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The Israeli-Palestinian Conflict: Implications for the Principles of Distinction and Self-Defence in International Humanitarian Law

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ABSTRACT

Armed conflicts, stemming from socio-economic, political, religious, and security factors, have persisted throughout human history. The Israeli-Palestine conflict stands as a prolonged example, while post-Cold War conflicts by non-state actors have also emerged. International Humanitarian Law (IHL) introduced principles of self-defence and distinction to safeguard civilian populations during such conflicts, yet both state and non-state actors often disregard them. Israel, in its conflict with Palestine, adopted targeted killing (TK) to uphold these principles, as Nigeria did during its 1967–1970 civil war. However, permanent members of the UN Security Council often prioritise their own rules of engagement, neglecting self-defence and distinction. This undermines justice, epitomising the "might is right" ideology, as evidenced by Russia's destruction of civilian infrastructure in Ukraine. Urgent reform of the Security Council is imperative, considering these alarming trends. This article scrutinises ongoing armed conflicts, including the Israeli-Palestine conflict, the Nigerian civil war, and conflicts involving powerful nations like the USA, Iraq, Afghanistan, Ukraine, and Russia. It employs doctrinal, analytical, comparative, and descriptive methodologies to assess the observance of self-defence and distinction principles. Findings reveal Palestine's instigation of the Israeli-Palestine conflict, powerful nations' preference for their Rules of Engagement, and the over-politicisation of the Security Council through veto power. Proposed reforms include the domestication of Geneva Conventions and Protocols, expanding the Security Council's permanent membership to include African, Latin American, and South American countries, and developing rules for terrorist groups.

Keywords: Armed conflicts; International Humanitarian Law (IHL); Targeted killing (TK); Security Council reform.

INTRODUCTION

Armed conflicts, whether internal, international, or non-international, are triggered by certain fundamental reasons, such as religious, social, economic, or political reasons (Radin, 2013). The lingering Israeli-Palestine armed conflict was engendered by control over land, according to biblical accounts (Buchanan¸1988; Alobo & Nabiebu, 2022; Nabiebu, 2022). Both Israeli and Palestinian/Lebanon historians lay historical and religious claims to the land in dispute, which both pro-Israeli and pro-Palestine historians concede despite their divergent interpretations (Hajj, 2016).

According to Soyer (2007), Israel has legitimate biblical, religious, and historical claims to the disputed land area because they occupied the area until 136 AD, when the Romans forcefully removed its people from there. The removal of the Jewish people from the area by the Romans was informed by their revolt against the latter. The contemporary lingering armed conflict between Israel and Palestine is traceable to the 19th century, which witnessed the rise of their rival movements, Zionism and Arab nationalism. The Zionist movement fought for the establishment of a nation-state for the Jewish people in Palestine (Lowrance¸ 2012). The immigration of Jewish people domiciled in Europe and the Americas to their homeland in Palestine in order to acquire their right to self-determination was promoted by the World Zionist organisation and funded by the Jewish National Fund (Dalsheim, 2019). The fund provided the financial resources for the Jewish people to purchase land both under the Ottoman Empire and British colonial rule (Moscrop, 2000).

Before the 1947–1948 war between Israel and Palestine, there had been pockets of religious riots against the Jewish people by the Arab population in Palestine in 1920, 1929, 1936, and 1937 (Karsh, 2010). Since 1947–1948, Israel and Palestine on the one hand, and Israel and Lebanon on the other, have orchestrated the flagrant abuse of the concepts of distinction and self-defence contrary to the provisions of the rules of international humanitarian law on the subject matters (Kiswanson & Power, 2023).

This article explores all the armed conflicts between the two countries and how they comply with the rules of distinction and self-defence. Other contemporary armed conflicts in the world will also be explored with a view to critically examining the respect or otherwise for the concepts of distinction and self-defence in such conflicts.

LITERATURE REVIEW

This is divided into conceptual and theoretical frameworks only

CONCEPTUAL FRAMEWORK

- **Distinction**: It is the duty of military commanders in armed conflicts to distinguish between civilian populations, objects, and military objectives with the sole aim of directing their operations against military objectives (Nasu, 2009). It is the pivotal fulcrum of the IHL and dates back to the St. Petersburg Declaration of 1868 (Nwachukwu, 2014).
- **Self-defence:** This is a standing rule of engagement (SROE) in which a soldier or an individual relies on using force during an armed conflict in the face of a threat of bodily harm or death (Corn, 2016). It is located in the Jus ad bellum principle and is part and parcel of the use of force in law enforcement by state agents. Self-defence could apply to a unit, individual, national, state, or collective self-defence, whether anticipatory self-defence, pre-empire self-defence, mistaken self-defence, or direct self-defence (Cooper, 2019). The concept is constrained by the principles of absolute necessity, strict proportionality, and precautions as understood under human rights law. Self-defence is recognised under Article 51 of the UN Charter.

