



NEAR EAST UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
INTERNATIONAL LAW PROGRAM

**THE EFFECTIVENESS OF THE INTERNATIONAL
HUMANITARIAN LAW IN ARMED CONFLICTS**

KOCHAR AHMED MOHAMMED

MASTER'S THESIS

NICOSIA

2018



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THESIS SUPERVISOR
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NICOSIA
2018

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DEDICATION

..... To my family

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to my supervisor Assoc. Prof. Dr.Derya Aydin OKUR who played an essential role towards the success of this study. Greatest appreciation also goes to my friend Rosa whose support has been so much enlightening.

ABSTRACT

THE EFFECTIVENESS OF THE INTERNATIONAL HUMANITARIAN LAW IN ARMED CONFLICTS

The main focus of this study is devoted towards determining the extent to which IHL mechanisms have been employed in relation to their scope and objectives to enhance effectiveness in handling IACS and NIACs matters. The study adopted an exploratory research design and the findings from the study showed that the international humanitarian law does play its part in dealing with international armed conflicts and non-international armed conflicts. The study however established that there are a lot of factors that are affecting the effectiveness of the international humanitarian law in dealing with international armed conflicts and non-international armed conflicts. Notable challenges that are affecting the effectiveness of the international humanitarian law in dealing with armed conflicts are differences in legal ideologies, inherent legal structures, political differences and tensions, changing nature of armed conflicts and lack of proper enforcement mechanisms. The findings further revealed that there are problems that are associated with the definition of legal terms and formulation of principles which to some extent been considered to be too theoretical. The findings also provided strong support to the idea that international organisations have a huge role to play. The study went on to conclude that armed conflicts have changed a lot with new and sophisticated ways of perpetrating armed conflicts being introduced and that this is affecting the effectiveness of international laws have not yet been amended to deal or cater for such changes.

Key terms: Armed conflicts, effectiveness, international armed conflicts, international humanitarian law, non-international armed conflicts

ÖZ

SILAHLI ÇATI MALARDA ULUSLARARASI INSANCIL HUKUK ETKİNLİ

Bu çalışmanın ana odakları UH mekanizmaları IACS ve NIACs konularını ele alan etkinliği ile ilgili tirmek için kapsamlı ve amaçları ile ilgili olarak kullanılmı tır ne ölçüde belirlenmesine yönelik yapılmı tır.

Çalışma Açıklayıcı bir ara tır tasarımı benimsemi ve ara tırmanın bulguları uluslararası insancıl hukuk, uluslararası silahlı çatı mave uluslararası olmayan silahlı çatı mave ile ilgili üzerinde eni ol madı ını gösterdi.

Çalışma ancak uluslararası silahlı çatı mave uluslararası olmayan silahlı çatı mave ile ilgili uluslararası insancıl hukuk etkinliği in etkileyen birçok faktör vardır.

Silahlı çatı mave ile ilgili uluslararası insancıl hukuk etkinliği in etkileyen Önemli zorluklar silahlı çatı mave uygun uygulamaların eksikli do asında i tirerek yasal ideoloji ler farklılıklarda asında hukuki yapıları, politik farklılıklar ve gerilimler vardır.

Bulgular ayrıca yasal hüküm ve bir ölçüde de teorik olarak kabul edilmi ilkelerin formülasyonun tanımlanması ile ilgili sorunlar oldu unu ort ayakoydu. Bulgular ayrıca uluslararası kurulu lar o ynamak için büyük bir role sahip oldu ufikrine güçlü bir destek sağladı.

Çalışma silahlı çatı malar silahlı çatı malarla gerçeğe tirdi i konusunda eni sofistike yöntemler çoktanıtılıyor ve i tisonucun a gittive bu uluslararası yasaların etkinliği in etkiledi iyönü nde ki henüz anla mave yabuta ürde i ikliklerin kar ılamak üzere tadiledilmedi tır.

