

# Protection of Civilians during Non-International Armed Conflicts: A Review of the Boko Haram Conflicts in North-Eastern Nigeria

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**Abstract:** *The protection of civilians is of importance in any armed conflict. In ancient times, this protection was not provided for, as both civilians and military personnel were liable to be attacked, taken prisoners or killed by the adverse party. Under the modern international humanitarian law, safeguards have been put in place to guarantee the protection of the civilian population during armed conflict. The objectives of this research is to examine the origin of Boko Haram activities in Nigeria; status of Boko Haram under international humanitarian law; effects of Boko Haram activities in Nigeria, and the protection of civilians in North-Eastern Nigeria. Doctrinal and non-doctrinal methods of research were adopted through the use of primary and secondary sources of law. The primary source includes statutory provisions, judicial reports and treaties. Secondary sources are opinions of legal writers, essays, newspaper reports and materials from internet. Boko Haram activities in North-eastern Nigeria fall under non-international armed conflicts. The Boko Haram insurgency has taken its toll on Nigeria as a nation. There is high number of victims mostly civilians. Some were killed, others displaced while women and children are raped and forced against their will. There has been also wanton destruction of property and pillage. There is no doubt that with all these atrocities committed by the Boko Haram members and the extra judicial killing by the military, the Boko Haram insurgency qualified as non-international armed conflict. However, this is not enough, the study has contributed to knowledge by showing that there is need for proper measures to be taken to prevent the reoccurrence of the inhuman acts that happened in the wake of Boko Haram. Though, the violations of International Humanitarian Laws are not due to the inadequacy of its rules, but the lack of willingness to respect them, or and also due to ignorance of the rules. Hence there is need for the government, Non-Governmental Organizations and humanitarian organizations such as Red Cross to intensify efforts of disseminating rules of IHL in peace time. This can be achieved through radio programs and incorporating the principles into civic education and general studies.*

**KEYWORDS:** protection of civilians, non-international armed conflicts, Boko Haram conflicts, North-Eastern, Nigeria

## INTRODUCTION

Boko Haram is a radical Islamist movement shaped by its Nigerian context and reflecting Nigeria's history of poor governance and extreme poverty in the North. The radical Islamic agenda with violence and its stated goal is the establishment of a sharia state, and it shows little interest in actually governing or implementing economic development. It is based on the fundamentalist Wahhabi theological system and opposes the Islam of the traditional northern Nigeria establishment, which is broadly tolerant.

Boko Haram and its more radical splinter, Ansaru, are steadily expanding their area of operations. Kidnapping has become a major source of revenue and is widespread, while attacks have occurred in various cities in Nigeria.

The government's response has been to treat Boko Haram as a part of the international al-Qaeda movement. Security service abuses are likely a driver of some popular support for or acquiescence in what is one of the poorest parts of the world.

Boko Haram's combination of a sectarian agenda with violence is distinctive. According to the movement's rhetoric, its goal is to create God's kingdom on earth through justice for the poor achieved by the rigid application of Islamic laws or sharia.<sup>1</sup> Anything that gets in the way of this goal must be destroyed. For Boko Haram, violence is not a perversion of Islam; it is a justifiable means to a pure end.

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<sup>1</sup> Boko Haram has never issued a political manifesto or programme to be uninterested in conventional politics or "economic development".

The group adheres to the strict Wahhabi understanding of “tawhid” (the oneness of God or monotheism)<sup>2</sup> According to Boko Haram rhetoric, a secular nation promotes idolatry, i.e state worship. The pledge of allegiance to the flag and singing of the national anthem are manifestations of such idolatry and hence punishable by death. For Boko Haram, the state is a nest of corruption that exploits the poor. The state is formed and sustained by Western values and education, both of which are against the will of Allah.

Boko Haram is a recent manifestation of a decade –long civil war within Islam. Radical reformers in what is now Nigeria have long claimed that Muslim leaders are “infidels,” and “unjust”, even when the rulers themselves claim to be Muslims. This often manifests as a conflict between Salafi fundamentalists and the tolerant Sufis who dominate the traditional Nigerian Muslim elites.

Boko Haram is thus a direct threat to the traditional Islamic establishment, which is led by the sultan of Sokoto and the Shehu of Borno, both of whom the movement has tried to murder; it also claimed responsibility for killing the Shehu’s brother and bodyguards of the sultan.

Mohammed Yusuf, a charismatic preacher, organized his community in the city of Maiduguri around 2003. It sought to establish God’s kingdom on earth by isolating itself from wider society. Although the movement was hostile to the Nigerian state and rejected Western education as non-Islamic, it remained generally non-violent until 2009. In that year, there were altercations over local issues that

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<sup>2</sup> Wahhabism finds its stongest expression in Saudi Arabia.

were likely manipulated by local politicians, which resulted in Mohammed Yusuf ordering a direct attack on the state, to which the security forces responded brutally.

During the suppression of the uprising, the police murdered Mohammed Yusuf. This crime was captured on video and went viral on social media,<sup>3</sup> while several hundreds of Mohammed Yusuf's followers were extra judicially killed. The movement went underground, re-emerging in 2010 under the dead leader's deputy, Abubakar Shekau.

The reconstituted Boko Haram sought revenge against the security forces and committed itself to the overthrow through violence of the Nigeria state government and the compromised Islamic establishment. The movement has called for the replacement of the Sultan of Sokoto with a shura (council) dominated by Boko Haram.<sup>4</sup>

The size of Abubakar Shekau's Boko Haram is unknown. However, it has mounted operations involving at least 500 operatives, implying several thousand members and affiliates.<sup>5</sup> In addition, much larger members appear to acquiesce to what Boko Haram is doing.

From the above, civilians are not given adequate protection as recommended by various laws both locally and internationally. Therefore, legal protection of civilians during non-international armed conflict is brought to the front burner.

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<sup>3</sup> Al Jazeera, 2010.

<sup>4</sup> Soufan Group 2013.

<sup>5</sup> Leadership, 2013.

In Nigeria, the Boko Haram insurgency has opened up wide-ranging discussions regarding human security and human rights. At present, there is consensus that the confrontation in the North-East Nigeria has reached the threshold and is therefore adjudged non-international armed conflict (NNAC).<sup>6</sup> Thus parties to this conflict (Nigerian Security Forces and Boko Haram combatants) are responsible for any violation of IHL. Serious violations of international humanitarian law constitute war crimes<sup>7</sup> and thus entail individual criminal responsibility. Certain crimes, when committed as part of a wide spread or systematic attack directed against any civilian population with knowledge of the attack constitute crimes against humanity, which also warrant individual criminal responsibility. In a non-international armed conflict, the parties are bound to comply with the norms contained in common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Convention and customary international humanitarian law.

## **1.2 Statement of the Problem**

The attacks on civilians and civilian objects in Nigeria, by Boko Haram, particularly in the North-Eastern region is alarming despite the various ways of tackling the menace. The impact of the deadly sect of Boko Haram is no longer news in Nigeria. It has left the windows open for more widows and widowers. Economic activities have reduced drastically.

For Nigeria, incidence of Boko Haram has caused so much loss both in human and material resources. As a result of this, several efforts have been made by charitable organizations and the Federal

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<sup>6</sup> *The Prosecutor v Tadic Case No. IT-94-AR 72*, ICTY Appeal Chambers, 2 October, 1995.

<sup>7</sup> ICRC Customary IHL Study, Rule 156 (as cited in H.S. Okorie, *Laws of armed Conflict* (Lagos) Princeton & Associates Publishing Co. 2021.

Government alike to protect both civilians and civilian objects. So many security outfits like the local vigilantes, community police etc. were set up by the government to complement the efforts of the military and the various security agencies.

The activities of Boko Haram and the attendant effects are reported on a daily basis on front pages of our daily Newspapers, Recently, it was reported that President Muhammadu Buhari stated: “NIN-SIM linkage will help Nigeria to track crooks and bandits bedeviling our dear nation.”<sup>8</sup>

There is still a lot to be done to stem this scourge. The government of Nigeria and relevant authorities such as the national and states houses of Assembly enacting specific legislations outside the Geneva Conventions and Additional Protocols to help put an end to this menace against helpless civilian populace and victims of armed conflicts.

### **1.3 Aim and Objectives of the Study**

- i. to examine the impact of the structures of the Boko Haram sect on civilians and civilian objects.
- ii. to examine the adequacy of the rules relating to the protection of civilians during Non-International Armed Conflicts.
- iii. to ex-ray the provisions of Common Article III to the Four Geneva Conventions of 1949.
- iv. to suggest more effective legal measures on how to ensure the protection of civilians during Armed conflicts in the North Eastern region and Nigeria in general.

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<sup>8</sup> The Vanguard Newspaper of Friday May 07, 2021.

#### **1.4 Scope of the Study**

This research work shall focus on the legal protection of civilians and civilian objects during non-international armed conflicts particularly Boko Haram in the North East region of Nigeria.

#### **1.5 Research Methodology**

The method of research adopted is doctrinal through the use of primary and secondary sources of law. Doctrinal research involves legal principles generated by the courts and the legislature. It focuses on the particular rather than the general. The primary sources include statutory provisions, judicial reports and treaties while secondary sources like opinions of legal writers, journal, articles, Newspaper reports and materials from the internet are also employed.

#### **1.6 Literature Review**

Non-international armed conflicts are armed confrontations which occur within the territory of a state and in which the armed forces of no other state are engaged against the central government.<sup>9</sup>

A Non-international armed conflict takes place within the territory of a state; it requires the confrontation between the authorities of a state and armed groups or among armed groups, that do not operate under the authority of the state. When a foreign state extends military support to an armed group acting against the government, such armed conflict will take a different status of international armed conflict.<sup>10</sup>

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<sup>9</sup> C.C. Wigwe, International Humanitarian Law (2010) Readwide Publishers, Lagos.

<sup>10</sup> C. Hagler, Law of Armed Conflict: Principles and Concepts (2021) Princeton & Associates Publishing Co. Ltd., Lagos.

According to Common Article 3 of the Four Geneva Conventions as well as the provisions of the Additional Protocol II:

The parties to the non-international armed conflict are to treat all persons who take no active part in hostilities humanely without any distinction on the basis of race, colour religion or faith, sex, birth or wealth, or any other similar criteria.

The parties to a conflict must at all times distinguish between the civilian population and combatant in order to spare the civilian population and civilian property. Neither the civilian population as a whole, nor individual civilians may be attacked.<sup>11</sup>

According to Jean-Jacques Rousseau<sup>12</sup> in one of his principles he formulated in the 18<sup>th</sup> century about the development of are “...war is no way a relationship of man with man but a relationship between states, in which individuals are enemies only by accident; not as men nor even as citizens, but as soldiers(...) since the object of war is to destroy the enemy state, it is legitimate to the latter’s defendants as long as they are carrying arms; but as soon as they lay them down and surrender, they cease to be enemies or agents of the enemy, and again become mere men, and it is no longer legislated to take their lives.

It is noteworthy that before the advent of the Four Geneva Conventions and the Additional Protocols, Fyodor Marten laid down the following principles for cases not covered by humanitarian laws.<sup>13</sup>

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<sup>11</sup> T, Hillier: Principles of Public International Law: Cavendish Publishing Ltd. (1999) (2nd ed.).

<sup>12</sup> The Social Contract.

<sup>13</sup> Marten Clause.



He opined that “civilians and combatants remain under the protection and authority of the principle of international law derived from established customs, from the principles of humanity and from the dictate of public conscience”. The rights made available to civilians are guaranteed under the humanitarian law.

In the case of internal armed conflicts, Article 13 paragraph 2 AP. II provides that:

The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threat of violence the primary purpose of which to spread terror among the civilian population is prohibited.

There are also available rights of protection of objects indispensable to the enemy of the civilian population.

Article 54, para. 2 AP. 1 provides that:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food stuffs, agricultural areas for the production of foodstuffs, crops, livestock, drinking water, installations and supplies and irrigation works, for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

The protection of victims of non-international armed conflicts does not limit its scope to civilian populations and civilian objects.<sup>14</sup> The rules also include the wounded, sick, Shipwrecked and Prisoners of War. According to GCIV which governs some aspects of the protection of wounded and sick civilians, the infirm, expectant mothers and other civilians in need of medical attention are included in the rules provided by GCIV.<sup>15</sup> Members of the armed forces who are forced to make emergency landing at sea or

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<sup>14</sup> C. Bartolotta, “Terrorism in Nigeria: The Rise Boko Haram, [2011], The Whitehead journal of Diplomacy and International Relations, accessed on 4/7/2015.

<sup>15</sup> Article 14 – 22 GCIV.

from aircraft are to be considered shipwrecked<sup>16</sup> Article 42 Additional Protocol I provides protection for persons who are parachuting from an aircraft from being attacked during their descent and upon landing in territory controlled and occupied by an enemy. They must also be given the opportunity to surrender before being attacked, unless it is undoubted that they are involved in a hostile act. The combined effect of Article 42, GC I and II and Additional Protocol I, when read together create a kind of soft ground for hostility to thrive with all respect. A member of the armed forces whose intent is to attack the adverse party, seems to be given the latitude to unleash his terror. Those persons who are parachuting from an aircraft should not be attacked during their descent except the main purpose of such persons is attack. These provisions seek to defeat the legal maxim. “Equity looks at the intent rather than the form”. The study treated very well the protection available to members of the armed forces who in their appearances are hostile bearing arms, or who are involved in hostile activities.

According to Michelle Mack,<sup>17</sup> most conflicts today are waged between a state and organized non-state armed group(s) or among such group themselves. The daily life of many civilians caught up in this situation, is ruled by fear or the threat of destruction and extreme suffering.

The Geneva Convention of 1864 provided a kind of rudimentary protection of Prisoners of War. The essence of the obligations as far as prisoners of war are concerned is that detaining them does not amount to a sanction or punishment but is purely a precautionary measure. According to Tim Hillier,<sup>18</sup>

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<sup>16</sup> Article 12 GC II.

<sup>17</sup> International Humanitarian Law and the quest for a Legal Framework applicable to Modern-day U.N. peacekeeping Operations (2000) Centre for Civil and Human Rights, Notre Dame Law School.

<sup>18</sup> (*Supra*) 8

there is an overriding duty to treat POWs humanely, but there is still some doubt as to the ambit of the protection. There is dispute about the status of those who commit war crimes prior to their capture, and the exact status of guerilla forces is still unclear.

## **REGULATION OF NON-INTERNATIONAL ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW**

The law of nations is synonymous with the term “public international law “or international law,” which is the body of rules governing relations between states and between them and other matters of the international community.

Grotius<sup>19</sup> took the view that the law was no longer an expression of divine justice but the fruit of human reason and that it no longer preceded action but arose from it. International humanitarian law forms a major part of public international law and comprises the rules which, in times of armed conflict, seek to protect people who are not, or are no longer taking part in the hostilities, and to restrict the methods and means of warfare employed.

International humanitarian law can be said that the predominant sources of modern international humanitarian law are the laws of The Hague and the Laws of Geneva Conventions. The law of The Hague (or the law of war proper) is expressed in the Hague Conventions of 1899 and 1907. It determines the rights and duties of belligerents in the conduct of operations and limits the choice of means and methods

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<sup>19</sup> Grotius (Hugo de Groot) (1583 – 1645), a Dutch jurist and diplomat who strongly influenced the theory of law and the state in general, and of international law in particular.

of fighting.<sup>20</sup> On the other hand, the Geneva conventions were developed from 1964 to 1949 and provided for the protection of civilian persons during the times of war as well as prisoners of war.

War is as old as mankind, and all civilizations and religions have tried to limit its devastating effects by subjecting warriors to customary practices, codes of honour and local or temporary agreements with the adversary. These traditional forms of regulating warfare became largely ineffective with the rise of conscripted mass armies and the industrialized production of powerful weapons in the course of the nineteenth century – with tragic consequences on the battlefield. Medical services were not equipped to cope with the massive number of casualties caused by modern weaponry; as a result, ten of thousands of wounded, sick and dying soldiers were left unattended after battle. This trend, which began with the Napoleonic Wars in Europe (1803 – 1815) and culminated in the American Civil War (1861 – 1865), set the stage for a number of influential humanitarian initiatives, both in Europe and in North America, aimed at alleviating the suffering of war victims and driving the systematic codification of modern international humanitarian law.

