ARMED CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW[1]

Abstract

The essence, fulcrum or goal of International Humanitarian Law is to limit, for humanitarian reasons, the effect of armed conflict. It seeks to do so by means of rules that protect persons who do not or are no longer participating in the hostilities, that restrict the means and methods of conducting hostilities and that prevent the escalation of the conflict. Its main objective is to limit the suffering caused by war or armed conflict, prevent bloodshed and ultimately strengthen world security by protecting the victims of and participants in hostilities. It focuses in the protection of human right and respect for humanity during armed hostilities. One great obstacle confronting international institutions in their bid to develop International Humanitarian Law is their perceived inability to enforce its will. Other obstacles include lack of state co-operation, lack of adequate resources and insufficient funding for International Institutions. Therefore, this work focuses on armed conflicts under International Humanitarian Law which are deeply rooted in the political, economic, social and ideological relations of the modern world. As a contribution to the rethinking process, the work contains an in-depth analysis of the historical sources of International Humanitarian Law, scope of application of International Humanitarian Law, International and Non-International Armed Conflict, Mixed International and Non-International Armed Conflict. The study proffers necessary recommendations.

Key words: *Armed Conflict, Humanitarian Law, Hostility, Combatant, Wounded, Prisoner*

1. Introduction

Basically, it must be noted that International Humanitarian Law applies under two broad circumstances to wit: where there is a recognized armed conflict or in any cause of occupation of another territory by any occupying force as state. We shall hereunder examine in details these circumstances where rules of International Humanitarian Law will be called to bear by the contending states as parties.

2. History and Sources of International Humanitarian Law

The law of armed conflict has sources which can be traced to remote antiquity[2]. As a result of the disastrous result of war from time immemorial it has been realized that certain level of chivalry or fairness should play and prevail during the exercise of armed hostilities to regulate the conduct of war. Even in the biblical days there were eloquent resemblances of rules of law. In the Old Testament, God imposed rules of law enjoining the Israelites forces during their attack on the heathen tribes among the inhabitants of Canaan to eat the fruit from captured orchards and not to eat the actual trees themselves[3]. Similarly, Prophet Elisha warned and forbade the King against killing of prisoners[4]. In the same vein, Israelites were further enjoined as follows[5]: And when the Lord thy God hath delivered it unto thine hands, thou shall smite every male thereof with edge of the sword. But the women, and the little ones and the cattle, and all that is in the city…. Even in the biblical days, there was some respect for standards in armed conflicts[6].

Rules, though in a very rudimentary form and military practices which in early times fell far short of modern theory, were observed to suppress that brutish inclination to 'fight to the finish' and 'kill to the last'; these rules are indeed precursors of international humanitarian law. Right from these early times the culture that demanded the extension of charity towards one's enemy as a cardinal

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[2] C. Leslie Green, *The Contemporary Law of Armed Conflict* (3rd Ed, Manchester: Juris Publishing, 2008) p. 26.

[3]Deuteronomy 20:19-20, The Bible (KJV) p. 305.

[4]Kings 2:22-23. Op.cit. P. 565.

[5]Deuteronomy 20:10-14. Op.cit. P. 304.

[6] See, e.g. Deuteronomy, chapter 20 verses 10-14, 19-20, The Bible (KJV).

constituent of military discipline evolved[7] and with time crystallized into a subtle campaign for restraint in conduct of hostilities.

For instance, the Knights of Chivalry in Europe adopted rules on fighting which notion of chivalry has survived till this day. Warfare then became subjected to many customs, practices and principles and from these rules of ancient civilizations and religions, international humanitarian law derived its roots. History is replete with records of how conducts of early wars were variously regulated with rules that clearly boarders on humanitarian codes of conduct. As far back as 538 BC, King Cyrus of the Old Persian Empire in conducting his war with the Babylonians commanded his soldiers to humanely treat the vanished people and respect the sanctity of religious shrines[8]. In the war against Rome in 410 AD, Alaric 1 who prosecuted the war respected Christian churches and spared the lives of those who took refuge in the church buildings[9]. The Manu Code of India which dates back to first century forbade the use of poisoned spears and arrows and outlawed the killing of wounded and sleeping combatants.

An epic Indian poem *Mahabharata* composed between 200 B.C and 200 A.D states that a King should refrain from doing such an injury to his enemy that will irritate and irk his foe, that a sleeping enemy should not be attacked, and that with death enmity is brought to an end, implying perhaps that enemy corpses should not be desecrated[10]. In ancient India, the rule of war basically required equilibrium and proportionality of the belligerents' in the conduct of warfare. A car warrior should fight a car warrior. The elephant rider should fight an adversary riding on an elephant. Same rule applied to one on a horse as one on foot fights a foot soldier[11]. The ancient Greeks had their rules of war. Among the City States thus:[12]

> Temples and priests and embassies were considered inviolable…. Mercy… was shown to helpless captives. Prisoners were ransomed and exchanged. Safe-conducts were granted and respected. Truces and armistices were established and, for the most part, faithfully observed. Burials of the dead were permitted, and graves were unmolested. It was considered wrong and impious to cut off or poison enemy's water supply, or to make use of poisoned weapons' Treacherous stratagems of every descriptions were condemned as being contrary to civilized warfare.

In 1386, King Edward II of England published an Ordinance for the government of the army, wherein he established limits to the conduct of hostilities and on the pain/penalty of death, acts of violence against women and unarmed priests, the burning of houses and the desecration of churches.

