Violence, Proportionality, and Laws in War: Analyzing the U.S. Armed Acts in Afghanistan

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A thesis submitted in partial fulfillment of the requirements for the degree of MS Peace and Conflict Studies

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Thesis Acceptance Certificate

It is certified that the contents and form of the MS thesis titled "Violence, Proportionality, and Laws in War:Analyzing the U.S. Armed Acts in Afghanistan" written by Ms. Raheelah Irshad (Registration No. 00000318142) of Centre for International Peace and Stability has been vetted by the undersigned, found complete in all respects as per NUST status/regulations, is free of plagiarism, errors and mistakes and is accepted as partial fulfillment for the award of MS/MPhil Degree. It is further certified that the necessary amendments as pointed out by the GEC members of the scholars have also been incorporated in the said thesis and have been found satisfactory for the requirement of the degree.

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Dedication

I dedicate this thesis to my father- thank you for your endless love, support, and encouragement.

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Abstract

International laws for wars prohibit the states from violations. In the war zone, the purpose of the International Humanitarian Law is to provide justice to the victim and, most importantly, to protect the civilians or those who are not taking a direct part in the hostility. The purpose of this research is to investigate the US' war acts in Afghanistan by using International Humanitarian Laws, specifically, the principles of Proportionality, Distinction, Unnecessary Suffering, and Military Advantage. This research aims to provide a critical analysis regarding the humanitarian laws and their implementation by the United States in Afghanistan during war on terror. The research was conducted by implementing qualitative exploratory research, for which data was gathered by conducting interviews of thirteen experts of law background. The interviewvees included law experts and researchers, think tanks, senior law analysts, military personnels, and university professors. The main finding was that principle of proportionality and discrimination must be modified to provide status to the war actors instead of labelling them as terrorists, the conflict of Afghanistan must be classified in both International and non-international armed conflicts, actors in the war must be considered under the International armed conflict before June 2002. Furthermore, ICC needs to pressurize the US for the prosecution of war acts in Afghanistan to mitigate the greivances of people of Afghanistan.

Keywords: International Humanitarian Law, Self-defense, State actors, Non-state Actors, Law of Proportionality, Just War

Table of Contents

Chapter 1

Introduction

1. Introduction:

The 21st Century-age of advanced and autonomous weapons- is witnessed by several unethical international and non-international attacks. Unfortunately, these highly advanced weaponized attacks are being defended by dominant, powerful attackers with the use of sugar-coated words provided by International Humanitarian law, such as; Self-defense, military advantage/objectives, and many more. As a result, the Consequences of such defendable attacks have made the affected states more vulnerable than before the intervention of other states, such as; millions of causalities, destruction of states' infrastructures, etc. Even in most countries like Iraq, Afghanistan, and Syria, where the interventions were made to contain terrorism, it has been seen that the brutal intervention of other states has not only increased terrorism but also has made the affected state feel so unprotected in the hands of both states and non-state actors. (Qureshi, 5-07-2019)

Moreover, it is so predictable how states interpret the use of force under the shadow of a Self-defense strategy. (Mignot-Mahdavi, 17 December 2019) This research aims to make the states aware of how these sugar-coated words are being mishandled and exploited by the powerful states. Nevertheless, to inform the international lawmakers that there is a need to update the laws of defense strategies opted by the interventionist states.

The wars of this century have become more modern with artificial intelligence in using advanced weapons, which can give precise results on the one hand, while such weapons can cause destruction on a huge level. Therefore, Laws persuade the states to use force under the concept of proportionality to create less damage.

Unfortunately, powerful states exploit international laws to pursue their interests, despite carrying precise weapons to destroy their enemies. Afghanistan is a crucial case study, which has created complexities for lawmakers to implement humanitarian laws. Firstly, the United States intervened in Afghanistan by exploiting the right of self-defense to kill terrorists. In the pursuit of its purpose of waging war, the US violated several International Humanitarian Laws by neglecting the nature

of the armed conflict in Afghanistan. In many cases, the US avoided the Principle of Distinction, which could save saved thousands of civilians' lives. Even the US condemned providing any combatants to the Taliban fighters of the de-facto government of 2001, a clear violation of the Geneva Conventions.

Furthermore, dozens of literature provide facts and figures regarding the torture program of the US with Afghanistan's detainees. Despite all the violations, the US is not willing for the investigations of its war crimes in Afghanistan and has blocked the investigation initiated by International Criminal Court.

According to the Geneva Conventions and Additional Protocols, the Principle of Distinction clearly discriminates between Civilians and combatants. Such as; Walzer elaborated on concepts of combatants and Civilians. According to him Combatants are trained fighters, and they have an organized structure and command laced with weapons, which ultimately distinguishes them from Civilians. While on the other hand, Henry Shue described the concept of civilians Civilians must be protected from attack, and they shouldn't be harmed in any way as civilians are not harming anyone. Notably, the Principle of Distinction is based on the Principle of limited warfare instead of total war to avoid the illegal and unnecessary suffering in the war. (Khen, 2016, pp. 767-770)

Moreover, the Principle of Military necessity has been exploited in many ways since the inception of the war rules. In the past, armies conducted unnecessary civilian casualties by arguing for a greater military advantage of it. Similarly, more damage was created to the civilians by destructing the civilians' objects and by killing civilians. Further, the Principle of Proportionality is the most important principle to be followed while engaging in the war, because this principle is directly linked with military necessity and unnecessary suffering. Proportionality prohibits that war acts against military objectives that can create sudden or incidental loss or injury to civilian life and destruction to civilian objects or the combination of civilian and military life and objects, and harm to the civilian life and objects is in such a way that loss is excessive than the anticipated direct and concrete military advantage. In short, this research focuses on these core principles to evaluate the war acts of the US war on terror in Afghanistan, that to what extent principles were followed or violated by the US.

1.1. Literature Review:

At the beginning of the 21st century, a sudden heinous terrorist attack on the World Trade Centre in America shook the world completely. After that attack, International organizations, especially NATO, UNSC, and other powerful states, made a coalition to save the world from such fearless terrorists, in which the U.S. has played a very pertinent role. However, the question is whether the intervention of such states and organizations in another state by initiating a war to combat terrorists can be considered a just war according to the Jus in Bello? For example, Jean Bethke Elshtain portrayed the Iraq war as "tortured and murdered," According to her, war is just a disaster and can only be justified if the people are protected from the massacre. (Craig J. N. de Paulo, Patrick A. Messina, Daniel P. Tompkins, 2011)

The most dangerous decision the U.S. had made was to designate WOT, a Global International armed Conflict. This characterization was aimed to make it justified to kill the enemies (terrorists) of the West anywhere, anytime, in any corner of the world. This characterization initiated the deliberate killings of enemies by making it lawful under the International Armed Conflict. On the contrary, the U.S. opted for a selective strategy in the United States, Canada, and Germany. The U.S. did not kill suspected terrorists in the West by assassination or ariel killings. The U.S. did not implement the Principle of Proportionality in the East, while the U.S. only cared for its states and allies regarding applications of the laws. (Sassoli, 2004, pp. 212-213)

According to Yoram Dinstein- a Legal Expert- the phrase "War on Terrorism" was not a legal term; it was just a trope to establish an illusionary sketch of an extremist war. People, who use this term, believe in its reality, while on the other hand, the legal experts can only understand the real meaning of this term, which does not exist in legal reality. It is just a metaphor. (Dinstein, 2009, p. 43)

Moreover, it was evident that the 9/11 attack was an open call for the use of armed force. In the case of Afghanistan, which has been already in consideration of the security council since 1993, then after 9/11 US and its allies invaded Afghanistan unilaterally, which is not justifiable according to UN Charter. By adding to it, the UN Charter does not allow the threat of force against the integrity of the territory and politically independent state. According to the charter, there are only two possibilities to use force against other states; first, the force can be used by an organization

(Security Council) on behalf of the international community, and second is that a state can use force based on individual or collective self-defense. However, under Article 51 of the U.N. charter, self-defense can only be applied based on the principle of Proportionality of International Humanitarian Law. For such purpose, a state has to report before Security Council, and after this report, now it depends on Security Council to take further measures. On such a basis, the U.S. cannot justify her self-dense in the case of Afghanistan because Security Council has been already there, and in the views of the U.S., the case of Afghanistan falls under terrorism which is an issue of international peace and stability. The only thing the U.S. was obliged to do was to compel the council to fulfill its duties under its charter regulations. Interesting is that the security council could have evoked its use of force on its own; even the secretary-general can take the initiative under article 99.

Nevertheless, after three weeks of resolution of 12 September (recognition of individual and collective self-defense), the U.S. and its allies-initiated bombings on Afghanistan; these bombing acts could have been done by the council precisely in the same way the U.S. wanted. However, the U.S. and its allies did it by themselves on behalf of "Self-defense." this shows that the U.S. may have chosen "unilateralism" to escape from the council's international accountability and requirements. Meanwhile, NATO also played a doubtful role in this war on terror because NATO, a regional organization, was using force based on collective self-defense organization and an organization can play one organizational role at a time. Also, under Article 53 of the security council charter, it is not legal to resort to force for a regional organization before approval from the council. (Mani, 2002)

As Jeff argues about the illegal harm of non-combatants in Afghanistan to maintain U.S. global dominance, this dominance is a very unsatisfactory reason to continue the war in Afghanistan. He also interprets that war can only be morally justified if fought based on necessity and lesser evil. He further adds that the Proportionality of killing people must overcome the harm caused by the war; otherwise, the American war in Afghanistan would not benefit anyone, but there would be suffering and deaths over there in Afghanistan. (MCMAHAN, 2011)

War in the 21st century has become self-defense instead of war itself. People are killed in the war based on self-defense, which is precisely equal to the killing of people in the war other than the

war of self-defense. Mcmahan argues in his book that justification of killing in self-defense should be the same as killing in war, and killing of a person is allowed only when that person is liable to be killed, whether it is a war of self-defense or a war of any other kind. (MCMAHAN J., 2009)

Moreover, each Military operation is restricted to obey the law of Proportionality while using Unmanned Combat Ariel Vehicles, so that collateral damage must not exceed form the military advantage. (Lülf, 2013) While in the case of U.S. attacks on Iraq and Afghanistan, there is excessive use of such autonomous weapons.

The literature indicates that the legal basis of war acts prescribed by the U.S. under the ambit of self-defense has ignored the many essential features of the law of Proportionality. Therefore, there is a need to theorize the U.S.' war acts under the consideration of Legal Positivism to describe the individualism opted by the U.S. to make her justifications more legal without considering the Proportionality and necessity of International Humanitarian Law.

1.2. Problem Statement:

For many decades, Afghanistan has suffered from international and non-international armed attacks. Most importantly, after the 9/11 incident, there have been legal and illegal bombings that are still going on. Although after the 11 September attack, legal authorities have become very active in evolving International Humanitarian Law. However, from 2001 to 2011, there has been literature on the U.S. attack on Afghanistan by several researchers to endorse the right of self-defense used by the U.S. to justify its use of force. Nevertheless, the problem is that there is less study to justify the right of self-defense and use of force because Afghanistan has been victimized under the shadow of self-defense since 2001, and powerful states are using force based on unilateralism and individualism. There is an immense need to research in jus in Bello to introduce limitations on the right of self-defense, and there is a need to enhance the concept of Proportionality on a broader level.

Moreover, more modernized weapon systems are born with this age of evolution, especially autonomous drones. So, there is also a need to raise a voice on the control of autonomous weapons to follow the principle of Proportionality and mitigate violence and vulnerabilities from the state of Afghanistan. Furthermore, no specific legal treaties exist for deploying unmanned combat

vehicles or cyber-attacks. (Lülf, 2013) Therefore, this research would concentrate on the legal review of IHL with the subject of historical and technological shifts.

1.3. Research Significance:

This research is pertinent to study as it provides unconventional ways to cope with the legal issues of the war in Afghanistan under the paradigm of the principles of IHL. Keeping in view the complexities of the conflict, this research helps differentiate between two phases of international armed conflict and non-international armed conflict in Afghanistan. Readers can understand how an external powerful state's invasion of another state should be based on the legality of war laws instead of any political, military, or economic agendas.

First of all, this research attempts to separate the case of Afghanistan from the "war on terror," as the U.S. called War on Terror, a global International Armed Conflict, to gain the authority to kill susceptible "designated terrorists" anywhere and anytime. Further, this research focuses on particular articles of the Geneva Conventions, which should be implemented in the case of the Afghanistan Conflict to elaborate on its non-international armed conflict phase. Additionally, certain Afghanistan conflict actors were deprived of specific legal privileges due to the U.S.' individualism in implementing IHL. This research sheds light on the U.S.' strategies regarding the war in Afghanistan, as the U.S. has operated the conflict's rules and regulations under its constitution rather than following the rules and regulations of the Geneva Conventions.

Furthermore, in western literature, the status of Afghanistan is argued as a "failed state" to negate the statehood status of Afghanistan, which is compulsory for the membership of the Geneva Conventions. This research elaborates these arguments under the lens of IHL. Moreover, the parties to the conflict, specifically the Taliban, were not given any status by the U.S. jurisdiction; in this research, the reader can understand the applicability of Additional Protocols to establish any status of such a complex actor of the conflict.

Notably, this research can help International Humanitarian Law students deeply understand the humanitarian laws concerning a challenging case study like Afghanistan. It has become a custom in the law prosecution to underestimate non-state actors' status, or it takes time to investigate those who can be visible law abiders of IHL. Therefore, this research is an effort to make the world

realize that victims of the war can also be from non-state actors, and IHL respects all the victims regardless of their identity.

On a global level, this study can also convince the universal court to rethink the status of Afghanistan instead of surrendering before the U.S. law strategies to exclude all the actors of Afghanistan's conflict from the shadow of the Geneva Conventions.

This research will also help the law administration to bring different policies and transformative reforms in the proportionality factor of Just War for the case of Afghanistan. This research seeks to fill the gap in previous literature. In addition, this research would be proven helpful in updating the principle of Proportionality, Distinction, unnecessary sufferings, and military necessity of IHL.

1.4.Research Methodology

1.4.1. Research Approach:

This chapter elaborates on the research methodology and tools for collecting the data to conduct this research as this research involved a case study with a specific period, which needed a suitable qualitative approach to uncover the in-depth realities. Such as; qualitative research helps the researcher use multiple methods to gather descriptive and contextual data, which further assists to elucidate the critical informations from different backgrounds and persons. Moreover, qualitative research creates an understanding of a person's experiences within the research field, which can further help the researcher use such experience to contextualize his/her research. (Mann & Stewart, 2000, pp. 2-3) Further, this chapter includes the modes of data collection by keeping in view the sensitivity of the research.

Since this research was conducted to conceptualize the humanitarian laws to understand the war acts of the United States in Afghanistan, by keeping in mind the sensitivity of the topic, qualitative research was proved the best choice in figuring out the multiple research strategies and inquiries to interpret the various research questions to conclude the research. Furthermore, to analyze the legal perspective of war acts from 2001 to 2011 in Afghanistan, qualitative research was proved very constructive in investigating the laws to implement the detailed legal arguments against the legal and illegal war acts of the United States.

This research focused on a specific case study, which helped explore diverse legal perspectives to investigate the legality or illegality of multiple actors involved in the conflict. Additionally, comprehending the legal contexts of the Afghanistan case study is considered the most complex task in categorizing the International humanitarian laws to the actors and civilians associated with the conflict, which became the most crucial reason to use qualitative methods to investigate the complexities of the conflict. Further, qualitative research was the most acceptable choice to explore the historical events, as it assisted in implementing the legal perspectives on those events.

At the start, research appeared to be a vague process in finding the answers to complex questions, especially the questions that started with "Why" and "How," but in the end, the qualitative method helped in concluding such complex questions. This research method helped investigate the war strategies of the United States in Afghanistan and assisted in contextualizing those strategies with the use of legal perspectives.

1.4.2. Data Collection Tools:

The broadened legal concepts to be used in a case study that required data analysis under the considerations of primary and secondary sources. For such purpose, secondary data was taken from the already existing literature, such as; legal institutional(including ICRC, ICC, and ICJ, etc.) reports or documents, legal tribunal reports, newspapers, research articles, already available video opinions or lectures of legal experts, and books. Notably, a literature review related to implementing International Humanitarian Laws in Afghanistan during a specific period was consulted more extensively.