Anahtar Kelimeler: Silahlı çatı malar, etkinliği, uluslararası silahlı çatı malar, uluslararası insancıl hukuk, uluslararası olmayan silahlı çatı malar

TABLE OF CONTENTS

ACCEPTANCE/APPROVAL

| | |
|---|-------------|
| DECLARATION | i |
| DEDICATION | ii |
| ACKNOWLEDGEMENTS | iii |
| ABSTRACT | iv |
| ÖZ | v |
| TABLE OF CONTENTS | vi |
| ABBREVIATIONS | viii |
| INTRODUCTION | 1 |
| CHAPTER ONE | 7 |
| THE NOTION AND TYPOLOGY OF ARMED CONFLICTS | 7 |
| 1.1 Introduction | 7 |
| 1.2 Overview of Armed Conflicts | 7 |
| 1.3 Types of armed conflicts | 8 |
| 1.3.1 International Armed Conflicts | 8 |
| 1.3.1.1 Doctrine | 10 |
| 1.3.1.2 Jurisprudence..... | 10 |
| 1.3.2 Non-International Armed Conflicts and IHL | 11 |
| 1.3.2.1 Treaties | 11 |
| 1.3.2.2 Doctrine | 14 |
| 1.3.2.3 Jurisprudence..... | 15 |
| 1.2.3 Special Types of Armed Conflicts..... | 15 |
| 1.2.3.1 War of Liberation | 15 |
| 1.2.3.2 Internationalized Internal Armed Conflicts | 18 |
| 1.2.3.3 Armed Conflicts Incorporating the Involvement of the UN | 22 |
| 1.4 Challenges of Classifying Armed Conflicts..... | 24 |
| 1.4.1 Theoretical Definition of Non-International Armed Conflict..... | 25 |
| 1.4.2 The Changing Nature of Conflicts | 26 |
| 1.4.3 War Against Terror | 27 |
| 1.5 Importance of Classifying Armed Conflicts..... | 29 |

| | |
|--|-----------|
| 1.6 Select Issues of the Protective Scope of IHL in IACs | 31 |
| 1.6.1 Participation in Hostilities | 31 |
| 1.6.2 Conduct of Hostile Matters | 32 |
| 1.6.3 The Issue of Military Objectives..... | 32 |
| 1.6.4 The influence of the Principle of Proportionality on the Conduct of Hostilities . | 33 |
| 1.6.5 An Overview of Efforts to Establish Precautionary Measures | 35 |
| 1.6.6 The Influence of the Concept of Occupation | 36 |
| 1.7 Ravaging Effects of Armed Conflicts..... | 36 |
| CHAPTER TWO..... | 39 |
| OBLIGATIONS AND SCOPE OF THE IHL AND COMPLIANCE ISSUES | 39 |
| 2.1 Obligation and Scope to Enforce Compliance with the IHL..... | 40 |
| 2.2 Prevailing IHL Bodies and Mechanisms | 40 |
| 2.3 Modern IHL Supervision Instruments | 42 |
| 2.4 Factors affecting the Compliance of Parties and States to the IHL During Armed Conflicts | 43 |
| 2.4.1 Differences in Legal Ideologies | 43 |
| 2.4.2 Inherent Legal Structures | 43 |
| 2.4.3 Political Differences and Tensions | 44 |
| 2.4.4 Changing Nature of Armed Conflicts | 45 |
| 2.4.5 Lack of Proper Enforcement Mechanisms..... | 46 |
| 2.5 Promoting Compliance with the IHL in Armed Conflicts | 46 |
| CHAPTER THREE..... | 49 |
| DISCUSSION OF FINDINGS, CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS FOR FUTURE STUDIES | 49 |
| 3.1 Discussion of Findings | 49 |
| 3.2 Conclusions..... | 52 |
| 3.3 Recommendations | 54 |
| 3.4 Suggestions for Future Studies | 54 |
| REFERENCES..... | 55 |
| Articles | 56 |
| Books | 59 |
| Cases..... | 61 |
| Other sources..... | 61 |
| PLAGIARISM REPORT | 63 |

| | |
|---|-----------|
| ETHICAL COMMITTEE APPROVAL | 64 |
|---|-----------|

ABBREVIATIONS

AP:Additional Protocol

HRVs: Human Rights Violations

IACs:International armed conflicts

Ibid: ibidem

ICC: International Criminal Court

ICJ: International Court of Justice.