Similar provisions were contained in the codes issued by Ferdinand of Hungary in 1526, by Emperor Maximilian II in 1570, and by King Gustavus Augustus of Sweden in 1621.

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[7]Michael Ibanga, 'Evolution of International Humanitarian Law Past Development and Current Trends', (1999) *Sri Lanka Journal of International Law* Vol. II, p. 131.
[8] See GezaHerezegh, *Development of International Humanitarian Law* (Budapest: AkademiaKaido, 1984) p.12
[9]GezaHerezegh, *Development of International Humanitarian Law.*Op.cit, p 14.
[10]C. F. Amerasinghe, 'History and Sources of the Law of War' (2004), *16 Sri Lanka JIL*, pp 263,264. Also see Armour, *Customs of Warfare in Ancient India,* (India: 7 Transactions of the Grotius Society, 1922), Pp. 7, 71, 77, 87, cited in C. Leslie Green, *The Contemporary Law of Armed Conflict.* Op.cit. p.19,
[11]See Armour, *Custom and Warfare in Ancient India.Op Cit,* Pp 71, 77, 81
[12] C.Phillipson, *The International Law Custom of Ancient Greece and Rome,* (Vol. II), (London: MacMillan Publication, 1911), pp 221-223.

During the period of Hittite Kingdom, between the12th and 15th centuries B.C, laws of war were characterized by a certain respect for legality and human usage[13]. Under the said law the rule of' submission at the place of conflict' was created and provided which rule prohibiting the taking into captivity of the inhabitants of a besieged town and preserving such town from destruction[14].

Article 100 of the Swedish Articles of war decreed that no man should 'tyrannize over any churchman or aged people, men or women, maydes or children[15]. Also the United States Bill of Rights and the Lieber Code of 1791 and 1863 respectively, the 18th century Hammurabi Code of ancient Babylon, the 6th century Byzantine code of Justinian obviously contained humanitarian codes of war[16].

According to Yamanic, the Islamic religion as far back as one thousand four hundred years ago laid down clear rules of war and defined the rights and obligations of combatants and non-combatants in order to make war as civilized and as humane as possible[17]. According to Green, the leading Islamic statement on the law of nations written on the 9th century forbade killing of women, children and the old[18], or the blind, the crippled and the insane. While fighting was on between the *dar al Islam* (the territory of Islam) and the *dar al harb (*the rest of the world, also known as territory of war) 'Muslims were under legal obligations to respect the right of non-Muslims, both combatants and non-combatants'[19]. In accordance to the teaching of the Prophet, booty of war did not belong to the individual captor but was to be shared in accordance with the set rules[20]. Prisoners of war are not to be killed but too many ransomed or set free by grace[21]. Prisoners of war may be killed where their killing will be advantageous to the Muslims unless prisoners agree to become Muslim in which case the prisoner will be considered as booty of war, his life spared and divided among captors. In fact until 19th century there was no fixed body of international humanitarian law. All the treatise concerning the protection of war victims were circumstantial, binding only the signed parties and applicable to only specific armed conflicts[22]. Thus, what existed before that period were rules that created limitations and restrictions in the conduct of warfare which rules varied greatly among the conflicts and were based on times, places and countries involved. The 19th century marked a new turn of the origin of the regime of the internalization of the rules of modern international humanitarian law that applied to all states and at all times and at all cases of armed conflict.

The history of the first universal codification of international humanitarian law is traceable to the battle of Solferino of 1859. During this battle which was fought at the North of Italy between French and Austrian armies, a Swiss businessman and a field banker named Henry Dunant through the war ravaged plain of Normandia, witnessed the aftermath of the bloody battle of Solferino. Henry Dunant saw the suffering of thousands of wounded and dying men who helplessly lay unattended to on the battlefield, abandoned with no care and left facing certain death. In that battle about 38,000 were killed or wounded within 15hours. Dunant, moved with deep sympathy, sought to bring

[13]C. F. Amerasinghe, 'History and Sources of the Law of War' *Op.cit,* p 263.

[14] Also see W. Presier, 'History of the Law of Nations: Ancient times to 1648, (edited by R. Bernhardt) in *Encyclopedia of Public International Law* (1995) (London: Oxford University Press, 2012) p. 724.

[15] See the article by Eduardo Grepi, 'The Evolution of Individual criminal responsibility under international law'; (30 September 1999) The International Review of the Red Cross No. 835. Also visit www.ICRC.org/we/eng/siteen0.nsf/h. Accessed 4/05/2012.

[16]B. Thomas Goehner, 'International Humanitarian Laws and the Geneva Conventions'; http//www.redcross.org/museum/images/HTL ACT 4 p.3. Accessed 31/03/2012.

[17] A. Yamaniz, *Humanitarian International Law in Islam*: A general book outlook, quoted by M.T Ladan in Introduction To Human Rights and Humanitarian Law (Zaria: Ahmadu Bello University Press, 1999) P.132.

[18] The Islamic Law, ss 22-31, 47, 81, cited in L.C Green, *The Contemporary Law of Armed Conflict*. Op.cit. p.19.

[19]Ibid., Khadduri, intro., 13, cited in L.C Green, *The Contemporary Law of Armed Conflict*. Op.cit p. 19.

[20]Ibid., ss 2-38,54-60, 148-371., cited in L.C Green, *The Contemporary Law of Armed Conflict*. Op.cit p, 19.

[21]Ibid., ss 44, cited in L.C Green, *The Contemporary Law of Armed Conflicts*. Op.cit p, 19.