Meanwhile, primary data was collected by conducting semi-structured in-depth interviews, which helped analyze the research investigations. The current research was based entirely on International Humanitarian Law; therefore, it was compulsory to take interviews with those who had thorough knowledge or research in the related field. Further, interviews were also taken from the officials who had war-related research in Afghanistan or were currently working in think tanks with analytic expertise on International research topics in Afghanistan, specifically related to the international role of the United States in Afghanistan. Overall, seven interviews were conducted. Three interviewees were Law professors in prestigious institutes located in foreign countries, while

others were senior intelligence analysts and experts on international laws and international relations.

1.4.3. Conducting Mode of Interviews:

Before conducting interviews, a questionnaire was prepared on more than ten questions, and the same questionnaire was shared with the interviewees. The questions were arranged with the themes consulted from the relevant literature review. The interviews were conducted in online video mode because international law experts and analysts were contacted for research interviews. Additionally, the pandemic has confined the world to online commitments until the complete eradication of the virus. While the interviewees, who resided in Pakistan, were approached for a face-to-face interview.

Moreover, the interviews were conducted personally with comprehensive and open-ended questions to make the interviewees more explicit about the research purpose and inquiry. The average duration of the semi-structured interview was 40 to 55 minutes. Except for two interviews, all were tape-recorded with the interviewees' consent, and these recorded interviews were later transcribed to examine the research inquiry. In comparison, the two interviews were taken in written form on the word documents from the interviewees via Email.

Furthermore, all the interviewees were categorized in the four main themes to figure out the different concepts on the same questions based on the legal perspectives, such as; (i) Law Professors from International and National universities, (ii) officials from legal and regional think tanks, (iii) Senior Intelligence Analyst (iv) Senior International Law Researchers. Additionally, as discussed earlier, the research study was based on a case study of a susceptible state, and it was essential to have such an expert who had some research experience in that particular state to explore more clear realities about the war actors.

1.5. Research Objective:

This research aims to discover the violation of International Humanitarian Law in the U.S. war on terror in Afghanistan.

To explore the right of Self-defense with the subject of the Principle of Proportionality of International Humanitarian Law.

To identify the U.S. role in creating vulnerabilities among the Afghan population.

To identify Individualization and unilateralism adopted by the U.S. in the case of the Afghan war.

1.6. Research Questions:

To what extent has the U.S. followed the conditions of IHL in the war on terror or in Afghanistan's Conflict?

What is the role of the U.S.' armed acts in exploiting the "Right of Self-defense" in the case of Afghanistan?

Were the features of Proportionality and military necessity followed by powerful states during WOT?

How can the inclusion of proportionality debate in existing security policies yield effective results in combatting insecurity and building sustainable peace in Afghanistan?

What are the challenges to the IHL in the implementation of Proportionality and military necessity in the armed conflict in Afghanistan?

Chapter 2

Conceptual Framework

2.1. Introduction:

The function of the "Conceptual Framework" can be inclusive, such as it can work as an indispensable tool to organize the entire research. A lacking conceptual framework would lack the central theme and have an unorganized and irrelevant theory. A solid conceptual framework can generate a robust methodological argument. Moreover, the meaning of the word "concept" is to explore the mind's imagination of an idea or theme on which a scholar wants to conduct research. After this conceptualization, scholars tend to identify the key concepts or ideas and find the connection or relationship between these concepts. (Waldt, 2020, p. 2) Similarly, a framework means a conceptual drawing in which concepts are interlinked and create meaning. (Tamene, 2016, p. 3)

Likewise, the conceptual framework plan already exists, but the researcher builds coherence sand and structure in an organized way. According to Maxwell, a conceptual framework generates a system comprised of concepts, presumptions, variables, beliefs, and theories. Moreover, the conceptual framework endorses ad gives knowledge to the research work of the researcher. In such a way, a conceptual framework is used to construct the different assumptions and arguments to justify the researcher's study to explore the problem further. In the conceptual framework, three proportions are usually taken for the research. One is the researcher's interest, the second is the similar or relevant research from existing literature, and the third comprises the theoretical framework.

Furthermore, the literature review plays a key role in comprising the conceptual framework. The research mainly focuses on the literature review to find out the key concepts related to his/her research, and with the help of the literature review, a researcher can determine the connections among these key concepts. After determining key concepts and the interconnectedness among those concepts, the researcher can also embed the research into a specific theoretical framework by finding a related theory from the literature review to accomplish the conceptual framework.

Moreover, a researcher must possess certain skills to construct a conceptual framework for his research, such as; he must possess logical reasoning, the ability to interlink different events and trends of the world, an understanding of the connectedness between various variables, skills to build a conceptual model, and most important is that he must possess the ability to answer the "how, what, what-if, where, and when" related to the research questions of his research. (Waldt, 2020, pp. 2-5)

2.2. The Emergence of IHL:

History is evident that the ways or strategies of warfare have been evolutionized with time, either in terms of weapons or resources of the war. It has always been a difficult task to fight a war on a holly basis. However, humanitarian law promoters have always made efforts to invoke humanitarian laws to protect innocent civilians and armed forces who cannot fight further or have surrendered themselves. According to Theodor Meron, humanitarian rules made in ancient times were quite flexible, but there was little or no compliance. In history, the rules to fight were usually made when fighters were organized in groups.

Moreover, Keegan estimated that around 5000 years ago, warfare began in the world, such as; a military system that came into being by Mesopotamia in the early duration of 3000 B.C. After that, military codes and rules were made. Though Roman armies had made certain war rules, unfortunately, those rules could not survive today. Notably, there were no prisoners and distinction rules in those Roman wars. Even prisoners were massacred, making no distinction between combatants and non-combatants.

Nevertheless, the evolution of the rules for prisoners came in 1400 B.C, when Egypt agreed with Sumeria and several other states on the treatment of the prisoners. Later on, in the twelfth and thirteenth centuries, laws of Armed Conflicts were introduced for the first time in history. In 1305, a Scottish nationalist named William Wallace was executed under the verdict given by an English court based on his atrocities in war. Furthermore, in 1386, death was made mandatory by Richard II's Ordinance for the Government of the Army for those who would perform any violent acts or humiliation against women, priests, and the church.

Similarly, England's Articles of Wars were based on the war articles of Sweden Monarch, named Gustavus Adolphus, which were published in 1621 under the title of "Articles of Military Lawwes to be Observed in the Warres." Furthermore, the well-known Treaty of Westphalia was the first agreement between the states to return the soldiers without ransom. These treaties or laws regarding war's rules based on ideal humanitarian practices began to be codified in the second half of the eighteenth century, and punishments were made on violating these rules. At the end of the nineteenth century, several states agreed on the war's limitations, and these agreements were made officially under the Hague Regulation IV in 1907. (Solis, 2010, pp. 3-9) However, still, there were lackings of accountability for the personal violations. Such as, The 1907 Hague Convention failed to explore the military necessity and ignored the vulnerabilities of civilians. (Alexander, 2015, p. 113)

Such as unnecessary killings were still not scrutinized, even after the soldiers had surrendered. For example, more than twenty thousand Japanese combatants were killed in World War II. Similarly, based on hate, thousands of civilians were slaughtered in the second half of the twenty-century massacres; after that, many ethical reconstructions were made by scholars regarding the humanitarian aspect of the war. Such as Michael Walzer elaborated on the best fighting in terms of fighting without plunder, rape, and killing of innocent civilians. (Solis, 2010, p. 9)

Before the inception of World War I and II, International Lawyers refer to the Battle of Solferino in 1859 as the crucial point in the history of International Humanitarian Law. An important personality, who initiated the idea of humanitarian rules in the war, was Henry Dunant. Dunant was the witness to the horrific acts of killing and injuring the soldiers in that battle, which led him to initiate a humanitarian foundation with the help of his Red Cross movement. That initiation later transited into International Humanitarian Law. Dunant also emphasized the Geneva Convention of 1864 for the better condition of the wounded and sick in the armed forces on the battlefield. That convention was the basic initiative for the birth of further events to firmly establish the International Humanitarian Law, such as; the Hague Convention in 1907 and the 1949 Geneva Conventions. Along with these conventions, the most important legal supporters of the International Humanitarian Law were the Additional Protocols, which were presented in 1977 to enhance the International Humanitarian Law further. (Alexander, 2015, p. 112)

Furthermore, with the evolution of technology, weapons have been evolutionized, which has become a challenging aspect of International Humanitarian Law. To eradicate the severe damage due to such weapons, many conventions have been approved under the banner of International Humanitarian Law. For example, the Biological Weapons Convention, and Conventional Weapon Convention and their five protocols were approved in 1972 and 1980, respectively. (ICRC, 2004, p. 1)

Furthermore, the establishment of International humanitarian law has made it easy to distinguish between international and non-international armed conflicts. IHL regulates the balance between military necessity and humanitarian concerns. Similarly, IHL is a keen supporter of the protection of lawful and legitimate combatants of the war, and with the help of IHL, the Distinction can be made between civilians and combatants. Likewise, prisoners can be treated humanely under the humanitarian lens. In short, there is proper and clear clarification in the International Humanitarian Law on who should be given privileged and who should be held eligible for punishment.

2.3. The Concepts of IHL:

This research is about war acts of the United States in Afghanistan through the lens of IHL. Therefore, implementing a conceptual framework for this research would help the researcher understand the basic concepts of International Humanitarian Law under which the study would be done. It would also help to analyze the U.S.' war acts in a lawful manner instead of just dialogues or speculation. Moreover, to analyze the war acts, a researcher must conceptualize the legality and illegality that occurred by that particular act through the principles of IHL. The following concepts of International Humanitarian Law are important to conceptualize the research to conclude the research effectively and legally.

2.3.1. Distinction:

According to Hugo Grotius, once arms have been taken for war to fight, then respect for the law or humans is invisible in the war acts. (Duffy, 2005, p. 217) Throughout history, wars have made the population more vulnerable to attacks. People are afraid of unlawful war acts, which result in illegal casualties and suffering. Atrocities and oppressions committed by parties to the conflict are more heinous and unforgivable because those parties have entirely ignored the

humanitarian laws of war that can distinguish between lawful and unlawful targets on the battleground of the conflict. For such purposes, International Humanitarian Law or Jus in Bello is the best effort to govern how states can conduct the war without falling prey to the illegality of killing civilians. In ancient times, the killing of civilians was considered against the war's main idea and moral values. In the Thirteenth Century, Saint Thomas Aquinas introduced its normative consideration based on the Just War doctrine, further elaborated by the discourse of civilization in the nineteenth century. Just war discourse was further developed in the twentieth century. Its core principle was the Principle of Discrimination, which is known as the Principle of Distinction in this modern era to explain the laws of the war. In the contemporary IHL theories, to understand the Principle of Distinction, the Distinction between the Combatants and the Civilians is the essential consideration of IHL. Such as, According to Walzer, Combatants are those who are trained to fight, are commanded by someone, and are provided with weapons, which ultimately distinguishes them from Civilians. While according to Henry Shue, Civilians must be protected from attack, and the No-harm Principle should approach them as civilians are not harming anyone.

Similarly, the Principle of Distinction concept was based on the Principle of limited warfare instead of total war to contain the illegal and unnecessary suffering in the war. For instance, according to UPPSALA Conflict Data Program 2015, approximately 700 thousand people were killed from 1989 to 2014. Likewise, there were many civilian casualties due to the drone attack against the Islamic State of Iraq and Syria (ISIS). (Khen, 2016, pp. 767-770)

In IHL, according to the definition of the Principle of Distinction, Civilians are those who must be kept immuned from the direct attacks by combatants until Civilians are not involved in the direct participation in hostile attacks. IHL is implemented in the armed attack, either an International armed attack or a non-international armed attack. In the international armed attack, civilians are not labeled with the membership of any party to the conflict or of any organized party to the conflict, and they must not be the participants of *levée en masse*(the members of the non-occupied place who take arms spontaneously without having time to organize in an armed force after the attack of the enemy to defend themselves). Furthermore, to understand the difference between combatants and civilians, it is crucial to have a core understanding of the armed force. According to Geneva Conventions and Hague Regulations, the armed force must be comprised of four conditions such as; firstly, a responsible command drives the armed force; secondly, the armed

force can be recognized at a distance by having a fixed sign or emblem, thirdly, members of armed force should be laced with arms openly, and fourthly, they must be acting according to the laws and regulations of the war. These four conditions must be entitled with the identity of combatants to be privileged with the Prisoner of War (POW) status after the detention.

Moreover, there should be the belongingness of an organized armed force with the party to the conflict, which requires that organized armed forces must have a de-facto relationship with the party to the conflict at least. According to International law, attribution of state responsibility depends upon the conduct of war acts by the respected armed forces. Similarly, in International Armed Conflict, if groups are engaged in violent action against a party to the conflict without belonging to any party, then under the Additional Protocol I, Hague Regulations, and Geneva Conventions, those members of groups must be considered as Civilians. However, those civilians would not be privileged with the status of POW. In addition, this conflict will not fulfill the requirements of international armed conflict, as this kind of conflict is between state and non-state actors instead of between state actors. These organized armed forces conduct armed acts without belonging to any party to that particular conflict. Therefore, that conflict can be regarded as a non-international armed conflict after surpassing violence to the required threshold. Then the identity of individuals would be scrutinized as civilians or as members of armed forces under the considerations of the non-international armed conflict.

Moreover, domestic law determines the membership of individuals in an organized armed force, and this membership can be constituted as civilian or soldiers based on their conduct, functions, and responsibilities. According to the Principle of Distinction, civilian protection of the members of regular armed forces can be restored if those members become inactive from the consistent, organized parties. On the other hand, membership in volunteer organized forces, militias, and resistance forces is not determined by domestic law. Their functions can be inspected under the liability of non-international armed conflict.

Similarly, individuals who participate in a *levée en masse* cannot be given the status of civilian and will consider as combatants due to their spontaneous act of taking arms to fight with the invading troops of the enemy in the context of respecting International laws and customs of war. In contrast, all other persons taking a direct part in the hostilities spontaneously and unorganized

can be considered Civilians. On the other hand, they will not enjoy civilian protection as they are taking a direct part in the hostilities.

Additionally, persons who are turned against the government and organized their armed force, though this kind of armed force is not the same as the state armed force on the intense level and this type of organized force is called Dissident armed force. Other groups, which are organized armed forces and consist of recruitment from the civilian population, develop adequate military force to conduct hostilities as representatives of a party to the conflict. Moreover, such non-state organized parties to the conflict are different from state-organized armies, as non-state parties include humanitarian and military portions of the civilian population. For humanitarian purposes, civilians usually play only a supportive role, not a fighter role. Therefore, it is crucial to distinguish the civilian population from the fighter ones to gain civilian-protection advantages. However, to remain an organized armed force and differentiate between civilian and rebel fighters, the functions of such an organization must be active and continuous. However, IHL would not provide these constant combat functions civilian protection benefits based on their routine recruitment, execution, and military exercise functions. Suppose members of such non-state armed forces would remain inactive or decide to join lately. In that case, they can enjoy civilian protection until they join back on an active functional basis. However, a non-state armed force that carries continuous combat function by its members then it should not be considered that force fulfills the criteria of the combatants; it is just to distinguish between the civilians who are taking direct part in hostilities and who are not taking a direct part in the war acts.

Civilians cannot be considered members of the organized group if they only provide a supportive role; for example, their functions are to purchase, smuggle, and deal the weapons or provide intelligence data. They can enjoy civilian protection unless they get involved in direct participation in the conflict, but such activities can also enhance the chances of incidental death or injuries. If there is doubt whether the member whom an adverse party has captured is civilian or not, then in the case of doubt, that member must be considered a civilian. (Nils Melzer, 2009, pp. 26-39)

On the contrary of the civilian, combatants take a legitimate direct part in hostilities and are the members of state-organized armed forces and can benefit from the POW status on the capture by the enemy. The difference between combatants and civilians is that combatants can be targeted

legally. In contrast, civilians are not the legal targets unless they take a direct part in the hostilities; they must be protected against direct attack. Combatants consist of all the members of the armed force of the parties to conflict except medical staff and pastors, and they have the legal right to participate in hostilities. (McLeod, 2015, pp. 52-53)

Combatants are free to make their choice by withdrawing from the hostilities by giving up their arms or by surrendering, or after becoming *hors de combat* (when combatant falls into the hands of an adversary, or by becoming defenseless due to wounds, sickness, shipwreck, or unconsciousness). Additionally, on detention, a combatant cannot be prosecuted or punished based on taking part in war acts of hostilities. Moreover, a combatant must behave distinctively from the civilian by wearing a uniform, cap, or emblem or carrying a flag or arms. A combatant can either pretend to be a civilian by wearing a civilian hat or perform raids at night and behave like a civilian in the daytime. Detention of such combatants can result in the loss of POW status, and that combatant will also not gain the civilian protection privilege and will be considered unlawful combatants. Even after attempting a lawful targeting of the enemy, such combatants cannot claim the rights of lawful combatants. (Dinstein, 2004, pp. 28-29)

2.3.2. Military Necessity:

Military necessity is the only Principle whose inception was not based on just war theories. In the previous history, military personnel developed this Principle to gain an undue military advantage at the risk of human life and land destruction. Nevertheless, humanitarian lawyers and just war theorists intervened to coin this Principle with moralities and human dignity with time.