ICRC: International Committee of the Red Cross

ICT:International Criminal Tribunals

ICTY: International Criminal Tribunal for the former Yugoslavia

IHL:International Humanitarian Law

IIACS: Internationalized Internal Armed Conflicts

ISIL:Islamic State of Iraq and the Levant

NIACs:Non-International Armed Conflicts

pp: Pages

UN:United Nations

UNSC:United Nations Security Council

USA:United States of America

Vol: Volume

WOL: War of Liberation

INTRODUCTION

Background to the Study

Despite the establishment and implementation of the international humanitarian law (IHL) into practice to curb international armed conflicts (IACs) and non-international armed conflicts (NIACs), a lot of ground still remains to be covered by the much-coveted statutory instrument¹. All the issues and concerns that are being placed on the IHL have been concluded to be matters that govern its effectiveness in dealing with acts, incidences and outcomes of armed conflicts. Assertions are still high that a lot of civilians are still suffering from the effects of armed conflicts². This includes among others issues such as destruction of essential civilian property, displacement of the civilian population, and intentional assaults on civilians. To make matters worse these examples are some of the prohibitions made by the IHL and it is argued that the extent to which civilians have suffered from the effects of armed conflicts is largely due to violations of the IHL³. Further insights that have been established from reports made concerning challenges that are being encountered in use of the IHL have revealed that the role of the IHL in addressing IACs and NIACs is questionable⁴. This follows observations that have been made which outlined that civilians are still being utilised as human shields, while incidences of gross sexual violence, personal dignity outrages and cruel treatment, torture, forced disappearances, and murder⁵. On the other hand, perpetrators of armed conflicts have also been deemed to have been deprived of their basic rights and this includes right to a fair trial even from the onset things like proper treatment whilst being held under detention and curbing arbitrary detention⁶.

There are widespread concerns that the IHL has not been and is still not effective in addressing acts, incidences and effects that transpire during armed conflicts. For instance, it was established that IHL has also witnessed accusations being levelled

¹Fleck, *The Handbook of International Humanitarian Law*, (2008) pp. 29-30.

² *Ibid.*

³ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977).

⁴ *Ibid.*

⁵ *Ibid.*

⁶ *Ibid.*

against it, concerning its potency to enhance effectiveness in preserving the safety of humanitarian and medical personnel. There are several cases in which stiff resistance has been encountered by humanitarian officials in executing their duties in areas that are affected by armed conflicts. Moreover, journalists are among the victims that are succumbing to the effects of IACs and NIACs and the effectiveness of IHL is also being criticised on the basis of failing to curb such acts⁷.

Despite accusation on the effectiveness of the IHL in terms of its challenges, limitations, accomplishments and failures, a lot has been done in the past to improve the operational effectiveness of the IHL in handling IACs and NICs issues. For instance, there has been a widespread growth in public awareness's about the IHL covering its principles and what necessitates violations. This is evidenced by insights drawn which exhibits that focus on debates and summits has been on heightening IHL standards⁸. One way or the other, the effectiveness of the IHL is dealing with matters of IACs and NICs is and will still continue to be subject to questioning. This study thus places emphasis is ascertaining the effectiveness of the IHL is dealing with matters of IACs and NICs.

Problem Statement

The notion of effectiveness is surrounded by different perceptions and there is no consensus about what constitutes an effective outcome. For instance, Coombes (2009), contends that an effective statutory policy such as the IHL can have its effectiveness determined based on its accomplishments. This, therefore, implies that the greater the accomplishments the IHL has attained the more effective are considered to be. However, the number of perpetrators brought to justice following the inception of the IHL is lower than the number of perpetrators who are still remaining at large⁹.