[22]The History of humanitarian law; www.pp.l.nl/100years/topics/ihl.p.1. Accessed 18/10/2014.

practical aid to the wounded soldiers. Instinctively, he applied the principle of humanity, the endeavor 'to prevent and alleviate suffering wherever it may be found' and on this basis sought the assistance of the local inhabitants to come and help insisting that the wounded combatants from both sides should be taken care of. He immediately did everything to organize help for the thousands of wounded men who have been left to die where they fell but despite their efforts, thousands died.

Being a witness to the horrors of the battle of Solferino and taking active role in dispensing medical services to the victims of the war was only a stage in Dunant's ambitious humanitarian programme. Greatly moved by the experience, Henry Dunant wrote a book titled *A Memory of Solferino* (*Un Souvenir de Solferino)* published in 1862 wherein he described the plight of victims of war, followed by two proposals/appeals that caused quite a stir, had remarkable result and were met with resounding success in Europe. Dunant's first proposal was the establishment of the civilian voluntary relieves societies to be formed in the peacetime with nurses who would be ready to act as auxiliaries to army medical services and care for the wounded in wartime. In the words of Dunant: 'Would it not be possible, in time of peace and quiet, to form relief societies for the purpose of having care given to the wounded in wartimes by zealous, devoted and thoroughly qualified volunteers?'. This marked the origin of Red Cross Movement.

Dunant's second proposal was that these volunteers who would be called upon to assist the military medical services be recognized and protected through international agreement. Under this proposal, army medical services were to be declared neutral and given distinctive emblem so that they could dispense their medical/humanitarian services on the battlefield. This was fountainhead of international humanitarian law[23].This idea heralded the creation of 'International Committee for Relief to the wounded' in 1863 which later became the International Committee of the Red Cross. The said committee was basically formed to examine Dunant's twin proposal and ensure its implementations. At the end of 1863, the very year when International Committee of the Red Cross was formed, the first voluntary aid societies, the future National Red Cross or Red Crescent societies -were set up.

The Swiss government in response to the pressure of the International Committee of the Red Cross agreed to convene a diplomatic conference which was held in Geneva in 1864. The conference was attended by representatives of twelve nations as well as representatives of military medical services and humanitarian societies. At the end, a treaty prepared by international committee and entitled 'The Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field'' was adopted on the 2nd day of August 1864. The treaty which consists of 10 short articles was the first treaty in international humanitarian law[24]and well described as the starting point of the Geneva law on the protection of victims of armed conflicts[25.] That treaty *inter alia* specified and provided as follows:

1. Ambulances, military hospitals and the medical personnel serving with them are to be regarded and recognized as neutral and protected by the belligerents.
2. Civilians who assist the wounded are to be protected.
3. Wounded and sick combatants are to be collected and cared for by either party.
4. The symbol of the Red Cross on a white background (the reverse of the Swiss flag) was adopted to serve as a protective emblem to identify medical personnel, equipment and facilities. The Geneva Conventions recognize three emblems that are currently in use: the Red Cross, the Red Crescent (used in most Muslim countries) and the red crystal. The red

[23]Yves Sandoz, The International Committee of Red Cross as guardian of international humanitarian law. www.icrc.org/web/eng/sireen0.nsf/htmlabout the icrc-311298. p.3. Accessed 19/06/2008.
[24]The History of humanitarian law; www.pp.l.nl/100years/topics/ihl.p.2. 24/11/2014.
[25] G.Herezegh, *Development of International Humanitarian Law, Op.cit* p.23.

crystal was introduced in 2006 in situations where the Red Cross or crescent may not be understood as a neutral by the belligerent. Also if permitted by laws of a country, a national society may use the red crystal on its own or with their emblem inside it to identify their staff and facilities[26].

That 1864 Geneva Convention was the source of international humanitarian law[27]. Subsequently, further conferences were held, extending the basic law and incorporating other categories of protected persons, such as the prisoners of war (POWs). On the other flank, certain conferences were held at The Hague touching and concerning international humanitarian law. It was from these roots that international humanitarian law evolved[28]. Current *jus in bello* governing the use of force in war consists of positive treaty law and customary law[29]. International Humanitarian Law is often divided into two strands: the Geneva and The Hague laws as well as the two Additional Protocols to the 1949 Geneva Conventions popularly called Additional Protocol I and II (AP I and II).

While the Geneva Conventions of 1949[30] and their Additional Protocols[31] are concerned with the treatment of victims of war or armed conflict and amelioration of their conditions, The Hague[32] codified in a series of declaration and treaties the limiting means and method of warfare and general conduct of hostilities and warfare by the belligerent states.[33]According to Pictet, the law of war is divided into two branches: the law of the Hague which 'determines the right and duties of the belligerent in the conduct of operations and limit the choices of means of doing harm' and the 'law of Geneva' which 'is intended to safeguard military personnel placed *hors de combat* and persons not taking part in hostilities[34].

These two strands of law are undoubtedly closely linked up and interrelated in serving an objective of international humanitarian law. The International Court of Justice in its Advisory Opinion of 8 July 1966 on the *Legality of the Threat or Use of Nuclear Weapons*[35], acknowledged in the clear and unequivocal terms the basic unity of international humanitarian law. In the words of the court: 'These two branches of law applicable in armed conflicts have become so closely interrelated that they are considered to have gradually formed one single complex system known today as

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[26] Also see International Humanitarian Law and the Geneva Conventions Study Guide available online at: www.redcross.org/mueum/images/HHL ACT 4. p.14. Accessed 6/04/2001.