- **Distinction**: This is a pivotal principle of the Law of Armed Conflict (LOAC) and is a basic rule that is contained in Article 48 of the Additional Protocol.

The protocol states that:
In order to ensure respect for and protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between civilian population and combatants and between civilian objects and military objectives and accordingly direct their operations only against military objectives.

By this statutory definition, distinction is mandatory and is borne of respect for and the desire to protect the civilian population and its objects. It is available only to non-combatant civilians.

- **International Humanitarian Law (IHL):** This is the set of codified laws and customs that are applicable to armed conflicts. It is the law of armed conflict (LOAC): armed conflicts may be internal, international, non-international, or internationalised armed conflicts (Macak, 2018). IHL was codified by the International Committee of the Red Cross (ICRC) and is only applied by the ICRC whenever a situation of violence reaches the level of armed conflict. Armed conflicts are governed by IHL (IUS in bello) and its norms.
- **Targeted killing (TK)** is an IHL-recognised principle that refers to the use of technological lethal force with the intent, premeditation, and deliberate desire to eliminate individually selected persons who cannot apparently be caught by other means.

The use of "persons" is vague, as it could even refer to non-combatant civilians and their objects. However, one can surmise that the word can only refer to militant counterparts and may include bystanders.

THEORETICAL AND THEMATIC FRAMEWORKS

This article is an exploration of the use or non-use of the concepts of distinction and self-defence in the lingering armed conflicts between Israel and Palestine and, by extension, some other armed conflicts that have been prosecuted in the world in the 20th and 21st centuries. It examines whether the use or non-use of these customary and normative IHL rules has even been breached in these conflicts and why. The use or non-use of these IHL conceptual rules could be applied to internal, international, non-international, and internationalised armed conflicts.

Liivoja and McCormack maintain that to clearly delineate the concept of distinction under IHL, civilians must be clearly defined as persons who are not combatants as stipulated by Article 50(1) of the protocol, while civilian objects are those objects that are not military objectives as defined under Article 52(1) (Salomon, 2017). He further argues that the definition of combatants and military objects that constitute military objectives is overly important for the construction and application of the principle of distinction. This is because distinction in contemporary LOAC consists of detailed rules and norms on "respect" and "protection" that are reserved for civilians and civilian objects, which can nonetheless be forfeited if such civilians participate in hostilities (Solis¸2021).

Grey posits that it is necessary to distinguish between the "distinction" between civilians and their objects and military objects on the one hand and the "distinction" between armed attacks and frontier incidents, which, however, was inelegantly adumbrated in Nicaragua to explicate collective self-defence (Melzer, 2009). He suggests that the latter means distinguishing between acts that are grave (armed attacks) that can ground collective self-defence and acts that do not constitute sufficient gravity (frontier incidents) and so do not elicit collective self-defence.

In suggesting the defensive reformulation of the principle of distinction, Dowdeswell has formulated the following rules:

1. Rules adopted for engagement must be ones that protect civilian lives, prevent mistaken killings, and promote best practices and accountability among security forces.
2. Rules adapted must be consistent with the rules, norms, and values of LOAC, and Armed forces must be made to change the way they frame decisions in the use of lethal force, restricting the use of prejudices as well as replacing subjective discretion with the constraints of institutionalised decision-making procedures.

The author observes that this rule is the most difficult.

Dowdeswell (2016) posits that the problem of distinction might be solved by requiring that civilians forfeit their immunity when it is objectively true that the civilians have indeed participated directly in hostilities. Adopting the objective test and standard would amount to a complete rejection of the reasonableness standard. The author implies here that the forfeiture of civilian immunity is purely based on objectivity and may not be based on reasonability.

McDonald (2009) reveals that the principle is faced with threats in the contemporary world by certain factors, such as 21st century trends in armed conflicts that do not observe the rules of distinction, the civilization of the military by the recruitment of civilians to design, manufacture, maintain, and operate several weapons systems, the privatisation of former military functions, and terrorism and counterterrorism. He maintains that these factors have rendered Clausewitz's Trinitarian model of war as a battle fought between the sovereign states, that is, government, an army, and people, obsolete in the contemporary world, where many armed conflicts are organised for ethnic, racial, or religious reasons or unhealthy rivalries by groups for control over scarce resources.

Gaggioli (2017) contends that self-defence is being abused in contemporary armed conflicts because users cannot easily locate its source of origin; hence, they engage in a Tower of Babel phenomenon in an attempt to interpret its meaning and locate its source of origin. Due to the omnipresence of self-defence, soldiers use it to justify their use of force. IHL experts who are dazzled by its meaning tend to jettison it as a military concept and not an IHL concept. The author explicates the concept through its legal sources, content, and effect on military operations. The author also locates its sources of origin in jus ad bellum, municipal criminal law, and international human rights law.