On the other hand, arguments still remain that the effectiveness of the IHL must not be determined based on outcome or achievements but on the ability of governing bodies such as the United Nations (UN), to enforce it and foster compliance and

⁷ Ibid, 1.

⁸ HCJ 769/02, The Public Committee Against Torture in Israel v. the Government of Israel, 11 December 2006, para. 25.

⁹ Ibid, 6.

cooperation among nations (Barnett, 2002; Byman et al., 2012; Christensen, 2010). Such is considered to be a spearheading force that can trigger more and widespread effective results¹⁰.

On the contrary, it was established that the effectiveness of the IHL should be based on the attainment of its stipulated objectives and this includes among others protecting civilians during armed conflicts¹¹. When such an idea is taken into consideration, a lot of doubts can be placed on the effectiveness of the IHL to handle IACs and NICs. This is because it is still regarded as ineffective towards military interventions and regulating methods of warfare, handling issues such as civilian population in a territory under belligerent occupation etc.

On the other hand, the application of the IHL towards combating IACs is considered to be significantly different than towards curbing NIACs. This has also been established that this has been due to varying conditions that ensue during a conflict. For instance, the Tadic case led to indispensable criteria (intensity and organisation of the conflict) of classifying a NIAC and since then the applicability of the IHL towards NIAC has been different¹²

Moreover, most approaches that have been made to heighten the effectiveness of the IHL are considered to be possessing inherent limitations. For instance, efforts to improve the operational effectiveness of the IHL are assumed to have led the IHL to function outside its scope. As a result, it is considered to have been subject to risks of politicised misinterpretations and implementations. This can be evidenced by the idea that the application of the IHL has been limited to certain areas and situations by States even though the vast evidence was available to prove the existence of an armed conflict. Furthermore, Khen and Moodrick, (2007), argue that the IHL has in most cases suffered from manipulation as changes in its applicability were made to include issues that are not part and parcel of the IHL. This is aggravated by difficulties in clarifying what constitutes violence in legal aspects. Moreover, opportunistic misinterpretations have been discovered to be a major element that

¹⁰Wippman & Evangelista, *New Wars, New Laws* (2005) p. 16.

¹¹ *Ibid.*

¹²Prosecutor v. Limaj et al., Second Amended Indictment, Case No. IT-03-66-PT, 6 November 2003

affects certain legal principles and some States have been taking advantage of this situation to point out violations in other States and neglecting their own acts¹³.

Meanwhile, one often contends that the ability of a statutory apparatus to address legal violations is often hindered by challenges and hence this implies that the use and effectiveness of the IHL to deal with armed conflicts is governed by the ability to deal with those challenges. This issue has remained unaddressed even though ideas have been pointed out that there are challenges that are hampering the effectiveness of the IHL. This can be reinforced by notions given by Coombes (2009), who established that the use of the IHL has not brought many accomplishments on the table. This also follows widespread criticisms against the widely popular statutory instrument, the IHL that its violations are still ongoing and a lot of civilians are still being affected by IACs and NIACs.

Moreover, the ability of the IHL to copy and address prevailing armed conflict issues is deemed to be the key instrument towards improving the effectiveness of the IHL in dealing with armed conflicts (Akande, 2012). This, therefore, implies that there is a greater need to conduct studies that are capable of ascertaining such an ability. This study, therefore, thrives to ascertain the effectiveness of the IHL in dealing with international and non-armed conflicts.

Research Objectives

The main focus of this study is devoted towards determining the extent to which IHL mechanisms have been employed in relation to their scope and objectives to enhance effectiveness in handling IACs and NIACs matters.

