4. ACCOMMODATING NEW WARS IN OLD LAW: CASE STUDY

4.1   Case Study: Global War on Terror

4.1.1   Introduction: Over the course of the 1990s, and particularly since 11 September 2001, state-sponsored terrorism has gradually declined, whereas transnational terrorism has gained in importance. This form of terrorism, as epitomized by Al Qaeda after the overthrow of the Taliban regime in Afghanistan, commonly uses weak and failing states as safe havens and receives support from various non-state actors. Spanning a global transnational network, it capitalizes on legal loopholes and deficiencies in law enforcement in developing and developed countries alike. Parts of Afghanistan and northwest Pakistan have served as a hideout for Al Qaeda and Taliban units since the overthrow of the Taliban regime.[203]

Undoubtedly, international terrorism has posed huge challenge to the world community and the trouble posed to international legal regime has reached to the point that it must be faced immediately. A more controversial challenge that has been faced at the very initial level, is that whether terrorism must be referred to as 'war' or to be classified as an 'armed conflict', a recognized term of contemporary and formalized international law. Also, a significant issue interrelated to the first question is with respect to the terrorists that whether they can be considered as an 'armed group'? The answer to the second question depends on the first one, if the terrorist organization is referred to as an armed group it can be then the terrorist and counter-terrorism operations can be termed as an armed conflict falling within the framework of international humanitarian law.

4.1.2   Background: To identify that point in the history of conflict that led to the beginning of the conflict is not just difficult but also clouded with doubts and vague as it requires an objective analysis of the background of the conflict. This objective analysis of the origin of the conflict is difficult to be found and difficult to make after so many years

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[203] Lüders, M., "Nach dem Sturz der Taliban: Kein Frieden von Kabul bis Kaschmir." Friedrich & Ebert-Stiftung (eds.), 2003. http://library.fes.de/fulltext/id/01561.htm

of hostilities. This very complexity is faced even in identifying the beginning of 'war on terrorism'. Although, the US has been the target of terrorist activities due to its dominant role in the Cold War period, there are many challenges of ambiguity with respect to war on terror. However, the position that war with Al Qaeda since the 11 September 2001 seem to be acceptable as it led to the declaration of the "War on Terrorism".[204]

4.1.2.1 History: Nobody in the world has paid attention when, in 1996 Osama Bin Laden declared war on the US. Laden was an US ally who had fought alongside mujahideen in Afghanistan against the Soviet Union during the Cold War. But the US presence in Saudi Arabia and increasing clout in the middle east turned a friend into a foe. Laden called for a public jihad against the US while being under the protection of Taliban. However, the attack of 9/11 shook the whole world and US declared the "Global War on Terror", and many consider this to be starting point of the conflict between the US and Al-Qaeda.

However, Dominic Tierney has divided *'The Twenty Years' War'* between Al Qaeda and the US has into five phases.[205]

- The first phase is the pre-9/11 phase from 1996-2001 during which the US embassies in Kenya and Tanzania were attacked by Al Qaeda killing twelve Americans. America held Laden responsible and retaliated by cruise missile attacks in Afghanistan and Sudan in 1998 killing six Al Qaeda personnel.[206] Again in 2000, Al Qaeda attacked USS Cole at a Yemen port killing seventeen Americans.

- The second phase is marked by the 9/11 attack and declaring a war against terrorism and the first step towards winning was the invasion of Afghanistan to

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[204] Remarks by Alberto R. Gonzales, Counsel to the President, before the American Bar Association Standing Committee on Law and National Security, Washington, DC,(Remarks by Alberto Gonzales)\
Available at: www.fas.org/irp/news/2004/02/gonzales.pdf

[205] D. Tierney, "The Twenty Years' War" The Atlantic, Aug 23, 2016.
Available at https://www.theatlantic.com/international/archive/2016/08/twenty-years-war/496736/

[206] Ibid.

destroy the training camps of Al Qaeda and install the government of Hamid Karzi after overthrowing the Taliban regime.

- The third phase from 2003 to 2006 led the expansion of geographical scope of the conflict in the middle east. The invasion of Iraq worsened the situation and led to the emergence of Al Qaeda Affiliates (AQA) and Al Qaeda in Iraq (AQI) opening the war on several fronts. The US was now involved in Iraq weakened its position in Afghanistan where Taliban became the beneficiary and recovered several parts of Afghanistan spreading further to areas of Pakistan.

- The fourth phase from 2007-2011 can also be known as the age of alliances where US allied with Sunni forces against the AQI which now had rebranded itself into Islamic State of Iraq. Meanwhile, US refocused its attention to Afghanistan and pooled its forces with nearly one lakh personnel. Meanwhile, Osama Bin Laden was killed in Pakistan in 2011 and it was felt that the conflict will see an end.

- However, the fifth phase from 2011 to 2016 was the age of transition and transformation that was led by the Arab Spring which consolidated the AQI/ISI into ISIS taking the center stage of the global jihadist movement and Al Qaeda was marginalised. Meanwhile Taliban grew strong in Afghanistan.

Since then, Al Qaeda has seen several ebbs and tides. However, Al Qaeda still holds ground in North Africa and Yemen[207] and is regaining its position as a global threat to international peace and world order.

4.1.2.2 Geographical scope: The geographical scope of this conflict is further a challenge to be addressed. Afghanistan has clearly been the epicentre of operations against Al Qaeda, although it might be argued that Pakistan now occupies an equally central position. However, US has now directed operations against Al-Qaeda across an

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[207] D. Tierney, "The Twenty Years' War" The Atlantic, Aug 23, 2016.

https://www.theatlantic.com/international/archive/2016/08/twenty-years-war/496736/

area stretching from Algeria to Somalia, and Yemen to Tajikistan.[208] Not all of these operations are direct armed attacks against Al Qaeda, but back door operations like intelligence gathering and sharing with other countries in their fight for the same cause.[209] The most publicized operation in recent time is, of course, the killing of Osama bin Laden in Abbottabad, Pakistan.[210] The other and more frequent type of operation is the use of unmanned aerial vehicles (drones) to carry out strikes against militants. US has been directly targeting Al Qaeda and Taliban leaders[211] and the number of strikes has been rising since 2010.

Yemen has been an additional staging ground for operations against Al Qaeda. Recently, the leader of Al Qaeda in Yemen is believed to be dead in US airstrike.[212] As *Andrew Beshai* states, "What began as an attack on Manhattan and Washington DC by a terrorist group in Afghanistan has expanded into a "global war" raining death on individuals in rural areas of Pakistan, Yemen, and Somalia."[213] Secret CIA detention facilities, known as 'black sites', are alleged to have existed in Thailand, Romania, Poland and Lithuania, amongst other countries.[214] Individuals have also been transferred to or detained by other States where they have allegedly been held on behalf of the CIA for the purposes of

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[208] Scott Shane, Mark Mazzetti, *et.al*, "Secret Assault on Terrorism Widens on Two Continents" The New York Times, Aug 14, 2010.

[209] Scott Shane, Mark Mazzetti, *et.al*, "Secret Assault on Terrorism Widens on Two Continents" The New York Times, Aug 14, 2010.

[210] Press Briefing by Senior Administration Officials on the Killing of Osama bin Laden, Office of the Press Secretary, The White House, available at: https://obamawhitehouse.archives.gov/the-press-office/2011/05/02/press-briefing-senior-administration-officials-killing-osama-bin-laden.

[211] Lubold G.& Strobel W.P., "U.S. Targets Yemen Al Qaeda Leader in Drone Strike" The Wall Street Journal, Jan 31, 2020.

[212] Seligman L. & Gramer R., "Leader of Al Qaeda in Yemen believed dead in U.S. Airstrike" Foreign Policy, Feb 3, 2020.

[213] Beshai A.,"The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates" 48 *Loyola of Los Angeles Law Review* 829 (2015).

[214] UN General Assembly, Study on Secret Detention, UN GAOR, UN Doc A/HRC/13/42 (May 20, 2010)

interrogation or detention without trial, with concerns arising over such cases in relation to Jordan, Egypt, Morocco, Syria, Pakistan, Ethiopia, Djibouti and Uzbekistan.[215]

4.1.3 Actors in the Conflict

4.1.3.1 The United States: The international community responded by recognizing the 9/11 attack as an armed attack,[216] and the United States commenced hostilities against the Al Qaeda organization and the Taliban government of Afghanistan.[217] The then President of the US characterized the conflict as a global "war on terror" and further declared that the war extended to "every terrorist group of global reach."[218] The US Congress by passing the 2001 Authorization for Use of Military Force (AUMF) permitted the US President to take extraordinary measures to combat global terrorism. The 'Global War on Terror' was so global that US claimed all war time privileges, including the right to kill without warning, detain without trial, and search and seize cargo on the high seas in all its counter terrorism operations.[219] As the US was at war, it was not bound to extend human rights to these individuals as far as they are not in the US territory and hence created a military prison at Guantanamo Bay, Cuba. This allowed the government to function in something close to a law-free zone while exercising substantial executive power.[220]

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[215] Ibid.

[216] UN Security Council, SC Res 1368, SCOR, UN Doc S/Res/1368 (Sept. 12, 2001); UN Security Council, SC Res 1776, SCOR, UN Doc S/Res/1776 (Sept. 19, 2007).

[217] Torreon B. "Instances of use of United States armed forces abroad: 1798–2013" 22 *Congressional Research Service*. Available at: http://fas.org/sgp/crs/natsec/R42738.pdf.

[218] Beshai A, "The Boundless War: Challenging the Notion of a Global Armed Conflict Against al-Qaeda and Its Affiliates" 48 *Loyola of Los Angeles Law Review* 829 (2015)

[219] Mary Ellen O'Connell, "Ad Hoc War" in Krisensicherung und Humanitarer Schutz – Crisis Management and Humanitarian Protection 405 (Horst Fischer et al, eds., 2004).

[220] Jack Goldsmith, *The Terror Presidency* 64-65 (W.W. Norton & company, 1st edn., 2007); Jane Mayer, *The Dark Side* 150-51 (Doubleday, 1st edn., 2008).

It is within a month of the Twin Tower attack US launched Operation Enduring Freedom, with aid of United Kingdom and began a campaign in Afghanistan that has not ended even today. This use of force was endorsed by the Security Council that declared the 9/11 attack as an armed attack justifying US right to defence under Article 51[221] and by NATO that even called upon member States to render assistance. Later, even Iraq was taken into the fold of the war on terror which led the legally distinct conflicts against Iraq and Al Qaeda were treated as a single war. Gradually, US considered everybody as an enemy who was an ally of Al Qaeda.

Since 2006, apart from the clear targets of Al Qaeda and Taliban, US has acted against "associated forces". indulged into air strikes, targeted killings, and ground operation against groups such as Al Shabab in Somalia, Islamic State in Khorasan, and Al Qaeda in the Arabian Peninsula in Yemen. Further, despite Al Qaeda fighting against Islamic State since 2014, the US took military action against this group. On the pretext of Syrian government using chemical weapons against the civilians in 2017, US government undertook air strikes attacking the Syrian government forces. Currently, US is actively engaged in war in seven countries namely, Afghanistan, Iraq, Syria, Yemen, Somalia, and Niger.

Thus, the global war on terror has truly become global with almost 80 countries on six continents affected by it. Since 2011, with more than *twenty lakh* US soldiers, commanders and officers, there are *forty* countries where US has military bases and *sixty-five* counter terrorism camps. Even after three decades, completing in 2021 and spending $1.9 trillion fighting terrorism, the global war on terror is not winding down.

4.1.3.2 Al Qaeda: Founded by Osama Bin Laden in 1980s, it is the 9/11 attacks that brought terrorism to forefront and what resonated thereafter was a network, which became invisible of sorts, Al Qaeda. It has been described as a distinct group, or a network of groups and even network of networks. Few even describe it as an ideology,

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[221] Supra note 219 at 139.

intangible and perpetual, rather than an entity.[222] Being a complex international extremist network, Al Qaeda has been described as an organized entity with 'central direction, training, and financing'.[223] Up until 2001 it was an organized group having a clear leadership and a fixed location for training camps and headquarters.[224] The US invasion of Afghanistan precipitated the physical dispersal of the group which then transformed itself into a decentralized network metamorphosing into many groups and individuals operating on the basis of a shared ideology and, in some cases, past training in the Afghan camps. However, there may still be loose connections to the leadership of a 'Mother Al Qaeda (Al Qaeda al Oum)'. It is also referred as 'The Al Qaeda Associated Movement (AQAM)' that is run by the members of Al Qaeda and loosely associated extremists. This change is significant as it demonstrates decentralization of control with several branches of the network now functioning as a franchise.

The Australian government, which at times has been supportive of the US position in the war on terror, sets forth a similar assessment, going so far as to point out that '[f]or many Muslim extremists, Al Qaeda has become more an idea or ideology than a physical entity'. According to a 2010 Report to the US Senate Foreign Relations Committee: *"Over the past eight years, Al Qaeda has evolved into a significantly different terrorist organization than the one that perpetrated the September 11 attacks. At the time, Al Qaeda was composed mostly of a core of veterans of the Afghan insurgency against the Soviets, with a leadership structure made up mostly of Egyptians and bin Laden, a Saudi of Yemeni descent. Most of the organization's plots either emanated from—or were approved by—the leadership. The Al Qaeda of that period no longer exists. Due to pressures from U.S. and international intelligence and security organizations, it has*

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[222] 'US National Military Strategic Plan for the War on Terrorism', Chairman of the Joint Chiefs of Staff, Washington, DC 20318, 13 available at: https://archive.defense.gov/pubs/pdfs/2006-01-25-Strategic-Plan.pdf (Last visited on February 01, 2020).

[223] Jinks D., "September 11 and the Laws of War" 28 *Yale Journal of International Law* 1 – 38 (2003).

[224] Noam Lubell, *Extraterritorial Use of Force Against Non-State Actors* 118-121 (OUP Oxford, 1st edn., 2010).

transformed into a diffuse global network and philosophical movement composed of dispersed nodes with varying degrees of independence. [...] The Al Qaeda network today also is made up of semiautonomous cells which often have only peripheral ties to either the leadership in Pakistan or affiliated groups elsewhere. Sometimes these individuals never leave their home country but are radicalized with the assistance of others who have travelled abroad for training and indoctrination."[225]

At best, it appears that if Al Qaeda is to be described as a distinct entity, perhaps the most appropriate depiction that has been offered is of a structure that is 'murky' with a loosely organized but highly focused network.[226] Indeed, even the Director of the FBI spoke of a three-tiered threat, with the core Al Qaeda organization as the first tier, a second tier of 'small groups who have some ties to an established terrorist organization but are largely self-directed. These are Al Qaeda franchises—hybrids of homegrown radicals and more sophisticated operatives', and a third tier of 'homegrown extremists. They are self-radicalizing, self-financing, and self-executing. They meet up on the Internet instead of in foreign training camps. They have no formal affiliation with Al Qaeda, but they are inspired by its message of violence'.[227] Regional groups operating under the name of Al Qaeda operate in a number of places, including 'Al Qaeda in the Arabian Peninsula' (AQAP = merger of the Saudi and Yemeni Al Qaeda groups), Al Qaeda in the Islamic

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[225] US Senate Foreign Relations Committee Al Qaeda in Yemen and Somalia: A Ticking Time Bomb: Report to the Senate Committee on Foreign Relations, S. Rep. No. 111, 111th Congress, 2nd Session 5, available at: https://www.govinfo.gov/content/pkg/CPRT-111SPRT54494/html/CPRT-111SPRT54494.htm (Last visited on January 21, 2019).

[226] 'Transnationality, War and the Law', A Report on a Roundtable on the Transformation of Warfare, International Law, and the Role of Transnational Armed Groups', Program on Humanitarian Policy and Conflict Research, Harvard University (April 2006) 9.

[227] R. Mueller, Director, Federal Bureau of Investigation, "From 9/11 to 7/7: Global Terrorism Today and the Challenges of Tomorrow" Transcript of Chatham House event, available at: www.chathamhouse.org/events/view/154891 (Last Modified on 7 April 2008).

Maghreb[228], and Al-Qaeda in Iraq (sometimes referred to as Al Qaeda in Mesopotamia).[229]

Thus, Al-Qaeda has distinct features, which make it different from other contemporary transnational armed groups.

- Its objectives, nor its scope of activity are limited to a single territory or affect a particular group. It becomes difficult to neatly categorize its activities, as they are spread over across nations affecting several nations at the same time. For example, one of the targets of a strike in Pakistan was the head of the Islamic Movement of Uzbekistan.[230]

- It does not exercise government like control over an area or group of people, nor does it intend do so. It lives in thin air without needing support from any government or group to legitimise its objectives or actions. Although, based on radical Islam, it focuses on all Muslims with an object of a Caliphate over all territories, and being at war with America and its citizens that fund American activities. This seems too broad to be called a focus at all. This further distinguishes it from other groups like Hamas and Hezbollah who act for certain group, purport to exercise power over them and expect legitimacy from them.

- As not confined to a territory it cannot be defeated by seizing the territory. Further, not being connected to any population, it faces no restraint about any adverse impact on the population, nor strives for their materialistic gains to negotiate to bring the war to end.

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[228] "Profile: Al-Qaeda in North Africa" BBC News, Jan 17, 2013.

[229] Schmitt E., "Iraqi Qaeda Group Shifts to Remain a Threat", The New York Times, Dec. 20, 2009.

[230] "Uzbek rebel "killed" in Pakistan", BBC News, Oct. 2 2009.

Available at: http://news.bbc.co.uk/2/hi/south_asia/8286315.stm (Last visited on Aug 6, 2019).

- Al Qaeda has indicated that maximum damage is its main terrorist strategy and is capable to use the limited biological, chemical, and radiological capabilities it is believed to possess.[231] This indicates its military operations different from other groups.

- Instead of a centralized command structure, Al Qaeda is a decentralized network, acting in small autonomous groups, sometimes comprising of self-motivated members of the country on target.

Thus, almost nineteen years after the 9/11 attacks, the group has evolved significantly. Osama bin Laden was killed in May 2011 and since then, the group has been led by Ayman al- Zawahiri and his son and heir apparent Hamza bin Laden, who was killed recently in a US attack. Due to the growing prominence of ISIS in Syria, Al Qaeda faced serious existential crises in the last few years and hence established relationship with Al Shabaab in Somalia, Jabhat al-Nisra in Syria and al- Qaeda in the Indian Subcontinent (AQIS) in South Asia. The influence of the core of the group in Pakistan has decreased but the franchise groups have grown in prominence, like Al Qaida in Arabia Peninsula (AQAP), Al Qaeda in the Islamic Meghreb (AQIM), and its various off shoots throughout the Salem, AQIS, al- Shabaab and Hurras al Deen (HAD)- Al Qaeda's representative in Syria. Its AQAP that has involved itself into public works projects in the areas under its control like refurbishing water wells, fixing damaged infrastructure and providing basic necessities to the poor. It has also entered into agreements with countries like UAE and Yemen that view this terrorist group as partner. With more than 40,000 members spread across the world, Al Qaeda has again started to regain its prominence and making its fear and presence felt through streamed messages.