Nußberger (2017) postulates that the subject of self-defence has increasingly become contentious between states and writers. The controversy, he maintains, is over the scope of the right to self-defence in relation to anticipatory or preemptive self-defence and protection of nationals and whether this is lawful. He also argues that this controversy over the doctrine of self-defence has been intensified by recent developments in the doctrine, such as the "Bush doctrine of pre-emptive self-defence in response to colonial occupation and terrorist attacks by non-state actors, and the like. The critical question is whether Article 51 of the United Nations charter contains provisions on emerging conflicts such as terrorist attacks and the use of the doctrine of self-defence in such situations.

Dowdeswell (2011) identifies the problem of mistaken killings at war as a pivotal problem in the doctrine of distinction. She acknowledges that the Rule of Engagement and the ICRC's Interpretative Guidance resolve this pivotal problem of distinction by privileging the prerogatives of states and their military objectives. She, however, concedes that the resolution of the problem is inadequate and unsatisfactory because mistaken killings at war violate the fundamental legal principles that guarantee equality and neutrality under the law of armed conflict.

RESEARCH METHOD

The method used in this article is doctrinal, analytical, and comparative, with a view to providing the requisite proposals for reform by the United Nations and state parties.

AN EXPLORATION OF THE ISRAELI-PALESTINE ARMED CONFLICTS AND THEIR ASSAULT ON DISTINCTION AND SELF-DEFENCE

This section of the article explores the history of the Israeli-Palestinian conflict up to contemporary times and whether distinction and self-defence are usually observed in such armed conflicts. It is appropriate to point out from the onset that age-long these armed conflicts between both countries are usually prosecuted by Israeli military and Palestinian non-state actors, such as the Palestinian Liberation Organisation (PLO), etc., which can rightly be described as terrorists. The Israeli military is clothed with self-defence by the jus ad bellum, Israeli domestic criminal law, and International Human Rights Law (IHRL).

Under International Humanitarian Law (IHL), which governs international armed conflicts, civilians ought to enjoy immunity from attack unless and for such time as they take a direct part in hostilities (Waszink¸ 2011). Only combatants, whether lawful, unlawful, privileged, or unprivileged, can take part in such hostilities. The question is whether members of the PLO, etc., are combatants in the age-long armed conflicts between Israel and Palestine. Their hostilities against Israel, however, are prohibited by the International Criminal Law (ICL) and the national criminal law of Israel, but not the IHL, because the latter has not yet recognised terrorism. This article also explores the reactions of Israel to unprovoked attacks by the PLO, etc. during armed conflicts as to whether Israel has ever breached IHL rules on self-defence and distinction during armed conflicts.

1948–49 WAR: ISRAEL AND THE ARAB STATES

The roots of the armed conflicts between Israel and Palestine on the one hand and Israel and Lebanon on the other can be traced to the late 19th century, which witnessed the rise of national movements such as Zionism and Arab nationalism (Porath¸ 2020). The Zionist Movement was formed in 1897 to actualize the creation of a homeland for Jewish people in the Middle East and to assuage the widespread persecution of Jews and anti-Semitism in Russia and Europe. The 1948–1949 war was caused by two factors, namely, the abolition of the British mandate over Palestine and the Israeli Declaration of Independence (Rogan & Shlaim, 2001). This war was prosecuted by the military combatants of Jordan, Syria, Egypt, and Iraq against the Israeli military. It is estimated that between 700,000 and 750,000 Palestinian Arabs were expelled by Israel from their lands. They are today described as Palestinian refugees.

The aftermath of this war witnessed the rise of the Palestinian Liberation Organisation (PLO), which heads all Palestinian terror organisations; for example, the Popular Front for the Liberation of Palestine (LFLP), which started attacking Galilee villages with rockets and other Israeli civilian targets such as schools, buses, apartment blocks, and even Israeli foreign embassies, and hijacking Israelis at foreign airports (Bush¸1989). Some of these terrorist attacks against Israel were the Sabena flight 572 hijacking, the Lod Airport, and the Munich massacres (Pedahzur¸2009). In pre-emptive and anticipatory self-defence, Israel was constrained to attack the PLO headquarters in Lebanon. The legal implication is that the distinction between combatants and non-combatants was not observed by both sides in this war, as even Israel witnessed the expulsion of 856,000 Jews from their homes in Arab countries such as Libya, Iraq, Yemen, Syria, Lebanon, and North Africa. They lost their properties.

