attack is not only to weaken and dismantle the military power of the

⁴ Id pp.124

⁵ Han Peter Gasser, “Acts of terror "terrorism "and international Humanitarian Law,” International Review of the Red Cross RICR, Vol.84 No.847 (September 2002), pp.554

⁶ Geneva Convention Relative to the Protection of Civilian Persons in Time of War; signed at Geneva on 12 August 1949 In force on 21 October 1950 United Nations, Treaty Series, vol. 75, No. 973 Arts. 33; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): signed at Geneva on 8 June 1977 In force on 7 December 1978 United Nations, Treaty Series, vol. 1125, No. 17513, Art. 4/2/d

⁷ Noëlle Quénivet, “The ‘War on Terror’ and the Principle of Distinction in International Humanitarian Law”, Anuario Colombiano de Derecho Internacional ACIDI, Vol. 3 (Especial, 2010) p.160; see also Threat of Use of Nuclear Weapons, Advisory Opinion, [1996] ICJ Rep. 226, paras. 78-79.

⁸ Ibid

⁹ Terrorism and International Law: Challenges and Responses, 30 May - 1 June 2002, Sanremo, Contributions presented at the “Meeting of independent experts on Terrorism and International Law: the International Institute of Humanitarian Law

adversary rather to terrorize the whole population and to intimidate the government to act in some way.¹⁰

In addition, these "terrorist" organizations opted a method of conducting hostilities in a barbaric and savage way. They almost completely disregard and violate the major principles of warfare and protections granted to civilians under international humanitarian law.

One of the great challenges in the "war on terrorism" for IHL is to ensure the protection of civilians and limit the methods of conducting hostilities. Civilians are mainly targets of the conflict and in addition to civilians it is difficult to ensure the proper treatment of those who participate in the conflict. Therefore, "war on terrorism" is one of the main challenges of IHL at the present time. The challenges are mainly on distinguishing the participants, assuring the right methods of warfare, regulating the conduct of hostilities and protecting the civilians.

United States opted its military force to respond the 9/11 attack against Al-Qaida and its allies.¹¹ Since use of regular military force by a state is one criteria for determining a situation of violence to be an armed conflict in in case of NIAC, this decision of the US has an important impact on the discussion of application of IHL in the fight against terrorism.¹² However, including the USA, many countries pose their doubts on the relevance of IHL norms on conditions not only emanated from actions on the ground, but also it was claimed that IHL and its core principles were not pertinent in the new context.¹³ Particularly gathered opinio juris of states by ICRC showed that several States conveyed the impression that the relevancy of the law prior to September 11, had disappeared. Following the US example, some States began even to express their opposition to such rules.¹⁴ The question thus arises, are the practices of some States violating the existing standards or are these developments indicating the emergence of new ones?¹⁵

In addition to IAC and NIAC there is also commonly known as "transnational armed conflict." There is a great debate whether the law of international armed conflict applies to transnational armed

¹⁰International humanitarian law and terrorism: questions and answers available on:- <https://www.icrc.org/eng/resources/documents/faq/terrorism-faq-050504.htm> accessed on June 6,2016

¹¹John C. Yoo& James C. Ho, International Law and the War on Terrorism, available on:- <https://www.law.berkeley.edu/files/yoonyucombatants.pdf> accessed on April 12,2016

¹²Ibid

¹³NoëlleQuénivet, cited above at note 7, p.160

¹⁴ Id p.159

¹⁵ Ibid

conflicts. State practice and *opinio juris* do not apply the law of international armed conflict to conflicts between states and certain non-state actors.¹⁶

Among the "terrorist groups" Harakaat Al-Shabaab al-Mujahidin, commonly known as Al-Shabaab, is the main opposition group which pose principal threat to peace, security and stability in East Africa for more than two decades.¹⁷ Al-Shabaab is fighting with AMISOM, the Transitional government and its allies. In addition to this it also carried out a number of terrorist acts including recruitment of child soldiers.¹⁸

Before it was formed itself and identified as an insurgent group, Al-Shabaab's origin can be traced back to the al-Ittihad al-Islamia(Union of Islam)—a militant Salafi group which gained prominence in the 1990s, in the midst of the civil war which followed the fall of Siad Barre's military regime.¹⁹ Some observers therefore argue that the Islamic Courts Union's defeat by the TFG and Ethiopian troops may have precipitated the creation of a radical movement that would become al-Shabaab.²⁰ A report by a Monitoring Group observes that Al-Shabaab has a vast network on hierarchy and command that supports it with revenue through taxation to their controlled territory in Lower Juba, bordering Kenya.²¹

1.3 Statement of the Problem

One of the requirements of IHL to be applicable is there must be an armed conflict whether international or non-international.²² And there are several criteria to level a certain conflict to be an armed conflict. Among the criteria in order to be an armed conflict, there must be two parties.²³ Due to this criterion, some argued that terrorism is a phenomenon. Both practically and legally war cannot waged against a phenomenon but only against an identifiable party to an armed conflict.²⁴ On the other hand, terrorism is

¹⁶Marco Sassoli, "Trans National Armed Groups and International Humanitarian Law", Program on Humanitarian Policy and Conflict Research Harvard University Occasional Paper Series Number 6(Winter 2006) p.4,

¹⁷Report of the Monitoring Group on Somalia and Eritrea pursuant to Security Council resolution 1916 S/2011/433 (2010) pp.18

¹⁸ *ibid*

¹⁹Al-ShabaabOrigins, Current Status, and a Look into the Future available on:- www.othersolutions.e u accessed on 31/07/2016

²⁰ *ibid*

²¹Report of the Monitoring Group, cited above at note 17, p.18

²²Gabor Rona, "Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'," Summer/Fall vol. 27:2, (2003) pp.56 Article published in "the Fletcher Forum of World Affairs"

²³International Humanitarian Law and Terrorism :Question and Answers; ICRC's position on terrorism available on <https://www.icrc.org/eng/resources/.../faq/terrorism-faq-050504.htm>

²⁴*ibid*

an act which targets those who do not participate in hostilities particularly civilians to create fear on the public in order to put pressure on the state to act or not to act in some way. Due to its criminality by nature and outlawed both in international and domestic laws many argue that a fight against terrorism is an extension of law enforcement mechanism rather than a matter which falls under IHL as armed conflict.²⁵ Though Terrorism was clearly prohibited under the Geneva Conventions²⁶ still there are several arguments how IHL will be applicable on the war on terrorism.

As stated above for IHL to be applicable there must be at least two armed groups fighting each other. And when we see the constituents of armed groups we will find some elements to be fulfilled like organization, a command responsible to the acts of his subordinates, internal disciplinary systems to insure compliance of IHL²⁷ to carry arms openly²⁸ and in case of NIAC in addition to organization and responsible command the group should control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol²⁹. On the contrary, terrorists are persons or groups of persons who commit unlawful acts and subject to sanctions of both international and domestic legal systems.³⁰

Taking in to account these challenges the following research questions will be addressed in this paper to elucidate the whole discourse.

1.4 Research Questions

The research question of this study is: to enquire the possibility of the application of IHL in the "war on Terrorism" particularly in the fight with Al-Shabaab.

The specific research questions are:

²⁵Report by International Committee of the Red Cross, International Humanitarian Law and the challenges of contemporary armed conflicts Report, 31st International Conference of Red Cross and Red Crescent, Geneva, Switzerland 28 November – 1 December 2011

²⁶The 4th Geneva Conventions cited above at note 6, Arts. 33; Protocol(II) Additional to the Geneva Conventions cited above at note 6 Art.4/2/d

²⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I); signed at Geneva on 8 June 1977, in force on 7 December 1978 United Nations, Treaty Series, vol. 1125, No. 17512, Art. 43/1

²⁸Annex to the Hague Conventions of 18 October 1907 Regulations Respecting the Laws and Customs of War on Land. Art. 1

²⁹Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II): signed at Geneva on 8 June 1977, in force on 7 December 1978 United Nations, Treaty Series, vol. 1125, No. 17513, Art.1/1

³⁰Gabor Rona, cited at note 22, pp.48

- Are ultimate goal, means and methods and specificity of armed group necessary for the application of IHL?
- Do some aspects of the fight against terrorism amount to a "transnational" armed conflict?
- What would be the application of IHL where the acts of counter terrorism or "war on terrorism" fulfils the requirements of armed conflict?
- Does the case by case approach in assessing armed conflicts also apply to "war on terrorism?"
- Is "war on terrorism" at national or international level can be classified as IAC or NIAC?
- Does the organization and structure of "terrorist groups" like Al-Shabaab contribute to in the determination for application of IHL?
- Does employing the military in the fight against terrorism like what USA did as a response to 9/11 terrorist attack upgrade the conflict in to armed conflict?³¹
- Does the classification of Al-Shabaab as a terrorist organization by USA and some other countries has an impact on the application of IHL?
- Could the fight with Al-Shabaab fall under NIAC or IAC?
- Does Al-Shabaab fulfill the criteria of armed group under IHL?

In addressing the above listed research questions I tried to respond the first question in chapter two; the next six questions in chapter three and the rest three in chapter four.

1.5 Objectives of the Research

The general objective of this paper is to explain how challenging war on terrorism on the traditional application of IHL. The specific objectives of the research are:-

- to analyze the categories of armed conflict in light with the contemporary armed conflicts.
- to analyze the applicability of the minimum threshold of armed conflict to that of "war on terrorism"
- to discuss the reactions of states in the current declaration of "war on terrorism"
- to investigate in detail the structure and organization of Al-Shabaab in order to find out whether it constitutes a feature of an armed group.
- to discuss the status of armed conflicts with Al-Shabaab and other the "terrorist organizations" in line with the rules of IHL

³¹John C. Yoo& James C. Ho, cited above at note 11

- to verify whether prisoner of war status is vested to the fighters of Al-Shabaab

1.6 Methodology of the Study

The research will basically be conducted based on desk review. Different books, articles, and publications currently on the hand of the researcher and available at different libraries will be consulted. Since it is an emerging issue of international law, analysis of a wide range of sources will be made including soft laws, decisions of international tribunals, reports of international organizations including the UN, AU and other international human rights and humanitarian organizations, customary international law, and treaty laws. Information from well-known news agencies will also be taken in to account.

1.7 Literature Review

There are several literatures of IHL and the fight against terrorism. However, there is no a comprehensive literature pieces on the status of Al-Shabaab and the application of IHL on the fight against this group except scanty coincidental side discussions on some of its feature. So in this part I have discussed some of the relevant literatures on the application of IHL in the fight against terrorism and existing literatures in case of Al-Shabaab.

Gabor Rona in his article on “Interesting Times for International Humanitarian Law: Challenges from the “War on Terror”³² discussed on the sufficiency of IHL to embrace the changing nature of armed conflicts particularly the fight against terrorism. He has assessed the major criticisms of IHL based on the existing rules of IHL and finally he concluded that “humanitarian law is quite at home with the War on Terror when it amounts to armed conflict. When the War on Terror does not meet the criteria for armed conflict, it is not that humanitarian law is inadequate, but rather that its application is inappropriate.”³³

He further argued that terrorism and the war on terror as a kind of phenomena IHL will not apply unless they fulfill the criteria of armed conflict.³⁴Therefore, it is not because of the inadequacy of

³²Gabor Rona, cited above at note 22 pp.57

³³ Id pp.58

³⁴Ibid

IHL rather the inappropriate application of it to the components of terrorism which does not sufficiently meet the requirements of armed conflict.³⁵

He also discussed the scope of application of IHL in case of fighting against terrorism. For this purpose he examined several practical examples including the US declaration on war on terror after the 9/11 attack. And he identified that without avoiding the hurdle regarding lack of comprehensive definition of terrorism, acts of terrorism may happen in both international and non-international armed conflict and IHL will be applicable in both conflicts.³⁶

Dominika ŠVARC, in his article on “Military Response to Terrorism and the Jus ad Bellum”³⁷ examined the option of multilateral and unilateral employment of military force to prevent or to respond to acts of terrorism. In his paper he assessed the gradual enlargement of the notion of threat to international peace and security by the Security Council as a collective measure and the complex issue of a unilateral military response to terrorism, focusing on (a) the appropriate interpretation of the concept of ‘armed attack’ in the context of terrorist activities; (b) the requirement of States of terrorist attacks; and (c) the doctrines of anticipatory and preventive self attributability-defense.³⁸ He carried out his analysis not referring to a particular incidents or state practice rather attempts to evaluate the different legal dimensions of a military response to terrorism in general and abstract terms.³⁹

Regarding multilateral collective security measures he concluded that the Security Council being endowed with broad (if not unlimited) discretionary powers in determining whether a particular situation or issue is a threat to international peace and security, starting in 1992, the Council has also frequently condemned specific acts of terrorism as well as specific cases of state support for terrorism or state failure to prevent terrorist activities as a threat to international peace and security.⁴⁰ Though the Security Council failed to explicitly authorize military measures on its resolution number 1373 the Council members unanimously determined all acts of international terrorism, constitute a threat to international peace and security. And these steps can be taken as an indication

³⁵ Ibid

³⁶ Id pp.56, 60

³⁷ Dominika Švarc, “Military Response to Terrorism and the Jus ad Bellum”, Defense Against Terrorism Review Vol. 1, No. 1, (Spring 2008)

³⁸ Id pp.30

³⁹ Ibid

⁴⁰ Id p.33

of the Council's growing recognition that military actions might in extreme circumstances be necessary when dealing with this mounting global security threat.⁴¹

In case of unilateral military response he raised and discusses the issue of self-defense as it is enshrined under Art.51 of the UN Charter in terms of terrorist attacks emanated from non-state actors. By referring the ICJ decision in the Nicaragua case and states practices in the Israeli military intervention in claiming self-defense he stressed the possibility of alleging self-defense in case of terrorist attacks of non-state actors.⁴²

Finally, he concluded his article in recommendations that in order to comply with the existing legal principles of the international community, any counter-terrorist military action should be carried out on the basis of these fundamental principles of the contemporary jus ad bellum: (1) The recognition of the primacy of the collective security system under the UN Charter. (2) A continuing compliance with the fundamental jus ad bellum requirements in the exercise of self-defense.⁴³

Lt. Col. Godard Busingye in his Article on "The Global Fight against Terrorism and the Application of International humanitarian Law" attempts the conceptual analysis of acts of terrorism and how terrorism handled overtime and finally he addressed whether IHL applies to the global fight against terrorism.⁴⁴

The author has discussed the concept of terrorism from different perspective particularly he singled out the definition of terrorism given in the OAU Convention on the Prevention and Combat of Terrorism which exclude the struggle of peoples in liberation and self-determination.⁴⁵In his analysis of global fight against terrorism and IHL he concluded that if acts of terrorism have a link to an armed conflict then IHL would apply- they need not be committed within the actual vicinity of armed conflict but must be in extricable connected to such an armed conflict.⁴⁶

He further stated that terrorists, unlike combatants or fighters acts in concealment do not specifically come within the purview of IHL and as such the global fight against terrorism need not at all times be classified as armed conflict.⁴⁷

⁴¹ Ibid

⁴² Id p.35

⁴³ Id p.45

⁴⁴ Lt. Col. Godard Busingye, cited above at note 3, p.125

⁴⁵ Ibid

⁴⁶Id pp.132

⁴⁷ Id pp.134

Awol K. Allo on his Article on “Ethiopian Armed intervention in Somalia: The legality of Self-defense in Response to the Threat to Terrorism”⁴⁸ examined the justification of Ethiopia in its intervention in to Somalia i.e aggression and threat to terrorism to take military measures on the Union of Islamic Courts(UIC) in Somalia which is composed of different insurgent groups including Al-Shabaab.⁴⁹

He made conceptual analysis of Ethiopia’s claim of self-defense based on desk research using resources like governmental statements, policy papers, official correspondences and newspaper articles.⁵⁰

He made his assessments of Ethiopia’s defense based on both individual self-defense and collective self-defense under Article 51 of the Charter of the United Nations and reach on the conclusion that: “Since there is no treaty between Ethiopia and Somalia for collective self-defiance as in the case of NATO more over being the attack is against the Somalian government emanated from within Somalia itself not directed from abroad; Ethiopia’s claim to collective self-defense of Somalia under Art. 51 of the UN Charter does not seem to be compatible with stipulation of the Charter”.⁵¹

With regard to individual self-defense the author examined Ethiopia’s claim of self-defense in light of the UN Charter and customary International law and draws a conclusion that Ethiopia’s claim of self-defense measure does not seem to be in line with the requirements of the UN Charter because it fails to meet the requirements of an occurrence of an attack of a significant scale.⁵²

The above researches have direct and indirect significance on the understanding of IHL and the war on terrorism. However, they are not comprehensive enough to examine the fight against terrorism in both NIAC and IAC; the organizational and other criteria in case of NIAC for the application of the law particularly the authors have failed to address the specific context of IHL and terrorism in the failed state scenario like in Somalia. In addition to this the above researches do not specifically address organizational structure and the application of the law in the fight against Al-Shabaab.

