

# Do We Need a New Legal Framework for Fighting Non-Conventional Wars?

## The International Law of War, Human Rights & the Global Fight Against Extremism and Terrorism

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*Abstract* - This paper examines the existing legal framework for fighting violent extremism and terrorism. Highlighting the inherent limitations of the current International Law of War in dealing with the growing challenges posed by terrorists and violent extremist groups, the paper discusses the problem facing military commanders, security agents, state actors and the international community in confronting extremist groups while upholding human rights values and respecting the law of war. The paper poses the question as to whether the current legal framework for dealing with extremist groups is sufficient without contravening the essential provisions and ethos of the International Law of War and Human Rights. Using examples, the paper examines how extremist groups flagrantly disregard the rule of law and disrespect human rights in their campaign of terror. The paper also notes instances in which the current Western strategy in fighting terrorism may be viewed or considered as conflicting with human rights and international law.

**Keywords:** *Law of war, non-conventional wars, international law, human rights law, violence, extremism, non-state groups/actors, terrorism, security agent*

### I. INTRODUCTION

Global terrorism and the rise of violent extremism amongst non-state actors and groups, remain one of the greatest challenges facing the world's nations and society at large in the early 21<sup>st</sup> century. There is a general consensus that the violent and gruesome activities of non-state armed groups such as Al Qaeda, Islamic State of Iraq and the Levant (ISIL), the Boko Haram, Al-Shabaab, and other splinter organisations, commonly referred to as terrorists<sup>1</sup> groups, constitute a significant threat to world peace and collective security of all

nations. Their violent operations also undermine the societal human values and respect for human life that are shared by peoples of all nations and cultures.

It is against this backdrop that terminologies and phrases such as 'extremism', 'war on terror', 'attack on our common values', 'those who want to divide us', 'radicalisation', etc. have become a common usage in political and security discourse. While the aim of this paper is not to discuss the accuracy or appropriateness of this terminologies or phrases, from linguistic, semiotic or political correctness point of view, the fact that there is a 'war' suggests that the conduct of all parties involved in this war needs to be assessed or judged against the principles of international law of war.

Not only is it crucial to understand the nature of the 'war on terror' but also the *modus operandi* of the terrorist armed groups that makes this war unconventional. Also, the question needs to be asked as to whether the way we fight the war in the West is strictly in line with the existing framework of international law of war. To this end, the paper poses the following questions:

- (1) Judged against the Western values of human rights and respect for international laws that govern armed conflicts, can all current anti-terror operations and strategies for fighting terrorists' armed groups be considered legal?
- (2) If no, what are the instances in which anti-terror operations may be viewed or considered to have breached or contravened the international law?
- (3) Should there be a re-think of the current international law of way to take account of the complex nature and unique methods of operation by armed groups such as ISIL, Boko Haram and Al-Shabaab?
- (4) Is it always essential or important for states and security agents to respect and uphold the rule of law while faced with growing threat of terrorism, and extreme violence by non-state armed groups?

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<sup>1</sup> Terrorism is a highly contested issue with over 100 definitions of what constitutes a terrorist act. Different countries have different views of a terrorist. (See E. S. Smith, *International Security: Politics, Policy, Prospects* Palgrave Macmillan, 2010, pp. 152-158).

### III. EXPLAINING INTERNATIONAL LAW OF WAR & INTERNATIONAL HUMAN RIGHTS LAW

#### A. *Key features of International Law of War*

International humanitarian law (IHL) commonly known as the "law of war" or the "law of armed conflict" is a set of rules which, for humanitarian reasons, seeks to limit the effects or human cost of war or armed conflict.

Essentially, the international law of war protects civilians, including women and children, who are not taking part in a war or armed conflict and, therefore, should not, under any circumstances, be a target of any military operations. The law also protects combatants<sup>4</sup> who, for any reason, are no longer taking part or participating in hostilities. The principle of distinction between legitimate military targets and non-military interests is a fundamental feature of the IHL. Under this principle all parties in a conflict are required to differentiate between those participating in conflicts and those NOT involved in hostilities.

The law also restricts the means and methods of warfare that could be used by parties involved in armed conflict so as to prevent wanton and indiscriminate destruction of lives and properties and civilian infrastructures. Under this law, only legitimate military targets<sup>5</sup> or targets that have specific military objectives could be lawfully attacked. This is broadly underpinned by the principle of proportionality<sup>6</sup> in which all military attacks must relate to the level of threat posed by the enemy.