1950–67, Six-Day War

Between 1950 and 1967, there was unbridled violence in the Middle East, which manifested in attacks on Israeli civilians by the Jordanian Army, Palestinian militants, or fedayeen (who were actively sponsored, trained, and armed by the Egyptian government) (Bassiouni & Ami, 2009). A series of attacks on Israeli civilians were carried out by them, which included the Yehud attack, the Ma'ale Akrahim massacre, the Belt-oved attack, the Shafir shooting attack, the 1956 Eilat bus ambush, the Ein Ofarim killings, and the Negev desert road ambush. In self-defence, Israelis also launched these attacks: the Belt Jalla, the Qibya

massacre, the Nahalim reprisal raid, and the Rantis and Falameh reprisal raids on an Egyptian military outpost in Gaza in February 1955, in which 37 Egyptian soldiers were killed. These attacks and reprisal attacks were devoid of the application of the doctrine of distinction between civilians and soldiers under IHL (Del Cantrell, 2015).
The Six-Day War of 1967 by Israel against Arab states started with a preemptive strike against Egypt, which had been aiding Palestinian fedayeen attacks against Israel. The aftermath of the Six-Day War manifested in the seizure of many territories by Israel, such as the Gaza Strip from Egypt and the West Bank from Jordan, including East Jerusalem (Shlaim & Louis, 2012). Israel assumed its sovereignty over the entire city of Jerusalem.

1968-2021
There have been sporadic armed conflicts between Israel and Palestine. These sporadic armed conflicts are organised by Palestinian terrorist groups as uprisings or intifadas for the non-realisation of the "State of Palestine." The first intifada of December 1987 led to the deaths of 1551 Palestinians and 422 Israelis; it was organised by Hamas as "armed resistance" against Israel (Shoukair, 2013). The second intifada erupted in 2000 and has been contained to date. It is viewed by Palestinians as a legitimate war of national liberation against foreign occupation, while Israel considers it a terrorist campaign (Byman, 2012). The second intifada has caused thousands of victims on both sides, both among combatants and civilians, and has been more deadly than the first intifada. The prosecution of the second intifada depicts that pre-emptive and anticipatory self-defence is exercised by Israel to protect its nationals, while the distinction between combatants and civilians is not recognised by both sides.

It needs to be pointed out that in order to respect the doctrine of distinction under IHL in armed conflicts, Israel has since the year 2000 adopted the policy of targeted killings (TK) against Palestinian militants, which has between November 9, 2000, and today caused the deaths of more than 216 targeted persons, 148 bystanders, as well as injured hundreds of others. Countries such as the United States, Pakistan, Germany, the United Kingdom, Russia, Somalia, and the Central and South American States have adopted TK as a technological lethal force with the intent, premeditation, and deliberate attempt to eliminate individually selected persons who cannot apparently be caught by other means (Apiiyah, 2018).

The question is: does TK have convincing moral, political, and legal justification? This question would be answered against the backdrop of the principles of IHL, human rights law, and the paradigms of law enforcement and hostilities. TKS are used in international and non-international armed conflicts and are legally recognised under IHL, human rights law, paradigms of law enforcement, and hostilities. TKS are used in international and non-international armed conflicts and are legally recognised under IHL, human rights law, paradigms of law enforcement, and hostilities between a state and terrorist or paramilitary organizations. The use of TK in armed conflicts (international or non-international) brings to the fore the significance of distinction as to who is a lawful potential target and who is not. The distinction between the two actors must hinge on an individual's status in relation to his being a combatant or civilian and his direct hostile activities. This is in accord with Article 51(3) of Additional Protocol I and Article 13(3) of Additional Protocol II, which provide that civilians who take part in hostilities must lose their right to protection against attack during the pendency of their direct participation in hostilities (Hancox, 2013). The legal implication is that during war, both the military of the counterpart state and civilians of the opposing state taking direct part in hostilities are legitimate targets. The lawfulness of TK is, therefore, firmly governed by the principle of distinction under IHL.

Direct participation was further expounded in the ICRC 2009 Interpretative Guidance to include the conjunctive ingredients of the threshold of harm or finality of the act, direct causation or relationship between the act that is qualified by the threshold of harm and probable harm by the opponent, and belligerent nexus, or the act that relates to the armed

conflict (Chaney, 2011; Alobo & Nabiebu, 2022). These elements of direct participation in hostilities by civilians that qualify them as legitimate targets have been vehemently criticised by academics and practitioners. It has been argued that for TK to be lawful, it must fulfil the requirement of military necessity, which is devoid of acts of treachery, perfidy, and hostility, so that the connected loss is neither proportionate to the concrete nor direct military advantage anticipated.

It is pertinent to stress that the lingering armed conflict between Israel and the Palestinian terrorist organisations is governed by the fourth Hague convention, or Hague Convention IV on Respecting the Laws and Customs of War on Land (1907), the Geneva Convention Relative to the Protection of Civilian Persons in Time of War (1949), and Additional Protocol I to the Geneva Convention of 12 August 1949 relating to the protection of victims of International Armed Conflicts of 8 June 1977. These laws constitute customary international law, and Israel is a party to the Fourth Convention of 1949. It has not, however, domesticated any of them into its legal system but honours the humanitarian provisions of some of the laws. Israel is bound by its public law, which recognises the Israeli Defence Force as the People's Army, which is authorised by law to do all acts that are necessary and legal to defend the state and attain its security-national goals. These acts include, but are not limited to, armed conflict against terrorist organisations outside the Israeli State. In carrying out these legally recognised acts, the Israeli military is exempt from criminal liability under its domestic law.