The Principle of Military Necessity was first codified by Francis Lieber, a political philosopher, and jurist of The United States of America. On 24 April 1863, he introduced his code of laws of war, which then American President Abraham Lincoln signed to use in the American civil war to guide the soldiers about war conduct. According to Article 14 of the 1863 code, military necessity can be implemented in those circumstances where such repercussions of war cannot be avoided, which are essential to gain military advantage. Such implementation should be according to the modern, and just laws of the war within the limitations of the usage of force described by the war laws so that war ends should not be approached to the threshold level. Moreover, according to humanitarian lawyers, to achieve a humanity level in the means and methods of warfare, military

necessity can be compromised over the catastrophic execution of the war. At the same time, military necessity is only mentioned in Article 23(g) of the Hague Regulations. Still, it could not make a place to be codified in all Geneva Conventions and Additional Protocol I besides its presence in all the treaties. However, its concept has been defined by IHL in many terms, like protecting civilian objects and unnecessary suffering. Sadly, military lawmakers had amalgamated many unlawful justifications with military necessity in the past. According to the 1863 code, while using the military necessity principle, any illicit war acts of soldiers can be justified in the complete defeat of the enemy.

Furthermore, earlier military officials interpreted military necessity in many affordable ways, which were for them to conduct the war. For instance, "the Hostage case" is best epitomized by the definition of military necessity described by the Nazi personnel after World War II. For them, military necessity was the legal permission to adopt any violence or force to coerce their enemy for the complete surrender or gain the respected war goal at any price. According to Nazi officials, any kind of destruction or killing of the enemy's life and infrastructure was allowed in the military necessity to achieve such war ends. Even the killing of such persons or demolition of such places- unavoidable- was permitted in this Principle. Only unacceptable was the killing of innocent residents for the sake of vengeance or to fulfill the thirst to kill. Other than that, it was legal for the sake of necessity provision. For instance, it was lawful to knock down transmission lines and railways or any other functional property of the adverse party. Armed forces could even destroy the worship places and residential areas of inhabitants if it is essential for the mission.

The Law Professor, Alan Dershowitz, called the military necessity the most lawless in the camaflogue of lawful conviction while elaborating on these kinds of destruction and killing. According to this, armed personnel could lawfully do anything harmful, such as; the destruction of the military object, to weaken the enemy's power. Unfortunately, history is full of such heinous examples of unlawful military necessity. Such as; an instance of the Commando Order in 1942 depicts the horrific use of military necessity, which was issued seven years before the Geneva Conventions by Adolf Hitler. Nazi soldiers just killed the abducted prisoners without any trials or implementation of the law. They tried to justify their acts under the flag of military necessity to do whatever was necessary for military advantage. Similarly, a German war doctrine

Kriegsraison was well known for using military necessity without considering the humanitarian laws of war. According to that doctrine, soldiers could do whatever was necessary to defeat the enemy, whether it was destroying property or killing civilians or prisoners of war.

Moreover, military necessity can also be achieved by weakening the financial sources of the enemy in such a way that it will not or, more negligible, affect the civilian population. However, history is evidence of bombing or destroying the civilian materials or infrastructure to enfeeble the enemy's financial support. For example, during the civil war of the U.S., the northern army destroyed the cotton crops of the southern army. Although destroying crops was not providing them a military advantage, it weakened the southern army's economic support so that the southern power could not purchase arms and weapons. Union rationalized this act as a military necessity to minimize the southern's monetary value, but it was later considered a military tactic that had destroyed the civilian objects. There is no doubt that it is difficult for

Commander to manage reasonableness of military tactics with the military necessity on the battleground. For instance, a commander cannot order to kill the prisoners of war for military convenience, which already has been forbidden by the 1956 land warfare manual of the U.S. army. Even a commander cannot kill prisoners in air bombing warfare based on his survival instincts. Additionally, according to Article 41(3) of Additional Protocol I, POW must be released in severe, unusual circumstances because the killing of POW is not allowed in any kind of circumstances.

However, such defense-based justifications were further opposed by many military leaders. Napolean argued that such motives to kill or injure an enemy could be venial only on a necessary, indispensable basis; otherwise, such acts would be considered criminal. Furthermore, IHL links military necessity with its other two core principles of Proportionality and Unnecessary Suffering. Additionally, ICRC has strictly warned to interpret military necessity unlawfully because military necessity is only concerned with the actions according to the laws and customs of the war, and military necessity cannot be considered as the freedom of war acts to defeat the enemy at any cost. (Solis, 2010, pp. 258-267)

2.3.3. Unnecessary Sufferings:

The evolution of weaponization to conduct warfare is the most dangerous and challenging phenomenon of the 21st century for International Humanitarian Law. Modern and powerful states attempt to develop more robust and new-technology weapons to access accurate targets. These high-potency weapons can destroy their target and demolish a large-scale population and landscape with prolonged or lifetime effects. For example, targeting combatants with such weapons can create problems for civilians, but it can also extend the suffering of combatants in terms of lifetime disability or death. In addition, a large landscape or infrastructure can be destroyed while using such weapons, and it would take a long time to minimize its after-effects. Therefore, IHL considers it a severe challenge for humanity.

In IHL, unnecessary suffering is more subjected to combatants than civilians. Under the realm of IHL, unnecessary suffering is observed with the notion of military necessity and Proportionality.

According to Additional Protocol I, Article 35(1), there are proper limitations for opting methods and means of warfare in an armed conflict. No party to the dispute can go beyond such boundaries. And in Article 35 (2), deployment of such weapons, missiles, materials, and means or methods of war are completely prohibited, which can create unnecessary suffering. (Protocol I, 1977)

Notably, such weapons cannot distinguish between combatants and civilians. For example, the Petersberg Declaration banned small-caliber bullets due to their unnecessary casualties of civilians with the lack of military necessity. (Solis, 2010, p. 260) Moreover, when armed forces prefer military necessity over humanitarian laws of war, they will ignore the unnecessary suffering. Such as, military necessity can overrule the health risks of the civilians when it comes to the high military advantage for the armed forces. (Solis, 2010, p. 263)

In such grave situations of military necessity, IHL does not allow any needless suffering to the combatants. That stance is elaborated in Article 41 of the Additional Protocol I, which condemns any kind of torture, injury, or killing of those combatants who cannot defend themselves or who are wounded or have surrendered. Such combatants must be considered as hors de combat despite giving them any staunch punishment.

Moreover, with the development of modern weapons having a high precision rate and can target many people simultaneously, just like bombings explosive weapons, IHL faces many challenges regarding the use of Proportionality and military necessity with unnecessary suffering. According to IHL, military advantage should be proportionate to unnecessary suffering to attack the target, like there should not be a more suffering and less military advantage. In some places, this formula is used to calculate reasonable suffering. For example, the ratio between military advantage and suffering or casualties should be reasonable, such as causalities should not be very high than a military advantage, but it can be slightly elevated than the military advantage. (PAUST, 2009, p. 274)

Furthermore, at the end of 1980, a resolution was passed by the United Nations General Assembly aimed to prohibit certain weapons that can be highly detrimental or indiscriminate. That convention was named The United Nations Convention on Certain Conventional Weapons (CCW). Convention with its four protocols was endorsed by the United Nations member states under the utmost consideration of International Humanitarian Law. Such as the convention, along with its protocols, would apply to circumstances: for example, according to the common Article 2 of all Geneva Conventions, including Article 1 of the Additional Protocol I for the protection of the victims of the war. According to Protocols of CCW, mines, booby-traps, incendiary devices, blinding lasers, and other devices are strictly prohibited from being installed in a civilian majority area or near the civilian object. For instance, Protocol II of CCW, in its article 6(2), stated that any booby-trap use is firmly restricted from being developed to produce unnecessary suffering or superfluous injury. Similarly, a blinding laser can cause collateral effects in the shape of permanent blindness, which would be unnecessary suffering for the combatants and civilians. (Roberts & Guelff, 2000, pp. 521-530)

Moreover, today's war is not based on only conventional weapons. Non-conventional weapons are also in the race of evolution and development to be used in the war. Such biological and chemical weapons can affect the forces with permanent repercussions. Similarly, a nuclear weapon is considered the most vigorous means of war. Such as babies born in Hiroshima and Nagasaki-the two cities of Japan- are still facing severe biological after-effects of the nuclear bombs thrown by the U.S. Still, international law faces an extreme challenge to prohibit such indiscriminate nuclear weapons, which can cause prolonged, unnecessary suffering to civilians and combatants. Even the

destruction to the land caused by these weapons would take decades to recover completely. However, International Law is still confused with the legality or illegality of Nuclear weapons in armed conflict. The International Court is still unanswerable on the application of nukes during the situation. of self-defense, where the survival of a state is at risk. (Dinstein, 2004, p. 78)

Additionally, with the development of modern weapons, the liability of the usage of such weapons is claimed by the states based on "Precise Target." In armed conflict, such an attack on the target with accurate precision is usually known as "target killing." The weapon used for target killing can be manned or unmanned aerodyne vehicles or planted covertly as explosive devices. In such kind of weaponry system, the targeted person cannot avail the opportunity to surrender or defend himself from the attack. While according to IHL, in the circumstances of surrender, the combatant should be considered *hors de combat*. Therefore, IHL prohibits implementing such surprise attacks with the help of explosive devices or aircraft. During such circumstances, the combatant is not holding even a few seconds to think about surrendering or communicating with the attacker. (MELZER, 2009, p. 370)

2.3.4. Proportionality:

The Principle of Proportionality is the essential rule to be observed under the laws of war. Proportionality is highly vocal for protecting civilians or the victims of war, either humans or objects used for humans. This Principle is inextricably linked with military necessity and unnecessary suffering. In the case of unnecessary suffering, combatants are the main focus to be protected from unfair conduct of war. Likewise, the Principle of Proportionality is more prone toward civilians and objects related to civilian use. In addition, Proportionality prohibits such war acts against military objectives that can create sudden or incidental loss or injury to civilian life and destruction to civilian objects or the combination of civilian and military life and objects; and harm to the civilian life and objects is in such a way that loss is excessive than the anticipated direct and concrete military advantage. According to Article 51(5,b) of Additional Protocol I, the threat of an undiscriminating attack is expected in a manner that it can engender incidental suffering to civilian life and destruction to civilian objects, and this suffering or destruction would be immoderate as compare to military advantage. Similarly, according to Article 57 (2,b), such an

attack that can cause accidental harm to civilian life and objects, or an attack, about which it is evident that its target is not military, must be nullified. (Protocol I, 1977)

The former article emphasizes the precautions to follow during the attack on the military objective. At the same time, the latter elaborates the threat that if Article 51 (5,b) is violated by the commander, there would be an excessive loss of civilian life and objects than the military advantage, and such actions committed by the commander would be taken as grave breaches of the law. Moreover, before this Protocol, this Principle of Proportionality was elaborated earlier in the field manual of The U.S. Army Law of Landwarfare in 1956 that incidental harm to civilian life and destruction to the objects must not be exceeded as compared to the military advantage. The Proportionality Principle interlinks different terms like military advantage and collateral damage to proportionate the military advantage with the unnecessary suffering of civilians. For example, according to Article 58 of API, it is necessary to take early precautions to avoid collateral damage. Such as, if the military target is located near a populated civilian area, it is essential to evacuate that area from the civilians. (Solis, 2010, pp. 273-274)

Moreover, to further understand the Principle of Proportionality, it is necessary to have sound knowledge of military advantage. Military advantage must be obtained directly and concretely, which means that the benefit of attacking other parties should come after a direct attack on them; it should not be assumed that military consequences would be improved with time in a long term duration. In addition, the advantage should be identifiable and quantifiable to find the relative proportion of civilian loss and military advantage. (Gisel, 2016, p. 12)

Furthermore, the Principle of Proportionality is more tilted toward precautions or measurements that need to be taken during or, if possible, before an attack to achieve Proportionality between incidental harm and military advantage. Such as, the military objective should not be located near the heavily populated area; it can damage collateral. Such as the area that is surrounded by the military and non-military resources, either in the shape of humans or non-humans- is attacked, then the loss would be collateral, which means both military and civilian personnel or objects would be damaged. On the contrary, the attack that is deployed mistakenly and causes killings of civilians would not be included in the collateral damage because that attack was not linked to the strike against enemy forces. Nevertheless, casualties of non-combatants and civilian objects due

to the attack against a lawful military force would be collateral damage. However, Proportionality does not declare that presence of civilians would not be taken as the target should not be subjected to attack. It can be attacked, but the commander or attacker must take the necessary precautions to reduce the incidental or collateral damage to civilians or civilian objects before the attack. The attacker must assure the reasonability between the military advantage and killings or damage to the civilian and civilian object. It is the consistent duty of the commander to measure the acceptable risk of attacking the enemy or other force.

Similarly, the defender must take reasonable precautions to avoid the amalgamation of civilian and military personnel, and there must not be the placement of the military object among the civilian population. Likewise, parties to the conflict are prohibited from using civilian population or objects to shield the lawful targets. (Solis, 2010, pp. 274-276)

Additionally, it is necessary to use reasonable and methodical sources to carry out the precautions successfully. These sources would help gather information about how much civilian involvement is mingling at the targeted place and the nature of the object before the attack. Further, such information would help scrutinize the object's military or civilian nature and help the enemy's tactics to use civilians in the pursuit of his goals. In the case of doubt, additional information must be assembled before the order of an attack. Hence, the commander must continuously gather the information until he is completely satisfied before pursuing the strike because bombing based on skeptical information can cause an indiscriminate attack, which would violate the Principle of Discrimination. For example, in 2003, during the Iraq war, the U.S. Army fired an attack against an influential adversary without knowing his identity. While according to the Principle of Proportionality, if the attack is carried out against an individual, then there must be confirmation about his name and function to be targeted that either he is a legitimate military target or not. In addition, parties are obliged to analyze the methods and means of war. Such as, during the aerial bombing, the pilot must critically investigate the target, whether it is a military target or not, or it is near or far from the civilian population.

Moreover, there are further mandatory precautions before launching an attack and after gathering information about the nature of the object. For instance, it is necessary to give warnings before attacking the place. Such as according to Article 19 of the Leiber Code, the enemy must be

informed about the bombings at the particular place so that non-combatants or innocent civilians, especially women and children, can be removed from that place. The benefit of warning in a besieged area is that the adverse party will have no way to cover or protect the military object in such a short time, and there would be a confirmed military advantage to the attacking party. However, respect for the Principle of Distinction and Proportionality must be lied to the parties of the conflict in any condition, whether the civilians vacate the place or not after the warning. (Queguiner, 2006, pp. 5-17)

Furthermore, the enemy using human shielding to protect a military object can create such circumstances where the implementation of Proportionality would be pretty challenging. Anyhow, during such circumstances, a commander must comply with the Principle of Proportionality because if the enemy is deliberately using a human shield, then the fundamental rights of civilians would be at stake. On the other hand, if civilians are intentionally protecting military objects, it would be considered a violation of the law. In most places, such a shielded population would be deprived of civilians, and this act of shielding would be considered direct participation in the conflict. However, if a party is violating the law of war by exploiting civilian life, the other party still has to take steps to maintain the Proportionality between military advantage and civilian harm. (Queguiner, 2006, p. 22)

Chapter 3

Case Studies

3.1. Introduction:

The consequences of armed conflicts have increased with more drastic effects on humanity. The global environment has suffered a lot, such as; the evolution of transnational terrorism has further modified the international and non-international armed conflict with advanced strategies and high-technology weaponization. War is itself havoc, but today's modernization of war has caused its long-term after-effects, creating no expectation for the future's everyday life. In short, such devastating challenges have affected the state's security, and individuals' security has been put at risk. Furthermore, the inclusion of new actors in the war and advanced war methods has created vulnerabilities towards human security.

Similarly, this contemporary violence has further created challenges for International Humanitarian Law to protect the humans who are given privilege under International Humanitarian Law. The most difficult challenge is to contain non-international armed actors, as they do every possible illegal act to win the war. Such actors do not have any concern for human life when it comes to their cruel war goals, and for this, they can opt for any merciless strategy to conduct the war, due to which human suffering has been increased so far.

