Chapter 1- General Framework of the Research

1.1. Background of the Study

Our world is witnessing heart breaking, unprecedented and horrifying civilian death and casualties because of armed conflicts that are largely conducted in and around densely populated civilian cities. Contrary to the rules, principles and customs of armed conflict that dictate civilians to be spared from attack, contemporary armed conflicts are causing unbearable death and injury to civilians and destruction to their objects. Despite the existence of various International Humanitarian Laws that are designed to protect civilians from the impact of armed conflicts, civilians are still suffering from the scourge of internal and international armed conflicts. The current suffering and plight of civilian population due to explosive weapons, landmines, and remnants in densely populated areas is becoming a glaring reality in the ongoing internal armed conflicts, which is the most prevalent form of armed conflict in today's world. In the 2009 report to the United Nation Security Council it has been articulated the increasing concern at the use of explosive weapons in *'densely populated environments which inevitably has an indiscriminate and severe humanitarian impact.'*[1]

We live in an increasingly violent world in which more civilian deaths are witnessed because of employment of *explosive weapons* either in the hands of the state or by terrorist groups, as protagonists adopt a greater willingness to use explosive weapons indiscriminately. In May 2014, a study by Action on Armed violence (AOAV) in-to thousands of explosive attacks in 2013 across 58 countries, found a 15 percent increase in the number of civilians killed or maimed by large-scale weaponry like car bombs, mortars,

[1] John, Borrie and Maya, Brehm, 'Enhancing Civilian Protection from Use of Explosive Weapons in Populated Areas: Building a policy weapons in populated areas; Building a policy weapons and research agenda' Selected Article on International Humanitarian Law, September 2011, Volume 93 No. 883, p. 810 [Here in after, John and Maya, Enhancing Civilian protection from the use of explosive weapons in populated areas]

and drone-launched missiles.[2] Increasingly a greater proportion of munitions cause death on civilian populations.[3] Majority of the casualties (82 per cent) were civilians rather than combatants. “Each year there is large number of death and injury as a result of explosive remnants of war, many innocent civilians have lost their lives and limbs by disturbing or inadvertently coming in to contact with explosive remnants of war.”[4] In addition to their devastating consequences through claiming the lives of very large number of civilians, these weapons remnants also deter reconstruction and highly affect economic livelihood.[5] Houses, hospitals and schools cannot be rebuilt until such weapons are cleared out from the area and contaminated land cannot be farmed.[6]

Syria is the biggest state user of such weapons in 2013, while Syrian rebels accounted for the highest usage among non-state armed groups.[7] The ongoing conflicts in Afghanistan, Iraq,[8] Pakistan and Somalia also partially explained the rise in civilian casualties by the employment of explosive weapons. The increasing use of artillery shells, airdropped bombs and rockets, ballistic missiles, drones, and IEDs is going under the radar of international agencies such as the United Nations whose focus has been primarily up on the use of chemical weapons.[9] The second biggest user of explosive weapons in 2013 was the NATO force in Afghanistan, where last

[2] Jane Hunter and Robert Perkins, ‘Explosive States Monitoring Explosive Violence in 2014’, Iain Overton, *Action on Armed Violence*, Ministry of Foreign Affairs of Norway, Norway, May 2015, p.13
[3] Ibid.
[4] “Explosive remnants of war” at <https://www.icrc.org/eng/war-and-law/weapons/explosive-remnants-war/overview-explosive-remnants-of-war.html> [last accessed February 5, 2016]
[5] Ibid.
[6] Ibid.
[7] *Syria one half of the estimated 300,000 civilian deaths have come from explosive devices*, supra note 1.
[8] In Iraq, the rise in the use of improvised explosive devices and a fourfold rise in suicide bombing have resulted in an increase of 91 per cent on the civilian casualty rate year on year, Ibid.
[9] Ibid.

year the international security assistance force (Isaf) was responsible for a 50 per cent rise in civilian casualties.[10]

In ongoing conflicts, there are also employment of ERWs and landmines, that are becoming causes for the injury and death of much number of civilians.[11] For instance- in Yemen, Houthis have employed landmines, in the city of Aden. Accordingly, in 2009 landmines, which were believed to have been employed by the Houthi forces before retreating from Aden, caused numerous causalities. Local security experts reported that on August 1, 9 people were killed and 18 wounded from a series of landmines, explosions in Aden.[12] In this and other areas the consequence of war has been much number of unexploded ordinances including landmines,.[13] As per the report of ICRC, the major states that have been and are being affected by explosive remnants of war are; Cambodia, Iraq, Laos, Libya, and Viet Nam.[14] From among these states in Libya there existed significant amount of unexploded ordinance in 2011 and because of this the state has experienced a larger number of casualties than the other states above.[15]

Most of the time, more than the direct participants of armed conflict, civilians are most affected. Even if there are survivors, because of the further consequence of these weapons they suffer from; disability, psychological harm and so on.[16] Besides the use of such explosive weapons and the destructions caused by such weapons have an enormous effect on public goods or infrastructures which will cause interruption on the public services, resulting a long-term suffering as well.[17] From among the civilians,

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[10] Ibid.
[11] International Committee of the Red Cross, *Explosive Remnants of War*, ICRC Documentation Section, Geneva, December 2014, p.1
[12] "Yemen: Houthis Used Landmines in Aden | Human Rights Watch" at <https://www.hrw.org/news/2015/09/05/yemen-houthis-used-landmines-aden> [Last accessed July 4, 2016]
[13] Supra note 11, p.1
[14] Id., p.2
[15] Ibid.
[16] "International Network on Explosive Weapons (INEW), The Problem" at <http://www.inew.org/learn-more-about-inew> [last accessed February 1, 2016]
[17] Ibid.

the most vulnerable are women as they are mostly available at home. The other effect of the explosive weapons is internal displacement of the civilians again the primary refugees are women.[18]

Currently there exist various international humanitarian norms and principles governing the use of explosive weapons, landmines, and explosive remnants of war. Within the realm of treaty law, there are the following illustrative list of instruments. The Lieber Code, St. Petersburg Declaration 1868, Institute of International Law Resolution on Military Objectives 1969, Hague convention (II), (IV,2) and (IV,3) of 1899, Hague convention XIV of 1907, Geneva Protocol on Asphyxiating or Poisonous Gases and of Bacteriological Methods 1925, the Four Geneva Conventions, Additional Protocol I and II, Convention on Certain Conventional Weapons (CCW) 1980 and the Amended Article 1 in 2001, CCW Protocol (I) on Non-Detectable Fragments 1980, CCW Protocol (II) Prohibiting Mines Booby-Traps and Other Devices 1980 and the Amended protocol in 1996, CCW Protocol (III) Prohibiting Incendiary Weapons 1980, CCW Protocol (V) on Explosive Remnants of War 2003, CCW Protocol (IV) on Blinding Laser Weapons 1995, Convention prohibiting Chemical Weapons 1995,Ottawa convention1997or Anti-Personnel Mine Ban Convention or simply Mine Ban Treaty, and Convention on Cluster Munitions 2008.

The other norm is customary international humanitarian laws. They are either codified in various treaties or the treaty provisions may get customary international law status after *state practice* and *opinion juris* requirements are fulfilled. Finally, humanitarian law principles like distinction, military Necessity, proportionality, and precaution applicable to both international and non-international armed conflicts. From among these principles of international humanitarian law Principle of Distinction,[19]

[18]Supra note 1, p. 813

[19] Jean-Marie Henckaerts and Louise Doswald- Beck, Customary International Humanitarian Law, Volume 1, The press syndicate of the university of Cambridge, Cambridge United Kingdom, 2005, Pp. 3-25 [Here in after, Jean-Marie and Louise, *Customary International Humanitarian law*]

Proportionality,[20] and Measure of Precaution[21] applicable to both international and non-international armed conflicts. Regarding principle of military necessity applicable to both international and non-international armed conflicts, as the international law commission designated in its statement the principle is considered as pre-emptory norm of international law.[22] Lastly, principle of humanity has gotten customary international law status like the other core humanitarian law principles.[23]

1.2. Statement of the Problem

From time to time conflict between and within states is highly increasing especially in densely populated civilian areas, however the issue is not only employment of explosive weapons, landmines, and explosive remnants, but also their utilization is in densely populated civilian areas throughout such conflicts. The study investigates such use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas by the parties to conflict. The study explores what kind of protection is accorded to the civilians and civilian objects by the law. It also focuses on the adequacy of the existing humanitarian laws, rules, norms, principles in providing appropriate protection for civilians and civilian objects from such kinds of unlawful attacks.

As civilians are most of the time vulnerable to risks of war they have to be the primary ones to get protection. Besides explosive weapons are indiscriminate by their nature thus parties to the conflict when targeting may include civilians and civilian objects either intentionally or recklessly and become the reason for the death of massive number of civilians. Because of this fact, the study primarily examines the protection

[20] Id., p.46
[21] Id., Pp. 51-68
[22] Gary, D. Solis, *The Law of Armed Conflict International Humanitarian Law in War*, Cambridge University Press, New York, 2010, p.258 [Here in after, Solis, *The Law of Armed Conflict*]
[23] "International peremptory norms (Jus Cogens) and international humanitarian law", at <http://www.iccnow.org/documents/WritingColombiaEng.pdf> [last accessed July 13, 2016]

guaranteed to civilians and civilian objects. The harm caused by explosive weapons during the use of such weapons in densely populated civilian areas will be explored by the study. Various sources show that explosive weapons have been and are being reason for the death and injury for civilians.[24] Furthermore, employment of explosive weapons causes destruction of infrastructures which are essential to the wellbeing of civilians, i.e. "The destruction of transport facilities, markets, power, sanitation and health infrastructure as well as housing and shelter, impedes community access to food, clean water, health care, education and other necessities of life."[25] Pursuant to the report of humanitarian organizations like the ICRC and Doctors without borders, most of the injured persons as a result of mortar or artillery fire or in landmines explosions and suffering blast fragmentation in Mogadishu are civilians.[26] Furthermore ICRC has logged that, in 2010 the number of such injuries and deaths have abruptly increased.[27]

The study will analyze the continuous impact of explosive remnants of war on civilians and civilian objects as well as military forces.[28] For instance, in Iraq combination's air and ground campaigns littered the country with tens of thousands of unexploded sub munitions.[29] These landmines,, which can detonate on contact, caused daily casualties in the weeks after the end of active hostilities and present lingering dangers in populated areas and open fields.[30] Iraqi military and Fedayeen forces abandoned large caches of weapons and ammunition in schools, mosques, hospitals, and residential neighborhoods.[31] These munitions have killed or injured scores of Iraqis, many of whom are children, searching for scrap metal or playing with

[24] Supra note 1, p.812
[25] Id., p.813
[26] Supra note 1, p.814
[27] Ibid.
[28] Supra note 4
[29] "Off Target: The Conduct of the War and Civilian Casualties in Iraq: Iv Explosive Remnants of War", at <https://www.hrw.org/reports/2003/usa1203/6.htm> [last accessed February 4, 2016].
[30] Ibid.
[31] Ibid.

explosives. Opposition fighters have also looted the sites and used the ordnance for attacks on Coalition forces and against civilians, such as the deadly truck bombing at the U.N. headquarters in Baghdad on August 19.[32] The significant and ongoing impact of these explosive remnants of war demonstrates the need for armed forces to consider the post-attack effects of their actions.[33] Therefore, the study will discuss what is required by the law to minimize and control such effect of explosive remnants of war.

Most do not have the technical capacity or the resource to clear explosive remnants of war safely and few have the resources needed to deal with the psychological, medical, and rehabilitative needs of victims. Besides in our world there are millions of explosive remnants of war on the ground today affecting more than 80 countries. Some countries have been dealing with this problem for decades.[34]

The study will also provide analysis on the issue that, would an attack be legitimate when targeting Military Commander or General in a place where civilians are concentrated if the target is missed and instead caused severe damage on civilians and their objects.

The study will give emphasis on the points such as, whether there exist convention or customary rule of IHL prohibiting the use and threat to use of nuclear weapons, illustrating specific list of military objectives, and restricting the employment of drones.

Thus, having all the above-mentioned points in consideration, the general and specific research objectives of the study are provided below.

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[32] Supra note 29
[33] Ibid.
[34] *Poland for example has cleared some 100 million items from the two World Wars. In Laos, where the wars in Indochina ended in 1975, tens of millions of explosive remnants of war still remain to be cleared. More recent conflicts such as those in Afghanistan, Iraq and Sudan have also produced significant amounts of explosive remnants of war.* "Explosive remnants of war | International Committee of the Red Cross" at <*https://www.icrc.org/en/document/explosive-remnants-of-war*> [last accessed June 23, 2016]

1.3. Objective of the Study

1.3.1. General Objective

This study has the following general objective:

- ❖ Exploring the impact of explosive weapons, landmines, and explosive remnants of war in densely populated areas, evaluating such use from the perspective of principles of IHL and the existing IHL norms and assessing the adequacy of the norms.

1.3.2. Specific Objectives

- ✓ Exploring the casualties because of explosives weapons, landmines, and explosive remnants of war in populated civilian areas, and then tracing what should be done to reduce such damage.
- ✓ Examining the rules of IHL that have banned or restricted the use of explosive weapons, landmines, and explosive remnants of war.
- ✓ Evaluating the compatibility of the practice by the parties to conflict with the norms and the core principles of international humanitarian law and assessing the adequacy of these laws.

- ✓ Inspecting the role of states in general and ICRC in particular, to minimize the risks caused as a result of explosive weapons, landmines, and explosive remnants of war.

1.4. Research Question

The main research question that the study will address is:

- ➢ Is the existing legal frame work adequate to provide sufficient protection to civilian populations and civilian objects from the impact of the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas?

And, the study will try to answer the following supplementary research questions:

- ➢ What does the international humanitarian law say about the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas? What are the prohibitions and the restrictions by the law in such employment?
- ➢ What are the losses and impairments caused as a result of the use of explosive weapons and the bearings of landmines, and explosive remnants of war in densely populated areas?
- ➢ What kind of protection is accorded to the civilians and civilian objects by the law? Are civilians and civilian objects being protected or not?
- ➢ How are the principles of IHL especially the principle of distinction implemented at the time of use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas?
- ➢ Are the norms of IHL adequate or enough to govern the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas? Do we need additional rules and norms to govern such cases?

- What should be done to minimize the mutilation and destruction caused as a result of use of explosive weapons, landmines, and explosive remnants of war?

1.5. Significance of the Study

Since the issue of explosive weapons, landmines, and explosive remnants of war is a very critical because of the heart breaking, unprecedented and horrifying civilian death and casualties as a result of armed conflicts that are largely conducted in densely populated civilian cities, such event needs progressive jurisprudential and academic research. The study in this area could trigger further studies which will eventually provide ability to minimize or if possible to prevent the impact of explosive weapons, landmines, and explosive remnants of war in densely populated areas.

Furthermore, although there are a number of literatures on the use of explosive weapons, landmines, and explosive remnants of war, gaps are found within these literatures i.e. literatures that do indicate the gaps in the laws fail to propose concrete recommendations. This implies that the literatures are no adequate in sufficiently addressing the issue at spot light. Nonetheless, the study will fill such gaps and address the issues that the literatures failed to do so. Besides there is no extensive or no sufficient number of literature written or study conducted on the issue of adequacy of the existing humanitarian laws in governing the use of explosive weapons, landmines, and explosive remnants of war. Thus, the study will serve as a literature both on the use of explosive weapons, landmines, and explosive remnants of war and more importantly on the adequacy of the existing humanitarian laws governing such matters.

Finally, and most importantly, the study will serve as foundation for the need of a new IHL norm if the existing norms of IHL are insufficient to govern the issue.

1.6. Literature Review

Indeed, there exist various written texts on the explosive weapons, landmines and explosive remnants of war. There exist various books, article and studies and ICRC reports about the employment of explosive weapons, landmines, and remnants in densely populated areas. Compared to the literature of explosive weapons, landmines, and explosive remnants of war, there are few written materials on the issue of adequacy of the international humanitarian laws in governing the use of explosive weapons, landmines, and explosive remnants of war. In lieu of this the written materials show that there have been various efforts made to minimize the humanitarian damages caused because of the employment of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas.