⁴⁸Awol K Allo, “Ethiopian Armed intervention in Somalia: The legality of Self-defense in Response to the Threat to Terrorism” Denver Journal Of International Law &policy, Vol.39 (2010-2011)

⁴⁹ Id pp.139

⁵⁰ Ibid

⁵¹ Id pp.144

⁵² Id pp.167

1.8 Significance of the Research

There are a number of "terrorist organizations" and there are several "war on terrorism" undertaken globally. On the other side, there is lack of uniform labeling of terrorist organizations. Particularly, individual and collective efforts of the international community as well as the organizations and the way of conducting hostilities of these "terrorist groups" pose a great challenge to IHL. So this research helps expose how deep is this challenge and the potency of the IHL to encompass this challenge. In addition to diagnose the sufficiency of IHL in regulating the challenge of War on terrorism, the research gives decision makers on the fight with Al-Shabaab how they should manage the fight through giving some information on the status of the Al-Shabaab and the applicable legal regime in conducting the hostilities and treatment of prisoners.

1.9 Organization of the Study

In general the thesis has the following components. Under chapter one, introduction about the study has been already discussed. In chapter two, armed conflict and armed groups under IHL in general is discussed. Particularly this chapter focused on classification of armed conflict, the constituents of armed groups under IAC and NIAC, the criteria of distinguishing armed conflict in case of NIAC. Chapter three will deal with IHL and terrorism. More importantly, this chapter will focus on the concept of "war on terrorism" under international Law, and its status under IHL", the distinction on treatment of terrorist acts in the time of peace and time of armed conflict, the measures of the international community to fight against terrorism, the impact of the UN GA and SC Resolutions in the fight against terrorism.

The status of Al-Shabaab as armed group is discussed in chapter four. Mainly general overview of Somali Crisis and the emergence of Al-Shabaab, the power structure and organization of Al-Shabaab as a military group, Al-Shabaab as a terrorist group, and the application of IHL in the fight against Al-Shabaab are some of the specific topics to be dealt in disclosing the depth of the challenge in a "war on terrorism" through a particular instance.

Finally, the research winds up on a conclusion and possible recommendations based on the finding of the research. Full list of bibliography is included in the last part of the research.

Chapter Two

Armed Conflict and Armed Groups under IHL

IHL does not apply to all violence; rather it applies whenever a situation of violence reaches the level of armed conflict.⁵³ The main concern of IHL is whether a situation of violence reaches the level of armed conflict. Therefore, the rightness of the purpose and goal of resorting to armed conflict is irrelevant in determining whether a certain violence is an armed conflict if other criteria have been fulfilled.⁵⁴

The laws of war, however, do not provide an authoritative definition of “armed conflict.” Neither have we found the definition of the term in international humanitarian law treaties. Substantial evidence suggests that the drafters of the Geneva Conventions purposely avoided any rigid formulation that might limit the law’s field of application.⁵⁵

Here the issue is: does the term armed conflict signify the same meaning and intensity under international armed conflict and non-international armed conflict? In this chapter, I have tried to discuss in detail the use of the term in both categories of armed conflict.

2.1 Armed Conflict under International Level

Common Art. 2 of the Geneva Conventions of August 12, 1949 considers a conflict as international armed conflict and calls for the application of the convention in all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.⁵⁶ Furthermore, Art.1/4 of the Additional Protocol enlarges the scope of IAC as to include armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist régimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International

⁵³ International Committee of the Red Cross, “International humanitarian law and the challenges of contemporary armed conflicts Excerpt of the Report prepared by the International Committee of the Red Cross for the 28th International Conference of the Red Cross and Red Crescent Geneva, December 2003,” International Review of the Red Cross IRRC Vol. 86 No 853(March 2004), pp. 221

⁵⁴ *Id.* pp.218

⁵⁵ Derek Jinks, *The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts*, Background Paper prepared for the Informal High-Level Expert Meeting on the Reaffirmation and Development of International Humanitarian Law, Cambridge, January 27-29, 2003 International Humanitarian Law Initiative pp.2

⁵⁶ The Geneva Conventions of August 12, 1949, ICRC, Common Art.2 of the Conventions I-IV

Law concerning Friendly Relations and Co-operation among states in accordance with the Charter of the United Nations.⁵⁷The commentary of the Geneva Conventions defines armed conflict as "Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place."⁵⁸Although paragraph two of Art. 2 of the Geneva Conventions is silent on the use of armed force in the total or partial occupation of the territory of another state in order to be an IAC at least one of the state should use a military force. In *Tadić*, case the ICTY stated that 'an armed conflict exists whenever there is a resort to armed force between states'⁵⁹In support of this ICRC expressed its view as:-

Under IHL, an international armed conflict (IAC) exists whenever there is recourse to armed force between two or more states. The threshold for determining the existence of an IAC is therefore fairly low, and factors such as duration and intensity are generally not considered to enter the equation. For instance, the mere capture of a soldier or minor skirmishes between the armed forces of two or more States may spark off an international armed conflict and lead to the applicability of IHL, insofar as such acts may be taken as evidence of genuine belligerent intent⁶⁰.

In general, under IAC the Geneva Conventions become automatically applicable even when a declaration of war is not followed by armed confrontations between the declaring state and its designated opponent(s).⁶¹Indeed, the declaration of war does not need to be underpinned by hostile actions against the enemy to make humanitarian law applicable. Therefore, a state which confines itself to a declaration of war but does not participate in the fighting has to apply the Geneva Conventions.⁶²

On the other hand, the International Law Association took a different stand in the criteria of armed conflict from the ICRC version for international armed conflict which does not necessitate existence

⁵⁷Protocol Additional to the Geneva Conventions (Protocol I) cited above at note 27, Art. 1/4

⁵⁸Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016 available on: <https://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=BE2D518CF5DE54EAC1257F7D0036B518> accessed on June 20/2016

⁵⁹ Id. #218

⁶⁰International humanitarian law and the challenges of contemporary armed conflicts, Report Document prepared by the International Committee of the Red Cross for 32nd International Conference of Red Cross and Red Crescent Geneva, Switzerland 8-10 December 2015 pp.8

⁶¹ Commentary of Convention I, cited above at note 58

⁶² Ibid

of actual fighting between the parties. ILA in its final report on the meaning of armed conflict in international armed conflict confirmed that at least two characteristics should be fulfilled: the existence of organized armed groups and engaged in fighting of some intensity.⁶³

The difference in the interpretation of the term armed conflict in the ICRC and the ILA is better grasped and identified when we see the criteria in light of Art.2 of the Geneva Conventions. In both interpretations of armed conflict the use of force particularly military force is a necessary element to qualify as an armed conflict. However, on the ICRC version intensity of fighting may not be considered under IAC if it is possible to ascertain the belligerent intent of the party. Whereas, by the Committee of ILA's interpretation exhibition of some intensity of fighting is a necessary element to be qualified as armed conflict. The Committee of ILA clearly states its deviation from ICRC's interpretation by saying "The International Committee of the Red Cross (ICRC) Commentary to the Conventions refers to "any engagement of the armed forces of High Contracting Parties" as an armed conflict for purposes of applying the Conventions. The Committee, however, found little evidence to support the view that the Conventions apply in the absence of fighting of some intensity."⁶⁴The ILA committee required, instead of the simple belligerent intent of the parties, the fight in both sides to manifest some intensity.

The Committee of ILA cited a 1995 decision of the International Criminal Tribunal for the former Yugoslavia in Prosecutor v. Tadic in supporting its argument. The tribunal states its reasoning as " the ICTY found that both a certain amount of organization among all fighting groups and a certain level of intense fighting distinguished armed conflict from other violence, such as riots and border incidents."⁶⁵

The second paragraph of Art.2 of the Geneva Conventions says "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance."⁶⁶ The literal interpretation of the last expression i.e "the said occupation meets with no armed resistance" refers to the absence of fighting between the parties to the conflict. This paragraph of the convention tells us that the convention is applicable if one state

⁶³International Law Association TheHague Conference(2010) Use of Force Final Report on the Meaning of Armed Conflict in International Law Summary pp.2 available on: <http://www.ila-hq.org/download.cfm?docid> accessed on June 06/2016

⁶⁴ Ibid

⁶⁵ Id. pp.3

⁶⁶ The Geneva Conventions, cited above note 56, Common Art.2 of Conventions I-IV

occupies the territory of another using its military force without any fight or armed resistance from the other state. So this paragraph of the Convention aligns with the interpretation of ICRC.

In conclusion, if it is said armed conflict under IAC does not always require the existence of active and intense fighting between the parties and on the other hand as it was decided by the ICTY on the Tadic case “an armed conflict exists whenever there is a resort to armed force between States...”⁶⁷ then it is necessary to define the scope of parties resort to armed force as stated in the ICTY decision.

According to D. Schindler, resort to armed force can be defined as any kind of use of arms between two States.⁶⁸ Likewise H.-P. Gasser explains that any use of armed force by one State against the territory of another, happens even whether or not the party attacked resists. And he continued stating that “As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy state, then they must comply with the relevant convention”.⁶⁹

From the readings of Art.2 of the Geneva Conventions particularly paragraph 2 does not seem to require not only active fighting but also use of force by both parties. Use of force by one party suffices to be an armed conflict. Even in the case of declared war, except the declaration of war signifies the belligerent intent of the parties it does not warrant the existence of active hostilities. In general save for the different views on the intensity of the conflict, for an international armed conflict there are three different situations where IHL applies, namely in cases of (1) effective armed conflict, (2) declared war, or (3) occupation of territory without armed resistance.⁷⁰

2.2 Armed Conflict under Non International Armed conflict

Article 3 common to the 1949 Geneva Conventions provides that it applies to armed conflicts not of an international character occurring in one of the High Contracting Parties and Article 1 (1) of 1977 Additional Protocol II provides that the Protocol applies to armed conflicts between the armed forces

⁶⁷ICTY, Prosecutor v. Dusko Tadić, Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal), Case No IT-94-1-AR72, 2 October 1995, para 70.

⁶⁸ ICRC, “How is the Term "Armed Conflict" Defined in International Humanitarian Law?” [International Committee of the Red Cross \(ICRC\) Opinion Paper](#) (March 2008), p.2,

⁶⁹ Ibid

⁷⁰ The Geneva Conventions, cited above note 56, Common Art.2 of Conventions I-IV

of a state and dissident armed forces or organized armed groups, which are commonly called “non-international armed conflicts”. In essence, a non-international armed conflict occurs between a state’s armed forces and an organized armed group or between different organized armed groups. Additional Protocol II sets forth far more detailed rules than Common Art.3, despite its narrower scope of application.⁷¹

Common Article 3 does not provide a detailed definition of its scope of application, nor does it contain a list of criteria for identifying the situations in which it is meant to apply. It merely stipulates that "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties."⁷²Whereas Art.1 of the Additional Protocol sets the details of the criteria and the instances of incidents excluded from being an armed conflict.

In order to have a comprehensive understanding of armed conflict in a non-international character it is important to explore the details and scope of Common Art.3 and its relationship with Art.1 of Additional Protocol II.

To start with Common Art.3; the ICRC Commentary states that:

"Common Article 3 is based on a negative description: it is applicable in the case of armed conflicts ‘not of an international character.’ Armed conflicts ‘not of an international character’ are armed conflicts where at least one Party is not a State. This reading is supported by the context of common Article 3: it comes after common Article 2, which applies to armed conflicts between States, i.e. international armed conflicts."⁷³

One may argue that in mathematics the term non international is a complement of international. Therefore, any armed conflict if it does not fall within the subset of international armed conflict it automatically becomes a non-international armed conflict. In addition to the ICRC’s commentary stated above we can also realize this feature of Common Article 3 when we see the definition of NIAC by International Institute of Humanitarian Law. In its manual on Law of Non-international Armed Conflict it defined NIAC as "Non-international armed conflicts are armed confrontations occurring within the territory of a single state and in which the armed forces of no other state are engaged against the central government."⁷⁴

⁷¹Louise Arimatsu & Mohbuba Choudhury, “The Legal Classification of the Armed Conflicts in Syria, Yemen and Libya” Chatham House, The Royal Institute of International Affairs (March 2014) p.3

⁷² See Commentary on Common Art.3 Supra Note 58 #384

⁷³ Id. #393

⁷⁴International Institute of Humanitarian Law, The Manual on the Law of Non-International Armed Conflict With Commentary(2006), p.2 Sanremo

ICRC promotes a position that armed conflict under Common Art.3 has two characteristics by referring the Judgment of ICTY on the Prosecutor v. Dusko Tadic, case as:-

- First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.
- Second, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.⁷⁵

In the application of Common Art.3 there is also a requirement that the conflict should occur within the territory of a state (a state party to the conflict according to most writers). However, through time this requirement looks obsolete or interpreted as only signifying within the territory of party to the Geneva Conventions. For instance Marco Sassoli has maintained that: "according to the aim and purpose of IHL, this provision must be understood as simply recalling that treaties apply only to their state parties."⁷⁶ He refers the recognition by the ICJ of the provisions of Common Article 3 as an emanation of general principles of law, namely 'elementary considerations of humanity', the territorial requirement of Article 3 can indeed be regarded today as less relevant for the applicability of the minimum rules of IHL⁷⁷

When we see the relationship of Common Art.3 of GC with that of Art.1 of the AP.II concerning to armed conflicts, AP. II adopts a more restrictive approach to internal conflicts and 'even formally excludes some situations that, with a broad interpretation, could be included in the scope of application of Article 3'.⁷⁸ According to Article 1, Additional Protocol II is only applicable when a conflict between an incumbent government and internal belligerent forces arises, not when the state is shaken by conflicts among different dissident groups, in which case only Common Article 3 is pertinent.⁷⁹

⁷⁵ICRC, "How is the Term "Armed Conflict" Defined in International Humanitarian Law?"International Committee of the Red Cross (ICRC) Opinion Paper (March 2008) p.3

⁷⁶A. Paulus and M. Vashakmadze, "Asymmetrical War and the notion of Armed Conflict: a tentative conceptualization"International Review of the Red Cross Volume 91 Number 873(March 2009), pp.119

⁷⁷ Ibid

⁷⁸Noëlle Quéniévet, Chapter 2 Applicability Test of Additional Protocol II and Common Article 3 for Crimes in Internal Armed Conflict p.35 available on: <http://www.springer.com/content/document> accessed on June 10,2016

⁷⁹ Ibid

In addition to this it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control "as to enable them to carry out sustained and concerted military operations and to implement this Protocol".⁸⁰

When we see the two instruments separately, Common Article 3 is broader in scope than Art.1 of Additional Protocol II. But it is important to look in to the effect of the restrictive approach on the application of the Common Article 3 which is criticized as vague and unclear. Article 1 of the Additional protocol II clearly stated the purpose of the protocol as "... develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of applications..."⁸¹

One also may ask if the protocol has limited and narrow application what is its importance to be adopted? The commentary of ICRC explains the purpose of the protocol in the following words.