In Europe, the move towards codification of international humanitarian law was initiated by a businessman from Geneva, Henry Dunant. On a journey through northern Italy in 1859, Dunant witnessed a fierce battle between French and Austrian troops and, appalled at the lack of assistance and protection for more than 40,000 wounded soldiers, improvised medical assistance with the aid of the local population. After returning to Geneva, Dunant wrote *Un souvenir de Solferino*<sup>21</sup> in which he made essentially two

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<sup>20</sup> Picket, Jean (1985): development and Principles of International Law, Dordrecht: Martinus Nijhoff. ISBN 9024731992 p. 2.

<sup>21</sup> A Memory of Solferino.

propositions. First, independent relief organizations should be established to provide care to wounded soldiers on the battlefield and, second, an international agreement should be reached to grant such organizations the protection of neutrality. His ideas were well received in the capital of Europe and led to the founding of the international committee of the Red Cross<sup>22</sup> and to the adoption by 12 states of the first Geneva convention for the Amelioration of the condition of the wounded in Armies in the Field.<sup>23</sup> A parallel development was triggered by the atrocities of the American Civil War and led to the adoption by the government of the United States of the *Lieber Code* or more accurately, the Instructions for the Government of Armies of the United States in the Field.<sup>24</sup> Although the *Lieber Code* was a domestic instrument and not an international treaty, it has influenced the development and codification of modern international humanitarian law well beyond the borders of the United States.

## 2.1 Conceptual Clarification of IHL

The rules of international humanitarian law (IHL) is to regulate conflicts to minimize human suffering. IHL reflects a balance between the military necessity in a conflict and the needs for humanitarian protection.

International humanitarian law is founded upon the following principles:

- i. the distinction between civilians and combatants;
- ii. the prohibition of attacks against those *hors de combat*;

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<sup>22</sup> 1963.

<sup>23</sup> 1864.

<sup>24</sup> 1863.

- iii. the prohibition on the infliction of unnecessary suffering;
- iv. the principle of proportionality;
- v. the notion of necessity.
- vi. the principle of humanity.

These basic principles which shall be discussed later are included in the specific rules and norms of international Humanitarian Law (IHL). They also help the interpretation of the law when the legal issues are unclear or controversial.

Depending on the issue the balance between the principles and interest shifts. For example, during hostilities, military necessity may limit the notion of humanity by allowing for destruction, but in other situations such as the protection of the wounded and sick, the principle of humanity is at the heart of the legal rules.

### **2.1.1 Branches and Sources of IHL**

International Humanitarian Law has two branches: the law of Geneva; which is the body of rules that protects victims of armed conflict, such as military personnel who are *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith. Law of Geneva is calibrated on the piece-time-like” rules, with a distant human rights flavor, for protecting persons situated aloof from battlefields while the

law of the Hague which is the body of rules establishing the rights.<sup>25</sup> As opposed to the ‘law of Geneva; the law of Hague’ is a colloquial term that refers to a body of law mainly dealing with rules of conduct of hostilities and establishing limitations or prohibitions of specific means and methods of warfare.

The term derives its name from the Hague Conventions of 1899 and 1907. It comprises of rules protecting person who are not in the power of a party to the conflict. With the adoption of Additional Protocols to the 1949 Geneva Conventions that codify and develop rules on conduct of hostilities, the dichotomy between the ‘terms law of Geneva’ and ‘law of the Hague’ has largely lost its relevance.<sup>26</sup>

#### **i. Sources of International Humanitarian Law**

International humanitarian law (IHL) has its main sources in customary international law and treaty laws such as the Geneva Conventions. The formal and informal regulations of armed conflict have existed for almost as long as armed conflict itself.

The *Lieber code* of 1863 is recognized as the first modern codification of these customs and rules, enforced against those fighting in the American Civil War. Since then, legal treaties and customary practice have developed, which together form an extensive legal framework regulating modern conflict.

This framework covers a range of issues including the protections of civilians, prisoners of war, conduct of hostilities, wounded and sick, shipwrecked, weapons, occupation, detention, cultural property, and naval warfare.

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<sup>25</sup> Robert Kolb, of Hague Law and Geneva Law Retrieved from <www.westpont.edu> 14/05/2021.

<sup>26</sup> Law of the Hague: <casebook.icrc.org.> accessed on 14/05/2021.

i) Treaty Law

People protected by the four Geneva Convention of 1949:

- i. the wounded and the sick on land (first Geneva Convention)
- ii. the wounded, the sick and the shipwrecked at sea (Second Geneva Convention).
- iii. prisoners of war (Third Geneva Convention)
- iv. Civilians (Fourth Geneva Convention).

The four Geneva Conventions of 1949 are applicable in international armed conflicts. One article – Common Article 3 – specifically applies in non-international armed conflict.

All 196 states are parties to the four Geneva Conventions of 1949, making them universal. As a response to the development of new methods of combat. Additional Protocol I of 1977 confirmed the existing rules in international armed conflict and added further ones. Also because most conflicts since the second World War have been non-international, states decided to complement the rules of common Article 3 with a more developed framework of protection for people suffering the effects of non-international armed conflict by adopting additional Protocol II of 1977.

In 2005, a new additional instrument was adopted by states to remedy the problem of the recognized emblems (the red cross and the red crescent) being wrongly perceived in certain contexts as having religious, cultural or political connotations, and not being respected as neutral distractive signs. Additional Protocol III introduced an additional emblem, the red crystal, which offers the same protection



as the red cross and the red crescent emblems. In addition to the four Geneva Conventions of 1949 and their three additional Protocols of 1977 and 2005, a large number of treaties and other legal instruments deal with issues relating to the conduct of hostilities and the protection of the civilian population. They contain rules applicable in international armed conflict, non-international armed conflict or both (the issues include the use of certain weapons, the protection of cultural property, the protection of children, and the prosecution and punishment of criminal offences).

## **ii) Customary Law**

Customary law is a body of rules that States regard as binding under international law. These rules are identified by looking at the practice of states (including) official accounts of military operations and other official documents, military manuals, national legislation and case law). These rules (which are accepted as law) need to be distinguished from practices that States do not regard as obligatory (e.g practices followed as a matter of policy rather than out of any sense of legal obligation).

Customary law may fill certain gaps in the protection provided to victims of armed conflict by treaty law. These gaps result when:

- (a) Certain States do not ratify certain treaties (e.g the Additional Protocols or Certain Weapons Conventions). (In the case of armed conflicts involving a coalition of States with different treaty-based obligations – because they have not all ratified the same treaties – customary law may

represent those rules that are common to all members of the coalition. In this situation, customary law may serve as a base for drafting common rules of engagement). Or when:

- (b) treaty law lacks detailed rules on certain issues pertaining to non-international armed conflict. (This is the case with respect to the conduct of hostilities (military objectives, indiscriminate attacks, proportionality, precautions in attack), the protection of journalists, humanitarian assistance, and also in other areas such as the implementation of humanitarian law. Once again, customary law may fill the gap, because practice has created a substantial number of customary rules that are more detailed than the often rudimentary provisions in Additional Protocol II of 1977).

### **2.1.2 Meaning and Types of armed Conflict**

Armed conflict is said to exist when there is an armed confrontation between the armed forces of States or between governmental authorities and organised armed groups or between such groups within a State.<sup>27</sup> An armed conflict also exists whenever there is a use of armed force or belligerent occupation between States or when protracted armed violence takes place between States and organized armed groups or between such groups.

#### **Types of armed Conflict**

The typology or classification of armed conflicts is one of the contemporary challenges facing those working in international humanitarian law, as well as related fields, such as international criminal

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<sup>27</sup> <<https://www.amnesty.org.>> accessed 4th November, 2021 at 2:am..

law. As the application of IHL depends on the existence of an international or non-international armed conflict,<sup>28</sup> knowing when such situations exist is of key importance.

Furthermore, since not all rules are applicable to both types of conflict, it is essential to determine what actually constitutes each of the two types of armed conflict. In determining whether IHL applies, one cannot first ask the question whether there is an armed conflict simpliciter, and only when considered whether that conflict is international or non-international in nature. An armed conflict exists when there is an international or non-international armed conflict, not the other way around.

The core instruments of IHL, the 1949 Geneva Conventions and the 1977 Additional Protocols, distinguish between situations of international armed conflict (IAC) and non-international armed conflict (NIAC). According to Article 2, common to the four 1949 Geneva Conventions, the provisions relating to IAC apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties and to all cases of partial or total occupation. In 1977, Article I of Additional Protocol I further added situations similar to the anti-colonial struggles, which until then had been regarded as non-international, to the realm of IAC.<sup>29</sup>

Under IHL, different rules apply to the different types of conflict. Therefore, classifying the type of conflict is crucial to know which rules apply. There tends to be much more codification of rules applicable to IAC, compared to NIAC.

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<sup>28</sup> Certain Provisions of IHL apply in peacetime or continue to apply after the armed conflict has ended. E.g Arts. 47, 49, and 53 of the First Geneva Convention of 1949; Arts. 44, 45 and 50 of the Second Geneva Convention of 1949; Art. 5 of Additional Protocol II.

<sup>29</sup> Art. I(4) of Additional Protocol I.

In addition, there are sub-categories of both NIACs and IACs that have different applicable rules. For example, within international armed conflicts, there are more extensive rules that apply to situations of occupation than with general IAC where there is no occupation. Within internal conflicts, territorial control is a required element to apply. Additional Protocol II, but this is not required for the application of Common Article 3.

#### International Armed Conflict:

The basic requirement for an IAC is that there must be an armed conflict between two or more States. Common Article 2<sup>30</sup> sets out the commonly accepted definition of an IAC:

In addition to the provisions which shall be implemented in peace-time, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High contracting Party, even if the said occupation meets with no armed resistance.<sup>31</sup>

Aside from occupation, where there needs to be no armed resistance, the level of violence needed between two States to amount to a situation of armed conflict is generally undefined. However, it is generally accepted that even “two shots” fired across a border could lead to the application of IHL.

The threshold of violence is a question of practical relevance. For example, if during a training exercise an army patrol accidentally went into the territory of another State and returned without any

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<sup>30</sup> Geneva Conventions.

<sup>31</sup> Common Article 2 of the Geneva Convention.

engagement with the other State, IHL would have no role to play. However, if that mistake led to an exchange of fire between the two armed forces, the applicable rules of IHL would apply.

It is important to note that the rules on international armed conflicts are more extensive and more detailed than those covering internal armed conflicts, given that they include those set out in The Hague Conventions of 1907, the Four Geneva Conventions and the First Additional Protocol to the Geneva Conventions of 1977.

### **Occupation:**

At this point, there is need to address the concept of occupation as it relates to IAC. Occupation is a concept that only applies in the context of an IAC. Occupation is not defined in the 1949 Geneva Conventions. However, the 1907 Hague Convention IV sets out the following definition:

“Territory is considered occupied when it is actually placed under the authority of the hostile army. The occupation extends only to the territory where such authority has been established and can be exercised.

### **Non-International Armed Conflicts:**

The majority of today's armed conflicts are non-international armed conflicts. The reluctance of States to accept international legal oversight into their internal affairs often means that the threshold of violence and organization required to define a situation as an armed conflict is significantly higher than what would be needed for a IAC.

Common Article 3 tells us what does not qualify as an armed conflict, namely internal disturbances or tensions. Internal disturbances are riots, demonstrations and isolated, sporadic acts of violence that take

place inside the territory of a State. Case law, especially by the International criminal Tribunal for the Former Yugoslavia (ICTY), has clarified the elements of a NIAC.<sup>32</sup>

This allows for the assertion that a non-international armed conflict exists when there is a situation of protracted armed violence between governmental authorities and organized armed groups, or between such groups within a State.

Hence, there are two key elements needed for a NIAC: protracted armed violence, and the involvement of an organized armed group. In the case of Haradinaj, the tribunal set out some possible factual indicators to help assessing if a NIAC exists.

**a. Protraction of Violence:**

The following factors can give an indication of the level of protraction and intensity of violence needed for a NIAC:

- i. the number, duration and intensity of individual confrontations;
- ii. the types of weapons and other military equipment used;
- iii. the number and caliber of munitions fired;
- iv. the number of persons and type of forces partaking in the fight;
- v. the number of casualties;

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<sup>32</sup> <<https://www.diskonis.se>> resources: accessed 14/11/2021.

- vi. the extent of material destruction;
- vii. the number of civilians fleeing combat zones;
- viii. the involvement of the UN security Council may also be a reflection of the intensity of a conflict.

**b. Organization:**

The following factors are indicative of the level of organization of an armed group:

- i. the existence of a command structure and disciplinary rules and mechanisms;
- ii. the existence of a headquarters;
- iii. the ability to gain access to weapons, other military equipments, and training;
- iv. the ability to plan, coordinate, and carry out military operations;
- v. the ability to define a unified military strategy and use military tactics;
- vi. the ability to speak with one voice, negotiate, and conclude agreements such as ceasefires or peace accords.

Additional Protocol II (AP II) of 1977 also deals with internal armed conflicts. To apply the provisions of AP II, the non-international armed conflict must occur between a State and an armed group (or two armed groups for Common Article 3 ruled out). In addition, the conflict must take place on the

territory of a High Contracting Party to the Geneva Conventions, and the armed group has to control a part of the territory.<sup>33</sup>

## **2.2 Historical Overview of the Regulations of Non-International Armed Conflict**

The vast majority of contemporary armed conflicts are waged, not between States, but between States and organized armed groups or between such groups they are non-international in character.

In the past, the States brooked no interference in the way they dealt with their domestic affairs, including internal conflict. The principle that states must refrain from intervening in matters which international law recognizes as being purely domestic was widely accepted. It is reflected in the 1945 United Nations Charter,<sup>34</sup> of which declares that nothing in the Charter enables the United Nations to intervene in matters which are essentially the internal affairs of any State unless there is a threat to peace, a breach of peace or an act of aggression, in which case the United Nations is entitled to have recourse to enforcement measures under chapter VII of the Charter.<sup>35</sup> Traditionally, therefore, non-international armed conflicts have fallen outside the scope of the law of armed conflict.

This reluctance of State to subject internal matters to international codification has been gradually eroded over the years, probably because of the extreme violence and cruelty characterizing many internal armed conflicts. The States have come to accept that there are some situations which cannot be treated as purely internal; on the contrary, they are of concern to the international community as a whole. This

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<sup>33</sup> Supra.

<sup>34</sup> Article 2(7).

<sup>35</sup> Article 39 empowers the Security Council to determine the existence of any threat to the peace, breach of the peace, or an act of aggression.



change in attitudes has allowed rules to be codified governing non-international armed conflicts, but the process of codification has been much slower than for international armed conflicts. The combined effect has therefore been to have separate and fewer rules applicable to non-international armed conflicts.

The first step in the process was the adoption of the four Geneva Conventions in 1949; they included a provision introducing the minimum standards of humanity it was hoped would be observed in future of non-international conflicts. In order to “develop and supplement” those standards, Protocol II additional to the Geneva Conventions<sup>36</sup> was adopted in 1977.

In a non-international armed conflict, each party is bound to apply, as a minimum, the fundamental humanitarian provisions of international law contained in Article 3 Common to all four Geneva Conventions. Those provisions are developed in and supplemented by two Additional Protocol II of 1977. Both Common Article 3 and Additional Protocol II apply with equal force to all parties to an armed conflict, government and rebels alike.

### **2.3 The Provisions of Article 3 Common to the Geneva Conventions**

During the negotiations preceding the adoption of the 1949 Geneva Conventions, the proposal was made to extend the Conventions’ applicability *in toto* to non-international armed conflicts.<sup>37</sup> It soon became clear however, that States would agree to fully apply all four Conventions to non-international armed conflicts only at the price of a very narrow definition of non-international armed conflict that was

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<sup>36</sup> The Geneva Conventions of 12 August, 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), of 8 June 1977.

<sup>37</sup> Find Record of the Diplomatic Conference of Geneva of 1949, Vol. II – B, pp. 120 – 129 and 325 – 339.

highly unlikely to be met in reality.<sup>38</sup> As a consequence, the applicability of international humanitarian law to non-international armed conflicts would probably have remained the exception instead of becoming the rule. It was therefore ultimately decided to limit the provisions applicable in non-international armed conflicts rather than the cases of non-international armed conflict to which international humanitarian law apply.<sup>39</sup> Common Article 3 emphasized that the introduction of these minimum rules does not affect the legal status of the parties. This means that the fact of applying Common Article 3 does not itself constitute recognition by the *de jure* (legal) government that the opposition has authority of any kind. The government authorities are still entitled to suppress an insurgency by all legitimate means under domestic legislation. Common Article 3 in no way affects the government's right to prosecute, try and sentence its adversaries for their crimes, for example treason or common: crimes, according to its own laws. Under national legislation, any person can be prosecuted for the mere fact of participating in armed hostilities. This means that in non-international armed conflicts there is no such thing as combatant status. Consequently, captives are not entitled to Prisoners of War (POW) status as defined in international armed conflict.<sup>40</sup>

Accordingly, Common Article 3 simply identifies a number of key duties and prohibitions providing a minimum of protection to all persons who are not, or who are no longer taking an active part

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<sup>38</sup> *Ibid*

<sup>39</sup> ICRC, Commentary on the First Geneva Convention, 2nd ed., 2016.