- To distinguish how differences between, and approaches towards IACS and NIACs will pose threats to the effectiveness of the IHL in handling IACS and NIACs matters.
- To ascertain prevailing IACS and NIACs challenges that undermine the extent to which the IHL delivers effective results in curbing IACS and NIACs.

¹³ Compare Kretzmer, Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence, (2005), p. 196

- To proffer potential insights that can be tapped into in order to enhance the operational effectiveness and degree of the corporation required to stimulate and foster the effectiveness of the IHL in addressing IACS and NIACs.

Research Questions

The formulation of the above-mentioned targets can be alternatively restated in the form of research inquiries and the following inquiries

- What is the extent to which IHL mechanisms have been employed in relation to their scope and objectives to enhance effectiveness in handling IACS and NIACs matters?
- How do differences between and approaches towards IACS and NIACs pose threats to the effectiveness of the IHL in handling IACS and NIACs matters?
- How do prevailing IACS and NIACs challenges undermine the extent to which the IHL delivers effective results in curbing IACS and NIACs?
- What are the potential insights that can be tapped into in order to enhance the operational effectiveness and degree of the corporation required to stimulate and foster the effectiveness of the IHL in addressing IACS and NIACs?

Research Methodology

This study is based on an exploratory research design that seeks to ascertain clearly the effectiveness of the IHL in dealing with IACs and NIACs. This follows establishments that have been made that determining the effectiveness of the IHL is being surrounded by unresolved and clarified issues. Some of the outlined issues are concerned to civilian rights and displacements of civilian property, applicability, politicised misinterpretations and implementations, warfare, rights and treatment of perpetrators of armed conflicts, the safety and operational capabilities of humanitarian personnel and cooperation concerns. This is important because it makes it feasible to focus on the relevant subjects as well utilising appropriate data sources (Creswell & Clark, 2007). As a result, this study will draw information from academic books, published research articles and journals as well as reports by the UN and International Committee of the Red Cross (ICRC) to deduce gaps, ideas and

potential solutions towards improving the effectiveness of the IHL in dealing with IACs and NIACs.

Significance of the Study

From the observed insights it has been noted that numerous civilians around the world are still succumbing to the adverse effects of IACs and NIACs and therefore by highlighting limitations as well as areas that can be looked at to improve the effectiveness of the IHL in handling IACs and NIACs problems, damage to civilian property, the number of civilians who die or are displaced will be reduced. This study will also aid in highlighting suitable approaches that can be made when approaching amendment, interpretation and implementation activities of the IHL in relation to IACs and NIACs matters which can resultantly aid in boosting cooperation of member States. Thus, global peace and unit can be feasible when the much-coveted global statutory instrument gains its effectiveness in handling IACs and NIACs problems. This study will also be used for further academic purposes by other researchers.

Organisation of the Study

This study is structured into three sections in which the initial part covers introductory remarks surrounding armed conflict issues as well as the operational and applicability of the IHL towards IACs and NIACs. A broader description of IACs and NIACs is outlined in section one while the second part offers a background to the role of IHL including its accomplishments, failures, limitations and achievements and efforts to improve compliance to the IHL as strategy to enhance its effectiveness and the third-part lays out the established conclusions as well as recommendations that have been made from the study.

CHAPTER ONE

THE NOTION AND TYPOLOGY OF ARMED CONFLICTS

1.1 Introduction

This chapter looks at the idea of armed conflicts and the various types of armed conflicts that are in existence. It also examines the legal doctrines and jurisprudence behind IACs and NIACs and how they influence the effectiveness of the IHL. This chapter also places focus on examining the challenges that are encountered in classifying armed conflicts as well as the importance of classifying armed conflicts. This is important as the application and enforcement of the IHL hinges a lot on the classification of armed conflicts. This chapter, therefore, serves an important purpose of outlining key issues that will affect the effectiveness of the IHL in dealing with armed conflicts and possible measures that can be taken in order to improve the effectiveness of the IHL in dealing with IACs and NIACs.