Such ruthless changes in the dynamics of conducting war have created complexities while implementing the International Humanitarian law. Furthermore, the signatories of IHL have been a greater exploiter of law throughout the decades. For example, ignorance of states regarding civilian death toll and civilian objects loss for the sake of military advantage or under the excuse of military necessity. Such as, Israel, Russia, and Columbia exploit self-defense to justify their acts of killings, curfews, and house demolition without considering proportionality and military necessity.

Moreover, powerful states invoke laws to invade less powerful states based on suspicion or self-defense. Such as, the United States invaded Iraq and Afghanistan behind the so-called logic of suspicion and self-defense respectfully. (Moussa, 2008, pp. 23-27) Though it is difficult for International Criminal Tribunals to check on such states to what extent they are following the rule

of law and to examine each bit of proportionality and necessity against all war acts. However, there are many examples where such tribunals played crucial roles in making such states accountable for their illegal and dreadful war acts.

3.2. International Criminal Tribunal for the Former Yugoslavia:

The International Criminal Tribunal for the Former Yugoslavia was mandated by the United Nations Security Council Resolution 827. The purpose of mandating such a tribunal was to prosecute each individual who had been responsible for the violations of International Humanitarian Law since 1991. History shows how innocent people of Serbia, Croatia, Bosnia, and Herzegovina have suffered a lot with the crimes of ethnic cleansing, genocide, rape, sexual assaults, forcible displacements of civilians, and intentionally military attacks, and atrocities of remorseless influential individuals. This tribunal was authorized to exercise jurisdiction over the grave breaches of The Geneva Convention 1949 to maintain the justice to mitigate the war crimes against humanity. (WAGNER, 2003, pp. 353-354)

3.2.1. Case Study of Dusko Tadic:

Dusko Tadic was a political leader of the Serb Democratic Party (SDP). He was indicted on charges of violating Articles 2, 3, 5, and 7 of the Geneva Conventions in Prijedor from May 1992 to August 1992, where he was accused of ethnic cleansing of fourteen thousand Bosnian Civilians. He was accused of killing thousands of people and was indicted on charges of rape, inhumane treatment of people, torture, and illegal killings. (Chahal, 2015) In addition, Tadic was also charged with the rape of a women prisoner at Omarska Camp. He was charged with the grave breaches of deliberately creating suffering under Article 2 of Geneva Conventions, inhumane treatment under Article 3 of Geneva Conventions, and he was charged rape as a severe violation against humanity under article 5 of Geneva Conventions. Further, he was charged with the unlawful killings of civilians, who were claimed as protected persons under Article 7 of the Geneva Conventions.

To this, Dusko Tadic argued about the lack of fundamental signification of the Geneva Conventions in the jurisdiction. Such as; he argued about Articles 2 and 3 of the Statute that those articles could only be implemented in the International Armed conflict, and he was accused of the

crimes of that conflict, which was not an international armed conflict, and therefore the violations should be limited to the conflict of that specific character. The court further argued that according to Article 5 of the Geneva Convention, grave breaches must be avoided in armed conflict, whether international or internal. Moreover, Tadic argued about the supremacy of the Security Council that the establishment of such a criminal tribunal did not lie under the jurisdiction of the Security Council as the character of conflict was completely internal, and International Military Tribunal could only establish such kind of tribunal. The prosecutor argued that the Security Council treated all the conflict as an international armed conflict, which was reflected in its resolutions to maintain peace and restrict the other states from being responsible for the grave breaches of the Geneva Conventions. Prosecutor further argued that the intensity of the involvement of the National Army of Former Yugoslavia in the conflict of Bosnia-Herzegovina 1992 defined the character of the conflict towards International Armed Conflict.

Further, the laws and customs of the war were also applicable in all kinds of conflict, whether it was international or non-international. Additionally, the United States provided the document on behalf of the Security Council, which elaborated the inclusion of Article 3 of the Geneva Convention along with the Additional Protocol of 1977 in the territory of Former Yugoslavia to hold all the obligations under the International Humanitarian Law. Prosecutor further contended regarding Article 5 about the crimes against humanity, which was also applicable in the internal armed conflict according to the Geneva Conventions. Moreover, while rejecting Tadic's argument regarding the powers of the Security Council, Prosecutor presented the argument that International Military Tribunals were not equipped with modern or contemporary International Law regarding crime against humanity, which was mainly comprised of International Humanitarian Law. (Greenwood, 1996, pp. 265-267)

Furthermore, to all the defendant's arguments about the internal or international armed conflicts, the Appeals Chamber contended that International Humanitarian Law would remain applicable until a peaceful settlement is not achieved in all kinds of armed conflicts, either internal or international. Therefore, it was not necessary to consider the character of the conflict when it was clear that it was an armed conflict in Bosnia-Herzegovina territory. Additionally, the Appeals Chamber did not consider the conflict of Bosnia-Herzegovina as a single armed conflict, as that conflict had attributes of both internal and international armed conflicts.

Moreover, that conflict had been treated as a dual-nature conflict. Such as, at the same time Government was confronting the insurgent group and another state who was supporting that insurgent group. For example, in the case of "Military and Paramilitary Activities in and against Nicaragua," the International Court of Justice claimed such conflict of a dual nature, such as the conflict between contras forces and the Nicaragua Government, was the nature of the internal conflict. In contrast, the activities of the United States in and against the Nicaragua Government were held accountable under the laws of international conflict. Similarly, when Bosnia-Herzegovina became an independent state in March 1992, then the hostility between the forces of the Bosnian Government and the troops of Croatia and Serbia was entirely an international nature. However, Trial Chamber approved the nature of the conflict as an armed conflict, and after that, laws and customs of the fourth Geneva Convention were implemented on it, which holds that grave breaches of rape, killings, and unnecessary sufferings would be punished under the current humanitarian law, either it was an internal conflict or international conflict. (Greenwood, 1996, pp. 270-273)

For his atrocities, Tadic was sentenced to twenty years imprisonment. Nevertheless, the Tadic case provided a new ground for the international tribunal to insert the laws of internal armed conflict for the violations of International Law under the banner of International Humanitarian Law. Moreover, the most influential decision of this case was that violations of the customs of internal armed conflict could be implemented on the individual criminal responsibility, which would be beneficial for the future prosecutions of such cases. (Greenwood, 1996, p. 281)

3.3. Case Study of Nicaragua and El Salvador

3.3.1. Introduction:

Nicaragua and El Salvador, both Central American states, have been badly affected due to the violations of International Humanitarian Law at the hands of rebel forces named Farabundo Marti National Liberation Front (FMNL) in El Salvador and Contras in Nicaragua since the 1980s. Their domestic conflicts converted into huge armed hostilities due to the external states' exploitation of these dissident forces, where the United States played a significant role. According to their government's and international laws, both countries could use military forces against those rebel forces violating their Government's rules. Further, these conflicts had faced many civilian

violations and casualties due to the warring parties' illegal means and methods of war. Among them, illegal landmines explosions created most of the civilian casualties. Under the banner of International law, they asked their respective friendly states to provide military advisors and materials to initiate war against dissident forces.

Similarly, dissidents also received military aid from their respectful, friendly states. Such as, the United States was the primary source for Contras to gain military weapons, training, and influential financial assistance. Moreover, Contras were also provided logistic support from Costa Rica and Honduras. Additionally, the Honduran Government permitted Contras to establish its military bases in its territory when it could train its force and supply weapons to its forces already in Nicaragua. While on the other hand, FMNL was ultimately operationalized in El Salvador, and it was provided with military support from Cuba, the Soviet Union, and the Warsaw Pact member states. At the same time, it also received some logistic support from Nicaragua. (Goldman, 1987, pp. 539-541)

3.3.2. Nature of the Conflict:

According to Article 2 of the Geneva Conventions, a war should be declared between two or more states to claim the conflict as international; otherwise, any other armed conflict should exist between the warring states. Similarly, in the conflicts of Nicaragua and El Salvador, the conditions for the international armed conflict could not be met as any of the states-who was providing military or financial assistance to the dissidents of both countries- has ever declared war against Nicaragua and El Salvador. Even there was no direct intervention from the dissidents' supporter states with their respective armed forces in Nicaragua and El Salvador. Concerning the non-international nature of their conflict, following rules and laws of International Humanitarian Law would be applicable. Such as, both states were the parties of Common Article 3 of four Geneva Conventions, which should be followed in all kinds of armed conflict to avoid the violations of IHL.

Similarly, all customs and rules regarding non-international conflict under the authorization of International Law would be implemented in their conflict situation. Further, Additional Protocol II and The Land Mines Protocol were the most appropriate laws in El Salvador and Nicaragua. (Goldman, 1987, pp. 541-543)

Moreover, both El Salvador and Nicaragua did not publicly acknowledge the internal armed conflict, despite allowing ICRC to maintain its permanent delegations in their territory. However, they both permitted ICRC to remain active in civilian assistance operations, and ICRC was also able to have access to apprehend the dissidents in the combat zones. Therefore, with such acts of permission to ICRC, both implicitly conceded the internal armed conflict in their respective territory.

Furthermore, Article 3 of the Geneva Conventions does not prohibit the states from implementing their domestic rule and regulation upon the dissident forces. Therefore, Both El Salvador and Nicaragua had the right to capture, scrutinize, and punish the dissidents. Nevertheless, in both conflicts, the persons from the Government and dissident forces were protected under common Article 3 of the Geneva Conventions and were found wounded, sick, traumatized, or otherwise detained by the other side. In addition to it, according to article 3 of the Geneva Conventions, such kind of inhumane acts with a protected civilian would be considered a homicide. Similarly, the United Nations Resolution 2444, named "Rights for Human Rights in Armed Conflicts," was recognized globally on December 19, 1969, which endorsed civilian immunity. It also emphasized that the warring parties discriminate against civilians from the combatants in every situation. Such UNGA resolution explicitly stated "armed conflicts" in its statement, which further made the stance of article 3 about the internal or non-international armed conflicts more robust, that rules must be followed in any armed conflict. (Goldman, 1987, pp. 544-548)

3.3.3. Applicability of IHL on Nicaragua and El Salvador Conflict:

In the armed conflicts of Nicaragua and El Salvador, the nature of humanitarian laws regarding legality and illegality is as significant as in the other conflicts in other states. To apply International Humanitarian Law, it is imperative to consider all the aspects considered vulnerable during conflicts. Among those aspects, the distinction between combatants and non-combatants should be made compulsory and lucid to avoid unnecessary harm to innocent civilians. For example, the persons who are not taking direct part in hostilities or indirectly supporting armed parties in different ways, like; providing aid, food, or acting as messengers information. However, these persons can be the incidental victims of a weaponized attack, such as; booby-traps, explosions, and bomb attacks.

Furthermore, the persons providing aid to Contras and FMLN in Nicaragua and El Salvador should be scrutinized under the domestic law of their respective states. Similarly, persons who were members of the armed forces but were not taking part in the hostilities can enjoy civilian societies. However, such members would lose their civilian immunity when they would take part in killing or attacking the enemies. In addition, those persons who took arms to defend themselves from Contras in Nicaragua will also lose civilian immunity and be prosecuted under Nicaragua's domestic law.

Secondly, combatants must avoid attacks on civilian objects, such as; worship places, schools, crop fields, and places that are only in the use of civilians. There would not be any advantage to the military by attacking such places. Furthermore, cultural places in both Nicaragua and El Salvador must be protected, as in the 1954 Hague Convention, cultural places were prohibited to attack even by attacking such places can give an advanced military advantage; in other words, even military necessity overcomes the immunity of such places, cultural places should not be attacked. In the case of the conflicts of both states, landmines and booby traps have been common means of the war, so it is highly emphasized to protect civilian objects from such landmines or explosive devices.

Thirdly, in both states, those persons or places associated with the armed forces of states or rebel forces were the legitimate targets of the combatants. Such as; members of the Contras, Sandinista Army, KISAN, MISURASTA, or any other such rebel groups in Nicaragua were the legitimate targets. Similarly, in El Salvador, members of FMLN, defense forces of civilians, or the combined armed forces were the popular military targets according to the description provided by the International Humanitarian Law. Furthermore, naval establishments, military establishments, military weapons, military vehicles, fuel warehouses used only for military purposes, and many other similar military objects were considered legal. Moreover, other non-military objects were a considerable advantage to military purposes, such as weapons industries established for specific military use.

Lastly, if the armed forces of Nicaragua and El Salvador were the reasons behind indiscriminate deaths and torture of the civilians, then those acts of death and torture by the armed forces of both countries would be considered violations of the International Humanitarian Law. However, if

Contras or FMLN did such acts, then International Humanitarian Law would not apply to it; rather, the domestic laws of both states would deal with these rebel forces and would prosecute them for their heinous acts.

3.4. Case Study of Sierra Leone

3.4.1. Historical Background of the Conflict:

Since her independence in 1961 from colonial rule, Sierra Leone has been exploited through the Government's corrupt policies. Further, Sierra has been poorly influenced by the informal economy due to the illicit trade of diamonds, which was the country's crucial mineral resource. Weak democracy resulted in the unemployment of the youth bulge, and corruption by the political parties became the main route to invite the rebel groups to intervene in the government policies and exploit the unemployed youth in making illicit money from the unauthorized mining and trade the diamonds. Another important reason for the radicalization in the state was frustrated students, who were drugged because of mental stress due to high inflation and the unemployment rate in the country. Finally, on March 23, 1991, the rebel group Revolutionary United Front (RUF) entered Sierra Leone from Liberia. After that, the Government Leader of that time named, Joseph Momoh, decided to recruit new young people into the military to fight against guerilla fighters. However, unluckily, those recruits were already drug addicts, thieves, and hoodlums due to the drained economic situation of the country, and soon they made civilian life more miserable on war grounds.

After the subversion of Joseph's rule, National Provisional Ruling Council (NPRC) took control of the Government under the supervision of twenty-nine-year-old Army Captain Valentine Strasser. Unfortunately, the acts of Strasser and his newly recruited soldiers were quite heinous toward civilians. Moreover, Strasser's Government talks with RUF further deteriorated the environment of Sierra in case of youth radicalization, which was turned into brutal violence on the land of Sierra. In maintaining good terms with RUF. after the Government of Strasser, Ahmed Tejan Kabbah's Government did the same, which allowed RUF to make their feet more robust in the exploitation of Sierra.

Furthermore, the Sierra conflict was deeply interlinked with the Conflict of Liberia in terms of rebellion and exploitation of the illicit economy. Such as; Charles Taylor, who was first known as a tyrant of the Liberian conflict, later became the President of Liberia. He was considered an instigator of the Sierra Conflict by backing rebels' intervention and youth radicalization by providing weaponry and financial aid. Additionally, Taylor had shaken hands with the Leader of RUF to initiate Conflict in Sierra. One of the main reasons for Taylor's intervention was to loot diamonds from mines to form an illicit political economy to finance his war in Liberia. Therefore, besides the military, financial, and refugees problem at the borders, diamonds were the leading cause of the Conflict in Sierra.

Likewise, the nature of the Conflict in Sierra was quite different from the conflicts in other states of Africa. Such as, in Africa, conflicts were based on ethnicity, but in the case of Sierra, there was no clear agenda for rebel forces. For example, RUF had never declared any clear ideology for fighting in Sierra. According to Ian Smilie-who wrote books on the diamond resources used by the states and rebel forces- theories of political science or any military and economic history of a state are not enough to explain the Conflict of Sierra Leone. In the Conflict of Sierra Leone, it was clear that the purpose of the parties to the conflict was not to win. They want to conduct a profitable violation under the camouflage of warfare. (Akinrinade, 2001, pp. 392-397)

3.4.2. Parties to the Conflict:

The Republic of Sierra Leone Military Forces and Revolutionary United Front (RUF) were the principal provokers of the conflict. RUF had control over half of the country, while on the other half, the public had already realized the terror of RUF as the small agencies of RUF were also emerging slowly over the other half of the country. (Maurice, 2017, p. 4) While the other forces were The Armed Forces Revolutionary Council (AFRC), Civil Defense Forces (CDF)-mainly known as Kamajo, and forces from other states such as Liberia. On the other hand, the parties trying to maintain peace were the Economic Community of West African States Monitoring Group (ECOMOG) and the United Nations Mission in Sierra Leone.

Moreover, AFRC was the Government force consisting of junior officers who seized power in 1996. After attaining power, AFRC requested RUF to join them. RUF accepted the offer, and after joining the AFRC, RUF gained more power in the Government. As a result, the combatants of

AFRC became double in numbers after the inclusion of RUF. This made it difficult for the regional security forces to distinguish between the RUF fighters and AFRC soldiers, as both performed rebellion in their acts. Furthermore, the Kamajo militia consisted of the locals of Sierra Leone., who mainly attained weapons in the wake of self-defense.