<sup>40</sup> G.C. Pt. II Art. 12.

in the hostilities. In return, this miniature convention<sup>41</sup> must be applied “as a minimum” by each party to any “armed conflict not of an international character.”<sup>42</sup> Common Article 3 reads as follows:<sup>43</sup>

In the case of an armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall apply as a minimum, the following provisions:

1. Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above mentioned persons:

(a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(b) taking of hostages;

(c) outrages upon personal dignity, in particular, humiliating and degrading treatment;

(d) the passing sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2. The wounded and sick shall be collected and cared for. An impartial humanitarian body such as the International Committee of the Red Cross may offer its services to the parties to the conflict.

The parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present convention.

<sup>41</sup> *Op. Cit.*

<sup>42</sup> G.C. I-IV, Common Art. 3(1).

<sup>43</sup> *Ibid.*

The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

A non-international armed conflict within the meaning of Common Article 3 does not necessarily have to involve a government; it can also take place entirely between organized armed groups, a scenario that is particularly relevant in areas of weak governance, such as so-called “failed states.” As earlier mentioned, in order for a non-state armed group to be considered a “party” to a conflict, Common Article 3 does not require say recognition of belligerency by the opposing State nor popular support, territorial control or political motivation.

The concept of “party to an armed conflict” presupposes a minimum level of organization without which coordinated military operations and collective compliance with international humanitarian law would not be possible. Furthermore, in order to qualify as an “armed conflict,” non-international confrontations must always involve violence that reaches a certain threshold of intensity.

Non-international armed conflicts are subject to a different and more limited legal regime than international conflicts. Nevertheless, the law of international armed conflicts can still be applied. Common Article 3 provides for this by encouraging the parties to the conflict “to endeavor to bring into force, by means of special agreements, all or part of the other provisions of the Geneva Conventions”.

While the adoption of Common Article 3 was a welcome development, and while the Article in a sense expresses the essence of international humanitarian law, earning it the name of a convention, a miniature, its very generality create problems. It is not clear how far its protection extends. For instance, the Article is silent on the protection to be given to doctors and other medical personnel as well as medical units and transportation. It does not deal with the protection of the emblem. There are no provisions

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Publication of the European Centre for Research Training and Development–UK

relating to treatment of detainees or to methods and means of warfare. Common Article 3 is also silent on the question of the general protection of the civilian population. There is no express prohibition of attacks against the civilian population or rules on the conduct of hostilities aimed at sparing the civilian population. Neither is there regulation of relief operations during non-international armed conflicts.<sup>44</sup>

## **2.4 Additional Protocol II of 1977**

Additional Protocol II, which was adopted in 1977, develops and supplements Common Article 3. It is the outcome of a serious endeavor to define the protection afforded in non-international armed conflicts in detail. The protocol does not modify the conditions of application of Common Article 3, but defines its own scope of application more restrictively and therefore, cannot serve as generic definition of non-international armed conflict. Again, the desire of States not to have others interfering in their internal affairs was a major obstacle.

Article I of the Protocol reads:

- i. This Protocol shall apply to all armed conflicts which are not [of international character] and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and contracted military operations and to implement this protocol.

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<sup>44</sup> International Humanitarian Law Applicable in non-international armed conflicts: The law applicable during non-international armed conflicts, available at <[http://www.asser-ihl-13463b\(5\)](http://www.asser-ihl-13463b(5))> p. 3.

- ii. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

Thus, in contrast to Common Article 3, Additional Protocol II applies only to armed conflicts involving a Contracting State as a part to the conflict and taking place in the territory of that State.<sup>45</sup> Moreover part of the State's territory must be under the effective control of the opposition forces, thus assimilating their rules to that of a *de facto* authority with direct obligations not only towards the opposition party, but also towards the inhabitants of the territory under their control.<sup>46</sup> The Protocol's high threshold applicability is indicative of the continuing reluctance of governments to expand the international regulation of internal armed conflicts unless they develop into situations comparable to international armed conflicts in many ways.<sup>47</sup>

#### **2.4.1 Field of Application of Additional Protocol II**

According to its Article 1,<sup>48</sup> Additional Protocol II applies to armed conflicts which take place on the territory of a High Contracting party and which involve the armed forces of the State and one or more armed rebel groups.<sup>49</sup> The Protocol thus, does apply to situations of fighting between one or more groups but not involving the armed forces of the state.<sup>50</sup> This requirements is a major limitation on the application

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<sup>45</sup> Common Art. 3 to the GCs.

<sup>46</sup> *Ibid.*

<sup>47</sup> *Ibid.*

<sup>48</sup> Art. 1(2).

<sup>49</sup> *Op. Cit.*

<sup>50</sup> ICTY, *The Prosecutor v Fatmir Limaj et al.* Trial Chamber II (Judgment), 30 November 2005, Case No. IT-03-66-7, para 89.

of the Protocol particularly as contemporary conflicts often are waged between rebel groups without involvement of the State.<sup>51</sup> A further limitation on the Protocol's applicability, as compared with Common Article 3 is the stated requirement that the rebel groups must operate under a responsible command and control a portion of the national territory.<sup>52</sup> The logic of this requirement is that if the rebel group does not control some territories, then as a practical matter, it will probably not be in a position to carry out sustained and concerted military operations and to implement the Protocol.<sup>53</sup> However, the control requirement may also make some States less willing to admit the applicability of the Protocol since for a State to admit the application of Protocol II is to concede that it has lost control of a part of its national territory.

The requirements of having a responsible command and existing control over territory are probably a practical necessity,<sup>54</sup> since without meeting these conditions, most rebels will not be able or willing to apply the Protocol.<sup>55</sup> Many of the types of rebel groups operating today are very loosely organized, with sometimes a deliberately unstructured command in order to avoid criminal responsibility of the leaders or are engaged in activities which deliberately aim at violating the law.<sup>56</sup> However, an organization akin to that of a regular army is not necessary.

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<sup>51</sup> *Ibid.*

<sup>52</sup> Art. 1(2) AP II.

<sup>53</sup> Rome Statute, Art. 8(2)(d) and (f).

<sup>54</sup> ICTY, *The Prosecutor v Ramush Haradinaj et. al* Trial Chamber I (Judgment), Case No. IT-04-84-T, 3 April 2008, para 60.

<sup>55</sup> API., Art. 43(1).

<sup>56</sup> ICTC, Commentary on the First Geneva Convention and ed., 2016.

The requirement in Article I that, in order for the Protocol to apply, the fighting must be sustained<sup>57</sup> which means that operations should be kept going continuously. According to the commentary,<sup>58</sup> at the beginning of a conflict, military operations rarely have such a character, and thus in most cases only common Article 3 will apply to the first stages of a conflict.

The Protocol<sup>59</sup> does not apply automatically when the above conditions are met; instead, there is an additional criterion: the armed groups opposing the State must evidence their willingness to be bound by the Protocol<sup>60</sup> (this willingness could be indicated by actually applying its terms or by making a declaration that they intend to be bound).<sup>61</sup> Unless the rebels claimed to be the legitimate government, in which case it could bind them automatically even without their consent, the Protocol only kicks in once they demonstrate their willingness to be bound by it.

Whereas Common Article 3 specifies that the application of its provisions or even the application by agreement of all or part of the conventions does not affect the legal status of the parties to the conflict,<sup>62</sup> and Protocol II does not contain an equivalent provision. This was not considered to be necessary since nowhere in Protocol II is there a reference to the ‘parties’ to the conflict. The application of Protocol II by the parties does not constitute recognition of belligerency nor does it change the legal nature of the relations between the parties involved in the conflict.<sup>63</sup> Protocol II does not establish any special category

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<sup>57</sup> *Op. Cit.*

<sup>58</sup> *Ibid.*

<sup>59</sup> Additional Protocol II.

<sup>60</sup> *Ibid.*

<sup>61</sup> ICTY, *The Prosecutor v Dusko Tadic a/k/a “Dule,”* Decision on the Defence Motion for Interlocutory Appeal on jurisdiction, Appeals Chambers 2 October 1995, Case No. IT-94-1-AR72, para. 70.

<sup>62</sup> Common Art. 3(2).

<sup>63</sup> *Ibid.*



of protected persons, nor does it create any legal status. All persons deprived of their liberty for reasons relating to the armed conflict enjoy the same legal protection.<sup>64</sup> The Protocol applies automatically once the objective criteria for its application have been met.<sup>65</sup> Of course in practice, it can be difficult to make such an objective assessment, and there is nobody invested with the power to make it.

#### **2.4.2 Critique of Additional Protocol II**

Protocol II is an improvement on Common Article 3 in so far as it specifies in greater detail the fundamental guarantees which parties must respect during non-international armed conflicts.

Despite the developmental and supplementary nature of Additional Protocol II, what is more noteworthy, however, is what is missing from the Protocol. It contains a mere 28 Articles as compared with the 102 of Protocol I. There are no provisions on methods and means of warfare. There is no provision granting general protection to civilian objects, although there is a provision dealing with protection of cultural objects and a prohibition against attacks directed against the civilian population. However, Protocol II fails to include some specific prohibitions included in protocol I, including a direct prohibition against indiscriminate attacks, a direct prohibition against attacks on civilian objects, or indeed any provisions relating to the conduct of conflict. There is no specific prohibition of reprisals against the civilian population, although a prohibition against reprisals could be implied in Protocol II, in the same way as with Common Article 3. Some provisions concerning treatment of persons whose liberty has been included (the Protocol omits use of the term prisoners of war', treating military and civilian detainees

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<sup>64</sup> Commentary of 1987 material field of application.

<sup>65</sup> Additional Protocol II (Article I).

equally) have been included. There are also no provisions dealing with combatant or POW status. Neither does Additional Protocol II say anything about the duty of commanders or of the High Contracting parties and parties to the conflict with regard to repression of breaches of the fundamental guarantees.

#### **2.4.3 Customary International Laws of Non-International Armed Conflict**

International humanitarian law has its origins in the customary practices of armies as they developed over the ages and on all continents. The “law and customs of war”, as this branch of international law has traditionally been called, was not applied by all armies, and not necessarily vis-à-vis all enemies, now were all the rules the same. However, the pattern that could typically be found was restraint of behavior vis-à-vis combatants and civilians, primarily based on the concept of the soldier’s honour. The content of the rules generally included the prohibition of behavior that was considered unnecessarily cruel or dishonourable, and was not only developed by the armies themselves, but was also influenced by the writings of religious leaders.

The most significant landmark from the point of view of cataloguing these customs in one document was the drafting by Professor Francis *Lieber* of the Instructions for the Government of Armies of the United State in the Field, promulgated as General Order No. 100 by President Lincoln in 1863 during the American Civil War. The *Lieber Code*, as it is now known, strongly influenced the further codification of the laws and customs of war and the adoption of similar regulations by other states.

Together, they formed the basis of the draft of an international convention on the laws and customs of war presented to the Brussels Conference in 1874. Although this conference did not adopt a binding

treaty, much of its work was later used in the development of the 1899 and 1907 Hague Conventions and Declarations.

These treaties did not codify all aspects of custom, but its continued importance was reaffirmed in the so called “Martens clause”, first inserted in the preamble to the 1899 Hague Convention (II), which provides that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.<sup>66</sup>

The importance attributed to customary law, despite or because of, its partial codification, was most clearly seen in the reliance placed on it by the various war crimes trials after both the First and Second World Wars.<sup>67</sup>

In 1995, the intergovernmental Group of Experts for the Protection of War Victims met in Geneva and adopted a series of recommendations aimed at enhancing respect for international humanitarian law, in particular by means of preventive measures that would ensure better knowledge and more effective implementation of the law. Recommendation II of the Intergovernmental Group Experts proposed that:

The ICRC be invited to prepare, with assistance of parts in IHL representing various geographical regions and different legal systems, and in consultation with experts from governments and international organizations, a report on customary rules of international humanitarian law

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<sup>66</sup> 1899 Hague Convention II.

<sup>67</sup> Knut Dormann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, Cambridge University Press, 2003.

applicable in international and non-international armed conflicts, and to circulate the report to States and competent international bodies.<sup>68</sup>

In December 1995, the 26th International Conference of the Red Cross and Red Crescent endorsed this recommendation and officially mandated the ICTC to prepare a report on customary rules of international humanitarian law applicable in international and non-international armed conflicts:<sup>69</sup>

#### **2.4.4 International Humanitarian Treaty Law:**

International humanitarian treaty law is well developed and covers a wide variety of aspects of warfare, offering protection to victims of war and limiting permissible means and methods of warfare. The four Geneva Conventions of 1949 and their Additional Protocol of 1977 provide an extensive regime for the protection of persons who do not or no longer participate in armed conflict. The regulation of the means and methods of warfare in treaty law goes back to the 1868 St. Petersburg Declaration, the 1899 and 1907 Hague Conventions and the 1925 Geneva Gas and Protocol and has been addressed in the 1972 Biological Weapons Convention, the 1977 Additional Protocols, the 1980 Convention on Certain Conventional Weapon and its five Protocols, the 1993 Chemical Weapons Convention and the 1997 Ottawa Convention banning anti-personnel landmines. The protection of cultural property in the event of armed conflict is regulated in detail in the 1954 Hague Convention and its two Protocols, and a host of others.

There are however, two important impediments to applying these treaties to current armed conflicts. First, treaties apply only to the States that have ratified them. This means that different treaties

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<sup>68</sup> Meeting of the Intergovernmental Group of Experts for the Protection of War Victims, Geneva, 23-27 January 1995.

<sup>69</sup> Report on the follow-up to the International Conference for the Protection of War Victims, International Review of the Red Cross, No. 310, 1996, p. 58.

of international law apply to different armed conflicts depending on which treaties the States involved have ratified. While nearly all states have ratified the four Geneva Conventions of 1949, Additional Protocol I has not yet gained universal adherence. As the Protocol is applicable only between parties to a conflict that have ratified it, its efficacy today is limited because several States that have been involved in international armed conflicts are not parties to it. While many States have ratified the Protocol, several States in which non-international armed conflicts are taking place have not. In these non-international armed conflicts, Common Article 3 of the four Geneva Conventions often re-mains the only applicable treaty provision.

Secondly, this wealth of treaty law does not regulate a large proportion of today's armed conflicts in sufficient detail. The primary reason for this is that the majority of current armed conflicts are non-international, which are subject to far fewer treaty rules than international conflicts, although their number is increasing. In facts, only a limited number of treaties apply to non-international armed conflict as amended, the statute of the international criminal court, the Ottawa Convention barning anti-personnel landmines, the chemical Weapons Convention, The Hague Convention for the Protection of Cultural Property and its second Protocol and, as already mentioned, Additional Protocol II and Article 3 common to the four Geneva Conventions. While Common Article 3 is of fundamental importance, it only provides a rudimentary framework of minimum standards and does not contain much detail. Additional Protocol II usefully implements Common Article 3,<sup>70</sup> but it is still less detailed than the rules governing international armed conflicts contained in Additional Protocol I.

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<sup>70</sup> *Op. Cit.*

Common cause would suggests that such rules and the limits they impose on the way war is waged, should be equally applicable in international and no armed conflicts is an indication that this notion gaining currency within the international community.

The fore going provides evidence that many rules of customary international law apply in both international and non-international armed conflicts and shows the extent to which State practice has gone beyond existing treaty law and expanded the rules applicable to non-international armed conflicts. In particular, the gaps in the regulation of the conduct of hostilities in Additional Protocol II have largely been filled through State practice, which has led to the creation of rules parallel to those in Additional Protocol I, but applicable as customary law to non-international armed conflicts.

In conclusion, knowledge of the rules of customary international law is therefore of use to the many actors involved in the application, dissemination and enforcement of international humanitarian law, such as governmental authorities, arms bearers, international organizations, components of the International Red Cross and Red Crescent Movement and non-governmental organizations. A study on customary international humanitarian law may also be helpful in reducing the uncertainties and the scope for argument inherent in the concept of customary international law.