Since 2000, massive terrorist assaults have been directed against Israel and Israelis by Palestinian terrorist organisations in Judea, Samaria, and the Gaza Strip territories, which are within the borders of Israel (Kfir¸2019). These terrorist attacks are directed against Israeli civilian centres, shopping centres, markets, coffee houses, and restaurants and have occasioned the deaths of one thousand Israeli citizens and thousands of Israelis injured by terrorists. These massive terrorist assaults led to the introduction of TKs and preventive strikes by Israel as self-defence mechanisms. TKs and preventive strikes are aimed at killing terrorists in Judea, Samaria, and the Gaza Strip who organise and launch terrorist assaults on Israelis in these territories (against both soldiers and civilians). TKs and preventive strikes have also erroneously caused deaths and harm to thousands of Palestinians. Israeli government actions against Palestinian terrorist organisations call for determination in relation to their legality in the case of HCJ 769/02 (Stahl¸2010). The Public Committee Against Torture V The Government of Israel, instituted by Palestinian NGOs against Israeli use of TKs, The Israeli Supreme Court overturned the conclusions of the High Court in Barakeh v. Prime Minister and ruled that TKs are justiciable but consistent with Israeli jurisprudence, judicial practice, and judicial policy (Vedaschi, 2018). The Supreme Court was criticised in relation to the status of the armed conflict and applicable law, the interpretation of "direct participation in hostilities," and the fulfilment of proportionality requirements. It is submitted that these constitutive elements mentioned above are subsumed by Article 51 of the United Nations Charter, which grants Israel the right to self-defence through military force in all its territorial areas affected by armed conflicts.

EXPLORATION OF THE USE OF SELF-DEFENCE AND DISTINCTION IN OTHER ARMED CONFLICTS

The world has been consistently embroiled in national, regional, and inter-national wars, civil wars, revolutions, uprisings, and, since the end of the Cold War, insurgencies, terrorism, and organised crime, which are replete with violations of human rights. These activities are all regulated by the laws, rights, and duties of war, as defined by the laws and customs of war. Armies, militaries, territorists, and volunteer corps are expected to observe the laws, rights, and duties of war under the Declaration, as well as these conditions:

1. They must be commanded by a person responsible for the subordinates.
2. They must have distinctive emblems that are recognisable from a distance.
3. They must carry arms openly, and

4. They must conduct their operations in accordance with the laws and customs of war.

NIGERIAN CIVIL WAR, 1967–1970

The Nigerian civil war is adjudged to have strictly observed the principles of self-defence and distinction (Tanimu, 2020). This assertion can be reinforced by the strict observance of the operational code of conduct that was promulgated by the defunct Federal Military Government to regulate the conduct of officers and men of the Nigerian Armed Forces throughout the war (Benson, 2016; Benson, 2018; Benson¸2020). The code, which was reminiscent of and borrowed from the principles of the Geneva Conventions of 1949, contained the following guiding rules of war:

1. Under no circumstances should pregnant women be ill-treated or killed.
2. Children must not be molested or killed.
- Youth and schoolchildren must be attacked unless they are engaged in hostility against the Federal Government Forces. They should be given all the protection and care they need (Enemugwem, J. H., & Sara, 2009; Udofia, 2018; Udo & Inua, 2020).
1. Hospital staff and patients should not be molested.
2. Soldiers who surrender should be treated as prisoners of war (POWs) and not killed, because they are entitled to humane treatment, respect for their person, and honour.
3. No property or building should be destroyed maliciously.
- Churches and mosques must not be desecrated.
- Women should neither be raped nor attacked or subjected to any indecent assault or treatment.
1. Male civilians who are hostile to the Federal Armed Forces must be treated humanely but dealt with firmly and fairly.
2. All wounded soldiers and civilians must be given the necessary medical attention and care, and they must also be respected and protected in all circumstances.
3. All foreign nationals on legitimate business must not be molested, but mercenaries should not be spared because they are the worst enemies (Van Dijk, 2022).

These principles of the code eloquently echoed the IHL principles of self-defence and distinction but contained higher standards than IHL standards, even though the civil war was a non-international armed conflict. To effectively implement the code, "the Nigerian Government ensured that Biafra refugees were catered for in camps created by the Federal Ministry Government, which treated the war as a fratricidal war. Non-military objects were not destroyed by the federal armed forces. The case of Pius Nwoga v. State is also illustrative. In that case, the accused led some army officers to the home of the deceased to kill him. It was held by the court that the deliberate and international killing of an unarmed person living peacefully in the Federal Territory of Nigeria constitutes a crime against humanity, even if committed during the civil war. The court sentences the accused to death because his offence amounted to a violation of Nigerian domestic law and so deserved to be punished.