In essence, IHL sets out an international standards for acceptable rule of engagement in any conduct of hostilities and provide the framework for protecting innocent civilians and those who are no longer taking part in hostilities.

A key feature of IHL is that it strikes a careful and sensible balance between measures required to achieved the purpose of war (military necessity) and the need to protect or limit collateral damage to civilians or persons affected by armed conflict (principle of humanity).

#### B. *The United Nations Charter and the Use of Force*

Article 2(4) of the UN Charter prohibits unnecessary, disproportionate use of force in any armed conflict. The spirit of the UN Charter suggests that diplomacy should always be

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<sup>4</sup> Combatant, in this context, means any member of the armed forces, member of an irregular armed groups that belong to a party in a conflict and member of any other para-military groups with a responsible command that separate themselves from civilians.

<sup>5</sup> Military targets are those that contribute effectively to military action of the enemy.

<sup>6</sup> Under the principle of proportionality, a 'disproportionate' attack is an attack, which may cause massive incidental damage that could be considered excessive in relation to the military advantage gained through the attack.

These are some of the issues that this paper seeks to address. The Western governments' military strategy on war on terror provides a context in which to examine these issues. As terrorism is a global phenomenon, it is important to understand the international legal framework within which this war is being fought and the extent to which the essential provisions and ethos of the current International Law of War and Human Rights are being compromised or contravened by both the non-state extremist terrorist groups and also Western governments' counter-terror operations.

### II. TERRORISM & VIOLENT EXTREMISM – A GLOBAL TREND

In the last 15 years there has been a rapid rise in the global trends in terrorist activities<sup>2</sup>. The number of deaths from terrorist activities rose from 11,133 in 2012 to 17,958 in 2013, representing an increase of about 61% [3]. Globally, terrorism-related deaths rose from 3,361 in 2000 to 17,958 in 2013.

Based on their Global Terrorism Index (GTI)<sup>3</sup>, Iraq, Afghanistan, Pakistan, Nigeria and Syria remain the world's hot spots for terrorist activities [3]. These five countries not only suffer a disproportionately high incidence of terrorism, they also harbour violent extremist groups that launch attacks on other locations around the world.

Although most terrorist activities take place in the developing world, Western interests abroad and at home remain the prime targets for extremist groups. Consequently, Western governments, led by the United States see global terrorism not only as not only an attack on their ways of live but also an affront on the values of a civilized society. The United States and its allies are therefore using all means possible to defeat extremist groups and end their campaign of terror. A key element of the Western anti-terror strategy is the use of military force involving air bombardments of violent extremist groups' locations and hideouts in countries such as Syria, Iraq, Afghanistan, Yemen, Somalia and others.

While the choice of sites and locations of Western military targets for counter-attacks on extremist groups are largely strategic and often led by intelligence, there had been instances in which such intelligence may not be as accurate or reliable as expected. The implication of this is the growing number of non-terrorists civilian targets being hit by air missiles in what could be considered or viewed as a violation of the law of war.

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<sup>2</sup> According to the British view, terrorist activities involve the use or threat of action intended to (a) influence the government or to intimidate the public or a section of the public, and (b) advance a political religious and ideological cause. (Smith 2010, pp. 152.

<sup>3</sup> Global Terrorism Index (GTI) is a quantitative measure of the impact of terrorism based on the number of lives lost, injuries sustained, property damaged and the psychological after-effects of terrorist activities in a country, designed by the Institute for Economics & Peace. The composite score ranging from 0 to 10 provides an ordinal ranking of countries based on negative impact of terrorism. With 10 being the most severe impact.

considered as the preferred means of resolving conflicts. In reality, this is not always possible, as armed conflicts are common features of inter-state relations. States, by their very nature, sometimes go to war with other states and the nature of modern states and international system has been influenced largely by historic wars and conflicts.

The goal of the IHL is to provide (a) the legal framework that sets out rules of international law on the legality of using force (Jus Ad Bellum) and (b) the humanitarian rules that must be obeyed or respected in any armed conflict or warfare (Jus in Bello).

*C. International Humanitarian Law and Human Rights Law: Differences and Complimentary Provisions*

For the purpose of this paper, it is necessary to differentiate between Human Rights Law (HRL) and International Humanitarian Law (IHL) in order to discuss their applicability to the activities of extremist groups and the current global war on terror.

Figure 1 shows the key features of HRL and IHL with regards to their goals and application while Figure 2 highlights the essential differences and complimentary provisions between these two sets of international law.

While HRL focuses essentially on the protection of human rights in terms of freedom of expression, freedom of assembly etc., IHL seeks to protect civilians, the wounded, and shipwrecked, internees etc. and regulate the conduct of war.