William H. Boothby in *"Weapons and the Law of Armed Conflict"* stated that; in the previous two centuries, there have been several attempts in order to affect disarmament via legal elimination of certain weapons by imposition limitation. The success of this efforts has been on the WMDs like chemical and biological weapons. The limitation has been not only their use in war time but also their development, production, and stockpiling in peacetime has been forbidden.[35] The author of the above-mentioned book continued explaining about the explosive remnants of war in the other chapters. It stated that NGOs and others publicized the dangers and unintended civilian casualties caused by the explosive residue left after an armed conflict which will collectively be referred to in the chapter of the book as ERWs.[36] In general the book has made detailed discussion about how to reduce the impact of explosive remnants of war and the way how states can be able to undertake their obligation to clear the ERW.[37]

[35] William, H. Boothby, *Weapons and the Law of Armed Conflict,* Oxford University Press, New York, 2009, p. Vii [Here in after, William H. Boothby, Weapons, and the Law of Armed Conflict]
[36] Id., p.299
[37] Id., Pp.300-301

Additionally, the applicable provision of the protocol V to CCW dealing about the explosive remnants of war on the land territory including internal waters of high contracting parties has been discussed in the book.[38] The book has also made a detailed discussion about the applicable provision of the protocol V to CCW dealing about the explosive remnants of war on the land territory including internal waters of High contracting parties.[39]

Francois Bugnion in the *book "the international committee of the red cross and the protection of war victims* "has stated that as civilians are not participants of war they need to be secured or safe from attack thus indiscriminate attacks are prohibited.[40] The author continued discussing that the IHL norms granting protection of civilians from indiscriminate attacks are; articles 25, 26, 27 and 28 of the 1899 Hague Convention and articles 1 and 2 of the 1907 Hague Convention.[41] Then the author has reviewed different conferences prohibiting weapons of mass destruction.[42] Moreover, the book mentioned the provisions of Protocol I Additional to the Geneva Conventions which grant protection to civilians from indiscriminate attacks.[43] The book finally tried to analyze the provisions above as to the conferences conclusion and mentioned the gaps with in the laws by their failure to answer practical issues. Even though the book has showed the gaps it failed to address the solution or has not provided recommendation for the existing gaps, this research will address such gap after analyzing the laws.

The Article by John Borrie and Maya Brehm *"Enhancing Civilian Protection from Use of Explosive Weapons in Populated Areas: Building a Policy and Research Agenda"*. Firstly, mentioned that the use of explosive weapons

[38]Supra note 35., Pp.301-302
[39] Ibid.
[40] Francois, Bugnion, *The International Committee of the Red Cross and the Protection of War Victims*, Macmillan publishers limited and ICRC, Genève, 2003, p.717 [Here in after, Francois, *The International Committee of the Red Cross and the Protection of War Victims*]
[41] Id., Pp. 719-720
[42] Supra note 40, Pp. 721-726
[43] *Articles 53, 51 and 52 of the Protocol (I) Additional to The Geneva Conventions*, Ibid Pp. 727-728

primarily harms civilians. Thus there has to be coherent and effective humanitarian responses made to enhance the protection of civilians.[44] Also this article describe the effects of explosive violence, critically examines how the existing humanitarian law regime tends to address the issue.[45] Secondly, the article explained the impact of the use of explosive weapons in populated areas as a very serious issue, in which weapons in populated areas as a very serious issue in which the UN Secretary General has frequently pointed it out as distinct humanitarian problem.[46]

A book *"Customary International Humanitarian Law"* by Jean-Marie Henckaerts and Louise Doswald-Beck has made detailed discussion on the issue of customary nature of IHL. In which before various treaties were enacted customary practices of armies were the existing international humanitarian laws commonly known as '*the laws and customs of war*'.[47] Then codification of these laws and customs of war began to develop by the Lieber code, then the 1899 and 1907 Hague conventions and declaration came in to being.[48] Actually it is at Nuremberg that the *International Military Tribunal* discovered that Hague conventions of 1907 had gained customary international law status.[49] As per the *nuclear weapons test case* most of the provisions of the 1949 Geneva conventions have customary international law status.[50] After assessment of different state practices the book has stated the rules found incorporated in different conventions governing conduct of hostilities have got customary international law status applicable in both international and non-international armed conflicts such as the rules on the principle of distinction[51] and the rules on different kinds of weapons.[52] However, on the issue of whether the prohibition of use of

[44] Supra note 1; p.809
[45] Ibid.
[46] Supra note 1; p. 810
[47] Supra note 19, p. xxxi
[48] Ibid.
[49] Supra note 19, p. x1viii
[50] Id., p. 1
[51] Id., Pp. 3-68
[52] Id., Pp. 237-292

nuclear weapons has got customary international law status the book responded negatively stating that "[t]here is neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons."[53] In the advisory opinion of the ICJ on the use of nuclear weapons the court stated that:

> The treaties dealing exclusively with acquisition, manufacture, possession, deployment and testing of Nuclear weapons, without specifically addressing their threat to use, certainly point to an increasing concern in the international community with these weapons. It concludes from this that these treaties could therefore be seen as foreshadowing future general prohibition of use of such weapons but they do not constitute such prohibition by themselves. ("…")[54]

Moreover, regarding the customary international law on the prohibition of the threat to use of nuclear weapons the court stated that;

> The members of the international community are profoundly divided on the matter of whether non- recourse to nuclear weapons over the past 50 years constitutes the expression of an opinion juris. Under these circumstances the court does not consider itself able to find that there is such opinion juris. ("…")[55]

As to the issue of adequacy of the existing humanitarian laws in governing the use of explosive weapons, landmines and remnants there is a report prepared by ICRC *"International Humanitarian Law and The Challenges Of Contemporary Armed Conflicts"* at the 28th international conference of the red cross and red crescent stresses that the existing IHL rules are adequate enough to govern and handle the contemporary armed conflicts or hostilities.[56] The report mentioned that the first protocol additional to the

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[53] Id., p. 255
[54] International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory opinion, 8 July 1996, paragraphs 47-73, at <http://www.icj-cij.org/docket/files/95/7497.pdf> [Last accessed July 4, 2016]
[55] Supra note 19, p. 255
[56] "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", at <https://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts_final_ang.pdf> [Last accessed July 4, 2016]

Geneva conventional under article 52 fails to put forward the list of military objects instead it gives an overall definition of military objective.[57] The report also stated that indirect contributions and possible advantages are not categorized under the military objective.[58] It has also criticized article 51(5) (b) of the first protocol additional to the Geneva conventions as that it is hard to make the valuation of the damages to civilians and their objects and the specific military advantage gained in to the field.[59] However, the report stating the non-existence of list of military objects it argued the adequacy of the existing IHL norms to govern the contemporary armed conflicts. Thus, it failed to propose enactment of new and specific rule to fill the above gap with in the IHL norms, instead the report rash to the practicability of the rules of IHL which is improper recommendation.

In general, the above literatures have discussed about the use and impact of explosive weapons, landmines, and explosive remnants of war in densely populated areas also some of them has attempted to analyze the existing humanitarian laws on the matter and some others tried to assess the adequacy of IHL norms. However, they failed to provide solution after analyzing the laws. With the existence of problem with in the general laws and with the non-existence of specific IHL rule prohibiting or restricting the above matter they recommended to work only on the implementation of the existing laws.

1.7. Methodology of the Study

This study is purely doctrinal descriptive, narrative, and analytical. It describes what explosive weapons, landmines, and explosive remnants of war are, the consequences of the employment of these explosive weapons, landmines, and explosive remnants of war in densely populated civilian cities. It narrates and analyzes the current war undertaking by different

[57] Ibid.
[58] Ibid.
[59] Ibid.

states especially in the case of employment of explosive weapons, landmines, and explosive remnants of war and most importantly, it also analyzes the adequacy of the existing IHL norms and principles to govern the issue.

In recent years, there has been growing interest in the areas of explosive weapons, landmines, and explosive remnants of war owing to the use of such weapons in densely populated areas and the consequent devastating impacts in conflicts in the recent past or ongoing. Albeit this, not much of extensive research has been conducted in the areas of explosive weapons, landmines, and explosive remnants of war. However, there exist a number of published and unpublished books, journal articles, official reports, case decisions and scholastic resources. Currently, this issue has become top story in different Medias, ICRC websites, Magazines and newspapers describing devastated impact of explosive weapons and explosive remnants of war.

The study not only relies on the sources of international humanitarian law but also the examination of the study bases up on the sources of international law in public international law. Such as soft laws, precedents of international nature, scholar's opinion, customary laws, and treaties will be carefully inspected.

1.8. Delimitation of the Study

The stud**y** shall focus on the explosive weapons, landmines, and explosive remnants of war in densely populated areas both in international and non-international armed conflicts. Since modern armed conflicts explosive weapons, landmines, and explosive remnants of war caused extraordinary and horrific civilian death and causalities. Therefore, the study is limited to the categories of explosive weapons, landmines, and explosive remnants of war. And it doesn't cover IHL issues other than the above three.

The study when incorporating some case laws, it will be limited to only international tribunals' thus domestic case decisions are not within the scope of the study. And from among the principles of IHL the study is limited to the principles of distinction, military necessity along with humanity, proportionality, and measure of precaution. Therefore, the study will not assess or analyze the principle of unnecessary suffering as it has little significance for the matter at hand.

Furthermore, the study is confined to assessing the adequacy of the existing IHL norms, rules, and principles. Thus, the study is not in the concern of whether the existing norms of IHL are properly implemented or not. In other words, the issue of how different states and parties to conflict practice or strive for the implementation of the IHL norms is out of the scope of the study.

1.9. Organization of the Study

The study comprises six chapters. The first chapter deals with the background and essential structure of the study including the objective, the main and supplementary questions, the significance, methodology, literature review and delimitation of the study.

Chapter two specifies the introductory remark on the explosive weapons, landmines, and explosive remnants of war. Moreover, the chapter also provides the definition and types of explosive weapons, landmines, and explosive remnants of war.

Chapter three stipulates about the use of explosive weapons, landmines, and explosive remnants of war plus what the law states about them, how far it restricts and prohibits their employment in densely populated areas. The study will assess the existing treaties, international customary laws, principles of international humanitarian laws and judicial decisions and soft laws governing the use of explosive weapons, landmines, and explosive remnants of war.

Chapter four provides the kind of protection accorded to the civilians and civilian objects by the law. As the impact of explosive weapons, landmines, and explosive remnants of war is tremendous which causes death and destruction to a massive number of civilians and an enormous number of civilian objects, the foremost ones that need protection from the impact of explosive weapons, landmines, and explosive remnants of war are civilians and civilian objects.

Chapter five is the analysis of the adequacy of the existing humanitarian laws in governing the use of explosive weapons, landmines, and explosive remnants of war. In lieu of this the adequacy of the core principles, conventions, customary law, case laws of international humanitarian law governing explosive weapons, landmines, and explosive remnants of war will be discussed.

Chapter six presents the author’s conclusions and furnishes recommendations on what should be done for the law to govern the use of explosive weapons and explosive remnants of war effectively and efficiently. Besides, what measures should be taken to minimize and control the impact of explosive weapons and explosive remnants of war. If the researcher decides on the non-adequacy of the existing international humanitarian laws recommendation will be forwarded for new IHL rules or principles to be enacted.

Chapter 2- Explosive Weapons, Landmines, and Explosive Remnants of War

2.1. Introduction

Explosive weapons, landmines, and explosive remnants of war share common feature which is they are explosive devices and they use explosive force as initial means to cause damage on either peoples or properties.[60] Such nature of these weapons, mines and remnants makes them difficult to control after they are utilized.[61]

Employment of explosive weapons in densely populated civilian areas i.e. towns, cities and other areas where civilians are concentrated is currently being cause for the death, injury and destruction of civilians and civilian objects.[62] Besides it is becoming a great humanitarian concern.[63] The same is true for explosive remnants of war and landmines in which there are about 20,000 deaths as a result of landmines, and unexploded ordinances per annum.[64] Massive number of these unexploded ordinances and other

[60] United Nations, *Landmines, Explosive Remnants of War and Improvised Explosive Devices,* United Nations Mine Action Service (UNMAS), New York, 2015, Pp. 11-21
[61] Ibid.
[62] Supra note 1, p.812
[63] Ibid.
[64] Jonmahmad Rajabov, 'Explosive Remnants of War Their Consequences', online, *Journal of ERW and Mine Action*, Vol. 10: Issue.2, Article 8, Para.1,

explosive devices such as, abandoned ordinances (in general ERWs) are found in areas where armed conflict has occurred.[65]

This chapter explores and discusses the definition and types of explosive weapons, landmines, and explosive remnants of war one by one.

2.2. Definition of Explosive Weapons, Landmines, and ERWs

2.2.1 Definition of Explosive Weapons

Explosive weapons are weapons using explosive force and also blast, fragmentation and heat as a primary means to cause damage on greater number of population and properties when employed in densely populated areas.[66] Explosive weapons have a wider area effect, and bring about devastating adverse effect on infrastructure such as housing, schools, hospitals, and water and sanitation systems, resulting in irresistible long-term effects on people's lives far beyond the conflict itself.[67] Moreover, as a result of destruction of infrastructures by the use of explosive weapons, there will be increase of gender gaps in the society and most importantly displacement and refugee problems will subsequently follow.[68]

2.2.2. Definition of Landmines

Landmines or 'mines' are explosive devices which are basically victim-activated where in, either a human person or vehicle the anticipated targets are.[69] "A mine comprises a quantity of explosive material contained within

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<http://commons.lib.jmu.edu/cgi/viewcontent.cgi?article=1779andcontext=cisr-journal>
[65] Id., Para.2
[66] Cross, Kenneth, Ove Dullum, Marc Garlasco and N.R. Jenzen-Jones, 2015, Explosive weapons in populated areas: technical considerations relevant to their use and effects, special report, Perth: Armament services (ARES), p.13
[67] Supra note 1, Pp.812-813
[68] Id., p.813, Infra my discussion *'Explosive weapons such as mortars, rockets, artillery shells, air dropped bombs, IED*s …etc.'
[69] Geneva International Center for Humanitarian Demining, *A Guide to mine action,* GICHD Documentation Section, Geneva, 1987, p.7

some form of casing (typically in metal, plastic or wood), and a [fusing] mechanism to detonate the explosives."[70]

The 1997 Ottawa Convention or mine ban treaty also defines landmines, under article 2(2) as, "'mine' means a munition designed to be placed under, on or near the ground or other surface area and to be exploded by the presence, proximity or contact of a person or a vehicle."[71]

2.2.3. Definition of Explosive Remnants of War

The protocol on Explosive remnants of war (Protocol V) to the convention on conventional weapons defines explosive remnants of war under article 2(1) as, "*Explosive remnants of war,* means unexploded ordinance and abandoned explosive ordinance".[72] The Protocol also defines unexploded ordinance and abandoned explosive ordinance under articles 2(2) and 2(3) as; "Unexploded ordinance means explosive ordnance means explosive ordnance that has been primed, fused, armed or otherwise prepared for use and used in an armed conflict. It may have been fired, dropped, launched or projected and should have exploded but [it] failed to do so."[73]

"Abandoned explosive ordnance means explosive ordinance that has not been used during an armed conflict, that has been left behind or dumped by a party to an armed conflict, and which is no longer under control of the party that left behind or dumped it. Abandoned explosive ordinance may or may not have been primed, fused, armed or otherwise prepared for use."[74]

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[70] Ibid.
[71] Convention on the Prohibition of the Use, Stockpiling, Production, and Transfer of Anti-Personnel Mines and on Their Destruction, September 1997, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities* by ICRC, Article 2(2). Infra my discussion '*Landmines such as anti-tank or anti-vehicle mines, and anti-personal mines.*'
[72] Protocol on Explosive Remnants of War (Protocol V), 2003, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 2(1).
[73]Ibid.
[74]Ibid.