This further makes it difficult to deal with Al Qaeda in a strict legal fabric and apply the international humanitarian law keeping in mind its nature and identity.

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[231] Ulrich Schneckener, *Transnationaler Terrorismus: Charakter und Hintergründe des 'neuen' Terrorismus* (Frankfurt am Main: Suhrkamp, Germany, 2006).

4.1.3.3 United Nations: United Nations has always played an active role in maintaining peace and countering use of force and terrorism. The involvement of UN has broadened in the post-Cold War times, that is in the nineties, and further broadened in the post 9/11 decades. The post-Cold War era saw instances of rising internal conflicts, gross human rights and humanitarian violations that forced UN for collective action in those cases which would fall under individual actions. The notion of 'threat to international peace and security' was broadened which led to the expansion of threat to include global, regional, and national experiences of terrorism. The main instrument in the 1990s in the fight against terrorism was economic sanctions which were adopted against Libya in 1992, against Sudan in 1996 and against Taliban in 1999 in Afghanistan. The other sanctions turned out to be effective but not the one against the Taliban as it run on illegal opium trade in connivance to Al Qaeda. Thus, more effective international responses were seen after 2001, when terrorism became the top priority. The Security Council within hours of attack, passed two resolutions for military action and for globalised fight against terrorism obligating all the 191 UN member States to take legislative and executive actions at the domestic level in order to prevent and suppress future terrorism activities.[232] These resolutions recognised the right of self-defence of individual or collective States in response to terrorist acts thus allowing them for individual and military response.

After the overthrow of the Taliban regime in Afghanistan in late 2001, the Security Council applied sanctions against Al Qaeda, the remaining Taliban units, and their associates, and obligated all States to implement these sanctions. Prior to 9/11, the Security Council's strategy for targeting the Al Qaeda network had primarily consisted of the sanctions package against the Taliban regime; only in Resolution 1333 (2000) did the UNSC apply limited sanctions against Al Qaeda. After the downfall of the Taliban regime, the UNSC recognized that Al Qaeda had lost its main state(-like) sponsor and

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[232] Chantal De Jonge Oudraat, "The United Nationa and the Campaign against Terrorism", 1 Disarmament Forum 2, 3 (2004).

restructured its sanctions regime to adjust it to the altered circumstances. Consequently, Resolution 1390 (2002) and its follow-up resolutions required all States to take relatively extensive measures to directly target Al Qaeda and the Taliban, as well as individuals, groups, undertakings, and entities associated with them. It turned out that UN actions against terrorism had become open-ended, global regime that is focused on any group or entity associated with Al Qaeda, Osama Bin Laden and Taliban and were not linked to a particular conflict. Since then, UNSC has come up with several resolutions whereby all States had to freeze financial assets and economic resources owned or controlled by individuals or entities subject to the sanctions, prohibit the entry into and transit through their territory of the designated individuals, prohibit supply, sale, and transfer of arms and related materials, as well as refrain from providing training or military assistance to the respective individuals and entities. The latest resolution UNSCR 2462 on 'Threats to international peace and security caused by terrorist acts: Preventing and combating the financing of terrorism' passed in March 2019, has further tightened the financial aid to terrorist activities and organisations even impacting the humanitarian and civil societies working in the conflict zones.[233]

4.1.3.4 Alliance in the Global War on Terror: Two coalitions operated the Global War on Terror in Afghanistan, the US led, and the NATO led coalitions. US led coalition comprised of special forces, air and naval, strictly under the US chain of command claiming legitimacy under right to self-defence. The NATO led coalition referred to International Security Assistance Force (ISAF) with the mandate of UNSC ISAF comprised a total strength of more than *fifty thousand* soldiers from across *fifteen* nations excluding US and Afghanistan. In the US led operation Freedom, more than *sixty* countries and their military have contributed so far.

4.1.4 Classification of the Conflict on War on Terror: Several aspects that make the classification of Global War on Terror difficult is that *firstly*, this conflict primarily

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[233] UN Security Council, SC Res 2462, SCOR, UN Doc S/Res/2662 (March 28 2019).

involves a transnational armed group that has dispersed members with decentralised organisation. *Secondly*, all major countries can be said to be participating in this war as they are fighting against anybody who qualifies as a terrorist without having any single definition of a terrorist at all. *Moreover*, the global war on terror seems to be at a crossroad with the criminal law and humanitarian law on the road to International Law. Thus, the classification becomes a subject of debate. Some scholars consider it to be a non-international armed conflict as its not between two States but is between a State and a non-State group.[234] However, the other group is of the opinion that due to the cross-border nature spread over multiple States who are actively engaged in the conflict, it's an international armed conflict.[235] However, any pure and strict classification of such a hybrid conflict is difficult,[236] it is important to determine first that whether Global War on Terror is an Armed Conflict at all.

4.1.4.1 International Armed Conflict: As per the Geneva Conventions, rules of international humanitarian law apply to armed conflicts. Common Article 2 to the

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[234] T. Hoffmann, "Squaring the Circle? International Humanitarian Law and Transnational Armed Conflicts", International Humanitarian Law and Transnational Armed Conflicts. Hague Academy of International Law, 218 (2011), In Matheson, M.J. and Momtaz, D. (eds), *Rules and Institutions of International Humanitarian Law Put to the Test of Recent Armed Conflicts*, 217, at 253–4; Andreas Paulus and Mindia Vashakmadze, "Asymmetrical war and the notion of armed conflict: a tentative conceptualization", (2009) 91 *International Review of the Red Cross* 95, at 111–12.

[235] Human Rights Council resolution S-2/1, UN Doc. A/HRC/3/2, 23 November 2006, paras. 59, 62. This view was endorsed by the Commission, ibid., paras. 55–60.

See also Supreme Court of Israel, *The Public Committee against Torture in Israel* et al. *v. The Government of Israel* et al., Supreme Court of Israel, 13 December 2006, HCJ 769/02, para.18.

Stewart, J., 'The UN Commission of Inquiry on Lebanon: A Legal Appraisal', (2007) 5 *Journal of International Criminal Justice* 1039, at 1042–3.

[236] Corn, G.S., 'Hamdan, Lebanon, and the Regulation of Armed Hostilities: The Need to Recognize a Hybrid Category of Armed Conflict', (2006) 40 *Vanderbilt Transnational Law Journal* 295

Schöndorf, R.S., 'Extra-State Armed Conflicts: Is There a Need for a New Legal Regime?', (2004) 37 *New York University Journal of International Law and Politics* 26.

Conventions states that they "shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties." Thus, only States can be contracting parties to the Conventions and not transnational armed group like Al Qaeda as it is not a State. Therefore, the hostilities between the US and Al Qaeda do not qualify as an international armed conflict to attract the application of the Geneva Conventions. Even the customary international law is silent on the matter.[237]

The next question then can be is whether the term 'war on terror' changes the nature of the conflict and making it fall within the purview of rules of international armed conflict. As Geneva Conventions apply 'to all the cases of declared war' it initially raised few questions. However, declaration or recognition is no longer the criteria for trigger the application of Geneva Conventions. Further, declaration by Al Qaeda that it is at war with US does not hold any values in the eyes of law as a non-State actor has no ground to declare a war against a State. Thus, the factors that trigger application is hostilities or engagement between two States, whereas Al Qaeda is not a State, hence any conflict with a non-State actor will not fall under the definition of international armed conflict, simply because of its nomenclature or because of its global nature.

Although, these situations fall outside the purview of law of armed conflicts, some activities of transnational armed groups and actions taken by States against such transnational groups will be termed as international armed conflict. These activities are those that are directed against the armed forces or territory of State by forces acting as

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[237] William K. Lietzau, "Combating Terrorism: Law Enforcement or War?", in Michael N. Schmitt and Gian Luca Beruto, eds., *Terrorism and International Law, Challenges and Responses, San Remo:* International Institute of Humanitarian Law and George Marshall European Center for Security Studies, 2002, p. 80.

proxy for another State representing it or under a *de facto* control of that other State.[238] Similarly, it is possible that in 2001, Al Qaeda in Afghanistan was acting under the direction and control of Afghanistan. In such a scenario the law of international armed conflict would then apply. Although at that time, international humanitarian law was already applicable due to the conflict between the US and Taliban which was de facto controlling Afghanistan. Likewise, the law of international armed conflicts would apply in cases of hostilities directed by a State against a transnational armed group in the territory of third State without its authorization or consent. Although, such an application is too controversial.[239]

Further it was presumed that if any internal conflict adopts an international element, the entire conflict will turn into international. But, if one looks onto the State practices it turns out that a conflict is divided into components.[240] Even before 2001, nobody called a worldwide conflict as international simply because few components of it were international in character. Similarly, even during Cold War this issue had never aroused.

Thus, it can be said that when US forces attacked Afghanistan on its refusal to handover Al Qaeda terrorist triggered the application of law of international armed conflict. However, war on terror or against Al Qaeda will not be classified as an international armed conflict.

4.1.4.2 Non-International Armed Conflict: The International Criminal Tribunal for the Former Yugoslavia (ICTY) has laid down two criteria for establishing the existence of a non-international armed conflict: (i) the intensity of the conflict and (ii) the organization

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[238] Marco Sassoli, *Transnational Armed Groups and International Humanitarian Law*, 8 Program on Humanitarian Policy and Conflict Research (Harvard University Occasional Paper Series Winter 2006 number 6).

[239] Ibid.

[240] Dietrich Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", 163/II Collected Courses (1979) 119.

of the parties.[241] The Tribunal has proposed a list of indicative factors relevant in determining whether the required threshold of intensity and organization has been met.[242] To classify the hostility between US and Al Qaeda as a non-international armed conflict faces conceptual as well as factual challenges. With respect to the factual analysis of the classification, it must be determined that whether the conflict reached the threshold of Common Article 3 and the exclusionary criteria of "situations of 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."[243] "Relevant factors that contribute to an armed conflict include: intensity; number of active participants; number of victims; duration and protracted character of the violence; organization and discipline of the parties; capacity to respect international humanitarian law; collective, open, and coordinated character of the hostilities; direct involvement of governmental armed forces (vs. law enforcement agencies); and *de facto* authority by the non-state actor over potential victims."[244]

US in its instructions to Military Commissions has a broad understanding of armed conflict. "Armed conflict does not require ... ongoing mutual hostilities .... A single hostile act or attempted act may provide sufficient basis ... so long as its magnitude or severity rises to the level of an 'armed attack' or an 'act of war', or the number, power, stated intent or organization of the force with which the actor is associated is such that the act or attempted act is tantamount to an attack by an armed force. Similarly, conduct undertaken or organized with knowledge or intent that it initiates or contributes to such

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[241] ICTY, *Prosecutor v. Haradinaj* et al., Judgement, Case No. IT-04-84-T, T.Ch. I, 3 April 2008, para. 38.

[242]Ibid para. 49..

[243] Protocol II, art. 1(2).

[244] Marco Sassoli, Transnational Armed Groups and International Humanitarian Law, 8 Program on Humanitarian Policy and Conflict Research (Harvard University Occasional Paper Series Winter 2006 number 6)

hostile act or hostilities would satisfy the nexus requirement."[245]   Thus, as per the state practice of US, 9/11 attack can definitely be termed as an armed attack and permit US to retaliate on the grounds of self-defence under Article 51 of UN Charter.

The other questions that were asked were whether a conflict between a transnational armed group and a State or several States spread geographically and operationally over the territory of many States can be termed as non-international armed conflict. To this, the United States administration refused to consider the war against Al Qaeda as a non-international armed conflict and thus not being covered by common Article 3[246]. The rationale behind this argument was that the conflict between Al Qaeda and the US was spread on territories of several States and not on the territory of just one State party, thus giving a very narrow, limited and rudimentary interpretation to Common Article 3 and Add Protocol II. Even a conflict spreading across borders remains a non-international armed conflict. Thus, it must be understood that international and non-international armed conflicts are distinguished based on parties involved and not on the basis of the territorial scope and geographical spread of the conflict.[247]

Thus, in cases of conflict between a transnational armed group and several States, can be termed as a non-international armed conflict if it fulfils the prescribed thresholds of Common Article 3 and Additional Protocol II. Although, there is no unanimity in this characterisation as some call the conflict between US and Al Qaeda and similar terrorist organisations as armed conflicts[248], and some restrict it only to the conflict of 2001-2002

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[245] Section 5(C) of Military Commission Instruction No. 2, Crimes and Elements for Trials by Military Commission, April 30, 2003, www.dtic.mil/whs/directives/corres/mco/mci2.pdf.

[246] Marco Sassoli, Transnational Armed Groups and International Humanitarian Law, 8 Program on Humanitarian Policy and Conflict Research (Harvard University Occasional Paper Series Winter 2006 number 6).

[247] Liesbeth Zegveld, Accountability of Armed Opposition Groups in International Law, Cambridge: Cambridge University Press, 2002, p. 136.

[248] Jinks D. (2003). September 11 and the Laws of War, *Yale Journal of International Law 28* (p.1 – 38).

in Afghanistan and not the current war on terror.[249] This is so because the intensity of violence between US and Al Qaeda has not crossed the required threshold. Since 9/11 there have been attacks by Al Qaeda in Bali, Madrid, London, and Jordan which are not internal to US nor they are protracted.

However, the classification further becomes controversial due to the decentralized nature of Al Qaeda and several groups independently acting on the similar lines of Al Qaeda feeling associated to the group based on the shared enmity towards the Western societies. This makes the classification difficult as it happened after the terrorist attacks in Madrid in 2004 and in Lebanon in 2005. Both the governments, British and Spanish could not target the harbour of the terrorist which was a building as a military object as they did not consider themselves to be in armed conflict at that times. The decision was taken since those who perpetrated the terrorist attacks of 2004 and 2005 were nowhere associated to Al Qaeda but had used the same websites and instigated by the same hate towards the West.[250]

Thus, the independent terrorist networks that have mushroomed worldwide point to the decentralized network of Al Qaeda. These groups seek their inspiration from around five thousand radical Islamic websites. The Central Intelligence Agency's Director offered in April 2006 that "new jihadist networks and cells, *sometimes united by little more than their anti-Western agendas*, are increasingly likely to emerge".[251]

As noted by Gabor Rona, '[Parties] have rights and responsibilities. There can be no humanitarian law conflict without identifiable parties. ... Wars against proper nouns ...

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[249] Jelena Pejic, "Terrorist Acts and Groups: A Role for International Law?", 75 British Yearbook of International Law (2004), pp. 85-88.

[250] "Indictments are Near in '04 Attacks, Report says Madrid will charge 30-40", The International Herald Tribune, April 10, 2006, p. 3; "Al-Qaida n'est pas lié aux Attentats de Londres", Le Monde, April 11, 2006, p. 8.

[251] Mark Mazzetti, "Spy Agencies Say Iraq War Worsens Terrorism Threat", The New York Times, September 24, 2006, p. A1, citing the leaked National Intelligence Estimate of 2006.

have anyway advantages over those against common nouns (e.g., crime, poverty, terrorism), since proper nouns can surrender and promise not to do it again.'[252]

4.1.4.3 No armed conflict: Is Terrorism & Counterterrorism an Armed Conflict?

Every day, States are fighting non-State actors that are designated as terrorist. The launch of global war on terrorism and rising non-State actors have brought to the crossroads two different regimes, international humanitarian law and law on terrorism in domestic and international regime. The recent overlapping between the two regimes has led to the blurring of the distinction between the two.

Firstly, the war on terror has no identified party. Terror or terrorism cannot be a party to an armed conflict. Hence, an identifiable party is important to apply the provisions of international humanitarian law. Hence, war on Al Qaeda can be tested on the criteria of armed conflicts.

Secondly, it is important to understand that terrorist activities by an armed group non-State actor during an armed conflict is not unlawful as certain acts are not prohibited under international humanitarian law. Similarly, counter-terrorism measures taken against non-State groups designated as terrorist does not trigger the application of law of armed conflict. It has to be tested factually based on the criteria of the Geneva Conventions. The dispersed organisation and more instances of allegiance have limited the consideration of terrorist as armed groups under the Common Article 3.

Thirdly, international humanitarian law provides equal rights to both the parties during the conduct of hostilities, which is not the case in the law regulating terrorist activities.
It does happen that the counter-terror measures to curb direct and indirect terrorist organisations under the domestic regime or International Law, are so exceptional in

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[252] Gabor Rona, "International Law under Fire – Interesting Times for International Humanitarian Law: Challenges from the 'War on Terror'", 27 The Fletcher Forum of World Affairs, (2003), pp. 60-61.

nature that they violate the principles of international humanitarian law and even obstructing the reach of humanitarian measures to the needy. Hence it becomes important to examine that what are the repercussions of terrorism being dealt as an armed conflict and not as a crime.

The United States has conducted its military operations worldwide under the domestic framework of AUMF, whereby it claims that international humanitarian law applies but it's not obligated by the same whereby it has all the rights prescribed the international humanitarian law, its enemies do not. Thus, the Talibani terrorists captured in Afghanistan, members of Al Qaeda captured anywhere in the world will be treated as unlawful combatants and thus they are neither protected by Convention III on prisoners of war nor by Convention IV on civilians. Hence, "war on terrorism" is no such thing to attract application of international humanitarian law, rather every event must be assessed individually.

4.1.5 Challenges: It is quite clear that under the Global War on Terror, US is fighting international armed conflict against Taliban in Afghanistan and is fighting non-international armed conflict against Al Qaeda in Afghanistan, Iraq, and Pakistan. However, rest in all other countries, the hostilities between US and Al Qaeda and associates is not an armed conflict. Hence, it becomes important to classify those set of hostilities happening outside the conflict zones but under the same framework.

Thus, the 'global war on terror' paradigm raises several challenges due to the application of international humanitarian law.

● **Blurred distinction between war and peace** - Non-applicability of international human rights law: international humanitarian law allows parties to use more lethal force and target civilians directly participating in the conflict or can be lawfully killed as unintentional collateral damage if military advantage is in proportion to the civilian deaths. However, in times of peace none of these is permissible under international human rights law. Thus, increase in scope of global war on terror has

made hundreds of thousands of civilians vulnerable in Yemen, Somalia, Pakistan, and others wherever the conflict extends. Further, international humanitarian law does not recognize "unlawful combatants" status to participants in armed attack. Either they are combatants or civilians, and on both the cases are protected. However, the tag of unlawful combatants prevents the terrorist to be protected neither under international humanitarian law or international human rights law.