The common features of these two sets of international laws are their joint protection of people’s right to life, right to physical and mental integrity, the prohibition of torture, ill-treatment and other degrading treatment of people.

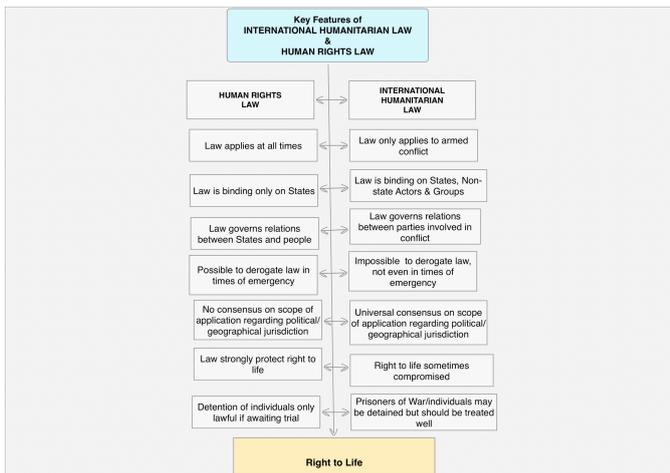


Figure 1. Key features of International Humanitarian Law (IHL) and Human Rights Law (HRL).

Source: Authors, 2016

**HUMAN RIGHTS LAW (HRL) & INTERNATIONAL HUMANITARIAN LAW (IHL) : ESSENTIAL DIFFERENCES & COMPLIMENTARY PROVISIONS**

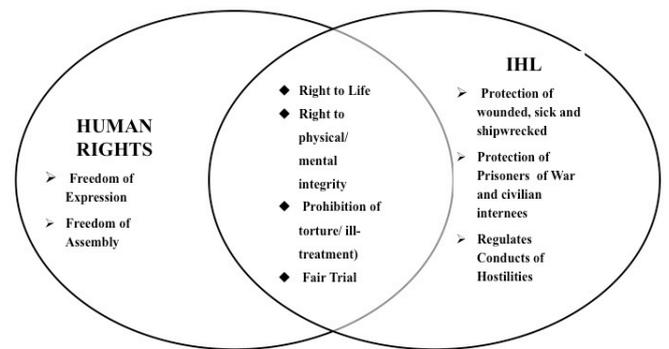


Figure 2. Essential differences in and complimentary provisions of Human Rights Law (HRL) and International Humanitarian Law (IHL)

Source: Authors, 2016

**IV. VIOLENT EXTREMIST GROUPS, HUMAN RIGHTS LAW & INTERNATIONAL LAW OF WAR**

Against the backdrop of both HRL and IHL, it is clear that extremist groups such as ISIL, Boko Haram, Al Shabaab and other similar groups are oblivious to or at least show no regard to the international law of war in their conduct of hostilities. They seem to break every rule and principle of both HRL and IHL by employing tactics that violate and contravene these laws.

Figure 3 shows how extremist groups use of civilians including women, children, young and vulnerable groups as icons and trophies of war in their campaign of terror. Contrary to the rule of international law of war, extremist groups often use civilians and non-combatants in their war of terror. Non-combatants are often forced to join, take part and serve as suicide bombers or used as an economic resource to propagate and execute their violent activities.

For most extremist groups, women are invaluable source of emotional support and demographic continuity for their cause, supplying child soldiers that they use in front-line battles and terror operations. Through a sophisticated network of religious indoctrination and radicalization, vulnerable people, including dis-enfranchised young Muslims and converts in Western society are drawn into the web of extremism where there is little or no chance of escape. Once in the terrorist groups’ camp, these terrorists ‘captives’ turned belligerent become schooled in the art of launching terror attack with extreme brutality and violence.

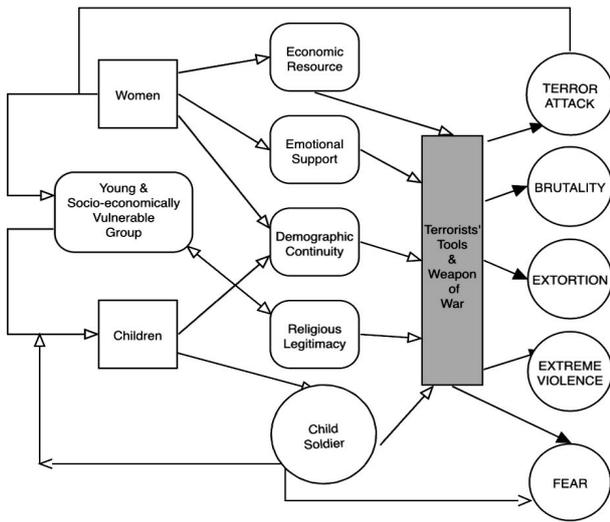


Figure 3. Civilians, women and children: terrorists' tools and weapon of war.