From among the above definitions of explosive remnants of war the phrase "explosive ordinances" refers to conventional weapons comprising explosives except for mines, Booby traps and other devices pursuant to the CCW (Protocol II).[75]

2.3. Types of Explosive Weapons, Landmines, and ERWs

2.3.1. Types of Explosive Weapons

As there is no authoritative definition of explosive weapons, the 2012 UN-Secretary General report put the illustrative lists of weapons which constitute explosive weapons.[76] Therefore, pursuant to this report artillery shells, missiles and rocket war heads mortars, aircraft bombs, grenades and improvised explosive devices are the types of explosive weapons.[77]

As writers named Zukas and Walters explanation there are two categories of explosive weapons:[78]

I. Explosive weapons that are launched from the air craft or air force, the field, and the naval forces. Moreover, hand can toss explosive weapons i.e. grenades or left buried underground i.e. landmines.
II. High explosive devices- like explosive mine, bomb, grenade, shell, round or warhead or explosive munition.

II.3.2. Types of Landmines

Land mine is structurally composed of an explosive material with metal, plastic or wood case and supported by fuse, which helps to detonate the

[75] International Committee of Red Cross, *Hand book on international rules governing military operations*, ICRC Documentation Section, Geneva, p.196
[76] Maya, Brehm, *Protecting Civilians from The Effects of Explosive Weapons: An Analysis of International Legal and Policy Standards*, United nations institute of disarmament research (UNIDIR), Geneva, 2012, p.11 [Here in after, Maya, *Protecting civilians from the effects of explosive weapons*]
[77] Ibid.
[78] Ibid.

core explosive charge. In which the employment of landmines is by situating them below or above the ground.[79]

The common categories of landmines are two:[80]

1. Anti-Tank or Anti-Vehicle Mines- they are mostly denoted as types of mines other than anti-personal mines.[81] However, we use the definition of Anti-handling device to define the term Anti-tank or anti-vehicle[82], as per article 2(3) of the 1997 Ottawa Convention:
   "[a]nti-handling" device means a device means a device intended to protect a mine and which is part of, linked to, attached to, or placed under the mine and which activates when an attempt is made to tamper with or otherwise intentionally disturb the mine.[83]
2. Anti-personnel mines- the above convention has also defined anti-personal mines under article 2(1) as:

> "Anti-personnel mine" means a mine designed to be exploded by the presence, proximity or contact of a person and that will incapacitate or injure or kill one or more persons. Mines designed to be detonated by the presence, proximity or contact of a vehicle as opposed to a person, [sic] that are equipped with anti-handling devices, are not considered anti-personnel mines as a result of being so equipped.

Pursuant to the expertise classification of mines there are four types of mines:[84]

I. Blast
II. Fragmentation
III. Bounding and

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[79] Geneva International Center for Humanitarian Demining (GICHD), *A Guide to Mine Action*, GICHD, 5th Edition, Geneva, March 2014, p.16
[80] Ibid.
[81] Supra note 69, Pp. 7-8
[82] "Anti-tank or Anti-vehicle mines: Perfectly legal and plenty lethal | Landmines in Africa" at <https://landminesinafrica.wordpress.com/2011/10/11/anti-tank-or-anti-vehicle-mines-perfectly-legal-and-plenty-lethal/> [Last accessed July 26, 2016]
[83] Supra note 71.
[84] Supra note 69.

IV. Directional fragmentation

2.3.3 Types of Explosive Remnants of War

As it has been discussed under the definition of explosive remnants of war the major categories or types of ERWs are:[85]

i. Unexploded ordinance
ii. Abandoned explosive ordinance

In general, ERWs comprise artillery shells; grenades mortar shells rockets missiles and other forms of explosive ordinance.[86]

[85] Supra note 72.
[86] Supra note, 34.

Chapter 3- The Use of Explosive Weapons, Landmines and Explosive Remnants of War Under International Humanitarian Laws

3.1. Introduction

There is a basic rule in undertaking armed conflict that parties to conflict in every times of hostilities they have the obligation to distinguish civilians and civilian objects from military object with the purpose of granting protection to civilian and civilian objects.[87] In other words, they shall not target civilian and civilian objects during their operation of attack rather they shall target only on military objectives.[88] The use of explosive weapons, landmines and explosive remnants of war however violate the above fundamental rule because of their indiscriminate nature in causing damage on the civilian population and civilian properties. The use of explosive weapons has been and is being cause for the death and injury of a number of civilians and destruction of civilian properties.[89] Furthermore, data on the jvictims of landmines indicates that every year there are tens of thousands of new victims of landmines,.[90] On the other hand, pursuant to the report of the ICRC Nyon meeting ERWs and anti-personal mines are the reason for the death and injury of many numbers of civilians.[91]

The above formerly mentioned rule is not the only rule regulating the use of explosive weapons, landmines, and explosive remnants of war, there are

[87] Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to The Protection of Victims of International Armed Conflicts (Protocol I), 1977, *Protocols Additional to the Geneva Conventions of 12 August 1949*, International Committee of Red Cross, Geneva, 1202, Article 48.
[88] Supra note 35, p.42
[89] Supra note 1, P.812
[90] Supra note 79, p.22
[91] Supra note 35, p.300

various declarations, conventions or treaties, international customary laws, principles of IHL and judicial decisions and case laws governing the matter at spot light. Therefore, this chapter will thoroughly discuss these different IHL norms, principles, and judicial decisions.

3.2. Assessing the Permissibility of the Use of Explosive Weapons, Landmines, and Explosive Remnants of War under the International Humanitarian Laws

3.2.1. Existing International Humanitarian Law Conventions

For the purpose of this study, treaties imply that international agreements concluded between states as per the requirements of the Vienna convention on law of treaties[92] and concerning the use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas. As states are the enabling instruments or founder and parties to the treaties they benefit from the treaty itself by getting protection at the same time they bound by their agreements.[93] Therefore, as it has been stated above in this section different conventions and declarations of international humanitarian law concerning the matter will be discussed exhaustively.

I. The Hague Convention (October 1907)

This convention is commonly known as declaratory of customary law.[94] The convention under article 1 puts a duty on the contracting parties to

[92] Vienna Convention on the Law Of Treaties, 1969, Entered force on 27 January 1980 United Nations, *Treaty Series, vol. 1155*, Article 2(1) (a).
[93] Supra note 35, p.28
[94] Id., p.13

observe the *Laws and Customs of War* on land during the issuance of rules to their armed land forces.[95] Such *Laws and Customs of War* primarily originated by the customary practices of traditional armies.[96] Even though these earlier *Laws /Rules/ and Customs of war* were not similar, later they were codified in to different IHL conventions. Therefore, this Hague convention as one of IHL instrument declares these *Laws and Customs of War* which were customary laws by nature.[97]

II. Geneva Conventions of August 1949

Articles 1, 2 and 3 found in each of the four Geneva Conventions are common articles applicable to all the four Geneva Conventions.[98] In which the article 1 state the obligation of the contracting parties to respect and protect the convention, secondly, article 2 states about the applicability or scope of the convention and finally the third convention states about non-international armed conflict.[99] Actually, article 3 is not only a common article it is also a basic rule or provision for the additional protocol II even though it is not as detailed as the latter.

The fourth Geneva Convention relative to the protection of civilian persons in time of war under article 4 defines who protected persons by the Geneva Convention are.[100] Then article 27 of the convention tries to discuss about the treatment accorded to protected persons this is based

[95] Convention Respecting the Laws and Customs of War on Land, October 1907, collection *of Hague Conventions and some other international instruments*, revised and updated edition, International Committee of Red Cross, Geneva 1989, Article 1.
[96] Supra note 19, p. xxxi
[97] Ibid.
[98] Geneva Conventions Relative to the Protection of Civilian Persons in Time of War, 1949, *the Geneva conventions of 12 august 1949*, International Committee of the Red Cross, Geneva 1202, Article 1,2 and 3.
[99] Ibid.
[100] Ibid., Article 4.

on the principle of humanity that these persons on the principles of humanity that these persons need to be humanly treated.[101]

III. Convention on the Prohibition of the Development Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction (April 1972)

Under this convention in any circumstances it is prohibited for the state parties to develop, produce, stockpile or otherwise acquire or retain microbial or other biological agents or toxins whatever in their origin or method of production of types and quantities that have no justification for prophylactic, protective or other peaceful purposes and weapons equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.[102] Moreover, pursuant to article 2 of the convention state parties are obliged to destroy weapons of such kind.[103]

IV. Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (January 1993)

This convention prohibits the state parties:[104]

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[101] Id., Article 27.
[102] Convention on The Prohibition of the Development Production and Stockpiling Of Bacteriological (Biological) and Toxin Weapons and on their Destruction, 1972, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 1.
[103] Ibid.
[104] Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 1993, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 1(a-d).

- Firstly, the development, production, otherwise acquiring, stockpiling, or retaining chemical weapons, or transferring, directly or indirectly, chemical weapons to anyone;
- Secondly, using of chemical weapons;
- Thirdly, to engage in any military preparations to use chemical weapons; and
- Finally, assisting, encouraging, or inducing, in any way or in any one to engage in any activity prohibited to state party under this convention.

Pursuant to sub articles (2) (3) and (4), in line with the provisions of this convention state parties are obliged to destroy chemical weapons which they own or found on the territory of other states including the production facilities of the weapon.[105] However, if the above prohibited acts are undertaken as per the requirements of the convention such act will cease from becoming violation.[106]

V. Convention on the Prohibition of the Use, Stockpiling Production, and Transfer of Anti-Personnel Mines and on Their Destruction (September 1997)

By this convention using, developing, producing, acquiring, stockpiling, retaining or transferring to any one, directly or indirectly antipersonnel mines by state parties is prohibited.[107] Not only the above the action by state parties to assist, encourage or induce, in any way party under this convention is banned.[108] Pursuant to article 4 state parties are also obliged to destroy every stockpiled anti-personnel mine which the state party itself owns as soon as possible.[109] Besides, the state parties have

[105] Id., Article 1(2), (3) and (4)
[106] Id., Article 6(1)
[107] Convention on the Prohibition of the Use, Stockpiling Production, and Transfer of Anti-Personnel Mines and on their Destruction, 1997, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 1(1) (a)
[108] Id., Article 1(1) (c).
[109] Id., Article 4.

the obligation to clear and destruct anti-personnel mines from the mined areas as per the requirements of article 5 of the convention.[110]

VI. Protocols Additional to The Geneva Conventions (June 1977)

A. Additional Protocol (I)

The Additional Protocol under the fourth part comprises the basic rules of conduct of hostilities and more importantly protection accorded to civilian population and civilian properties from the impacts of hostilities. From among these fundamental rules one can find article 48 which states that parties to the conflict are duty bound to refrain from targeting civilian and civilian objects but military objects during military operation.[111] The other rule is prohibition of indiscriminate attacks.[112] Pursuant to article 51(4) of this protocol indiscriminate attacks are attacks whose means and methods of warfare are not directed against a specific military objective.[113] In addition to this warfare without applying the principle of distinction harms civilian and damage civilian objects implies an indiscriminate attack.[114]

The categories of indiscriminate attacks pursuant to article 51(5) are of this protocol:[115]

i. *an attack by bombardment by any methods or means*[116] which treats as a single military objective several clearly separated and distinct

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[110] Id., Article 1(2).
[111] Supra note 87, Article 48.
[112] Supra note 35, p.43
[113] '*Military objectives, where objects are concerned, are those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers definite military advantage.*', Supra note 87, article 51(4)
[114] Supra note 87, Article 51(4).
[115] Id., Article 51 (5) (a) and (b)
[116] '*bombardment by any method or means refers that every kind of attacks by projectiles or missiles with the exception of use of small fire arms*', Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949, Yves Sandoz, Christophe Swinarski, Bruno Zimmermann (eds.), *International committee of the Red Cross*, Martinus Nijhoff Publishers, Geneva, 1987, p.624, para.1968.

military objectives located in a city, town, village or other area containing similar concentration of civilians and civilian objects, and;

ii. *an attack which may be expected to cause incidental loss of civilian life,* injury to civilians, damage to civilian objects or combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.

Moreover, pursuant to article 52 of this protocol parties to the conflict cannot in any way target civilian objects that are not military objectives which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.[117] From among the attack of civilian objects it is strictly forbidden to target or cause destruction on the objects which are indispensable to the survival of civilians. These objects could be like food stuffs, agricultural areas for the production of food stuffs crops, livestock drinking water installations and supplies and irrigation works of whatever intention that conflicting parties have.[118] In addition to the above hostile parties have to refrain or stop from attacking works or installations such as dams, dykes and nuclear electrical generating stations if the attack has resulted no military advantage instead many civilian casualties got injured or died.[119] However, if the above mentioned works or installations are applied for other purposes other than their normal use and if they are used directly to assist military operations the attack of those works or installations will be permissible or valid as long as it is the only way to end the assistance.[120] Sub article 5 of the same article states that installations which are built for the purpose of defending the protected works cannot

[117] Supra note 87, Article 52(1) and (2).
[118] Id., Article 54(2)
[119] Id., Article 56(1)
[120] Supra note 87, 56(2) (a-c)

be object of attack and they are themselves permissible as long as they are not used in hostilities.[121]

The other rule in the protocol as per article 57 is that the parties obligation to take precautionary measures during attack.[122] Similar to the requirement under article 48 of the protocol parties are under obligation to make distinction between military objects and civilians including their objects.[123] The party who chose to attack should affirm three things; Firstly, that the attack has neither caused death, injury or destruction on civilians and their properties rather applied to military objectives as per article 52 (2) of the protocol.[124] Secondly, it took all the possible precautions to reduce the risk of death, injury and destruction of civilian objects.[125] Thirdly, if the attack is believed to cause incidental risk of death, injury and damage to civilians and their objects the attacking party has to refrain from attack.[126]

Other than the above affirmation, the other precaution need to be taken by the hostile parties is that if an attack is believed to cause incidental loss and injury to civilian, also damage to their properties the attack shall be cancelled or suspended.[127] Moreover, before undertaking the attack unless and otherwise it is impossible to do so effective warning must be given to the civilian population.[128]

Finally, and most importantly, article 58 (b) of the protocol states that parties under conflict must evade or stop locating military objectives in or close to densely populated areas.[129] Such obligation should be

[121] Id., Article 56(5)
[122] Id., Article 57(2) (a-c)
[123] Id., Article 48
[124] Id., Article 52(2)
[125] Id., Article 57(2) (a) (ii)
[126] Id., Article 57(2) (a) (iii)
[127] Id., Article 57(2) (b)
[128] Article 57 (3): *"Always the choice must be an attack which causes the least risk to civilian and civilian objects when there is a situation of several military advantages",* Id., Article 57 (2) (c). Article 57 (3)
[129] Supra note 87, Article 58(b)

undertaken both during peacetime (i.e. avoid storage of military materials or ammunitions in places where there is high concentration of civilians or cities) and during armed conflicts (i.e. avoid placing troops, equipment, or transports in densely populated areas).[130] For the purpose of this study, densely populated areas are similar with the term 'concentration of civilians' defined as "a city, town, village or other area containing a similar concentration of civilians or civilian objects." [131] Furthermore, protocol III of the convention on conventional weapons defined densely populate areas or concentration of civilians as: "Concentration of civilians means any concentration of civilians be it permanent or temporary, such as in inhabited towns or villages or as in camps or columns of refugees or evacuees, or group of nomads." [132] In general, it is prohibited to attack areas where there is high concentration of civilians or densely populated areas as defined above.