- **Non-Combatant Status of American Soldiers:** As combatants' privilege is not available in non-international armed conflict, American soldiers are not protected for their actions and conduct during the war on terror. They can be exempted only by domestic law, which has been provided by Afghanistan by virtue of Status of Forces Agreement 2002. However, as the war on terror has spread almost in many parts of the globe, American soldiers face potential prosecution for any act of extra territorial violence.

- **Target of Affiliated groups that are unconnected with the original conflict**: With authority to target groups affiliated to Al Qaeda has raised legal and practical challenges. Legally, US is authorised to attack Al Qaeda as a resort to self defence against 9/11 and hence it would be erroneous to attack groups do not connect to Al Qaeda's global outlook. Many groups have emerged for regional objectives. An example of this is asking US to attack Al Qaeda in Syria. Practically, US attacking other groups not having any nexus to the 9/11 attacks but focusing regional objectives start engaging with US. Example is US drone strike killing Al Shabab's leader in 2008 led to direct engagement between the two in Somalia.

- **Direct Attack:** The US Supreme Court in the case of *Hamdan v. Rumsfeld* decided that US was at war with Al Qaeda and Taliban and thus the laws of war are applicable. Similar stand was taken by the Bush Administration. Accordingly, the use of drones and the military force was in line of the proportionality test and thus consistent with the laws of war. This stance was changed during the Obama

Administration which reframed its global war on terror as a war against Al Qaeda, the Taliban, and associated forces.[253] However, this was merely a political statement as militarily the drone strikes were still conducted at several places in Pakistan and Yemen still considering the world as a battlefield. Moreover, the number of drone strikes had actually risen by the Obama Administration as the US targeted several Al Qaeda and Taliban leaders killing the leader of Al Qaeda in Yemen by the U.S. airstrike.[254]

Thus, the ongoing air strikes raise several questions about the terminology of the conflict. The terminology of 'war against Al Qaeda and associated forces' and 'global war on terror' would affect the applicable laws pertaining to targeted killings and drone strikes. Considering that the US in engaged in armed conflict against Al Qaeda terrorists, then the laws of war are applicable, which makes the rules of legality of military force, the principle of necessity and proportionality become applicable. [255] In such a scenario, members of Al Qaeda if become lawful combatants can be targeted, but if they are not, they are protected as civilians and cannot be a military target. Further, indiscriminate attacks are prohibited as the distinction between military objects and civilians must be obliged to and any attack done has to fulfil the principle of proportionality which is based on military necessity and advantage. [256]

Moreover, principles of humanity also must guide the actions of parties in a conflict which generally prohibits use of weapons that can cause unnecessary suffering.[257]

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[253] Milena Sterio, The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law, 45 Case Western Reserve University School of Law 197 (2012).

[254] Seligman L. & Gramer R. (2020, February 3). Leader of Al Qaeda in Yemen believed dead in U.S. Airstrike, Foreign Policy. https://foreignpolicy.com/2020/02/03/al-qaeda-leader-yemen-believed-killed-c-i-a-drone-strike-arabian-peninsula-security-brief/.

[255] Supra, note 238.

[256] Ibid.

[257] Additional Protocol I, art. 35(2)

Although, the Obama Administration was very confident of its air strikes when it claimed that its drone programme is in sync with the rules of *jus in bello* as the targeting is accurate because it narrows down the focus to exactly the target avoiding harm to civilian and civilian objects.[258] However, the authenticity of the drone programme remains under the cloud of doubt due to the secrecy maintained by the CIA.

- **Detention of Terrorists**: Declaring Global War on Terror, US claimed three major wartime privileges, to declare suspected individuals as "enemy combatants", the right to target, capture and kill the enemy combatants and the right to search ships and seize cargo if they are suspected of carrying materials for terrorists. Thus, US could target anybody anywhere without any warning on the pretext of it being a member of Al Qaeda or an associate of it.

  US Administration under Obama tried to distance itself from the rhetoric of 'war on terror' by using the term 'global campaign' but still continued using the term 'war on Al Qaida' making the war narrow, not against terrorism but against a specific entity. A host of cases have been litigated, including five already decided by the US Supreme Court,[259] yet basic questions still lack definitive answers. If this is essentially a "war," what international law provisions apply? Who can be killed or captured? How long can those captured be held, and under what conditions? How many prisoners be interrogated? Can detainees be criminally tried? If so, by what courts and on what charges?

  The US Supreme Court's decisions have confused, rather than clarified, these issues. In 2004, for example, Justice O'Connor's plurality opinion in ***Hamdi v.***

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[258] Supra note 238.

[259] Boumediene v. Bush, 128 S. Ct. 2229 (2008); Hamdan v. Rumsfeld, 548 U.S. 557 (2006); Rumsfeld v. Padilla, 542 U.S. 426 (2004); Rasul v. Bush, 542 U.S. 466 (2004); Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

Rumsfeld held that detention of enemy fighters was a "fundamental incident" of waging the conflict Congress sanctioned in the September 2001 Authorization for the Use of Military Force (AUMF).[260] Although not explicitly stated in the opinion, the authority discussed is logically sourced in the law of war governing international armed conflict.[261] Two years later in ***Hamdan v. Rumsfeld***, however, Justice Stevens's plurality opinion seemed to hold that the conflict is "non-international," governed by Common Article 3 of the 1949 Geneva Conventions. But the law of war provides no authority for detention in non-international conflicts; it must be provided by domestic law, and no U.S. law addresses this issue or could logically govern extraterritorial conduct in this realm.[262] And in its 2008 ***Boumediene v. Bush*** decision, the Court held that Guantánamo detainees had a constitutional right to *habeas corpus* review but gave little guidance as to the substantive law to be applied in judging their cases on the merits.[263]

- **Individual status**: Considering that laws of war apply to war against Al Qaeda, its members become lawful combatants and thus lose the protection accorded to the civilians. However, terrorists usually do not wear uniforms to be identified as combatants. Contemporary wars are fought by armies and militias that appear as civilians and disguise themselves to not to resemble as soldiers. In such a scenario one such provision of Geneva Conventions raises a very peculiar issue related to the identification of the soldiers. As per the Geneva Conventions, soldiers need to be dressed in uniforms to be identified as a lawful combatant. However, strict

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[260] Hamdi v. Rumsfeld: 542 US 507 (2004) at 518-19.

[261] Id. at 518-21.

[262] Green L. C., *The Contemporary Law Of Armed Conflict* (1st ed.) 52-57 (1993); Kevin Jon Heller, *Three Thoughts on the Preliminary Detention Report, Opinio Juris*, (last visited on July 21, 2019); Goodman R., *Rationales for Detention: Security Threats and Intelligence Value*, International Legal Studies, HLS 85.

[263] Boumediene v. Bush, 553 U.S. 723.

interpretation of such a rule would make members of Al Qaeda unlawful combatants and unprotected civilians and not true soldiers of war.[264]

Moreover, the Geneva Conventions and the Additional Protocols are silent with respect to the requisites of direct participation in hostilities by civilians. However, these requirements can be found in the study conducted by the ICRC and in an Israeli Supreme Court case law.[265] As per the ICRC study, direct participation deals with a specific act participation in which by the civilians make them lose their protection against direct attacks, unlike members of an armed group who remain as participants due to constant combatant function for the entire duration of their membership in the given armed group.[266]

Following the above methodology, members of Al Qaeda or the terrorists can thus be a target while they are directly engaged in the active hostility, restricting the lawful use of force and selection of targets and thus raising questions on the legality of the entire drone programme.

The second approach was given by the Supreme Court of Israel that is based upon the fact "whether civilians are performing the function of combatants."[267] Civilians participating in random hostile acts do not lose their protection, but the permanent members of terrorist groups do lose their protected status of a civilian. Hence, by this approach members of Al Qaeda do not have protection as civilians.

Therefore, due to no unanimous practice or a definite law for classification and loss of protection of the individual status, applicability of the humanitarian law comes

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[264] Supra Note, 238.

[265] Ibid.

[266] Supra Note, 238.

[267] Helen Keller and Magdalena Forowicz, *A Tightrope Walk Between Legality and Legitimacy: An Analysis of the Israeli Supreme Court's Judgment on Targeted Killing*, 21 LEIDEN J. INT'L. L. 185, 207 (2008).

into question. Detailed analysis is required after every terrorist attack and severe preparation before every target. Although, Obama Administration was clear in its approach when it held that "individuals who are part of an armed group are belligerents and, therefore, lawful targets under international law."[268]

4.1.6   Conclusion: Is Global War on Terror a New War?

Terrorism is not new. It has been used as a method of war since ages. However, rise of non-State actors resorting to acts of terrorism is a growing concern as two separate issues are now intermixed to a great extent. Stringent counter terrorism operations, especially after 9/11 have blurred the distinction between war and peace. The global war on terror has challenged the very distinction of civilians and combatants, international and non-international conflicts on which the premise of international humanitarian law is based. The events after 9/11 have challenged the sufficiency of law of armed conflict and this has further worsened due to the features of fourth generation warfare. Fighting against a non-State armed group that has spread and dispersed across the world, with an ideological goal that cannot be defeated until the ideology is crushed has led this conflict to be referred as a clash of civilizations. With numerous States forming alliances and supporting a failed State in its fight against non-State groups like Taliban and US constantly attacking a non-State group have for twenty years have highlighted grave asymmetry in the parties that have led to severe consequences like, use of technology, targeting civilians and use of methods and means to target large number of populations in a single attack.

The global war on terror has further highlighted the nuances of extraterritorial application of domestic laws and misuse of the principles of international humanitarian law. Even if the laws of war would have been applied, they would still turn out be inadequate keeping

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[268] Milena Sterio, The United States' Use of Drones in the War on Terror: The (Il)legality of Targeted Killings under International Law, 45 Case Western Reserve University School of Law. 197 (2012).

in mind the nature of the adversary and its willingness to comply with the rules of armed conflict. Though, began as an exception after the 9/11 attack, the Global War on Terror has been normalized in the last thirty years.

4.2   Case Study 2: Syrian Conflict

4.2.1   Introduction: The conflict in Syria is one of the classic cases of those conflicts that are too straight to fit into the traditional classification of the conflicts. The Syrian conflict has all the major features and characteristics of the contemporary conflicts. Starting from the beginning of 2011, it has turned out to be the most complex conflict with numerous actors bearing convoluted relationship with each other and the international actors and other significant partners and players. While it witnessed all major modern weapons from missiles to drones being used in the conflict, the conflict further shocked the world using chemical weapons on civilians and protected objects. The conflict might just have caused regional disturbance, but the cascading effect of the conflict has been the emergent refugee crises that led the waves of conflict travel across continents. When the conflict is nearing a decade, the international community including US and Russia have taken several efforts in mitigating the effects and humanizing the war, unfortunately failing to abate the violence. More than 6.2 million people have left their homes, leaving behind *four lakhs* who have died in the last *nine* years, but any efforts to end the conflict have failed to bring everlasting tenable solutions. Undeniably, many reasons can be accounted for the failure, where the legal dilemma caused by the conflict is one among them.

This part of the research has tried to analyse the classification of the conflict in the existing framework to determine the efficacy of the current system to address the challenges faced by contemporary conflicts. The assessment is based on the factual overview of the hostile scenario of the conflict, its multitude parties, and their alignments. Lastly, the consequences of such a classification will also be discussed.

4.2.2 Background to the Conflict

4.2.2.1 Overview of the Syrian Conflict: Until the World War I, ruled by the Ottoman Empire and after the war, under the French, Syria remained under military occupation and forced regime changes till 1941. Even after the French had left, Syria could not establish a stable government for nearly three decades. In 1970, Hafez-Al-Assad, father of current leader Basher-Al-Assad, of Allawi religious minority and member of socialist Bath Party seized power and solidified his position post a referendum.[269] Since then, the eruption of conflict in Syria has been based on religion and sectarian issues. Assad's governance was based on "Arabism" and modern secular values. In opposition to the socialist Baath Party was the conservative Sunni Brotherhood, an Islamic movement aimed to make Syria a Sunni Muslim nation. Majority population being Sunnis, Alawis and Assad family was considered as heretics. Any opposition to the regime was cracked down forcefully as it happened in 1982 when an uprising by Muslim Brotherhood was suppressed by violence and seizure of their headquarter, Hama. Post the death of Hafez, Bashar became the President in 2000 by referendum vote but bringing no reforms in corruption. This led to more open political discourse also called the "Damascus Spring", which was nonetheless silenced by arresting the activists[270]. Further, the economic policies favoured the minority Alawis or Shia and marginalized most of the population. The disproportionate benefit to 13% minority disenfranchised a vast majority causing resentment and destabilization.[271]

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[269] William R. Polk, "Understanding Syria: From Pre-Civil War to Post-Assad", *The Atlantic,* December 10, 2013.

[270] Amnesty International, Report on Syria: Smothering freedom of expression: The detention of Peaceful Critics (June 2002).

[271] Christopher Phillips, "After the Arab Spring: Power Shift in the Middle East? Syria's Bloody Arab Spring", London *School of Economics* 37, 38 (2012).

4.2.2.2 Other Contributing Factors: The political history is one of the root causes of the conflict. However, there have been other factors that have affected the dynamics of the Syrian Conflict. The political distrust towards the government was aggravated by internal and extraneous factors like the environmental problems, economic crises and regional instability and unrest.

i.   **Economic Instability**: Although serious efforts were taken by Assad, the financial stability of small country like Syria was adversely affected by a lot of foreign developments like the global financial crises and regional unrest causing depleting trade worsened by growing population and long-term droughts. These developments affected the urban and the rural population concurrently, eventually burdening the urban areas after large scale migration from rural areas due to crop failures.[272]

ii. **Arab Spring:** During the same time, when India saw its mass movement against corruption led by Anna Hazare and other non-governmental organisations, a fruit vendor in Tunisia Mohammed Bouazizi set himself on fire to protest against corruption and injustice meted by the Tunisian government.[273] The same fire spread all over Algeria, Jordan, Egypt and Yemen and even led to change of regimes in Tunisia and Egypt. This Arab Spring further spread to Libya, Saudi Arabia, Iran and other countries.[274] The reverberations of Arab Spring were felt in Syria when people started public demonstrations, using all forums like Facebook, Twitter and YouTube to protect and demanded a regime change.

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[272]   The World Bank in Syrian Arab Republic, *available at:* http://www.worldbank.org/en/country/syria/overview (last visited August 07, 2020).

[273] David Wallace, et all, "Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict"', 25.3 *Michigan State Law Review* 560 (2017).

[274] Marc Fisher, "In Tunisia, Act of One Fruit Vendor Sparks Wave of Revolution Through Arab World", *The Washington Post,* Mar. 26, 2011.

iii. **The Syrian Uprising:** The Arab Spring and its success gave momentum to the internal protests in Syria to which the Syrian government responded with a iron fist, killing hundreds. Even children being part of demonstrations were not spared[275] and the regime and its leader Assad unapologetic about it.[276] More protests led to more violent crack-down which ultimately prompted to the radicalization of conflict acting as catalyst for a nationwide movement filled with riots and violence. The rebels organised themselves into military groups numerous in number and engaged into violence with the Syrian armed forces. Since then, numbers of groups have come to the forefront, joined by foreign fighters, and funded by foreign countries. The enduring violence and chaos led to a failing State. This vacuum was filled by an emerging group, Islamic State successful in making inroads within Syria.[277]

4.2.3 Actors in Conflict: With more than a hundred-armed groups and militias[278] Syrian conflict is one of those conflicts that illustrates characteristic feature of contemporary conflict-multiplicity of parties and foreign intervention. With armed groups active at local level, each fighting with a different aim, Syrian Conflict has seen cooperation, clashes, and shifting alliances among the parties making the situation fluid. Further, numerous State and non-State armed groups taking part in the hostilities make the classification a difficult task. Understanding the nature of armed groups participating in the conflict is pertinent to classify the conflict. Hence, the major parties have been identified and discussed below.

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[275] Daraa: The Spark that Lit the Syrian Flame, CNN, *available at*: http://www.cnn.com /2012 /03/01/world/meast/syria-crisis-beginnings/ (last visited August 21, 2020).

[276] Supra note at 256.

[277] Richard Johnson, "Visualizing the 220,000 Lives Lost in Syria", *The Washington Post,* Mar. 29, 2015.

[278] Congressional Research Service, Report on Armed Conflict in Syria: Overview and U.S. Response, (July 27, 2020).

4.2.3.1 Syrian Government and its Allies: Bashar-al-Assad, the President of Syria, still controls the capital, the machinery and the armed forces, western part of country bringing major urban areas under his control and the whole of coastal region. It still maintains diplomatic relations in the region and continues to represent the country at United Nations, thus acting as the *de jure* 'Government of Syria' from the international legal perspective.[279]

With many soldiers deserting or losing life, the Syrian Government has been supported by a large pro-government militia, National Defence Forces (NDF), organised with the help of Iran, that work under the command and coordination of armed forces while participating in offensive and defensive operations. The other foreign fighters fighting on behalf of the government are Lebanese Shiite militia Hezbollah, Iraqi and Afghan Shiite fighters.

Further, there are two States, Iran and Russia that have provided active support to the Syrian Government. Iran, in addition to training, military advice and aid, has deployed its own Revolutionary Guards in the support of the Syrian Government.[280] Russia also provided support to Syria Government in the form of arms and ammunition, guided missiles, drones and military advisors on the front itself. Further, at the request of Syrian Government, Russia has provided with troops that have targeted opposing rebel forces like Al-Sham and ISIS.[281]\

4.2.3.2 Free Syrian Army: Free Syrian Army was formed out of the army officers defecting from the Syrian army in 2011. Later, it broadened to take into its fold many rebel groups of the Supreme Military Council. Supreme Military Council is the Syrian

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[279] Terry D Gill, "Classifying the Conflict in Syria*"* 92 *International Law Studies* 4 (2016).

[280] Ibid.

[281] *Syrian Rebels to Russia: Stop Bombing Us*, REUTERS (Oct. 26, 2015, 4:15 PM), Http://Www.Reuters.Com/Article/Us-Mideast-Crisis-Syriaiduskcn0sk0qr20151026.

militant rebel group having close ties with the Syrian National Council- the Syrian Provisional Government in exile-located in Turkey, that was formed to win international support for the rebels.[282] Syrian National Council has been recognised as the "legitimate representatives of the Syrian People" by *eighty* States and the European Union and is represented in the Arab League.[283]

The FSA is an organised group having a structured command and comprises of thousands of fighters, mostly Sunni Arabs. Considered as mostly moderate rebels, they have been provided with financial, arms and training support by the US and other nations for several years.[284] Other nations like, Saudi Arabia[285], Turkey and Qatar[286] have also helped FSA in direct and indirect manner.