Source: Authors, 2016

The authors' analysis of specific activities and *modus operandi* of the four main extremist groups - ISIL, Boko Haram, Al-Shabaab and Al Qaeda, over the last 5 years shows a breach of all principles of HRL and IHL in terms of military necessity and humanity. By launching indiscriminate attacks on civilian targets, extremist groups seem to pay no respect to any distinction between military and non-military objectives in their campaign.

Figure 4 shows specific activities of these groups and key areas where their campaign violates or breaches the international law of war.

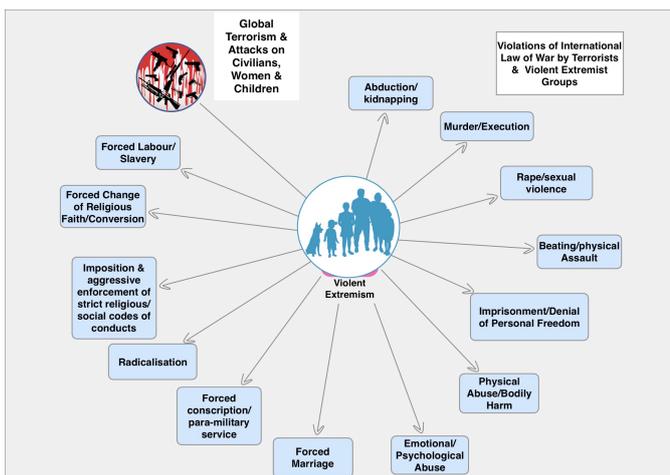


Figure 4. Violent extremist groups and violations of International Law of War

Source: Authors, 2016

The abduction of 200 school children by Boko Haram in Nigeria is a classic case of extremist groups targeting civilians and children with total disregard for or respect for human rights, right to life and right to physical and mental integrity.

Ranging from mass abduction, kidnapping, rape, sexual violence, physical abuse, imprisonment, beheading, murder, execution etc. violent extremist groups unleash a considerable degree of fear and terror on civilians, women and children with a frightening degree of impunity and disregard for the rule international law of war.

### V. FIGHTING EXTREMIST GROUPS, WESTERN GOVERNMENTS' COUNTER TERROR OPERATIONS & THE INTERNATIONAL LAW OF WAR

Most governments within the international state system understand and broadly accept the legitimacy of international law and, albeit grudgingly, allowed themselves to be subjected to its influence.

The fear and terror that the extremist terror groups unleash on society and their general disrespect for human values and dignity has resulted in anti-terror armed campaign against these groups. Led by Western governments' and their allies, anti-terror strategies now involving military actions to dislodge and disrupt the activities of violent extremist groups.

A key feature of the strategies adopted mostly, but not exclusively, by Western governments in the fight against violent extremism is the use of military force in the form of air attack at terrorist targets. Unfortunately, these targets are often close to or embedded within civilian populations as extremist groups routinely operate close to or locate themselves within civilian populations that make it difficult for any air attack.

Western governments anti-terror military operations in Iraq, Syria, Yemen and Somalia, etc., to mention a few, have resulted in the death of many non terrorists and have cause considerable distress to local people and civilians who play no role in hostilities.

Although the authors cannot verify the accuracy of their figures, some analysts<sup>7</sup> have suggested that about 4 million civilians have been killed since the beginning of Western governments' campaign of "War on Terror."

According to the Washington D.C.-based Physicians for Social Responsibility (PSR), the U.S. interventions in Iraq, Afghanistan and Pakistan alone killed close to 2 million people, and that the figure was closer to 4 million when adding the deaths of civilians caused by the U.S. and its allies in other countries, such as Syria and Yemen [13].

<sup>7</sup> Analysis: US-Caused Civilian Deaths Versus Toll of 'Terrorist' Attacks. Telesur: <http://www.telesurtv.net/english/analysis/US-Caused-Civilian-Deaths-Versus-Toll-of-Terrorist-Attacks--20151115-0010.html>

If these statistics were correct, it seems the fight against violent extremist groups in the currently constructed war on terror is being fought on both sides at a considerable human costs and collateral damage to civilians. This high loss of lives by non-combatants in the global war on terror seem to suggest a fundamental breach of the 3 main principle of distinction, proportionality and precaution as enshrined in the international law of war.