VII. Additional Protocol (II)

Pursuant to article 13 of the Additional Protocol II, civilians are granted protection from the negative impacts of military operation.[133] If the attack against works or installations believed to cause loss or damage of civilians and civilian objects, the attack is totally prohibited.[134]

VIII. Convention on Certain Conventional Weapons (CCW) 1980

[130] Supra note 116, p.694, para.2251
[131] "Explosive Weapons in Populated Areas" at <https://www.google.co.uk/url?sa=002_factsheetexplosiveweapons_2.pdfandusg=AFQjCNHLgkwPSVpUFP_Q9PFB2NAmJ6lo1wandbvm=bv.142059868,d.d24> [Last accessed December 20, 2016]
[132] Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III), 1980, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 1(2).
[133] 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, *Protocols Additional to the Geneva Conventions of 12 August 1949*, International Committee of the Red Cross, Geneva 1202, Article 13.
[134] State practice establishes the rule, *"Civilian objects are protected against attack, unless and for such time as they are military objectives"* as a norm of customary international law applicable to both international and non-international armed conflicts. Supra note 19, p. 34

a) Protocol on Non-Detectable Fragments (I) October 1980

This protocol bans weapons which injure or attack the human body by fragments and which could not possibly be discovered by x-ray.[135] This protocol is with the purpose of preventing the impact of weapons like grenades that are made of plastic or similar material that doesn't show up on x-rays and that would therefore be extremely difficult to locate and remove surgically.[136] Furthermore, this protocol bases up on the principle of unnecessary suffering or superfluous injury.[137]

b) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II) October 1980

Pursuant to article 3 of this protocol in any way or manner employment of weapons like mines, booby traps, and other devices against civilians and their objects is strictly forbidden.[138] Moreover, it is forbidden to employ indiscriminate weapons and methods of warfare.[139] In which indiscriminate use implies whose method or means having no military objective, no specific military objective and causes loss of civilian and civilian objects even compared to the military advantage the loss is more than the advantage.[140] There has to be precautionary measures in the use of the above weapons not to cause damage or loss to civilians.[141]

Another fundamental rule in this protocol is that prohibition of employment of mines, booby-traps and other devices in densely

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[135] Protocol on Non-Detectable Fragments (Protocol I), 1980, *Collection of Hague Conventions and Some Other International Instruments*, Revised and updated edition, International Committee of the Red Cross, Geneva 1989.
[136] "The law of armed conflict" at <https://www.icrc.org/eng/assets/files/other/law5_final.pdf>, [last accessed December 20, 2016]
[137] Ibid.
[138] Protocol on Prohibitions or Restrictions on the Use of Mines Booby-Traps and Other Devices (Protocol II), 1980, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 3(1) and (2).
[139] Id., Article 3(3)
[140] Id., Article 3(3) (a-c)
[141] Id., Article 3(4)

populated civilian areas such as cities, towns, villages, or other places where there is dense population of civilians.[142] However this principle has two exceptions where the prohibition ceases to exist:

- "They are placed on or in the close vicinity of a military objective belonging to or under the control of an adverse party; or"[143]
- "Measures are taken to protect civilians from their effects for example, the posting or warning signs, the posting of sentries, the issue of warnings or the provision of fences"[144]

Remotely delivered mines if only if they have or they are themselves military objective that they can be employed, plus to this if it is possible to confirm their location pursuant to article 7(1) of this second protocol and if it can be shown that mine has been cleared out so that no risk of harm will occur. [145]

According to article 6 of this protocol booby-traps are banned from use, where they are containing explosive material they are kind of what are listed under sub-article 1(b) of this protocol and they are to cause unnecessary suffering.[146]

c) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended On 3 May 1996 (Protocol II as Amended)

This amended protocol obliges the parties to conflict to clear remove, destroy or maintain mines, booby traps and other devices.[147] Pursuant to article 4 of this amended protocol on anti-personnel mines which are not-detectable are banned.[148] The protocol also prohibits the use of anti-

[142] Id., Article 4(2)
[143] Id., Article 4(2) (a)
[144] Id., Article 4(2) (b)
[145] Id., Article 7(1)
[146] Id., Article 6(1) (a)
[147] Protocol on Prohibitions or Restrictions on The Use Of Mines, Booby-Traps And Other Devices (Protocol II as amended), 1996, *Rules Of International Humanitarian Law And Other Rules Relating To the Conduct Of Hostilities*, Revised and updated edition, International Committee Of The Red Cross, Geneva 1202, Article 3(2).
[148] Id., Article 4

personnel mines with the exceptions; firstly if these weapons are located in an area fenced or where there has been made proper distinction of civilians and secondly where there has been fulfillment of clearance obligation before leaving the area.[149]

d) Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) October 1980

Employment of incendiary weapons targeting civilians and civilian objects is strictly forbidden unless the military objective to attack using incendiary weapons has been proved that all the possible precautionary measures are undertaken to minimize the loss of civilians including their objects and it is in places other than densely populated civilian areas the use of incendiary weapons is not allowed.[150]

e) Protocol on Explosive Remnants of War (Protocol V) November 2003

Under this protocol state parties are primarily obliged to undertake all feasible measures to clear eliminate and abolish explosive remnants of war immediately depending on the possibilities.[151] This activity of clearance of ERWs shall be undertaken as per the rules under articles 3(3) (a-d), article 4.[152]

The other fundamental obligation that the contracting parties have is that to take all the possible precautions to protect civilians and civilian objects from the impacts of ERWs. The details of the precautionary measures are stated under part 2 of the technical annex at the end of this protocol.[153]

[149] Id., Article 5(2) (a) and (b)
[150] Supra note 132, Article 2(1-4)
[151] Supra note 72, Article 3(1)
[152] Id., Article 3(3) (a-d) and Article 4
[153] Id., Article 5(1)

f) Convention Prohibiting Certain Conventional Weapons (CCW) Amended Article 1, 2001

Sub article 2 of this convention states that; "This convention and its annexed protocols shall also apply, in addition to situations referred to in paragraph 1 of this article, to situations referred to in article 3 common to the Geneva conventions of 12 August 1949 […]."[154] Therefore, we can infer that all the prohibition and restriction on the explosive weapons, landmines and explosive remnants of war not only applies on international armed conflicts but also non-international armed conflict.

IX. Convention on Cluster Munitions, May 2008

As per article 1 of this Convention contracting parties are under responsibility to refrain from using, developing, producing, and transferring, acquiring, stockpiling, and retaining cluster munitions. Plus, to this, state parties shall not support, inspire, or persuade any one to engage in an occupation which violates this convention.[155] The above prohibition also applies to air dropped explosive bombs.[156] The other obligation of contracting parties is that they should confirm that the remnants of cluster munitions are not left over rather cleared out and demolished fulfilling the requirements set out and demolished fulfilling the requirements set out under article 4(1) (a-c), article 4(2) (a-e) and article 3.[157]

3.2.2 Customary International Humanitarian Law

[154] Convention Prohibiting Certain Conventional Weapons (CCW), Amended Article 1, 2001, *Rules of International Humanitarian Law and Other Rules Relating to the Conduct of Hostilities*, Revised and updated edition, International Committee of the Red Cross, Geneva 1202, Article 1(2)
[155] Convention on Cluster Munitions, 2008, *International Committee of the Red Cross*, Geneva 1202, Article 1 (1) (a-c)
[156] Id., Article 1(2)
[157] Id., Article 4(1) and (2)

For the purpose of this study customary international law or customary IHL is defined as a law established by a persistent and consistent practice of subjects or states recognizing the practice as a law.[158] In other words, the creation of an international custom requires two cumulative and non-detachable categories; these are State Practice and Opinio Juris Sive Necessitatis.[159] These categories infer that for a customary international law to exist it is not enough that the states declare their recognition of some rules, rather the other half that as it is required in article 38 of the ICJ Statute acceptance of the rule has to be confirmed by a General and uniform practice by states themselves.[160] Thus the conducts of states need to be consistent with the customary rules of international law. In particular, pursuant to the study conducted by ICRC on customary rules of IHL, states whether they are parties to any of IHL Conventions or not when undertaking either international or non-international armed conflicts need to comply with the customary rules of international Humanitarian law.[161] Besides, majority of the rules and principles of IHL are born from custom and existing treaties are codifications of rules and customs of war.[162] These customary rules of IHL are discussed as follows:

- The rules that oblige parties to the conflict to make distinction between civilians including their objects and combatants including military objectives are norms of international law applicable to both international and non-international armed conflicts.[163] Thus targeting and attacking civilians and civilian objects are strictly forbidden. If parties to conflict

[158] Supra note 40, p.345
[159] International Court of Justice, Case Concerning the Continental Shelf (*Libyan Arab Jamahiriya/Malta*), Merits, 3 June 1985, para 27, at <http://www.icj-cij.org/docket/files/68/6415.pdf> [Last accessed September 30, 2016]
[160] International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States of America*), Merits, 27 June 1986, Para. 184, at <http://www.icj-cij.org/docket/files/70/6505.pdf> [Last accessed September 30, 2016]
[161] Supra note 19, p. xxxv
[162] Id., p. xxxi
[163] Id., Pp.3-28

violate these rules as per article 8(2) (b) (i) of the statute of international criminal court amounts to a war crime.[164]

- The definition of military objective as a rule under article 52(2) of the API has customary international law status applicable to both international and non-international armed conflicts.[165]
- Rules on indiscriminate attack including the categories of indiscriminate attack as stated under article 51(4) are norms of customary international law applicable to both international and non-international armed conflicts.[166]
- The rule prohibiting attacks by bombardment in densely populated civilian areas like cities, towns, village, or other densely populated civilian area is a norm of customary international law applicable to both international and non-international armed conflicts.[167]
- Regarding proportionality in attack, the rule stating that once an attack is employed it is prohibited to cause loss on civilian and civilian objects excessive to the military advantage anticipated is a customary norm of international law applicable to both international and non-international armed conflicts.[168]
- The other norm of customary international law applicable both in international and non-international armed conflict is that, obligation of parties to conflict to take all feasible precautionary measures to avoid if not possible to minimize casualties of civilians and civilian objects during military operations.[169]
- Moreover, besides to taking all feasible precautionary measures and giving an effective warning, cancelling, or suspending an attack which is not military objective or the incidental loss to civilians and civilian object is excessive compared to military advantage anticipate is also a

[164] Id., Pp.3-28
[165] Id., Pp. 29-30
[166] Id., Pp.37-42
[167] Id., p.43
[168] Id., p.46
[169] Id., p.51

customary norm applicable to both international and non-international armed conflicts.[170]

- The rule stating that employment of means or methods of warfare which is believed to cause unnecessary suffering or superfluous injury is prohibited is norm of customary international law applicable to both international and non-international armed conflicts.[171]
- As to the rule on the prohibition of employment of indiscriminate weapons, it has customary international law status and applicable to both international and non-international armed conflicts.[172]
- Pursuant to the provision of the API under article 51(4) (b) and 51(4) (c) and customary international law there are two requirements to be an indiscriminate weapon; Firstly, if the weapon cannot be targeted a specific military objective and secondly if it cannot be limited as per the requirements of the additional protocol I.[173] Besides in the nuclear weapons case, Judge Higgins stated in her dissenting opinion that indiscriminate weapons are incapable of being targeted at military objective.[174] Then in the case the states have defined indiscriminate weapon in detail as "a weapon is indiscriminate if it has uncontrollable effects or if the damage would be extensive and maybe expected to cause incidental civilian losses which would be excessive in relation to the military advantage anticipated."[175] Additionally, in the International Criminal Tribunal for the Former Yugoslavia on the Matric Case 1996, stated that if a weapon cannot be targeted at a specific military objective, it is nothing but an indiscriminate weapon.[176]

[170] Id., p.60
[171] Supra note 19, p.237
[172] Id., p.244
[173] Id., 247
[174] Id., 247
[175] Id., p.248
[176] Id., Pp.247-248

- The rule stating the Prohibition of Use of Biological Weapons is a norm of customary international law which is applicable to both international and non-international armed conflicts.[177]
- The rule banning the use of chemical weapons is a norm of customary international law applicable to both international and non-international armed conflicts.[178]
- As mentioned in The Hague declaration 1899 the rule that prohibits employment of expanding bullet with in the human body is a norm of customary international law applicable to both international and non-international armed conflicts.[179] Plus to this prohibition of the anti-personnel use of bullets which detonate with in a human body is also a norm of customary international and non-international armed conflicts.[180]
- The rule that prohibits employment of booby-traps as stated in the second and amended protocol of convention on certain conventional weapons is a norm of customary international law applicable to both international and non-international armed conflicts.[181]
- The rule restricting landmines, in which parties to conflict has to take a high care to minimize their indiscriminate effects, also the rule requiring parties to the conflict to clear and remove landmines, from the area they have been employed after the end of the war are norms of customary international law applicable to both international and non-international armed conflicts.[182]
- The rule stating that the use of incendiary weapons must have a great caution so that no harm or loss will occur on civilians and civilian objects is a customary norm applicable both to international and non-international armed conflicts.[183]

[177] Id., p.256
[178] Id., p.259
[179] Supra note 19, p.268
[180] Id., p.272
[181] Id., p.278
[182] Id., Pp.280-286
[183] Id., p.280-286

- The final customary norm for the matter at spotlight is the rule prohibiting the anti-personal use of incendiary weapons unless it is not feasible to use a less harmful weapon to render a person *horse de combat*.[184] And this customary norm is applicable both in international and non-international armed conflicts.[185]

3.2.3 Principles of International Humanitarian Laws

In international humanitarian law, there are basic principles which serve as a rule to evaluate armed conflicts. These principles are found either incorporated in different conventions of IHL or/and as a norm of customary international law applicable to both international and non-international armed conflicts. In this section except for principle of unnecessary suffering as it has a little significance for the matter at spotlight the rest principles of distinction, military necessity along with humanity, proportionality and precaution will be thoroughly discussed.

3.2.3.1 Principle of Distinction

The principle of distinction is a very fundamental rule that the parties to the conflict have to apply during attack especially at the time of use of weapons.[186] This principle is also a customary norm applicable to both international and non-international armed conflicts.[187]

The rules about the principle of distinction states that: “The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians.”[188] And, “The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks

[184] Id., p.287
[185] Id., p.289
[186] Supra note 22, p.251
[187] Supra note 19, p.251
[188] Supra note 19, p.3

may only be directed against military objectives. Attacks must not be directed against civilian objects."[189]

Even though it is not as detailed as the above, the first law to recognize principle of distinction was St. Petersburg Declaration.[190] This principle can also be found in the Lieber Code of 1863, API articles 48, 51(2) and 52(2) and APII.[191] The other conventions of IHL incorporating principle of distinction are the amended protocol II to the convention on certain conventional weapons, the third protocol of CCW, and the Ottawa treaty.[192]

The principle when it states that the parties to conflict must in every time make distinction between civilians and combatants also civilian objects and military objectives, infers that combatants differentiate themselves by having distinctive sign which can be easily detectable from a distance or wearing uniform plus to this sparing civilian from military objects.[193]

This principle becomes significant and applicable after WWI in which when employment of indiscriminate weapons in densely populated civilian areas began and also when the loss and destruction of civilian and civilian objects has become a contemporary issue.[194] As explosive weapons, landmines, and explosive remnants of war are indiscriminate weapons, when the parties to conflict employ them in densely populated civilian areas it will be violation of principle of distinction, different conventions stated formerly and customary international law. Moreover, as per the statute of international criminal court deliberate breach of principle of distinction amounts to a war crime.[195]

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[189] Id., p.25
[190] St. Petersburg Declaration of 1868 *"The only legitimate object which states should endeavor to accomplish during war is to weaken the military forces of the enemy."* Id., p.3
[191] Id., Pp.3-4
[192] Id., Pp.3-5
[193] Supra note 22, p.251
[194] Id., Pp. 251-252
[195] Rome Statute of International Criminal Court, 1998, Article 8(2) (b) (i), at <https://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf> [Last accessed September 30, 2016]

Despite the above principle of distinction is susceptible to some issues that if it is said that parties to the conflict has the obligation to spare civilians and civilian objects from combatants and military objectives. What about civilians who are employees in the defense factory? Will it be legitimate to attack the factory and use weapons of above mentioned on the factory? If such attack is prohibited because there are civilians found in the factory it will be banning of military target at all.[196] Pursuant to article 51(5) (b) and article 52(2) of the API an attack will be legitimate and it will not be indiscriminate if the military advantage anticipated is greater than the loss of civilians. In this case attacking the defense factory may help the adverse party to win the war and the loss of civilians compared to the advantage gained from attacking the factory may be very small. Therefore, it will be legitimate to attack the factory and it will not violate the principle of distinction.[197]

About the applicability of principle of distinction to non-international armed conflicts, it may be hard because most of the time this kind of armed conflicts use Guerilla warfare and indiscriminate attacks.[198] But, this principle applies to all types of conflicts plus guerrilla warfare and insurgencies.