Although being considered as a moderate rebel group, the FSA has faced several serious accusation of humanitarian violations like using child soldiers, kidnapping civilians, and indiscriminate shelling in populated areas. However, post 2015, the number of fighters associated to FSA have decreased as they have joined more radical group such as ISIS and Jabhat al-Nusra.[287]

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[282] Christopher Phillips, "After the Arab Spring: Power Shift in the Middle East? Syria's Bloody Arab Spring", *London School of Economics* 37, 38, 40 (2012).

[283] Supra note 264.

[284] West Training Syrian Rebels in Jordan, GUARDIAN,
available at: http://www.theguardian.com/world/2013/mar/08/west-training-syrian-rebels-jordan.

[285] Mariam Karouny, '*Saudi Edges Qatar to Control Syrian Rebel Support'*, REUTERS (2013).

[286] David Blair, *Qatar and Saudi Arabia 'Have Ignited Time Bomb by Funding Global Spread of Radical Islam,'* TELEGRAPH (2014).

[287] David Wallace, et all, "Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict"', 25.3 *Michigan State Law Rev*iew 565 (2017).

4.2.3.3 Hay'at at Tahrir al-Sham (earlier known as Jabhat al-Nusra): Falling on the radical side of the spectrum and having roots in Al Qaeda in Iraq (AQI) is responsible for the jihadist movement of 2011. However, it broke the alliance with AQI and made one with Al Qaeda,[288] which made US designate it as a terror group followed by UN imposing sanctions later on.[289] With an intent to soften its image and escape sanctions, it re-branded itself as al-Sham in 2016[290] yet had violent encounters with more secular non-jihadist opposition like Syrian Armed forces, Hezbollah and FSA.[291] With some Syrian territory under its control, al-Sham has acquired State like features by indulging in some kind of governmental functions and keeping a control over utilities like food distribution, heath care and trash collection.[292] With the second largest number of foreign fighters recruited after ISIS, al-Sham is also able to procure weapons and funds from foreign donors, especially Qatar.

Unlike ISIS, the territory under control of these armed rebel groups is difficult to be mapped due to myriad factions within large organisations spread through the region that is not geographically contiguous.[293]

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[288] *Hay'at Tahrir al-Sham (Formerly Jabhat al-Nusra)*, MAPPING MILITANT ORGS., *available at:* http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493 (last visited on March 27, 2019).

[289] Supra note 272.

[290] Aymenn Jawad al-Tamimi, *Al-Qa'ida Uncoupling: Jabhat al-Nusra's Rebranding as Jabhat Feteh al-Sham*, MIDDLE EAST FORUM *available at:* http://www.meforum.org/6219/jabhat-alnusra-rebranding (last visited on August 22, 2019)

[291]*Hay'at Tahrir al-Sham (Formerly Jabhat al-Nusra)*, MAPPING MILITANT ORGS., http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/493 (last updated Mar. 27, 2017).

[292] Daveed Gartenstein-Ross & Phillip Smyth, *How Syria's Jihadists Win Friends and Influence People*, ATLANTIC (Aug. 22, 2013), http://www.theatlantic.com/international/archive/2013/08/how-syrias-jihadists-winfriends-and-influence-people/278942/

[293] Aron Lund, *The Political Geography of Syria's War: An Interview with Fabrice Balanche*, CARNEGIE ENDOWMENT FOR INT'L PEACE (Jan. 30, 2015), http://carnegieendowment.org/syriaincrisis/?fa=58875.

4.2.3.4 Islamic Front: Riding in between the moderate and radical Islamic spectrum, Islamic Front collectively represents the middle of the ideological compass, more conservative than FSA but not radical as Jabhat al-Nusra or ISIS.[294] Engaged in regular clashes with the Syrian forces, they are also seen fighting against other rebel groups. They have been largely dependent on private funding and local sources, and there have been no conclusive evidence found to show funding by a foreign State.[295] A loosely organised opposition, neither has a central command structure to exercise effective control nor has the ability to inflict violence of an intensity matching other rebel groups. However, it forms part of the mainstream opposition as these are represented in the Syrian National Council.[296]

4.2.3.5 Islamic State of Iraq and Levant (ISIS): Also known as IS, ISIL or Daesh, ISIS originated in Iraq as an affiliate of AQI that was active in anti US and anti-Iraqi government insurgency from 2003-2013. ISIS also had an important role in establishing Al-Nusra before actively participating in the Syrian conflict since 2013. Post the failure to merge Al-Nusra and ISIS, both groups are no longer directly connected and are opposed to each other in some respects.[297]

Being the most richest terror organisation in history, ISIS has a highly organised command structure, collects revenue for conquered areas and works with an aim to establish a caliphate transcending all boundaries.[298] With its headquarters at Rakka, ISIS exercises geographical control over sizeable areas in Iraq and Syria and governs them by

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[294] Supra note 272.

[295] Aron Lund, *The Politics of the Islamic Front, Part 1: Structure and Support*, Carnegie Endowment for International Peace, http://carnegieendowment.org/syriaincrisis/?fa=54183.

[296] Abdullah Rebhy, *Syrian Opposition Groups Reach Unity Deal*, SEATTLE TIMES (Nov. 22, 2012), http://www.seattletimes.com/nation-world/syrian-opposition-groups-reach-unity-deal/.

[297] *What is "Islamic State,"* BBC (Dec. 2, 2015), http://www.bbc.com/news/ world-middle-east-29052144.

[298] *How ISIS Works*, N.Y. TIMES, http://www.nytimes.com/interactive/2014/09/16/world/middleeast/how-isis-works.html (last visited on September 16, 2019).

providing public utilities, health care and education.[299] Thus, with a highly coherent and effective military management and a civil administration in areas under its control, ISIS has involved itself into numerous violent incidences against all major actors in the conflicts falling on both the sides of the spectrum i.e. State and non-State actors. ISIS forces have targeted the soldiers of Syrian government and has also engaged with the mainstream opposition and Kurdish forces in northern Syria. Moreover, it has engaged with foreign State forces like the Iraqi and Kurdish forces in the Kurdish autonomous region of northern Iraq; and with other States that support either the Syrian or Iraqi governments, or both.[300] Thus, it has been seen that ISIS has been in conflict with all major parties active in the Syrian conflict. The US and other allies forming the international coalition of dozens of countries have conducted airstrikes against ISIS in Syria in 2014.[301]

4.2.3.6 Kurdish Popular Protection Units: Rojava, or Syrian Kurdistan is a *de facto* autonomous region located in norther Syria adjoining the border with Turkey. Under the political control of Kurdish National Council and Kurdish Supreme Committee since 2012, Kurdish people are one of the largest stateless community in the world facing ethnic discrimination and economic alienation. Acting as a neutral party not affiliated to the conflict, the armed Kurdish Militias, the People's Protection Units (YPG) guard the north and have fought against the rebel groups and the Syrian forces both, more frequently with the ISIS that controls the area adjacent to the Kurdish territory.[302]

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[299] Muhammad Al-`Ubaydi et al., Combating Terrorism Ctr. at West Point, The Group that Calls Itself a State: Understanding the Evolution and Challenges of the Islamic State 18 (2014).

[300] Terry D Gill, "Classifying the Conflict in Syria*"* 92 *International Law Studies* 359 (2016).

[301] David Wallace, et all, "Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict"', 25.3 *Michigan State Law Rev*iew 368 (2017).

[302]Ibid.

Although Turkey alleges YPG to be a terrorist organisation affiliated to the Kurdish Workers Party (PKK), the same Kurdish Workers Party (PKK) with which Turkey has engaged in an enduring conflict. However, this claim has been rejected by western countries predominantly US that has carried out numerous airstrikes against ISIS in direct support of YPG. Other western countries also provide all sorts of financial, military aid and assistance to the Kurdish militias. The YPG and its political affiliates have assumed legislative, executive and judicial functions like passing laws, collecting oil revenue and even establishing courts, and are exercising administrative control over the area with an aim to achieve recognised political autonomy and consolidate the control over the Kurdish populated regions in Syria and resist the moral enemy ISIS.[303]

4.2.3.7 US and other International Actors: US has played an active role in the providing support, direct and indirect to Syrian rebel groups since 2012. Other States like Jordan, France and UK have also aided the non-Islamist rebels by establishing military training areas in Jordan.[304] Active attacks and more than 6000 airstrikes on ISIS personnel, equipment and buildings has been carried out by the US and its coalition forces of UK, France, Australia, Bahrain, Jordan, Saudi Arabia, and the UAE in Syria[305], whereas Denmark and Belgium engaged with ISIS in Iraq.[306]

The coalition was invited by the Iraq government following the advances made by ISIS into deep Iraqi territory during 2014. The Syrian Government has very categorically opposed the coalition operations within its territory and characterised them as unlawful

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[303] Terry D Gill, "Classifying the Conflict in Syria*"* 92 *International Law Studies* 10 (2016).

[304] Orlando Crowcroft, *Isis News: British Soldiers in Jordan and Turkey Training Rebels to Fight Islamic State and Bashar al-Assad,* INT'L BUS. TIMES (May 19, 2015, 15:26), http://www.ibtimes.co.uk/isis-news-british-soldiers-jordan-turkey-trainingrebels-fight-islamic-state-bashar-al-assad-1502017.

[305] Dan Lamothe, *7 Countries Have Entered the Fight Against ISIS*, BUS.INSIDER (Jan. 20, 2016, 12:21 PM), http://www.businessinsider.com/7-countries-haveentered-the-fight-against-isis-2016-1

[306] *Operation Inherent Resolve: Targeted Operations against ISIL Terrorists*, U.S. DEPARTMENT OF DEFENSE (Apr. 26, 2016), http://www.defense.gov/News/Special-Reports/0814_Inherent-Resolve.

and violation of its sovereignty[307], it has never actively objected to the airstrikes and has not taken actions against the aircraft in its airspace. However, the coalition States have claimed their right to use of force inside Syria as a matter of (collective) self-defence which is a reaction to ISIS advancement in Iraq and terrorist activities in France, Turkey and other States, that have been attributed to ISIS.[308] Most-importantly, none of the coalition airstrikes have targeted the Syrian government forces, objects or installations but only against ISIS and its objects installations like oil wells and military equipment. However, in April 2017, as a response to Syrian Governments use of chemical weapons against civilians, US military carried out airstrikes against a Syrian base for the first time in the entire duration of the conflict.[309]

If one looks at the account of air strikes conducted in the Syrian Conflicts, it gives very fussy picture. The United States that has conducted several airstrikes against the Khorasan Group within the Al Nusra Front has also supported other armed groups like the YGP by providing it air support to conduct strikes on ISIS and regain control of certain key towns. Now, as Turkey sees YPG as an ally of the PKK, it has conducted air strikes against the Syrian Kurdish Forces.[310]

Even Israel, since the beginning, has responded to the mortar strikes and gunfire in the Golan Heights that had originated in Syria by exclusively targeting Hezbollah and Syrian

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[307] Permanent Rep. of the Syrian Arab Republic to the U.N., Identical Letters dated September 16, 2015 from the Permanent Rep. of the Syrian Arab Republic to the United Nations addressed to the Secretary-General and the President of the Security Council, U.N. Doc. S/2015/718 (Sept. 17, 2015).

[308] The United States informed the UN Security Council in September 2014 that it relied on Article 51 of the UN Charter as the legal basis for conducting airstrikes against ISIS in Syria in support of Iraq. *See,* Somini Sengupta, *U.S. Invokes Iraq's Defense in Legal Justification of Syria Strikes*, NEW YORK TIMES (Sept. 23, 2014). http://www.nytimes.com/2014/09/24/us/politics/us-invokes-defense-of-iraq-in-saying-strikes-on-syria-are-legal.htm l?_r=0.

[309] Supra note 286.

[310] Jordain Carney, *US Targets the Khorasan Group with a New Round of Airstrikes*, DEFENSEONE (Nov. 6, 2014),
http://www.defenseone.com/threats/2014/11/us-targets-khorasan-group-new-round-airstrikes/98417/.

military assets[311], to an extent that shot down a Syrian jet after it allegedly crossed into Israeli airspace.[312]

4.2.3.8 Summary: The broad spectrum of parties, numerous state and non-state actors engaged in the Syrian conflict make conflict classification a difficult and complex task. Violence amongst the non-State groups fighting against the State crosses the threshold of intensity to qualify as a non-international armed conflict and the international interference of several States internationalizes the conflict. Thus, conflict classification becomes important in light of parties and conduct of conflict.

4.2.4   Classification of Syrian Conflict

 With numerous rebel groups, almost all countries of the Gulf and most of the international powers fighting in alliances or against one another, seems like a war of all against all. Classifying such a conflict is a difficult task. However, it needs to be analysed and determined in an objective manner whether Syria is an armed conflict and if yes then what kind. Once the type of conflict is ascertained the body of law applicable becomes apparent.

4.2.4.1 Existence of Non-Intentional Armed Conflict in Syria- Civil War: Determining the violence in Syria as an armed conflict is important to trigger the application of law of armed conflicts. This determination is done as per the rules laid down in the Geneva Conventions, whereby hostilities between States is an international armed conflict and in case of non-international armed conflict the intensity of the hostility to be of 'protracted armed violence' with an involvement of a non-State armed

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[311] Nic Robertson & Laura Smith-Spark, *Heavy Shelling Rocks Golan Heights Area Between Syria, Israel*, CNN (Feb. 21, 2014, 11:13 AM),

[312] Laura Smith-Spark, *Israel Says It Shot Down Syrian Warplane Over Golan Heights*, CNN, http://www.cnn.com/2014/09/23/world/meast/syria-israel-plane/

group to be organised sufficiently with a command structure to carry out the protracted armed violence with the sustained intensity.

The Syrian conflict began with a non-violent student protest in March 2011 that was met with disproportionate resistance by the Government of Syria. The brutal force, instead of suppressing the protest spread it to other. As more people joined the protest, the government used more tough hand which added duel to the fire. By August 2011, peaceful protest subdued was replaced by a more organised and violent insurgency.[313] In order to throttle the anti-government forces, the Syrian army launched large scale military operations directly attacking and shelling densely populated areas and deploying tanks and heavy armoury in the urban areas. International community responded to the uncalled violence by imposing sanctions. Even the President Assad acknowledged the intensity of violence when he told, "[w]e live in a real state of war from all angles."[314]

Since the escalated hostilities and violence between the Syrian forces and the armed groups have reached the intensity the conflict has attained the first element of protracted armed violence. With respect to the second criteria of organisation, Syrian conflict poses a serious challenge due to the numerous armed groups involved. Some like FSA and ISIS are well known, but the hundred others are small, disorganised and extremely fluid. It's equally difficult to get reliable information as to the command structure and the capacity to carry military operations of the armed groups. Most of them would not even meet the criteria, however ISIS and FSA can definitely bear the organisational element.

ISIS has acquired State like characters and no longer acts like an insurgent group. While holding territory, ISIS no just conducts coordinated military operations across Syria and

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[313] Louise Arimatsu & Mohbuba Choudhury, The legal classification of the armed conflicts in Syria, Yemen and Libya, *Chatham House* 7 (2014).

[314] Syria's Assad: "We Live in a Real State of War", available at http://www.cbsnews.com/news/syrias-assad-we-live-in-a-real-state-of-war/ (Last visited on Aug 6, 2020).

Iraq, but also recruits fighters from almost half of the countries around the world. With complex administrative and governance structure, ISIS under the leadership of Abu Bakr al Baghdadi and after his death in 2019, his successor Abu Ibrahim al-Hashemi al Quarayshi have run their well-coordinated military campaign by recruiting soldiers, capturing US supplied weapons in a manner very close to a "pseudo-State led by a conventional army rather than a rebel group"[315].

Even FSA would meet most of the organizational criteria, although does not act as a unified armed force but as a loosely affiliated coalition of groups pledging their loyalty to the Supreme Military Council that was formed due to pressure from Qatar and Saudi Arabia who promised to supply advanced weapons to the rebels fighting under a central command structure.[316] The Military Council managing the helm of affairs provides the required organizational threshold. Other groups such as al-Sham and the Kurds also satisfy more or less the required degree of organisation although not as sophisticated as that of the ISIS.

Further, with respect to the second criteria of intensity of the conflict, the sustained nature of violence in Syria by the non-State armed groups leads to a conclusion that there exists a non-international armed conflict in Syria. Thus, intensity and duration of conflict coupled with the organizational capabilities of armed groups, the Syrian Conflict has met the legal threshold for a non-international armed conflict. This has also been suggested by

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[315] David Wallace, et all, "Trying to Make Sense of the Senseless: Classifying the Syrian War under the Law of Armed Conflict"', 25.3 *Michigan State Law Review* 588 (2017).

[316] Elliot Friedland & Serabian, *Who's Who in the Syrian Civil War*, THE CLARION PROJECT 20 (Feb. 20, 2017), https://clarionproject.org/whos-who-in-the-syriancivil-war/

This article is no more available on this website. Found it here instead: https://clarionproject.org/wp-content/uploads/Clarion%20Project%20Syrian%20Civil%20War%20Factsheet.pdf

Who's Who in the Syrian Civil War, *available at* https://clarionproject.org/wp-content/uploads/Clarion%20Project%20Syrian%20Civil%20War%20Factsheet.pdf (Last visited on August 6, 2020).

the United Nations Human Rights Council, 3rd Report of the Commission of Inquiry on the Syrian Arab Republic [317] .

An important aspect of the Syrian conflict due to the numerous parties involved is that there are multiple non-international armed conflicts fought, between State and non-State armed groups and among the non-State armed groups, thereby making the application of laws and protections to a wider spectrum of groups.

4.2.4.2 Existence of International Armed Conflict in Syria: Due to the involvement of many State forces, a question as the existence of international armed conflict also arises. Although the State actors are majorly involved against various armed groups, there are few instances where the States have had confrontations. Few of these armed confrontations have been old and some of them are very recent. Citing a few such instances that have triggered the rules of war are, armed conflict between Israel and Syria since 1967 near the Golan Heights, several air engagements between Turkey and Syrian forces in 2012 and between Turkey and Russia in 2015. However, none of these countries have ever caused the violence to escalate. Further, the recent air strikes by US on the Syrian airbase had triggered the application of international humanitarian law.[318]

Other than this, the States though avoid involving against each other, provide all kinds of support to the non-State groups or the Syrian Government. The support to the non-State groups in the form of weapons, training, monetary supply may 'internationalise' the conflict if they condition of 'overall control' is fulfilled. The threshold of 'overall control' is high and requires compelling evidence. With no evidence found of State controlling the armed groups, and all major non-State actors acting independently, as per

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[317] UN HRC, A/HRC/21/50 (August 15, 2012).