1.2 Overview of Armed Conflicts

The idea to understand principles that govern IACs and NIACs lies in defining what is termed an armed conflict. An armed conflict can thus be defined as activities involving the use of armed force between two or more States¹⁴. The major problem that lies with this definition is tied to the idea that States must be capable of recognizing and accepting the existence of an armed conflict. This can be supported

¹⁴ Fleck, *The Handbook of International Humanitarian Law*, (2008), pp. 29-30.

by the idea which states that most States do sometimes disagree about the existence of an armed conflict and yet in actual fact an armed conflict taking place¹⁵. This problem has also been relatively considered to be one of the key weaknesses of the IHL when it comes to dealing with armed conflicts¹⁶. This implies that if there is no political will of the States then the IHL will not be a strong position to be applied. As a result, the IHL can be considered to be having a theoretical perception of armed conflict¹⁷. Thus, when looking at the effectiveness of the IHL in dealing with IACs and NIACs, one can point out that the abstract approach of the IHL to armed conflict is another key issue to consider.

Meanwhile, when looking at the notion of armed conflict, it is important to note that armed conflicts can be categorised by the IHL into three distinct categories namely;

1. International armed conflicts
2. Internationalised armed conflicts and,
3. Non-international armed conflicts

1.3 Types of armed conflicts

1.3.1 International Armed Conflicts

Art. 2 of the 1949 Geneva convention states that an IAC occurs when two or more States are engaged in armed hostilities¹⁸. The identification and recognition of IAC will, therefore, subject both parties to an IAC to customary international law provisions including those outlined by the AP 1 of the Geneva convention¹⁹. What is now placing a huge distinction between IACs and NIACs is the extent to which these two-armed conflicts are now taking place. That is, the number of incidences of NIACs has declined a while that of IACs has remained on a steady path²⁰. For example, this can be evidenced by armed conflicts that have been witnessed between Iraq and USA, Russia and Ukraine, Greece, Cyprus and Turkey.

¹⁵ Ibid.

¹⁶ Evans, *International Law*, 2010, p. 820. Compare Kretzmer, *Targeted Killings of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence*, (2005), p. 196.

¹⁷ Ibid, 12.

¹⁸ Ibid.

¹⁹ Ibid, 13.

²⁰ Kolb & Hyde, *An Introduction to the International Law of Armed Conflicts*, (2008), p. 78, 54.

When it comes to the issue of determining the effectiveness of the IHL in dealing with IACs, the first thing that can be noticed is that other States might have problems in recognising the other State that is involved in an IAC²¹. Doubts can be placed as to whether this has a problem of affecting the applicability of the AP 1 of the Geneva convention. For example, when the USA was had put into arrest Taliban forces and argued that they should not be judged charged as prisoners of war²². The reason being that the USA pointed out that the captured Taliban forces were not legally recognised as an Afghanistan's legal force²³. This had an effecting of preventing the USA from applying the 3rd Geneva convention against the Taliban forces. The decision was however disputed because it was established that the decision to apply AP 1 of the Geneva convention applied irrespective of whether the State of the regime is recognisable or not²⁴. What it therefore meant is that any Party that had endorsed to be part of Geneva convention will be automatically considered to be an armed conflict party in the event that it has been involved in an armed conflict with other States. Hence, it will be governed by the AP 1 of the Geneva convention. It is the responsibility of the Swiss Federal Council to inform other State whenever it has made a decision that a State is not officially recognised²⁵. This has a problem of allowing the Swiss Federal Council to have autonomous power and decision of over other States in times of armed conflicts especially when such a State is being oppressed politically and military. Moreover, chances are high that the Swiss Federal Council can be used to settle political scores by other States.

There is a limited guarantee that will be able to serve its purpose effectively without the interference or influence of other States. In the event that it has been influenced and failed to recognise a State as a legitimate State, then it means that the IHL and other customary international laws will not be applicable²⁶. This will further put into danger the lives of innocent civilians residing in the conflict zone. Hence, it can be said that the effectiveness of the IHL in dealing with IACs and NIACs is to some extent determined by the ability of the Swiss Federal Council to effectively and appropriately recognise a State involved in an armed conflict as a legitimate State.