[27]Yves Sandoz, The International Committee of the Red Cross as guardian of International Humanitarian Law. www.icrc.org/web/eng/sireen0.nsf/html/about-the-icrc-311298. P 3. Accessed 19/06/2008.

[28]www.hrea.org/learn/guides/ihl.html p.1. Accessed 28/11/2011.

[29] D. David Jividen: JUS in Bello in the Twenty First Century: Reaping the Benefits and facing the Challenges of Modern Weaponry and Military Strategy''; in Timothy L.H McCormack (Ed.) Yearbook of International Humanitarian Law: (Volume 7), (The Hague, Cambridge University Press, 2006) P 116.

[30] The Geneva Conventions of 1949 consists of four treaties: Geneva Convention for the Amelioration of the condition of the wounded, and sick in the armed forces of the field, 12 August 1949; Geneva convention for the Amelioration of the condition of the wounded, sick and shipwrecked members of the armed forces at sea 12 August 1949; Geneva convention relative to treatment of prisoners of war 12 August 1949 and Geneva convention relative to the protection of civilian persons in time of war 12 August 1949

[31] The Additional Protocols of the Geneva Conventions are: Protocol Additional to the Geneva conventions 12th August 1949, and relating to the protection of victims of international armed conflict (AP 1), adopted on the 8th day of June 1977, and protocol Additional to Geneva Convention of 12th August 1949 and relating to the protection of victims of international armed conflicts.

[32] The Hague Conventions of 1907 include: The Hague Convention III Relative to the Opening of Hostilities, The Hague Convention IV respecting the laws and customs of war on land; The Hague Convention V respecting the Rights and Duties of Neutral Powers and Persons in case of war on land, Hague Convention IX concerning Bombardment by Naval Forces in Time of War of 1907 and The Hague convention X for the adaptation to marine warfare of the principles of the Geneva convention of 1906.

[33]Kate Mackintosh, The Principles of Humanitarian Action in International Humanitarian Law; www.odi.org.UK/hpg p 4. Accessed 4/06/2012.

[34] J. Pictet, *Humanitarian Law and the Protection of War Victims* (Leiden: Sijthof 1975) p 31.

[35]Legality of the Threat or Use of Nuclear Weapons, ICJ Reports (1996) p. 226.

international humanitarian law. The provisions of the Additional Protocols of 1977 give expression and attest to the unity and complexity of that law. Indeed, many provisions of the Geneva and The Hague conventions are broadly accepted as restating and reflecting the customary international humanitarian law[36] applicable to all countries[37].

It is interesting to note that many of the international treaties on armed conflict were made in response to many new methods of warfare. World War I (1914-1918) witnessed the first large-scale use of poison, ariel bombardments and capture of prisoners of war. World War II (1939-1945) witnessed killing of civilians and military personnel in equal number[38]. As fallout of the atrocities of the World War II the Charter of the United Nations (1945) prohibits the threat or use of force against other states except in the case of self-defence. The Geneva Convention of 1949 as well as the Additional Protocols of 1977 further limited the means of warfare and provided protection to non-combatant civilians and prisoners of war. In the aftermath of the Holocaust, the Genocide convention of 1948 outlawed acts that were carried out with the intention of destroying a particular group. In fact, it is from these roots that the international humanitarian law evolved over the course of over a century and a half. So, it follows that the rules of International Humanitarian Law *basically* can be sourced from rules of customary international relating to war which rules crystallized state practices coupled with several other international legislations including the four Geneva Conventions[39] and its Additional Protocols[40], the Hague conventions[41], the Resolutions of the General Assembly, Security Council of the United Nations as well as rules culled from rich jurisprudence of international judicial tribunals that have dealt with the subject of international humanitarian law.

3. Scope of Application of International Humanitarian Law

Basically, it must be noted that international humanitarian law applies under two broad circumstances to wit: where there is a recognized armed conflict or in any case of occupation of another territory by any occupying force or state. We shall hereunder examine in details these circumstances where rules of international humanitarian law will be called to bear by contending States or parties.

4. Armed Conflict under International Humanitarian Law

It is trite that for the law of war to apply, there must be an armed conflict or an occupation. Put differently, international humanitarian law is a body of laws and rules applicable when armed violence reaches the level of armed conflict, and is confined only to armed conflicts, whether international or non-international[42]. Interestingly enough, this concept of armed conflict is broader that 'war' to include all kinds of hostilities among States and other contenders, such belligerent groups, insurgent rebels[43]. Thus in the absence of a statutory definition of this concept, States practices must be consulted and relied upon in defining this concept. This is so even though some treaties contain some indications that do not amount to armed conflict. For example, internal

[36] For a rule to be considered as 'customary international law' there must exist extensive and uniform state practice flowing with a sense of legal obligation (*opinion juris*). See North Sea continental shelf cases, ICJ Rep (1969) 4 para 73-81 and continental shelf (Libya Arab Jamahiriya/Malta, ICJ. Rep (1985) 29 para. 27.

[37]www.hrea.org./learn/guides/ihl.html p.2. Accessed 28/11/2011. Also see www.odi.org.UK/hpg p.5. Accessed 4/06/2012.

[38] Ibid p. 1

[39] On these Geneva Conventions see notes 29 *infra*

[40] On these Additional protocols see notes30 *infra*.

[41] On some of these Hague conventions see notes 31*infra*.

[42] International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, documents prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November, International Review of the Red Cross, Volume 89, Number 867, (September 2007), p. 722.