Knowledge of the rules of customary international law may also be of service in a number of situations where reliance on customary international law is required. This is especially relevant for the work of courts and international organisations. Indeed, courts are frequently required to apply customary international law. For instance, for the International Criminal Tribunal for the Former Yugoslavia which pursuant to Article 3 of its statute, has jurisdiction over violations of the laws and customs of war. As a

result, the Tribunal has had to determine whether certain violations of international humanitarian law were violations under customary international law over which the Tribunal has jurisdiction. In addition, in many countries, customary international law source of domestic and can be invoked for and adjudicated by national courts. Customary international law is also relevant to the work of international organizations in that it generally represents the law binding upon all member States.

## **2.5 Fundamental Principles of Non-International Armed Conflicts**

The rules regulating the conduct of hostilities are central to the framework of international humanitarian law. This highly articulated set of rules, found in both treaty and customary law, establishes the parameters by which adversaries must conduct their operations. These rules aim to limit the effects of hostilities, and are critical to the protection of civilians during armed conflict. Implicit in each rule is a balancing of the humanitarian imperative and military necessity.

Throughout the history of warfare, the conduct of hostilities has inflicted unspeakable suffering on millions of families and individuals. This remains the case today. Civilians and combatants alike are killed, wounded or maimed for life, and often lose loved ones or other property and belongings. Landmines, cluster munitions and other unexploded ordinance render entire regions uninhabitable for years and sometimes decades. Villages, cities and individual dwellings are destroyed, cultural property and religious sites damaged, and power plants, bridges and other critical infrastructure rendered useless, forcing entire population to flee their homes, with enormous humanitarian consequences. It has long been a central

objective of international humanitarian law, therefore, to prohibit unrestricted warfare and to regulate the conduct of hostilities so as to mitigate as much as possible, the “calamities of war.”<sup>71</sup>

The three most fundamental maxims of IHL relevant to the conducts of hostilities are as follows:

(1) the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;” (2) in pursuing this aim, “the right of the parties to the conflict to choose methods or means of warfare is not limited”; and (3) “the civilian population and individual civilians shall enjoy general protection against dangers arising from military operations”<sup>72</sup>

The principle of Distinction between civilians and combatants. This principle provides in Rule I of customary international law:

The parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attack must not be directed against civilians.

State practice establishes this rule as a norm of customary international law applicable in both international and non-international armed conflicts. The three components of this rule are interrelated and the practice pertaining to each of them reinforces the validity of the others. The term “combatant” in this rule is used not to enjoy the protection against attack accorded to civilians, but does not imply a right combatant status or prisoner of war status. This rule to be read in conjunction with the prohibition to attack persons recognized to be *hors de combat* and with the rule that civilians are protected against attack unless and for such time as they take a direct part in hostilities.

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<sup>71</sup> St. Petersburg Declaration.

<sup>72</sup> API, Art. 50(1).



There are many instruments that give credence to this principle. Article 13(2)<sup>73</sup> prohibits making the civilian population as such, as well as individual civilians, the object of attack.<sup>74</sup> The prohibition on directing attacks against civilians is also contained in Amended Protocol II to the Convention on Certain Conventional Weapons.<sup>75</sup>

It is also set forth in Protocol III to the Convention on Certain Conventional Weapons, which has been made applicable in non-international armed conflicts pursuant to an amendment of Article I of the convention adopted by consensus in 2001. The Ottawa Convention banning anti-personnel landmines States that the convention is based, inter alia, on the principle that a distinction must be made between civilians and combatants.<sup>76</sup>

Under the statute of the International Criminal Court, “internationally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities” constitutes a war crime in non-international armed conflicts.<sup>77</sup>

Alleged violations of this rule have generally been condemned by States, irrespective of whether the conflict was international or non-international. Similarly, the United Nation Security Council has condemned or called for an end to alleged attacks against civilians in the context of numerous conflicts both in international and non-international conflicts.

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<sup>73</sup> Additional Protocol II

<sup>74</sup> Additional Protocol II, Article 13(2) (adopted by consensus).

<sup>75</sup> Amended Protocol II to the CCW.

<sup>76</sup> Ottawa Convention, Preamble.

<sup>77</sup> ICC Statute, Article 8(2).

As early as 1938, the assembly of the league of Nations stated that “the intentional bombing of civilian populations is illegal.”<sup>78</sup> The 20th International Conference of the Red Cross in 1965 solemnly declared that governments and other authorities responsible for action in all armed conflicts should conform to the prohibition on launching attacks against a civilian population.<sup>79</sup> Subsequently, a UN General Assembly resolution on respect for human rights in armed conflicts, adopted in 1968, declared the principle of distinction to be applicable in all armed conflicts.<sup>80</sup> The ICRC also called on parties to both international and non-international armed conflicts to respect the distinction between combatants and civilians.<sup>81</sup>

*The Prohibition to attack those hors de combat.* Rule 47 of the customary international armed conflict provides that:

*Attacking persons who are recognized as hors de combat is prohibited. A person hors de combat is:*

- (a) anyone who is in the power of an adverse party;
- (b) anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness; or
- (c) anyone who clearly expresses an intention to surrender; provided he or she abstains from any hostile act and does not attempt to escape.

Article 4<sup>82</sup> states that:

All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to

<sup>78</sup> League of Nations, assembly, Resolution adopted on 30th September, 1938.

<sup>79</sup> 27th International Conference of the Red Cross and Red Crescent, Plan of Action for the years 2000-2003 (adopted by consensus).

<sup>80</sup> UN General Assembly, Res. 2444 (xxiii) (adopted by unanimous vote of III in favour, none against and no abstentions).

<sup>81</sup> The Practice of the ICRC.

<sup>82</sup> Additional Protocol II.

respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors

Article 4<sup>83</sup> prohibits several acts, specifically, violence to the life, health and physical or mental well being of persons, in particular murder, as well as cruel treatment such as torture, mutilation or any form of corporeal treatment; collective punishments; taking of hostages; acts of terrorism; outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; slavery and the slave trade in all their forms; pillage; threats to commit any of the foregoing acts.

Rule 47 is based on Common Article 3 of the Geneva Conventions, which prohibits “violence to life and person, in particular murder of all kinds” against persons placed *hors de combat*<sup>84</sup> In addition, this rule is contained in other instruments pertaining also to non-international armed conflicts.<sup>85</sup>

Under customary international law, a person can be placed *hors de combat* in three situations arising in both international and non-international armed conflicts:

(i) Anyone who is in the power of an adverse party; (ii) Anyone who is defenceless because of unconsciousness, shipwreck, wounds or sickness. This category is based on the Hague Regulations common Article 3 of the Geneva Conventions and Additional Protocol I which prohibits attacks on defenceless persons.<sup>86</sup> (iii) Anyone who clearly indicates an intention to surrender. The general tenet that

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<sup>83</sup> *Ibid.*

<sup>84</sup> *Ibid.*

<sup>85</sup> e.g Memorandum of Understanding on the application of IHL between Croatia and the SFRY, para 6.

<sup>86</sup> Hague Regulations, Article 23.

emerges from this practice is that a clear indication of unconditional surrender renders a person *hors de combat*. In land warfare, a clear intention to surrender is generally shown by laying down one's weapons and raising one's hands.

The ability to accept surrender under the particular circumstances of combat was discussed by the United Kingdom and the United States in the light of the war in the south Atlantic and the Gulf War respectively.<sup>87</sup>

The United Kingdom pointed out that it may not be possible to accept surrender from a unit while under fire from another position. Hence, a party which "takes" surrender has to come forward and submit to the control of the enemy forces.

The United States took the position that an offer of surrender has to be made at a time when it can be received and properly acted upon and that a last – minute surrender to an onrushing force may be difficult to accept. The question remains, however, as to how to surrender when physical distance may make difficult to indicate an intention to surrender or may subject one to charges of desertion. Another position taken by the United State is that retreating combatants, if they do not communicate an offer of surrender, whether armed or not, are still subject to attack and that there is no obligation to offer an opportunity to surrender before an attack.

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<sup>87</sup> Find Report to Congress on the conduct of the Persian Gulf War.

Meanwhile, according to Additional Protocol I, immunity from attack is conditional on refraining from any hostile act or attempt to escape.<sup>88</sup> The commission of these acts signifies that the person in question is in fact no longer *hors de combat* and does not qualify for protection under this rule.

### 2.5.1 Unnecessary Suffering

The prohibition of the use of means and methods of warfare which are of a nature to cause superfluous injury or unnecessary suffering was included by consensus in the draft of Additional Protocol II but was dropped at the last moment without debate as part of a package aimed at the adoption of a simplified text.<sup>89</sup> There was no indication, however, of any objection to the rule as such in this context.

Originally restrictions and prohibitions on the use of certain weapons were motivated by the desire to protect combatants from disproportionate harm and suffering. As early as 1868, the preambular paragraph of the St. Petersburg Declaration stated.

That the only legitimate object (...) during war is to weaken the military forces of the enemy; That for this purpose it is sufficient to disable the greatest possible number of men; that this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disable men, or render their death inevitable; That the employment of such arms would therefore, be contrary to the laws of humanity.

This reason inspired the emergence of one of the most basic principles of international Humanitarian law, which prohibits employing “weapons, projectiles and means and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.”<sup>90</sup> In application of this principle, IHL

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<sup>88</sup> Additional Protocol I, Article 41 (adopted by consensus).

<sup>89</sup> Draft Additional Protocol II, Article 20(2)

<sup>90</sup> Hague Regulations, Article 23€; API, Article 35(2); CIHL, Rule 70.

restricts or prohibits certain types of weapon, the effects of which are considered to be excessively cruel regardless of the circumstances, such as binding laser weapons, expanding bullets and weapons that injure by means of non-detectable fragments. The prohibition against causing superfluous injury or unnecessary suffering also works a general principle by which all means and methods of warfare have to be measured.

In the absence of district treaty criteria as to what suffering is “unnecessary” and what injury “superfluous,” the rule requires that a balance be struck between considerations of military necessity and humanity. This seems to be the approach taken by many States.<sup>91</sup> And by the ICJ in its advisory opinion on nuclear weapons, in which it argues that the prohibition against causing superfluous injury or unnecessary suffering makes it unlawful to cause combatants “harm greater than that unavoidable to achieve legitimate military objectives.”<sup>92</sup>

### **2.5.2 The Principle of Military Necessity:**

The “principle of military necessity” permits measures which are actually necessary to accomplish a legitimate military purpose and are not otherwise-prohibited by international humanitarian law. In the case of an armed conflict the only legitimate military purpose is to weaken the military capacity of the other parties to the conflict. In times of conflict, military necessity is the notion used to justify the recourse to violence. Any violence that is not justified by military necessity is prohibited by the law of armed conflict.

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<sup>91</sup> CIHL Commentary on Rule 70.

<sup>92</sup> ICJ, Legality of the Threat or use of Nuclear Weapons (Advisory Opinion), 8 July 1996; ICJ Reports 1996, para. 25.

No principle is more central to International Humanitarian Law (IHL), nor more misunderstood than that of military necessity. It has been proffered both to justify horrendous abuses during armed conflicts and to impose impractical and dangerous restrictions on those who fight. Contemporary conflicts, as well as ongoing efforts to clarify IHL's application therein, have further muddied the waters.

In IHL, the principle appears in two guises; justification for normative deviation, and as an element of the *les scripta*. The first notion is quickly dispatched, for the law surrounding military necessity as a justification for violating IHL is well settled. With regard to the latter, military necessity appears as both a specific element and a general foundational principle.

Although the catalogue of direct references to military necessity in IHL is slim, the principle pervades the entire body of law by undergirding individual rules. In this central role, military necessity exists in equipoise with the principle of humanity, which seeks to limit the suffering and destruction incident to warfare. This symbolic relationship determines in which direction, and at what speed, IHL evolves. It also determines the manner of its application on the battlefield.

In order to maintain an acceptable balance between the two principles, strict fidelity to the existing IHL rules is essential. It is not appropriate, for instance, to supplement express rules with any further requirement to assess military necessity or humanity considerations; the requisite balancing has already taken place. Case – by case determinations of where the balance should lie would generate disrespect for

extant rules on the part of those negatively affected and render the norms to be applied in the fog of war less certain for all.<sup>93</sup>

### **2.5.3 The Principle of Proportionality**

The principle of proportionality prohibits attacks “which may be expected to cause incidental loss of civilian life, injury to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”<sup>94</sup> Given that direct attacks against civilians and civilian objects are already prohibited, the proportionality evaluation is relevant only when attacks are directed against lawful targets.

The key term to be examined in the proportionality equation is “excessive.” While the requirement of proportionality is absolute, the standard of “excessiveness” is relative. IHL does not establish an objective threshold above which the infliction of incidental harm would always be excessive. In principle, targets with a comparatively high military value (high-value targets) will justify greater incidental harm than targets with a comparatively low military value (low – value targets).

Although the proportionality assessment necessarily contains subjective elements, a certain degree of objective guidance can be derived from the terminology used in the treaty text. Thus the infliction of incidental harm on protected persons or objects can only be justified by advantages of a “military” nature, and not by political, economic or other non-military benefits. Moreover, the anticipated military advantage must be “concrete” and “direct” and not of a merely hypothetical, speculative or indirect nature. It must

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<sup>93</sup> N.S. Michael, *Military Necessity and Humanity in International Humanitarian Law: Preserving the Delicate Balance*, Retrieved from <[www.casebook.icrc.org](http://www.casebook.icrc.org)> 20/8/2021.

<sup>94</sup> API, Art. 51(5)(b); CIHL. Rule 14.



also be expected to result from a specific attack or operation, and not from a military campaign as a whole. Therefore, the overarching intention of “winning the war” cannot, as such, serve to justify the infliction of incidental harm on persons and objects protected against direct attack.

When assessing the excessiveness of incidental harm, the foreseeable second - and third – order effects of an attack must also be taken into account. For instance, attacks against dual-use infrastructure, such as electrical grids or telecommunication networks, may not only have the immediate effect of preventing the enemy from using that infrastructure for military purposes and exposing the civilian population to short – term shortages. They may well have a crippling effect on the medium – and long – term ability of the civilian authorities and medical services concerned, and of the general civilian population, to cope with the everyday consequences of the war.

## **PROTECTION OF CIVILIANS DURING NON-INTERNATIONAL ARMED CONFLICTS**

### **3.1 Meaning of Civilian**

The Additional Protocol II provides for the definition of a civilian thus:

A civilian is any person who does not belong to one of the categories of persons referred to in Article 4A(1),(2),(3) and (6) of the third convention and in Article 43 of this Protocol.<sup>95</sup>

This provision does not expressly define who a civilian person is and so recourse must be had to the Article 4A(1), (2), (3) and (6) GCIII and Article 43 APII mentioned above.<sup>96</sup>

Article 50 of the 1977 Additional Protocol I states:

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<sup>95</sup> Article 50 Para. 1 API.

<sup>96</sup> C.W. Chris, International Humanitarian Law: (Accra): Read Wide Publishers, 2010 at 128.

Article I of the 1938 International Law Association (ILA) Draft Convention for the protection of civilian Populations against New Engines of War provides:

The phrase “civilian population” within the meaning of this convention shall include all those not enlisted in any branch of the combatant services nor for the time being employed or occupied in any belligerent establishment as defined in Article 2.

Rule 5<sup>97</sup> provides as follows:

Civilians are persons who are not members of the armed force. The civilian population comprises all persons who are civilians.

The definition of civilians as persons who are not members of the armed forces is set forth in Article 50 of Additional Protocol I, to which no reservations have been made.<sup>98</sup> It is also contained in numerous military manuals.<sup>99</sup> This practice includes that of States not at the time, party to Additional Protocol I.<sup>100</sup>

In non-international armed conflicts, the definition that “any person who is not a member of armed forces is considered to be a civilian” and that “the civilian population comprises all persons who are civilians” was included in the draft of Additional Protocol II.<sup>101</sup>

The first part of this definition was amended to read that “a civilian is anyone who is not a member of the armed forces or of an organized armed group and both parts were adopted by consensus in

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<sup>97</sup> Customary International Humanitarian Law (CIHL).

<sup>98</sup> Additional Protocol I, Art. 50 (Adopted by Consensus).

<sup>99</sup> The Military Manuals of Argentina, Australia, Benin etc.