Common Article 3 does not contain a definition of armed conflict. In the absence of clarity of this concept, it gave rise to a great variety of interpretations and in practice its applicability was often denied. To improve the protection of the victims on non-international armed conflicts it proved necessary not only to develop the rules, but also to find more objective criteria to determine whether they are applicable and to reduce the measure of discretion left to each government.⁸²

As a conclusion, the Geneva Conventions and the Additional Protocol II set two types of non-international armed conflicts, granting individuals different kinds of protection from the ghastly effects of armed conflicts.⁸³ And likewise, when we see the practice of states, they have distinguished two types of non-international armed conflicts in referring the applicable law in a certain conflict as a conflict which call the application of Common Article 3 or Art.1 of Additional Protocol II.⁸⁴

Regarding to the characteristics of armed conflict in case of IAC it is possible to say there is no much criteria except the requirement of use of force or involvement of armed force. But do we expect the same characteristics in the case of NIAC?

Art.1/2 of AP.II sets out incidents not being an armed conflict. These are internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts. From this provision it is understood that the degree of violence or the

⁸⁰ IRC, cited above at note 75, pp.4

⁸¹ Additional Protocol to the Geneva Conventions(Protocol II), Cited above at note 29, Art.1/1

⁸² Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949 International Committee of the Red Cross Martinus Nijhoff Publishers Geneva 1987 p.1348

⁸³⁸³Noëlle Quéniwet, cited above at note 78, p.39

⁸⁴ Id p.41-42

intensity of the conflict should be greater in intensity and time to be an armed conflict. However still it is not clear from the convention what the actual minimum threshold to be. Various indicative criteria have been suggested to facilitate the determination whether a given situation has met the required intensity threshold.

The ICTY has considered such factors as the following:

the gravity of attacks and their recurrence; the temporal and territorial expansion of violence and the collective character of hostilities; whether various parties were able to operate from a territory under their control; an increase in the number of government forces; the mobilization of volunteers and the distribution and type of weapons among both parties to the conflict; the displacement of a large number of people owing to the conflict; and whether the conflict is subject to any relevant scrutiny or action by the UN Security Council.⁸⁵

ICRC has also explained these intensity thresholds as:-the number, duration and intensity of individual confrontations, the type of weapons and other military equipment used, the number and caliber of munitions fired, the number of persons and types of forces partaking in the fighting, the number of casualties, the extent of material destruction, and the number of civilians fleeing combat zones. The involvement of the UN Security Council may also be a reflection of the intensity of a conflict.⁸⁶

2.3 Transnational Armed Conflict

This is an emerging category of armed conflict becoming familiar after the 9/11 attack against United States of America. After the 9/11 attack the question has been raised whether the traditional classification of armed conflict by IHL (i.e IAC and NIAC) adequately accommodates the challenges of contemporary "transnational" conflicts against terrorist groups such as Al Qaeda.⁸⁷ The US Supreme court took a position in Hamdan v Rumsfeld case as:-⁸⁸

Common article 2 provides that international conflicts are those between two or more states. Common article 3 residually provides that non-international conflicts are those 'not of an international character' that is not covered by common article 2. Common article 3 was thus held to apply to any conflict not

⁸⁵Louise Arimatsu & Mohbuba Choudhury, cited above at note 71 p.4

⁸⁶ Report by the International Committee of Red Cross, cited at note 25 p.9

⁸⁷Hamdan v Rumsfeld, (Sup. Ct. US 557 (2006)); cited in Ben Saul, "Terrorism and International Humanitarian Law" Sydney Law School Legal Studies Research Paper No. 14/16 (February 2014) p.5-6

⁸⁸Ibid

between two states, regardless of where it takes place. The conflict between the US and Al Qaeda on the territory of Afghanistan was accordingly determined to be a non-international conflict.

ICRC rejected the existence of transnational armed conflict as a separate category of armed conflict by saying all situations of violence should be analyzed and classified as either IAC or NIAC based on specific criteria.⁸⁹

Dapo Akande strengthens such view but in different approach. He advances his approach to classify armed conflicts based on the consent of states.⁹⁰ He stated that “any use of force or armed conflict with non-state actor in the territory of a state without the consent of that state amounts to international armed conflict between the two states.”⁹¹

He further argued that:

...the law that governs transnational conflicts between a State and a non-State group will depend, in the first place, on whether the territorial State in which the non-state group is based has given its consent to the foreign State using force against that group. Where such consent exists, then the conflict will be governed by the law of non-international armed conflicts. The situation here will be no different from a situation in which the territorial State itself fighting the non-State group and invites the foreign State to intervene. The consent of the territorial State has the effect that there are not two opposing States involved in the conflict.

From the arguments forwarded by the US Supreme Court, the ICRC and Dapo Akande, it is clear that transnational armed conflicts could not be sufficient to constitute a new classification of armed conflict. In the three arguments what was arguable was the category of transnational armed conflict either IAC or NIAC. This difference in position takes the argument on the interpretation of Common Art. 2 and 3 of the Geneva Conventions.

Some argued that Common Art. 2 of the Geneva Conventions 2nd paragraph which states "The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance" recognizes the use of force against a non-international armed group without the consent of the territorial state as

⁸⁹ Report by the International Committee of Red Cross, cited at note 25 p.10

⁹⁰Dapo Akande, Are Extrterritorial Armed Conflicts with Non-State Groups International or Non-International?(October 18, 2011) available on:- <http://www.ejiltalk.org/are-extraterritorial-armed-conflicts-with-non-state-groups-international-or-non-international> accessed on July 24, 2016

⁹¹ Ibid

international armed conflict. Moreover, some⁹²including Dapo Akande⁹³argued that the interpretation of common Article 3 in conjunction with Art. 1 of the Additional Protocol II to the Geneva Conventions constitute the bound of "armed conflict on a non-international nature" as a conflict with in the territory of state party to the conflict or state of the conflicting parties if the armed conflict conducted between two non-state armed groups.

The wording of Common Article 3, referred to above, does not prevent a non-international armed conflict from straddling more than one State. Indeed those who take this view note that the reference to one of the High Contracting Parties was simply a reference to the fact that this provision in the Conventions only applies where fighting occurs in the territory of, at least, one party to the Conventions, without an intention to confine the application of Common Article 3 to situations where fighting occurs solely within the territory of only one of the parties. It is further argued that the classification of the conflict as non-international follows from the fact that the opposing parties are not two states but rather a state and a non-state group.⁹⁴

To take a position in this issue the author of this paper argued that in the interpretation of paragraph two, Common Article 2 of the Geneva Conventions, the belligerent intent of at least one the parties is necessary to form armed conflict. The term "no armed resistance" could not be interpreted as merely absence of consent of the territorial state. It is also too far from the notion of armed conflict which need as a matter of principle the existence of two parties and some intensity of conflict. Therefore, if an armed conflict exists between the state and a certain organized armed group without the objection of the territorial state, that conflict should be considered as a non-international armed conflict based on Common Art.3. I have discussed that Common Art.3 and Art.1/1 of Additional Protocol are distinct legal instruments and propose their own thresholds.

So the scope of Common Art.3 should not be narrowed by the Protocol's narrow approach. And as it is indicated in the Commentary of the Geneva Convention it is better to leave the common Art.3 more dynamic enough to include the immerging and contemporary issues of armed conflict. As stated by the US Supreme Court, the phrase "armed conflict not of an international character" under

⁹²Ben Saul, Terrorism, Counter-Terrorism and International Humanitarian (May 11, 2016) available on:- http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2778893 accessed on August 1, 2016

⁹³Dapo Akande, cited above at note 90

⁹⁴ See Hoffman and Lubell as cited In Dapo Akande Supra Note 90

Common Article 3 should be construed as all armed conflicts which are not of an international armed conflict taking place state parties to the Geneva Conventions.

2.4 Armed Group under International Law

In our previous discussion we have seen that one of the components of IAC is the involvement of armed force of parties to the dispute. In case of NIAC armed conflict occur whenever there is an armed conflict between a state and a non-state armed group or between armed groups within the territory of a state. The criteria and composition of armed group under IAC and NIAC are different. Therefore, it is important to see the basic characteristics of this division.

2.4.1 Armed Groups under IAC

It is not complicated to identify the armed groups under IAC. Where IAC is taking place between states the armed groups of the conflict are the armed forces of parties to a conflict. These armed forces of parties to the conflict include armed forces of a party to the conflict as well as members of militias or volunteer corps forming part of such armed forces.⁹⁵ In addition to these the Third Geneva Conventions gives recognition to other members of militias or volunteer corps who do not forming part armed forces of the state but fulfills the following conditions as combatants:- a) commanded by a person responsible for his subordinates; b) having a fixed distinctive sign recognizable at a distance; c) carrying arms openly; d) conducting their operations in accordance with the laws and customs of war.⁹⁶

However, Additional Protocol I does not endorse the above criteria in full. It focuses on the existence of responsible command which is responsible to the acts of its subordinate and the availability of internal disciplinary procedure to insure the compliance of international humanitarian law.⁹⁷ Moreover, Art.44/2 of the protocol diminishes the role of respect of international humanitarian law as criteria to determine the combatant status by saying "violations of these rules shall not deprive a combatant of his right to be a combatant."⁹⁸

The Protocol has extended its field of application to entities which are not states if they conform to the requirements of the present article. Liberation movements fighting against colonial domination

⁹⁵Geneva Convention relative to the Treatment of Prisoners of War, of 12 August 1949,(Convention III) Art.4/1

⁹⁶ Ibid

⁹⁷Protocol Additional to the Geneva Conventions, cited above at note 27, Art.43/1

⁹⁸ Id Art.44/2

and resistance movements representing a pre-existing subject of international law may be "parties to the conflict" within the meaning of the Conventions and the Protocol.⁹⁹In addition, the notion of "party to the conflict", also includes those who are fighting for "self-determination" or "national liberation".¹⁰⁰

2.4.2 Armed Groups under NIAC

Combatant status exists only in international armed conflicts.¹⁰¹The term fighter is rather used in case of non-international armed conflict.¹⁰² For NIAC to exist two conditions must exist i.e organized armed group and some intensity of conflict.¹⁰³Therefore, level organization of the non-state armed group is crucial to determine the conflict. The required degree of organization of such armed groups for the purpose of Common Article 3 has not been specifically defined in legal texts or in jurisprudence.¹⁰⁴

International Tribunals and institutions listed some standards for a level of organizational structure to satisfy the needs of the Protocol. To mention some of them:

ICRC listed some of the indicators which were developed from international jurisprudence including "the existence of a command structure and disciplinary rules and mechanisms within the armed group, the existence of headquarters, the ability to procure, transport and distribute arms, the group's ability to plan, coordinate and carry out military operations, including troop movements and logistics, its ability to negotiate and conclude agreements such as cease-fire or peace accords, etc."¹⁰⁵.

From Boskoski, case, the ICTY lists five major criteria, in an effort to elaborate the criteria of intensity and certain level of organization as a pre requisite of NIAC as it is stipulated in Art.1/1 of the Additional Protocol II, as: 1) the existence of a command structure; 2) military (operational) capacity of the armed group; 3) logistical capacity of the armed group; 4) the existence of an internal

⁹⁹ Commentary on Additional Protocols, cited above at note 82, pp.508

¹⁰⁰ Ibid

¹⁰¹Jean-Marie Henckaerts and Louise Doswald-Beck, Customary International Humanitarian Law,(2009), Volume I Rules p. 11 Cambridge University Press,

¹⁰² Id p.13

¹⁰³ ICTY, Prosecutor v. LjubeBokoski Johan Tarulovski Case No.IT-04-82-T United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 Judgment of: 10 July 2008 para. 194

¹⁰⁴ Ibid

¹⁰⁵Report by the International Committee of Red Cross, cited at note 25 p.08

disciplinary system and the ability to implement IHL and 5) the armed group's ability to speak with one voice;¹⁰⁶

In the Tadic case the Chamber observed that “an organized group [...] normally has a structure, a chain of command and a set of rules as well as the outward symbols of authority” and that its members do not act on their own but conform “to the standards prevailing in the group” and are “subject to the authority of the head of the group”. Thus, for an armed group to be considered organized, it would need to have some hierarchical structure and its leadership requires the capacity to exert authority over its members.¹⁰⁷

The ICTY decides on the level of organization of the armed groups based on common Art. 3 as:

The warring parties do not necessarily need to be as organized as the armed forces of a State. Neither does the degree of organization for an armed group to a conflict to which Common Article 3 applies need be at the level of organization required for parties to Additional Protocol II armed conflicts, which must have responsible command, and exercise such control over a part of the territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol. Additional Protocol II requires a higher standard than Common Article 3 for establishment of an armed conflict. It follows that the degree of organization required to engage in “protracted violence” is lower than the degree of organization required to carry out “sustained and concerted military operations”.¹⁰⁸

Unlike Common Art.3 of the Geneva Conventions Additional Protocol II sets some qualifications on the organizations of armed group by saying "... 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"¹⁰⁹

According to the Additional protocol there are three classifications of armed groups. i.e armed forces of a state party, dissident armed forces and other organized armed groups.¹¹⁰ Unlike the Additional Protocol I, this protocol does not give the definition of civilians. Due to this there is a blurring situation on the concept and scope of other organized armed groups. It is uncertain whether these organized armed groups are civilians or special groups other than civilian.¹¹¹ If the members are civilians, they are only targetable while participating in the hostilities. If not, they may be treated as

¹⁰⁶ICTY, Prosecutor v. Ljube Bokoski Johan Tarulovski, cited at note 103 p.194-203

¹⁰⁷Id. Para. 196

¹⁰⁸Id. para. 197

¹⁰⁹Additional protocol to Geneva Conventions, cited above at note 29, Art.1/1

¹¹⁰Ibid

¹¹¹Michael N. Schmitt' "The Status of Opposition Fighters in a Non International Armed Conflict", International Law Studies Volume 88p.127

analogous to members of the armed forces, and thereby remain targetable even when not participating.¹¹²

Following the approach of negative interpretation of the term civilian in the first additional Protocol ICRC in its IHL customary law study express the view that civilians are all persons who are not members of armed forces of a party, dissident force or organized armed groups.¹¹³

2.5 Conclusions

As it was discussed above in order to have an international armed conflict for the purpose of Article 2 of the Geneva Conventions it is enough only use of armed forces by one party against another state. The level of intensity of the fight and span of time it is conducted are not a crucial element for the determination of IAC. However, for NIAC unlike IAC organization of parties to the conflict and the intensity of fighting is so important to determine the existence of NIAC.