[43] I. Detter, *The Law of War* (2nd Ed., Cambridge: Cambridge University Press, 2000).

disturbances and tensions such as riots and sporadic acts of violence or the use of armed forces by criminals, street rioting or even well-organized terrorist activity are conventionally not considered armed conflict to which international law applies.

Various tests are put in place in ascertaining whether or not a given situation amounts to armed conflicts for the application of the rules and principles of international humanitarian law. For example whether armed groups have territorial control, an organization having the characteristics of a state, properly structured armed forces, show respect for the law of war, or other intelligent status has been recognized[44]. This helps to distinguish between criminal or terrorist activity on the one hand and armed conflicts on the other hand. If armed opposition groups control territory and are structured on military lines and conduct operations wearing distinct military uniforms then there is a strong case for saying that there is an armed conflict. Beside the element of organization of the forces, there must also be a certain level of intensity of the conflicts to distinguish between armed conflicts and internal security operations[45]. On what constitutes an armed conflict, Rogers is of the view that once heavy armour, artillery, and ground attack aircraft have been deployed in action, it was clear that the intensity threshold had been crossed[46]. Where on the other hand the weapons used and deployed are assault rifles and rocket-propelled grenades, the conclusion will be inevitably that the conflict in question is not armed conflict except and unless, as in Somalia or Iraq, where these weapons are the only ones available to the insurgents or fighters[47].

It is not only in the scene and during armed hostilities do humanitarian laws apply. Many provisions for humanitarian law are meant to apply even away from the scene of the fighting or after the cessation of hostilities. No wonder the Appeal Chambers of the International Criminal Tribunal for the former Yugoslavia in the notorious *Tadic's case* held that:

> … an armed conflict exists wherever there is a resort to armed forces between States or protracted armed violence between governmental authorities and organized armed groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there[48].

Thus, the concept of armed conflict under the context of international humanitarian law includes all kinds of hostilities between two or more States or among States and other contenders, such as belligerent, insurgents and rebels[49] and includes hostilities between opposing factors or two ethnic groups within one state[50].

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[44] See J. S. Pictet, *Commentary on the First Geneva Convention* (Geneva: ICRC 1952) Pp 44-50.
[45] Y. Sandoz, C. Swinarski and B. Zimmermann, *Commentary on the Additional Protocols* (Geneva: ICRC 1987) para 4438.
[46] D. David Jividen: JUS in Bello in the Twenty First Century: Reaping the Benefits and facing the Challenges of Modern Weaponry and Military Strategy''; in A.P.V. Rogers, *Unequal Combat and The Law of War,* Yearbook of International Humanitarian Law, *Op.cit.,* p. 8.
[47] *Ibid,* p.9.
[48] *Prosecutor v Tadic,* Case No. IT-94-1-1, Decisions on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October, 1995, 35 ILM 1996, 35, para 70. Also see 105 ILR (1997) Pp. 419 at 488.
[49] Ingrid Detter, *The Law of War. Op.cit,* p 496.
[50] *Prosecutor v Dusko 'Dule' Tadic Case,* Case No.IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction (jurisdiction) (Appeals Chamber), 105 *ILR (1997)* P. 419, 488. Also see International

Indeed, international humanitarian law is a law that was made and tailored for armed conflicts, which are by definition emergency situations[51] and which conflict may be either international or non-international in character[52]. Thus, the existence of an armed conflict is both a necessary and sufficient condition for the application of international humanitarian law[53]. International humanitarian law in essence recognizes and distinguishes between international armed conflicts and non-international armed conflicts. In the words of Cerone[54], 'within the corpus of the law of armed conflict, a distinction is drawn between those norms that regulate international armed conflict and those applicable to non-international armed conflict'.

5. International Armed Conflict (IAC)

It is trite that international law by history is concerned with relationship between states. Thus the law of armed conflict, being a branch of international law, was developed in relation to interstate conflicts and was not in any way concerned with armed conflicts occurring within the territories of one particular state or between an imperial power and a colonial territory. This is so because under the traditional principle of state sovereignty over domestic affairs, any armed conflict occurring within the territory of one particular state was considered to be within the exclusive jurisdiction of the sovereignty concerned[55]. What is international armed conflict as recognized under international humanitarian law? Common Article 2 of the Geneva Conventions provides as follows:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war 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 a territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

Thus, the expression 'international armed conflict' (IAC) describes any engagement of regular armed forces of one state with the regular armed forces of a foreign state. International armed conflict simply is an armed conflict between two or more states and occurs when one
or more states have recourse to armed forces against another state, regardless of the reasons of the intensity of this confrontation[56]. It follows therefore that the 2001 war between the Allied forces led by the United States and the Taliban regime in Afghanistan tagged 'war on terror' after the 9/11 US attack is an example of an international armed conflict recognized under the Geneva Conventions.

Also conflicts where a government is simultaneously engaged in hostilities with a rebel movement within the territory and with another state which supports the rebel movement is deemed and

Humanitarian Law and the Geneva Conventions Study Guide (available online at: www.redcross.org/museum/images/HHL, ACT 4.pdf. Accessed 27/05/2014.

[51] Marco Sassoli, 'State Responsibility for Violations of International Humanitarian Law', (June 2002), Vol. 84, No 846 International Review of the Red Cross, p. 416.

[52] Malcolm MacLaren and Felix Schwendimann, *The New ICRC Study on Customary International Humanitarian Law as an Exercise in the Development of International Law* – Part I/II http://www.germanlawjournal.com/article.php?id-627. Accessed 29/08/2013.