<sup>100</sup> The Practice of France, Indonesia, Israel etc.

<sup>101</sup> Draft Additional Protocol II Submitted by the ICRC to the Diplomatic Conference Leading to the Adoption of the Additional Protocols, Art. 25.

Committee III of the Diplomatic Conference leading to the adoption of the Additional Protocols.<sup>102</sup>

However, this definition was dropped at the last moment of the conference as part of a package aimed at the adoption of a simplified text.<sup>103</sup> As a result, Additional Protocol II does not contain a definition of civilians or the civilian population even though these terms are used in several provisions.<sup>104</sup> It can be argued that the terms “dissident armed forces or other organized armed groups... under responsible command” in Article I of Additional Protocol II inferentially recognize the essential conditions of armed forces, as they apply in international armed conflict,<sup>105</sup> and that it follows that civilians are all persons who are not members of such forces or groups.<sup>106</sup> Subsequent treaties, applicable to non-international armed conflicts, have similarly used the terms civilians and civilian population without defining them.<sup>107</sup>

While State armed forces are not considered civilian, practice is not clear as to whether members of armed opposition groups are civilians subject to *Rules 6*<sup>108</sup> on loss of protection from attack in case of direct participation or whether members of such groups are liable to attack as such, independently of the operation of *Rule 6*.<sup>109</sup> Although the Military Manual of Colombia defines the term civilians as “those who do not participate directly in military hostilities (internal conflict, international conflicts)”,<sup>110</sup> most

<sup>102</sup> Draft Additional Protocol II, Art. 25 as adopted by Committee III.

<sup>103</sup> *Ibid.*

<sup>104</sup> Additional Protocol II, Articles 13-15 and 17-18.

<sup>105</sup> Rule 4, CIHL.

<sup>106</sup> Michael, Brother, Karl Joseph Partsch, Weldemar A. Solf (eds), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p. 672.

<sup>107</sup> Amended Protocol II to the CCW. Art. 3(7)-(II); Protocol III to the CCW, Art. 2; Ottawa Convention, Preamble, ICC Statute, Art. 8(2)(e)(i),(iii) and (viii).

<sup>108</sup> Customary International Humanitarian Law (CIHL).

<sup>109</sup> *Ibid.*

<sup>110</sup> Colombia, *Instructors' Manual*.

manuals define civilians negatively with respect to combatants and armed forces and are silent on the status of members of armed opposition groups.

### **3.2 General Protection of Civilians during Non-International Armed Conflicts**

The protection of the civilian population is of importance in any armed conflict. In ancient times, this protection was not provided for, as both civilians and military personnel were liable to be attacked taken prisoners or killed by the adverse party.<sup>111</sup> Under the modern international humanitarian law, safeguards have been put in place to guarantee the protection of the civilian population during an armed conflict. In similar fashion, the civilian population is also to be protected in a non-international armed conflict from the effects of war. The rules designed to protect the civilian population are embodied primarily in the Geneva Conventions and the Law of The Hague, Customary International humanitarian law also has a role to play in the protection of the civilian population as well as the Additional Protocols of 1977 amongst other international agreements.

The protection available to civilians in non-international armed conflict is provided for under Common Article 3 of the Four Geneva Conventions as well as the provisions of the Additional Protocol II. Article 3 imposes a duty on the parties to the non-international conflict to treat all persons who take no active part in hostilities humanely without any distinction on the basis of “race colour, religion faith, sex, birth or wealth, or any other similar criteria”. Civilian persons fall within the category of those who take no active part in hostilities and as such should be treated humanely. Article 3 goes further to prohibit violence to life and person as well as outrages upon personal dignity which include humiliating and

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<sup>111</sup> C.W. Chris, *op. cit.*

degrading treatment. This provision fortified the protection available to civilians in times of internal armed conflict.

The Additional Protocol II contains further provisions relating to the protection of civilian populace during internal armed conflict. For instance, it provides that:

All persons who do not take a direct part or who have ceased to take part in hostilities whether or not their liberty has been restricted are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse destruction. It is prohibited to order that there shall be no survivors.<sup>112</sup>

The categorization of “persons who do not take a direct part in hostilities” similar applies to civilian persons. Additional Protocol II hence assumes that the entire population is civilian and therefore must be granted the protection established by humanitarian law, “unless and for such time as they take a direct part in hostilities”.<sup>113</sup>

In non-international armed conflicts, humanitarian law establishes that individuals may belong to the category of civilians yet participate directly in hostilities at certain times. Additional Protocol II establishes that such individuals shall benefit from the protection granted civilians. This protection may be suspended only for the duration of their direct participation in hostilities.

Additional Protocol II,<sup>114</sup> define the protection and means of protection that must be adopted for the benefit of civilians:

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<sup>112</sup> Art. 4 AP II.

<sup>113</sup> AP II Art. 13. 3.

<sup>114</sup> Art. 13 – 18.

- i. “The civilian populations and individual civilians shall enjoy general protection against the dangers arising from military operations.” To this effect, they must never be the object of attacks or of any acts or threats of violence the primary purpose of which is to spread terror.<sup>115</sup>
- ii. Starvation of civilians as a method of combat is prohibited. It is therefore prohibited to attack, destroy, or remove objects indispensable to the survival of the civilian population.<sup>116</sup>
- iii. Works or installations containing dangerous forces – namely, dams, dikes, nuclear plants, and electrical generating stations, must never be the target of an attack if such an attack may cause the release of dangerous forces and consequently cause severe losses among the civilian population.<sup>117</sup>
- iv. Cultural objects and places of worship that constitute the cultural or spiritual heritage of people must never be attacked or used in support of the military effect.<sup>118</sup>
- v. “The displacement of the civilian population shall not be ordered for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand”.<sup>119</sup> This it must respect strict conditions.

International Humanitarian Law (IHL) is based on the principle of distinction between the armed forces, who conduct the hostilities on behalf of the parties to an armed conflict, and civilians, who are presumed not to directly participate in hostilities and must be protected against the dangers arising from military

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<sup>115</sup> Art. 13.

<sup>116</sup> Art. 14.

<sup>117</sup> AP. II Art. 15.

<sup>118</sup> AP. II Art. 16.

<sup>119</sup> AP. II Art. 17.

operations. Nonetheless, aspects of contemporary warfare have led to an increased intermingling of civilians with armed forces as well as warfare in urban settings.

Difficulties in effectively distinguishing between legitimate military objectives and civilian objects jeopardize the capacity of IHL to protect victims of war and limit armed violence in times of conflict.

The status of civilians who participate directly in hostilities is provided for in the two Additional Protocols of 1977 relating to international and non-international armed conflicts.<sup>120</sup> This status provides that such civilians lose their protection as civilians during the period of their direct participation in hostilities. International humanitarian law seeks to control the consequences of this loss of protection of civilian status because it does not result, as such, in the acquisition of protection afforded to those with combatant status. This is therefore a dangerous, hybrid status, which the two Protocols attempt to limit in time and according to the situation of the persons concerned.<sup>121</sup>

### **3.3 Categories of Civilians**

Apart from the fundamental guarantees owed to every human being in the power of a belligerent party, IHL affords special protection to various categories of person who, owing to their sex, age, profession or status, are particularly exposed to certain risks.

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<sup>120</sup> AP I Art. 45. 1, 51.3; AP II Art. 13.3.

<sup>121</sup> “Direct Participation in Hostilities.” Special issue, *International Review of the Red Cross* 8.72 (December 2008): 853 – 81.

### 3.3.1 Women

In time of war, women are often left to take care of children and other dependants on their own and under extremely difficult circumstances. In addition, they are particularly exposed to the risk of sexual violence and abuse by weapon-bearer or organized criminal groups. International humanitarian law therefore emphasizes that women must be “specially protected against any attack on their honour, in particular against rape, forced prostitution, or any form of indecent assault.”<sup>122</sup>

Rule 134<sup>123</sup> provides that:

The specific protection, health and assistance needs of women affected by armed conflict must be respected.

While Common Article 3 of the Geneva Conventions and Additional Protocol II do not contain a general rule stating that the specific needs of women must be respected, they refer to specific aspects of this rule by requiring respect for the person and honour of each, prohibiting violence to life, health and physical and mental well-being, prohibiting outrages upon personal dignity, including humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault, and requiring the separation of women and men in detention.<sup>124</sup>

The UN Security Council, ECOSOC and the UN Commission on Human Rights do not distinguish between international and non-international armed conflicts with respect to the protection of women in armed conflicts.<sup>125</sup> The UN Security Council, for example, has called for respect for the specific needs of

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<sup>122</sup> GC IV, Art. 27(2); AP I, Art. 76(1).

<sup>123</sup> Customary International Humanitarian Law (CIHL).

<sup>124</sup> Geneva Conventions, Common Article 3; Additional Protocol II, Articles 4-5 (adopted by consensus).

<sup>125</sup> UN Security Council, Res.



women in the context of particular conflicts, such as in Afghanistan but also in general.<sup>126</sup> In a resolution adopted in 2000 on protection of civilians in armed conflicts, the UN security Council expressed its grave concern at the “particular impact that armed conflict has on women” and reaffirmed “the importance of fully addressing their special protection and assistance needs”.<sup>127</sup> The UN Secretary-General’s Bulletin on observance by United Nations forces of international humanitarian law provides that “women shall be specially protected against any attack.”<sup>128</sup>

The UN special Rapporteur on violence against Women, its causes and consequences and the committee on the elimination of Discrimination against Women have expressed concern at the violation of women’s rights in international and non-international armed conflicts.<sup>129</sup> In 1992, the Committee started that gender based violence impairs or nullifies “the right to equal protection according to humanitarian norms in time of armed conflicts.”<sup>130</sup>

The Plan of Action for the years 2000-2003, adopted by the 27th International conference of the Red Cross and Red Crescent in 1999, called for “particular protective measures for women and girls.” The specific needs of women may differ according to the situation in which they find themselves – at home, in detention or displaced as a result of the conflict – but they must be respected in all situations.

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<sup>126</sup> *Ibid.*

<sup>127</sup> *Ibid.*

<sup>128</sup> UN Secretary-General’s Bulletin, Section 7.3.

<sup>129</sup> UN Commission on Human Rights, Reports of the Special Rapporteur on Violence against Women, its Causes and Consequences.

<sup>130</sup> Committee on the Elimination of Discrimination against Women, General Recommendation No. 19 (violence against Women).

The 26th International Conference of the Red Cross and Red Crescent indicated other specific needs when it called for measures” to ensure that women victims of conflict receive medical, psychological and social assistance”. Similarly, in 1999, in a report to the UN General Assembly, the Committee on the Elimination of Discrimination against women required States to ensure that “adequate protection and health services, including treatment and counseling, are provided for women in specially difficult circumstances, such as those trapped in situations of armed conflict.”<sup>131</sup>

### 3.3.2 Children

Pursuant to the convention on the Rights of the Child, “a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier”<sup>132</sup> the Geneva Conventions and Additional Protocols use different age – limits with respect to different protective measures for children, although 15 is the most common.<sup>133</sup>

Additional Protocol II states that “children shall be provided with the care and aid they require”.<sup>134</sup> Pursuant to the convention on the Rights of the child, States must respect and ensure respect for rules of international humanitarian law relevant to the child and they must take “all feasible measures to ensure protection and care of children who are affected by armed conflict”.<sup>135</sup> Similar language can be found in the African Charter on the Rights and Welfare of the Child.<sup>136</sup> The requirement of special respect and protection for children is contained in other instruments pertaining also to non-international armed

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<sup>131</sup> Committee on the Elimination of Discrimination against Women, Report to the UN General Assembly.

<sup>132</sup> Convention on the Rights of the Child, Article I.

<sup>133</sup> 18 years of age: Compulsion to work in Occupied territory (Fourth Geneva Convention).

<sup>134</sup> Article 4(3).

<sup>135</sup> *Ibid.*

<sup>136</sup> Article 22.

conflicts,<sup>137</sup> which the 1989 Convention on the Rights of the Child initially adopted the same obligation,<sup>138</sup> its Optional Protocol of May 2000 lifted the age limit for compulsory recruitment to be 15 years, called on States to raise the minimum age for voluntary recruitment above 15 years and provided that non-State armed groups should not under any circumstances recruit or use in hostilities children under 15 years of age.<sup>139</sup> If children fall into the power of an adverse party after having directly participated in hostilities, they continue to benefit from the special protection accorded to children, whether or not they are prisoners of war (POW).<sup>140</sup>

### **3.3.3 Death Penalty on Children**

The Fourth Geneva Convention provides that “the death penalty may not be pronounced against a protected person who was under eighteen years of age at the time of the offence”.<sup>141</sup> Additional Protocol II prohibits the imposition of the death penalty on children under 18 years of age at the time of the offence.<sup>142</sup>

### **3.3.4 Internally Displaced Persons (IDPs)**

People have been uprooted by prosecution in all ages. What is unique today is the massive scale of such movements, within and across national borders, based on the increased number of armed and conflicts situations coupled with systematic injustices, 40 countries, mainly in Africa and Asia, are in

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<sup>137</sup> Agreement on the application of International Humanitarian Law between the Parties to the conflict in Bosnia and Herzegovina, para. 2.3.

<sup>138</sup> Convention on the Rights of the Child, 20 November 1989, Art. 38(3).

<sup>139</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in armed conflicts, 25 May 2000, Arts. 2-4.

<sup>140</sup> AP I, Art. 77(3).

<sup>141</sup> Art. 68, Fourth paragraph.

<sup>142</sup> Art. 6(4) (Adopted by Consensus).

active conflicts, and over 92 countries globally have become less peaceful over the last 12 years. Yet, unlike in the past, currently there is greater awareness and willingness on the majority of international community to address these atrocities.

Internally displaced people (IDPs), in the context of International Humanitarian Law (IHL) are those who have been forced or obliged to leave their homes behind, notably for reasons related to armed conflict or other voidance, and who remain within the borders of their country. Therefore, IDPS have not crossed borders to find safety. They stay within their own country and remain under the protection of its government, even if that government is the reason for their displacement.

Today, Internally Displaced People (IDPs) are amongst the most vulnerable groups of persons as there is no universal, legally binding instrument that specifically addresses their plight. This is irrespective of the UN Guiding Principles on Internal Displacement of 1998, which remains as the only universally accepted international framework for the protection of IDPS. This is complemented by other regional instruments such as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa,<sup>143</sup> which entered into force on 6 December 2012, as the first-ever legally – binding regional instrument for the protection and assistance of IDPS.

Accordingly, IDPs are partly protected by a gamut of laws including international humanitarian law, refugee law, international human rights law, and of course, the national law of the State concerned. The present system is *ad hoc*, with no organization having a global mandate to protect and assist the

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<sup>143</sup> Kampala Convention, 2009.

internally displaced. There exists what can be called a “protection gap” that exists not only because of the sensitivity of the subject within the country concerned, but also various gaps within the international framework. Resultantly, the international law has not succeeded in effectively preventing internal displacement.

However, the UN Charter, especially the rules on use of force is also relevant to the IDPs. Additionally, the UN Guiding Principles on Internal Displacement provide useful guidance on displacement specific aspects. They have broad support from the international community, and many states have incorporated them into domestic laws. Many of the rules contained in the Guiding Principles are part and parcel of international human rights law and international humanitarian law.

Although the principles<sup>144</sup> are not a binding legal document, they have already gained, in a short time, standing and authority. They have been acknowledged by the UN and endorsed by the major international humanitarian and development organizations. They have begun to be used in the field as an advocacy tool by international organization, regional bodies and NGOs.

### **3.3.5 International Committee of the Red Cross (ICRC) and Internal Displacement**

Internal displacement is frequently the consequence of violations of IHL during armed conflicts. When civilians flee a conflict zone, this is a good indication that the warring parties are indifferent to their protection or, worse, are deliberately targeting them. It is expected that every effort is made to prevent such displacement. Wherever IDPs find themselves and whatever the reason for their displacement, they

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<sup>144</sup> The 1998 United Nation Guiding Principles on Internal Displacement.

remain as civilians and, as such, are entitled to every protection afforded that category of individuals under IHL.