Though Art.1/1 of Additional Protocol II of the Geneva Conventions declare that the protocol develops and supplements Common Article 3 of the Geneva Conventions without modifying the latter's field of application in effect it is evident that the protocol presents a separate criteria for NIAC. As a result it makes the existence of two scenarios for the existence of NIAC. It is undeniable that Art.1 of the Additional Protocol qualifies the broad and vague expression of Common Art.3. For example the Protocol qualifies the nature of armed conflict which was expressed in vague terms in the Convention by excluding situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence.

More over the Protocol helps in clarifying the nature of parties to the conflict which was vaguely expressed under Common Art.3. Common Art. 3 do not mention the identity of the parties to the conflict except mentioning the members of the armed force (of the state) it doesn't identify the other parties to the conflict. Whereas Art. 1/1 of the Protocol explains the nature of other forms of armed group which is a non-state armed group which has its own characteristics as having a certain level of organization, with responsible command, controlling a territory, a capacity to conduct military operations and the ability to implement the protocol.

From the discussions above it is exhibited that Common Art.3 has a wider scope of application in comparison to Additional Protocol. It has the elasticity to include all sorts of armed conflicts outside

¹¹² *ibid*

¹¹³ Jean-Marie Henckaerts and Louise Doswald-Beck, *cite above* at note 101, p.19

international armed conflict. And the broader definition of Common Art.3 makes the argument of armed conflicts as IAC and NIAC more persuasive.

Finally, according to the arguments of different authors and judicial decisions from the interpretations of Art.1/1 of the Additional Protocol II and Common Art.3 of the Geneva Conventions it is possible to identify armed conflict of a non-international nature which is conducted between 1) the armed forces of a state and the dissident armed force or other organized armed group within a state to the conflict 2) The armed forces of a state and organized armed groups outside the territory of a state party to the conflict (without the objection of the territorial state) 3) between organized armed groups of non-state actors.

Chapter Three

IHL and Terrorism

3.1 Nature and Definition of Terrorism

International terrorism is not a new phenomenon. Indeed, the origin of the word ‘terrorism’ dates back to the French Revolution of 1789 as the label used by the establishment to describe the conduct of revolutionaries.¹¹⁴

Despite the long-lasting presence of terrorism in domestic and international life, however, there is currently no comprehensive, concise, and universally accepted legal definition of the term.¹¹⁵ The United Nations General Assembly has repeatedly called for the convening of an international conference to define terrorism and distinguish it from legitimate acts in furtherance of national liberation struggles.¹¹⁶

The international community are not successful to provide either a comprehensive United Nations treaty on terrorism or an official definition of the term “terrorism” for the time being in spite of a number of negotiations and committee meetings have been taking place at the United Nations.¹¹⁷

Since there is no available comprehensive definition at international level, I found it important to see some definitions of terrorism given to it in order to extract some of the common features of terrorism. For this purpose I selected International Convention for the Suppression of Financing Terrorism and the Draft Comprehensive Definition of Terrorism from international level, the OAU Convention on the Prevention and Combating of Terrorism, 1999, the Framework Decision of the Council of Europe adopted in 2002 and the Arab Convention on the Suppression of Terrorism adopted in 1998 from regional instruments.

Starting from the international effort, the International Convention for the Suppression of Financing Terrorism defines not directly the term terrorism rather consider an act to be an offence of financing terrorism as:-

¹¹⁴A. Conte, Human Rights in the Prevention and Punishment of Terrorism,(2010) Springer-Verlag Berlin Heidelberg p.7

¹¹⁵ Ibid

¹¹⁶Michael P. Schar,“Defining Terrorism as the Peace time Equivalent of War Crimes: Problems and Prospects”, Case Western University School of (2004)Law, pp.359

¹¹⁷United Nations Office on Drugs and Crime Vienna, Frequently Asked Questions on International Law Aspects of Countering Terrorism(2009), United Nations New York, pp.15 The international community still unable to adopt this draft convention. See What is Comprehensive Convention on International Terrorism?, available on:- <http://www.livemint.com/politics...>

any person commits an offence within the meaning of this Convention if that person by any means, directly or indirectly, unlawfully and willfully, provides or collects funds with the intention that they should be used or in the knowledge that they are to be used, in full or in part, in order to carry out: (a) an act which constitutes an offence within the scope of and as defined in one of the treaties listed in the annex; or (b) any other act intended to cause death or serious bodily injury to a civilian, or to any other person not taking an active part in the hostilities in a situation of armed conflict, when the purpose of such act, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹¹⁸

There is an attempt to give a comprehensive definition of terrorism in the draft Comprehensive Convention against International Terrorism.¹¹⁹This draft convention defines terrorism as:-

a person commits an offence if he/she unlawfully and intentionally causes death or serious bodily injury to any person; or serious damage to public or private property, including a place of public use, a state or government facility, a public transportation system, an infrastructure facility or to the environment; or damage to property, places, facilities or systems referred to in paragraph 1 (b) of the present article resulting or likely to result in major economic loss; when the purpose of the conduct, by its nature or context, is to intimidate a population, or to compel a government or an international organization to do or to abstain from doing any act.¹²⁰

The Framework Decision, of the European Union adopted on 13 June 2002, states that:

terrorist offences include the following list of intentional acts which, given their nature or their context, may seriously damage a country or international organization where committed with the aim of: (i) seriously intimidating a population, or (ii) unduly compelling a government or international organization to perform or abstain from performing any act, or (iii) seriously destabilizing or destroying the fundamental political, constitutional, economic or social structures of a country or international organization.¹²¹

The decision listed down specific offences to be terrorist acts if they are committed for the purpose of the above objective as killing, attacks on the physical integrity of a person, kidnaping or hostage

¹¹⁸ International Convention for the Suppression of the Financing of Terrorism Adopted by the General Assembly of the United Nations on 9 December 1999 In force on 10 April 2002 U.N. Doc. A/RES/54/109, Annex Depository: Secretary-General of the United Nations Art.2/1

¹¹⁹ Appendix II Draft comprehensive convention against international terrorism Consolidated text prepared by the coordinator for discussion 8 A/59/894, Art.2 available on <https://www.ilsa.org/jessup/jessup08/basicmats/unterrorism.pdf> accessed on November 23,2016

¹²⁰ibid

¹²¹ Council Framework Decision of 13 June 2002 on combating terrorism Official Journal of the European Union Communities(2002/475/JHA), Art.1/1 of.

taking, causing heavy loss on public infra structure and economic interest, seizure of aircraft, ships or other means of public or goods transport and other offences. In addition to this the decision gives a definition for terrorist related groups and terrorist link offences under Art. 2&3.¹²²

Whereas, the Arab Convention for the Suppression of Terrorism defines terrorism as:

any act or threat of violence, whatever its motives or purposes, that occurs in the advancement of an individual or collective criminal agenda and seeking to sow panic among people, causing fear by harming them, or placing their lives, liberty or security in danger, or seeking to cause damage to the environment or to public or private installations or property or to occupying or seizing them, or seeking to jeopardize a national resources.¹²³

Like the definition on Convention of the Suppression of Financing of Terrorism the Arab League definition prefers to make a reference to other international anti-terrorism instruments for specific offences.¹²⁴

In limiting the scope of the convention Art. 2 excluded from the ambit of the convention all cases of struggle by whatever means, including armed struggle, against foreign occupation and aggression for liberation and self-determination, in accordance with the principles of international law. This provision shall not apply to any act prejudicing the territorial integrity of any Arab State.¹²⁵

When we look in to the OAU Convention on the Prevention and Combating of Terrorism, 1999 under Art1/3, defines terrorist act as :-¹²⁶

Any act which is a violation of the criminal laws of a state party which may endanger the life integrity or freedom of, or cause serious injury or death to, any person, any number or group of persons or causes or may cause damage to public or private property, natural resources, environmental or cultural heritage and is calculated or intended to:

- (i) intimidate, put in fear, force, coerce or induce any government, body, institution, the general public or any segment thereof, to do or abstain from doing any act, or to adopt or abandon a particular standpoint, or to act according to certain principles; or
- (ii) Disrupt any public service, the delivery of any essential service to the public or to create a public emergency; or
- (iii) Create general insurrection in a State;

¹²² Id Art. 1/1, 2&3

¹²³ The Arab Convention for the Suppression of Terrorism Adopted by the Council of Arab Ministers of the Interior and the Council of Arab Ministers of Justice Cairo, April 1998, Art. 1/2

¹²⁴ Id Art.1/3

¹²⁵ Id Art. 2

¹²⁶ OAU Convention on the Prevention and Combating of Terrorism, 1999 available at <https://treaties.un.org/doc/db/Terrorism/OAU-english.pdf> accessed on May 21,2016

(b) any promotion, sponsoring, contribution to, command, aid, incitement, encouragement, attempt, threat, conspiracy, organizing, or procurement of any person, with the intent to commit any act referred to in paragraph (a) (i) to (iii).

The struggle of peoples for their liberation, self-determination, and armed struggle against colonialism, occupation, aggression and domination by foreign forces are excluded from the ambit of this definition.¹²⁷

In the five conventions including the draft Comprehensive Convention, the basic objectives to address in the anti-terrorism conventions and the specific elements of offences are more or less the same. The major difference in the five conventions can be identified is the scope of application. As clearly stated in the conventions the Arab and African states excluded the scope of the definition to govern armed struggle of self-determination and colonial domination. Whereas, in the European Union convention there is no mention of such things. And when we take the Suppression of financing of Terrorism the exclusion is terrorist acts on persons actively involved on armed conflict; while in the draft convention in an effort to compromise these different interests the draft convention excluded the activities of the armed forces during an armed conflict.¹²⁸

According to Helen Duffy the current draft excludes only the actions of armed forces at the time of armed conflict and left other parties to the armed conflict like non-state parties in the non-international armed conflict.¹²⁹ And this partial exclusion has made the draft convention to encounter stringent resistance from delegations intent to ensure that if state forces are excluded, those they consider 'freedom fighters' or national liberation movements fighting against those forces are likewise excluded¹³⁰

Antonio Cassese pointed out three different positions reflected globally with respect to terrorism.¹³¹

The first group of states defended that any act of peoples or organizations in times of armed conflict in case of self-determinations are exempted from labeling to be considered as terrorism either under international terrorism law or international Humanitarian Law.¹³² The second group of states and

¹²⁷ Id Art.3

¹²⁸ Draft comprehensive convention against international terrorism, cited above at note 118, Art.20/2

¹²⁹ Helen Duffy, The War on Terror' and the Framework of International Law(2005), Cambridge University Press, p.22

¹³⁰ Ibid

¹³¹ Antonio Cassese, International Criminal Law(2nd ed. 2002), Oxford, pp.162

¹³² Ibid

authorities took a position that all acts performed by freedom fighters in time of war shall not be covered by the international law of terrorism rather under International Humanitarian Law.¹³³

Whereas, the third position which is labeled as the middle ground holds a position that:-¹³⁴

Attacks by freedom fighters and other combatants in armed conflict, if directed at military personnel and objectives in keeping with international humanitarian law, are lawful and may not be termed as terrorism. If instead they target civilians, they amount to terrorist acts (not therefore to war crimes) if their purpose is to terrorize civilians. Thus the conduct of hostilities is not left to the exclusive legal dominion of international humanitarian law.¹³⁵

However, from the above definitions still we can say there are different positions on the definition and application of terrorism during armed conflict in both international and non-international armed conflicts.