Similarly, ECOMOG forces sometimes opted for cruel strategies against civilians, such as; rape, mutilation, murder, sex slavery, and many wicked acts. There was also evidence that the Eastern European countries provided small ammunition aid, especially from Bulgaria and Ukraine through Liberia, Burkina Faso, and Libya to the Rebel groups across Liberia and Sierra Leone border. (Akinrinade, 2001, pp. 398-407)

3.4.3. Nature of the Conflict:

An armed conflict can either be international or can be non-international. On the other hand, it can be a mixture of both international and non-international when more than one state is backing both rebel and state forces.

Moreover, it also depends on the intensity of the conflict, leading to armed conflict. Such as, when a state is struggling with its civil conflict, and the involvement of ruthless insurgents creates civilian damage and deaths up to a higher number, which is higher than a military advantage, then such conflict can be an intensified armed conflict.

In the case of Sierra Leone, conflict was a kind of mixed nature, as both international and non-international actors were part of it. If Sierra Conflict were an international conflict, then all the clauses of International Humanitarian Law would be implemented. However, if the conflict were non-international, common Article 3 of the Geneva Conventions would be applicable. Also, some clauses of Additional Protocol II would be implemented in the conflict to prosecute the wrong deeds. However, the Sierra conflict was an armed conflict because the parties to the conflict were organized and could hold military operations under a command order. Similarly, according to the decision of the Appeals Chamber of Former Yugoslavia in the Tadic Case that prolonged armed violence between authorities of the Government and organized armed gangs or groups would be considered an armed conflict, and in such conflict, International law would be entirely implemented until a peace agreement or termination of conflict would be held. Moreover, the

Conflict of Sierra Leone was quite of the nature of non-international armed conflict, as RUF was a completely organized group fighting with organized weaponry.

Many other groups could attempt military exercises with the support of international states; though international states did not intervene directly, they indirectly backed many rebel groups of Sierra Leone. Therefore, it would be appropriate to categorize Sierra Conflict as a "Non-international Armed Conflict ." ((Akinrinade, 2001, pp. 408-410)

3.4.4. Violations of IHL in the Conflict of Sierra Leone:

In this conflict, forces have occurred violations at every phase of the conflict. Even the peacekeeping forces in the country were accused of brutal violations. It is not imperative to determine the degree of violation committed by which party to the conflict. However, the responsibilities of the humanitarian law should be implemented by each party to the conflict. Such as, more than 4 million people were internally displaced, approximately 5 lac people became refugees in the neighboring states, up to 50 thousand people were killed wickedly, and it was estimated that rape and mutilation were used as weapons of war with more than one lac people. Most of them were killed and maimed by RUF and AFRC. These all sufferings to the civilians and damages to the civilian places are serious violations that must be considered through the lens of International Humanitarian Law. (Akinrinade, 2001, p. 426)

3.4.4.1. Violations by Government Forces:

In the case of the Sierra Leone Conflict, responsibility for the violations of International Humanitarian Law entirely lie on the governmental forces and RUF because of their organized army and military acts in the state. Ironically, they both committed brutal acts to spread terror and win personal interests.

Government forces committed crimes against humanity while ignoring their adherence to the Geneva Conventions and Additional Protocols. Government forces were accused of executing many combatants and non-combatants prisoners, killing suspected insurgents, rape and mutilating civilian bodies.

Moreover, the Civil Defense Force and Sierra Leone Army were alleged to be guilty of detention and killing of insurgents, child recruitments, capturing of suspects, and capricious torture of rebel prisoners. Such as, a hostage at one of the CDF headquarter lost his ear during his hostage, and he was beaten brutally; there were visible cuts on his back which were evidence of the inhumane treatment of CDF. Additionally, government army helicopters attacked indiscriminately with gunshots in the Northern Provinces of state, which ultimately resulted in the killings of more than thirty civilians. (Maurice, 2017, p. 20) Furthermore, in 1996, just before the elections, both rebels and soldiers intervened in the peaceful villages of the civilians to terrorize them by cutting their fingers, lips, arms, and ears with long knives. In short, forces in the conflict used mutilation as a weapon of war. For such heinous crimes, the Government of Sierra Leone prosecuted merely minor cases were prosecuted by the Civil and martial courts. (Akinrinade, 2001, p. 427)

Additionally, to investigate the acts of ECOMOG, the United Nations observers collected the information from more than a hundred people in Freetown(The capital of Sierra Leone). According to that data, ECOMOG treated inhumanely with people at checkpoints. Such as, soldiers of ECOMOG killed and stripped nacked suspected rebels, even they did the same with women and children, and sometimes they whipped civilians at checkpoints on their nacked bodies. Moreover, some witnesses claimed that those soldiers killed women and children without any trial. Nevertheless, only ECOMOG treated civilians in a more civilized way and tried to maintain peace by preventing RUF from spreading terror in the Southern and Northern areas of Sierra Leone. (Maurice, 2017, p. 21)

3.4.5. Implementation of the International Humanitarian Law:

The nature of the Sierra Leone Conflict clearly defines its characteristics of armed conflict, which ultimately makes each individual responsible for the crime committed by him/her during wartime. For such cases, IHL provides moral laws and legislation to create punishments and amnesties for those held responsible for violations and those who can be held free, respectively.

Though the conflict of Sierra was not an international conflict due to its non-international nature, Article 6 of Protocol II provides it the right to prosecution of the offenders according to the laws of Sierra's Government.

Moreover, the involvement of International characteristics in the conflict, such as arms backing to the rebel forces by Liberia, Nigeria Forces, and Burkina Faso, strongly permits IHL to be implemented on the severe offense committed by International actors. IHL can prosecute such actors to severely condemn the instigation and intervention of the international actors in the civil conflict of other countries. For example, Charles Taylor- Former President of Liberia- was convicted by Appeals Chamber in the Special Court For Sierra Leone to address his serious breaches of International Humanitarian Law under Article 3 of Geneva Conventions and Article 6 of Protocol II. The special court of Sierra Leone held that such provisions were also used to prosecute the soldiers of AFRC, who committed the crimes like mutilation, killings, rape, child recruitment, and many such criminal acts against civilians.

However, still many provisions need to be implemented to provide complete justice to the civilians of Sierra Leone for the conviction of serious violations of the International Humanitarian Law because many international actors who were accused of breaches are not willing to take the criminal responsibility, and there are fewer shreds of evidence of their association with the conflict, which makes them more opportunist to get rid of the conviction. (Akinrinade, 2001, pp. 441-442)

Chapter 4

Laws in War and The US' War in Afghanistan

4.1. Proportionality and the US' War in Afghanistan:

International law emphasizes states' militaries to follow jus in Bello whenever they are involved on the soil of the war zones. There is no doubt that there are so many uncertainties on the war ground regarding the enemy's way of attacks, regarding the accuracy and efficient technology of the weapons of the enemy, which further make the commanders make such uncertain decisions because of the lack of accurate pieces of information. Such ambiguities give birth to violations of the humanitarian laws, which were not intended to be violated. However, here the question arises of how powerful states with a robust economy can be involved in vast mistakes of drastic civilian deaths with less or even no military advantage, as in today's modern world, where accuracy is being experimented with to modify it from the previous one. The same is the case with the United States in Afghanistan. Such as, the US army has been condemned for its mistakes of killing civilians and damaging infrastructure in some specific events. (Murphy, 2009, p. 8)

For example: according to the report of the United Nations Mission in Kabul in 2008, ninety civilians were killed in the US airstrike on a village in the West of Afghanistan, and among those ninety civilians, sixty were children. Later, the Head of the Parliamentary defense committee confirmed that the children who died in the attack were three to fifteen years old only, and besides this, twenty-five people were also injured in that attack. While according to the report of the Kabul Government Commission, the total number of deaths in this particular attack was ninety-five. Moreover, according to the UN Human Rights Team, this attack was the most destructive attack carried out by the United States, which caused most civilian deaths. (Gall, 2008) Nevertheless, unfortunately, there are many examples of such destructive attacks in Afghanistan, which indicate the violation of the Jus in Bello.

To investigate the proportionality, the interviewee Dr. Bakare Najimedeen[1] gave some thoughtful insights. As he quotes;

> "The US, as a part of the International community, comes under the platform of International. So, it is compulsory for the US to abide by the laws. To one extent, the US will always consider itself as one of the providers of international law, so categorically and automatically, it is believed that the US itself is a promoter of international law, as there are also many instances where the US abides by the law".

He further adds on the violations made by the US in Afghanistan that

> "I think it is very clear, that the the law of proportionality has been violated in many cases, whether it is during the funeral or during marriage ceremony, even in discriminate trainings of the civilians. Further, a lot of casualties of civilians have been done in terms of collateral damage, which clearly indicates that, to certain extent, the law of proportionality have largely been violated by the US."

Similarly, an organized army of a state has to remain responsible for following the International Humanitarian Laws on the ground of the war zone. Furthermore, states must be held responsible for the war behaviors of their soldiers, as each state trains its army with a comprehensive knowledge of war laws to avoid war crimes. This means states must abide by the laws of war; otherwise can face sanctions if they violate the laws.

Such as; according to the interviewee Gary D. Solis[2], who has spent twenty-six years as a Marine and has also served as a company commander in Vietnam and is the author of the book "The Law of Armed Conflict," that,

> "Perfection in warfare is simply not possible. For example; in a specific airstrike, one has to make an informed judgment, an honest assessment to that particular airstrike. Unfortunately, in armed conflicts, these decisions to conduct an airstrike are made by people who do not have an unbiased viewpoint of what's going to happen or what is intended. Which makes the people to take decisions instantly, and in a situations of stress without knowing all the circumstances. Moreover, I was in combat in Vietnam, and I have taught cadets at the United States Military Academy who were going to Afghanistan. I taught them about distinction and observance of the law of armed conflict, and one has to make an honest, informed decision about collateral damage. Nevertheless, sometimes there are not only

[1] Dr. Bakare Najimedeem is HOD Research at Centre of International Peace and Stability (CIPS), NUST, Islamabad, Pakistan

[2] Gary D. Solis has been a U.S. Marine for twenty six years and He has been an adjunct Law Professor at George Town University Law Centre.

> mistakes, like commander may say that there is heavy collateral damage, but this target is so important. And all we can do, is tell our students, this what the law is. Therefore, student must be honest, and must be careful about collateral damage. But this kind of decision is very different in combat. When the commander is under the stress of incoming fire, and so many factors have an impact on the decision to employ the weapon or not employ the weapon to avoid collateral damage. American commanders in Afghanistan, made a bad call made a bad decision in regard to collateral damage".

However, according to Geneva Conventions, these uncertain scenarios and lack of information do not permit a commander and soldiers to violate the laws. Moreover, how it can be measured whether these violations can be incidental or intentional. Further, interviewee Gary agrees with the occasional violations committed by the US. As he mentions,

> "The US on occasion, sometimes, maybe even often violate distinction and proportionality. If the question is, did the US ever violate proportionality and distinction in its airstrikes, the answer is clearly yes. In other words, in war in armed conflict, bad decisions are always going to be made. Now when I say that, I don't mean to use that as an excuse for the US and its allies, and in my opinion, in many cases, too often, the US has abused distinction and proportionality. American commanders in Afghanistan, made a bad call made a bad decision in regard to collateral damage."

Ironically, the US made such preemptive decisions in the war in Afghanistan. Such as, for the invasion of Afghanistan, the role of the US' individualization in terms of its suspicious and overthinking attitudes toward Afghanistan was proved to be a clear violation of international humanitarian laws of war. Furthermore, International Humanitarian Laws take precautions during the war and before the initial attack. It is more crucial that these precautions are interpreted and manipulated to achieve quick and vast military advantages. Similarly, it is pertinent to examine the US' war attacks in Afghanistan regarding such precautions, whether they used correct or authentic precautions to save the lives of civilians. To achieve these precautions, the US army gathered all the information or just assumed the target and attacked the civilians, either intentionally or unintentionally. Moreover, the US army went on attacks without having the essential and authentic information. To elaborate on this, the interviewee Law Prof. Peter S. Margulies,[3] gave examples of recent attacks of the US expressed in the Times Magazines (Cooper & Schmitt, 2021) and conceptualized the attacks of the US as he describes;

[3] Peter S. Margulies is Professor at Roger Williams University (School of Law).

> "To me, one of the single biggest problems is that the US' reliance on **confirmation bias**, and the related issues are the so called **soda straw problem**. Confirmation bias is a concept that basically says, when you take in new information, you analyze that information according to your previous prejudices or your story that you already think, to explain that set of facts. It means then that you don't adequately consider facts that might point in a different direction from your story.
>
> It reinforces certain perceptions that already exist. And it doesn't allow you to consider the possibility of a completely different interpretation. That was clearly a problem. For example; in the Kabul attack in Afghanistan, the US apparently believe that the prior strike on the airport near Kabul had involved people passing the computer bag back and forth. So the targeting cell, then said the guy who actually worked for a US relief agency and Kabul, look for examples where people are passing bags back and forth. But in fact the problem is that people pass bags back and forth all the time, for all kinds of reasons, you going on some trip just to visit your relatives, you got some bags, you got to load in your car. It means you're just confirming your prior story, instead of looking at the evidence, and just going wherever the evidence leads you. And the Times article suggests that's been an ongoing problem with the US attacks."

Furthermore, it has been more than twenty years since the US started the drone strikes, which are still vague in pointing out their targets. Unfortunately, these drones still need to be modified or developed in a modern scientific way for a better and more precise artificial intelligence service. Intriguingly, the US- the world's largest military and economic power- still lacks the scientific precision of the drones, and more ironic is that the US still endorses and uses such drones in attacks, as the drone strike in the Kabul attack 2021 was so blurred on the drone camera. (Savage, Schmitt, Khan, & Hil, 2022) Prof. Peter has also conceptualized these drone strikes in an awe-inspiring way, as he describes the Soda Straw Problem associated with the drone strikes,

> "Soda Straw Problem that's sort of, that's the US kind of flying expression. For a particular problem of vision lies in the drone attacks. And that problem was also revealed in the Kabul attack. But it's been a common problem with drone attacks for many years. So what happens is that with a drone, there's usually one camera and that camera is focused on the target. So it doesn't see anything around the target. It's in focus only on target as if you're looking through soda straw. You are drinking a Coca Cola or something and you're looking right through that soda straw. And that means, you see that little area around the soda straw, you don't see anything else in the wider area. So suppose you're parking the car on the road, you're looking through that soda straw to see your target which is a car, you see that car, but you don't see oncoming traffic. And you fire a missile at that one car, you may end up hitting another car coming in the opposite direction. That's basically what happened with a Kabul shutdown with cars, that car was coming in the street, which was the target of the soldiers. But once the car pulled into this courtyard, there were people

> that turned out. They were children who were rushing to meet the car, they saw their dad or some other relative of theirs. Our operators did not see those kids. And so when they fired on the car, it created an explosion that also killed the kids"

Dr. Peter further indicated the issues of such proportionality in his interview, how the Principle of Precaution can be followed in strict and feasible terms for the US, but the US did not follow it in such a manner in the drone strikes. As he indicates such issues in his interview,

> "Another point very quickly I want to make that goes to this issue proportionality, and that is the quality of the video that we see. So it appears that the quality of the video of that courtyard, and the Kabul was poor, like it was of poor quality. And that meant it was very difficult to tell apart who was a kid or who was an adult. If you had better quality video, it'd be much easier to see that are related issues, the angle of the video, many of the videos were taken overhead. And from straight overhead, you're looking straight down, it's hard to detect height, because you just see the tops of people's heads. So, you need another angle. If you're looking at people this way, horizontally, then it's easier to see, well, this person is short, this person is tall. And, of course, if someone is short, that would tell you, it could be a kid, it could be a child. So we need to approve the video about the quality of the video, the definition of the video. And we also need to improve the angles that are available to us. And that's something also this has been a problem for years. But it's a problem that the US is a rich and sophisticated country could address and it is feasible for the US to do that. So those are all kind of basic things. But those are problems indicated in the Kabul strike, and in the New York Times series, and they said the US has not addressed those issues and their problems with at least some US strikes under IHL."