The role of the International Committee of the Red Cross is to protect and assist persons affected by armed conflict and other situations of violence. To this end, the ICRC takes direct and immediate action in response to emergency situations, while at the same time promoting preventive measures, such as the dissemination of IHL and its incorporation in national legislations. Under international humanitarian law, people are protected from and during displacement as civilians, provided they do not take a direct part in hostilities. While they are displaced, IDPs are entitled to the same protection from the effects of hostilities and the same relief as the rest of the civilian population. Return is only expressly addressed by IHL in the context of evacuations. In such cases, displaced people need to be transferred back to their homes as soon as hostilities in the area have ceased. A right of return can arguably be inferred *a fortiori* or a stronger reason following unlawful displacement.<sup>145</sup>

The International Committee of the Red Cross's overall objective is to alleviate the suffering of people in armed conflict and other situations of violence. To that end, the organizations strives to provide effective and efficient assistance and protection for such persons, be they displaced or not, while taking into consideration the action of other humanitarian organization. ICRC's assistance to IDP's can include distributing relief supplies (such as food, water and essential house-hold items), and providing shelter, and hygiene and health care programmes.

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<sup>145</sup> Internally Displaced Persons and International Humanitarian Law, ICRC Advisory Service on International Humanitarian Law (2017) 1.

### **3.4.1 United Nations High Commissioner for Refugees and Internally Displace Persons**

The UNHCR believes that the pretention of displacement and the protection of IDP's and other affected populations within their own country are the responsibility of national authorities. However, and particularly in situations of armed conflict IDPs may find themselves over territories where State authority is absent or difficult to enforce. In such situations the prevention of displacement and the protection of IDPs is also the responsibility of non-State actors. The UNHCR has identified the “protection gap” that exists not only because of the sensitivity of the subject within the country concerned, but also various gaps within the international framework. In its cluster approach”, the UNHCR has identified the “protection gap”, and created institutional mechanism to ensure that protection is a care component and a crosscutting element of humanitarian response.

The UNHCR further maintains that although the critical test of any humanitarian response is what happens on the ground, until now there has been no comprehensive and practical guidance on how to operationalize protection in situations of internal displacement.<sup>146</sup>

### **3.4.2 UN Guiding Principles on Internal Displacement**

In 1998, the Representative of the UN Secretary-General on Internally Displaced People, Mr. Francis M. Deng submitted the Guiding Principles on Internal Displacement to the then UN Commission on Human Rights. These principles, although not a binding legal instrument, have since gained considerable authority. The Heads of States and Governments assembling in New York for the September

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<sup>146</sup> UNHCR Handbook for the Protection of Internally Displaced Persons (March, 2010).

2005 World Summit unanimously recognized them as an “important international framework for the protection of internally displaced persons,<sup>147</sup> and the General Assembly has not only welcomed “the fact that an increasing number of States, United Nations agencies and regional and non-governmental organizations are applying them as a standard” but also encouraged “all relevant actors to make use of the Guiding Principles when dealing with situations of internal displacement”.<sup>148</sup>

A key notion affirmed in the Guiding Principles is that States have the primary responsibility to prevent displacement, to protect and assist IDPs under their jurisdiction, and to provide durable solution to their situation, in order to fulfil this responsibility. States need to have in place domestic normative and policy frameworks, with necessary implementing structures and processes, so that they can respond effectively to the specific needs and vulnerabilities of IDPs.<sup>149</sup>

The UN Guiding principles, however, do not attempt to explicitly address the gaps in the legal protection of IDPs, but they do restate the existing international norms related to them and attempt to provide governments and international organizations with guidance on how to respond to the needs of IDPs.

### **3.4.3 Medical Personals**

According to Additional Protocol I,<sup>150</sup> the term “medical personnel” refers to military or civilian persons who have been formerly assigned by a party to a conflict exclusively to medical transports. Such

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<sup>147</sup> UN General Assembly GA Resolution A/60/L. 1 para. 132.

<sup>148</sup> (A/RES/62/153 para. 10).

<sup>149</sup> Internally Displaced Persons and International Humanitarian Law, ICRC Advisory Service on International Humanitarian Law, (2017), 2.

<sup>150</sup> Similar Provisions are Provided in Article 36 GC II and Article 24-26 GC I.



assignments may be either permanent or temporary. The assignments also include collection, transportation, diagnosis or treatment of the wounded, sick and shipwrecked, or the prevention of disease.

The term includes:

- i. Medical personnel of a party to the conflict, whether military or civilian, including those described in the first and second Conventions and those assigned to civil defence organizations.
- ii. Medical personnel of national Red Cross (Red crescent) societies and other national voluntary aid societies duly recognized and authorized by a party to the conflict;
- iii. Medical personnel made available to a party to the conflict for humanitarian purposes by a neutral or other State which is not a party to that conflict by a recognized and authorized aid society of such a State; and by an impartial international humanitarian organization.

#### **3.4.4 Duty to Respect and Protect**

According to Articles 24 and 25 of the Geneva Convention, medical personnel shall be respected and protected in all circumstances.

Article 16<sup>151</sup> provides that:

It is prohibited to punish persons for carrying out medical activities compatible with medical ethics or to compel persons engaged in medical activities to perform acts or to carry out work contrary to the rules of medical ethics.

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<sup>151</sup> Additional Protocol I.

Personnels exclusively assigned to medical duties must be respected and protected in all circumstances.<sup>152</sup> This means that medical personnel may not be directly attacked, threatened or hindered in his activities, but also that they and their particular role must be actively protected and supported by the belligerents. The duty to respect and protect medical personnel is not a personal privilege but a derivative of the protection afforded to the wounded, the sick and the shipwrecked. Therefore, medical personnel lose their special protection pursuant to the same principles as medical units if they commit outside their humanitarian function, acts harmful to the enemy,<sup>153</sup> (acts of hostilities).

#### **3.4.5 Loss of Protection due to acts Harmful to the Enemy**

This special protection of medical units ceases when they are used to commit, outside their humanitarian function, acts harmful to the enemy.<sup>154</sup> Treaty IHL does not define “acts harmful to the enemy,” but it is clear that such acts do not necessarily have to involve offensive combat action.

This special loss of protection does not, however, necessarily entail loss of protection against direct attack. If medical units are used to commit acts harmful to the enemy, such as collecting and communicating intelligence unrelated to combat operations, they may lose their special protection as medical units, but still retain their status as civilian objects.

#### **3.4.6 Journalists**

International humanitarian law establishes two different status for journalists in situation of armed conflict: “War correspondents” who are accredited with the armed forces, and other journalists.

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<sup>152</sup> *Ibid.*

<sup>153</sup> GCI, Art. 21; API, Art. 13; CIHL Rules 25 and 27.

<sup>154</sup> *Ibid.*

Historically, the sole status of war correspondent was defined by the Third Geneva Convention of 1949 for international armed conflict. War correspondents (journalists authorized directly by a party to the conflict to follow its troops) who are captured in the exercise of their functions in an area of conflict are considered prisoners of war. This puts them under the protection of the Third Geneva Convention.

This protection extended to other categories of journalists who are not accredited with the armed forces. These journalists have the status of civilians and are to be protected as such.<sup>155</sup> Although Additional Protocol I is meant to be applied to international armed conflicts, it is always possible to request that its provisions also be respected in non-international armed conflicts.

Indeed, according to Rule 34<sup>156</sup> published by the ICRC in 2005, “civilian journalists engaged in professional missions in area of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities” whether it be in a non-international or an international armed conflict.

Civilian journalists engaged in professional missions in areas of armed conflict must be respected and protected as long as they are not taking a direct part in hostilities.

Journalists engaged in professional missions in areas of armed conflict are considered civilians. As such, they may not be targeted. They are protected by their civilian status, on the condition that they refrain from any activity that might jeopardize their civilian status and character.

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<sup>155</sup> Art. 79, API.

<sup>156</sup> Customary International Humanitarian Law.

Respect for the rules of professional ethics and independence of the press strengthen the protection of journalists civilian status against potential accusation of participation in hostilities or providing military advantage to one side of the conflict.

### **3.4.7 Loss of Protection**

Like other civilians, journalists lose their protection against attack when and for such time as they take a direct part in hostilities.<sup>157</sup> This principle is also recognized in Article 79(2),<sup>158</sup> which grants protection to civilian journalists “provided that they take no action adversely affecting their status.” This also implies that journalists, like any other person entering a foreign country must respect that country’s domestic regulations concerning access to its territory. Journalists may lose their right to reside and work in a foreign country if they have entered illegally. In other words, the protection granted to journalists under international humanitarian law in no way changes the rules applicable to access to territory.

### **3.5.3 Use of Civilians as Human Shield during Armed Conflicts**

It is prohibited to seize or to use the presence of persons protected by the Geneva Conventions as human shields to render military sites immune from enemy attacks or to prevent reprisals during an offensive.<sup>159</sup> It is hence prohibited to direct the movement of protected persons in order to attempt to shield military objectives or operations. Many categories of persons are specifically protracted by humanitarian law, such as civilians, the wounded and sick, prisoners of war, and medical personnel’s.

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<sup>157</sup> Rule 6, CIHL op. cit.

<sup>158</sup> Additional Protocol I supra.

<sup>159</sup> GCIV Arts. 28, 49; API Art. 51(7); AP II Art. 5. 2. C.

Such acts are clearly established as war crimes under international humanitarian law this is also reflected in the statute of the International Criminal Court (ICC), which includes the use of a civilian or protected person as a shield for military operations in its definition of war crimes, when committed during an international conflict.<sup>160</sup>

Customary international humanitarian law also prohibits the use of human shields, both in international and non-international conflict. Rule 97<sup>161</sup> provides that: *The use of human shields is prohibited*. In the context of international armed conflicts, this rule is set forth in the Third Geneva Convention (with respect to prisoners of war), the Fourth Geneva Convention (with respect to protected civilians) and additional Protocol I (with respect to civilians in general).<sup>162</sup>

With respect to non-international armed conflicts, Additional Protocol II does not explicitly mention the use of human shields, but such practice would be prohibited by the requirement that “the civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”<sup>163</sup> It is significant, furthermore, that the use of human shields has often been equated with the taking of hostages,<sup>164</sup> which is prohibited by Additional Protocol II,<sup>165</sup> and by customary international law.<sup>166</sup>

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<sup>160</sup> Art. 8(2) b. xxiii of ICC statute.

<sup>161</sup> The 2005 ICRC Customary IHL study.

<sup>162</sup> Third Geneva Convention, Art. 23, first para, Fourth Geneva Convention, Art. 28; API Art. 51(7) adopted by consensus.

<sup>163</sup> AP II Art. 13(1).

<sup>164</sup> The Practice of El Salvador and the European Community.

<sup>165</sup> Art. 4(2)(c) of AP II.

<sup>166</sup> Rule 96.

In addition, deliberately using civilians to shield military operations is contrary to the principle of distinction and violated the obligation to take feasible precautions to separate civilians and military objectives.<sup>167</sup> The ICRC has reminded parties to both international and non-international armed conflicts of the prohibition of using human shields.<sup>168</sup>

Jurisprudentially, the Israel Supreme Court introduced a notion of “*free will*” in the concept of human shield which greatly weakens the immediate protection of civilians from this kind of practice during military operations.<sup>169</sup> In this judgment, the court questioned the law applicable to civilians who serve as “*human shields*” to protect terrorists who participate in hostilities. They themselves are victims of terrorism.

However, if they do so of their own free will, out of support for the terrorist organization, they should be seen as persons taking “a direct part in the hostilities”<sup>170</sup> This nuance can be assessed only through a posterior analysis and on a case-by-case basis. This should be the work of a judicial body, which would determine on a case-by-case basis if the recourse to human shields constituted a crime or not, provided that in the case where the human shield did give his consent, the notion of crime could be extended.

Nonetheless, the assessment of the potential “*free will*” of a civilian in situations of armed conflicts or terrorism is very complex and dangerous. It cannot be left to the appreciation of commanders, not serve

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<sup>167</sup> Rule 23 – 24 *Ibid.*

<sup>168</sup> ICRC, Communication to the Press No. 93/17

<sup>169</sup> The Supreme Court sitting as the High Court of Justice, Public Committee against Torture in Israel, 11 December 2005.

<sup>170</sup> Para 36 *Ibid.*

as a prior justification of an armed attack on a civilian who does not sufficiently express resistance or opposition to the “*status of human shield*.”<sup>171</sup>

### 3.5.4 Effects of Targeting Protected Civilians

In the 21st century, the art and science of targeting, particularly in the aerial environment, has become extraordinarily complex. So too has compliance with humanitarian law. Battlefields of centuries past were linear in character, with opposing forces facing each other across a FEBA (forward edge of the battle area). This positioning, together with the limited range and mobility of weapon systems, rendered civilian populations relatively immune to the direct effects of warfare. Civilians were either distant from the battlefield or fled as hostilities drew near.

Those who do not partake in the hostility should not be attacked as this would violate their human rights. The Geneva Convention<sup>172</sup> lays down that civilians are not to be subject to attack. This includes direct attacks on civilians and indiscriminate attacks against areas in which civilians are present.

The law of targeting lies at the heart of international humanitarian law (IHL). As such it is the fulcrum around which discussion of combat operations revolves. This was the case during the war in Iraq,<sup>173</sup> and remains so with respect to the conflicts in Afghanistan<sup>174</sup> and Syria.<sup>175</sup> This precise applicability

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<sup>171</sup> <[https://guide\\_humanitarian-law.org.](https://guide_humanitarian-law.org.)> accessed 6, November 2021 at 4:am.

<sup>172</sup> AP I, Art. 51(1).

<sup>173</sup> Hum. RTS. WATCH, OFF TARGET: THE CONDUCT OF THE WAR AND CIVILIAN CASUALTIES IN IRAQ (2003) <[http://www.hrw.org/sites/default/files/reports/usa1203\\_sumrecs.pdf](http://www.hrw.org/sites/default/files/reports/usa1203_sumrecs.pdf)[hereinafterHRWIraqReport]>

<sup>174</sup> Hum. RTS. WATCH, Fatally Flawed: Cluster Bombs and their use by the United States of America in Afghanistan (2002), <<http://www.hrw.org/reports/2002/us-afghanistan>>

<sup>175</sup> UN Human Rights Council, Rep. of the Independent Int’l Comm’n of Inquiry on the Syrian Arab Republic, UN. Doc. A/HRC/25/65> (Feb. 12, 2014).

of the law of targeting has sparked a flurry of recent reports about drone operations by UN Special Rapporteurs and non-governmental organizations and underpins the highly contentious debates over the legality of autonomous weapon systems.

The principle of distinction serves as the keystone in the law governing targeting Recognized by the International Court of justice as one of the two “cardinal” principles of international humanitarian law,<sup>176</sup> it has been codified in Article 48 of API: In order to ensure respect for protection of the civilian population and civilian objects, the parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.<sup>177</sup>

## ORIGIN OF BOKO HARAM ACTIVITIES IN NIGERIA

### 4.1 Origin

Mohammed Yusuf establish the group in Maiduguri, the capital of the northern state of Borno, Nigeria.<sup>178</sup> Although the original name of the group is *Jama at Ahl al – Sunnah li – I – Da ‘awah wa al – Jihad* (often translated as “association of the People of the Sunnah for Preaching and Jihad”). The name Boko Haram, which means “westernization is sacrilege”, was given to the group by neighbours based on how they viewed its lifestyle and teachings. This, in turn, was popularly interpreted as “Western education is a sin” or “Western education is forbidden.” Ideologically, Boko Haram is against Westernization, which it views

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<sup>176</sup> Legality of the Threat of use of Nuclear Weapons Advisory Opinion, 1996 I.C.J. 226 178 (July 8).

<sup>177</sup> API, Supra note 8, at 48.

<sup>178</sup> <<https://www.britanoin.com>> accessed November 15, 2024.



as negatively impacting Islamic values. The group blames Western influences for Nigeria's culture of corruption, which has contributed to a wide gap between the few rich and the many poor.<sup>179</sup>

## 4.2 Early Activities

Boko Haram gained widespread exposure in July 2009 when, after an incident in which group members were allegedly subjected to the excessive use of force by police and then were unable to get official investigation into the matter, the group launched attacks on police posts and other government installations, killing scores of police officers.<sup>180</sup> When the police could not bring the situation under control, the army was brought in. The ensuing Joint Military Task Force operation left more than 700 Boko Haram members dead and destroyed the mosque that the group used as its headquarters.<sup>181</sup> There was massive state murders and destruction of properties of both Boko Haram members, sympathizers and a motley huge member of innocent civilians. The Nigerian military forces committed various humanitarian law violations, war crimes and acts which constitute crimes against humanity.<sup>182</sup>

Boko Haram atrocities, intensified violence and violations of laws of armed conflict went on crescendo. The sect indiscriminately killed civilians, abducted women and girls, forcibly conscripted young men and boys and destroyed villages, towns and schools. It also tortured, raped and forcefully took

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<sup>179</sup> Hagler, O. Violation of International Humanitarian Law by Parties to the Armed Conflict in the Northeast Nigeria; International Journal of Business & Law Research 6(1): 58-66, Jan – March, 2018.