3.2 Global War on Terrorism under IHL

Global war on terrorism is a concept emerging in the international politics after the 9/11 attack of United States as President George W. Bush declared global war on terrorism.¹³⁶ The United States government has concluded that the attacks of September 11 have placed the United States in a state of armed conflict to which the laws of war apply. It has also determined that members of the Al Qaeda terrorist network and the Taliban militia are illegal combatants under the laws of war, and so cannot claim the legal protections and benefits that accrue to legal belligerents, such as prisoner of war status under the Third Geneva Convention of 1949.¹³⁷ This attack was a turning point to take a militarized response to terrorism, which have been viewed as a law enforcement problem until 9/11.¹³⁸

U.S. officials and other analysts have asserted that the global war on terror is an international armed conflict though it is not a conflict between states, territorial boundaries of the conflict are undefined, the beginnings are amorphous and the end indefinable, and, most importantly, where the non-state parties are unspecified and unidentifiable entities that are not entitled to belligerent

¹³³ Ibid

¹³⁴ Id pp.163

¹³⁵ Id pp.165

¹³⁶ Reports on Terrorism and International Law: Challenges and Responses. Contributions presented at the "Meeting of independent experts on Terrorism and International Law: 30 May - 1 June 2002 the International Institute of Humanitarian Law Sanremo

¹³⁷ John C. Yoo & James C. Ho, cited above at note 11

¹³⁸ David K. Linnan, Enemy Combatants, Terrorism, and Armed Conflict Law A Guide to the Issues, pp. 78 Praeger International Westport, Connecticut • London

status.¹³⁹ However there are several critics on this assertion from different groups. For instance, ICRC preferred to call it fighting of terrorism and classify the conflict on a case by case basis by saying:-

While the term has become part of daily parlance in certain countries, there remains a need to examine, in the light of IHL, whether it is merely a rhetorical device or whether it refers to a global armed conflict in the legal sense. Based on an analysis of the available facts, the ICRC does not share the view that a global war is being waged; it takes a case-by-case approach to the legal classification of situations of violence that are referred to colloquially as part of the 'war on terror'.¹⁴⁰

On the report of Eminent Jurist Panel it was taken a consensus that Bush administration's "war on terror" has resulted not only in an assault on individual human rights but, more broadly, in an erosion of the rule of law that threatens the continued strength of domestic and international legal systems.¹⁴¹

Mary Ellen O'Connell in her article on The Legal Case Against the Global War on Terror argued in response to J.W. Bush's declaration of global war on terror that "The decision to treat the struggle against terrorism as a global war, may well have had unintended consequences, including enhanced status for terrorists and setting dangerous precedent."¹⁴²

Furthermore, the ICJ on the legality of Israeli's construction of a barrier wall between Israel and Palestinian populated land of the West Bank and in the case of Uganda (Armed activities on the territory of Congo, Democratic Republic of Congo Vs Uganda); rejected the defense of self-defense where there is a threat from non-state actors not sponsored by states. This interpretation of ICJ undermines the US claim and justification of war on terrorism¹⁴³

In general we can find two unusual issues on the US global war on terrorism. The first one is US recognizes non state actors as an armed group which is unusual when we see international state

¹³⁹Gabor Rona, cited above at note 22, p.64

¹⁴⁰ What does IHL say about terrorism? Available on: <https://www.icrc.org/en/document/what-does-ihl-say-about-terrorism> accessed on November 03,2016

¹⁴¹Mark W. Vorkink & Erin M. Scheic, "The "War on Terror" and the Erosion of the Rule of Law: The U.S. Hearings of the ICJ Eminent Jurist Panel available on: <http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1190&context=hrbrief> accessed on Oct.12,2016

¹⁴²Mary Ellen O'Connell, "The Legal Case Against the Global War on Terror", *Case Western Reserve Journal of International Law* 36 (2004) p.357

¹⁴³Geoffrey S. Corn and others, *The War on Terrorism and Laws of War* (2nd ed.,2015), A Military Perspective Oxford University Press, p.30-31

practice where states normally avoiding non state actors not to recognize as combatants.¹⁴⁴ The second thing is US denies POW status for these combatants who are participating in this international armed conflict claiming them being an unlawful combatants which is also unusual to the international law.¹⁴⁵ As far as IHL is concerned there are only two group of people i.e combatants and civilians.¹⁴⁶ There is no categorization of unlawful combatant as such.¹⁴⁷ Therefore, as Kelly Morgan described from a legal stand point US declaration of global war on terror is not actually regarded as an internationally legitimate conflict.¹⁴⁸

3.3 Treatment of Terrorism under International Humanitarian Law

The Geneva Conventions and their Additional Protocols expressly and impliedly prohibit acts of terrorism in situations of armed conflict. Under Art. 33 of the 4th Geneva Convention terrorism is expressly prohibited. In case of non-international armed conflict Art. 4/2/d and Art.13/2 of Additional Protocol II of the Geneva Conventions prohibits acts of terrorism and acts or threats of violence the primary purpose of which is to spread terror among the civilian population.

In addition to this, Rule 2 of the ICRC study (2005) on Customary International Humanitarian Law clearly stipulates that: “Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited”.¹⁴⁹ And the commentary immediately adds: “State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts”.¹⁵⁰

Acts of terrorism defies the major principle of IHL and the fundamental protections the law granted to civilian populations. One major principle which is violated through acts of terrorism is the principle of distinction. Under the Geneva Conventions lawful military targets during armed conflict

¹⁴⁴Andreas Paulus and MindiaVashakmadze, ”Asymmetrical war and the notion of armed conflict – a tentative conceptualization”, International review of the Red Cross, Volume 91 Number 873(March 2009), p.103

¹⁴⁵ Kelley, Morgan, "Challenges to Compliance with International Humanitarian Law in the Context of Contemporary Warfare" Independent Study Project (ISP) Collection. Paper 1618 (2013), p.23 available on: http://digitalcollections.sit.edu/isp_collection/1618

¹⁴⁶ Additional Protocols to the Geneva Conventions(protocol I), cited above at note 27, Art.52

¹⁴⁷ICRC, “International humanitarian law and the challenges of contemporary armed conflicts, Reports and Documents,”International Review of Red Cross Volume89 Number867 (September2007), pp.726

¹⁴⁸ Kelley Morgan, cited above at note 145 pp.23

¹⁴⁹Jean-Marie Henckaerts and Louise Doswald-Beck, cited above at note 101, Rule 2

¹⁵⁰ Ibid

are only military objectives. Civilian people and objects are always protected from military attack except where they directly participate in armed conflict and under military necessity.¹⁵¹

In addition to explicit prohibition, the Geneva Conventions implicitly condemn acts of terrorism by prohibiting the elements of terrorist acts like in the case of Common Art. 3 which prohibits taking of hostages; violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Additional Protocol I prohibits taking of hostage mutilation, torture and murder of peoples under the control of the military power.¹⁵²

In principle, terrorist groups may be involved in various types of international and non-international armed conflicts under IHL.¹⁵³ With this respect sometimes there may be state/sponsored/ terrorism. However once the state engaged in armed conflict against another state any ‘terrorist’ means or methods used will be regulated by the IHL rules on the conduct of hostilities and international criminal law, discussed below.¹⁵⁴

On the applicability of IHL to “the war on terrorism” scholars promote different views. Some argued that humanitarian law has failed to keep up with the changing nature of armed conflict, always fighting the last war rather than the next one.¹⁵⁵ Gabor Rona responded to this criticism, as "humanitarian law, as most recently codified in the Geneva Conventions of 1949 and their Additional Protocols of 1977, does not anticipate armed conflict in the context of modern terrorism. But to conclude that humanitarian law cannot accommodate terrorism and the efforts to combat it when these phenomena amount to armed conflict would be wrong."

He further argued that terrorism and the war on terror as a kind of phenomena IHL will not apply unless they fulfill the criteria of armed conflict.¹⁵⁶ Therefore, it is not because of the inadequacy of IHL rather the inappropriate application of it to the components of terrorism which does not sufficiently meet the requirements of armed conflict.¹⁵⁷

¹⁵¹ Additional Protocols to the Geneva Conventions (protocol I), cited above at note 27 art.52

¹⁵² Id Art.3/1/a&b) Art. 75

¹⁵³ Ben Saul, “Terrorism and International Humanitarian Law” Sydney Law School Legal Studies Research Paper No. 14/16 (February 2014) pp.2

¹⁵⁴ Ibid

¹⁵⁵ Gabor Rona, cited above at note 22 pp.57

¹⁵⁶ ibid

¹⁵⁷ Id pp.58

Dominika Švarc forwarded his view by referring to the international community's acceptance particularly in the aftermath of the 9/11 attack, of certain terrorist attacks as armed attack and necessitates a military response based on Art.51 of the Charter of the United Nations as a self-defense.¹⁵⁸ He concluded his view by saying "it seems clear that in contemporary international law the concept of 'armed attack' has been considered broad enough to cover terrorist armed actions, provided that they reach a certain level of intensity"¹⁵⁹

Lt. Colonel Dodard in his article on "The Global Fight against Terrorism and the Application of International humanitarian Law" discussed that acts of terrorism can be committed in peace times and during armed conflict.¹⁶⁰ He further stated that "It would legally be argued that if acts of terrorism have a link to an armed conflict then IHL would apply they need not be committed within the actual vicinity of the armed conflict, but must be inextricably connected to such an armed conflict."¹⁶¹

ICRC promotes its position on the application of IHL in case of fighting against terrorism as:-¹⁶²

International humanitarian law is applicable whenever a situation of violence reaches the level of armed conflict. The underlying causes of the armed conflict have no bearing on the application of IHL. Whenever armed conflict does occur, it is governed by IHL (*jus in bello*). Invocation of the justness of the resort to armed force, particularly in the "war against terrorism", has not infrequently served as a justification for denying the applicability of the full range of international humanitarian law norms in situations where that body of rules was undoubtedly applicable

In a particular reference ICRC believes that the so-called "war on terror" can also take the form of a non- international armed conflict, such as the one currently being waged in Afghanistan between the Afghan government, supported by a coalition of States and different armed groups, namely, remnants of the Taliban and Al-Qaeda.¹⁶³

As a conclusion, terrorism as such cannot be a party to a conflict, but clearly identifiable terrorist groups can. However, many states, while launching military operations against such groups and organizations, are not ready to accept the existence of armed conflict within their boundaries. If they

¹⁵⁸Dominika Švarc, cited above at note 37 pp.35

¹⁵⁹ibid

¹⁶⁰Lt. Col. Godard Busingye, cited above at note 3, pp.123

¹⁶¹ ibid

¹⁶²International Committee of Red Cross, cited above at note 53, pp.221

¹⁶³ICRC, cited above at note 147 pp.725

admit that there is an armed conflict, they tend to argue that the so-called war on terrorism constitutes a new type of armed conflict to which international humanitarian law does not apply¹⁶⁴

3.4 Treatment of Terrorists under International Humanitarian Law

The status of war on terrorism or fighting of terrorism is becoming more complicated in the case of the treatment of persons who are captured for being a member of a terrorist group. The main issue is: should they be treated as a prisoner of war or considered as a combatant or are they simply mere criminals? For example though the United States government has concluded that the attacks of September 11 have placed the United States in a state of armed conflict, it has also determined that members of the al Qaeda terrorist network and the Taliban militia are illegal combatants under the laws of war, and so cannot claim the legal protections and benefits that accrue to legal belligerents, such as prisoner of war status under the Third Geneva Convention of 1949.¹⁶⁵

On the other hand Michael H. Hoffman argued that terrorists are not unlawful combatants. As explained, unlawful combatants operate during armed hostilities and usually against lawful military objectives. Terrorists often act in time of peace and, further, quite often against legally protected sites and persons. Thus they are more accurately described as unlawful belligerents¹⁶⁶ and he continued on stating their fate as unlawful belligerent lack any privilege or authority under international law, and upon capture may find themselves facing legal proceedings.

Manooher Mofidi and Amy E. Eckert argued that private citizens, including terrorists, have no claim to the benefits of protection guaranteed soldiers under Geneva Convention II. Under Geneva Convention III, attacks must avoid civilians and non-military targets by all means possible. Terrorist acts violate that principle.¹⁶⁷

An act by private persons could not be a legal act of war under international humanitarian law. War is a condition between states or between a state and an identifiable force. Because terrorists are not states and generally refuse to fulfill the requirements for becoming an identifiable warring party

¹⁶⁴Andreas Paulus and Mindia Vashakmadze, "Asymmetrical war and the notion of armed conflict – a tentative conceptualization," International Review of the Red Cross Volume 91 Number 873 (March 2009), pp.115

¹⁶⁵John C. Yoo & James C. Ho, cited above at note 11, pp.1

¹⁶⁶ Michael H. Hoffman, "Terrorists Are Unlawful Belligerents, Not Unlawful Combatants: A Distinction with Implications for the Future of International Humanitarian Law", Case Western Reserve Journal of International Law Vol.34, Issue 2(2002)pp. 229

¹⁶⁷Manooher Mofidi Amy E. Eckert, "Unlawful Combatants or Prisoners of War: The Law and Politics of Labels" Cornell International Law Journal Volume 36 Issue 1 (Spring 2003), Article 3

under Geneva Convention II, terrorists, by definition, are never engaged in a legal act of war under accepted customary definitions.¹⁶⁸

In view of the above discussion, when we examine the relevant provisions of the Geneva Conventions as discussed here and there are two categories of armed conflict i.e. IAC and NIAC. So the fight against terrorism may fall either on IAC or NIAC if it fulfills the conditions of armed conflict. And if it is IAC the prisoners or detained persons who participated in such conflict got a combatant status and will not be charged for participating in the conflict as long as they do not commit acts that violate IHL. In other words, the persons face charge for crimes only when it is proved that they violate the rules of IHL otherwise being a member of the armed forces of a state or a resistance or liberation movement in the case of self-determination is not sufficient to punish the prisoner. So the issue here is: what if the prisoner is a member of the armed force of a state or a liberation movement sponsoring terrorism? Does it make any difference on the treatment of the prisoner? Since criminal offence is an individualistic by its nature it is difficult to share the arguments of either the US or Michael H. Hoffman to make the prisoners subject to criminal charge only being member of the terrorist organization in IAC.

However, when it comes to NIAC it will be another story. First of all there is no combatant status in case of NIAC¹⁶⁹ and secondly since NIAC is more of the internal matters of the state party to the conflict the maximum protection from IHL to the detained persons participating in such conflict is the treatment listed under Common Art.3 of the Geneva Conventions and Art.5 of Additional Protocol II to the Geneva Conventions. And these provisions of the Conventions do not prohibit the detaining party to take measure based on its own criminal law. So the arguments of Michael H. Hoffman may be working in the case of NIAC.

In general, if a person is detained in relation to an international armed conflict, the relevant treaties of IHL fully apply. If a person is detained in connection with a non-international armed conflict, the deprivation of liberty is governed by Article 3 common to the four Geneva Conventions, other applicable treaties, customary international law, and other bodies of law such as human rights law

¹⁶⁸ Ibid

¹⁶⁹International Committee of Red Cross, cited above at note 147, pp.726

and domestic law. If a person is detained outside an armed conflict, it is only those other bodies of law that apply¹⁷⁰

3.5 Conclusions

Lack of comprehensive definition on terrorism at international level is one problem in the fight against terrorism. From the discussions of this chapter it is possible to see the impact of the problem recurs more at times of conflict. It is clear that in both IHL and other international and domestic laws acts of terrorism is prohibited and the commission of such offence is a crime. However, due to different positions among states on the definition of terrorism in times of conflict it is difficult to secure shared vision and commitment to fight terrorism.

More importantly the lack of consensus in the definition of terrorism during conflict creates a lot of argument to determine the appropriate legal regime to be applied in the fight against terrorism. It is because of this problem several scholars and states divided in treating the fight against terrorism from law enforcement measures to armed conflict. One may wonder giving of a lot of emphasis on the problem of definition if acts of terrorism are a crime in both legal regimes which govern during peace time and armed conflict. According to the researcher at least two important points may be deserved to be mentioned. The first one is it has the impact in determining the applicable law i.e whether domestic law governing law enforcement or International Humanitarian Law. And the second one is it has its own effect the characterization of the act. For example if the fight against terrorism with in armed conflict without prejudice to the application of Common Art.3 the member of the armed group might have the chance not to be prosecuted merely being the member of such armed group which could have been liable under domestic criminal law.

On the application of IHL to the fight against terrorism despite different arguments were forwarded it is envisaged that from nature of terrorist organizations, the arguments of different writer and state practices there is a progressive development in accepting the fight against terrorism as an armed conflict if it satisfies the conditions of armed conflict. Particularly, this trend become more common after the 9/11 attack on United States of America.