[318] Exclusive: Situation in Syria constitutes international armed conflict – Red Cross, *available at* http://www.reuters.com/article/us-mideast-crisis-syria-redcross-idUSKBN17924T (Last visited on August 6, 2019).

the existing legal framework it can be determined that the Syrian non-international armed conflict has not "internationalised".

4.2.5   Key Developments- War Crimes and United Nations: With numerous war crimes and human rights abuses, Syria has become the epicentre of humanitarian crises in today's time. Syrian governments alleged use of chemical attacks, indiscriminate attacks by the armed groups, arbitrary arrest by the Syrian government and spread of terror by the armed groups are just few instances of horrific Syrian Civil War. Even the international forces like US has been accused of human rights violations, air strikes in the populated urban areas leading the cities to ruins. Series of crime led the UN General Assembly adopt a resolution in December 2016 by which an International, Impartial and Independent Mechanism was madated to assist in the investigation and prosecution of persons responsible for most serious crimes under international law committed in Syrian Arab Republic since March 2011. According to the resolution, the purpose of the Mechanism is 'to collect, consolidate, preserve and analyse evidence of violations of international humanitarian law and human rights violations and abuses' in order to prepare files and facilitate trials in courts or tribunals that have or may in the future have jurisdiction over these crimes.[319] The Mechanism has already submitted its second report to General Assembly and is assisting the national criminal justice process by providing evidences and records. The Mechanism has also engaged into contextual work like mapping crime patters, understanding links between crimes and individual, direct perpetrators and commanding authority.[320]

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[319]International, Impartial and Independent Mechanism, 'Mandate', *available at* https://iiim.un.org/mandate/ (Last visited on August 6, 2020).

[320]United Nations Human Rights Council, Report of the International, Impartial and Independent Mechanism to Assist in the Investigation and Prosecution of Persons Responsible for the Most Serious Crimes under International Law Committed in the Syrian Arab Republic since March 2011, 4 (Aug, 2018).

4.2.6 Conclusion: Is Syria a New War? It turns out that Syria has been facing both international armed conflict to a lesser extent, and non-international armed conflict to a greater extent, thereby attracting application of the international humanitarian law pertaining to each of these respectively. However, the other facets of conflict make the characterization difficult. Some of the distinct features of Syrian Conflict that make it more than a civil war have been discussed hereinafter.

Syrian conflict began with a peaceful protest by few college students, that gradual insurgency as the government of Syria handled it brutally. The emerging country wide protests turned into a revolution to change the socio-political and economic situation of the country, with no ideological and political agenda attached. However, denying the undercurrents of ideological and political agenda would be a wrong judgment. Identity politics was prevalent in the conflict, though not since the beginning, but soon after it grew into a revolution. The regime responded with violence and tagged the protesters as 'terrorists' and 'foreign elements'. Due to the heterogeneity in the society, and the long alienation of majority community, the protests turned to sectarianism and the various alliances transformed yet again the civil war into a Shia-Sunni war.[321]

Further, due to enormous variety of actors and international actors also present, the monopoly of the Syrian State on legitimate violence has diminished completely. One can find on the Syrian territory, State and non-State actors, regular troops, militias, foreign mercenaries, jihadists groups involved in committing atrocities. The asymmetry between the rebel groups and the State forces were inherent and could not be reduced even after other States supporting few of the armed groups. The poor military vision, lack of command and control like a regular force has also widened the asymmetry. Further, these rebel groups due to the asymmetry took to the guerrilla warfare. The hostilities were now

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[321]Syrian War Is Not Only Sectarian, *available at*: http://www.al-monitor.com/pulse/politics/2013/05/syrian-conflict-failed-sectarian-analysis.html (Last visited on August 9, 2019).

concentrated in the urban areas, causing population displacement. Syrian conflict echoes ethnic cleansing, targeted mass killings, rape, execution, destroyed civilian households and infrastructure on a daily basis. One of the most direct and immediate impact of the urban sectarian conflict is population displacement, internally and internationally. Severe humanitarian crises have emerged due to large number of internally displaced persons and refugees. The migration of refugees in neighbouring countries has led to border clashes and sectarian conflict in Lebanon and Jordan resulting into the spill over effect.

The funding of the conflict has highlighted new features of the 'War Economy'. Apart from foreign assistance, the parties in the conflict have mobilised support from not just the people of Syria, but from governments, religious communities, private donors, foreign citizens and even on Facebook and social media. Other instances for raising find are capturing oil fields, looting the government weapons, selling looted artefacts.

Thus, principally Syrian Conflict may be a non-international armed conflict with few instances of international armed conflict, the actors, methods and means of warfare, spread of violence and the war economy have actually changed the nature of war, making it a new type of conflict. With deep ideological and political aims rooted in the conflict have turned the conflict into something more than just armed conflict. Classification of the conflict merely on the grounds of international armed conflict and non-international armed conflict have several consequences impacting the Syrian Conflict. The issues related to relationship of various parties to each other, the geography of the conflict, the rules related to detention and prisoners of war have a far-reaching effect on the nature and classification of the conflict.

4.3   Case Study: Kashmir Issue

4.3.1   Introduction

4.3.2   Overview of the Conflict

       4.3.2.1 History

       4.3.2.2 Changing Dimensions

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4.3.3 Actors

       4.3.3.1 India

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4.3.6   Conclusion: Is Kashmir Conflict a New War?

4.3   Case Study: Kashmir Issue

4.3.1   Introduction

Kashmir, famous for its natural beauty and scenic landscapes, has a history of bloodshed and conflict as old as the Indian independence and even before. Kashmir issue is a classic example of an enduring conflict that has a displayed fluidity throughout its existence. Kashmir has not just seen a long internal disturbance, but also seen witnessed three wars between India and Pakistan on its land, regular border skirmishes, terrorist incursion and a brooding ground for proxy war. From frequent clashes between highly militarised and weaponised paramilitary forces and terrorists happening in the civilian area, the valley has in the past few years seen numerous instances of stone pelting leading to direct participation of hostilities. Further, in light of the recent instances of surgical strikes, human shield and return of an Indian air force pilot as a prisoner of war has made it imperative to analyse the applicability of Geneva Conventions to the Kashmir Conflict.

4.3.2   Overview of the Conflict

4.3.2.1 History: Out of the 565 princely states in British India, Kashmir was one holding significant importance for its strategic location, area and distinct regions and demography. Situated at the junction of newly formed Pakistan and China, the kingdom of Kashmir was the largest in size, with Muslim majority population living with Hindus and Buddhists in harmony. This spirit of harmony and tolerance was defined as Kashmiriyat. It was further reflected in the reign of Kashmir where it was ruled by a Hindu Dogra Family in a population where over 77 percent were Muslims.

With the end of colonial rule in British India and creation of Pakistan, even the doctrine of paramountcy lapsed giving a choice to the princely kingdoms, to either join India or Pakistan or remain independent. However, remaining independent was not a political option available due to an ungraceful exit of English and thus, princely states elected to

accede either States based on communal allegiance of the people and geographical contiguity. Except Junagadh, Hyderabad and Kashmir, all the princely States joined either India or Pakistan before 15th August 1947.[322] Although, Junagadh and Hyderabad were forcibly acceded to India, Kashmir and its political players had different aim, with the ruler of Kashmir Maharaja Hari Singh willing to remain independent.

Soon, in 1947 the independence of Kashmir was threatened by the attack of Pathan tribes from Pakistan which reached remarkably close to Srinagar, the capital of Kashmir. This acted as a potential ignition for triggering the first Indo-Pakistan War. When, the Pathan invasion reached its peak, Maharaja Hari Singh sensed defeat and appealed Indian government for help, to which India agreed *in lieu* of legal accession of Kashmir. Thus, led to the signing of the Accession Agreement and the Indian army acted immediately and pushed back the Pathan tribal by 1948. Meanwhile, Indian and Pakistan had the first armed conflict when the Pakistan Army attacked Kashmir and, in several months, lost its ground. Fearing of the conflict to spread on several stretches of the India-Pakistan border the United Nations intervened and a cease fire agreement was signed between the two States in December 1948. Under this, both the countries agreed to halt the hostilities and accepted the presence of United Nations Military Observer Group in India and Pakistan (UNMOGIP), although it failed to resolve the conflict.[323] This conflict led to the drawing of the Line of Control bifurcating Kashmir into two, the Pakistan Occupied Kashmir and the Indian State of Jammu & Kashmir bearing a special status under Article 370 of the Indian Constitution.

However, this peace was short lived as Pakistan initiated a two phased plan to seize Kashmir. *Firstly*, the regular armed forces disguised as local tribesman crossed the law of armed conflicts and staged insurgency like situations in Kashmir however, the locals did not cooperate for the hostility. *Secondly*, Pakistan attacked Kashmir which was retaliated

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[322]Rajat Ganguly, *India, Pakistan, and the Kashmir Dispute* 13(Asian Studies Institute 1st edition 1998).
[323] *Ibid.*

with an equally strong force that defeated Pakistan on all fronts. The international community and UN immediately acted by putting an armed embargo on India and Pakistan and resolved a cease fire in Tashkent in 1966 thus ending the second India-Pakistan war of 1965.

India Pakistan entered into third conflict but this time not regarding Kashmir but due to the refugee crises faced by India caused by secessionists movement in East Pakistan. India intervened militarily in East Pakistan responding to which Pakistan attacked India on the Kashmir border. Soon the conflict came to an end with India occupying East Pakistan and declaring it as an independent State of Bangladesh and was also able to maintain the status quo in Kashmir. This conflict ended with the signing of the Shimla Agreement in 1972 under which both the countries agreed to resolve their disagreements bilaterally by peaceful means.

The nuclear tests by both the countries created ripples that provided an unwanted thrust to the India Pakistan hostility. Although after being nuclear powers, both the States initiated peace talk, but this was short lived. Pakistan shortly after the handshake, pushed the troops and insurgents inside the Kashmir border near Kargil and attacked Indian troops provoking the fourth Indo-Pakistan war over Kashmir. The turf continued till the Indian forces pushed back the Pakistani troops further surrendering post-US intervention. Since then, there has been no direct kinetic engagement between the two State armed forces although the border between the two countries has never heard of peace.

4.3.2.2 Changing Dimensions: Meanwhile, when the armed forces of India and Pakistan were engaging at the borders, Kashmir was brewing a turbulent separate ethno-national consciousness specially among the Kashmiri Muslims. Rise of this new identity was rooted against the Kashmiriyat and erupted in a full flow in the late 1980s in the form of secessionist movements. Growth of Kashmiri nationalism and discontent was utilized by the militant groups who mobilized the youth of Kashmir for armed struggle and thus led

to eruption of a violent separatist movement. This secessionist movement was divided into two main branches. The first branch wanted an independent Kashmir and the other advocated merging Kashmir with Pakistan or creating an independent Islamic state with close ties with Pakistan.[324] The main secessionist organisation espousing the view of an independent sovereign, socialist, secular Kashmir was Jammu and Kashmir Liberation Fund (JKLF) which wanted to establish Kashmir for all Kashmiris irrespective of their religion. However, the minority community of Kashmiri Pandits and Buddihists and even Muslim ethnic minorities feared their execution in Muslim dominated independent Kashmir. The advocates of the second branch were mostly Muslim fundamentalist groups, religious elites in the Valley like Hibz ul-Mujahideen and pro-Pakistani organisations like All Party Hurriyat Conference. These groups considered non-Muslims as outsiders and resorted violence against them. Gradually towards the end of the decade, the separatist movement was radicalized to an extent that the focus shifted to Islam which caused genocide and mass exodus of Kashmiri Pandits from the valley.[325]

Since then, the Kashmir crises has not remained an India-Pakistan conflict but is also an intra-State conflict in the form of insurgency, led by armed militants fighting against Indian administration asking for self-determination. Frequent terrorist attacks have been the most prominent way of violent campaign against the Indian state by the insurgents.

4.3.2.3 Causes of the Conflict: The fluidity of the Kashmir conflict is affected by multi-layered phenomenon with a broad range of contributing factors.

i. **The Territorial Dimension**: The genesis of the conflict lies in the dispute over the Kashmir territory which is now divided into the India-administered Kashmir and the Pakistan-administered Kashmir. Both the States claim the right over the whole of Kashmir and consider the other's presence illegal. India considers Kashmir as an

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[324]*Ibid* at 15.

[325] *Ibid.*

integral part of the Indian Union and further India does not want to discuss this matter with neither Pakistan nor with any international actor. Pakistan, on the other hand, considers Kashmir's accession to India as illegal as will of Kashmiri people was never considered.[326] Pakistan further supports a Kashmiri's right to self-determination, which would give the predominantly Muslim population of Kashmir the option to accede to Pakistan.[327] By demanding a plebiscite, Islamabad regards the Kashmir issue as unfinished business of partition.[328] Further, Pakistan claims Kashmir on religious grounds under the two-nation theory.

ii. **Ethnic Heterogeneity**: The Pakistan's contention of claiming Kashmir on the grounds of religion is faulty as Kashmir dispute is not merely a territorial dispute but is also affected by ethnic heterogeneity. Kashmir is a land of multiple identities. With no uniform religion, Kashmir is a mosaic of three different religions, Islam (68.31 percent), Hindu (28.44 percent) and Buddhist (0.90 percent).[329] However, with the bifurcation of State of Jammu and Kashmir, the Buddhist inhabited areas have been constituted into a new Union Territory of Ladakh. Further, there are several minority ethnic groups residing in Kashmir like Gujjars, Paharis, Baltis and among the Muslims, Shias and Ahmedias who make the Kashmir diverse and thus their role in Kashmir conflict significant. Further, the exodus of Kashmiri Pandits from the valley, where they constituted the majority, has significantly changed the demography of Kashmir which can have decisive impact on plebiscite if it ever takes place.

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[326] Fakiha Khan, "Nuking Kashmir: Legal Implications of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute" 29 *Ga J Int'l & Comp L* 361, 373 (2001).

[327] Ali Khan, "The Kashmir Dispute: A Plan for Regional Cooperation" 31 *Colum J Transnat'l Law* 495, 503–504, 506 (1994).

[328] Cynthia Mahmood "Kashmir and the 'War on Terrorism" 8 *Kroc Institute Policy Brief* (October 2001). Available at http://www.jammukashmir.eclipse.co.uk/KROC_Kashmir.pdf

[329] Jammu and Kashmir Religion Census 2011, India, *available at* https://www.census2011.co.in/data/religion/state/1-jammu-and-kashmir.html (last visited on August 6, 2020)

iii. **Ideological Dimension:** The territorial dispute of Kashmir has its foundation on divergent ideological conceptions of nation-building and State formation during the India-Pakistan partition. India believes in secular and democratic principles and thus a pluralistic unit like Jammu and Kashmir will exemplify the integrative strength of the State of India. Since the Kashmir region is the only state in India with a Muslim majority, the area is regarded as the "jewel in the crown" of India's commitment to secularism and federalism. However, Pakistani nationalist movement is ingrained to establish a theocratic State that would be a homeland for South-Asian Muslims which would be possible if Jammu and Kashmir merges with Pakistan thus making the conflict about the struggle and unification of Muslims from the domination of Hindus. The conflict has even been portrayed as a holy war (jihad).[330]

4.3.2.4 Recent Developments: In August 2019, the Government of India did two major things. Firstly, it ended the Special Status of Kashmir provided under Article 370 of the Indian Constitution and bifurcated the State into two centrally administered Union Territories of Jammu and Kashmir and Ladakh. Thus, the revocation of Article 370 led to the full integration of Jammu and Kashmir into India. This decision impacted the India-Pakistan bilateral relations, as this integration has changed the bilateral rhetoric into a 'strictly internal matter'. Pakistan acted immediately after this change and resolved to take all possible options to counter these steps which it considers illegal. Further, even the Pakistani Army said that it stood by the people of Kashmir and would go to any extent to support them. Other countries like China, US and France, and international organizations like EU and UN expressed concerns over restrictions and internet curbs in the valley and asked the parties to settle the dispute peacefully.

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[330] Michael L Feeley "Apocalypse Now? Resolving India's and Pakistan's Testing Crisis" 23 *Suffolk Transnational Law Review* 777, 783 (2000).

4.3.3 **Actors:** The fluidity of the Kashmir conflict is based on the changing dynamics due to the actors involved. Although, the India-Pakistan border has remained strained since 1947, the insurgency in Kashmir has aggravated gradually with every passing day. Classified as the world's most militarised zone, Kashmir conflict sees active involvement, military as well as political of not just India and Pakistan, but numerous terrorist organisations, separatist groups and political parties. Further, with the radicalisation of the local Kashmiri youth, an overwhelming participation of the civilians in the conflict has further complicated the nature of the crises. With indirect influence of Pakistan and its proxy war strategies have affected the classification of conflict and thus, analysis of the actors remains significant for the applicability of international humanitarian law.

4.3.3.1 India: India has always claimed Kashmir as an indivisible part of India. The Kashmir conflict has evolved dramatically and traumatically since the tragic partition of the Indian subcontinent in 1947. India maintains a massive military presence in Kashmir and by holding elections has a legitimate state government thereby controlling the law and other and governance of the state. Recently, with the abrogation of Article 370 and Article 35A, the State of Jammu and Kashmir has been fully integrated into the Union of India. All laws of India are applied in the region, and organs of the government functions under the limits of the Indian Constitution. All welfare policies of the Government of India are operational and thus people of Jammu and Kashmir have been benefited by it. Schools, universities, and colleges are functioning with the resources of the Government and infrastructural development has also been taken care of in the last seventy years.

4.3.3.2 Pakistan: Pakistan has constantly challenged India's territorial rights over Kashmir. Its strategic objective of dividing India and controlling Kashmir has shaped its policy of supporting terrorism against India. Having failed to defeat India through conventional military means, Pakistan's security establishment, since the late 1980s, has been supporting and financing the insurgency in Kashmir. Cross-border infiltration from

Pakistan has complemented the insurgency being waged by local actors. It has also sought to exploit the Kashmiri people's growing dissatisfaction with the Indian state. India's own inept handling of the insurgency has further worsened the situation in Kashmir.