Concerning the principle of distinction in different use of weapons especially explosive weapons like missiles, bombs and shells parties to the conflict are not obliged by an international law to “use smart munitions” of the above kinds which will perfectly and only hit the target.[199] Rather the only obligation to the parties to conflict is to respect the principle of distinction via applying the other principles of IHL or taking all feasible precautionary measures and undertaking proper assessments that employment of such explosive weapons in certain area has a military

[196] Supra note 22, p.253
[197] Ibid.
[198] Id., p.254
[199] Supra note 35, p.226

objective and will not cause excessive loss or damage of civilians including their objects compared to the military advantage anticipated.[200]

3.2.3.2 Principle of Military Necessity

The principle of military necessity has not been defined either in the fourth Geneva conventions of August 1949 or the Protocols Additional to the Geneva conventions. But it is recognized under The Hague Convention of 1907, Article 23(g) states that:

Article 23 "In addition to the prohibitions provided by special conventions it is especially forbidden:"[201]
Sub article (g) "To destroy or seize the enemy's property, unless such destruction or seizure be imperatively demanded by the necessities of war."[202]

Regarding customary international law the status of military necessity as per the report of the international law commission, the principle of military necessity is found to be one of the preemptory norms of international law.[203] This status of peremptory norm or in other words known as 'Jus Cojens' norm infers that:

> "[…] a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."[204]

Thus, principle of military necessity cannot be derogated by any convention unless modified by subsequent norm of international law which has the same character. Plus, to this pursuant to article 8(b) (xiii) of the Statute of ICC an act within conduct of hostilities unless it complies with the principle of military necessity it will amount to a war crime.[205]

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[200] Id., p.227
[201] Supra note 22, p.258
[202] Ibid.
[203] Ibid.
[204] Supra note 94, Article 53
[205] Supra note 195, Article 8(b) (xiii)

The Senior Nazi officers have tried to define the principle of military necessity in the post-world war II hostage's case as, military necessity refers that a party to an armed conflict can possibly take any kind of measure like destroying and killing of the enemy forces which enables it to be champion of the war. However, its attack will be lawful if two circumstances are fulfilled; firstly, if it is not directed against civilians including their objects and secondly, if the attack is required by the essentials of the war which means if it is necessary to destroy the infrastructures used by the adverse party including the private homes and churches then it is possible to proceed.[206]

In the Lieber Code military necessity is achieving the goal of military operation by earning military advantage, but the unnecessary suffering and loss of civilians including their objects has been reduced.[207] The battle field commander is duty bound to identify whether the attack against adverse party constitutes a military necessity or not.[208]

Employment of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas is against this principle. However, exceptionally if such attack has military advantage by taking necessary precautions like sparing civilians, giving an advance warning and making sure that there will be no excessive loss of civilians including their objects then parties to conflict can undertake the attack.

The parties to conflict in respecting the principle of military necessity they have to observe principle of humanity as well. The principle of humanity is a very fundamental rule in which all other principles are derived from it.[209] The principle of humanity literally implies human beings' right to dignity

[206] Supra note 22, p.259
[207] Id., p.260
[208] Id., p.264
[209] Larissa Fast, 'Unpacking the principle of humanity: Tensions and implications', 2016, 97(897/898), Pp.111-113, at 112 [Here in after Larissa, *Unpacking the principle of humanity: Tensions and implications*]

and in extended form right to life.[210] What is typically prohibited by the principle of humanity is infliction of death, injury and destruction not actually necessary to achieve a legitimate military purpose.[211] Therefore, employment of explosive weapons, landmines and explosive remnants of war in densely populated areas has to be demanded by necessities of war to achieve legitimate military objective. In other words, both principle of military necessity and humanity must be cumulatively fulfilled.

3.3.2.3 Principle of Proportionality

The Hague regulation IV firstly recognized this principle of proportionality by stating that, “the right of belligerents to adopt means of injuring that the enemy is not unlimited.”[212]

The API under article 51(5) (b) and in exemplifying indiscriminate attacks has defined principle of proportionality as:
“an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects or a combination there of, which would be excessive in relation to the concrete and direct military advantage anticipated.”[213]
The above infers that in military operations there may be an attack causing loss and destruction of civilians including their objects thus this attack will be unlawful when the military advantage gained is less than the loss of civilians and their objects. To determine the lawfulness and unlawfulness of the attack the proportionality of the above two conflicting interests has to be measured. If the result of the measurement above is that the military advantage anticipated is lesser compared to the loss of civilians and their objects it will be violation of article 57(2) (b) of the additional protocol

[210] Ibid.
[211] Supra note 75, p.54
[212] Supra note 22, p.273
[213] Supra note 87, Article 51(5) (b)

which requires the parties to conflict to suspend or cancel a military operation if it violates principle of proportionality.[214]

The principle of proportionality is also found incorporated in the Amended Protocol II to the Convention on Certain Conventional Weapons.[215] In this case pursuant to article 3(8) (c) of this convention is prohibited to employ mines, booby-traps and other devices if the employment of the weapons causes excessive compared to the military benefit gained.[216] Moreover, pursuant to the statute of ICC article 8(2) (b) (IV), violation of principle of proportionality of deliberate directing of an attack on an area knowing the fact that the loss will be excessive compared to the military advantage gained amounts to a war crime.[217]

The principle of proportionality is a norm of customary international law applicable to both international and non-international armed conflicts.[218] Besides, International Criminal Tribunal for the Former Yugoslavia and the report of the Inter-American Commission on Human Rights evidence the customary nature of the principle of proportionality.[219]

Even though, the principle of proportionality is not included in the additional protocol II applicable to non-international armed conflicts as it is customary norm and as it is incorporated in different conventions like convention on conventional weapons and it protocols which are applicable to non-international armed conflicts the principle can govern also the internal armed conflicts.

In applying principle of proportionality as it has been mentioned above "[…] concrete and direct military advantage anticipated" must be considered. Pursuant to the commentary on the additional protocol the phrase "concrete and direct military advantage" has been interpreted as the advantage must be fairly or very close in other words the military gain or benefit must be

[214] Id., p.41
[215] Supra note 19, p.47
[216] Supra note 138, Article 3(8) (c)
[217]Supra note 195, Article 8(2) (b) (IV)
[218] Supra note 19, p.46
[219] Id., p.49

fairly or very close in other words in the immediate future. If the advantage will appear in the long term it should be disregarded or shouldn't be considered as military advantage.[220]

In general, the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas violates this principle of proportionality. In measuring the military advantage anticipated comparing to the loss of civilians including their objects the letter would be excessive to the former so that it will be breach of the above-mentioned principle.

3.3.2.4 Measure of Precaution

The measure of precaution was first found in The Hague Convention (IX) of 1907 pursuant to article 2(3) of the convention the commanders of the military operations are obliged to undertake all feasible measures as a precaution in order not to excessively harm or small harm to occur in town.[221]

On the other hand article 57 and 58 of the API well explained the measure of precaution[222] pursuant to article 57 of the API parties to the conflict shall take all the feasible possible measures to spare civilian and civilian objects from military objectives and not directing or canceling an attack if it is believed to cause incidental loss of civilians and their objects.[223] Article 58 of the API states that the precautions that the parties to conflict shall undertake to protect civilians and their objects from the effects of military operations are:

[220] Supra note 19, p.50
[221] Hague Convention IX Concerning Bombardment by Naval Forces in Time of War (Hague IX), Article 2(3), 1907, at <http://www.warzone.cc/media/1907-Hague-Convention-IX-concerning-Bombardment-by-Naval-Forces-in-Time-of-War.pdf> [Last accessed September 30, 2016].
[222] Supra note 19, p.51
[223]Supra note 87, Article 57(1)

- "[…] to remove civilian population and individual civilians and civilian objects under their control from the vicinity of military objects."[224]
- "Avoid locating military objectives with in or near densely populated areas"[225]
- "Take the other necessary precautions to protect civilian population, individual civilians and civilian objects under their control against the dangers resulting from military operations."[226]

Even though this measure of precaution is not included in the Second Protocol Additional To The Geneva Conventions, it is a norm customary international law and it is found in the Amended Protocol (II) to the Convention on Certain Conventional Weapons and the Second Protocol to the Hague Convention to the Protection of Cultural Property which are applicable to both international and non-international armed conflicts.[227] The measure of precaution is with the purpose of reaffirming the principle of distinction. In which precaution implies that taking possible measures to make proper distinction between civilians including their objects from military objectives.[228] Besides this principle become very essential when an attack is directed in densely populated areas.[229] One thing that the parties to the conflict have to additionally consider is that, it is only when it is not possible to separate military objectives from densely populated areas that each party to the conflict is duty bound to spare civilians and their objectives under its control from military objectives.[230]

As the rule under article 57(c) effective warning shall be given to civilians if the circumstances permit.[231] However the element of surprise is essential

[224] Id., Article 58(a)
[225] Id., Article 58(b)
[226] Supra note 87, Article 58(c)
[227] Supra note 19, p.52
[228] Supra note 116, p.679, para.2189
[229]Id., p.679 para.2190
[230] Supra note 19, p.76
[231] Id., p.64

for the military operation to succeed or for the security of the attacking forces or that of friendly forces.[232]

From the practical point of view the precautionary measures against effect of attacks could be warning, withdrawal of the civilian population to safe places, direction of traffic guarding of civilian property and the mobilization of civil defense organizations.[233]

In general, primarily parties to the conflict according to the measure of precaution have to avoid locating military operations within or near densely populated civilian areas. Thus, use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas will be violating this principle. Secondly, if the attack by using such weapons is believed to have a military advantage if it is in such area, the hostile parties have to take precautionary measures like sparing civilians including their objects from areas of attack and also giving an effective warning.

3.2.4 Judicial Decisions and Soft Laws

3.2.4.1 Judicial Decisions

Judicial decisions pursuant to article 38 (1) (d) of the ICJ Statute are one of the sources of international law.[234] Pursuant to article 59 of the ICJ Statute

[232] Ibid.
[233] Id., p.70
[234] Charter of the United Nations and Statute of the International Court of Justice, Article 38(1) (d), 1945, at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000003-

there is no precedent or binding effect in international law except the parties themselves and in respect of that case.[235] These judicial decisions are subsidiary or material sources of law not formal sources of law, which infers that, no binding nature other than the parties to the dispute.[236]

This section will focus only international tribunal/court decisions and not domestic judicial decisions. So now let us see these different case decisions concerning the use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas.

i. Legality of the Threat or Use of Nuclear Weapons

From among the advisory opinions of ICJ one of them that because of the threat caused by nuclear weapons the only solution is elimination of such weapons.[237]

The court has defined nuclear weapons as follows:

> […] nuclear weapons are explosive devices whose energy the fusion or fission of they results from the fusion or fission of the atom. By its very nature, the process in nuclear weapons as they exist today releases not only immense quantities of heat and energy but also powerful and prolonged radiation. According to the material before the court, the first two causes of damage are vastly more powerful than the damage caused by other weapons, while the phenomenon of radiation is said too peculiar to nuclear weapons. These characteristics render the nuclear weapons potentially catastrophic. The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilization and the entire ecosystem of the planet.[238]

The court mentioned the case concerning military and paramilitary activities against Nicaragua (Nicaragua vs. United States of America) which

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1153.pdf> [Last accessed September 30, 2016]
[235]Id., Article 59
[236] Gideon, Boas, *Public International Law Contemporary Principles and Perspectives*, Edward Elgar publishing limited, United Kingdom, 2012, p.110 [Here in after Gideon Boas, *Contemporary Principles and Perspectives of Public International Law*]
[237]Supra note 54, Para. 3
[238] Id., Para.35

state applicability of principle of proportionality and recognized the principle as a norm of customary international law.[239]

The court as a standing point recognizes that the threat to use of nuclear weapons is not included in either the customary law or treaty law.[240] Besides from among the treaties prohibiting the employment of weapons of mass destruction the court couldn't be able to find any specific prohibition of recourse to nuclear weapons.[241]

However, the court mentioned that there existed several specific treaties regarding nuclear weapons, even though they are not treaty of general prohibition like other specific weapon treaties.[242] These treaties deal with acquisition, manufacture, possession, deployment and testing of nuclear weapons and they do not imply the prohibition of nuclear weapons rather they are indicating for future prohibition of nuclear weapons.[243]

In general, the court didn't find any specific convention or customary rule of IHL which prohibits or authorizes the use of nuclear weapons.[244] In this judicial decision the court has affirmed that it is prohibited to use weapons of a kind which indiscriminately cause loss of civilians including their objects and it violates principle of distinction.[245] The court has finally mentioned that the principles and rules of IHL which so far have been discussed apply to the nuclear weapons.[246]

ii. The Prosecutor Vs. Omar Hassan Ahmed Al Bashir

In April 2003 president Omar Al Bashir and other high ranking Sudanese political and military leaders of GOS have begun to forward military

[239] Id., Para.41
[240] Id., Para.52
[241] Id., Para.57
[242] Id., Para.58
[243] Id., Para.62
[244] Id., Para.78
[245] Ibid.
[246] Id., Para.87

operation against the groups opposing the government.[247] And at the operation the above former ones apparently committed crimes against humanity, war crimes and crimes of genocide subjected to civilians and places where civilians are found concentrated.[248]

The pre-trial chamber of International Criminal Court reasonably believed that Omar Al-Bashir has organized, led, and played a great role in the operation of the above stated crime.[249] The prosecution of Omar Al-Bashir was forwarding of direct attacks against Fur, Masalit and Zanghawa civilian population with violating article 8 (2)(e)(i) of the Rome Statute of ICC.[250]

In general, the chamber with rational bases believed on a conclusion that President Omar Al Basher's and his fellow men acts constituted war crime as stated in articles 8 (2)(e)(i) and 8 (2)(e)(v) of the Rome Statute of ICC have been committed by.[251]

The court also stated that:

> The prosecution alleges that Omar Al Bashir is criminally responsible under article 25 (3)(a) of the statute for committing genocide, crimes against humanity and war crimes through the "apparatus" of the state of Sudan, including the Sudanese armed forces and their allied Janjaweed militia, the Sudanese police forces, the NISS and the HAC from March 2003 to 14 July 2008.[252]

It has been observed non-reference of indiscriminate attack or even to the prohibition of direct attack by the statutes of International criminal tribunal for the former Yugoslavia (ICTY) and the international criminal tribunal for

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[247] International Criminal Court Pre-trial Chamber, *The Prosecutor V. Omar Hassan Ahmed Al Bashir*, Jurisdiction, 4 March, 2009, Para.55, at <https://repositories.lib.utexas.edu/bitstream/handle/2152/7868/bashirEng1.pdf?sequence=2andisAllowed=y> [Last accessed September 30, 2016].
[248] Id., Para.55
[249] Id., Para.55
[250] Id., Para.72
[251] Id., Para.78
[252] Id., Para.78

Rwanda (ICTR).[253] But per the rulings of the ICTY direct attacks on civilian population's amounts to a war crime.[254]

Even though the Rome Statute of ICC doesn't list expressly the prohibition of indiscriminate attack, but it does list war crimes of directing attacks against civilians.[255] Pursuant to article 8 (2)(b)(xx) of the Rome Statute of ICC use of weapons, projectiles, and indiscriminate means of warfare amount to a war crime.[256]

As per the ICTY case laws indiscriminate weapons of the above are prohibited from being used in densely populated civilian areas. In other words, they can be employed in other legitimate areas of warfare.[257]

iii. Prosecutor Vs Milan Martic

As per the prosecution of Milan Martic, Martic has been accused of the breach of obligation under article 3 of the Statute of ICTY by directing an attack against civilians.[258] The judgment also raises the principle of distinction that civilian population cannot be targeted or object of attack.[259] Plus to this, raising the case of Kordic and Cerkez appeal judgment the court stated that attacks may only be directed only against military objectives as defined under article 52(2) of the API and not on civilians including their objects.[260]

The court has also given emphasis for the principle of military necessity and proportionality in which stating that it is legitimate that there could be civilian casualties if the military advantage gained is greater than the loss of