THE US WAR IN IRAQ AND AFGHANISTAN

The United States of America's operations in Iraq and Afghanistan did not observe the traditional concept of combatant and the law of belligerent qualification. Rather, criteria relating to socio-political affiliations or family or tribal group associations were applied. The US attitude towards belligerents is dictated by its public laws, such as the 2001 Authorization to Use Military Force (AUMF), the 2009 Military Commissions Act (MCA), and the 2012 National Defence Authorization Act (NDAA) (Sinha¸2020). Some of these laws were used to target people who were past members of al-Queda, the Taliban, or associated terrorists that carried out hostilities against the US and its coalition partners. The legal criteria used by the US in Iraq and Afghanistan for the identification of hostile forces and combatants seemed to be poorly defined, misunderstood, and abused by American soldiers and their allied forces, and not based on self-defence and distinction

principles.

RUSSIAN-UKRAINIAN WAR

The February 2022 Russian-Ukrainian war was not fought in self-defence but as a barbaric and primitive invasion of Ukraine by Russia for purported political and security reasons. Russia does not want Ukraine to join the North Atlantic Treaty Organisation (NATO).

It is reported that Russian troops attacked civilian settlements with missiles, killing over 2000 civilians and injuring over 1000 others (Kramer, 2005). The implication for the IHL principle of distinction is that the Russian troops did not distinguish between military targets and objectives and the innocent and defenceless Ukrainian civilian population. The killing of over 2000 Ukrainian citizens cannot be described as mistaken killings by any standard rules of war logic and engagement, which allow the use of lethal force for hostility, the perception of hostile intent, and the declaration of a particular force or individual as hostile. The said 2000 deceased civilians might not have taken part in the hostilities (Sweijs & Michaels, 2024).

SELF-DEFENCE AND DISTINCTION UNDER IHL: MYTH OR REALITY?

Self-defence

The doctrine of self-defence formulated under Customary International Law and IHL is a fluid concept; hence, it has been subjected to abuse by some states, as we shall see infra. Since its adoption at the establishment of the United Nations, it has been a fundamentally contentious law between states and writers in relation to the scope of its use by states. The controversy rages around the scope of the right to self-defence and protection of nationals, and now the coinage of pre-emptive self-defence by the Bush doctrine and anticipatory self-defence. Due to its fluidity, some states have at one time or another hidden under it the ability to use force and aggression against other states. These International Court of Justice (ICJ) cases constitute an eloquent testimony to this assertion:

- Cameroon v. Nigeria (2002)
- Iranian oil platforms (2003)
- Armed Activities on the Territory of the Congo (DRC v. Uganda) (2005)

The legality underlying the use of self-defence in these cases has not, till date, been determined by the United Nations Security Council (which is more or less a toothless bulldog).

It is necessary to point out that Article 2(4) of the UN charter prohibits the use of force by one state against another, while Article 51 makes it mandatory for states to report to the Security Council on measures they take in the exercise of the right to self-defence (Glennon¸ 2001). This right ought to subsist until the Security Council fulfils its avoided international obligation of maintaining international peace and security in states embroiled in armed conflicts.

The role of the Security Council in determining the use of the scope of self-defence is merely investigatory and, at best, condemnation of wrongful states. For instance, in the 1980 Iran-Iraq conflict, Iraq was proved through the council's investigation to be a wrongful state; only responsibility for the wrongful use of force was assigned to it. In the Iraq-Kuwait conflict of 1990, the Security Council strongly upheld the use of self-defence by Kuwait (Weller¸ 2010). It needs to be stressed that Article 51 does not require the Security Council to make pronouncements on the use of self-defence by states, but it can make authoritative resolutions and statements on the use of self-defence that may not be binding, particularly on powerful states such as the United States, United Kingdom, Russia, France, China, etc., which, invariably, are members of the council. For instance, the UK breached Security Council Resolution 502 (10-1-4) of 1982, which directed the UK to cease hostilities against Argentina on Falklands Island, and no sanctions were imposed on the UK. The same Security Council imposed sanctions on Iraq for invading Kuwait in 1990.

The hallmark of self-defence, whether individual or collective, was articulated by the

International Court of Justice in Nicaragua v. United States and Democratic Republic of Congo v. Uganda, in which the legal requirements for the resort to the use of force by states in the form of self-defence from aggression were outlined. The legal requirements evolved from the proportionality of self-defence measures to armed attack, invocation of self-defence, and aggression in acts of terrorism or acts committed by non-state armed groups operating under the control of a foreign state or infra-jurisprudence. Self-defence has been extended to UN peacekeeping operations by the provisions of Chapter VII of its charter, Security Council Resolutions 776 of September 14, 1992, and 836 of June 4, 1993, which authorise the UN Protection Force (UN PROFOR) to exercise self-defence, whether extended or functional (Cox¸ 2017). By these resolutions, UNPROFOR is authorised to use force in self-defence and protect civilians in "safe areas" (Koops, et al., 2015). Under human rights law and law enforcement paradigms, self-defence is regulated by the principles of absolute necessity, strict proportionality, and precaution, as laid down in the CAROLINE INCIDENT, in which a pre-emptive attack was carried out by British forces in Canada on a ship manned by Canadian rebels who were planning an attack on the USA.