Similarly, there is no precision or accuracy when using the drone attack, but the international community still supports these attacks. According to the international powers, these strikes are gaining precision with time. Here the question arises, what about those attacks which were practiced in the past without assuming proportionality and unnecessary suffering. There are also so many examples where the states did not even follow the distinction of military and civilian objectives. The interviewee Oves Anwar[4] discussed such kind of attack during the interview as he described the attack,

> "First of all, the invasion of the US or the use of force by the US in Afghanistan was unlawful or was based on unlawful arguments. The Kunduz Hospital attack (MSF, 2015) on 3 October, 2015 is a mournful example of collateral damage and unnecessary. In drone strikes or air strikes or when you strike from the distance then there are more chances for collateral damage or killing of the innocent people,

[4] Oves Anwar is currently working as Director of Research Society of International Law (RSIL), Islamabad, Pakistan

> because there is no conformity that how many or where the military target exists. Moreover, the night raids of the US had spread terror among the Civilian population of Afghanistan, whatever they were lawful or not."

There are also many instances where a slight military advantage was achieved, resulting in more civilian casualties and damage. Even distinction could be made quickly, but the US military ignored the high ratio of civilians over there to gain more military advantage. On such argument, the interviewee Marc Garlasco[5] provided some thoughtful opinions, such as;

> "Each individual airstrike needs to be weighed against proportionality. You can't look at it as an entire campaign as International Humanitarian Law requires militaries to conduct proportionality. In my assessment, the US airstrikes were highly problematic and there are certainly instances where proportionality and distinction were not properly considered. This is the case, especially in attacks by special operations forces and the CIA. The distinction is much easier to adjudicate especially when some strikes killed only civilians and no Taliban, such as the Azizabad airstrike in 2008 that led to 90 deaths. This seems to be a clear violation of distinction. It is difficult to see how every airstrike properly weighed proportionality, especially when low-level Taliban were attacked and civilians were killed. Finally, the use of signature strikes was highly questionable. These are strikes where the US attacked the Taliban and considered everyone in the target area due to their proximity to the Taliban. These were likely unlawful."

However, scrutiny of the war acts is not only to measure the pre-emptive steps or precautions taken by the commanders or soldiers but also to measure the proactive steps prior to the attack. For instance, in the Herat attack in 2008, there were no warnings or proactive measures to protect the civilians. Similar to the case was with the night raids of the US in Afghanistan. At the same time, these proactive precautions were included in the responsibilities of each commander and soldiers, who were playing an active role on the war ground.

4.2. Taliban Warriors and Principle of Distinction (IHL):

The US invaded Afghanistan in 2001 when the Taliban were ruling Afghanistan. They were even controlling more than ninety percent of Afghanistan. The US invaded the Taliban by considering them an insurgent entity. Sometimes, the US called the Taliban a terrorist organization, claiming them the safe heavens providers to the Al-Qaeda members. Therefore, the

[5] Marc Garlasco is a Former Senior Intelligence Analyst of Pentagon and currently working as senior civilian protection officer for the United Nations Assistance Mission in Afghanistan (UNAMA) and senior military advisor for the Human Rights Watch Council

United States remained robust in claiming that the Taliban should not be given any specific title or privilege under the platform of the Geneva Conventions.

Moreover, there is a bulge of arguments presented by the US under their respected constitution to exclude the Taliban from the Geneva Conventions. Such as; the US argued-in the memorandum presented by John Yoo in front of the General Counsel of the Department of Defense- about the High Contracting Party Status of Afghanistan to exclude Afghanistan from having all of its legal rights under the Geneva Conventions so that the Taliban could not get any privilege from those rights. To contain the Taliban from approaching the doors of the Geneva Conventions, the US argued that the Taliban could not get any protection from the Geneva Convention because of the failed status of the Afghanistan state due to its collapse from being operationalized state. In addition to it, The US argued about the "failed state" status of Afghanistan that there was the condition of statelessness under the control of the Taliban, as the Taliban were acting as militia, rather than a government, which further deprived Afghanistan to be the High Contracting Party of the Geneva Convention because of its statelessness in that specific period. (Garraway, 2009, p. 167)

Relatability and authenticity of such argument were questioned in the interviews, that either based on the "failed state" status, a state can be excluded from the list of High Contracting Parties of the Geneva Conventions or not for a specific period. For such a question, Dr. Bakare Najimdeen responds,

> "I think this is just a convenient argument by the American government. Because failed state does not mean that it is no more state, it is just a failed state. So, for example, if a student fails in an exam doesn't nullify the student's studentship. So it means you are failed in the subject or you are failed in a particular area. Now, the question is the concept or the idea of failed state, this is according to a particular yardstick by some group of people? That yardstick is convenient and acceptable to everyone? Maybe for the Afghans, Afghanistan is not the failed state, maybe for some other country Afghanistan is not the failed state in terms of Islamic religion. But from the western perspective, especially from the American perspective, Afghanistan, may look like it is a failed state and that it is in their own definition. So even being a failed state does not nullify one's statehood. So therefore, Afghanistan still falls under the Geneva Convention."

Furthermore, if states are registered in the paradigm of international organizations, like the United Nations, they would be considered states. Their states cannot be changed based on their operational

or military capacity. The same is the case with Afghanistan. Afghanistan is the registered body in the United Nations, which means any external and internal political or military agenda cannot override Afghanistan from its legal status in the Geneva Conventions. Moreover, the US made such an argument to mitigate any privileges expected of the Taliban. Ironically, the Geneva Conventions protect the rights of actors in the armed conflict; whether they are state actors or non-state actors, they all must have to be protected under Common Article 3 of the Geneva Convention. Similarly, the interviewee Prof. Gary D. Solis, argues about such status of Afghanistan in terms of its registration within an international organization paradigm,

> "If a state is in the United Nations and has a nameplate in front of it, then obviously it's a state. And any argument to the contrary to this, is suspect. IS Afghanistan being in the United Nations? If it is then it is state. One other thing, in armed conflict, it doesn't matter that your target is a state or not, you still must observe distinction and proportionality. So, a state is failed or not, you can never disregard the law of armed conflict."

Similarly, the interviewee Prof. Peter Marguilles condemned such arguments of a "failed state" because given such status does not snatch the rights, which a state has privileged to enjoy under the regulations of the International Humanitarian Law, as he argues,

> "the United States made that argument right after 9/11. It was made during the first term of the Bush administration. And to be clear, I think that's an incorrect argument. I think it's problematic to view some country as a failed state. You have states or non-states. If Afghanistan is a state, then it has the obligations that only state has, and it has the rights that only state has. I think It's very dangerous to say some states are failed states. Any state could be a failed state. And then you have wars and attacks all over the place. So I think it was wrong for the US to make that argument."

Likewise, the interviewee Michael Kugelman[6] deplored such stance of the US of declaring Afghanistan a Failed State. He provides a very sound analysis of the operational status of Afghanistan during the war on terror by profoundly examining the overall control by the Taliban from 2001 to 2015. This further elaborates that Afghanistan's status was not failed because of the complex troubles faced by Afghanistan during this era. These troubles can be faced by any state

[6] Michael Kugelman is currently working as the Deputy Director of Asia Program and as the Senior Associate for South Asia at the Wilson Centre.

that does not reject any state's statehood theory. States face such problems due to many predicaments in their economy, politics, and defense systems. As he mentions,

> "I think this argument is a bit flawed, because I don't necessarily think Afghanistan was a failed state at that time, it was certainly failing. But, if you look at that period of 2001 to 2015, Afghanistan had a government. One could argue that it was illegitimate, it was dysfunctional, but it had a government. The first government after the Taliban came into power through a negotiation at the bond conference, and then there were several elections in Afghanistan, that were widely viewed to be flawed, and fraudulent, but they didn't bring to power new governments. And so there wasn't a governing body. So I think it would be wrong to describe Afghanistan as a failed state at that time and even going back to the moment when the US invaded Afghanistan in 2001, it was controlled by the Taliban. And the Taliban certainly was not a legitimate government, in my view, because it came to power through force by following a civil war. But, the country was governed, it's 90% of the country was controlled by the Taliban. So, there was a governing structures in that sense. I don't necessarily think that the US' reasoning was correct, because I don't think Afghanistan at that time was failed state, it was a failing state. It was a troubled state. It was a lawless state in many cases, but it wasn't necessarily a failed state."

Additionally, considering a state a failed state does not deprive her of all the legal prerogatives of the Geneva Conventions. Specifically, Common Article 3 of the Geneva Conventions applies to armed conflict, whether international or non-international. On the contrary, during the Bush Regime, the US argued that Common Article 3 does not apply to Afghanistan due to its 'non-international" nature of the conflict to deprive the Taliban of any benefits of the Geneva Conventions in the case of Prosecutions or trials. (Pomper, 2009, p. 527) The interviewees Christophe Paulussen[7] and his assistant Florent Beurret[8] provided a very-well argument to endorse the stance of the application of the Common Article 3 of the Geneva Conventions. Such as;

> "Afghanistan has been a High Contracting Party to the Geneva Conventions since 1956 and ratified Additional Protocols I and II in 2009. Even if the US considered Afghanistan to have been a failed state between 2001 and 2015, meaning that the Afghani government was not in effective control, Afghanistan is still a High Contracting Party to the Geneva Conventions. The treaties to which a failed state is a party to remain in force. Even if Afghanistan is not seen as a High Contracting

[7] Christophe Paulussen is currently working as Senior researcher and Academic programme coordinator IHL/ICL and Research Fellow at International Centre for Counter-Terrorism - The Hague

[8] Florent Beurret is internee at the T.M.C. Asser Intitute and a research Assistan to the Dr. Christophe Paulussen

> Party due to it being a failed state, which in itself is a very controversial and unclear definition, then the conflict would be classified as a NIAC and common article 3 would still apply to all (state and non-state) parties involved in the conflict."

However, the rules and regulations of the Geneva Conventions are implemented on all the parties who are participating in a conflict., which makes the states to be obliged for acting according to the paradigm of the Geneva Conventions, and they have to remain stick to the legal obligations of the Geneva Conventions.

According to the legal framework of the Geneva Conventions, all states should regulate their war acts following the laws of the conventions while determining combatants and civilians or while regulating military necessity and proportionality on the war ground. Therefore, in the case of Afghanistan, either Afghanistan should be considered a High Contracting Party of the Geneva Convention or not, or Taliban should be given combatant status or not, the other parties included in the conflict must act in accordance with the International Humanitarian Law, such as; the US should consider the legal laws in the matter of prosecutions for the detainees. Meanwhile, the US being a main High Contracting party and a massive vocal of International Humanitarian Law, should focus on Civilian protection, military necessity, proportionality, and unnecessary sufferings, specifically in the case of Afghanistan. The interviewee, Oves Anwar, brings this controversial issue of the "failed state" status of Afghanistan in compliance with the High Contracting Party Status of the US while arguing,

> "First of all, Afghanistan is a High Contracting Party or not, but the United States is and has been the High Contracting Party of the Geneva Conventions. Secondly, the customary International Humanitarian Law is applied regardless of this argument of the failed state, either you are a High Contracting Party or not. And the "Failed State" argument cannot be used to mitigate the legal obligations"

The most complex issue with the conflict of Afghanistan is its characterization due to its two different phases based on international and non-international armed conflict. Till 2002, the Taliban represented the defacto government in Afghanistan, which internalized the conflict in Afghanistan. After 2002, there was an interim government in Afghanistan, but the Taliban held control over Afghanistan's more significant and essential provinces. According to the paradigm of the Geneva Conventions, the conflict between states and insurgent groups would be categorized as non-international armed conflict. There are still many ambiguities regarding International and non-

international armed conflict because the Taliban held control over more than seventy percent of the territory despite all the efforts of foreign armies. The Taliban group had all the features of an organized armed group to fight against those armies. Such ambiguities in the characterization of the conflict made the Taliban unprivileged by many clauses of the Geneva Convention, and more confusion lies in the status of the Taliban under International Humanitarian Law. (Ojeda, 2009, p. 360)

In International Armed Conflict, the status combatants and Prisoners of War(POW) are very privileged to escape from punishments because combatants can kill their enemies and will not be prosecuted for this. Unfortunately, from October 2001 to 2002, the Taliban were deprived of this status, and they were detained for many years; most of them are still in detention in the United States. Those Taliban could be considered apprehended combatants and therefore were privileged to have POW status and be protected under the Third Geneva Conventions (GCIII). Additionally, if they were not combatants, they could be considered Civilians and were protected under the Fourth Geneva Conventions (GC IV). (Ojeda, 2009, pp. 360-361)

With this respect, according to Article 4 of the Third Geneva Conventions, different groups of people can have Prisoner of War status. Among those groups, the first group is the regular armed group of a party to conflict according to Article 4A (1). In comparison, the Taliban at that time were not recognized by most of the international community, not even by the United States. Therefore, the Taliban would be considered a Prisoner of War under Article 4A (3), which elaborates that "members of regular armed forces who proclaim allegiance to a government or an authority which s not recognized by the detaining power." In both Articles 4A (1) and (3), groups are mentioned as "Regular Armed Forces," but both forces are distinct from each other. Such as; regular armed forces of Article 4A (3) having any allegiance with any Government Authority, which is recognized or not recognized by the opponent Party to the conflict.

Moreover, the term "regular armed forces" was further described by the International Committee of the Red Cross (ICRC), that these forces either have allegiance to a recognized or unrecognized government, or they must have all the significant attributes which are elaborated in the Article 4A (2(a,b, c, d)) of the Third Geneva Conventions of having an organized army. Such as, they have to wear a uniform or have any distinct sign that can discriminate them from the civilians or other

militias, and most importantly, they respect the war laws. In accordance with such elaboration, the US administration made an argument in a White House Memorandum 2002 against the attire of Taliban that the Article 4 of the Geneva Convention cannot be implemented on Taliban to describe their status of Prisoner of War as they did not distinguish themselves from the civilians and they did not follow the rules and customs of war. The US collectively denied the POW status to the Taliban. On the other hand, there was a clear distinction carried by the Taliban, as they were wearing black Turbans or mufflers and carried weapons openly. Even they were carrying flags with them all the time, on which "Kalima Tayyiba" was carved. (Ojeda, 2009, p. 361) However, the allegation or complete denial of POW status to the Taliban based on "distinguishment" is problematic not in terms of the distinct definitions of the Geneva Conventions, but also it can instigate the Taliban and the world's legal community against the United States the visible war crime of denial of identity. For instance; Dr. Bakare explained such absurd stance of the United States against the Taliban and how the US can modify the laws of war in accordance with their interests, as he mentions,

> "It is very dicey that because Taliban at one point in time, they were ruling Afghanistan. So again, it is very semantic and use of metaphor. So if the Taliban have been ruling Afghanistan for some time, and they were overthrown, then they can actually be considered as a combatant, or if you call them a non-state actors, that they are not actually in the government, but they have their stakeholders in Afghanistan. So anyway, we know from the technical point of view that anyone who is in a uniform that makes that person, a combatant, so but when you look at the oppression, our modus operandi is of the Taliban, that is what to be called combatants. Because they have their own flag. They have their own leadership. They use violence and they have all of those characteristics that make someone a combatant. So in my humble view, I believe they can be given a combatant status. Moreover, sometimes it is convenient for the Americans to abide by IHL by Geneva convention. And when it suits them, or it is against their own national interests or their country, they need to modify their understanding, reconstruct, re-engineer the International Monetary Law, or the Geneva Convention according to their own interests. So therefore, because they understood the fact that granting the Taliban, the combatant status, would give Taliban certain privileges, which they don't want to extend to them. But the case of Afghanistan and Taliban is a very peculiar case, where the Afghan Taliban are stakeholders in the political theater of Afghanistan. It is so complicated to just dismiss them or simply call them a non-state actor. Yes, I understand that the conventional definition is that if you are out of government, you become a non-state actor. But today, we know that it is not just the state alone, that controls or shape or determines international relations or even domestic politics, that non state actors are as much important as well as the state. Yes, if we go by the Geneva Convention, that's for someone to be qualified as a combatant, he

> or she must be backed by the state. So in that sense, Taliban might not qualify as combatant. But again, the debate is now upcoming among the scholars of international law, that these so-called noncombatants, or these so- called non-state actors should also be recognized in the debates of law of engagement. It is also very important, so as to be able to come to a conclusive and matured ending of a conflict, because when you try to isolate or when you try to discard this important non-state actors from the equation of war, the conflict will continues to be projected. And the more complex, from a typical IHL or Geneva Convention definition, it might be so difficult to define the Taliban as a combatant. But again, if you look at it from the other characteristics, Taliban qualified to be combatants, other than that they are not backed by states."