After losing three consecutive wars, Pakistan changed its strategy but kept its goal intact. Taking benefit of the emerging secessionist tendencies in the Valley, Pakistan not just provided moral support to the secessionists but also aided rebels with weapons and training. This further led to the change in the character of conflict as secular Kashmiri movement was converted to a jihadi movement by the introduction of foreign militants trained by the intelligence agency of Pakistan, ISI (Inter-Services Intelligence) in Afghanistan. Various actors participating in the insurgency movement were Jammu-Kashmir Liberation Front and Hurriyat Conference who lost their momentum by either getting hijacked by Pakistan or not being representative of all Kashmiris. Even till today, ISI takes proactive steps to keep the Kashmir issue boiling by pushing infiltration and planning, preparing, and carrying out terrorist activities.

4.3.3.3 Separatist Organisations: The territorial dispute between India and Pakistan turned to an independence movement based on ideology. However, there has been no single party or politician that has been able to gain dominance or garner popular support. Further, the Kashmir conflict is unique as it's an internal conflict between moderate Kashmiri separatists and "foreign" extremist militants who have infiltrated from Pakistan's "jihadi" subculture. Thus, the separatist organisations active in Kashmir are classified into two groups, one that are moderates who believe in achieving goal of independent Kashmir through political means, and the other are military extremist organisations who undertake terrorist activities in Kashmir.

a. **Political Organisation:**

i. **Hurriyat Conference**: The All Parties Hurriyat (Freedom) Conference (or the "Hurriyat") was formed in 1993 by moderate (and some hard line) separatist leaders as an umbrella organization of political, religious, cultural and labour parties agitating peacefully for a referendum in Kashmir. Hurriyat leaders make the argument that their struggle for independence is not a "separatist" movement because they do not accept that India has ever attained legal control over the part of Kashmir that it occupies, but some acknowledge their willingness to negotiate only for increased autonomy if necessary. Through general strikes and international lobbying, the Hurriyat has sought to bring attention to charges that the Indian security forces have committed numerous human rights violations during their attempts to end militant activity in Kashmir.

ii. **The Jammu Kashmir Liberation Front (JKLF):** JKLF is a political organisation which is active on both sides of LoC. Until 1994, it was a militant organisation after which it declared cease fire and renounced its extremist agenda and engaged only in political mobilization of Kashmiris. However, its connection to terrorists and militants has always kept it under strict vigil of the India security forces. Its leaders have been several times accused of supporting militancy and extremism and indulging in money laundering activities to provide financial support to terrorist organisations. Recently, in 2019, the India government arrested its leader Yasin Malik under the Public Safety Act, 1978 and the party was declared unlawful under the Unlawful Activities (Prevention) Act, 1967.

b. **Extremist Organisations:**

i. **Lashkar-e-Taiba (Army of the Pure):** It was founded nearly during the end of the Cold War in the 1990s. Lashkar-e-Taiba (LeT) is an Islamic militant organization headquartered at Lahore, Pakistan. Its main aim is to establish an Islamic Caliphate in India. With almost thousands of fighters in its fold, LeT is a hierarchical organization, with a well-knit structure guided by leaders at the top who engage in raising men and funds. Hafiz Muhammad Saeed the founder and the head of the

organization who actively advocates and promotes violence in Kashmir by attracting youth to join extremists' groups through his sermons and speeches. A top-management team deals and manages all the work and runs departments like the Department of Preaching and Reform, the Department of Public Relations, and the Department of Education. Such divisions boost the capacity of LeT to finance, hire, and sustain its good profile and image internationally. One of the more unusual aspects of LeT's assault profile is the usage of a strategy known as *fidayeen*, comprising highly armed insurgent groups that strike particular objectives designed to inflict maximal damage. Thus, with a sophisticated organization and high participation, LeT remains the most active non-State participant in the Kashmir Conflict and also undertakes terrorist activities across India like the 2008 Mumbai attack.[331] Hafeez Sayeed who also heads the organization Jamaat-Ud-Dawa has been banned by US as a 'foreign terrorist organization', since 2014. LeT is also listed in the UNSC Sanctions List since 2005 for being associated with Al Qaeda.

ii.   **Hizbul Mujahideen (Freedom Fighters):** With an aim to unite Kashmir with Pakistan, it was founded in 1989. As its aim was to acquire Kashmir by a military approach, it is different from other militant organisations as its is primarily composed of Kashmiris unlike others who are Pakistanis. While Although it has been less active recently, its influence has increased since the neutralization of a young, popular commander Burhan Wani by Indian Armed Forces in 2016. In order to unite and strengthen the collaboration between JeM, LeT and HM, an umbrella organization was created knows as the United Jihad Council, which is headed by Salahuddin. [332]

iii. **Jaish-e-Mohammad (Army of the Mohammad)**: Founded by Masood Azhar in 2000 to annex Kashmir to Pakistan and bring it under Muslim rule to apply Sharia,

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[331]Violent Non-State Actors and the Kashmir Conflict, *available at:* https://nsiteam.com/social/wp-content/uploads/2019/09/Kashmir-VEO-Org-Analyis-UNO-Reachback-contribution-22-August.pdf (last visited on August 6, 2020).

[332] Ibid.

Jaish-e-Mohammad (JeM) was founded. During its initial years it was supported by Taliban. The ideology on which JeM works is based on *Qital fi Sabeel Allah* (armed fighting for the sake of Allah), and is in sync with the ideology of Al Qaeda. With force capacity in hundreds from across Afghanistan, Pakistan, and Kashmir, JeM targets poor, unemployed youth at the behest of better life and monetary rewards. It has also been supported by Pakistan Government, but it had to outlaw it in 2002 due to international pressure. JeM has recently conducted a large-scale attack on Indian troop of paramilitary forces killing 40 jawans in 2019.[333]

iv. **Al-Qaeda**: Already having a transnational presence, Al Qaeda has tried to break ground in South Asia, especially Afghanistan, Pakistan, Myanmar, Bangladesh through India. To achieve this, it created a wing named Al Qaeda in the Indian Subcontinent (AQIS). This group has ties with Pakistan and Afghanistan and is recruiting great numbers from these regions. AQIS is also careful to avoid any association from ISIS and therefore has created a code-of-conduct to enable themselves a solid establishment. To attract Kashmiris, it has collaborated with local fighters and motivated them for jihad and fight against Indian army.[334]

4.3.3.4 People of Kashmir: The two major startling elements about the ongoing conflict in Kashmir are the growing legitimacy about militancy among the educated classes and civil society of the Valley and the growing number of home-grown militants.

The Kashmiri Youth have played major cascading role in the social unrest by opposing the Indian State through resentment, anger, wide-spread anti-India feelings and of lately the taking up of arms against the same. The taking up of arms has out rightly brought up a new phase in the conflict with increased intensity, acts and fatalities. The popularity of '*Azadi*' slogan and the communal polarisation has now led to the firm entrenchment of secessionist sentiments amongst the Kashmiri civilians.

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[333] Ibid.

[334]Supra note 316.

Although, no single factor can be attributed to this phenomenon. Like all other Indians, the civilians of Kashmir also have the right to protest in a non-violent and peaceful manner. In such a secular democracy like India, the Kashmiris cannot be expected to remain in a continuous fear of laws such as Public Safety Act (PSA), 1978 and Armed Forces Special Powers Act (AFSPA),1958. These powers although necessary, supply various powers to the security forces and also have led to the exposure towards human rights violation in the state of Kashmir.

4.3.3.5 UN and Kashmir Conflict: The Commission made another resolution on 5 January 1949. The Commission urged both countries to accept the principle of "the question of the accession of the state of Jumma and Kashmir to India or Pakistan would be decided through democratic method of a free and impartial plebiscite."[335] In September 4, 1965 the Security Council adopted another Resolution. The Resolution calls upon both the countries:

1. To take forthwith all steps for an immediate cease-fire
2. To respect the cease-fire line
3. To cooperate fully with the United Nations military observer group in the task of supervising the observance of cease-fire
4. To report to the Council within three days on the implementation of this Resolution.

Another Resolution was adopted too by the Security Council at its 1238th meeting on 6 September 1965 which calls upon the parties-

I. To cease hostilities in the entire area of conflict immediately
II. To exert every possible effort to give effect to this Resolution

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[335] UN Commission for India and Pakistan, Report of the Commission for India and Pakistan, UNCIP, UN Doc. 5/1196 (January 5, 1949).

III.   To keep this issue under urgent and continuous review so that the Council may determine what further steps may be necessary to secure peace and security in the area.

Although, UN has failed to bring an end to the Kashmir problem. It is also equally true that the role of the UN cannot be ignored to prevent the parties from the nuclear war. It is also creating pressure as well as encouraging the parties to reach an effective and fruitful negotiation and has also recognised that Kashmir is a bilateral issue thus keeping away from direct involvement.

4.3.4   Classification

4.3.4.1 International Armed Conflict: Applying the thresholds of Article 2 of the Geneva Conventions and Additional Protocol I to the Kashmir conflict, undoubtedly, international armed conflict has existed between India and Pakistan four times in 1947, 1965, 1972 and 1999. All these conflicts ceased with ceasefire agreements. As the *Tadic* decision indicates[336] in international armed conflicts international humanitarian law applies until a general conclusion of peace is reached. However, a question in this case is whether cease-fire agreements amount to end to armed conflicts or belligerency continues and the parties can use force against each other. The term ceasefire literally means to cease firing. There is no official legal definition of ceasefire, but it can be defined as a 'suspension of acts of violence by military and paramilitary forces, usually resulting from the intervention of a third party'. Under the Hague Regulations of 1907, an armistice or ceasefire agreements only suspend military operations and the belligerent parties can resume hostilities anytime because it is not regarded to bring an armed conflict to an end.[337] However, since the World War II such treaties have remained rare and

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[336] *Prosecutor v. Tadic* (1995) Case No. IT-94-I-T.

[337]Regulations Respecting the Laws and Customs of War on Land, annexed to Hague Convention IV Respecting the Laws and Customs of War on Land (1907), art 36.

exceptional like the peace treaty between Israel and Egypt.[338] And if only peace treaties could bring an end to armed conflicts then the Korean conflict has not yet ended. Hence it turns out that, just as recognition of armed conflict is no more required to trigger the application of law of armed conflict, a formal peace treaty is not required to end the application of the law. Rather, mere cessation of hostilities should be enough to put an end to the armed conflict.[339] Thus, a ceasefire will end an armed conflict where it is intended to end the conflict.[340]

Thus, if one investigates the number of ceasefire violations made by Pakistan Army along the Jammu and Kashmir border, it creates doubts as to the validity and sanctity of the Cease Fire Agreement signed between the two countries in 2003. The year 2019 recorded the highest ceasefire violations by Pakistan Army, close to 3,289 instances making it on an average of nine such violations per day. Of the total, 1565 ceasefire violations took place since August 2019.[341] This is the time when the Indian government abrogated Article 370 and bifurcated the state of Jammu and Kashmir into two separate Union Territories. The number of ceasefire violations by Pakistani troops in 2019 was over 300 more than in 2018 and over three times that of 2017, when 971 cases were reported.[342] The time span from 2009 to 2013 saw an escalation in ceasefire violations by Pakistan. The number of cease fire violation for 2013, 2012, 2011, 2010 and 2009 were 347, 114, 62, 44, and 28 respectively.[343]

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[338]Peace Treaty between Egypt and Israel, 1979, International Law Materials 362 (18).

[339] Supra note 17 at 72.

[340]Supra note 14 at 44.

[341] Press Information Bureau, Government of India, Ministry of Defence, Ceasefire Violations by Pakistan, 18th November 2019. Available at https://pib.gov.in/PressReleasePage.aspx?PRID=1592064

[342] "2019 recorded highest ever ceasefire violations by Pakistan in Jammu and Kashmir in the last 16 years", *Economic Times*, January 5, 2020.

[343] "2019 recorded highest ever ceasefire violations by Pakistan in Jammu and Kashmir in the last 16 years", *Economic Times*, January 5, 2020.

Thus, these high number of cease fire violations reflect that India and Pakistan are not at peace at their borders making it hostile and thus not honouring the 2003 Ceasefire Understanding. In almost three years, it would be almost two decades that India and Pakistan have reached a Peace agreement, however, there seems no signs that peace would be established. The most prominent reason for the failure of this Agreement is the two-way blame game that happens between the two countries. India holds Pakistan accountable for providing safe havens to terrorists and also cover fire during terrorist infiltration to which India responds back with the fire, whereas Pakistan alleges India for unprovoked firing on the civilians residing in the Pakistan's territory.[344] India has also disagreed to engage in any peace talks until Pakistan uses an iron fist against the terrorist organisations mushrooming in Pakistan and has also maintained silence over the Pakistan's request to formalise the 2003 Ceasefire agreement.

Thus, the question is, do these breaches mean that India and Pakistan are under the continuous application of the Law on Armed Conflict as the conflict has not ended. Further, the threshold of international armed conflict is very low thus even small numbers of ceasefire violation will not affect the belligerent status of both the parties and they would be continuous bound by the rules of international humanitarian law. Aspects as to the casualty due the cease fire violations and its intensity is not at all relevant to apply the provisions of international humanitarian law.[345]

As for the application of international humanitarian law to international armed conflict there is no requirement in terms of intensity of conflict and thus as *Professor Schindler* argues that,

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[344]Pakistan's High Commissioner to India Abdul Basit argued in August 2015 that it was unprovoked firing by the Indian side. Mahim Pratap Singh, "Basit blames India over LoC firing", *The Hindu*, April 22, 2016.

[345] J.S. Pictet, Commentary to the First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 32 (ICRC, Geneva, 1952). Available at https://www.loc.gov/rr/frd/Military_Law/pdf/GC_1949-I.pdf.

"the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts if the armed forces of two States clash with each other. Even a minor frontier incident is sufficient. Any kind of use of arms between two States brings the Convention into effect."[346]

Hence, undoubtedly it remains a fact that India and Pakistan are fighting an international armed conflict which raises serious questions as to the application of law of armed conflicts and its violations by both the sides.

4.3.4.2 Non-International Armed Conflict: If one zooms into the Kashmir issue, one will face a most poignant scenario as to classification of armed groups in the Kashmir valley. Most armed groups and their leaders active in Kashmir have been classified either as terrorist organizations or leaders and members of terrorist organizations by the Indian Government and the UNSC.[347] Further, India has time and again objected to the use of term armed groups for referring the non-state actors' active in the Kashmir Valley, based either in the State of Jammu or Kashmir, or Pakistan occupied Kashmir or even having a safe haven in Pakistan. The issue was raked up again when the UN Office of the High Commission of Human Rights in Kashmir submitted its report for the first time since the inception of the conflict. In response to it, India termed the report on Kashmir as violation of India's sovereignty and integrity. Calling it a false and motivated narrative, India accused the OHCHR of ignoring the cross-border terrorism and creating an artificial similarity between two states where one is the largest and vibrant democracy and the other which openly sponsors terrorism. Calling the report an attempt to confer legitimacy to terrorism, India critiqued the report for being against the stand of UN Security Council that it took in light of the Phulwama attack by proscribing Masood

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[346]Dietrich Schindler, "The Different Types of Armed Conflict according to the Geneva Convention and Protocols", 63 *Recueil Des Cours* 131 (1979).

[347] "UN puts Pakistani armed group chief Masood Azhar on 'terror' list" *Al jazeera*, 1 May 2019.

Azhar as the leader of a terrorist entity Jaish-e-Mohammed. However, the report deliberately underplayed these terrorist leaders as "armed groups".[348]

However, the use of the words 'armed groups' for referring to the terrorist groups reflected the intentions of the UN body whereby it tried to portray an internal disturbance into an armed conflict. As per the South Asian Terrorist Portal[349], there are more than thirty[350] terrorist/ extremist/ insurgent groups in Jammu and Kashmir: Analyzing the groups that are active in Kashmir, extending the applicability of international humanitarian law in Kashmir seems to be far stretched. As highlighted above with respect to several criteria of non-State groups to qualify as an armed group, these terrorist groups will not qualify as a 'party to the armed conflict' simply because most of them possess organization structure, have a few hundred to thousand members, have leader and post statements through various channels but have a fragmented structure with no leadership effective to interact with the government and abide by the principles of international humanitarian law. Further they also lack territorial control to effectively attack the Indian armed forces.

With respect to the intensity criteria, India has always maintained that the militancy in Kashmir is an internal matter and can be controlled with law-and-order mechanism.

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[348]Official Spokesperson's response to a question on the Report by the Office of the High Commissioner for Human Rights on "The human rights situation in Kashmir", Ministry of External Affairs, Government of India. *Available at:* https://www.mea.gov.in/media-briefings.htm?dtl/29978/Official_Spokespersons_response_to_a_question_on_the_Report_by_the_Office_of_the_High_Commissioner_for_Human_Rights_on_The_human_rights_situation_in_K. (Last visited on December 02, 2019)

[349]Terrorist / Extremist / Insurgent Groups - Jammu and Kashmir, *available at:* https://www.satp.org/satporgtp/countries/india/states/jandk/terrorist_outfits/terrorists_list_j&k.htm

[350] Some of active and proscribed armed groups are Jaish-e-Mohammed (JeM), Jammu & Kashmir Liberation Front (JKLF t), All Parties Hurriyat Conference (APHC), All Parties Hurriyat Conference (APHC), Hizb-ul-Mujahideen (HM), Tehrik-ul-Mujahideen.

However, an important aspect that needs to be highlighted is that although India proclaims this issue to be a law-and-order issue aggravated by terrorism, it has enforced the Armed Forces Special Powers Act 1958 in Jammu and Kashmir since 1990, the year which marked the beginning of insurgency in Kashmir. Since then, Kashmir has been living in high military presence that aims to neutralize the terrorist activities in Kashmir.

Moreover, to apply the principles of international humanitarian law on the Indian soil to any conflict where the Government of India is a party, it requires recognition under the Geneva Conventions Act of India, 1960 passed under article 253 of the Indian Constitution, read with entries 13 and 14 of the Union List in the Seventh Schedule.[351] The Act provides for punishment for grave breaches of the Geneva Conventions 1949 and regulates legal proceedings with respect to protected persons (prisoners of war and internees). Thus, until the Government of India does not recognise the Kashmir conflict as a non-international armed conflict, it is not bound to apply the rules thereof.

Further, the events in Kashmir, do not sufficiently meet the threshold of non-international armed conflict. Although, there have been sporadic instances of violence and hostilities in Kashmir, the non-state actors have been unable to gain and exercise effective control over Kashmir as the Indian army, para-military forces and Jammu & Kashmir Police has remained successful in neutralizing their armed attacks. Indian army calls such events as terrorist attacks thus keeping them out of the purview of international humanitarian law.