¹⁷⁰ Ibid

Chapter Four

The Fight against Al-Shabaab and IHL

4.1 Emergence of Al-Shabaab

4.1.1 Background

After the collapse of Siad Barrie regime in 1991, Somalia entered in to crisis with conflicts everywhere among militants who made their basis in different tribes and clan to control power.¹⁷¹ Islamic courts were one of the militant groups overriding the different tribes to consolidate power in Somalia. It was established in Mogadishu and parts of southern Somalia. Among the sharia courts the first court was set up in northern Mogadishu in 1994, under the chairmanship of Sheikh Ali Dheere (from the same clan).¹⁷²Afterwards several courts were established in Beledweyne town, in the Hiiran region, and some other locations, in cooperation with local faction leaders.¹⁷³ The integration and merging of these different Islamic Courts become finalized and resulted in the establishment of the Supreme Council of Islamic Courts, which in 2006 became known as the UIC, and was founded as the new umbrella organization of the sharia courts in Mogadishu.¹⁷⁴

The UIC was internally quite diverse, and it brought together moderates, who were not interested in pursuing political aims violently, as well as extremists.¹⁷⁵ According to some observers only a minority of the ten or eleven courts that joined forces in 2004 were extremist and militant.¹⁷⁶

The UIC controlled Mogadishu and most of Southern Somalia and started to implement the strict interpretation of Islam and taking harsh measures.¹⁷⁷ Sheikh Hassan Daahir Aweys who was the founder and leader of Alitahad al Islamia in 1996 has become the head of UIC in 2006 and the court had elected 90 parliamentarians to legitimize its legal base.¹⁷⁸

The appointment of Aadan Hashi Ayro, a young militant close to Sheikh Hassan Daahir Aweys, as commander of the militia of the Ifkahalane court in 2005, without protest from the other courts

¹⁷¹Mohamed A. Mohamed; “ From Cold War Era to War on Terror U.S. Strategic Interest in Somalia”,

UMI Number: 1464764 (June 2009), pp.13 available on:

https://horseedmedia.net/.../US_STRATEGIC_INTEREST_IN_SOMA... accessed on November 24,2016

¹⁷² Markus Virgil Hoehne, “Counter-terrorism in Somalia: How external interference helped to produce militant Islamism” pp.4 available on: webarchive.ssrc.org/Somalia_Hoehne_v10.pdf accessed on March 29,2016

¹⁷³ Id pp.5

¹⁷⁴ Id. pp.6

¹⁷⁵ Ibid

¹⁷⁶ Ibid

¹⁷⁷ Id pp.22

¹⁷⁸ Id pp.27

signifies the change in the strategy of the UIC to violent strategy. As an evidence of this Ayro and his followers had made international headlines for desecrating a colonial-era Italian (Christian) cemetery in Mogadishu. Ayro soon became the leader of the courts' 'youth organization', a group combining a small number of extremely radical and militant elements, known as Al-Shabaab.¹⁷⁹

4.1.2 Buildup of Al-Shabaab

Al-Shabaab, which means "the youth" in Arabic, started as a small faction of radicalized Islamists in Somalia's Islamic Courts Union, an alliance of Sharia courts.¹⁸⁰ Al-Shabaab's origin can be traced back to the al-Ittihad al-Islamia (Union of Islam)—a militant Salafi group which gained prominence in the 1990s, in the midst of the civil war which followed the fall of Siad Barre's military regime. A group of young hardliners who sought to establish a "Greater Somalia", with the aim of imposing a strict fundamental Islamic rule, seceded from al-Ittihad al-Islami and joined the Islamic Courts Union¹⁸¹

Al-Shabaab was an active, armed, politicized fanatical group that nominally operates under the ICU flag.¹⁸² During the time when the ICU took over Somalia's government in 2006, despite Al-Shabaab's feature of radicalism, the latter's influence was not that much significant. It was more dominated by other liberal faction in the Union.¹⁸³ However, after the coalition was removed from power by Ethiopian forces and the Somali Transitional Government Al-Shabaab splintered off from ICU in the wake of the alliance's demise, and grew into full-blown insurgency.¹⁸⁴

Some observers therefore argue that the Islamic Courts Union's defeat by the TFG and Ethiopian troops may have precipitated the creation of a radical movement that would become Al-Shabaab.¹⁸⁵ On top of this Al Qaeda launched its 'e-jihad' (electronic jihad) in Somalia by referring to the country in media addresses disseminated via television and the Internet and calling upon dedicated jihadists to aid the Somali mujahidin.¹⁸⁶ This virtual involvement has gained material substance

¹⁷⁹ Ibid

¹⁸⁰Huffington Post: A Brief History Of Somalia's Al-Shabaab Terror Group available on: http://www.huffingtonpost.com/2015/04/02/al-shabab-history_n_6992704.html accessed on Oct. 3/2016)

¹⁸¹ Other solutions ; Risk Management Service available on www.othersolutions.eu Al-Shabaab Origins, Current Status, and a Look into the Future 09 November 2015 accessed on August 16,2016

¹⁸²Abdisaid M. Ali, The Al-Shabaab Al-Mujahidiin – A Profile of the First Somali Terrorist Organization, ISPSW pp.1

¹⁸³Markus Virgil Hoehne, cited above at note 172, p.6

¹⁸⁴Huffington Post, cited above at note 180

¹⁸⁵Other Solutions, cited above at note 181

¹⁸⁶Markus Virgil Hoehne, cited above at note 172, pp.2

with the rise of the Somali extremist group Al-Shabaab 2005, and a handful of unpopular hardcore militants has by 2009 become the dominant military force in southern and central Somalia.

In May 2008, Al-Shabaab's new leader openly pledged support for Osama Bin Laden. The strategies of the group resemble those of Al Qaeda cells in other parts of the world (suicide bombings and remote-controlled explosives, beheadings of opponents, and so forth), and foreign fighters and volunteers from the Somali Diaspora have joined the ranks of the movement.¹⁸⁷

As Abdisaid M. Ali stated the principal objective of Al-Shabaab is to establish a Somali Caliphate of the Wahhabi Islamic sect in Somali-inhabited regions of the Horn of Africa through and by way of militarized intervention.¹⁸⁸

Al-Shabaab leaders are members of a Shura Council; the number of council members is unknown. The Shura Council has set Al-Shabaab's policy in Somalia, and local administrations are expected to abide by this policy. The power that Al-Shabaab's Shura Council holds over local administrations varies geographically.¹⁸⁹

4.2 Al-Shabaab as a Terrorist Group

Terrorism is a crime under both international and domestic law.¹⁹⁰ Though there is lack of comprehensive definition of terrorism internationally specific acts of terrorism have been made a criminal act in different international, regional and national laws. Like the definition of terrorism we could not easily get the definition of terrorist groups internationally in spite of its recurrence use in several situations. In this regard the Framework decision of the European Union Council can be mentioned in trying to define the term terrorist groups by saying "...terrorist group' shall mean: a structured group of more than two persons, established over a period of time and acting in concert to commit terrorist offences."¹⁹¹ Taking this definition and using a simple deduction of "a terrorist is as a person who commits a terrorist act" I will discuss the nature of Al-Shabaab as a terrorist group.

¹⁸⁷ Ibid

¹⁸⁸ Abdisaid M., cited above at note 182, pp.3

¹⁸⁹ Al-Shabaab Leadership Profiles, available on:- <http://www.criticalthreats.org/somalia/al-shabaab-leadership> accessed on November 11, 2016

¹⁹⁰ Antonio Cassese, cited above at note 130, p.166

¹⁹¹ Council Framework Decision of 13 June 2002, cited above at note 120, Art. 3

In its foundation though Al-Shabaab was formed as a military wing of the UIC it was influenced by a majority of extremists including its leaders Adan Hashi Ayro.¹⁹² Particularly after the defeat of the UIC by the Transitional government of Somalia and Ethiopian forces it sought for the support of different extremist groups including Al Qaeda.¹⁹³

Al-Shabaab Al-Mujahidiin is closely associated, if not an integral part of Al-Qaida, militarily and ideologically, in the horn of Africa¹⁹⁴ And to boost its strategic move it declared its allegiance to Al Qaeda and the global terror network.¹⁹⁵ As a terrorist group Al-Shabaab has organized, committed and take responsibility for a number of terrorist activities in Somalia and neighboring countries. To mention some of them: - on 11 July 2010, Al-Shabaab committed its first major successful operation outside Somalia with coordinated suicide bombings against two nightclubs in Kampala, killing 79 people and wounding dozens more.¹⁹⁶

In addition to this Al-Shabaab engaged on several terrorist activities in Kenya. According to Sky News report Al-Shabaab committed or master minded terrorist activities of a September, 2013 massacre at the Westgate Mall in Nairobi, killing at least 67 people; hijacking a bus travelling to Nairobi shooting dead 28 non-Muslim passengers who could not recite an Islamic declaration; Gunmen attack against workers as they slept at a quarry in northern Kenya and killed at least 36 people.¹⁹⁷ And finally the latest attack on Garissa University in eastern Kenya, near the border with Somalia which killed 147 and injured 79.¹⁹⁸

In Somalia too Al-Shabaab committed a number of terrorist attacks. For instance in August 2010, Al-Shabaab staged suicide attack at the Muna Hotel, killing at least 33 people, including four members of Parliament¹⁹⁹ On February, 2015, a suicide attack at the Central Hotel in Mogadishu killed 25 people and wounded 40 others.²⁰⁰

¹⁹² Markus Virgil Hoehne, cited above at note 172 p.2

¹⁹³ Id p.2

¹⁹⁴ Abdisaid M., cited above at note 182, pp.1

¹⁹⁵ Other Solutions, cited above at note 181, p.2

¹⁹⁶ Report of the Monitoring Group, cited above at note 17, p.24

¹⁹⁷ Sky News; 2 April 2015, Al-Shabaab: Deadly Campaign Of Terror Attacks, available at <http://news.sky.com/story/al-shabaab-deadly-campaign-of-terror-attacks-10365174> accessed on November. 8, 2016

¹⁹⁸ National Consortium for the Study of Terrorism and Responses to Terrorism (START) available on: - https://www.start.umd.edu/pubs/STARTBackgroundReport_alShabaabGarissaU_April2015.pdf accessed on November 9, 2016

¹⁹⁹ Report of the Monitoring Group, cited above at note 17, p.17

²⁰⁰ Sky News, cited above at note 197

The Monitoring Group established by the Security Council recorded 98 incidents involving improvised explosive devices in Mogadishu between April 2010 and April 2011, mainly targeting AMISOM and Transitional Federal Government forces, although some civilians have also been killed. At least nine of the incidents were attempted suicide attacks, of which four were foiled.²⁰¹ The Government of Ethiopia claims that in 2009, an Al-Shabaab cell planned to attack 10 targets in Addis Ababa, although the Monitoring Group has not been able to independently verify that information.²⁰²

According to START, since Al-Shabaab has emerged from the Islamic Courts Union (ICU) in 2007, al-Shabaab has carried out more than 1700 terrorist attacks, killing more than 4,000 and wounding more than 4,000. The number of attacks attributed to al-Shabaab has increased rapidly from less than 10 in 2007 to more than 800 in 2014. Out of these attacks the majority is on military targets (48%) in relation to other targets like private citizens and property (26% of all attacks), general government (12.9%), police (8%), businesses (6.1%), diplomatic entities (2.0%), and journalists and media (2.0%).²⁰³

Al-Shabaab took responsibility for several terrorist attacks.²⁰⁴ United States designated Al-Shabaab as a foreign terrorist organization in March 2008.²⁰⁵ In addition to United States it is also designated as a terrorist organization by Australia, Canada, United Arab Emirates and the United Kingdom.²⁰⁶ On the part of the parties to the conflict against Al-Shabaab particularly IGAD states though there is no official declaration of Al-Shabaab as a terrorist group but IGAD declared Al-Shabaab as a transnational Security threat and considered it as a terrorist.²⁰⁷ However, there is no Security Council or African Union resolution on the terrorist status of Al-Shabaab. Unlike ISIL, the Security Council,

²⁰¹ Report of the Monitoring Group, cited above at note 17, p.19

²⁰³ START, cited above at note 198

²⁰⁴ For instance the group claimed responsibility for several high profile bombings and shootings in Mogadishu targeting Ethiopian troops and Somali government officials. In July 2010, Al-Shabaab claimed responsibility for 2 suicide bombings in Kampala, Uganda, which killed over 70 people. These bombings were said to be in retaliation for Uganda's participation in the AMISOM mission in Somalia. Al-Shabaab (Al-Shabab) The Supreme Islamic Courts Union (ICU) available on: <http://www.globalsecurity.org/military/world/para/al-shabaab.htm> accessed on November 23/2016

²⁰⁵ CNN 02/04/2015, What is Al-Shabaab, and what does it want?, By Holly Yan, available on: <http://edition.cnn.com/2015/04/02/world/africa/al-shabaab-explainer/> accessed on Oct. 3/2016

²⁰⁶ WIKIPEDIA, Al-Shabaab Militant Group available on: [https://en.wikipedia.org/wiki/Al-Shabaab_\(militant_group\)](https://en.wikipedia.org/wiki/Al-Shabaab_(militant_group)) accessed on November 16/2016

²⁰⁷ IGAD, Al-Shabaab as a Transnational Security Threat, March 2016 available on: <http://www.igadssp.rg/> accessed on January 12, 2017

from the total of its 47 resolutions on Somalia and deployment of AMISOM from 2007-2016, it did not pass a single resolution in labeling Al-Shabaab as a terrorist organization.²⁰⁸

In general, even though Al-Shabaab was originated as a militant group and its main objective is to establish a caliphate government in Somalia it has been using terrorism as a means of terrorizing the people and compelling the TFG and its allies to subdue for its interests.