The United States made every argument for excluding the Taliban from the provision of the International Humanitarian Law. Whether it was about the discrimination in dress code or war acts, the US always wanted to make the Taliban deprived of some legal prerogatives, such as combatants or POW status, to hold them prosecuted for a prolonged duration. On asking about the US' denial of any status to the Taliban. the interviewee, Oves Anwar, argues in a precise way, such as;

> "In my opinion, Taliban should be given the Status of Combatant and Prisoner of War. An argument which is usually discussed against Taliban that Taliban did not have uniform, while they did carry weapons openly. So, distinction can still be made by weapons in that regard, which is also a purpose of uniform to distinguish oneself from civilians. In this case of denying status to Taliban, the US took advantage of International Humanitarian Law, and avoided the responsibilities of IHL, while the benefits and responsibilities should be applied along with each other. In that case, the US played a negative role by undermining the IHL for not giving any status to Taliban."

Moreover, there are many complexities in the government stature of Afghanistan. Afghanistan has been deprived of an official government system for many decades. However, Afghanistan has been a High Contracting Party of the Geneva Conventions, which permits its government, either de facto or de-jure, to enjoy complete legality of International Law. Therefore, the Taliban, during their defacto government status, are obliged to remain under the provision of International Humanitarian Law, and the International community must accept this stance in order to make the Taliban realize that they have to obey laws as they are bound to do so because of their de facto government in Afghanistan at the specific time. Further, suppose the Taliban had the status of an organized army after being ousted from the government status. In that case, article 4 of the Geneva convention III is still applied to them if they have maintained an organized army under an

organized command structure or fulfilled all the requirements of Article 4 of GCIII. As, Christophe Paulussen along with his assisstant Florent Beurret states that

> "It has been argued that the Taliban were (at least *de facto*) in control of the Afghani government at the time of the US invasion in 2001. In that case, at the beginning of the war, Taliban fighters were part of the armed forces of Afghanistan making them combatants according to Rule 3 of the ICRC's Customary IHL Study. This also means that they were to be given (presumptive) POW status under Article 4(1) of the Third Geneva Convention. Article 5 of the Third Geneva Convention also determines that Taliban fighters should, if any doubt existed about their status as POW, have enjoyed POW status until determined otherwise by a competent tribunal. You could argue that the Taliban became a militia during the course of the war after the installment of a transitional government in June 2002. This meant that Taliban fighters would still receive POW status, under Article 4(2) of the Third Geneva Convention, if the Taliban fulfilled certain conditions: being commanded by a commander, having a fixed distinctive sign recognizable at a distance, carrying arms openly, and respecting the laws and customs of war. The Taliban's conduct would therefore have to be determined on the basis of the abovementioned conditions before granting Taliban fighters POW status."

On asking the same question about the combatant status of the Taliban, the interviewee Marc Garlasco argued about the combatant status of the Taliban in the beginning of the US' invasion in Afghanistan, because of the nature of the International armed conflict at the beginning. As he mentions,

> "The Taliban was the government of Afghanistan when the US invaded. Therefore, this was an international armed conflict. Under the Geneva conventions they should then be considered an army. Now the war morphed when the government changed, and we saw numerous types of conflicts, but whether one liked the Taliban or not, is immaterial - they were the government at the time the war began."

4.3. Analysis of the Treatment of Taliban Detainees in IAC and NIAC:

During the war, the state parties commit war crimes intentionally or unintentionally. However, after the end of the war, its the responsibility of the state to implement all the provisions of International Humanitarian Law on the capture of fighters, civilians, or members of militias. Common Article 3 of the Geneva Conventions applies to the conflicts that occurred on the land of the High Contracting Parties of the Geneva Conventions. (Sassoli, 2004, p. 200) On such a basis, all the captured members should be treated humanely. As the Interviewee, Gary D Solis, argues,

> "Whether or not, Taliban are combatants, they are entitled to the protections of common Article 3 of the Geneva Conventions, if they're captured, then they are they should receive all of the protections of common Article 3. I think that too often. There are no protections given, for example, at Abu Ghraib, and Guantanamo, places like that. They're just It's inexcusable conduct by the United States."

Additionally, the fighters and civilians suffered a lot from the illegal acts of the US forces in Afghanistan. The US soldiers committed not only casualties but also illegal and forceful deportation. The International Humanitarian law completely prohibits such illegal deportation. For instance, according to the Nuremberg International Military Tribunal, the expulsion of the protected person(Civilians, etc) from occupied territory during the war is a colossal crime against humanity, whether it was done for any so-called purpose. Moreover, according to Article 49 of the fourth Geneva Convention, forcible removal of protected persons or individuals from the occupied territory to the territory of another state or to the territory of occupying power is strictly prohibited, regardless of any reason. (Solis, 2009, p. 230)

Even the ICTY also declared the deportation of the protected person from their homeland an "inhumane act." Further, in an armed conflict, nationals who were captured while doing wrong acts or participated in hostilities and were declared unlawful combatants should not be removed forcefully or captured in an outer state for detention purposes. This act is highly prohibited in Article 76 of the Fourth Geneva Conventions. (Solis, 2009, p. 232)

Furthermore, the Taliban detainees held at Guantanamo Bay and Abu Gharib were ill-treated by the US officers. Most of them are still waiting for trails. There are so many examples in which international media has openly accused American officials of torturing detained fighters involved in the hostilities. According to the post of the Washington Post, an Afghan militant was unlawfully captured at Guantanamo Bay detention camp, which was claimed by a federal judge. (Hsu, 2021) Even the treatment of the prisoners was worst, which crossed the limit of humanity.

The interviewee Dr. Peter Marguilles argues about the US' treatment of the Taliban in Prison, and he mentions that a question arises on their captivity after the withdrawal of the US from Afghanistan,

> "Well, so just to be clear, there are some basic rules that should be applied to anyone who is being detained. So if you are detained, then you're no longer an immediate threat. Then you would be called outside of combat, and then you cannot be

> mistreated. And it doesn't matter who you are. It could be Al-Qaeda. You could be the Taliban. You could be something else, it doesn't matter, you cannot be mistreated or you cannot be beaten up by the party or state who detained you. It's all wrong. It's all bad. So those basic protections should apply to anyone, whether they're Taliban or Al Qaeda. And that was a real problem with the way the US approached this. And the US is still having people. The US should ask herself, do she want to hold on to the people Guantanamo, who are not being charged with anything? They've been held for 20 years. And importantly, the US is now out of Afghanistan. Why the US is still holding these people? That's a legitimate question to ask. And of course, those were a severe problem using practices like waterboarding, sensory deprivation, the other techniques that the US used, those were all either torture, or cruel, inhuman and degrading treatment, which were completely prohibited under the Geneva Conventions and under Customary International Law against Torture"

Dr. Peter raised a crucial point from the such mistreatment by the US of the Taliban, why are Taliban or Afghan fighters still under the control of the US' jurisdiction, even after the withdrawal of the US? As Prof. Marco Sassoli argued in his article, the similar nature of the conflict of one state with another does not implement the same detention rules for the other state's Prisoners. Such as, the Taliban fighters cannot be held for a prolonged period in prison just because of the continuation of the same "war on terror" in Iraq and the Philippine. (Sassoli, 2004, p. 203)

Similarly, in his book chapter, Ryan Goodman argues by raising the question that just for gathering intelligence evidence, is it legitimate to capture individuals for an indeterminate time? (Goodman, 2009, p. 371)

Moreover, there are negative consequences for the persons who were detained (before 2002 or during the international armed conflict in Afghanistan) outside Afghanistan, such as in Guantanamo Bay or Abu Gharib, because even if they are proven Prisoners of War based on the hearing of Article 5 of Additional Protocol II, then they cannot be prosecuted unless they had committed any war crime. They will remain as an internee in prison under the detaining power till the end of hostilities in Afghanistan; in the case of Afghanistan, it is the United States. On the other hand, if the person is not proven POW under Article 5, he or she must be protected under the Geneva Convention IV as detainee or internee, where he or she can be interned until the removal of hostilities in Afghanistan. Further, he may be deprived of some rights in detention but must be treated humanely under the APII, and he can be prosecuted by the domestic law of the United States. Additionally, persons who could not fulfill the GC III and GC IV criteria must be protected

or treated humanely under the Common Article 3 of Geneva Conventions and Article 75 of AP-II. (Ojeda, 2009, pp. 362-363)

Furthermore, those persons who were captured during non-international armed conflict or after June 2002, then according to the Additional Protocol II, cannot enjoy combatant or POW status, and the US authorities can prosecute them under their domestic law of violence act. They can be protected under the CA3, and specific rules of APII would be applicable to them. Unfortunately, the legal basis of internment had been a fundamental issue for the US to treat the internees who were captured in NIAC at Bagram because UNSC did not provide any resolution as it provided for Iraqi detainees in 2008. Even there was no agreement with the authority of Afghanistan, and the US did not provide any legislation or execution for such persons who were facing such deprivation of liberty at the Prisons under the authorization of the United States. Which are clear violations of Articles 5 and 6 of the Additional Protocol II. (Ojeda, 2009, pp. 364-365)

According to Article 5 2(e) of the Additional Protocol II, detainees' physical or mental health should not be extinct due to prohibited mental torture activities by the detaining power. (ICRC, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 1977) Sadly, there are many examples of ill-treatment by the US staff in prison with the detainees, as prisoners were still being detained at Guantanamo Bay without any trail or prosecutions for an indefinite time, resulting in many suicide attempts due to psychiatric impacts on the prisoners. (Sassoli, 2004, p. 210)

As earlier in this chapter, it is discussed that the United States made the main argument for the denial of combatants and POW status to the Taliban that the Taliban could not be distinguished from the Al-Qaeda fighters and the civilians due to their war acts and attire, respectively. Under the provisions of the third Geneva Convention, whenever there is a doubt regarding the combatant status of detained belligerents, they must be treated as Prisoners of War until a competent tribunal declares their status. It is the obligation of detaining power to allow such tribunal to investigate such doubt; otherwise, the clause of establishing a competent tribunal to clear any doubt would be purposeless and would become impractical. Moreover, they must be kept as internees until the tribunal clears the doubt. (Sassoli, 2004, pp. 205-206) The Interviewees Christopher and Florent

mention about a competent tribunal to prosecute such doubts, and Prisoners must be given humane treatment until doubts are cleared. Such as,

> "However, in general, it can be said that in its War on Terror, the US decided to break from its military tradition of applying the Geneva Conventions broadly. The Bush administration very clearly made the choice to make extensive use of its naval base at Guantanamo Bay in Cuba so that prisoners who were subjected to inhumane treatment and even torture would not fall under the jurisdiction of US courts. This means that the US' international legal obligation under the Convention against Torture to ensure its domestic legal system prevents and punishes acts of torture was willfully circumvented. Simultaneously, prisoners from the Taliban and Al Qaeda were deliberately determined as "unlawful combatants" by the Bush administration, meaning that they did not receive full POW status. Consequently, they did not receive the POW protection against physical and mental torture as well as any other form of coercion as covered by Article 17 of the Third Geneva Convention. More specifically, the Bush administration approved a number of "enhanced interrogation techniques" like waterboarding, walling, deprivation of food and confinement in small coffin-like boxes, in an attempt to circumvent its international and domestic anti-torture obligations. These enhanced interrogation techniques were widely used at Guantanamo Bay, but also at the Abu Ghraib prison in Afghanistan."

The US had many arguments regarding the Taliban's Status and tried to designate them as a "terrorist organization" like Al-Qaeda, which would be unlawful to the Taliban regarding the Geneva Conventions' rules. The Interviewee, Michael Kugelman, has given a thoughtful view of America's strong opinion regarding the combatant or POW status of the Taliban by viewing them from the lens of terrorism. Though he was not an International humanitarian Lawyer, his views cover many dimensions of Taliban stature from the American point of view. He touched on the sentiments of the killing of civilians by the Taliban, and on such basis of war crimes, the Taliban should not be given any status as it would make them privileged to kill more civilians and combatants of other armies. As he mentions,

> "I think that the idea behind the pow designation isn't refers to combat and fighting a war. And I think one could argue that the Taliban because of its actions went beyond the status, it simply being an armed group, or military group because of its ties to international terror groups, like al Qaeda. Taliban, its own actions that included regularly targeting civilians, that's the Taliban did regularly during the period of the war, and certainly before that, in the 1990s, when it massacred religious minorities. So, in that sense, and I know this would be the US government's arguments, that the Taliban should never be given the status of prisoner of war of combatants just because it was not a military unit in a traditional

> sense. It was much worse than that, in the sense that it was a violent extremist organisation that had ties to international terror groups and regularly violated international law with its targeting of unarmed entities and civilians. So and I would think that the Taliban should not be given the status of POWs now, as you know, the US tried to get around that issue of bringing many Taliban to Guantanamo Bay, as it was unclear what their status was, and, the idea was just to house them in this in this terrible facility for an indefinite period of time."

Contrarily, even if the Taliban were not state actors after 2002, they cannot be excluded from the paradigm of International Humanitarian Law. For the reason that there are reasonable justifications to consider Taliban as members of an armed force of a Party to conflict, because if they would be considered as regular armed forces, then they will be remained pressurized to abide by the laws of war in order to obtain the status of combatants or Prisoner of War. On the other hand, in armed conflict, the enemies violate the laws, and regular armed forces of the party to the conflict are permitted to kill their enemies in compliance with International Humanitarian Law, which can endanger such armed forces by considering them, enemies or terrorists. Additionally, considering them only enemies by not obeying the laws is a violation of International Humanitarian Law because there could be many individual fighters who had complied with International Humanitarian Law. This will diminish the effect of Prisoner of War Status to protect those individual fighters. (Sassoli, 2004)

Moreover, Stefan Ojeda argued in his article that "Global counter-terrorism must not overlook the rules of war" that if a state does not consider her enemy as a party to an armed conflict, it would not be liable to initiate an armed operation against her enemy. Even she cannot opt for any military operation under International Humanitarian Law or opt for Human Rights Law to initiate a law enforcement operation. Further, it has become an eager demand on the platform of International Organizations like the UN to consider "non-state actors" as a terrorist, who are creating violence in an armed conflict, and no law should be implemented against them, while when the state commits the same act of violence against those group which is lawful, such as the attack against military objectives. States are doing this because they are frightened of gaining impunity for those violent acts by the non-state groups. Stefan called it a "lopsided legal circumstance" that under the paradigm of non-international armed conflict, such nono-state armed groups are being prosecuted for all of their acts, whether they are "lawful" or "unlawful," and this circumstance is not fair with

the non-state armed group in the discourse of International Humanitarian Law. (Ojeda, Global counter-terrorism must not overlook the rules of war, 2016)

Similarly, during an ICRC Live Commentary, Prof. Marco Sassoli argued that on a humanitarian level, this is wrong to reject "designated terrorists" on the mere basis of enemies and to have the privileged to kill them, as these groups often control more people than any state does. (ICRC, Updated Commentary brings fresh insights on continued relevance of Geneva Conventions for treatment of prisoners of war, 2020) Therefore, it is necessary to engage those groups in negotiations and compel them to comply with IHL, and denying POW status to those designated as terrorists could be the end of the Geneva Convention III, as any state could designate their enemy as a terrorist. Ultimately they will be deprived of some legal privileges. (ICRC, Updated Commentary brings fresh insights on continued relevance of Geneva Conventions for treatment of prisoners of war, 2020)

4.4. Analysis of the US' Response Towards ICC Investigation for Afghanistan:

Unfortunately, the US had not ratified both Additional Protocols, while Afghanistan had ratified Additional Protocol I in 2009. This non-ratification by the US is creating many hurdles in establishing competent tribunals to investigate or prosecute war crimes committed by the US army in Afghanistan.

To investigate the war crimes or war acts of any state or non-state actors, there is a legal system available on the international level, which governs the laws in compliance with the International Humanitarian Law, which usually works under the authority or supervision of the International Criminal Court (ICC).

Recently, a request has been made to the ICC to investigate the officials of the Central Intelligence Agency and armed forces of the United States for the war crimes committed by them in Afghanistan and Eastern Europe during the designated "War on Terror." Ironically, western literature and social media have trended demands for the prosecution of their adversary states, but till now, no CIA, military official, or civilian leader of the US has been prosecuted for war crimes in Afghanistan. The reason provided by the US was that its own domestic and constitutional system is such strong that it can prosecute its members and detainees and other Afghan officials by itself.