4.3.5 Key Developments: Triggers to International Humanitarian Law

Kashmir has been the hot spot of hostilities troubled by international armed conflict and internal disturbances. With no proper application of international humanitarian law and

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[351] V.S. Mani, '*International Humanitarian Law: an Indo-Asian Perspective*' (2001) 83 International Review of the Red Cross 59, 65.

disregard to human rights on both the sides of the border has brought Kashmir Conflict to the forefront. Further, the recent developments happening in Kashmir have made the situation more complicated. Incidents like, pre-emptive air strike, release of Captain Abhinanandan as POW, human shield and stone pelting and pellet gun firings have attracted a lot of international concern. The recent developments that happened in past two years have further made it imperative to assess the conflict and apply the provisions of Geneva Conventions.

4.3.5.1 Surgical Strike and Pre-emptive Air Strikes: When the personnel of Central Reserve Police Force were attacked by Jaish-e-Mohammed, Indian government undertook an air strike against the terrorist establishment in the Pakistani territory. This air strike was second in line after a surgical strike done by India in the year 2016 in response to terrorist attack on military base in Uri. However, recent Air strike was different than the previous one because this time, Indian Air Force did not just enter Pakistan Occupied Kashmir but crossed it and attacked the terrorist bases in the Pakistani territory. Indian statement of the Balakot Air strike is worth deciphering in order to categorise the attack as an armed attack under international humanitarian law.

> "Credible intelligence was received that JeM was attempting another suicide terror attack in various parts of the country, and the *fidayeen* jihadis were being trained for this purpose. In the face of imminent danger, a pre-emptive strike became necessary. Hence this non-military pre-emptive action was specifically targeted at the JeM camp."[352]

Thus, Indian statement nowhere reflects the application of international humanitarian law. This air strike raises several issues of international humanitarian law, *firstly*, whether

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[352] Statement by Foreign Secretary on 26 February 2019 on the Strike on JeM training camp at Balakot, Ministry of External Affairs, Government of India. *Available at:* https://www.mea.gov.in/Speeches-Statements.htm?dtl/31089/Statement_by_Foreign_Secretary_on_26_February_2019_on_the_Strike_on_J eM_training_camp_at_Balakot. (Last visited on November 15, 2019)

this air strike invokes application of the principle of 'necessity' as it was directed towards a non-state group. However, Indian government claimed this to be a non-military pre-emptive attack done under an imminent danger of more terrorist attacks being planned against India. *Secondly*, if that is the case, then does the attack fulfils the principle of proportionality. The answer to this question can be found in the 'doctrine of accumulation of events' that applies to series of forcible events or low scale terrorist activities culminating to an armed attack[353]. Further, going by the Caroline Test, India will still have to justify the attack on the grounds of "necessity of self-defence, instant, overwhelming, leaving no choice of means and no moment of deliberation"[354]. In India, the reiteration of the previous deadly attacks by Jaish-e-Mohammed and a series of other attacks being planned can be a reason for attempting an armed attack by the same. Not only the Pulwama attack but the attack on Pathankot, Uri and other singular acts of terrorism together fulfil the criteria of necessity and proportionality thus justifying India's action as a lawful exercise of right to self-defence. However, an important question as to sovereignty of Pakistan is significant because India intruded into the territory of Pakistan this time attacking armed groups thus invoking Article 2 (4) of the UN Charter. However, India confirmed that its action was 'non-military' and not against State of Pakistan but non-state groups. The term non-military has lot of significance, because firstly it does not invoke international humanitarian law w and secondly it does not recognise a State-like status of the armed group so as to bring it in the purview of international humanitarian law. By a conscious attempt India termed this attack as non-military because it did not intend to elevate the status of JeM from a terrorist organisation to a non-State group bearing some State like features. Further, India justified this attack although it was breaching the territorial sovereignty of Pakistan because India has time and again held Pakistan responsible for providing safe harbour to terrorist organisations on its territory. Although Pakistan pleads ignorance of this fact, it is not possible for such terror outfits to

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[353] Islamic Republic of Iran v United States of America (2003) ICJ Rep 161.

[354] Greenwood, "International Law and the Pre-emptive Use of Force: Afghanistan, Al-Qaida, and Iraq", 4 *San Diego International Law Journal* 7 (2003).

grow and mushroom without the aid of Pakistan. India's stand is further substantiated by the Financial Action Task Force (FATF) actions taken against Pakistan in the recent years. Thus, Pakistan's inactivity grants India the right of extraterritorial use of force as also recogised under Responsibility of States for Internationally Wrongful Acts[355] published by International Law Commission. Thus, India's action finds support under the provisions of International Law and stands justified.

However, an associated event to this air strike was the capture and later release of Indian Air Force Wing Commander Abhinandan Varthaman who was chasing out the Pakistani air crafts that entered Indian territory in response to the air strike. Although India in its statement avoided any reference to the application of international humanitarian law to the air strike, it invoked the Prisoner of War status for its captured combatant and thus asked Pakistan to apply the protection accorded under Geneva Conventions. Both States denied escalation of armed conflicts and Pakistan released the Indian Officer as a gesture of peace.

4.3.5.2 Use of Human Shields: The Kashmir Conflict is complex, and this complexity becomes denser with addition of new parties to it, like the civilians of Kashmir. These civilians with their involvement in Kashmir make the conflict asymmetric in nature. The Kashmir conflict was in the news again for the violation of the principles of international humanitarian law when a Kashmiri man called Farooq Ahmed Dar was trussed to the spare tyre at the front of a jeep and driven on a five-hour journey through several villages at the head of an army convoy. He claimed he was picked by the army while returning after casting a vote, allegedly beaten before he was lashed to the vehicle with a sign saying "This is the fate that will befall stone throwers" pinned to his chest. However, the

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[355]United Nations, Responsibility of States for Internationally Wrongful Act, Yearbook of the International Law Commission, 2001, vol. II (Part Two). (UN, 2001)

India army seized him because he was the part of the mob throwing stones and this created a window to move safely saving several lives.

"Human shields" as a method of warfare is prohibited under international humanitarian law. The law regards use of civilian population or their presence to shield military objects from attack or military operations. The presence of civilians in a conflict zone can be voluntary or involuntary and it does not take away the above protection.[356] It is not just formalised under Geneva Convention of 1949 and Additional Protocols[357] but is also looked as a war crime It is under the Statute of the International Criminal Court rendering civilians immune from military operations[358].

Although India may say that the principles of international humanitarian law won't apply as there is no armed conflict in Kashmir, international human rights law does come to rescue. In this context it becomes clear that India should have taken strict measures to punish the officer who indulged in the prohibited activity rather than lauding him for a counter-insurgency measure. It is only by virtue of a trial can it be determined that the action was justified on the grounds of proportionality and it did not serve any military advantage.

4.3.5.3 Direct Participation in Hostilities: Civilians and Kashmir Conflict: One of the significant issues raised by the Indian army in the whole Human Shield incident was the stone pelting undertaken by Kashmir civilians. Thus, an important position which must also be highlighted is that the civilians may themselves lose their protection by virtue of direct participation in the hostilities. By participating in any such activity and involving

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[356] International Committee of the Red Cross (ICRC), Human Shields, How does law protect at war? Available at https://casebook.icrc.org/glossary/human-shields.(Last visited on December 17, 2019)

[357] Third Geneva Convention, Article 23, first paragraph (cited in Vol. II, Ch. 32, § 2251); Fourth Geneva Convention, Article 28 (*ibid.*, § 2252); Additional Protocol I, Article 51(7) (adopted by consensus) (*ibid.*, § 2254).

[358] ICC Statute, Article 8(2)(b)(xxiii) (*ibid.*, § 2255).

themselves with the military would lead to the cessation of their protection is another important angle to the problem of Human Shields. Article 1 para 3 of Additional Protocol I of 1977 provides for cessation of protection to civilians if they take direct part in hostilities.

This issue becomes prominent and cannot be side-lined when one looks into the figures of stone pelting on the armed forces in Kashmir in the year 2019 itself. In the month of August itself, there were more than 658 such incidents, highest in any year.[359] These incidents usually block armed forces in their operations or during their efforts to neutralise the terrorists in the Valley, thereby aiding the terrorists to escape. Such participation can lead to suspension of protection accorded to the civilians against the risks of military operations. Thus, a civilian can be directly attacked if he a combatant. The international humanitarian law governing this are the Additional Protocol I and II[360]. However, pelting stones to be qualified an act of hostility requires extensive research as to the causation of the same to the conflict.

4.3.5.4 Use of Pellet Guns: The use of pellet guns during the recent unrest in Kashmir as a method of crowd control has been questioned because of several deaths and numerous injuries. Several reports and international pressures were made on the Indian Government to ban the use of pellet gun to control crowd in Kashmir. Across the world, these rubber pellets have been shown to inflict serious injuries, permanent disability, and death. The volatility of mob violence, inaccuracies in aim of the pellets, over-use of the pellet guns, and the perception of their harmlessness enhances the destructive potential of these so-called non-lethal weapons.

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[359] 2019 recorded most number of stone throwing incidents in Jammu and Kashmir, The Hindu, *available at:* https://www.thehindu.com/news/national/2019-recorded-most-number-of-stone-throwing-incidents-in-jammu-and-kashmir/article30485984.ece. (Last visited on January 18, 2020)

[360] Articles 51 § 3 of Additional Protocol I and 13 § 3 of Additional Protocol II to the Geneva Conventions of 12 August 1949.

By using pellet guns, the Indian Government violated international standards with its current response to protests in Kashmir. To be specific, by allowing the use of pellet guns on the protestors and stone pelters, the Government of India had violated norms established by the UN Basic Principles on the Use of Force and Firearms by Law Enforcement Officials.[361] The basic principles state that Law enforcement officials must apply non-violent means before resorting to the use of force. Whenever the lawful use of force and firearms is unavoidable, law enforcement officials shall exercise restraint in such use and act in proportion to the seriousness of the offense. They should focus on minimizing the damage and injury and ensure that assistance and medical aid are rendered to any injured or affected person.

The domestic procedures on crowd control should reflect international expectations of proportionality and necessity. During a crowd control operation, only two to five officers should have non-lethal weapons and banners should be used to warn the unlawful assembly prior to the deployment of any force. Not only that, when firing becomes necessary, which is only after efforts are made to disperse a crowd without force; every attempt should be made to fire below the waist. With the number of eye injuries, violations of human rights in Kashmir has been established prima-facie.

Moreover, the current state of law in India grants government officers an impunity for even the most gross violations of human rights, including the current pellet attacks and breakdowns in crowd control procedure. The Indian Criminal Procedure Code (CrPC),1973 produces *de facto* immunity for police officers, members of the armed forces and other government officials. Section 197 of the Criminal Procedure Code 1973 says that no court has jurisdiction over an alleged criminal offense committed by a

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[361] Kashmir: UN Reports Serious Abuse, *available at:* https://www.hrw.org/news/2019/07/10/kashmir-un-reports-serious-abuses, (last visited on August 7, 2019)

government official "while acting or purporting to act within the discharge of his official duty," without first obtaining authorization from the requisite Central or State Government.

4.3.6   Conclusion: Is Kashmir Conflict a New War?

Having a comprehensive glance and analysing the development of Kashmir conflict since past seven decades, reveals a significant change in both the dynamics and conceptualization of the conflict. Changes in the conflict pattern have happened due to the change in the parties to the conflict. Increasing role of non-state actors that are indulging in frequent but low intensity conflicts have changes the focus from traditional threats to new security threats thus affecting the applicability of international humanitarian law. The fluidity of the conflict is reflected from the fact that a movement that was as a movement of self-determination turned into a militancy motivated by ideological confrontations. The bilateral border issue soon became a centre stage for cross-border terrorism and involvement of transnational networks that completely modified the nature of conflict.

Significant features of Kashmir Conflict that make it a new war are primarily more frequent cases of low intensity conflicts between asymmetric parties. Although some see the Kashmir conflict as a religious dispute between Hindu India and Islamic Pakistan, the insurgency itself has become part of a larger debate over the emerging political character of Islam throughout the entire South Asian subcontinent. Thus, the Kashmir conflict reflects the blurring distinctions between ideological and non-ideological confrontations. Moreover, the freedom movement of Kashmiris has transformed to terrorist activities that is being planned and executed by transnational networks present in and out of Kashmir. The most important dimension of the conflict is the proxy war undertaken by Pakistan keeping in mind moral, financial, and military support provided to the terrorist and separatists active in the region.

It is very evident that given to various aspects, the conflict in the Valley of Kashmir has evolved over time where it has become difficult to characterise it under the straight jacketed formula if either an international armed conflict or a non-international armed conflict or both. However, India and Pakistan may deny or propose the applicability of international humanitarian law as per their interest, one thing that is stands undeniable is the serious human rights violations of the people of Kashmir. State parties India and Pakistan and the several non-State armed groups and militant organizations have only focused on the political aspects and goals of the conflict and avoided the question of violation of human rights that needs urgent attention.

4.4   Case Study: Naxal Conflict in India

    4.4.1   Introduction

    4.4.2   Overview of the Conflict

        4.4.2.1 History

        4.4.2.2 Other Factors

    4.4.3   Actors in Conflict

        4.4.3.1 State of India

        4.4.3.2 Mao Front Forces

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        4.4.3.4 Salwa Judum and other tribal anti-Naxal forces

    4.4.4   Classification of the Conflict

        4.4.4.1 Internal Conflict

        4.4.4.2 Non-International Armed Conflict

        4.4.4.3 Implications

    4.4.5   Conclusion

4.4   Case Study: Naxal Conflict in India

4.4.1   Introduction: Considered to be "biggest internal security challenge" the Naxalite insurgency's duration, vigour and geographic spread, and the organisation post 2004, with increased involvement of Indian military has raised all kinds of questions about the legal classification of the conflict. Whether it is an insurgency in true sense, or full-fledged civil war, has severe implication in the parties. The classification will not just impact the rights and duties of the parties, but also determine the level of violence and its impact on civilians.

Thus, the purpose of choosing Naxal Conflict is to determine whether there is an inconsistent application of laws and if the international humanitarian law framework is so weak that it has not been applied to a simple orthodox insurgency. Analysis of Naxalite insurgency also points out that what is essential to honour the principles of international humanitarian law during an non-international armed conflict is not just is consistent application but also in recognition of the nature of the conflict. Thus, when there are lacunas in mere classification of conventional non-international armed conflicts, how well the existing framework is equipped to deal with contemporary non-international armed conflicts that reflect features of fourth generation warfare.

4.4.2   Overview of the Conflict

4.4.2.1 History: The insurgency began in 1967 and has survived for more than half a century. In the past fifty years, Naxal conflict has seen drastic changes in terms of nature, methods, means, actors, and their organisations. The history of the conflict can be divided into three phases.

i.   **First Phase** (1960s- 1980s): Agrarian Revolution- Emerged in 1967, in the town of Naxalbari, West Bengal, landless tenant farmers revolted against the ownership of

the landowners under the leadership of Charu Majumdar. The movement got its ideological influence from the Maoist strand of Marxist doctrine that advocates armed struggle as a legitimate expression of class consciousness. The violent protests were suppressed by the police force, thus leading to an uprising all over Central India, where tribes and Adivasis began violent protests. The movement as it triggered in Naxalbari, it gets the name 'Naxalite' and other similar terms, 'Naxal' and 'Naxalism'. This phase saw periodic uprisings geographically spread through West Bengal, Bihar, and Andhra Pradesh. The Naxal movement was quelled temporarily due to imposition of National Emergency by the Government of India on the grounds of 'internal disturbances' stemming from different opposition forces.

ii. **Second Phase (**1980s-1990s): Political and Geographical Expansion: After the end of Emergency in 1997, the Naxal Movement saw growth and expansion not just geographically but also politically. Those who banished violence, did not leave the cause but started working through formal political institutions and trade unions. Those who followed the original agrarian rebellion expanded their political and military reach in almost 160 districts in ten states in the east and central India, now known as the Red Corridor.[362]

iii. **Third Phase** (2000s till Today): Political Organization and Consolidation: With the formation of the CPI-Maoist in 2004, the Naxal Movement got its strength consolidated and its direction redefined and realigned to the original ideological tenets of the Naxal Movement. This phase saw a dramatic social change, where the marginalised peasants and Adivasis shifted their emphasis to the military activity as a means not just to overthrow landlordism but establish an independent State.[363]

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[362] P. V. Ramana, D. Raja, et.al*., The Naxal Challenge: Causes, Linkages, and Policy Options,* 2, 3 (Pearson Education, New Delhi, 2008).

[363] Robin Jefferey, Ronojoy Sen, Pratima Singh (eds.), *More than Maoism: Politics, Policies and Insurgencies in South Asia* 25, 33 (Institute of South Asian Studies, 2012).

4.4.2.2 Other Factors: Indian State has been fighting this conflict since past five decades and has abysmally failed to contain it. To understand the nature of conflict and its causes, its underpinnings need to be addressed. There are several deep-rooted socio-economic factors that instigated the conflict and further sustained the intensity of the conflict. Chhattisgarh, Jharkhand and Orissa- is the greenest and resource rich part of the subcontinent and the residents of these areas, the Adivasis, are classified as "tribal" or "scheduled tribes". The Indian Labour Bureau has established a four criteria norm to determine scheduled tribes, viz., geographical isolation, backwardness/reliance on primitive agricultural methods and low human development indicators, distinctive culture, language and religion and shyness of contact.[364] Thus living in a closed cosmos, Adivasis are isolated from the mainstream and have been vulnerable to displacement and marginalisation as government and corporations force them off their land from mining and exploiting resources. Apart from being under-developed, the region was under the clutches of extreme poverty due to exploitation of sharecroppers, landless labourers by the landlords and moneylenders. Thus, the emergence and expansion of Maoist influence happened in light of persisting poverty and malnutrition in the most underdeveloped area of the subcontinent, further worsened by the alienation of forest land and no imminent measures taken by the Government to end the exploitation and include the marginalised into the mainstream. Thus, the rebels never had the problems in terms of recruitment and finding sympathisers.

Further, with liberalisation of Indian economy and opening of the markets added fuel to the fire. With more and more Indian and foreign companies operating in the resource rich areas of Jharkhand, Orissa, Andhra Pradesh has caused alienation of forest land and large-scale displacement.

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[364] Government of India, Report on Socio-economic conditions of Scheduled Tribes Workers, 6–11 (Ministry of Labour & Employment, 2007).

Moreover, the Naxal movement is not restricted to the rural and remote areas but has also garnered urban support. The contradictions of rich and poor in the cities has been used as a tool by the Maoist factions to build support in cities through infiltrating labour unions and targeting unemployed youth and students.