4.3 Al-Shabaab as Armed Group

From the discussions in chapter two, the level of organization is one requirement for non-state actors to be qualified as armed group under international law. Some of the features of this organizational structure is illustrated by the ICTY as 1) the existence of a command structure; 2) military (operational) capacity of the armed group; 3) logistical capacity of the armed group; 4) the existence of an internal disciplinary system and the ability to implement IHL. and 5) the armed group's ability to speak with one voice. So taking in to account these parameters I will discuss the nature of Al-Shabaab as armed group.²⁰⁹

4.3.1 Command Structure

The existence of a responsible command in the case of non-state actors implies some degree of organization not necessarily like a hierarchical system of military organization similar to that of regular armed forces. Rather it means an organization capable, on the one hand, of planning and carrying out sustained and concerted military operations, and on the other, of imposing discipline in the name of a de facto authority.²¹⁰ As far as the chain of command of al-Shabaab is concerned, it appears flexible.²¹¹ It is a decentralized, often with loosely coordinated levels of leadership that revolve around local villages and religious leaders. Nonetheless, that does not mean al-Shabaab are not politically organized.²¹² In fact in terms of hierarchical structure of its leadership al-Shabaab is well organized with independent components.²¹³

²⁰⁸ United Nations Security Council Resolutions available on:- <http://amisom-au.org/key-documents/united-nations-security-council-resolutions/> accessed on November 16/2016

²⁰⁹Jean-Marie Henckaerts and Louise Doswald-Beck, cited above at note 101

²¹⁰ Commentary on Additional Protocols, cited above at note 82, p.1352

²¹¹Dr.Abdi O. Shuriye, Al-Shabaab's Leadership Hierarchy and its Ideology, Research available on:- <http://hornaffairs.com/en/2012/05/07/research-al-shabaabs-leadership-hierarchy-and-its-ideology/> accessed on November 12, 2016

²¹²Abdisaid, cited above at note 182, pp. 1

²¹³Dr.Abdi O. Shuriye, cited above at note 210

Formally Al-Shabaab is a hierarchical organization led by its emir (“prince” or “commander”) and supported by his deputy emir. Answering to emir are a set of regional commanders who manage the group’s presence in southern Somalia and Mogadishu, Bay and Bokool, Punt Land and Somaliland, and Juba Valley.²¹⁴The emir has also appointed a Shura council of 10 members who oversee al-Shabaab’s regional commanders.²¹⁵

In practice, the Al-Shabaab appear to function as several largely autonomous commands: For example in 2012 after four days of meetings in Barawe, a port city in Somalia's Lower Shebelle region, the leaders of al-Shabaab reorganized their chain of command and selected new leaders for a variety of key roles.²¹⁶ The overall leader remains Sheikh Ahmed Abdi Godane (Muktar Abu-Zubeyr) who commands five regional administrations, each of which is responsible for its own military operations against the allied forces of Somalia, Kenya, Ethiopia and African Union peacekeepers.²¹⁷

Under the military branch, which is the most important branch of the organization, there are two sub-units; namely Jaysh Al-‘Usr or the army of hardship and suffering, and the judicial, social and economic branch, Jaysh Al-Hisbah, led by regional military leaders. The Jaysh Al-‘Usr serves as the group’s major external military apparatus. The Jaysh Al-Hisbah functions as the group’s religious police force, enforcing Sharia in areas of Al-Shabaab’s control.²¹⁸

4.3.2 Military Operation Capacity of Al-Shabaab

As to military capacity Al-Shabaab transitioned from a rebel group into a guerrilla movement and began seizing territory in central and southern Somalia. Al-Shabaab grew from a few hundred fighters in the 2006 to thousands by 2008. And as of March 2016 it has an estimated fighting force of 6000-12000.²¹⁹

Most of the time Al-Shabaab has been portrayed as a terrorist organization and its linkage and allegiance with Al Qaeda has become the headlines. However, Al-Shabaab has carried out a number

²¹⁴ Al-Shabaab, Counter Extremism Project pp.3 available on www.counterextremism.com/threat/al-shabab accessed on November 11, 2016

²¹⁵ Ibid

²¹⁶ New Structure of Al-Shabaab, available on:- http://www.somaliareport.com/index.php/post/3528/The_New_Structure_of_Al-Shabaab accessed on November 11, 2016

²¹⁷ Ibid

²¹⁸ Dr. Abdi O. Shuriye, cited above at note 211

²¹⁹ Al-Shabaab, Counter Extremism Project, cited above at note 214, p.3

of military operations against AMISOM, the Transitional Government and its allies. Since its re-emergence in 2006 it has controlled and lost through military operations a lot of territories in Somalia. Here under, some of the armed conflicts which Al-Shabaab has engaged as an armed group since then are discussed.

In October 2009, Al-Shabaab won a decisive battle over the RasKamboni forces for control of the port town of Kismaayo, which, together with the secondary ports of Marka and Baraawe, has since emerged as the most important source of income for the group.²²⁰ On 22 August 2010, Al-Shabaab launched its most significant military campaign since May 2009 called the “Ramadan offensive”, in which it involved an estimated 2,500- 5,000 Al-Shabaab fighters, with objectives that included capturing the Presidential Compound at Villa Somalia, symbolically dismantling the Transitional Federal Government.²²¹

The military strength of Al-Shabaab sometimes became too significant even a well-equipped military force could not withstand. For instance the coalition forces of AMISOM and Transitional Government have at times been forced to abandon some towns in pursuit of al-Shabaab. Particularly the September 1st 2011 siege of the Janele base by Al-Shabaab, which resulted in the killing of dozens of Ugandan troops, was partly blamed on lack of heavy equipment which had been deployed elsewhere²²²

According to the monitoring group report on 17 October 2010, advancing from the Ethiopian border town of Kalabaydh, a joint operation between Transitional Federal Government forces, the Ethiopian National Defense Force and the Hawaadle sub-clan militia of the “Shabelle Valley Administration” clashed with Al-Shabaab militia forces in Eel Gaal and Qowlad villages both in Beledweyne. During the clashes, an Ethiopian military truck was reportedly destroyed by a remote control improvised explosive device. Similarly, Ethiopian forces were forced back by heavy artillery fire during clashes with Al-Shabaab in Rabdhure (Bakool region).²²³

²²⁰Report of the Monitoring Group, cited above at note 17, pp.28

²²¹ Id. pp.17

²²²Other Solutions, cited above at note 181

²²³Report of the Monitoring Group, cited above at note 17, pp.52

4.3.3 Logistical Capacity

In addition to engaging in armed confrontations Al-Shabaab has controlled and administered a number of territories in Southern Somalia. Though it participated in smuggling of Sugar and Charcoal it also has a variety of revenue sources from the territories it controlled.

The Monitoring Group estimates that Al-Shabaab generates between \$70 million and \$100 million per year, from duties and fees levied at airports and seaports, taxes on goods and services, taxes in kind on domestic produce, “jihad contributions”, checkpoints and various forms of extortion justified in terms of religious obligation, or zakat.²²⁴

For example in 2011, Al-Shabaab controlled two “international” airports with asphalted airstrips (Kismaayo and Baidoa), one former military air force base with an asphalted airstrip (Baledogley) and about 20 small and medium-sized airfields in South and Central Somalia. Al-Shabaab therefore theoretically possesses the capability to charter and receive deliveries by wide-body aircraft (e.g. Boeing B727-200, Ilyushin Il-76 “Candid”) that might carry up to 47 tons of weapons and/or ammunitions.²²⁵ One of the logistics element is the armed groups ability to recruit and train militants. And for this purpose Al-Shabaab has training camps in different parts of Somalia one evidence to this is United States air strike on one of Al-Shabaab’s training camp which killed more than 150 militants.²²⁶

4.3.4 Existence of Internal Rules

Al-Shabaab leaders openly said that they have a hierarchy and strict internal rules.²²⁷ The Shura Council has set Al-Shabaab’s policy in Somalia, and local administrations are expected to abide by this policy.²²⁸ In the structure of Al-Shabaab there is a unit called Jaysh Al-Hisbah, whose function is to upload law and moral principles in the society and to oversee the general welfare of the public.²²⁹ For these criteria the important thing is to have the ability of an armed group to enforce the law, rather than willingness to implement the requirements.²³⁰ From the organizational structure of Al-

²²⁴ Id. pp.27

²²⁵ Id. pp.47

²²⁶ [REUTERS](#), March 8, 2016 U.S strikes Al-Shabaab training camp in Somalia, More than 150 killed Tuesday, Phil Stewart, available on [mobile.reuters.com](#) accessed on December 12, 2016

²²⁷ Dr. Abdi O. Shuriye, cited above at note 211

²²⁸ Dr. Abdi O. Shuriye, cited above at note 211

²²⁹ *ibid*

²³⁰ Dr. Timur Demir, “The Organizational requirements For the Threshold of Non- International Armed Conflict”, [Human Rights Review](#), Volume: III, Issue: 1 (June 2013), pp.137,

Shabaab and from its command structure it is in a position to implement the Geneva conventions; however, since Al-Shabaab mixed terrorism as its tactics to achieve its mission we can say that Al-Shabaab intentionally violates the major principles of the Convention.

4.3.5 The armed group's ability to speak with one voice

The existence of the ability to speak with one voice is directly related to the hierarchical structure of the organization.²³¹ It is more of ability to speak with one voice and with a level of persuasive authority on behalf of its members and confirms whether or not the organization achieves a level of organizational stability and effectiveness.²³² As it was stated in several literature Al-Shabaab's objective is the establishment of an Islamic state in Somalia, based on Islamic law and the elimination of foreign 'infidel' influence. In pursuance of this objective, Al-Shabaab has conducted a violent insurgency against the TFG, and foreign forces supporting the TFG. Al-Shabaab seeks the creation of an 'Islamic Emirate of Somalia', to include Somalia, Somaliland, Puntland, north-eastern Kenya, the Ogaden region of Ethiopia and Djibouti.²³³ In the hierarchy of Al-Shabaab Ali Mohamed Rage, also known as Ali Dhere, is Al-Shabaab's head spokesman and a member of the group's Shura Council He is responsible for press briefing and announcing the group's plans and strategies.²³⁴

As we can see from discussions above Al-Shabaab has satisfied almost all of the above conditions except Al-shabaab shows no interest to implement the Geneva Conventions which is a fundamental criterion which justifies the other elements of the definition: being under responsible command and in control of a part of the territory concerned, as well as the insurgents must be in a position to implement the Protocol.²³⁵ However since the criteria is more of ability than willingness based on the criteria still we can say Al-Shabaab satisfies this criteria too.

In general, as it was discussed in 4.2 above though Al-Shabaab conducted a number of terrorist activities and picked terrorism as a means to achieve its mission it has also a nature of armed group that is more or less well organized with a command structure and conduct its military operations from a territory and established some sort of administrative functions within the area it controlled.

²³¹ Id. pp.138

²³² Ibid

²³³ Ibid

²³⁴ Dr. Abdi O. Shuriye, cited above at note 211

²³⁵ Commentary on Additional Protocols, cited above at note 82, pp.1353

4.4 Application of IHL in the Fight against Al-Shabaab

As I have discussed in chapter two on the nature of armed conflict and armed groups it is clear that there are two types of armed conflicts i.e IAC and NIAC with their own unique features. As it has been said “The devil has in the details”, the problem comes whenever the conflict intermingled with terrorism or in other words the parties to the conflict use terrorism as a means to achieve their objectives.

It is a basic principle of international humanitarian law that persons engaged in armed conflict must at all times distinguish between civilians and combatants and between civilian objects and military objectives.²³⁶ The principle of distinction is a cornerstone of international humanitarian law. Derived from it are specific rules aimed at protecting civilians, such as the prohibition of deliberate or direct attacks against civilians and civilian objects, the prohibition of indiscriminate attacks, and the use of “human shields”,²³⁷ as well as other rules on the conduct of hostilities aimed at sparing civilians from their effects.²³⁸ International humanitarian law also prohibits hostage taking, whether against civilians or persons no longer taking part in hostilities.²³⁹

Once armed conflict level is reached, it may be argued that there is little added value in designating most acts of violence against civilians or civilian objects as “terrorist” because such acts would already constitute war crimes under international humanitarian law.²⁴⁰

In order to determine the applicability of IHL in the case of fighting against Al-Shabaab it is important to distinguish the nature of the conflict, the identity of parties to the conflict and the status of the parties under international humanitarian law.

4.4.1 Parties to the Conflict

Among the parties who have been participating in the conflict of Somalia are the transitional Federal Government which was installed in 2004 in Kenya and administered Somalia until 2012,²⁴¹ the

²³⁶ Additional Protocol to the Geneva Conventions (Protocol I), cited above at note 27, Article 48.

²³⁷ Id. Article 51.

²³⁸ Id. Article 57.

²³⁹ Hostage taking is a grave breach of GC IV (Article 147). See also Common Article 3 to the Geneva Conventions and AP I, Article 75.

²⁴⁰ Jelena Pejic, Terrorist Acts and Groups: A Role for International Law? pp.3 (Forthcoming in 2004 British Year Book of International Law) available on: -web.abo.fi/institut/imr/courses/challenges/.../Pejic(ff)1.doc accessed on June 9, 2016

²⁴¹ Markus Virgil Hoehne, cited above at note 172, pp.8

Present Federal Government of Somalia,²⁴² the Ethiopian, Kenyan, Burundi, Djibouti, Sierra Leone and Uganda forces under AMISOM,²⁴³ Kenyan and Ethiopian forces unilaterally,²⁴⁴ and Al-Shabaab.

The Transitional Federal Government and its successor i.e the present Federal Government of Somalia are internationally recognized governments of Somalia. However, both lack control of a substantial amount of territory of Somalia. And they have been heavily dependent on the protection and support of AMISOM and allied powers. Moreover both lack public acceptance as representative of the Somali people.

The other party participating in the fight against Al-Shabaab is AMISOM. AU Mission in Somalia was installed through the initiation of the African Union by the authorization of the UN Security Council.²⁴⁵ AMISOM was initially established and deployed based on the agreement between AU and the Transitional Federal Government of Somalia as a peace support operation.²⁴⁶ In 2014 it has a total uniformed personnel of 22,056.²⁴⁷

In practice, it has functioned more like a war-fighting operation comprised of a loosely coordinated coalition of willing troop-contributing countries.²⁴⁸ Army contributing countries under AMISOM has exercised considerable operational autonomy in their respective sectors. Rather than taking full command and control of the mission, AMISOM's force headquarters has generally played a coordinating role²⁴⁹

In general, AMISOM has never been a peacekeeping operation in the traditional sense of the term. Rather, it has more closely resembled a warfighting operation, especially after Ethiopian troops withdrew from Mogadishu in January 2009 leaving AMISOM as the main source of support for the

²⁴² A. Abukar, Somalia: A brief Country Report, AWEPA,2015 pp.31 available on:- www.awepa.org accessed on November 24,2016

²⁴³ Paul D. Williams with AbdurashidHashi,"Exit strategy Challenges for the AU Mission in Somalia" the Heritage Institute for Policy Studies, Mogadishu, Somalia February (2016), pp.3

²⁴⁴David Shinn, Analysis: International Efforts to Counter Al-Shabaab available on:- <http://hornaffairs.com/en/2012/02/22/analysis-international-efforts-to-counter-al-shabaab>accessed on:-November, 02,2016

²⁴⁵ Resolution 1744 (2007) S/RES/1744 (2007, Adopted by the Security Council at its 5633rd meeting, on 20 February

²⁴⁶ Mandate of AMISOM, 2006-2007 available on:- <http://amisom-au.org/mandate-2006-2007/>accessed on November 16,2016

²⁴⁷ Report of the Chairperson of the Commission on the Situation in Somalia pp.4 Peace and Security Council 462nd Meeting Addis Ababa, Ethiopia 16 OCTOBER 2014 PSC/PR/2.(CDLXII)

²⁴⁸ Paul D. Williams with AbdurashidHashi, cited above at note 242, pp.3

²⁴⁹ Ibid

TFG. Like other war-fighting missions, AMISOM is a multinational force that has operated without much strategic control imposed on the troop-contributing countries by the Force Headquarters.²⁵⁰

Ethiopian and Kenyan troops entered in to Somalia in several instances to attack Al-Shabaab. Sometimes they took measures unilaterally and in other times jointly with the TFG forces. For instance the Kenya Defense Forces (KDF) entered Southern Somalia in October 2011 in response to the Al-Shabaab threat in the border area and to “pursue insurgent groups”, following a series of kidnappings of tourists along the porous border²⁵¹Ethiopian force has also conducted military operation in coordination with the TFG force.²⁵²

Al-Shabaab, as I have discussed above, was originally established as a military wing of the UIC and after the latter’s fall Al-Shabaab organized itself in hierarchical with military command. It controls and administers a significant territory of Somalia. When we see this situation in the light of Art. 1/1 of Additional Protocol II which requires the existence of “organized armed groups, under responsible command, control a territory to carry out sustained and concerted military operations”, we can conclude that Al-Shabaab fulfills this requirement. Al-Shabaab has a command structure though it followed a decentralized structure, and every unit has its own commander which is also responsible to the central commander. For instance in the late 2013 Godane ordered for the new East African Combat Unit to be formed and to conduct a military attack. Based on this order, East African combat unit was formed under the auspices of the Jaysh al-Usra: Jaysh Ayman. This unit has carried out several attacks on Kenyan military and civilian objects. From attack on the military objects it is good to mention dual military raid on 14 June 2015 over the Kenyan defense force which resulted in the raid of local dispensary and the death of 11 KDF²⁵³

From the above discussion we can understand that the conflict is between the Transitional government and its allies i.e the AMISOM, Kenyan and Ethiopian government against Al-Shabaab. However, all conflicts do not call upon the application of IHL. A conflict to warrant the application of IHL the armed violence must reach the level of armed conflict, whether international or non-international²⁵⁴

²⁵⁰Id. pp.8

²⁵¹ IGAD, Final report on:- Al-Shabaab as a Transnational Security Threat pp.46 March 2016 available on:- <http://www.igadssp.org/> accessed on November 17, 2016

²⁵²Report of the Monitoring Group, cited above at note 17, PP.52

²⁵³ IGAD, cited above at note 251, pp.23-24

²⁵⁴JelenaPejic, cited above at note 240, pp.3

4.4.2 Nature of the Conflict

As discussed above Al-Shabaab conducts hostilities in combination of both legal and illegal means of warfare. It uses both military operation and terrorist activities to achieve its objectives. So it is difficult to consider all activities of Al-Shabaab as armed conflict particularly most of the terrorist activities mentioned above which targeted civilian objects and persons are sporadic terrorist activities which do not suffice to be armed conflict.