<sup>180</sup> <<https://www.dni.gov>> accessed July 20, 2024.

<sup>181</sup> *Ibid.*

<sup>182</sup> Amnesty International, Stars on their Shoulders, Blood on their Hands. War Crimes Committed by the Nigerian Military, 3 June 2015 (AFR 44/1657/2015) available from <<https://www.amnestyorglen/documents/afr44/1657/2015/en>> accessed on 26/8/2022.

girls into marriages.<sup>183</sup> The sect perpetrated killings razed and looted homes, business centres, schools, markets, churches and health facilities in Bornu, Yobe and Adamawa States. Since 2009, there have been about 6,000 civilian deaths perpetrated by Boko Haram. Within the same time, the sect has destroyed at least 211 schools in Bornu State alone, and abducted more than 500 women and girls from the Northeast of which at least over 100 either escaped, were rescued by Security Force or were released by them. Some abductees suffered other abuses as sexual violence, forced marriage or and forced conversion.<sup>184</sup>

In the largest abduction, the sect captured 276 female students from a secondary school in Chibok, Bornu State. According to Hagler Okorie,<sup>185</sup> out of this figure, 219 school girls are still in captivity. The sect massacred more than 100 male students in Buni Yadi and Potiskum, Yobe State. Boko Haram combatants have continued to attack towns and villages without military presence.

In the summer of 2010, the group began to assassinate individuals, typically police officers, and also attacked larger targets. One early operation that garnered widespread attention occurred in September 2010, when the group attacked a correctional centre in the city of Bauchi in Bauchi State, and released more than 700 inmates including some 100 Boko Haram members. Later that year, on Christmas Eve, the group attacked two Christian churches in Maidugari and detonated explosives in Christian neighbourhood in Jos, Plateau State, the latter attack killing more than 30 people.<sup>186</sup> Boko Haram's attacks increased in frequency and magnitude, killing and injuring many.

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<sup>183</sup> Human Rights Watch, Abuses by Boko Haram Conduct of Security Force, International and Political Violence, (World Report 2015), from <<https://www.hrw.org/world.report/2015>> accessed 28/8/2022.

<sup>184</sup> Human Rights Watch, *Ibid*.

<sup>185</sup> O. Hagler, (2021) *Law of Armed Conflict: Principles and Concepts*; Princeton & Associates Publishers: Lagos, p. 472.

<sup>186</sup> Boko Haram: History, Meaning, Insurgency, & Facts available from <<https://www.britainica.com>> accessed 26/8/2022.

On August 26, 2011, the group struck its high-profile international target within Nigeria when a suicide bomber crashed a car into the United Nations building in Abuja and detonated an explosive, which killed at least 23 people and injured more than 100 others. One of Boko Haram's deadliest attacks occurred on January 20, 2012, when more than 185 people lost their lives after group members launched coordinated attacks in the city of Kano, in Kano State, targeting police stations and government offices. After its 2010 resurrection, Boko Haram's membership and organizational structure were not clear. The group reportedly had begun splintering into multiple factions sometime after Mohammed Yusuf's death, with the main faction being led by Abubakar Shekau.

The shadowy nature of Boko Haram as well as its resilience made it difficult to craft an effective strategy to end the group's campaign of terror. The Nigerian government initially responded by pursuing a strategy of military confrontation. This did little to end the attacks, though government forces were eventually somewhat successful in driving the group from larger cities. In 2013, it was apparent that Boko Haram had taken over many rural local government areas in northeastern states, where they were able to gain strength.<sup>187</sup>

In April 2013, Abubakar Shekau dismissed a proposal from Nigerian President, Dr. Goodluck Jonathan to grant amnesty to Boko Haram militants if they disarmed; Abubakar Shekau declared that Boko Haram members had done nothing for which they needed amnesty.<sup>188</sup> The next month, Boko Haram launched a series of coordinated military style attacks in the town of Bama in Borno State. The attacks

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<sup>187</sup> JAS vs. ISWAP: The War of the Boko Haram Bptinters <<https://www.crisisgroup.org>> accessed June 20, 2024.

<sup>188</sup> The Cable: May 29, 2014 at 5:04pm.

left more than 50 people dead and destroyed numerous police, military, and government buildings.<sup>189</sup> The group also released more than 100 inmates from a prison in the said town of Bama. In response, the government launched its largest – scale military offensive against Boko Haram to date, employing thousands of troops on the ground and campaign of air strikes to combat the group. In spite of the military's actions, Boko Haram continued with its horrific attacks, including many on schools resulting in more than 1,200 deaths by the end of 2013.<sup>190</sup>

Violence, many northern leaders and groups, including the Arewa Consultative Forum, (ACF), urged government to dialogue with the group to end the killings.<sup>191</sup> In November, 2013<sup>192</sup> the group gave the government conditions for ending the hostilities. Acclaimed spokesman of the group, Abu Mohammed Ibn Abdulazees, in a tele – conference with journalists in Maiduguri, stated that if the State and the Federal Government wanted the group to cease fire completely, then former Bornu State governor, Ali Modu sheriff, must be arrested and prosecuted according to the laws of the land.<sup>193</sup>

He also said that the government should compensate the group and rebuild their places of worship which were destroyed during the 2009 uprising. He pointed out that for a dialogue to take place, it must be through the following elders: Dr Shettima Ali Monguno; former Head of State, General Muhammadu Buhari; Former Yobe State governor, Bukar Abba Ibrahim; Ambassador Gaji Galtimari and Barr. Aisha

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<sup>189</sup> Boko Haram Crisis: Bodies litter 'Nigeria's Bamatown: <<https://www.bbc.com>> accessed April 4, 2024.

<sup>190</sup> *Ibid.*

<sup>191</sup> *Supra.*

<sup>192</sup> Clifford Ndujue, (2013) Timeline of Boko Haram Clashes with the state: Vanguard Newspaper <<https://www.om.co.ampprofect.org>> accessed 15/8/2022.

<sup>193</sup> *Ibid.*

Alkali Wakil and her husband, Barr. Alkali Wakil, insisting that the dialogue must take place in Saudi Arabia.<sup>194</sup>

Abu Abdulazees also said that the group had mandated five members who are to mediate on their behalf. They include himself (Abu Mohammed Abdulazeez), Abu Abbas, Sheikh Ibrahim Yusuf, Sheikh Sani Kontogora and Mamman Nur.

However, a peace deal was brokered on January 28, 2013 after a marathon meeting. Some leaders of the group and the Bornu State Government, led by Governor Kashim Shettima with other top government officials and religious leaders from the state were in attendance.

The cease-fire came after a 42-month multi-prong attack unleashed on the polity by the sect. This did little to end the attacks. In June 2013, President Goodluck Jonathan had officially declared Boko Haram a terrorist group and banned it under Nigerian law, which meant that group members and anyone caught aiding them would be prosecuted under the country's Terrorism Prevention Act.<sup>195</sup> The new legal designation was expected to make it easier for authorities to prosecute members of the group legally.

Boko Haram's attacks persisted into 2014, particularly in the northeast, as the group raided villages and terrorized and murdered civilians with increasing frequency.<sup>196</sup> The group also killed hundreds of people by detonating bombs in large towns and cities, including Abuja.<sup>197</sup> Boko Haram continued to target

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<sup>194</sup> *Ibid.*

<sup>195</sup> The Nigerian Government has addressed the Boko Haram insurgency through the Terrorism Prevention Act, which was initially enacted in 2011 and amended in 2013.

<sup>196</sup> *Ibid.*

<sup>197</sup> *Ibid.*

schools, such as in the February attack on a College in Yobe State where some 50 male students were killed and the college was virtually destroyed.

The group drew worldwide condemnation after it perpetrated a mass kidnapping of more than 275 girls from a boarding school in Chibok in Borno State in April, which generated an increase in offers of international assistance to Nigeria as the country attempted to quell Boko Haram's acts of terror.<sup>198</sup> In May, the United Nations Security Council imposed sanctions on individuals in Boko Haram, freezing assets and issuing travel bans and an arms embargo.<sup>199</sup> However, given the group's informal structure, the sanctions had no discernible effect on Boko Haram's operations. The group continued its attacks and expanded the territory it occupied. In August 2014, Boko Haram declared the area under its control to be an Islamic state.

#### **i. Containment, Allegiance to ISIL, and Division:**

The tide appeared to turn in the fight against Boko Haram in February 2015 when a successful offensive was planned and launched by troops from Nigeria and neighbouring countries, which proved effective in uprooting Boko Haram from much of the area it has previously held. Meanwhile, in March 2015 the group pledged allegiance to ISIL, an insurgent group operating primarily in Iraq and Syria, and took the name ISWAP (later more commonly known as ISWA).<sup>200</sup> Also about that time, the group

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<sup>198</sup> On the night of 14-15 April 2014, 276 Mostly Christians, with some Muslims, School girls aged from 16 to 18 were kidnapped by the Boko Haram sect.

<sup>199</sup> The United Nations Security Council (UNSC) maintains a consolidated list of individuals and entities subject to sanctions, known as the UNSC Consolidated List. This list is used to implement measures imposed by the Security Council to maintain or restore international peace and Security.

<sup>200</sup> In March 2015, Boko Haram, under Abubakar Shekau, pledged allegiance to the Islamic state in West Africa Province (ISWAP).

experienced a significant fissure, with Abu Musab al- Barnawi, the son of the group’s original leader, Mohammed Yusuf, leading a majority of the militants while Abubakar Shekau remained the head of others. One of the reasons for the split was Abubakar Shekau’s indiscriminate use of violence that affected Muslims. In 2016, ISIL recognized al Barnawi’s faction as ISWA, and Shekau’s faction was then referred to by its original name: in Hausa, Boko Haram, or in Arabic, Jama at Ahl al-Sunnah li-l-Da’ awah wa al-Jihad (JAS). In spite of the different factions and names, “Boko Haram” was used at times to collectively refer to the various factions, particularly when there was confusion as to which group was responsible for an attack.

## **ii. Resurgence:**

Although the joint task force composed of troops from Nigeria and neighbouring countries had made significant progress against Boko Haram and its related groups beginning in 2015, attacks by the militants later resumed, with ISWA in particular being very active from 2018. ISWA also reportedly gained a new leader, Abu Abdullah ibn Umar al-Barnawi in 2019.<sup>201</sup>

## **4.3 Status of Boko Haram under International Humanitarian Law**

### **4.3.1 Under Common article 3**

In determining whether to regard the armed conflict between Nigeria and Boko Haram insurgents as a non-international armed conflict, some indicative data need to be weighed. This is with regards to the intensity of the armed conflict and the organization of the insurgents.

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<sup>201</sup> <<https://www.britainica.com/topic/boko-haram>> accessed November 20, 2021.

With respect to the intensity of the armed conflict, the indicative data will include, inter alia, the frequency of the acts of violence and the military operations, the nature of the weapons used, the displacement of civilians, and the number of victims wounded or dead. It is evident that the nature of weapons used by the insurgents are very sophisticated.<sup>202</sup> In fact the Bornu State Governor, Kashin shettima lost his composure and declared that the insurgents were better armed and motivated than even the military. Also, there have been consistent and frequent killings from July 2009 to February, 2014 and the number of deaths amounting to over 3000 with so many wounded.<sup>203</sup> Similarly, the insurgents have their bases spread across the Northeastern part of the country; an example is the Sambisa forest<sup>204</sup> Many civilians have also been displaced.<sup>205</sup> On 11<sup>th</sup> March, 2014 the Joint Task Force, consisting of ground troops and Air Force fighters destroyed one of the strongholds of the Boko Haram insurgents and captured some of its members around Dikwa, Cross Kukuwa and Alargarmo close to the lake chad border.

In the process, over 700 vehicle were also seized many of the vehicles were reported by the Director of defence information, Maj. Gen. Christ Olukolade to have been snatched from other people. He added that the camp was well planned with boreholes, dispensary and other facilities to aid the operations of the insurgents.<sup>206</sup>

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<sup>202</sup> <<https://armedgroups-international.org/2013/12/06/does-the-violence-between-boko-haram-and-nigerian-security-forces-amount-to-anon-international-armed-conflict>> accessed on 18th July 2023.

<sup>203</sup> In April 2012, the Chief of Army Staff said that the military was fighting a “War against Boko Haram. In May 2012, President Goodluck Jonathan said” what we facing is not just militancy or criminality but a rebellion and insurgency by terrorist groups which pose a very serious threat to national unity and territorial integrity.

<sup>204</sup> Ajanaku, “Boko Haram: Monstrous Terrorists” p. 27 as cited in Ahmadu Bello University, *Zaria Journal of Public and International Law*.

<sup>205</sup> Adelani Adepegba and Oluwole Josiah, “6000 Flee Boko Haram Crisis to Niger – UN,” *The Punch*: Wednesday, June 12, 2013 at p. 2.

<sup>206</sup> Fidelis Soriwei, “Soldiers”, *The Punch*, March 11, 2014.



Regarding the organization of the insurgents, the indicative data includes inter alia, the organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules. No doubt, the Boko Haram insurgents have a command structure. The attacks are also well coordinated evincing the existence of internal rules.

Flowing from the above, it can safely be concluded that the ongoing armed conflict meets the criteria for the application of Common Article 3. The minimum standards provided for in the article are therefore to be practiced by the belligerent parties as the article is applicable.

#### **4.3.2 Under Additional Protocol II**

The threshold set under Additional Protocol II is higher. The insurgents are required to be under a responsible command and exercise control over a part of its territory to carry out sustained and concerted military operations and to implement the protocol.<sup>207</sup>

Flowing from the analysis of the facts in the preceding subhead, it is clear that the Boko Haram insurgents are under a responsible command. Similarly, it is obvious that the insurgents' exercise of control over a part of the Nigerian territory (even though presently unknown) is stable. Of course they are not fighting from the air or living in the air. They occupy parts of the Nigerian territory and they have been able to and are still launching sustained and concerted military operations. Even though military sources confirm that some of the camps used as hideouts by members of Boko Haram have been identified

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<sup>207</sup> Additional Protocol II expands on Common Article 3 of the Geneva Conventions, providing more detailed guarantees for individuals not participating in hostilities.

in Northwestern Cameroun, it does not negate the fact that the insurgents still occupy some territories in Nigeria.

They have a known leader whose leadership this far has not been controverted. All these are pointers to the fact the insurgents also have the ability to implement the provisions of Additional Protocol II. The issue of whether they have implemented provisions of the protocol or signified interest to be bound by the protocol is secondary. This is because, where they fail to abide by the provisions of the protocol, they become liable for grave breaches and war crimes under international humanitarian law after the armed conflict. As a result, it is hereby submitted that Additional Protocol II of 1977 is also applicable in the present armed conflict.

#### **4.4 Effects of Boko Haram Activities in Nigeria**

##### **4.4.1 Violations of Rules of International Humanitarian and Human Rights Laws**

The rules of International Humanitarian Law apply to both parties to a Non-International Armed Conflict, the state party and the non-State actors, in this case, the Boko Haram groups. Thus, a non-state actor, the Boko Haram groups. Thus, a non-state actor, as the state actor, is bound by the body of rules of IHL applicable to a NIAC. Both parties are therefore, prohibited from attacking civilians, civilian populations, and civilian objects, nor spreading terror among the civilian populations. Civilians enjoy this protection and only become lawful targets of attacks for such time as they directly participate in

hostilities.<sup>208</sup> Attacks by both parties to the conflict are to be directed at specific military objectives anticipated by the parties, and indiscriminate<sup>209</sup> attacks and reprisal are prohibited.<sup>210</sup>

In clear violations of the rules of IHL, the Boko Haram groups launch their lethal attacks on civilians, civilian populations and civilian objects including attacking and bombing individual civilians, residential and commercial buildings, religious place (including churches and mosques), farms, markets, schools, recreational facilities, parks, gardens, among other areas of civilian populations and objects. Also, some times, the armed forces of Nigeria, in their bid counter the attacks by the armed groups, indiscriminately attack the civilian populations and objects, thereby causing excessive collateral damage further. Both parties violate the rules of IHL by killing members of the opposite party captured alive. Whilst it is true that States parties do not consider members of non-State actors as combatants, when captured alive by the regular armed forces, they should not be killed but detained and prosecuted in accordance with the domestic criminal laws of the State party. However, the armed forces of Nigeria, more often than not, kill members of the Boko Haram captured alive, thereby violating the rules of IHL. In the case of Boko Harm armed groups, they kill members of the armed forces and other security personnel fighting them whether or not in battlefield. The armed groups do not observe any of the rules of the IHL in the conduct of their hostilities against the armed forces of Nigeria.