Other non-military anti-terror strategies could also be considered as in breach of HRL and or IHL.

According to Amnesty International (2016) report, freedom of expression is *'the early casualty of "anti-terror" campaign'* in Turkey. Turkey has been a target and has suffered immensely from terrorist activities in recent years. This has resulted in the administration's broadening of the anti-terror laws in the country to curtail freedom of expression and civil liberties in could be considered as a violation of HRL [11].

While it may not be in breach of any international law, some have suggested that far too much resources<sup>8</sup> is committed by Western governments on anti-terror military operations against extremist groups than spent on social, health and educational programmes that could benefit the poor and the disadvantaged in society. For example, the US is reported as spending more than \$500 million per victim on anti-terrorism efforts while only \$10,000 is spent per victim on cancer research [12].

## V. CONCLUSION

In conclusion, it seems reasonable to suggest that there seems to be a tension between the urgent need to defeat, and rightly so, terrorists groups such as ISIL, Boko Haran, Al-Qaeda and their affiliates and the necessity to respect and uphold the principles of international law of war. Given the horrific and barbaric ways extremist groups conduct their 'war' against their 'enemies', it is more poignant that 'civilised' nation states and the international community uphold human rights values through international law in their response to dealing with violent extremist groups.

While the current international law of war was intended for a conventional warfare between regular combatants involved in conflicts, the 21st century 'war on terror' is nothing but conventional. Not only has the extremist groups shown total disregard and contempt for the rule of and engagement in armed conflict as laid down in the international law of war, their methods of operation seems to suggest that they have no intention to obey or subject themselves to any civil or international law. The lawlessness of their actions means there is no limit to their acts of barbarity, and hence they remain a

potent 'force of terror' that could strike anywhere in the world with a frightening degree of impunity and randomness.

To counter the 'force of terror' the conventional armed forces, military commanders, Special Forces, intelligent agents, and security experts, etc., all seems to be engaging terrorist groups in a battle that seems long drawn and protracted. While these counter terror forces, claim to operate under the conventional legal framework of the international law and under the scrutiny of international media, it is seems from the exceedingly high number of civilian casualties, that key principles and ethos of the international law of war are being compromised.

What is perhaps rather troubling is the possibility that the current Western governments' military approach in dealing with violent extremist groups may be inflaming terrorism even further. If this were true, then more innocent people would be affected by the war on terror with higher number of civilians caught up in long drawn hostilities.

The use of massive air attack on targets close to civilian populated areas with high potential for mass casualty, such as those reported in Syria, Iraq and Yemen cannot be said to be entirely in line with international law of war. So, there is a need to either reconstruct the current 'War on Terror' or at least discuss and renegotiate the principles of international law of war to establish the limits of its applicability while fighting a non-conventional war.

Either the Western governments admit that certain provisions of the current international law of war would need to and are being compromised by their anti-terror military operations or reconfigure the 'War on Terror' in way that will not only comply fully with international law but limit the threshold of hard to which civilians are being exposed.

As it stands, it seems that Western governments' military strategies involving air attack cannot win the 'war on terror' without breaking the international law of war.

So, four key questions that need to be addressed in relation to this issue are:

1. Is it possible to win the 'war on terror' under the current legal framework of international law and human rights? If so, how?
2. Do we need to rethink the current international law of war to reflect the different and complex nature of 21<sup>st</sup> century warfare?
3. How much of a compromise in human rights violation and international law contravention should we accept from our armed and security forces in their fight against violent extremist groups?
4. If at all possible, what and how long will it take to defeat the extremist armed groups and win the war on terror militarily?

<sup>8</sup> In what is seen by some as 'irrational threat amplifications', the US spends more than \$500 million per victim on anti-terrorism efforts. However, cancer research spending is only \$10,000 per victim.

These are some of the questions military officials, security analysts, policy makers may seek to find answers. Our intention in this paper is to highlight the issues that could start the debate and we are not necessarily offering answers to all of the questions raised here concerning the need for a new legal framework to confront violent extremism.

However, we believe that the fight against violent extremism will, as a matter of necessity, involve winning over the minds of the people involved in violent extremism. The brutality of these non-state armed groups demand an urgent action to fashion a ‘new weapon’ to fight a war that in all intents and purpose is far from conventional.

While there is an urgent need to defeat global terrorism, it is equally important to uphold the values of human rights and respect the rule of international law of war under which our current anti-terror military operations are subjected.

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