The pitfall of self-defence is enshrined in the principles of ex ante authority to use force, limited ex post justification or licence to kill, mistaken killings, and the "Babel Tower" phenomenon. The "Babel Tower" phenomenon identifies the various sources of self-defence in IHL (jus ad bellum), human rights law, criminal law, and law enforcement paradigms. Justification for the recourse to self-defence by state actors is variously rooted in these sources of self-defence, hence the "Babel Tower" phenomenon. In the midst of these various sources of self-defence, state agents can act in self-defence in a wider scope than authorised by IHL, Human Rights Law, criminal law, and law enforcement paradigms.

Mistaken killings are when risks are shifted from soldiers to civilians, thereby giving soldiers the privilege to kill civilians. The practice is contrary to the laws of armed conflict in Protocols Additional I and II, unjustified under the ordinary standards of self-defence, and morally wrong because they breach the constitutional provisions that guarantee equality and neutrality. Mistaken killings are mostly common during insurgencies and terrorist attacks. This can only be checked by shifting the risks from civilians back onto security forces and encouraging them to take steps to minimise those risks.

Distinction under IHL

Distinction is traced to the negotiations for the Geneva Conventions of 1864, 1906, 1929, and 1949, in which states used the opportunity to secure rights for their military personnel and civilian population through the process of reciprocal rights (Gutteridge¸1949). Non-state armed groups are excluded from the practice of distinction by state actors. In the contemporary world, distinction is practiced based on the provisions of Article 48 of Additional Protocol I, which stipulates that states parties to a conflict must at all times respect and protect civilian populations and civilian objects through distinction between civilian populations and combatants and civilian objects and military objectives; they must direct their operations only against military objectives. Whether belligerent parties to conflicts observe these rules and standards leaves much to be desired (Keck, 2012; Bisong, 2017).

The salient and operative words that require elucidation here are combatant status, civilian population, civilian objects, and military objectives (Bisong & Udo, 2014). These concepts are elucidated against the background of international armed conflicts and non-international armed conflicts. Combatant status is conferred by Articles 13(1) and (2) of Geneva Conventions I and II, Articles 4A(1)–(3) and 6 of Geneva Convention III, and Articles 43–44 of Additional Protocol I on members of the armed forces of a party to a conflict, members of militias or volunteer groups or corps forming part of such armed forces, members of other militias and members of other volunteer corps, including those of organised resistance movements belonging to a party to the conflict and operating in or outside their own territory, etc (Dörmann, 2003). These provisions were carefully crafted

to exclude emerging terrorists or members of terrorist organizations. Combatant status has certain privileges, such as the entitlement to be designated a Prisoner of War (POW) upon capture and combatant immunity from prosecution for war crimes (the caveat is that a combatant must have conducted himself in accordance with the laws of armed conflict). Treaties do not confer combatant status on non-state actors in non-international armed conflicts; hence, they are unlawful combatants. Other unlawful combatants are species, mercenaries, and terrorists such as Boko Haram, ISWAP, al-Qaeda, ISIL, ISIS, etc. International and domestic laws of states do not recognise them as a third category of combatants. It is hoped that with the emerging unification of the application of the laws of armed conflict to the various kinds of conflicts in the world, they might in the future be designated as lawful combatants by the UN and ICRC.

The civilian population is defined in Articles 50(1) and 50(2) API as a population that comprises civilians, defined as those who are not combatants; hence, civilians have residuary capacity only (Barber, 2009). The United States Annotated Supplement to the Commander's Handbook on the Law of Naval Operations also defines civilians as non-combatants or individuals who do not form part of the armed forces and who otherwise refrain from the commission or direct support of hostile acts (Dalton, 2016). According to Watkin, such specially protected persons may include medical officers, corpsmen, chaplains, contractors, civilian war correspondents, and armed forces personnel who are unable to engage in combat because of wounds, sickness, shipwreck, or capture (POWS) (Udo & Archibong, 2019).

The rationale, or quid pro quo, for granting special protected status to civilians under IHL and customary international law is that they must refrain and are prohibited from participating in hostilities except if their participation is in a levee en masse, that is, they would be regarded as belligerents (Dennis & Udo, 2021). These legal requirements for special protected status for civilians during armed conflicts are reinforced by Articles 4(11) and 13(3) of AP II, which grant protection to civilians who do not take direct part in hostilities, but they would lose protection if they took direct part in hostilities (Vité¸ 2009). Offering military objectives is a concept that evolved from the Hague Rules of Aerial Warfare to designate military objects that can be bombarded during armed conflicts. Article 24(1) of the Hague Rules provided for legitimate aerial bombardment to include military forces, military works, military establishments or depots, factories engaged in the ammunition of arms, ammunition, or military communication, or transportation used for military purposes.