[53] Ibid

[54] P. John Cerone, 'Status of Detainees in Non-International Armed Conflicts and their Protection in the Course of Criminal Proceedings*:* The case of Hamdam v Rumsfeld': (July 2006) Vol. 10, Issue 17*ASIL Insight.*

[55] C. Leslie Green, *The Contemporary Law of Armed Conflict, Op.cit*, p 66.

[56] How is the term '*Armed Conflict'* defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008 at http://www/icrc.org/web/eng/siteeg0.nsf/html/armedconflict-article-170308 at page 1. Accessed 10/12/2012.

qualified to be international armed conflict. This position was upheld by the International Court of Justice in the case concerning *Military and Paramilitary Activities in the war Against Nicaragua*[57]when it held that:

> The conflict between the *contras* forces and those of the government of Nicaragua is an armed conflict which is not of an international character. The acts of the *contras* towards the Nicaragua government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts[58].

It must be noted that there is no need for any formal declaration of war or recognition of the situation for such hostilities between states to be deemed an international armed conflict for the application of the relevant rules of international humanitarian law. In fact, the rules of international humanitarian law are even applicable even in a situation of the absence of open hostilities. It is irrelevant to the validity of international humanitarian law whether the states and governments involved in the conflict recognize each other as states[59]. This situation is further confirmed by Pictet when he stated in the commentary of the Geneva Conventions of 1949[60] that:

> Any difference arising between two states and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existences of a state of war. It makes no difference how long the conflict lasts, or much slaughter takes place.

Apart from the regular hostilities between states, it must be noted that the Additional Protocol 1 of Geneva Conventions[61] widened the scope and bounds of the concept of international armed conflicts. Article 1, paragraph of the said protocol defines international armed conflicts thus:

> Armed conflicts in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their rights of self-determination, as enshrined in the Charter of the United Nations and Declaration of Principles of International Law concerning friendly relations and co-operation among states in accordance with the Charter of the United Nations.

In widening the scope and regime of international armed conflict vide, Additional Protocol 1 of the Geneva Convention wars of national liberation, alien occupations, or racist regimes in the exercise of their rights to self-determination must be treated as conflicts of international character. A war of national liberation is a conflict in which people, as an exercise of their right to self-determination, are fighting against a colonial power. However, it is argued and strongly contended that Art 1(4) of Protocol 1 does not alter the nature of the conflict from non-international armed conflict, but only

[57]ICJ Reps, 1986, p. 3 T 114; 76 ILR 1 T 448.
[58] A similar view was taken by the ICRC in relation to the armed conflict in Angola. The ICRC Annual Report for 1998 treats the armed conflict in Angola as an international armed conflict in so far as it involved South Africa but as an internal conflict in other respects; pp 16-17.
[59]*Joint Service Regulations (ZDv) 15/2 in: D*.
[60] J. Pictet, *Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field,* (GenevaI: CRC, 1952), p. 32.
[61]Entered on the 8 June, 1977.

equates the rights of the people who fight against racists regimes for self-determination with the rights of other belligerents under Protocol 1[62].

It follows from the foregoing that international armed conflicts are wars between nations, wars of national liberation and wars in which people attempt to exercise their right of self-determination. It is trite and settled that the provisions of the Geneva Conventions must be complied with in all armed conflicts of international character. In the words of Schindler:, 'any kind of use of arms between two States brings the conventions into effect'[63]. According to Grasser[64] '… as soon as the armed forces of one state find themselves with wounded or surrendering members of the armed forces of civilians of another state on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy state, then they must comply with the relevant convention'.

In fact, the bulk of rules of international humanitarian law applies to international armed conflict when once parts of armed forces of two states clash with each other. This is so because classical and orthodox international humanitarian law conflicts occurring intrastate were traditionally not the concern of international law. Orthodox international law recognized states as the only subjects of international law and *ipso facto* matters or specifically conflicts and hostilities that occurred within a state or that did not involve two or more states were not matters of concern to international law.

The emphasis and basis of international law generally was strictly in the relationship between States. The St. Petersburg Declaration of 1868 prohibited the use of weapons which caused unnecessary suffering in 'times of war between civilized nations'. In this wise, the Geneva Conventions of 1864, 1906 and 1929 made provisions that related solely and extensively to humanitarian issues raised by such conflicts. Even the current Geneva Convention of 1949, with the singular and saving exception of common article 3, applies essentially and extensively in international armed conflicts. Even The Hague conventions of 1889 and 1907 provided limitations and restrictions of the means and methods of intestate warfare. Thus, international armed conflicts are majorly regulated by the four Geneva conventions of 1949 and Additional Protocol 1 of the Geneva Conventions of 1977.

6. Non-International Armed Conflict (NIAC)

Non-international armed conflicts on the other hand relate to internal armed conflicts. A majority of contemporary armed conflicts are not of international character. Internal armed conflict is a conflict 'not of an international character' and taking place within the territory of a High contracting State[65]. This class of armed conflicts refers to armed conflicts or hostilities between governmental armed forces and rebel factions or between various armed groups within one state territory. It arises when hostilities occur between the organized armed forces of a state and another group within a state. In this class of hostility, there is no international intervention by another state or the United Nations. For instance, the so-called 'war on terror' currently waged in Afghanistan between the Afghan government, supported by a coalition of States and different armed groups, namely the Taliban, Al-Qaeda and Boko Haram in Nigeria is non-international in nature. This is so because the said Afghan conflicts do not involve two opposed states but have international component in the form of massive foreign military presence and support on one of the sides of the conflict[66].