In case of NIAC for IHL to apply there must be some kind of organization and intensity of armed conflict.²⁵⁵ As we examine whether Al-Shabaab's conduct of hostilities fulfill this condition we can say that though Al-Shabaab resort to terrorist attack as its tactics, it has the capacity and the organization to conduct armed attacks in the meaning of IHL and has done it in a number of times on the Federal Government of Somalia and its allies.

In the fight with Al-Shabaab including the counter terrorism measures there are three situations which associate the application of different legal regime. These are the conflict which satisfies the criteria of armed conflict. For example the September 2016 attack of Al-Shabaab against the Somali government forces at the town of El Wak in Gedo Region, where it was claimed that Al-Shabaab forces stormed the military base of the government and controlled the town.²⁵⁶ Al-Shabaab also engaged on a conventional military confrontation against the TFG and AMISON in 2010 during the Ramadan fast.²⁵⁷

The second situation is Al-Shabaab's attack which satisfies the conditions of armed conflict, but in violation of the major principles of IHL like the principle of distinction. Asymmetric conflict largely undermines compliance with IHL. It is noted that the more asymmetric a conflict is, the more difficulties arise for implementation of IHL and for humanitarian action, as both sides are convinced that they must violate or at least 'reinterpret' IHL to suit their needs.²⁵⁸ Since Al-Shabaab employs asymmetric warfare most of its targets focus on hit and run ambush and suicide bombers. So in this

²⁵⁵ICTY, cited above at note 103, par.194

²⁵⁶Somalia: Over a dozen killed after Al-Shabaab attacked a military base available on:- <http://www.garoweonline.com/en/news/somalia/somalia-over-a-dozen-killed-after-al-shabaab-attacked-a-military-base> accessed on November 21, 2016

²⁵⁷ C. Nina-Emeka Okereke, "The Resilience of Al-Shabaab Al Mujahidin", African Journal for the Prevention and Combating Terrorism(June 2013) Vol. 4 No.pp.129 1African enter for the study and Research on Terrorism (ACSRT)

²⁵⁸Kelley Morgan, cited above at note 145 p.19

tactics civilians became victim of such attack which violates the principle of distinction and proportionality.

The third situation is Al-Shabaab attack committed outside armed conflict and which are purely a terrorist attack. As discussed under section two of this chapter there are a number of such incidents committed inside Somalia and the neighboring countries particularly in Kenya and Uganda. Therefore, except on the third situation it is possible to say IHL applies on the fight against terrorism.

Regarding to the classification of the armed conflict, the parties to the conflict are the TFG and its allies against the Al-Shabaab. Though there may be an argument on the TFG competence on representing Somalia and giving consent to Kenyan and Ethiopian Forces on behalf of Somalia TFG is internationally recognized government established in the Capital of Somalia and through time its control the territory increased. So there will not be any other better alternative to represent Somalia. Therefore, we can say if there is any armed conflict with Al-Shabaab it can be a non-international armed conflict.

Here there are two scenarios to be discussed the first one is the counter terrorism measure due to Al-Shabaab's activity with in Somalia and the other scenario is the counter terrorism resulted on Al-Shabaab's terrorist act in other states particularly in Kenya and Ethiopia.

As far as the Transitional Government is an internationally recognized government of Somalia in addition to combating terrorist acts which is committed with in Somalia it has also a responsibility to control and punish terrorist acts originates from its territory against another state.²⁵⁹ However, due to lack of capacity the TFG could not have done this by its own rather invited or showed its consent to those affected states to take counter terrorism measures alongside with the TFG. So in this case though the affected states in our case Ethiopian and Kenya are involved in armed conflict with Al-Shabaab to achieve two objectives i.e to help the TFG and to respond on the attack with in their territory since the measure has been take with the consent of the TFG the armed conflict with Al-Shabaab is a non-international armed conflict.²⁶⁰ Therefore, we can say the military actions of

²⁵⁹Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, signed at the third Special session of the General Assembly, in Washington D.C., February 2, 1971, Art. 1

²⁶⁰ Gerald L. Neuman, "Humanitarian Law and Counter terrorist force", European Journal of International Law(EJIL) (2003), pp.196

Kenyan and Ethiopian forces still fall within non-international armed conflict if we see the actions based on the broader interpretative scope of Common Article 3 of the Geneva Conventions which is applied to armed conflict outside of international armed conflict.

In general, the nature, objectives and methods of Al-Shabaab is too complicated to label the fight against Al-Shabaab either a law enforcement action or an armed conflict. However, notwithstanding its mixing up armed conflict with terrorism as a method to fight against the TFG and its allies Al-Shabaab still fulfills the essential conditions of armed conflict and excluding several terrorist acts committed by it outside armed conflict, the fight against Al-Shabaab could be labeled as non-international armed conflict.

In addition it is important to make a general overview on the practice of parties to the conflict other than Al-Shabaab whether they complied the basic rules of IHL. The parties to the conflict include the TFG of Somalia, AMISOM, Ethiopian and Kenyan forces.

Different international institution reports confirmed that several human rights violations and violations of IHL were committed by the AMISOM, TFG and allied forces. For instance the Human Rights Watch World Report of 2016 revealed that there was a credible report on indiscriminate civilian attacks by AMISOM forces. These indiscriminate attacks were committed both at times of military operation and as a response to Al-Shabaab's bombshell.²⁶¹

The same is true with other parties to the conflict. Reports suggest all sides in Somalia have violated the laws of war by conducting indiscriminate attacks, particularly through the use of indirect fire weapons. Similarly, in October 2010, the UN stated that civilians remained at high risk of being killed and injured in indiscriminate attacks by all parties to the internal armed conflict.²⁶²To see some empirical reports, on July 31, AMISOM soldiers killed six family members celebrating a wedding. An AMISOM investigation admitted responsibility for the killings; reported three soldiers

²⁶¹Human Rights Watch World Report 2016 Somalia Events of 2015 available on:-<https://www.hrw.org/world-report/2016/country-chapters/somalia> accessed on December 26,2016

²⁶²Nikolaus Grubeck, "Civilian Harm in Somalia: Creating an Appropriate Response", *Civilians in Armed Conflict Series* pp.17

had been arrested to face prosecution.²⁶³ On August 8, Ethiopian forces under AMISOM killed five civilians and injured six others at a checkpoint in Halgan, Hiraan.²⁶⁴

On other reports of the Human Rights Watch Some soldiers from Uganda and Burundi deployed with AMISOM sexually exploited and assaulted women and girls on their bases in Mogadishu. In some cases women and girls were offered humanitarian assistance, medicine and food in exchange for sex.²⁶⁵

Among the parties to the conflict AMISOM has been improving its compliance of IHL. In some cases it made subject to prosecution for those who committed such violations and in other cases it took responsibility, requested for apology and paid compensations. However, IHL violations committed by other parties to the conflict were either left unpunished or unknown as to the availability of the appropriate sanction.²⁶⁶

4.5 Conclusions

The whole purpose of conflict in Somalia after the fall of Siad barre rule is to control power. At the beginning the power struggle was among tribe leaders. However, the establishment of UIC through integrating Islamic courts which were established in different parts of the country changed the tribal based struggle in to a unified organizational system. Despite its extreme element and posing a threat to neighboring countries like Ethiopia and Kenya the UIC can be taken as a good chance for Somalia to create central administration.

When it was incorporated in to the UIC Al-Shabaab was a military group with radical nature. After the fall of the Al-Shabaab became more radical than ever, though it continued to engage in military operation with enhanced scale. Besides this, the deployment of AMISOM accompanied with intervention of the neighboring countries particularly Ethiopia and Kenya with their mighty military power greatly diminishes the Al-Shabaab's struggle to control power.

Throughout its operations Al-Shabaab combined armed conflict with terrorist activities to achieve its objectives. Because of this nature it becomes very difficult to label the conflict with Al-Shabaab either an armed conflict or a terrorist act which need law enforcement action. Notwithstanding to all

²⁶³ Human Rights Watch World Report 2015, cite above at note 261

²⁶⁴ Ibid

²⁶⁵ Ibid

²⁶⁶ NikolausGrubeck, cited above at note 262, p.45&46

these complicated situations taking in to account the main criteria to armed conflict and the involvement of the parties to the conflict the conflict with Al-Shabaab can be regarded as a non-international armed conflict.

CHAPTER FIVE

Conclusion and Recommendations

5.1 Conclusion

In the contemporary armed conflict there are a number of issues which pose a challenge on the traditional definition and practice of international humanitarian law. Some of these issues are related to the nature of the parties, the classification of armed conflict, the starting and end of armed conflict. In the case of classification of armed conflict, even though there is an argument in favor of the existence of another classification of armed conflict called transnational armed conflict in addition to the traditional classification of armed conflict i.e IAC and NIAC, this research found out that there is no as such additional armed conflict. It is only a matter of interpretation of Common Art.3. A broad interpretation of Common Art. 3 significantly helps identify the contemporary challenges of armed conflict.

Regarding the nature of armed groups it is possible to apprehend the main challenges in defining armed conflicts and the contribution of international tribunals and scholars on the field to identify armed groups particularly in the non-international armed conflict.

There is also a challenge on the starting and end of armed conflict in the contemporary armed conflict. Particularly this challenge was surfaced in the declaration of global war against terrorism. Among others one of the reason for the US declaration of global war against terrorism not to be taken as an international armed conflict under international law is its inability to precisely define the starting and end of armed conflict.

In comparison of armed conflict with terrorism we can find some of the basic features that determine the nature of a certain violence whether it is an armed conflict or not. Some of these features are in armed conflict we can find identifiable parties to the conflict, certain level of organization, control of territory or locate in some defined place, command structure and intensity of conflict. By the traditional definition acts of terrorism does not fulfill these criteria. However, in present time some acts of terrorism defying the traditional definition and put in question the perception and customary measure against terrorism.

Presently the measures taken against terrorism is not limited to domestic law enforcement mechanism through police force and other law enforcement organs it also necessitates the deployment of military force with hi-Tec military equipment and conventional weapons. Because of

this several states declare the so called ‘war on terrorism’. Though the term ‘war on terrorism’ is a misleading term and some like ICRC suggested it to be better termed as a fight against terrorism all these imply the changing norm of international law.

One of the Prevailing issues on the application of IHL on the fight against terrorism is ascertaining whether every incident of violence attains the minimum threshold of armed conflict. Therefore, the solution revolves on the appropriate application of two legal regimes on a non-state actor armed group: domestic/international terrorism law in case of any terrorist act which is committed outside of armed conflict and IHL where a terrorist act committed during armed conflict..

In principle IHL does not concern on the purpose and objectives of parties in the armed conflict. However, it is also looks in different in the means and methods of parties to armed conflict in classifying a certain violence to be an armed conflict or not. In other words a certain non-state actor like Al-Shabaab may employ both means terrorism and armed operation to achieve its objectives, but as far as a single activity of such group attains the threshold of armed conflict that specific incident will be governed under IHL regardless of the whole activities and nature of the armed group.

When we say war on terrorism or fighting against terrorism we are saying the appropriate measures and the relevant legal regime to sanction such offence. Since acts of terrorism is a crime whether it is committed in time of peace or during armed conflict the whole point of discussion in the war on terrorism is to determine which acts of terrorism and when it was committed makes IHL the appropriate legal instrument to deal the situation or the international terrorism laws including domestic laws to be appropriate to deal the matter. More over such discourse is also important to determine the particular point that the measures to fight terrorism fall either as a law enforcement measure or an armed conflict.

5.2 Recommendations

Given the nature of the research it is difficult to suggest specific recommendations. However I found it is important to make recommendations in a general form and on specific to those parties who are participating in the conflict with Al-Shabaab.

1. General recommendations to parties engaged in the fight against terrorism

Once a certain violence including the fight against terrorism fulfils the threshold of armed conflict it will be governed by IHL. In other words it becomes an armed conflict and is no longer a law enforcement measure. Therefore, in order to protect civilians from attack instead of merging all fight against terrorism as a law enforcement measure it is important to examine and treat every fight against terrorism on a case by case basis and give due recognition for conflicts which attains armed conflict status to encourage the parties particularly the non-state parties to comply with the basic rules of IHL.

2. Recommendations to the parties engaged in conflict against Al-Shabaab

- a. From its origin Al-Shabaab has emerged as an armed group though it pursued unacceptable methods of warfare. Therefore it is important for the states parties particularly IGAD countries to accept Al-Shabaab as armed group. This will help see other alternatives for example negotiation, cease fire and others for the protection of civilians and to reach a solution for the problem.
- b. It is important not to merge all operations of Al-Shabaab as a terrorist act. The terrorist acts and armed conflicts should be treated separately. This will help first in the treatment of prisoners and secondly it is important to deter the terrorist activities of the group. If it is possible to single out and prosecute those who participated in different capacity in the terrorist activity it will discourage the members of the group to engage in such activity and conduct its hostilities in line with IHL.
- c. The parties to the conflict against Al-Shabaab should beware of under international humanitarian law to restrain from attacking civilians and to use means of hostilities which cause indiscriminate attack.

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