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[253] *International institute of humanitarian law, conduct of hostilities the practice, the law and the future*, international institute of humanitarian law documentation section, p.102
[254] Ibid.
[255] Ibid.
[256] Ibid.
[257] Id., p.103
[258] International Criminal Tribunal for the Former Yugoslavia Trial Chamber, *Prosecutor V. Milan Martic*, Judgment, 12 June 2007, Para.66, at <http://www.icty.org/x/cases/martic/tjug/en/070612.pdf> [Last accessed September 30, 2016].
[259] Id., Para.67
[260]Id., Para.68

civilian population.[261] Along with this the chamber in its judgment has defined what indiscriminate attacks and any direct attack on civilians including their objects and use of indiscriminate weapons without making proper distinction between civilians and their objects is indeed an indiscriminate attack.[262]

iv. Prosecutor vs. Tihomir Bla[k] or Blaskic

In this case, Tihomir Bla[ki] was charged for violation of rule of distinction and military necessity by directing attacks against civilians and civilian objects, which was also considered violation of the laws and customs of war under article 3 and 3(b) of the Statute of ICTY and articles 51(2) and 52(1) of the API.[263] The court then has attempted to discuss the principles of distinction and military necessity.[264]

Moreover, the court stated that article 3 of the Statute of ICTY which mentions about the laws and customs of war is applicable to both international and non-international armed conflicts.[265] Also discussed that directing an attack against civilians and civilian objects is violation of the provisions of API.[266] The provisions of the Statute of ICTY apply to the rules of international humanitarian law that have got customary international law status.[267] Besides the Hague convention (IV) of 1907 respecting the laws and customs of war on land is the basis for article 3 of the Statute of ICTY.[268] The provisions of article 3 of the Statute of ICTY in general apply or satisfactorily govern the violations of the principle of distinction, military necessity and the other principles as well.[269]

[261] Id., Para.69
[262] Supra note 258, Para.69
[263] International Criminal Tribunal for the Former Yugoslavia Trial Chamber, *The Prosecutor V. Tihomir Bla[Ki],* Judgment, 3 March 2000, Para.12, at <http://www.icty.org/x/cases/blaskic/tjug/en/bla-tj000303e.pdf> [Last accessed September 30, 2016]
[264] Id., Para.180
[265] Id., Para.161
[266]Id., Para.162
[267]Id., Para.164
[268]Id., Para.168
[269] Id., Para.170

v. Santo Domingo vs. Colombia

The case between 'Santo Domingo vs. Colombia' was entertained by IACHR and it was concerning the launching of cluster bomb by Colombian Air force helicopter on the community of 'Santo Domingo'.[270] This cluster bomb not only simply exploded rather it had fragmentation effect and having indiscriminate as well as devastating effect.[271] As per the evidences the court stated that the bomb has also caused death of six children's, ten children's injuries, and a multitude of post-traumatic stress occurred on these innocent civilians.[272]

The court has analyzed the detonation of the cluster bomb according to the three core principles of IHL (i.e. principle of distinction, proportionality and precaution).[273] Then the court showed that the state (Colombian air force) violated the principle of distinction.[274] Also the court concluded that they haven't complied with the principle of proportionality as the casualties of civilians was excessive from military advantage anticipated because of the nature of the explosive device used.[275] with regard to measure of precaution the court concluded as: "[…] This leads to the conclusion that the air craft that launched the cluster bomb did not take the necessary care to consult the ground troops in order to find out if the bomb was needed to achieve the eventual effects on a military objective."[276]

In general, the court stated that measure of precaution has been violated because of employment of cluster bomb in the areas of 'Santo Domingo' by the Colombian air force.[277]

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[270] Inter-American Court of Human Rights, (Santo Domingo Massacre V. Colombia), Facts, 30 November 2012, para 6, at <http://www.corteidh.or.cr/docs/casos/articulos/seriec_259_ing.pdf> [Last accessed September 28, 2016]
[271] Ibid.
[272] Id., para.70
[273] Id., para.211
[274] Id., para.213
[275] Id., para.215
[276] Id., para.226
[277] Id., para.229

3.2.4.2 Soft Laws

a. Resolutions on Nuclear Weapon Issue

UN General Assembly has come up with almost 25 resolutions on the issue of nuclear weapons.[278] Most of them are concerned with specific areas or states.[279] Under this sub-section these resolutions will not be discussed as they are going to be explored at the analysis section. Rather this sub-section will focus on the Security Council resolutions and different declarations on the means and methods of war far.

b. Resolution on Small-Calibre Weapons Systems 1979

This resolution was adopted concerning the continuous development of Small-Calibre weapons system i.e. arms and projectiles and to avoid the injurious impact of this type of weapon.[280] This resolution is taking in to consideration "the agreement embodied in The Hague declaration of 29 July 1899, to abstain, in international armed conflict, from the use of bullets which expand or flatten easily in the human body"[281]

Finally, this resolution concerns research to be conducted on Small-Calibre weapon systems by government of different states in order to have a well-organized assessment of the impacts of such weapons.[282]

c. Institute of International Law Resolution on Military Objectives, 1969

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[278] Yuki Zaitsu, 'United Nations General Assembly Resolutions on Select Nuclear Weapons Issues', *67th Session of the United Nations General Assembly (2001-2011),* New York, September 25,2012, p.5
[279] Ibid.
[280] Resolution on Small-Calibre Weapon Systems by the United Nations Conference on Prohibitions or Restrictions on the Use of Certain Conventional Weapons, 1979, at <https://books.google.com.et/books-Resolution+on+Small-Calibre+Weapon+Systems> [Last accessed October 2, 2016].

[281]Ibid.
[282]Id., p.216

This resolution confirms that in an international relations use of force is prohibited but if states enter into an armed conflict violating this rule then the focus of law will be firstly, protecting civilians and secondly, limiting the conduct of the parties to the conflict during hostilities.[283] The resolution also takes in to consideration that the use of nuclear, chemical and biological weapons may involve for civilian populations and for mankind as a whole.[284] The resolution listed the rules to be respected in armed conflicts by the de facto or de jure government or by any other authority responsible for the conduct of hostilities.[285] The resolution then has discussed the principle of distinction and also defined military objective.[286]

Moreover, the resolution stated that civilian objects especially which are indispensable for the survival of the civilian populations and those objects which by their nature or use serve primarily humanitarian or peaceful purposes like religious or cultural needs are never to be taken as military objectives.[287]

Finally, the resolution prohibits the use of indiscriminate weapons and attacks that are not distinguishing between military and non-military objects.[288]

d. St. Petersburg Declaration, 1868

In this declaration, there is a basic rule of IHL governing the conduct of hostilities, “The only legitimate object which states should endeavor to

[283] The Distinction Between Military Objectives and Non-Military Objectives in General and Particularly the Problems Associated with Weapons of Mass Destruction, 1969, at <http://www.justitiaetpace.org/idiE/resolutionsE/1969_edi_01_en.pdf> [Last accessed October 2, 2016].
[284] Ibid.
[285] Supra note 283, p.377
[286]Id., p.378
[287]Ibid.
[288]Ibid.

accomplish during war is to weaken the military forces of the enemy.[289] Besides as the title of the declaration indicates the contracting parties have the obligation not to use or to renounce the employment of explosive projectiles which weight below 400 grams during conduct of hostilities.[290]

e. Declarations Concerning the Prohibitions, for the Term of Five Years, the Launching of Projectiles and Explosive Balloons and Other Methods of Similar Nature (First Hague, 1899

This declaration is with the purpose of prohibiting the launching of projectiles and explosives from balloons or by other methods of similar nature.[291] This declaration shall be binding on the contracting parties in an armed conflict in which the parties in conflict both or all of them must be contracting parties.[292]

f. Hague Declaration (IV,2) Concerning Asphyxiating Gases, 1899

In this declaration, the contracting parties agreed to refrain from the use of projectiles the sole object which is the diffusion of asphyxiating or deleterious gases.[293] Like the former declaration above this declaration binds only the contracting parties in war with each other.[294]

g. Hague Declaration (IV,3) Concerning Expanding Bullets, 1899

In this declaration, the contracting parties agree to abstain from using bullets which expand or flatten easily within the human body, these bullets could be like, bullets with hard envelope which doesn't entirely cover the

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[289] Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grams' Weight, December 1868, at <https://en.wikipedia.org/wiki/Saint_Petersburg_Declaration_of_1868> [Last accessed October 2, 2016].
[290] Ibid.
[291] Declaration Concerning the Prohibition, for the Term of Five Years, the Launching of Projectiles and Explosives from Balloons, and Other Methods of Similar Nature (First Hague, IV,1), 1899, at <http://avalon.law.yale.edu/19th_century/hague994.asp> [Last accessed October 2, 2016].
[292] Supra note 291, p.87
[293] Hague Declaration (IV,2) Concerning Asphyxiating Gases, 1899, at <https://ihl-databases.icrc.org/ihl/INTRO/165?OpenDocument> [Last accessed October 2, 2016].
[294] Ibid.

core or is pierced with incisions.[295] Similar to the first and second declarations above discussed, the scope of application of this declaration will be only on the contracting parties in to an armed conflict with each other.[296]

h. Hague Declaration (XIV) on Explosives from Balloons, 1907

Under this Declaration, contracting parties have agreed to refrain from the use of projectiles and explosives from balloons or by other new methods of a similar nature for a period extending to the close of the third peace conference.[297] The binding effect of this declaration is only the contracting parties in war with each other.[298]

[295] Declaration Concerning the Prohibition of the Use of Expanding Bullets (First Hague, IV, 3), 1899, <http://www.weaponslaw.org/assets/downloads/1899_HD_concerning_expanding_bullets.pdf> at [Last accessed October 2, 2016].
[296] Ibid.
[297] Declaration Relative to Prohibiting the Discharge of Projectiles and Explosive from Balloons (Second Hague, XIV), at <https://ihl-databases.icrc.org/ihl/INTRO/245?OpenDocument> at [Last accessed October 2, 2016].
[298] Ibid.

Chapter 4- Protection of Civilian and Civilian Objects from the Impact of Explosive Weapons Landmines and Explosive Remnants of War

IV.1 Introduction

Civilian population is composed of all persons considered as civilians.[299] In order to get protection from the IHL norms as civilian population one has to be civilian in the eyes of the law and has to take no direct part in hostilities.[300]

Civilian population and civilian objects are immune or privileged to be protected from the impacts of hostilities.[301] It is prohibited to make civilians including their objects military target.[302] Parties to the conflict have to apply principle of distinction and other principles discussed formerly, when employing explosive weapons[303], landmines,[304] and to clear the unexploded weapons from the areas of hostilities as soon as the hostilities end.[305]

In contemporary armed conflicts the use of explosive weapons in densely populated areas has caused and is causing several injuries and deaths of civilians plus to this destruction of civilian objects.[306] Landmines, have been and are causing injury death and destruction of civilians including their objects both at the time of and post conflict when left unexploded.[307] As per the publication of NGO's and other organizations there are a number of

[299] Supra note 35, p.43
[300] Ibid.
[301] Supra note 40, p.710
[302] Id., p.720
[303] Supra note 35, p.225
[304] Id., p.159
[305] Id., p.227
[306] Supra note 1, p.812
[307] Supra note 69, p.13

civilian casualties as a result of employment of ERWs and failure to clearance as soon the war ends.[308]

ICRC by conducting expert meetings and conferences discussed the issues of explosive weapons, landmines, and explosive remnants of war then has come up with the enactment of different IHL norms which ban and restrict the use of such weapons with the purpose of protecting civilians and civilian objects.

In this chapter civilians and civilian objects will be defined and secondly, the casualties of explosive weapons, landmines, and explosive remnants of war as per different reports will be discussed.

IV.2 Definition of Civilian and Civilian Objects

The Protocol (I) Additional to the Geneva Conventions of 1949 under article 50 (1) and (2) has defined the term civilian and civilian population as follows: “A civilian is any person who doesn’t belong to one of the categories of persons referred to in article 4(A) (1), (2), (3) and (6) of the third convention and in Article 43 of this protocol. In case of doubt whether a person is a civilian, that person shall be a civilian.”[309]

Thus, combatants or members of armed forces as defined under article 4(A) (1), (2), (3) and (6) of the third Geneva convention and article 43 of the API are out of the scope of the definition of civilians. However, the above definition of the term civilians is not contained in the APII, that it used the term civilians and civilian populations without defining these terms.[310] Thus not to create ambiguity for the purpose of this study the above definition of civilians and civilian population is applicable to both international and non-international armed conflicts.

[308] Supra note 35, p.299
[309] Supra note 87, Article 52 (1) and (2)
[310] Supra note 19, p.19

The international criminal tribunal for the former Yugoslavia in the Blaskic case has defined civilians as; “civilians are persons who are not or no longer members of the armed forces.”[311]

Civilian object unlike the term civilian is not expressly defined rather we use the definition of military objectives under article 52(1) and (2) of the API.[312] Thus civilian objects are objects which are not military objectives.[313] Even though, the above definition is not included in the API it can be found under article 2(6) of the Amended protocol II to the convention on certain conventional weapons which is applicable to both international and non-international armed conflicts.[314]

IV.3 Casualties of Explosive Weapons, Landmines, and Explosive Remnants of War in Densely Populated Areas Focus on Recent Conflicts

Because of the use of explosive weapons there are a large number of deaths and injury every year.[315] For instance, since 2011 there existed 150,000 deaths and injuries by rockets, mortars, and car bombs.[316]

Pursuant to the report of the NGO Action on Armed Violence the number of civilians who were killed by the employment of explosive weapons in 2012 was 25,000.[317] The impact of explosive weapons is higher on vulnerable

[311] Supra note 263, para.180
[312] Supra note 19, p.37
[313] *“Military objectives are limited to those objects which by their nature, location and purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization in the circumstances ruling at the time, offers a definite military advantage”,* Supra note 87, Article 52(2)
[314] Supra note 19, p.30
[315] “Impact of explosive weapons in populated areas”, at <https://childrenandarmedconflict.un.org/publications/ImpactofExplosiveWeapons.pdf> [Last accessed September 30, 2016]
[316] “Explosive states monitoring explosive violence in 2014”, at <http://aoav.org.uk/wp-content/uploads/2015/06/AOAV-Explosive-states-monitoring-explosive-violence-in2014.pdf> [last accessed August 25, 2016]
[317] Ibid.

groups like women and children who were both physical and psychological victims of explosive weapons.[318]

Explosive weapons not only has short term impact on civilians, it has also a long term effects like destruction of infrastructure, including water supply, sanitation, housing schools and hospitals.[319] Explosive weapons may fail to detonate so that leaving remnants or ERWs in civilian areas and pose threat to civilians.[320] And if they explode in years they would of course cause injury, death and destruction of civilians including their objects.[321] As per the 2011 Report of Landmine and Cluster Munitions Monitor found about 40% of civilian casualties from landmines and unexploded ordinance were children.[322]

Moreover, per the report of more than 1,400 NGOs in the international campaign to Ban Landmines (ICBL):

> In 2002 and through June 2003, there was new land mine casualties reported in 65 countries; the [majorities] (41) of these countries were at peace, not in war. Only 15 percent of reported casualties in 2002 were identified as military personnel. In 2002, the greatest number of reported new casualties [was] found in: Chechnya (5,695 casualties recorded), Afghanistan (1,286), Cambodia (834), Colombia (530), India (523), Iraq (457), Angola (287), Chad (200), Nepal (177), Vietnam (166), Sri Lanka (142), Burundi (114), Burma/Myanmar (114), and Pakistan (111). Significant numbers (over 50) of new casualties were also recorded in Bosnia and Herzegovina, Democratic Republic of Congo, Eritrea, Ethiopia, Georgia, Laos, Palestine, Senegal, Somalia, and Sudan.[323]

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[318] Ibid.
[319] Ibid.
[320] Ibid.
[321] Ibid.
[322] Ibid.
[323] Geneva International Center for Humanitarian Demining, *A Guide to mine action,* GICHD Documentation Section, Geneva, 1987, p.13, as quoted by, ICBL, "Major Findings", *Landmine Monitor Report 2003, Toward a Mine-free world*, Human Rights Watch, Washington DC, August 2003, available at www.icbl.org/lm/2003/findings.html

Likewise, explosive weapons and landmines, have further impact like social, economic, and environmental problems. As per the report it has been stated that:

> Countries with a minimal infrastructure…are particularly vulnerable to landmine use. Dams and electrical installation have been mined, which can seriously reduce the ability of a nation to produce the power necessary for reconstruction. Transportation system [has] been mined, interrupting the movement of people and the flow of goods and services. Market system [has] been unable to move over mined roads and foot paths to bring their product to market.[324]

The highest number of casualties of cluster munitions of 2012-2014 was found in Syria and they were about 1,968.[325] From among the Syrian and other casualties 92% of them are civilians and half of them were children.[326] In general the total number of casualties of cluster munitions in the world was 55,000.[327]

As per the report of the UN in Syria while the conflict began there have been casualties of ERWs and landmines in different sub-districts of Syria. Plus, to this most of the regions Lebanon were highly affected by ERW.[328]

The ERW contaminated areas of states like Syria, Lebanon, Turkey, and Iraq were reported to be the borders and the affected ones are mostly refugees.[329] The land mine monitor report additionally stated that:

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[324] Geneva International Center for Humanitarian Demining, *A Guide to mine action,* GICHD Documentation Section, Geneva, 1987, Pp. 13-14, as quoted by, S. Roberts, and J. Williams, *After the Guns fall silent*, The Enduring Legacy of Landmines, Vietnam Veterans of America Foundation, Washington DC, 1995, p.6

[325] "Cluster Munitions Monitor 2015" at <www.the-Monitor.org/media/2135498/2015_ClustorMunitionsMonitor.pdf> [Last accessed August 25,2016]

[326] Ibid.