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[62] Ingrid Detter, *The Law of War Op.cit.* Pp 51-53.

[63] D. Schindler, 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', (1979), Vol. 163, RCADI, p. 131.

[64] H. P. Grasser, (edited by H. Haug) International Humanitarian Law: An Introduction, in, *Humanity for All: The International Red Cross and Red Crescent Movement,* (Berne Paul Haupt Publishers, 1993), Pp. 510-511.

[65] High Contracting Party is a formal term used in a legal document to refer to that State (nation) that agrees to be bound by the Geneva and Hague Conventions.

[66] International Humanitarian Law and the Challenges of contemporary armed conflicts, document prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007, International Review of the Red Cross, volume 89, No. 867, (September 2007), p 725.

Indeed, the principle of non-intervention under international law prevented international regulation of internal conflicts. This is so because orthodox international law left and treated matters that happened and occurred within a state territory as being matters within the exclusive jurisdiction of the state in question and other states were accordingly refrained from intervening in such internal matters of other states. However, it was noticed that majority of today's armed conflicts take place within the territory of a state and the scope of the Geneva Conventions were widened to accommodate and recognize this specie of growing armed conflict. In fact, the substantive rules of humanitarian law governing non-international armed conflicts are much simpler than their counterpart regulating international armed conflicts. The source of international humanitarian rules governing non-international armed conflict is the potent provisions of the article 3 common to the four Geneva Conventions as well as Additional Protocol II to the Geneva Conventions of 1977. The first and only international agreement exclusively regulating the conduct of parties in a non-international conflict is Protocol II additional to the 1949 Geneva Convention[67]. The said protocol makes it clear that the law governing non-international armed conflict is different and distinct from that regulating international armed conflict[68].The said common article 3[69] which 'applies to armed conflicts not of international character occurring in the territory of one of the High Contracting Parties' in essence places an obligation on the parties to an internal armed conflict to respect and observe some basic principles of humanitarian considerations in the conduct of warfare.

Unlike international armed conflict for an armed conflict that is not of international character to qualify as a non-international armed conflict, the armed conflict must be distinguished from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry. The situation must reach a certain threshold of confrontation to qualify as an armed conflict within the class of non-international armed conflict[70]. In this regards, a two-way test is put in place in separating and excluding internal disturbances and tensions from the definition of non-international armed conflicts.

First, the hostilities must reach a minimum level of force and intensity; various factors may be of importance in determining whether the situation is one of armed conflict. There must be a certain level of the conflict to distinguish between armed conflict and mere internal security operations. The level of intensity must be beyond 'internal disturbances and tensions'. The hostilities should be of collective character or when the government is obliged to use military force against insurgents as opposed to mere police forces and actions. In the case of the *Prosecutor v Tadic*[71], the Appeals Chambers of the International Criminal Tribunal for the former Yugoslavia defined an armed conflict as existing 'whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State'. In determining the level of intensity, recourse must be had of the types of equipment and weapons used in the situation. According to Rogers[72], once heavy armour tanks, artillery and ground attack aircraft (attack helicopters) had been deployed in action, even if by only on one side, then that hostility amounts to armed conflict that satisfies the first leg of the requirement for non-international armed conflicts to which common article 3 and Additional Protocol II applly. Where

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[67] C. Leslie Green, *The Contemporary Law of Armed conflict*, *Op.cit,* p. 75.
[68] Ibid.
[69]Popularly called the 'Miniature Convention' being that it singles out the non-international phenomenon in the main body of the Geneva Conventions.
[70]*How is the Term 'Armed Conflict'* defined in International Humanitarian Law?, International Committee of the Red Cross (ICRC) Opinion Paper, March 2008 at http://www.icrc.org/web/eng/siteeg0.nsf/html/armed-conflict-article-170308 at p.3. Accessed 2/05/2011.
[71] Case No. IT-94-1-1.
[72] D. David Jividen: JUS in Bello in the Twenty First Century: Reaping the Benefits and facing the Challenges of Modern Weaponry and Military Strategy''; in A.P.V. Rogers, *Unequal Combat and The Law of War,* Yearbook of International Humanitarian Law, *Op.cit.,* p. 8

on the other hand the weapons used are assaults rifles and rocket-propelled grenades would not be necessary point to the existence of an armed conflict.

The second criterion is that non-governmental group in the conflict must, to be considered as 'parties to the conflict', possess a certain level of organization of the forces. That is to say, they must possess organized armed forces. The question of the organization of the forces in conflict is indeed a relevant consideration because this helps to distinguish between criminal and terrorists activities on one hand and armed conflict on the other hand[73]. Thus, if the armed opposition groups control territory, are structured on military lines and they conduct operations wearing something recognizable as a form of military lines, there is a strong indication for holding that there is an armed conflict. Thus, it is only when the level of violence and the parties involved meet the requirements for a non-international armed conflict do the present rules of international humanitarian law apply[74].

As earlier noted, Article 3 common to the four Geneva Conventions laid down the first rules to be observed by parties to non-international armed conflicts and which rules constitute both and minimum safety net-rules of international humanitarian law that State parties are bound to observe[75]. These rules protect civilians and persons who are *hors de combat* by prohibiting murder, mutilation, torture, cruel treatment, the taking of hostages, and outrageous upon personal dignity, in particular humiliating and degrading treatment. That provision also prohibits the passing of sentences without the observances of all the judicial guarantees which are recognized as indispensable by civilized people.