However, if the whole world's officials are being prosecuted, then why The US officials are reluctant towards it by making claims of being non-signatory of ICC? The distinctive nature of ICC is that it allows the victims to participate during their proceedings, which makes them witnesses of their prosecutions. Further, the Centre for Constitutional Rights emphasized ICC to prosecute the senior official from the George Bush administration together with George Bush, Dick Cheney, George Tenet (Former Director of CIA), and private contractors involved in the torture program authorized by the CIA. Fatou Bemsouda-an ICC Prosecutor to investigate war crimes in Afghanistan- requested to initiate an official investigation of the war crimes committed by the US officials. (Gallagher, 2018) Prosecutor Fatou endured the consequences of initiating such an investigation against the US, as she was blocked and sanctioned by the US. According to the US Sectary of State Mike Pompeo, such investigations aimed to target Americans. Even Pompeo threatened those who were in favor of such investigations against Americans. Those American threats were not to individuals of the International Court but also a severe insulting assail to the International Law by calling ICC "corrupt," "ineffective," and "biased." (Psaledakis & Nichols, 2020)

States' refusal to interrogate their war acts would impede any progress in fighting a lawful war or adhering to the laws of war. Specifically, with proportionality, because if making such refusal is so easy by the powerful states, they will surely not follow the keen Law of Proportionality in the war zone, as they will keep in mind that they will not be interrogated or nobody can interrogate them. The interviewee, Dr. Bakare, provides an intuitive thought on this,

> "Who will judge the Americans, who will hold the Americans responsible for violating this IHL laws? So proportionality as kind of not being gauge vis a vis military objective. And, the military objective as being much more done deal than the proportionality. So I think the question lies is with how state follows laws to adhere with IHL. It is the responsibility of International Community to form pressure on the US to make itself present for the accountability of its war acts"

Wars are being fought in any corner of the world, victims are being produced, and this is the uniqueness of IHL to provide respect and justice to those victims and provide a proportionate war in the war zone. Now a question arises how would these victims find justice? Who will decide that who is a real victim and who is not? As detainees are captured at secret places on the suspect of

terrorism, how can it be decided who abided by the war laws among them? For such purpose, arguments or shreds of evidence are analyzed by competent criminal tribunals.

On the contrary, in the case of Afghanistan, to analyze the arguments provided by the US or analyze the conflict in Afghanistan, there is a lack of audacity in the international tribunals to come forward against the arguments of the US. Also, the US has never asked for such a tribunal from the International actors; despite this, the US regulated Afghanistan's case in its jurisdiction without giving any details of its judicial or legal procedure. For instance, Interviewee Prof. Peter Marguilles suggests that the US must consider an international legal tribunal to apply the Geneva Conventions in Afghanistan to determine the detainees, prisoner of war status, and other legal status of Afghanistan, and its actors. Such as,

> "I do think there should be the convention supply fully in Afghanistan. That goes to questions of attacks, it goes to the question of how you detain suspected terrorists. According to the Geneva Conventions you need a competent tribunal to determine who is a prisoner of war. And I think the US needed to do that. And it was a legal problem that the US for a long time refused to do that. The question is how you detain suspected terrorists. So, according to the Geneva Convention, you need a competent tribunal to determine who is a prisoner of war. And I think the US needed to do that. And it was a legal problem that the US for a long time refused to do that. Now, actually, it's pretty easy to meet that criteria to have a competent tribunal. It doesn't take much. You just have five officers or even three officers on a battlefield, that could well be a competent tribunal. So it's not that hard. And so that's another reason it was a real mistake for the United States not to say for such tribunal. The US have to comply with all of the Geneva Conventions. And that then goes to how we did interrogation as well."

CIA, American Judicial System, Constitutional System always fancied themselves as judges, juries, and executioners. Nobody can trail them. They have their own incandescent justification of only guardians of human rights and eradicating terrorism, and they can do anything beyond the perceptions of the rest of the world. Moreover, the prosecutor for Afghanistan, "Karim Khan," has argued that the US will and should not be prosecuted because "worst" crimes are conducted by Taliban and ISIS members. (aljazeera, 2021) Here the question arises: Does this stance make the US eligible for committing worse crimes?

Additionally, to protect its member from the jurisdiction of the International Criminal Court, the Bush administration supposed a new law to frighten the states or prosecutors who would go under

the jurisdiction of the ICC to ratify any investigation against the US. On the other hand, when it serves America's interests, the US supports the ICC investigation. For instance, the Bush administration supported UN Security Council Resolution, which referred to the Genocide in Darfur and Sudan, so that ICC could investigate it, but Bush never allowed ICC to investigate its members for such investigations. Similarly, the Obama Government backed ICC for political and diplomatic purposes of the United States, as Obama Administration supported the UN resolution for Libya in 2011 after Muammar Al-Qaddafi, so that the Libya case could be brought to ICC for investigations. However, Obama opted for the same stance on the ICC membership; even he conceded that the US tortured detainees but never repeated the investigation process by allowing ICC for scrutinization.

Similarly, the current President of the US, Joe Biden, never permitted ICC to probe against the US troops and CIA agents, which clearly shows that if such happens, many things will come forward which can mitigate the interests of the US. (Zvobgo, 2021) The interviewee Oves Anwar critically analyzed the US' stance of not allowing the ICC's investigations against them and how the Americans put fences of law acts around their legislations to protect their members from the international probe. As he mentions,

> "International Criminal Court has appointed prosecutors for the investigation of the US' war acts. But, the US has always refused towards such prosecutions. Moreover, Karim Khan, who has been appointed recent prosecutor for the investigation of war crimes in Afghanistan, has announced to investigate only one side of the parties to the conflict. Meanwhile, he clearly announced that the US' war acts in Afghanistan will not be prosecuted. He seems to be politically bent in one way, maybe because of the pressure built by the US to put on the International Criminal Tribunals. Such as; there is a law existed to protect the US' military personnel, which is called "**Hague Invasion Act**". According to that Act, if the international criminal tribunals-whom the US is not a signatory-tries to prosecute The US' army then the US will invade The Hague jurisdiction. That is also a political development to save the US' soldiers from prosecutions, otherwise how it is possible that the US' soldiers are the most less in numbers on the prosecution table. There must be criticism on the US for denying the prosecutions, as IHL has given the language of critique. IHL has given the standard, which is accepted at the universal level to measure an act of war that either it is right or wrong under the platform of International Humanitarian Law"

Ironically, the US didn't stop on just sanctions and blacklisted things to stop the ICC from investigation, they developed such law strategies to impede the international law organizations

from scrutinization of the war crimes of its members in other countries. Hague Invasion Act is a huge example of it, and has been a nick name of the original Act 'The American Service-Members' Protection Act." America enacted this act just to establish their fear in minds of states because this act hinders the states to ratify ICC, when it comes for the US' probe. Even, America would assist UN peacekeeping financially and militrically, unless questions for the prosecution of the US' military personnel's would be arised. Richard Dicker_then Director of International Justice Program at Human Rights Watch- was not satisfied with this law as he considered this law was purposefully enacted to punish those state members who will go in the favor of the US' prosecution for war crimes. He further added that enactment of this act was a the US' another idea to antagonize the ICC with having a lot of loopholes than a chees has in it. He even called this act a US' trap and warned the states not fall in the US' chastening standards. (HRW, 2002)

Moreover, the interviewees Christophe Paulussen and Florent Beurret stated that it seems impossible for ICC to probe the US' members for their war crimes because of the Haugue Invasion act; even the prosecutor denied interrogating the US officer for war crimes in Afghanistan. Such as;

> "On the issue of prosecution, the ICC would be the most straightforward avenue to prosecute the war crimes committed by US officials and troops within Afghanistan. The United States is not a signatory of ICC, and since the US is a permanent member of the Security Council, a referral by the Security Council to the ICC would never materialize. The ICC does nevertheless have jurisdiction over crimes committed in a member state. Since Afghanistan is a member state, the ICC has previously tried to claim jurisdiction over the conduct of US nationals in Afghanistan. However, it seems impossible for the ICC to prosecute US crimes committed in Afghanistan in practice. Just after the ICC began operating in 2002, the US enacted **the American Service-Members' Protection Act**, which protects US military personnel and officials from criminal prosecution by international criminal courts. The US is not a party like the ICC. The ICC's prosecutor's office has long tried to start an investigation, but efforts are continuously being derailed by political pressure from the US in the form of, for example, individual sanctions to members of the prosecutor's office. The ICC's Pre-Trial Chamber II even initially denied formal authorization to the prosecutor's office to investigate due to the complex political climate still surrounding the Afghan scenario," due to which it becomes difficult to expect a robust cooperation from the relevant states in the future. Eventually, on 5 March 2020, the Appeals Chamber decided to authorize the prosecutor's office to investigate. However, since the ICC is a court of last resort that complements or replaces national procedures when states are unable or unwilling to proceed, it needs to give precedence to domestic investigations.

> Therefore, the US allegedly pressured the Afghan government into requesting a deferral of the ICC investigation on 26 March 2020 and announcing it would proceed in genuine investigations of its own. After this had paused the investigations by the Prosecutor's Office, ICC prosecutor Karim Khan on 27 September 2021, asked the Pre-Trial Chamber to restart the investigation. his office lacks meaningful resources, however, Khan announced he had decided to focus on "crimes allegedly committed by the Taliban and the Islamic State – Khorasan Province ("IS-K") and to deprioritize other aspects of this investigation." This means that Khan will not focus on alleged crimes committed by the US or Afghan government troops. This does mean that Afghanistan could still investigate these alleged crimes themselves."

According to the Scholar of International Law named Sophie Doroy, ICC is a universal court; therefore, its proseuctors should work with the agenda of diminishing impunity for all without any sort of discrimination. And when prosecutors with such a universal mission choosed a biased probe, it would alter the image of ICC as a hypocrite and double-standard, rather than pragmatism and impartiality in the mandate of ICC. (Zvobgo, 2021)

Likewise, the interviewee Marc Garlasco called the decision of Karim Khan not to prosecute the US in the case of Afghanistan a "politically driven" decision. He further emphasized an independent and impartial tribunal to investigate all the parties to the conflict on an equal level regardless of the powerful strategies of influential ones. As he mentions,

> "Unfortunately, the ICC has decided to investigate the Taliban but not the other parties to the conflict. I believe the ICC should extend its investigation to the US acts, and their recent decision is unfortunate, politically driven. There can be no justice or accountability for many of the acts committed against the Afghan population until an impartial international body such as the ICC investigates all parties to the conflict. There needs to be an independent and impartial international body to investigate the acts of the past 20 years by all parties to the conflict. Unfortunately, the ICC is best placed but is refusing its essential role. Perhaps the human rights council can create a fact-finding mission, but it has no teeth even then. I find it hard to see how there will be accountability"

The conflict in Afghanistan was the toughest and most complex one, but that was not the first time that ICC surrendered its investigation before this ICC backed down its investigations of the British military in Iraq. Further, if ICC continues to give up on the investigations of the powerful states, this continuation of giving up would convert its pragmatism into vindicating the West meanwhile schooling and ordering the rest of the world. As a result, ICC can lose the trust of its member

states; for example, the Philippines and Burundi withdrew their membership from the International Criminal Court by accusing the court of its partiality toward the West.

However, suppose ICC prosecuted the complete conflict of Afghanistan, including the probe of the US officials and military personnel. In that case, it could influence the world with its legal, reasonable, authoritative jurisdiction and could be an only super influential and dominating legal power at the global level. Otherwise, there would be long-term consequences of such favoritism towards the West, and it would risk prolonged charges to the universal Rule of Law under the supervision of International Humanitarian Law. (Zvobgo, 2021)

Nevertheless, if the United States disagrees with the investigations by an international court, then other powerful or allied states can pressurize the US or the ICC to establish a competent tribunal. Additionally, the UNSC can play a crucial role in establishing a competent tribunal to investigate the US' war acts in Afghanistan, as it already did in the case of Sierra Leone. Such tribunals do not take a longer duration; it only depends on a call of the UNSC to its allies to form a tribunal; previously, the UNSC maintained committees in less than one day. So, this can happen, but it seems, if not impossible, but daunting task for the UNSC to bring the US for investigation because of the permanent military and financial dependence of the UNSC on the shoulders of the US.

Chapter 5

Conclusion

Humanitarian Neutrality is the central goal of International Humanitarian Law, which means victims must be protected, regardless of who they are and where they are. Unfortunately, "Humanitarian neutrality" drifted away from the responsibilities of the parties to the conflict-the US specifically- in the case of Afghanistan, such as; the US' individualization remained dominant throughout the conflict, either it was the case of prosecution for the war crimes or it was status of Taliban regarding the Geneva Conventions. Moreover, the conflict in Afghanistan was the most complex in nature, which created difficulties in handling the different parties. Firstly, the US refused to concede Afghanistan as a high contracting Party to the Geneva Conventions as the Bush administration used the term "failed state" to deprive Afghanistan of the rules and regulations of the Geneva Convention. Then the US claimed about Taliban that there was no distinction between Taliban and Al-Qaeda fighters and declared them terrorists at the global level to exclude them from any privileges of the IHL. Both phases of International Armed Conflict and Non-International armed conflict existed in the case of Afghanistan. Such as; before June 2002, it fulfilled all the requirements of international armed conflict due to the de facto government of the Taliban, which made Taliban "combatants" as per the rule of the International armed conflict, but at that time, the Bush administration negated such status by claiming Afghanistan as "failed state" to eliminate Afghanistan from the list of High Contracting Parties of the Geneva Conventions. After June 2002, the conflict lay under the provision of the non-international armed conflict, in which Taliban could not enjoy the status of combatants, and on capturing, they also could not enjoy the status of POW. However, detainees could be treated under the Common Article 3 of the Geneva Conventions and Article 5, 6, and 75 under the Additional Protocol II, but the US keenly tried to make those detainees deprived of such privileges. There was a bulge of news regarding the torture and killings of those detainees.

Moreover, if the US doubted detainees' legal status, the US must try to establish a competent tribunal for investigations. Ironically, the US denied and condemned such investigation of their intelligence and military personnel. Nevertheless, if non-international armed groups remain

deprived of legal privileges, it can give birth of utmost violence against universal international law, which will make such groups choose their own ways of war and never abide by the law.

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ANNEXURES

ANNEXURE 1

Research Interview Methodology Table

I: Law Professors from International and National Universities					
No.	Interviewee	Date	Methodology	Recording	Transcript
1.	HOD (Peace and Conflict Studies)	24 January 2022	Semi-Structured (FTF)	Audio	Transcript Generated
2.	Retired U.S. Marine Corps and an Adjunct Professor of Law	24 January 2022	Semi-Structured	Audio	Transcript Generated
3.	Professor of Law	25 January 2022	Semi-Structured	Audio	Transcript Generated
II: Officials from Legal and Regional Think Tanks					
4.	Deputy Director of Asia Programm	15 Februry 2022	Semi-Structured	Audio	Transcript Generated
5.	Director of Research (RSIL)	26 January 2022	Semi-Structured	Audio	Transcript Generated
III: Senior Intelligence Analyst					
6.	Senior Civilian Protection Officer (UNAMA)	28 January 2022	Semi-Structured	Written Document via Email	Document Utilized
IV: Senior International-Law Researchers					
7.	Senior Researcher/Academic programme coordinator IHL/ICL	12 Februry 2022	Semi-Structured	Written Document via Email	Document Utilized
8.	Legal Research Assistant	12 Februry 2022	Semi-Structured	Written Document via Email	Document Utilized

ANNEXURE 2

Sample of Questionnaire

- Were the US' armed acts in Afghanistan legal, or did the US follow the International humanitarian law in the war zone from 2001 to 2011?
- Were the airstrikes by US forces proportionate enough to meet the threshold of the armed conflict as prescribed in the Geneva Conventions?
- According to the US (the Bush Administration), Afghanistan is not a high contracting party of the Geneva Convention because of its status as a "failed state." Should Afghanistan not be considered a high contracting part of the Geneva Convention from 2001-to 2011?
- Should the Taliban be given the status of Prisoner of War or combatants?
- America's treatment of the Taliban detainees was completely liable under the IHL?
- According to the Geneva Conventions, an insurgent party to the conflict would be considered combatant when it possesses some state authority or is under the control of a state? Did the Taliban possess some state authority in 2001?
- Were the civilian casualties caused by US attacks propionate enough to meet the military necessity or military advantage?
- At the end of the war, America has failed to achieve its military necessity. How can America's war acts be prosecuted, as America has blocked the investigation of ICC by arguing that she is not the signatory of ICC? Then how can America be persuaded to consider herself legitimate for the investigation?
- Does IHL need any limitation or further description to make the US abide by the laws, especially in the case of Additional Protocols, because the Afghanistan Case-study is based on state and non-state actors, and the US always denied any discrimination between state and non-state actors?
- How can the inclusion of proportionality debate in existing security policies yield effective results in combatting insecurity and building sustainable peace in Afghanistan?
- What is the role of the US in the exploitation of the "Right of Self-defense" to initiate the war on terror in the case of Afghanistan?
- Does self-defense permit a state to change the regime of another state?

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