Ultimately, a high degree of violence, indiscriminate killings, fake encounters, and human rights violations by the State machinery has increased the support for the Naxalite and also towards the insurgency.

4.4.3   Actors in Conflict: One of the enduring conflicts that the State of India is fighting on its territory is a peculiar illustration of asymmetrical conflict where the non-State actors are of varied nature. The non-State actors are mobilised under organisation like CPI (Maoist) and even farmers and peasants carry arms forming part of local tribal militia. A more controversial actor Salwa Jadum emerged in the scene to fight against the Naxalite. The non-State actors involved on the front usually comprise of the farmers and tribal thus making the determination of their combatant status difficult.

4.4.3.1 State of India: The Naxalite insurgency has undergone multiple, overlapping waves of tribal, socio-ethnic based insurgent movements since its inception in 1960s. These movements have ebbed and flowed as the Indian military and political approached has dealt it focusing on catalysing factors basically on two fronts- development and security.

Indian State had dealt the insurgency by deploying police and paramilitary in the red zone. However, through "Operation Green Hunt", the Indian State has tried to curb the biggest internal security threat to India on a large scale. Although, the Indian Army denies being directly involved in the counter-insurgency, it has actively engaged itself in training the non-military police and paramilitary forces and has also been part of certain

counterinsurgency operations.[365] Thus, the Indian army has participated indirectly like training, logistical support, formulation of strategy. As of today, the total fighting force engaged in countering the insurgency is more than 1,00,000 troops, with 1873 CAPF companies deployed in the left wing affected States. Since the year 2000, there have been total 4929 incidents of killing, with maximum fatalities of Maoists around 3966, followed by civilians counted 3791 so far. Around 2557 security personnels have martyred in last two decades.[366] With more than 15,000 arrests and 13,000 surrenders, there can be no hints to be found that the intensity of the conflict would fade anytime soon.

Also, India has put a ban on the major Maoists groups like CPI (Maoist) and other formations under the Unlawful Activities (Prevention) Act, 1967.

4.4.3.2 Mao Front Forces: Naxalite are sometimes referred to as Maoist or Left-Wing Extremists (LWE). With an idea to end exploitation of the depressed classes by violent means, there are more than forty Naxalite groups working with different identities. The first violent peasant uprising was spearheaded by the Maoist Party, i.e. the Communist Party of India (Marxist-Leninist), however later split into many factions on the aspects of strategy and methods and means like participating in elections or not. The two major factions during the initial phases of the Naxal movement were the Maoist Community Centre of India (MCCI) of Bihar and the CPI(ML) People's War Group of Andhra Pradesh. However, in 2004, "these two groups merged to form a new unified Maoist group, the Communist Party of India (Maoist) or CPI (Maoist). CPI (Maoist) is the most violent Naxalite group in the country credited for more than 80 percent of violent attacks done by the LWE groups. The main aim of CPI (Maoist) is to "establish full-fledged people's liberation army (PLA) and base areas by developing and transforming the

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[365] Aman Sethi, "Green Hunt: The Anatomy of an Operation" *The Hindu,* Feb. 6, 2010.

[366] South Asia Terrorism Portal, *available at*: https://www.satp.org (last visited on November 12, 2019).

guerrilla zones and guerrilla bases. The long-term goal of the Party is to capture the political power by violently overthrowing the Indian State."[367]

With a strong organizational structure, the CPI (Maoist) has both centralised and decentralised features all mentioned in its Constitution. In spite of all the central units of the Party being decentralized to increase the efficacy of each unit, one finds a strict hierarchical structure. With an intention to monitor, coordinate and organize activities all through the country, the CPI has in due course of time established Regional Bureaus. They also have developed a string of intelligence network in their area of influence and operate through front organisations under the guise of different names.

Further, the Central Military Commission controls the People's Liberation Guerrilla Army, an organised force with men, women and adolescent boys and girls recruited by the Maoist. The main layer of the PLGA consists of platoons, companies and battalions whereas the secondary force comprises of the Local Guerrilla Squads and the Special Guerrilla Squads. The groups of armed informers, also known as jan militias assist guerrilla squads that are referred to as *dalams*.

Also, CPI (Maoist) has an exceptionally large number of People's Militia in place which forms the third force or the base force of PLGA. They comprise of Gram Rakshak Dals or the Self-defence Squad which are present in large numbers.[368]

The political and military activity at the local level is assisted by village committees that relies on sanghams (village associations). With an aim to increase the Naxalite support base, this village level administrative unit spreads Maoist ideology and assists Jan Adalat.

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[367] Sandeep Dubey, "Maoist Movement in India: An Overview (Institute for Defence Studies and Analyses)" (2013).

[368] Ibid.

Sanghams not only challenge the village and tribal administration but also strike the State machinery like the Panchayats.

With the separation of the political and military wing, CPI (Maoist) capability of striking violence has strengthened from strike-and-run to ambush. It has further promoted the transfer of technology of making and planting IEDs which has now taken a mass form injuring killing around 260 troops since past four years.

4.4.3.3 Tribal and Indigenous Groups: It is of no surprise that the Adivasi populations have become the predominant "foot soldiers" as well as victims of the Naxalite insurgency. They have been intertwined with the Maoist movement since the Naxalbari tribal uprising against the landlord exploitation and eviction. The Naxal uprising later spread to other areas as a local tribal movement for better wages, cessation of forest official harassment and right to harvest wastelands. Although post emergency the tribal involvement was not as violent as before. However, post 2000, Adivasis have given a major thrust to the Maoist movement with greatest levels of violence being witnessed in the tribal areas primarily for two reasons, *firstly* due to series of merger amongst the Maoist organisations allowing them to consolidate their territory, cadres and resources and *secondly*, increased state repression of Maoist forces in Telangana, forced them to retreat to deeper tribal areas. *Finally*, Maoist expansion in the tribal populated areas, was due to hilly geography and dense forest provide a strategic advantage for guerrilla warfare, which has further been strengthened by Sanghams that sees participation by the local people and tribal.

4.4.3.4 Salwa Judum and other tribal anti-Naxal forces: In the Gondi language, Salwa Judum means "Purification hunt" was a group of rightist, anti-Naxalite militias drawn from young male Adivasis in Chhattisgarh, state with high levels of Naxalite activity.[369]

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[369] Human Rights Watch, ""Being Neutral is Our Biggest Crime" Government, Vigilante and Naxalite Abuses in India's Chhattisgarh State" 30 (2008).

Being fed up of violence, it emerged from an organic uprising among the Adivasis in 2005 in Dantewada district that garnered support from the Central Government too.[370] Began as a peaceful campaign, it turned to an armed response with the Salwa Judum activists were armed with guns, lathis, axes, bows and arrows. In almost three years around 4048 "Special Police Officers" had been appointed by the Government under the Chhattisgarh Police Regulations thus falling directly under the government protection and support although the Government did not took any responsibility for the actions of the activists. This led to the complete breakdown of the civil administration with the activists becoming vigilantes who asserted the right to control, intimidate and punish anyone suspected to be a Naxalite. However, Salwa Judum came under intense criticism for human rights violations, especially for employing child soldiers almost about 4000 minors in all.[371] The violence between the Naxal groups and Salwa Judum led to the displacement of at least 1,00,000 Adivasis.[372]

Later in 2011, the Supreme Court of India declared Salwa Judum illegal and unconstitutional on the grounds of it violating Article 14 and Article 21 of the Indian Constitution and ordered the militia to be disbanded.[373] Although Supreme Court acknowledged the effectiveness of Salwa Judum against the Naxalites, however its help to the Indian State did not alter its illegality. Justice Venkatesan said, "[i]ndeed, we recognise that the State faces many serious problems on account of Maoist/Naxalite violence. Notwithstanding the fact that there may be social and economic circumstances, and certain policies followed by the State itself, leading to emergence of extremist violence, we cannot condone it."[374] Post the disbandment of Salwa Judum, in 2015 version 2.0 of the armed militia was formed under the name Vikas Sangharsh Samiti

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[370] ET Bureau, "Chidambaram All Praise for SPOs" *Economic Times*, Jan. 8, 2009.

[371] Human Rights Watch, "India: End State Support for Vigilantes" (July 15, 2008).

[372] Ibid.

[373] *Nandini Sundar & Ors v State of Chhatisgarh*, (2011) 7 SCC 547.

[374] Ibid.

active and operational in Dantewada and Bastar. Very recently, a new Bastariya Battalion of CRPF has been commissioned comprising of all the recruits from Bastar district which will give operational dimension for the counter-insurgency operations against Naxalites. However, the move has been violative of human rights as it follows the same pattern of Salwa Judum by pitching tribal against tribal, but the government believes that the two groups are not same primarily for several reasons. Firstly, Bastar Battalion will be under the direct command and control of CRPF, it has been trained under the 44-weeks programme not just in use of weapons but also on civic duties and human rights and secondly more than fifty percent of the battalion comprises of women.

4.4.4   Classification of the Conflict: Assessing the situation of Naxalite Conflict to classify it as an armed conflict the multifactor ICTY test must be applied. The Government of India has not ratified the Additional Protocol II and hence the relevance of Common Article 3 becomes more controversial. Application of international humanitarian law has severe legal ramifications as it alters the rights and imposes liabilities on the parties. Under the domestic framework, Maoists are criminals seeking to harm the 'unity and integrity' of the country, thus giving too much power in the hands of the State and no protections whatsoever to the Maoists that they could be eligible of under the scope of international humanitarian law.

4.4.4.1 Internal Conflict: The State of India considers the Naxal Conflict as internal law and order situation and has thus dealt it according to the laws of peacetime. In 2006, the Prime Minister of India Manmohan Singh described Maoist insurgency as the "single biggest internal-security challenge" India had ever faced.[375] Further very recently, when the UN published its "Annual Report of the Secretary General on Children and Armed

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[375] Gaurav Khanna and Laura Zimmerman, "Development for Peace: The Decline of Naxalite Violence in India" (Oxford Research Group, 2017); PTI, "Naxalism biggest threat to internal security: Manmohan", *The Hindu*, (May 24, 2010).

Conflict",[376] it included Naxal Insurgency in the list of conflicts, India protested the decision saying Naxalite insurgency is neither an armed conflict nor a threat to international security.[377]

Since its inception, the Indian Government has looked at it as an internal disturbance. It was merely described as 'lawlessness' - a transgression to be repressed and contained.[378] The government launched massive police operation that drove the movement underground with most of the leaders under police custody. The emergency period further suffocated the movement with state authorities having blanket powers to crush the movement. However, the police excesses like extra-judicial killings and extortion, misappropriations and harassment of the Naxalites and their supporters refuelled the movement. As 'law and order' is the State subject under the VII Schedule of the Indian Constitution, all the States affected by Naxal violence came up with laws to arm the police to repress the uprising, like the West Bengal (Prevention of Violent Activities) Act, 1970. Some States even liberalised arms licensing to enable people to 'protect' themselves from Naxals.

At the Central level, the government banned the CPI (M) under the Unlawful Assemblies Prevention Act, 1967 and all its associated formations and front organisations. The government has formulated a two-pronged approach, the law and order approach and the social integration approach tackle the conflict in a holistic manner. The Centre supports the States with its Paramilitary Central Reserve Police Force (CRPF) and its guerrilla warfare trained Commando Battalion for Resolute Action (COBRA). Finally, the State of India has led the counter insurgency operations with an iron fist.

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[376] UN General Assembly, *Annual Report of the Secretary General on Children and Armed Conflict,* A/72/865-S/2018/465, GAOR, UN Doc A/72/865-S/2018/465 (May 16, 2018).

[377] PTI, "India Protests over UN Chief's Report", *The Hindu,* (Aug. 3, 2019).

[378] S. Banerjee, "Naxalbari: Between Past and Future", 37(22) *EPW* 2115 (2002).

4.4.4.2 Non-International Armed Conflict: Naxalite Conflict is the second oldest armed insurgency India has faced since its independence. The violence has been intensified since 2004 and with the 'Operation Green Hunt' a full-scale war was waged with the deployment of more than 1,00,000 CRPF personnel in the conflict zone. The Naxalites have a 10,000 strong guerrilla forces and more than 3800 strong militia. Thus, the militarization of the Naxalite movement has peaked in the last two decades and so has the number of casualties. With more sophisticated military equipment like IEDs and missile launchers being used have led to the escalation of conflict and casualties.

Further, CPI-Maoist, the foremost Naxalite body, displays considerable centralised authority over their operations. The group has a Central Committee at the highest level of hierarchy which is selected by elections and is able to control actions of subordinates and set agenda for them. It also commands over the Central Military Commission that coordinates over the PLGA. Apart from military organisation it has an established governing hierarchy with special emphasis to local administration undertaken by *gram rajya* programme, known as Revolutionary People's Committee (RPCs) or people's government. By 2008, there were 500 RPCs formed in the forests of east-central India, exercising influence over 2000 villages. Currently the area under Maoist control is spread to around 30 districts that are worst affected.[379]

Thus, the Naxalite show organised hierarchical group with an ability to plan activities and project power over territory, have a system in place to punish those who deviate within the PLGA demonstrates a system of internal discipline and responsible command in order to fulfil the first criteria to apply the international humanitarian law. The command structure of CPI (Maoist) combined with control over vast portions of territory that has replaced the Indian State, meets the threshold of organisation, and thus possess the ability to implement humanitarian rules.

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[379] Ruchir Garg, "The Case of Dandakaranya", in P. V. Ramana (ed.), *The Naxal Challenge: Causes, Linkages, and Policy Options* 25, 35 (Pearson Education India, 2008).

Further, the Naxalite insurgency also displays intensity to classify it as a non-international armed conflict. The number of violent incidents has remained high and have spread across the red corridor. Moreover, the Naxal controlled areas as "most dangerous zones" for the purposes of paramilitary compensation.[380]

However, regionally disparate, and temporally sporadic clashes do not satisfy the "intensity" criterion.[381] The attacks carried out by Naxalites have occurred in a highly concentrated corridor in the central-eastern India with increasing violence every year. Thus, the Naxalite conflict is neither regionally disparate nor temporally sporadic and the concentration and consistent high death toll of Naxalite related violence suggest the same. And further although Indian military is not directly involved it is actively engaged in supplying and training Indian police and paramilitary forces. The ICRC has previously noted that paramilitary forces can be considered combatants if they are engaged in hostilities and fulfil the definition of "armed forces," a category which includes all units under a command responsible to a party such as the Indian State for the conduct of its subordinates.[382] The police and paramilitary armed forces, deployed to the order of hundreds of thousands by the central Indian government, have clearly been engaged in hostilities, as they are solely responsible for Naxalite casualties.

Given the frequency and concentration of violent incidents, the displacement of civilians, the use of sophisticated weaponry, and the involvement of the Indian military and paramilitary, the conflict appears to be sufficiently "intense" for the purposes of non-international armed conflict classification.

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[380] PTI, "Modi Govt to Name Naxalite Areas 'Most Dangerous Zone'; Plans Special Benefits for Troops", *Zee News India,* Jun. 7, 2014.

[381] *Prosecutor v Fatmir Limaj,* (2005) IT-03-66-T, § 168.

[382]Customary International Humanitarian Law, "Rule 4: Definition of Armed Forces", 2(1).

4.4.4.3 Implications: India has strongly maintained the position that Maoist insurgency is an internal law and order situation and not an armed conflict. The moment it is classified as a non-international armed conflict, both the parties would be bound by the principles of customary international humanitarian law. However, enforcement of non-international armed conflict is weak particularly for two reasons, domestic and international. *Firstly*, the enforcement mechanism of international humanitarian law norms in cases of non-international armed conflict is weak as they have been developed for international armed conflict and are unsuitable for non-international armed conflicts. *Secondly*, India, in order to apply the principles of Geneva Convention, has formalised it under the Geneva Convention Act 1960. According to it, in order to apply or initiate the application of principles of Geneva Convention, a certificate from the Secretary of the Government is required.[383] Such a certificate triggers the application of Geneva Conventions in any conflict taking place on the Indian territory. No such certificate has been notified by the government thereby not invoking the rules of international humanitarian law nor has the government recogised Naxal Conflict as an armed conflict, rather it's a law-and-order situation that can be dealt under the laws of peace. The Naxal Conflict is between the sovereign State and the law breakers, who are mere criminals, thus posing no challenge to the sovereignty or unsettling it. Further, recognising Naxal Insurgency as a non-international armed conflict would bestow rights to both the parties and more so will give political status to the armed Naxalite. Resultant effect of it would be that Indian paramilitary forces will be restricted in their strategy to fight the Maoist.

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[383] The Geneva Conventions Act, 1960, s. 6. - **Proof of application of convention** *"If in any proceeding under this chapter in respect of a grave breach of any of the Conventions a question arises under article 2 of that Convention (which relates to the circumstances in which the Convention applies), a certificate under the hand of a Secretary to the Government of India certifying to any matter relevant to that question shall be conclusive evidence of the matter so certified."*

4.4.5 **Conclusion**: Fighting insurgency is not new to the Indian State. However, Naxal insurgency is a conflict of a peculiar nature. *Firstly*, this conflict is based on political/ideological movement gaining strength from the undercurrents of poverty, under development and exploitation. *Secondly*, it has deep rooted asymmetries. *Thirdly*, the distinction between the civilians and combatants has been diluted due to participation of tribal and farmers in the conflict. Even their neutrality or indirect and tacit support to either of the party, makes them vulnerable to 'collective punishments'. Dealing the Naxal conflict militarily is difficult because, the front-line Naxalites are 'farmers-by-day and fighters-by-night' that diminishes the distinction between the combatants and non-combatants and espouses the challenge of direct participation in hostilities by the civilians. This gives an added advantage to the Naxalite fighters as they can claim the protected status while they are not active in the hostilities, whereas the government forces need to be more careful in asserting the status of potential detainees before their arrest. Ultimately, in the Fourth Generation Warfare model, the Naxalite conflict is primarily a battle of political will and determination rather than of arms. Thus, it means, that isolated military action is the not the solution to this conflict but rather it must be supplemented by developmental agendas and democratic engagements.

These new trends in contemporary conflicts have been considered by Indian Army when it came out with its *Manual on Sub-Conventional Warfare* in 2006, which defines "sub-conventional warfare" as a generic term encompassing all armed conflicts that are above the level of peaceful coexistence among parties and below the threshold of war. This would include, militancy, insurgency, proxy war, and terrorism. And thus, such kinds of conflicts require involvement of all kinds if measures by the government, from military ti economic development to political reforms and perception management aimed at winning the 'hearts and minds' of the people.[384]

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[384] *Doctrine of Sub-Conventional Operations (New Delhi) Integrated Headquarters of Ministry of Defence (Army), December 2006. pg 1.*