With respect to the observance of the rules of international human rights law, both parties to a non-international armed conflict are obliged to conduct their operations within the framework of international

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<sup>208</sup> The Provisions of Articles 51 and 52, Additional Protocol I of 1977 to the Geneva Convention.

<sup>209</sup> Article 51(5), Additional Protocol I.

<sup>210</sup> Article 51(6), Additional Protocol I.

human rights law, respecting the rights to life, liberty and human dignity, and prohibition against torture and cruel, inhuman, and degrading treatment and punishment.<sup>211</sup> However, as have discussed earlier, the Boko Haram groups do not observe any of the rules of international human rights law, as they kill both civilians and members of the Nigerian armed forces at will.

The armed groups have deprived many citizens of Nigeria of their lives, maimed thousands of others, destroyed buildings, businesses, farms, and other means of livelihood, as well as displaced millions of Nigerians who are now internally displaced persons in their fatherland, managing shelter in some internally displaced camps made available by the governments of the affected states in Northern Nigeria. This state of affairs has worsened economic condition in Nigeria as the country grapples to meet their daily basic needs.

#### **4.4.2 Recruitment of Child Soldiers and Implications under IHL**

Under international humanitarian law, children under the age of eighteen years are prohibited from being recruited or conscripted as soldiers during armed conflicts.<sup>212</sup> It is, therefore, a war crime<sup>213</sup> to recruit children under the age of eighteen as soldiers during armed conflict or hostilities, by either party to the conflict, contrary to this prohibition, the Boko Haram groups mostly use children (including female children) abducted in schools, farms, churches, mosques, etc, as their fighters, including using them as suicide bombers, spies on espionage missions, and targets. The Nigerian armed forces, of course, do not

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<sup>211</sup> The ICC alleged that the Nigerian Security Forces Committed crimes against humanity and War crimes by its indiscriminate arrest, detention, torture and extra-judicial killings of people suspected to be members of Boko Haram.

<sup>212</sup> Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict.

<sup>213</sup> The Rome Statute for the International Criminal Court Penalizing Child Soldier in armed conflict or hostilities.

employ child soldiers. However, because they may not know when children are used by Boko Haram as fighters, they have killed many of these children in the process. Up till this day, the Boko Haram terrorists still recruit and use children for some of their operations.

#### **4.4.3 Humanitarian and Socio-Economic Development Crisis**

The extent of humanitarian crisis in the Northern States of Zamfara, Bornu, Yobe, Niger, Katsina, Kaduna, Taraba, Kabbi, Sokoto, among others, cannot be over-emphasized. Millions of citizens of these states in Northern Nigeria have been rendered homeless, as their buildings have been razed down, destroyed, and damaged by the Boko Haram terrorist groups. The governments of these states have established camps for the internally Displaced Persons (IDPs). Despite the efforts of the State governments to ameliorate the hardships faced by these IDPs, the conditions under which they live in these IDP camps can only be imagined than felt. Although international humanitarian bodies, and other national humanitarian bodies, assist the IDPs etc., these IDPs still suffer malnutrition, neglects, illness, and other pitiable worsening conditions. Many of these IDPs have died whilst in the IDP camps as a result of the conditions under which they live. Worse still, some officials of the governments, including security officers, who superintend these camps, have been reported to have abused some female inmates of these IDP camps by indecently assaulting, sexually exploiting, raping, and impregnating these vulnerable citizens.<sup>214</sup>

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<sup>214</sup> Brid, N.G.: Internally Displaced Persons and International Refugee Law, (2022) Oxford University Press.

The government is not doing enough, in this regard, to protect displaced women and girls and to ensure that they have access to basic rights and to ensure that they have access to basic rights and services or to sanction the abusers, including camp leaders, vigilante members, policemen, and soldiers.<sup>215</sup>

The Northern states of Nigeria are the states with lowest rate of literacy in Nigeria. There is no willingness among citizens to enroll in formal education, as most children and youths prefer or rather are used by the bourgeois and elite minority for herding as herdsman. One can, therefore, imagine the extent to which the menace of these armed groups has impacted on education and social orientation. The very few who accepted formal education are now out of classrooms and joined their peers in herding cows in other safer states. Many of the female students aged between ten and eighteen years, have been kidnapped and forcefully married off to the commanders and members of Boko Haram some who were released after payment of exorbitant ransoms, came back with pregnancies, whilst many other who had already given birth in captivity, were not allowed to come back with their children.<sup>216</sup> The effects on education and general social wellbeing of these people are debilitating.

Another pitiable case is that of Leah Sharibu, the lone Christian abducted from the Government Girls Science and Technical School, Depchi, Yobe State, abducted, together with other schoolgirls, in February 2018 by the Boko Haram terrorists.<sup>217</sup> She refused to renounce her Christian Faith and convert to Islam. Consequently, she has remained in the Boko Haram captivity since abduction till date and has

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<sup>215</sup> The Nigerian Government faces the Challenge of Providing for and protecting IDPs due to various crises, including conflict, natural disasters, and farmers – herders clashes.

<sup>216</sup> <<https://en.wikipedia.org/>> accessed June 9, 2025.

<sup>217</sup> Vanguard Newspapers of September 27, 2023.

since been married off to some commanders of Boko Haram.<sup>218</sup> It is reported that she has given birth to her second child while still in captivity.

Since the terrorist groups target both government and private establishments, many offices, companies, and other enterprises have been destroyed, thereby rendering citizens who work in these places of joblessness. The multiplier effects of these man-made joblessness are better imagined than felt. Thus, the worsening condition of living of the citizens of Northern Nigeria, who among the world's poorest dwellers, has quadrupled.<sup>219</sup> It would take years to rebuild these infrastructures and establishments destroyed by these armed groups, and the future effects would be catastrophic.

#### **4.5 Protection of Civilians**

According to Common Article 3 of the Geneva Convention provides for the protection of civilian in international Humanitarian Law:

the parties to the non-international Armed conflict are to treat all persons who take no active part in hostilities himself without any distinction on the basis of race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

The parties to a conflict must at all times distinguish between the civilian population and combatant in order to spare the civilian population and civilian property.<sup>220</sup> Neither the civilian population as a whole, nor individual civilians may be attacked.

The rights made available to civilians are guaranteed under the humanitarian law. In the case of internal armed conflicts, Article 13, paragraph 2 of the additional Protocol II provides thus:

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<sup>218</sup> *Ibid.*

<sup>219</sup> <<https://www.unhcr.org>> accessed June 28, 2025.

<sup>220</sup> Common Article 3 to the Geneva Conventions.

The civilian population as such, as well as individual civilians shall not be the object of attack. Acts or threats of violence the primary purpose of which to spread terror among the civilian population is prohibited.

There are also available rights of protection of objects indispensable to the enemy of the civilian population.

Article 54, para 2 of the Additional Protocol provides thus:

It is prohibited to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population, such as food stuffs, agricultural areas for the production of foodstuffs, crops, livestock's, drinking water, installations and supplies and irrigation works for the specific purpose or denying them for their sustenance value to the civilian population or to the adverse party, whatever the motive, whether in order to starve out civilians, to cause them to move away, or for any other motive.

However, despite the legal regime of the protection of civilians and civilian objects, in today's armed conflicts, civilians are often the most affected category of persons. They do not only face the risk of death and injuries but also that of displacement. All too frequently, civilians are targeted, or used as shields or their means of survival – water, food and shelter – destroyed. Women, children and persons, displaced by the conflict may be particularly affected by violence and its consequences.

#### **4.5.1 Nature of Protection**

Protecting civilians during armed conflict is a cornerstone of IHL, which provides a robust framework when civilians are protected. The protection extends to their direct environment and property, also known as “civilian objects”. The nature of the protection afforded to civilians under IHL is seen through two main leases.<sup>221</sup> Firstly, the principle of distinction draws a line between civilians and

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<sup>221</sup> Protocol I of the Geneva Conventions.



combatant, prohibiting any attack directly targeting civilians or civilian objects. Accordingly, civilians enjoy general protection against dangers that may arise from hostilities. Nevertheless, they may be incidentally affected by attacks against lawful targets, but even then, the proportionality rule must take part in hostilities.<sup>222</sup> Nevertheless, they may be incidentally affected by attacks against lawful targets, but even then, the proportionality rule must be respected, and the attacker must take all feasible precautionary measures to avoid incidental effects upon civilians.<sup>223</sup> Secondly, the status of “protected person” grants special protection to several categories of civilians, including those in the hands of a party to the conflict who they are not nationals of and nationals of neutral states present in occupied territories. IHL also protects specific civilian groups such as women, children, refugees and displaced persons, because of additional risks that such categories may face during armed conflict.

Additionally, IHL provides for certain fundamental guarantees. Among other safeguards, everyone in the power of a party to a conflict is entitled to humane treatment without adverse distinction based on such criteria as race, colour, sex, language, religion, national, origin or social status. These fundamental guarantees prohibit such acts as torture, degrading treatment, collective punishments, sexual violence, enforced disappearance, slavery, hostage-taking and unfair trials.

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<sup>222</sup> Article 51(5)(b) of Additional Protocol I.

<sup>223</sup> *Ibid.*

## **CONCLUSION**

### **Summary of the Work**

Chapter one of this piece of work examines the background to the study by reviewing the radical Islamic agenda with violence and the belief of establishing a Sharia State.

Chapter one also examines the statement of problem of the work by showing that the attack on civilians and civilian objects in Nigeria by Boko Haram, particularly in the North-Eastern region is alarming despite the various ways employed in tackling the menace. This chapter also illustrates the aim and objectives to the study by examining the impact of the structures of Boko Haram on civilians and civilian objects; the inadequacy of the rules pertaining protection of civilians during NAIC; x-rayed the provisions of the Common Article III to the Four Geneva Conventions of 1949; and suggest more effective legal measures on how to ensure that protection of civilians in the North-eastern region is guaranteed.

Chapter two of this piece of work focuses on the regulations of non-international armed conflict as they relate to Boko Haram activities in North-eastern region. This chapter x-rays the conceptual clarification of IHL; Branches and sources of IHL; meaning and types of armed conflicts; Historical overview of the Regulations of Non-international armed conflict; the provisions of article 3 Common to the Geneva Conventions. The chapter also touched Additional Protocol II of 1977; field of applications and its critique. This chapter also includes customary international law; international humanitarian treaty laws. This chapter is concluded by examining the fundamental principles of non-international armed conflicts; unnecessary suffering, military necessity and the principle of proportionality.

Chapter three focuses on the protection of civilians during non-international armed conflicts. This chapter x-rays the meaning of civilian; general protection of civilians during armed conflicts. It also takes care of categories of civilians: women, children, international displaced persons. Also the roles of international Committee of the Red Cross and the United Nations High Commissioner for Refugees on internal displaced persons.

The chapter also focuses the UN guiding principles on internal displacement: Medical personnels; journalists; duty to respect and protect; and loss of protection due to acts harmful to the enemy. This chapter is concluded by x-raying the loss of protection and the use of civilians as human shield during armed conflicts.

Chapter four illustrated the over-view of the Boko Haram activities in Nigeria vis-à-vis the rules of IHL. This chapter focuses on the origin, early activities in North-eastern Nigeria and effects of Boko Haram in Nigeria. This chapter also x-rays the level of violations of the rules of IHL and human rights laws. This chapter is concluded by looking at the recruitment of child soldiers and implications under international law.

Chapter five summarizes the whole work, showing the finding/observations, recommendations and contributions to knowledge.

In a nutshell, the rules of non-international human laws apply to both parties to a NIAC, the State party and non-state actor. Both parties are prohibited from attacking civilians, civilian populations and civilian objects, nor spreading terror among the civilian populations.

It is evident from the discussions that both parties to the conflict in the Northern Nigeria have committed serious violations of human rights and great breach of the provisions of the 1949 Geneva Convention on the law of war and their Additional Protocols relating to international law.

## **5.2 Findings/Observations**

- i. The Nigerian security Forces have committed war crimes and crimes against humanity in its response to Boko Haram insurgency.

These were constituted by the shocking level of deaths in military custody, extrajudicial execution, torture, unlawful detention and arbitrary arrests by the military.<sup>224</sup>

The office of the Prosecutor at the International Criminal Court in the Hague, identified eight cases of crimes against humanity and war crimes under Article 7 and 8 of the Rome Statute, perpetrated by both Boko Haram and the Nigerian security Forces.<sup>225</sup> Six of those crimes were by the Boko Haram while two were by the Nigerian security forces, ranging from attack on civilians, detention and deprivation of liberty, attacks on schools and educational buildings, recruitment of child soldiers, abduction and attacks on girls and women, and attacks on places of worship.

- ii. At present, there is consensus that confrontations in the North Eastern Nigeria has reached the threshold and is therefore denominated non-international armed conflict (NIAC).

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<sup>224</sup> Amnesty International, “Stars on their shoulders, Blood on their hands” is Cited by Hagler Okorie: (2018) International journey of Business and Law Research 6(1): 58-66.

<sup>225</sup> Ibekwe N, ‘ICC lists 8 possible war crimes against Nigerian Military, Boko Haram, premium times, <<http://www.premiumtimesng.com/news/headlines/193142-icc-lists-8-possible-war-crime-against-nigerian-military-boko-haram.htm>> accessed 10/6/2023.

iii. Thus, parties to the conflicts (Nigerian Security Forces and Boko Haram combatants) are responsible for any violation of international humanitarian law.

iv. Serious violation of international Humanitarian law constitute war crimes<sup>226</sup> and thus entail individual criminal responsibility.<sup>227</sup>

Certain crimes, when committed as part of a widespread or systematic attack directed against any civilian population with knowledge of the attack constitute crimes against humanity, which also warrants individual criminal responsibility. The major source of international humanitarian law are the Geneva Conventions and their Additional Protocols, and customary international law. In a non-international armed conflict.

v. The parties are bound to comply with the norms contained in Common Article 3 of the Geneva Conventions, Additional Protocol II to the Geneva Conventions<sup>228</sup> and Customary International Humanitarian Law.<sup>229</sup>

### 5.3 Recommendations

i. Appropriate proactive measures must be taken by government to strengthen the promotion and protection of human rights in the Northeast.

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<sup>226</sup> ICRC Customary IHL Study, Rule 156.

<sup>227</sup> The Prosecutor v Tadic, case No. IT-941-AR 72, ICTY Appeal Chambers, 2 October, 1995.

<sup>228</sup> Nigeria ratified this protocol on 10/10/1998.

<sup>229</sup> Customary International Law consists of rules that are binding on all states and can be defined as “general practices accepted as law. ICJ Statute, Article 38(1)(b).

- ii. The criminal justice system in Nigeria should be overhauled and made potent enough to ensure effective enforcement regime and increase access to justice and responsibility for all abuses and violations of international human right law and international humanitarian law.
- iii. There should be training and retraining of armed personnels and to overhaul the Nigerian security system. The current security architecture is less than efficient to deal with such a sophisticated social problem.
- iv. There is need to review the counter-terrorism strategy, policy and laws to ensure compatibility with international standards, including international human rights law and international humanitarian law.
- v. Government should introduce a cohesive radicalization programme that will serve as reorientation for victims of insurgency for effective integration into the society. This should accommodate women and girls whose human rights have been violated, including for sexual violence.
- vi. Take measures to re-establish children's access to education, including for girls, and particularly for those children displaced by the conflict; and rebuild schools destroyed during attacks and secure access to schools, while ensuring also the protection of teachers and students.

#### **5.4 Contributions to Knowledge**

- i. The study has shown that the conflict in the northeastern Nigeria between the Nigerian Security Forces and Boko Haram falls within the ambit of Non-international armed conflict.

- ii. The work has also demonstrated that parties to the Boko Haram conflict grossly violated the rules of Non-International Armed conflict and International Humanitarian Law.
- iii. This work has further shown that Boko Haram activities in the North east is unabated despite the efforts of the Nigerian Security Forces.
- iv. This work has shown that attacks on the civilian population and civilian objects shall go unabated because of the legal regime of International Humanitarian Law and other related enactments.

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