[327] Ibid.

[328] "Explosive Remnants of war (ERWs) and Landmines. Syria needs analysis project-August 2014", at <www.acaps.org/sites/acaps/files/products/files/11-Explosive-remnants-of-war-erw-and-Landmines-aug-2014.pdf> [Last accessed August 25, 2016]

[329] Ibid.

Iraq is one of the most land mine and ERW contaminated regions in the world with estimated 18 million mines laid during the Iran-Iraq war and an additional 1 million planted prior to the US-led invasions in 1991 and 2003 […]

From among the civilian casualties there is a story of a boy called *Chhom* who is a victim of unexploded ordinance:

> In 1993, 13-year-old Chhay Chhom picked up and shook an unusual item that he had found while grazing his family's cattle. The resulting explosion tore off his right fore-arm and punctured his body with metal fragments. The fragments and blast to his face left him completely blind. It is believed that he picked up one of the many pieces of unexploded ordinance still littering Cambodia. After being carried by his father to the hospital in Kompong Thom, Chhom's right hand right hand and forearm were surgically amputated and the fragments of the metal removed from his body. Chhom remained in the hospital for three months, but they could do nothing to save his eyesight. Because he was blinded, Chhom stopped going to school. Now in his 20's, he stays at home and cannot walk far from the house. His parents have rice paddies and cattle, but with his injuries he is unable to work or even help his parents much at home. "I used to have a lot of friends, especially when I was at school. But now they do not contact more or come to visit. I have a lot of difficulties, especially walking. I am in darkness every day never see any light."[330]

Civilians including their objects have been and are facing a lot of short and long term effects of explosive weapons, landmines, and explosive remnants of war. Because of space constraints the study couldn't discuss the casualties of explosive weapons, landmines, and explosive remnants of war exhaustively. However, from the discussion so far one can infer that use of such weapons in densely populated areas has a consequence of large number of casualties of civilians and civilian objects. Unless states work on

[330] "Explosive Remnants of War: The Legacy of Modern Armed Conflict",<http://www.pegc.us/archive/Organizations/ICRC_002_0828.pdf> [Last accessed September 30, 2016]

protecting civilians and their objects as well, there will be a continuous scarification of innocent civilians as the above kid Chhom.

Chapter 5- Analysis on the Adequacy of the Existing IHL Norms Governing the Use of Explosive Weapons, Landmines, and Explosive Remnants of War

5.1. Introduction

The focus of this study is the analysis on the adequacy of international humanitarian law conventions, customary laws, principles, and judicial decisions governing the use of explosive weapons, landmines, and explosive remnants of war particularly in densely populated areas. Therefore, in the first section the analysis on adequacy of the IHL conventions, secondly the adequacy of the core principles, thirdly adequacy of customary rules and finally the adequacy of the case laws will be discussed thoroughly.

5.2. Analysis on the Adequacy of the IHL Conventions

So far, in the third chapter different conventions of IHL concerning explosive weapons, landmines and explosive remnants of war have been discussed exhaustively. These IHL conventions are foundations of different rules to the conduct of hostilities and codification of rules and customs of war. And through time these conventions have advanced themselves and become more specific especially regarding the use of weapons.[331] With regard to the use of explosive weapons primarily we have the Protocol (I) Additional to the Geneva Conventions article 51 (5) prohibiting use of explosive weapons or indiscriminate weapons in densely populated civilian areas,[332] as employment of explosive weapons in densely populated areas is

[331]Supra note 35, Pp.2-3
[332] Supra note 87, Article 51(5)

indiscriminate means of warfare in its nature and as it will cause damage on civilians including their objects without distinction.[333] The other convention is the Protocol (II) of the Convention on Certain Conventional Weapons which prohibits and restricts the use of mines, booby traps and other devices.[334] The prohibition of these weapons is on their indiscriminate use and the employment of the weapons in densely populated civilian areas i.e. cities, towns and villages.[335] Another convention prohibiting or restricting the use of explosive weapons is Convention on Cluster Munitions, in which use of such weapons is prohibited not only the weapons but also the remnants of cluster munitions have to be removed from the area where they are employed.[336] Among the soft laws one can find the St. Petersburg Declaration of 1868 prohibiting the use of explosive projectiles which weight below 400 grams during conduct of hostilities.[337] Lastly, there is The Hague Declaration (XVI) 1907 which prohibits the use of projectiles and explosive from balloons or by other new methods of similar nature.[338]

As to the use of landmines there is the Second Protocol and its Amended Protocol to the Convention on Conventional Weapons which prohibits the employment of mines, booby-traps and other devices in an indiscriminate means and in densely populated civilian areas.[339] The amended protocol has prohibited the use of non-detectable anti-personnel mines and restricted the employment of other anti-personnel mines.[340] Moreover, one can find the Convention Prohibiting the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines.[341] And parties to the conflict have the obligation to clear out anti-personnel mines from the area they are employed.[342]

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[333] Ibid.
[334] Supra note 138, Article 3 (1) and (2)
[335] Id., Article 4(2)
[336] Supra note 155, Article 4(1) and (2)
[337] Supra note 281, p.171
[338] Supra note 297, p.135
[339] Supra note 138, Article 4(2)
[340] Supra note 147, Article 4
[341] Supra note 147, Article 1(1) (a-c)
[342] Id., Article 5

The Fifth Protocol to The Convention on Certain Conventional Weapons governs the employment of explosive remnants of war. Thus, parties to the conflict are obliged to carry out all the possible measures to clear or eliminate and abolish explosive remnants of war.[343] In a way parties to the conflict should take all the possible precautionary measures to protect civilians and civilian objects from the impact of ERWs.[344]

Even though, there existed several conventions governing the use of explosive weapons landmines and explosive remnants of war, the assessment of this study couldn't be able to find a binding convention prohibiting the use or threat to use of nuclear weapons. Pursuant to the nuclear weapons taste case, the court couldn't be able to find a general convention specifically authorizing the use of nuclear weapons and specifically prohibiting the use of nuclear weapons.[345] The court mentioned that the rules and principles of IHL govern the use of nuclear weapons.[346] However, lack of specific convention prohibiting the use of nuclear weapons like other weapons make the IHL norms to be non-adequate on the use of nuclear weapons as they are of a nature and categories of explosive weapons.

For the issue 'would it be possible to employ nuclear weapons in extreme cases of self-defense?' the '32nd International Conference of the Red Cross and Red Crescent' stated that, even though reaction due to self-defense is allowed, it shall be undertaken without violating the rules and principles of international humanitarian law.[347] Furthermore in the conference ICRC is with the position that, although IHL doesn't specifically prohibit nuclear weapons, its use is restricted by the rules of IHL and it is difficult and doubtful to envisage compatibility of the use of nuclear weapons with IHL

[343] Supra note 151, Article 3(1)
[344] Id., Article 5(1)
[345] Supra note 54, para. 78
[346] Supra note 5, para. 87
[347] International Committee of the Red Cross, 'International Humanitarian Law and The Challenges of Contemporary Armed Conflicts', *32nd International Conference of the Red Cross and Red Crescent,* Geneva, Switzerland, 8-10 December, 2015, p.59

principles.[348] The researcher also shares this view of ICRC, that even though the rules and principles of IHL restrict the use of nuclear weapons, the IHL norms are not adequate or compatible to nuclear weapons.

As per the United Nations General Assembly Resolution enacted in 2001 to 2011, there are about 25 resolutions and most of them are specific treaties concerning two or three states not general prohibition treaties.[349] However, there has been some attempt by the UN General Assembly by enacting a resolution on the general prohibition on use of nuclear weapons.[350] This resolution stayed as a draft and still without incorporating provisions it didn't become a complete binding convention.[351] Therefore, this fact shows that the international humanitarian law is not completely adequate in this matter to govern the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas.

As to the casualties of nuclear weapons, history takes us back to the atomic bombing of Hiroshima and Nagasaki on August 9, 1945 which resulted death of 340,000 people soon the employment of the weapon.[352] Not only the death of civilians, the incident caused complete destruction of civilian objects.[353] The problem of the atomic bomb was far from over in which the survivors of the attack still today suffer a lot of disease like cancer and others because of the atomic bomb explosion.[354]

As per the court interpretation of the characteristics of nuclear weapons on the nuclear weapons test case, nuclear weapons have an atomic nature and when they detonate their destructive power cannot be controlled in space

[348] Id., p.59
[349] Supra note 278, p.5
[350] Convention on the Prohibition of Nuclear Weapons, 2013, at <https://gafc-vote.un.org/UNODA/vote.nsf/e9e05f9ef74d8c7f05256705006e0a60/0ef0d05a7fb0b1ee85257c52005aaf0e/$FILE/L.21.pdf> [Last accessed September 30, 2016]
[351] Ibid.
[352] International Review of the Red Cross, 'The Human Cost of Nuclear Weapons', Article by international review of the red cross humanitarian debate law, policy and action, 2015, Volume 97 No.899, Pp. 494-592, p.500 [Here in after International Review of the Red Cross, *The Human Cost of Nuclear Weapons*]
[353] Ibid.
[354] Id., Pp. 500-501

or time in which the entire living and non-living would get damaged or demolished at once.[355] In our world today there exist about 16,000 nuclear weapons stored by the nuclear weapon states.[356] From among these nuclear weapons 1,800 of them are at a very alert stage which will detonate sooner by United States and Russia.[357] Thus the threat to use of these weapons is on the highest stage that someday it will explode and cause the greatest damage ever, even the current nuclear weapons are more powerful than those used in Hiroshima and Nagasaki.[358] The attack of Hiroshima and Nagasaki is a good example of employment of explosive weapons in densely populated civilian areas which violates the core principles and rules of IHL i.e. principle of distinction, proportionality, precaution, military necessity, humanity and unnecessary suffering.[359] However, as per the commentary of the API one cannot be able to conclude that nuclear weapons are prohibited by the rules of IHL as per the principles of distinction and unnecessary suffering.[360]

The researcher argues that even though the core principles of IHL prohibit and restrict the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas, these rules are not absolute there are exceptions like strict compliance with the principle of proportionality, principle of military necessity and military objective in principle of distinction. But in the case of nuclear weapons because of their destructive nature it is impossible to employ them only for military objectives in any way indiscriminate attack still exist and there will be a wide area destruction. Thus, by only mentioning the rules and principles of IHL stated under the API as applicable to nuclear weapons cannot conclude that the governing international humanitarian laws are adequate to address

[355] Supra note 54, para.35
[356]Supra note 352, p.502
[357] Id., p.503
[358] Ibid.
[359] Ibid.
[360]Supra note 116, p.594, para. 1857

the issue of nuclear weapons. Rather a specific binding convention prohibiting the use and threat to use of nuclear weapons is necessary.

The inadequacy of the IHL norms is not only the issue of nuclear weapons rather the non-existence of specific convention prohibiting or restricting drones is also another issue. What makes drones different from other weapon systems is that they have better surveillance capacity.[361] This kind of weapon may have better ability to identify and hit the target besides they may be better to minimize death and destruction of civilians and civilian objects.[362] At the same time it paves the way to a lot of opportunities for the adverse party in order to attack its opponents, so that civilians including their objects will be exposed to an incidental harm.[363] Thus, the attack by drones will be susceptible to abuse.[364]

Drones began to be employed in an armed conflict because, in non-international armed conflicts there existed asymmetric armed conflicts and guerrilla fighting as a means of warfare.[365] And this means were undertaken by using civilians and civilian objects as a shield.[366] In this case the regular armed forces were the losers and the irregular armed forces were the one's succeeding.[367] The only option for the regular armed forces to attack the adverse party was to attack the whole civilian population where the irregular armed forces used as a shield.[368] However, when attacking the

[361] "Report of the Special Rapporteur on extrajudicial, summary or arbitrary executions", at<http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf > [Last accessed October 4, 2016]
[362]Ibid.
[363] International Committee of the Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts', *31st International Conference of the Red Cross and Red Crescent*, Geneva, Switzerland, 28 November- 1 December, 2011, p.39
[364] Ibid.
[365] Michael W. Lewis and Emily Crawford, 'Drones and Distinction: How IHL Encouraged the Rise of Drones', online, *Georgetown Journal of International Law*, Vol.44, No. 2013, para. 1153, <https://www.law.georgetown.edu/academics/law-journals/gjil/recent/upload/zsx00313001127.PDF>.
[366] Id., p.1149
[367] Id., Pp. 1149-1150
[368] Id., p.1150

civilians including their objects states had to take in to consideration of legal requirements and they have to minimize casualties.[369]

Drones can also be categorized as a new technologies of warfare as remote controlled weapon systems.[370] Article 36 of the API will apply on this new weapon system.[371] This made employment of drones one contemporary challenge for international humanitarian law.[372] The operation system of drones faces challenges such as; lack of sufficient capacity of an operator in order to process a large volume of data,[373] having limited capacity to process contradictory data at a given time ('information over load')[374] and there will be an issue that if the operator whether he/she is capable to fully comply with the relevant IHL norms as a result of supervision of more than one such system at a time.[375]

As per the researcher's argument, even though drones are better than other weapons in minimizing casualties still they are employed in densely populated areas. In the above cases, thus if like missile is to be dropped from drones there will exist high amount of death and destruction of civilians including their objects with the purpose of attacking the irregular armed forces hiding with in the civilian areas. By employing drones in an armed conflict, we cannot argue that it is not violation of principle of distinction as long as it is being incorporated on civilian areas. In addition, under the guise of minimizing casualties' parties to the conflict are employing explosive weapons in densely populated areas.

Therefore, the IHL principle or the API cannot be sufficient to govern the use of drones or lacks adequacy to govern the contemporary challenges

[369] Id., p.1153
[370] Supra note 363, p.36
[371] Ibid, Article 36 of the API *'In the study, development, acquisition, or adoption of a new weapon, means or method of warfare, a High contracting party is under an obligation to determine whether its employment would, in some or all circumstances, be prohibited by this protocol or by any other rule of international law applicable to high contracting party.'*
[372] Supra note 363
[373] Ibid.
[374] Ibid.
[375] Ibid.

regarding drones. Then there is a need of specific convention restricting or prohibiting the use of drones in civilian areas like other explosive weapons, landmines and ERWs as the effect of all is causing deaths and destruction of civilians including their objects.

5.3. Analysis on the Adequacy of the IHL Principles

This study has clarified the core principles if IHL concerning the use of explosive weapons, landmines, and ERWs in densely populated areas. The general obligation that the parties to the conflict have according the principles of IHL is that they cannot use these weapons without making proper distinction between civilians including their objects and combatants.[376] The employment of the above weapons has to be complied by the necessities of war and shouldn't violate the principle of humanity.[377] Then the parties to the conflict before employing the above stated weapons have to measure whether the use of the weapons will cause excessive casualties compared to the military advantage anticipated.[378] Finally parties to the conflict have to take all the feasible measures by giving a warning for civilians to evacuate and spare civilians from the area of attack before employing the above mentioned weapons.[379]

All the core principles require the existence of military objective when directing an attack on a certain area by using either explosive weapons or landmines, or explosive remnants of war. The term 'military objective' has been defined under article 52(2) of the API as:

> "[…] military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage."