Article 24(1) also provided for the bombardment of civilian objects that may be located in the immediate vicinity of land operations, provided there is a presumption that the military concentration targeted is sufficiently important to justify such bombardment, having regard to the danger thus caused to the civilian population (Sassòli¸ et al., 2006). Even though these provisions have been revisited in legal instruments, the principles of proportionality and prebuttableness (whether rebuttable or irrebutable) were not well-intentioned as they could harm the civilian population unwarranted during armed conflicts. In modern IHL, attacks are now limited to or military that,ctives or objects that, by purpose, use, purpose, or use, make an effective contribution to military action and whose total or partial destruction, capture, or neutralisation…offers a definite military advantage. The US, which does not feel bound by the provision of Article 52(2) of the API, has evolved an exhaustive authoritative list of military objects to include enemy warships and military aircraft (Chertoff & Manfredi, 2018), naval and military auxiliaries, naval and military buses ashore, warship construction and repair facilities, military depots and warehouses, petroleum/oil/lubricants storage areas, docks, port facilities, harbours, bridges, airfields, military vehicles, armour, artillery, ammunition stores, troop concentrations and embankment points, lines of communications for military operations, and geographic features (e.g., mountain passes, buildings, facilities, etc.).

The norm of distinction in IHL and customary international law is currently

threatened by these factors, which are engendered by the reality of contemporary armed conflicts. One can hardly distinguish between contemporary armed conflicts due to these factors: lawful combatants engaged in armed conflicts and innocent civilians who are not involved in and are protected from hostilities. The factors that now impede the sanctity of the norms of distinction and protection in contemporary armed conflicts include, but are not limited to:

- non-observance of the principle of distinction in contemporary armed conflicts, e.g., terrorism,
- civilianization of the military in many states where civilians are engaged to design, manufacture, maintain, and operate weapons systems, e.g., USA military operations,
- privatisation of military functions, and
- terrorism or insurgency, and counter-terrorism or counter-insurgency.

FINDINGS

During the research, it was observed that:

1. In all Israel-Palestinian armed conflicts, Palestine instigates such conflicts with a view to actualizing its sovereignty;
2. Israel prosecutes its armed conflicts with Palestine with humanitarian underpinnings, hence the recourse to targeted killing techniques;
3. Self-defence has become too controversial because of its various sources of origin, thus giving rise to its varied interpretations. These sources include jus ad bellum municipal human rights law, criminal law, international human rights law, and law enforcement paradigms. This has led some writers to describe it as a Tower of Babel phenomenon.
4. mistaken killings by belligerents vitiate the potency of self-defence and distinction; and
5. The distinction is currently threatened by terrorism, counter-terrorism, civilianization of the military, and the privatisation of the military by some states, e.g., the USA.

CONCLUSION

The incorporation of the principles of self-defence and distinction into customary international law and IHL was well-intentioned because of the humanitarian considerations. It is doubtful if they have ever been observed even in conventional armed conflicts, as they are flagrantly abused in international and non-international armed conflicts. The reasons for their non-observance by parties to armed conflicts are the non-domestication of treaties regulating the practice of self-defence and distinction in both international and non-international armed conflicts into their legal systems as required by their internal laws or constitutions.

The other reason would be the practice of the "might is right" doctrine by parties that are members of the Security Council and that have at one time or another abused these principles during armed conflicts involving them. "A judge cannot and should not sit as judge in his own cause," nemo judex in causa sua. This anomaly can only be cured if permanent membership in the Security Council is liberalised to include parties from Africa, Latin America, and South America.

PROPOSALS FOR REFORM

1. States parties to the Geneva Conventions and Protocols and The Hague Regulations on laws and customs of war should domesticate them for effective compliance.
2. Permanent membership in the Security Council should be liberalised to include members from African, Latin American, and South American countries with equal powers with the USA, Russia, China, the UK, etc.
3. Compliance with IHL rules should be improved by states through:

- Compelling states ICRC to honour their obligation to respect and honour Geneva Conventions as contained in Article 1 of the Conventions.
- Existing IHL mechanisms, such as fact-finding commissions as contained in Article 90 and API, and both existing international and regional human rights bodies should be proactively more effective.
- New mechanisms, such as a system of ad hoc or periodic reporting, an individual complaint mechanism, and a diplomatic forum, should be introduced.
- The ICRC should urgently evolve norms and rules for states on the regulation of armed or terrorist groups, such as agreements between states and armed groups as enshrined in Article 3 of the Geneva Conventions.
- Armed groups should be compelled to issue and deposit their unilateral declarations of commitment to comply with IHL and the adoption of internal codes by them.
- Thirty-party involvement in armed conflicts through "good offices and other allied diplomatic initiatives should be highly encouraged by the ICRC.

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