In fact, these absolute and minimum rules of international humanitarian law as contained under common article 3 are no doubt regarded as being fundamental to preserving a measure of humanity in war that they are now referred to as 'elementary considerations of humanity' elevated to the status of customary international law that must be honoured and observed by all belligerents in all kinds of armed conflicts[76]. Thus, common article 3 has crystallized into a baseline from which no departure, under any circumstances, is allowed.

7. Mixed International and Non-International Armed Conflict

The dividing line between international and non-international armed conflict is that while in the former the parties are two or more States; in the latter the armed conflict is between groups within the territory of a State party. However, cases abound where a particular armed conflict possesses the characteristics of both international and non-international armed conflicts[77]. The Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia in her interlocutory decision on jurisdiction in the *Tadic's Case* found that 'an internal conflict through its troops or… some of the participants in an internal armed conflict act on behalf of that other state'. The conflicts in the former Yugoslavia were both international – between Serbia and Bosnia, Croatia and Bosnia, and Serbia and Croatia – and non-international Bosnia Serbs against Bosnia, Bosnia Croats against Bosnia, and even Bosnia Muslims against Bosnia's Muslim government[78].

[73]Ibid, p.9.

[74]*International Humanitarian Law and the challenges of contemporary armed conflicts,* documents prepared by the International Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007, International Review of the Red Cross, Volume 89, Number 867, (September 2007), p 516, 743.

[75]Ibid, p 516, 743.

[76]International Court of Justice, *Nicaragua v United States,* para 218.

[77] The ICTY recognized these hybrids cases of international and non-international armed conflicts as a class of armed conflict in the case of *Prosecutor v Tadic,* case No. IT-94-1-1, decisions on the defence motion for interlocutory appeal on jurisdiction of 2 October 1995, 35 ILM 1996, 35, para 84.

[78] C. Leslie Green, *Essays on the Modern Law of War,* (2nd Ed., New York: Transitional Publishers, Inc., 1997) p 215.

Even where it is trite that international humanitarian law recognizes two types of armed conflicts it is important to note that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at the certain mononet[79]. For instance, Rogers[80] takes the view that the law of international armed conflict applied in Iraq from the beginning of hostilities on 20th March 2003 until the end of the occupation period on 30th June 2004. After that, a non-international armed conflict continued between the interim government and later the government of Iraq, supported by collation forces, on one side, and the insurgent groups, on the other.

Instances of this graduating nature of armed conflict from non-international armed conflict abound and prevail in modern day warfare. Where for instance there is armed conflict within the territory of one State between governmental armed forces and dissident fraction(s) and the dissident fraction is receiving the military support of a foreign State, then the armed conflict which ordinarily is a non-international one is by virtue of the intervention of the foreign element elevated into an international armed conflict with all the provisions of the four Geneva Conventions and the protections afforded thereunder applicable to such conflict. For instance, the conflict in the DRC which started in Ituri region in 1999 was originally a local conflict between the Hema and Lendu ethnic groups which conflict exacerbated and graduated into international armed conflict by the intervention of Uganda military forces and other foreign armies and local militia that fought each other ruthlessly for the control of the gold mines, wealth and powers in the Great Lake region leaving at its trail over 60, 000 civilians slaughtered in the crisis[81].

Where however an armed conflict from the prevailing circumstances of the situation is declined from an international to non-international armed conflict as the Iraqi situation analyzed above, the combatants at that circumstance will be deprived of combatant status but however persons who, before that date, acquired protection under the law of war will or detainees, would continue to enjoy that protection until final release or repatriations[82].

8. Conclusion and Remarks

International humanitarian law is that branch of law dealing with such matter as the use of weapons and other means warfare, the treatment of war victims by the enemy, and generally the direct impact of the war on human life and liberty.[83] It applies under two broad circumstances where there is a recognized armed conflicts or in any case of occupation of another territory by any occupying force or state.

It is trite that International Humanitarian Law does not seek to end war or armed conflicts but rather is targeted to cushioning the devastating effects of war on humanity. Thus, International Humanitarian Law as an offshoot of international law has rules and principles that regulate the means, methods and conduct of armed conflicts and strives to uphold the human dignity even under a war situation. Humanity in war, compassion for the victims, and impartiality, meaning no adverse distinction based on race, ethnic origin, religion, social class or any other factor are the care values of International Humanitarian Law which values must be upheld in both peacetimes and wartimes.

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[79] How is the term '*Armed Conflict'* defined in International Humanitarian Law? International Committee of the Red Cross (ICRC) Opinion Paper, March 2008 at http://www/icrc.org/web/eng/siteeg0.nsf/html/armedconflict-article-170308 at page 1. Accessed 17/03/2008.

[80] D. David Jividen: JUS in Bello in the Twenty First Century: Reaping the Benefits and facing the Challenges of Modern Weaponry and Military Strategy''; in A.P.V. Rogers, *Unequal Combat and The Law of War,* Yearbook of International Humanitarian Law, *Op cit* p. 10.

[81] See reports of the Human Rights Watch titled: *International Criminal Court Trial of Thomas Lubanga at* www.hrw.org/en/news/2009/01/22/inte. Accessed 2/11/2011.

[82] See common article 2 to the Geneva conventions of 1949 that persons protected by the Geneva conventions continue to be so protected until after their release or repatriation.

[83] A. Bryan Garner (ed.) Black's Law Dictionary (America, West Publishing Company, 1999) p 745.