[376] Supra note 87, Article 48
[377] Supra note 22, p.258
[378] Supra note 87, Article 51(5) (b)
[379] Supra note 87, Article 57(2) (c)

The above definition has been frequently stated in the protocols II and III, annexed to the 1980 convention on prohibitions and restrictions on the use of certain conventional weapons which may be deemed to be excessively injurious or to have indiscriminate effects and the 1999 second protocol to The Hague cultural property convention.[380] In addition, the definition of military objectives is a norm of customary international law applicable to both international and non-international armed conflicts.[381]

However, the definition provided under article 52(2) of the API does not have illustrative list of specific military objectives.[382] Besides the requirement under article 57 (2) (a) (i) along with article 52(2) of the API both seems vague as to defining and illustrating military objectives, which will make the rule susceptible to abuse.[383]

Along with non-adequacy on the definition of military objective there are issues that are left unanswered by the existing IHL norms.[384] Among the issues the difficulty to differentiate between 'dual use' objects like military and civilian industries, military and civilian power plants, civilian and maritime air ports, transportations whether military or civilian, civilian television and radio stations whether they can be object of attack during direction of an attack, and when individuals contribute for the military whether they can be object of attack or not are the main ones.[385] Regarding the issues of targeting 'dual use' objects or objects which serve both military and civilian purposes, ICRC has a view that parties to the conflict view that parties to the conflict before and during such targeting such objects have to comply with the definition of military objectives pursuant to article 52(2) of the API:

[380] "Legitimate Military Objectives Under the Current Jus in Bello", at<https://www.google.ch/?gfe_rd=crandei=OXrzV9rjMrHY8AfZrY2wBg#q=legitimate+military+objectives+under+the+current+jus+in+bello> [Last accessed October 4, 2016]
[381] Supra note 19, p.29
[382] Supra note 380
[383] Id., p.142
[384] Id., p.153
[385] Supra note 380, Pp.153-158

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.

Despite ICRC's argument the researcher believes that the above definition of 'military objectives' is a general definition and requires an interpretation to govern cases concerning military objectives. As it has been frequently stated in this study there is no convention or any other rule of international humanitarian law which comprises of specific 1ist of military objectives. So that there won't be a difficulty among the parties in hostilities in general or military commander in particular to assess whether the target is a legitimate military objective or not. Besides for the domestic and international courts in entertaining cases concerning armed conflicts it will be much easier if there was a general convention which contains a specific list of military objectives.

In general, the definition of military objectives incorporated in different IHL norms fails to illustrate the specific list military objectives. In which when parties to conflict use explosive weapons, landmines, and explosive remnants of war in densely populated areas the issue of whether an area is legitimate target or not is ambiguous. Which resulted multiple interpretation and because of such interpretation there will be a boundless or unrestricted armed conflict which will surely violate the rules and principles of IHL by causing devastated and incidental damage to civilians including their objects.[386] Thus, the IHL principles incorporated in different conventions and customary laws are inadequate on the list of military objectives.

[386] International Committee of the Red Cross, 'International Humanitarian Law and The Challenges of Contemporary Armed Conflicts', 28th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 2-6 December, 2003, p.11

5.4. Analysis on the Adequacy of the International Customary Laws

Almost all the rules of international humanitarian laws governing the use of explosive weapons, landmines, and explosive remnants of war are norms of customary international law applicable to both international and non-international armed conflicts.[387]

Despite the above the non-adequacy to the international customary law exists on; firstly, the prohibition on the use and threat to use of nuclear weapons is not customary international norm,[388] secondly, even though drones are governed by article 36 of the API their use is not specifically prohibited or restricted by customary rules governing armed conflicts,[389] finally, the definition of military objective similar to the wording of article 52 (2) of the API is a norm of customary international law applicable to both international and non-international armed conflicts.[390] However, the researcher finds that there is no specific list of military objective as a norm of customary international law.

As per the above conclusions international humanitarian customary laws are non-adequate in governing the use of nuclear weapons, drones and list of attacks which comprise legitimate military objective.

5.5. Analysis on Adequacy of Case Laws Serving as A Precedent in the Matter

So far almost five cases of international tribunals have been discussed in the study. Because of space constraints the researcher couldn't specify all the case decisions of international tribunals concerning the use of explosive

[387] Supra note 19, Pp.3-289
[388] Id., p.255
[389] "The use of armed drones must comply with laws", at <https://www.icrc.org/eng/resources/documents/interview/2013/05-10-drone-weapons-ihl.htm> [last accessed September 9, 2016]
[390] Supra note 19, Pp. 29-30

weapons, landmines, and explosive remnants of war. These case decisions in general prohibit the use of indiscriminate weapons or weapons of mass destruction in civilian areas especially the densely-populated ones. 'Weapons of mass destruction' was defined by the United Nation Commission for Conventional Armaments as:

> [...] weapons of mass destruction 'included atomic explosive weapons, radioactive material weapons, lethal chemical and biological weapons, and any weapons developed in the future which have characteristics comparable in destructive effect to those of atomic bomb or other weapons' [...]. [391]

Thus, weapons of mass destruction include explosive weapons, landmines, and ERWs and basically Nuclear weapons which their employment in civilian areas is in general prohibited.[392]

Moreover, in the case of the Prosecutor v. Omar Hassan Ahmad Al Bashir ("Omar Al Bashir") in ICC the chamber has stated that indiscriminate attack on civilians including their objects and employment of indiscriminate weapons or bombardments of civilian areas according to the Rome statute constitutes a war crime.[393] Plus to this in the case of 'Prosecutor v. Milan Martic' the ICTY stated that such kinds of attacks violates the principles of distinction and proportionality.[394] At the same instance, in the case of 'Santo Domingo V. Colombia' the court concluded that the principles of distinction, proportionality and precaution have not been complied during the attack of Santo Domingo by the Colombian air force using cluster munition.[395]

From the assessment of these and other case decisions rendered by the international tribunals and the researcher can possibly conclude that there is no case decision to specifically prohibit the use of nuclear weapons, even

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[391] Susan B. Martin, 'Realist Perspectives on Ethical Norms and Weapons of Mass Destruction' *in* Sohail H. Hashmi and Steven P. Lee (eds.), *The Ethikon Series in Comparative Ethics*, *Ethics and Weapons of Mass Destruction: Religious and Secular Perspectives*, Cambridge University Press, New York, 2004, p.16
[392] Supra note 54, para78
[393] Supra note 247, para.78
[394] Supra note 258, para 69
[395] Supra note 263, para.211

the *nuclear weapons test case* only shows the non-existence of convention or customary law prohibiting the use and threat to use of nuclear weapons. As it is necessary to have specific conventions and international customary law prohibiting the use of nuclear weapons there should also exist a binding Judicial decision prohibiting the use and threat to use of nuclear weapons.

Additionally, drones have been and are being used under the guise of better surveillance capacity which help to minimize casualties.[396] USA can be a good example at these, justifying the use of drones in its armed conflicts.[397] There is no Judicial decision by international tribunal specifically prohibiting or punishing the parties to conflict for the employment of drones as they are materials to apply explosive weapons in civilian areas.

Finally, there is no decision by an international tribunal specifically listing the elements or examples of military objectives to govern the various issues raised in armed conflicts as discussed formerly.

On the other hand, there are various contemporary armed conflicts in our world witnessing the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas despite the existing IHL norms like Syria, Yemen, Afghanistan, Iraq, and others. And at the same instance there is no case law of international tribunal rendering punishment on those parties in hostilities violating the existing IHL norms.

In general, like the other international humanitarian norms Judicial decisions are non-adequate in governing the use and threat to use of nuclear weapons, drones and to identify list of attacks that constitute legitimate military objectives.

[396]Supra note 361
[397]Ibid.

Chapter 6- Conclusions and Recommendations

6.1. Conclusion

Explosive weapons, landmines, and explosive remnants of war share a common feature in which after utilization they can possibly affect a large area and become difficult to control, so that their employment in densely populated areas cause substantial number of casualties of civilians and civilian objects.[398]

Other than the basic rule putting obligation on the parties to conflict to make a distinction between civilian and civilian objects during attack, there are other norms of customary international law and conventions on different kinds of weapons governing the use of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas.[399] Plus to these there are soft laws (i.e. resolutions, declarations) and Judicial decisions even though they don't have a binding nature can possibly govern and have a gap filling role on the matter at spot light.[400] From among the international agreements the conventions prohibiting and restricting the use of landmines,, explosive weapons and explosive remnants of war are, the Convention Prohibiting Anti-Personnel Mines,[401] the Additional Protocol

[398] Supra note 1, p.812
[399] Supra note 87, Article 51(5) (a)
[400] Supra note 234
[401] Supra note 147, Article 1and the following

I,[402] the Additional Protocol II,[403] Conventions on Certain Conventional Weapons along with its protocols,[404] and Convention on Cluster Munitions.[405]

Most of the rules of international humanitarian laws found incorporated in different conventions/treaties are norms of customary international laws applicable to both international and non-international armed conflicts.[406] Thus the rules prohibiting and restricting the use of explosive weapons, landmines, and ERWs are customary rules which are expected to be observed by every state though not signatory of the treaties where the rules are incorporated.

With regard to the principles of international humanitarian law these principles do not prohibit the use of explosive weapons, landmines, and ERWs in the battle field.[407] Rather they require the parties to the conflict not to employ such weapons before; making feasible distinction between civilians and civilian objects, affirming the use of the weapons is compiled by the necessities of war and do not violate principle of humanity, making proper assessment that the employment of such weapons will not amount to excessive casualties compared to the military advantage anticipated, and taking all the feasible precautionary measure not to cause incidental damage to civilians and their objects.[408]

The final source of IHL used for the purpose of these study were judicial decisions and soft laws. As the scope of this study concerns the judicial decisions discussed so far were international tribunal decisions. The primary one is *nuclear weapons test case* which revealed the non-existence

[402] Supra note 87 Article 48 and the following
[403] Supra note 133, Article 13 and the following
[404] Conventions on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or Have Indiscriminate Effects, 1980, *Collection of Hague Conventions and Some Other International Instruments*, International Committee of the Red Cross/Geneva, 1989, p.187
[405] Supra note 155
[406] Supra note 19, p. xxxi
[407] Supra note 87, Article 52(2)
[408] Id., Pp. 36-42

of any international convention or customary international law on the legality or prohibition of nuclear weapons.[409] Plus the court affirmed that the use of nuclear weapons violates principles of international humanitarian laws.[410] Majority of the cases discussed in this study are similar in which the defendants have been charged for the employment of explosive weapons in civilian areas without complying with the principles of distinction, proportionality and precaution.

Until now there has been various attempts made by states and ICRC to minimize or prevent the impact of the use of explosive weapons, landmines, and ERWs in densely populated areas. Clearance efforts landmines, even though they were taking several years have been made by many states.[411] Despite, this the impact of the use of the above stated weapons in densely populated areas is increasing every year. For instance- we can take Syria and Yemen where there is excessive amount of civilian deaths and destruction of civilian properties.

The above-mentioned problems raise the issue of adequacy of international humanitarian laws in governing the use of explosive weapons, landmines, and explosive remnants of war. Though there exist conventions, customary laws, judicial decisions, and soft laws restricting or prohibiting the use of the above stated weapons in civilian areas, they are not adequate to govern all the specific issues related to the matter. From among such issues one is on the use of nuclear weapons. As it has been repeatedly mentioned the non-existence of specific convention or customary rules banning the use of nuclear weapons shows the non-adequacy of IHL norms togovern the use of explosive weapons. The other issue is regarding drones, drones are currently preferable kind of weapons from conventional weapons because of their better surveillance systems and their capability to minimize

[409] Supra note 19, p.255
[410] Supra note 54, para.78
[411] International Committee of the Red Cross, Anti-personnel Landmines: Friend or Foe, ICRC documentation section, Geneva, Switzerland, 1202, p.54

casualties.[412] However, unless there exist a specific convention or customary rule to restrict the use of such weapons they will be susceptible to abuse as these weapons are means to employ explosive munitions in a certain area which they in turn violate the principles of international humanitarian law. The final issue is about military objectives in which when the principles of distinction, proportionality and precaution are applied on the battle field raise disputes such as whether the attack of a specific area is a legitimate target or not is not sufficiently answered by the definition of military objectives under article 52(2) of the API.[413] Rather there is a need of a specific list of military objectives to adequately govern the above issues.

The above circumstances where IHL norms become non-adequate are current challenges and become a great humanitarian concern. In addition, the use of explosive weapons in densely populated areas,[414] the use of new mine technologies,[415] and clearance of ERWs plus ERW victim assistance are the other contemporary challenges on the matter at hand.

Even though, ICRC have been conducting meetings every four years raising the above issues till current times states have not enacted any convention on the prohibition of nuclear weapons, drones and having specific list of military objectives. Which shows the non-adequacy of IHL norms in governing the use of explosive weapons, landmines, and ERWs have not been still solved.

Moreover, even if there existed draft convention of prohibition of nuclear weapons as per the Resolution of UNGA,[416] and Institute of International Law Resolution on Military Objectives 1969 both are soft laws and draft convention which make them to have no binding effect on states.[417]

[412] Supra note 361
[413] Supra note 87, Article 52(2)
[414] Supra note 347, p.47
[415] Supra note 411
[416] Supra note 278, p.5
[417] Supra note 236

Therefore, international humanitarian laws are found to be non-adequate in governing the issues and challenges concerning the employment of explosive weapons, landmines, and explosive remnants of war in densely populated civilian areas. In which to protect and minimize civilian casualties as a result of the above way of conduct of armed conflict the existing humanitarian norms are not enough.

6.2. Recommendation

Because of the use of explosive weapons, landmines, and explosive remnants of war in international and non-international armed conflicts, casualties of civilians as well as civilian objects have been highly increasing from time to time. In which, the death and destruction of civilians including their objects has become a great humanitarian concern. The UN General Assembly have enacted about 25 resolutions and draft convention on the prohibition of nuclear weapons which are not general prohibitions of nuclear weapons.[418] Moreover, there is a Resolution of Institute of International Law concerning *the distinction between military objectives in general and particularly the problems associated with the weapons of mass destruction*, but the resolution is having no specific list of military objectives.[419]

So far in the former five chapters the study has discussed much about the use of explosive weapons, landmines, and explosive remnants of war in densely populated areas, the governing rules of IHL and the adequacy of the existing IHL norms. Now, as the researcher is in the position of the non-adequacy of IHL norms governing the matter at spot light recommends the following:

- Parties to the conflict must at all times avoid locating military objectives with in or near densely populated areas, unless the

[418] Supra note 278, p.5
[419] Supra note 283

military advantage to be anticipated is greater than civilian damage or feasible precautionary measures have been undertaken.

- By including some more provisions in the draft convention on the prohibition of use of nuclear weapons and making it comprehensive the researcher recommends ICRC to prepare a general convention banning the use of nuclear weapons and encouraging states to ratify the convention.
- Not only a treaty but also the rules specifically prohibiting the use of nuclear weapons need to be norms of customary international law applicable to both international and non-international armed conflicts.
- For a specific convention restricting the use of drones to be enacted and such rules to be norms of customary international law applicable to both international and non-international armed conflicts.
- To have a multi-lateral convention having specific list of military objectives which is capable of governing issues concerning legitimate military objectives during attack of a certain area or persons.
- The researcher also recommends enactment of specific convention on the matter of employment of explosive weapons in densely populated civilian areas for the purpose of restricting and prohibiting such acts by parties to the conflict.
- New-weapon technologies are capable of minimizing casualties of civilians and civilian objects than conventional weapons. But before employing them, the researcher recommends first to update the existing norms of IHL or to enact specific convention for it to be compatible with the operation of such weapon systems, and then modern warfare are suggested to prefer new-weapon technologies than conventional weapons.

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