²¹Noam Lubell, 'Challenges in Applying Human Rights Law to Armed Confl Ict' (2005) 87, 737.

²² Ibid, 19

²³International Committee of the Red Cross, 'ICRC Opinion Paper, March 2008 1 How Is the Term "Armed Conflict" Defined in International Humanitarian Law? Opinion Paper' (2008) 2 1.

²⁴ Ibid.

²⁵ Ibid.

²⁶ Ibid.

This is true and there are cases when the Swiss Federal Council had been accused of failing to notify other States after it had reached a decision not to recognise a State as legitimate²⁷. For example, a representative from Palestine was not allowed to participate in the APs conference of the Geneva convention following the decision by the Swiss Federal Council that the representative was not from a legally recognised State and did not even notify other States of this decision²⁸.

The other issue that can compromise the effectiveness of the IHL when dealing with IACs is the intensity of the IACs. There are a lot of disagreements that can be noted concerning the magnitude and duration of IACs. For instance, other studies argue that the duration and severity of IACs do not necessarily require that the Geneva convention be applied into force²⁹. On the other hand, when it comes to NIACs, insignificant incidences involving the shooting at a border between two States or the shooting down of a military aeroplane is good enough to enforce the application of the AP 1 into force. Moreover, when it comes to IACs, it does not necessarily require that the conflict is characterised by the use of arms or armed force³⁰. This is because a State can invade another State without using armed force or can declare war on another State and still both circumstances would be considered to be IACs.

1.3.1.1 Doctrine

The need to look at doctrines surrounding the notion of IAC lies in trying to gather information about perceptions towards its definitions and concepts. As noted by ideas which state that Art. 2 applies when two or more States have engaged in a conflict involving the user of armed force³¹. The Geneva convention will thus govern all the States that are involved in the IAC irrespective of the fact that the other State did not use armed force to resist occupation or attacks.

2.3.1.2 Jurisprudence

Efforts to examine how armed conflict cases should be approached are based on the Tadic case following a ruling which was made by the International Criminal Tribunal for the former Yugoslavia that an armed conflict takes place when two or more

²⁷Mary Ellen O'Connell, 'Defining Armed Conflict' (2008) 13 Journal of Conflict and Security Law Vol 393.

²⁸Ibid, 18.

²⁹Ibid, 19.

³⁰Sten Verhoeven, 'Institute for International Law Working Paper No 107 – March 2007 International and Non-International Armed Conflicts'.

³¹Ibid

States engage in an armed force which involves the use of armed force³². Ever since the inception of this definition, decisions to distinguish between IACs and NIACs have also been based on this definition. This goes to an extent of outlining the how the nature and intensity of armed force or conflict determine the nature of the conflict. Hence, the jurisprudence of IACs plays an essential role in the establishment of other internal laws aimed at regulating armed conflicts and protect the lives of people during and after armed conflicts.

1.3.2 Non-International Armed Conflicts and IHL

What distinguishes NIACs from IACs is that NIACs are either armed tensions between different armed groups within a State or between rebel groups and legitimate government forces without leading to the international intervention of other States or international organisations such as the UN³³. The other characteristic that can be noted with the NIACs relates to the extent to which the IHL can be applied. This is because when it comes to the issue of dealing with armed conflicts, the ability and effectiveness of the IHL is considered to be limited³⁴. It can be noted that only Art.3 of the Geneva convention and AP II are strictly devoted towards dealing with NIACs. Alternatively, Art.3 can be said to be the main pillar of dealing with NIACs. This action will, therefore, look at how Art. 3 and AP 3 deal with NIACs.

1.3.2.1 Treaties

1.3.2.1.1 NIACs in the context of Art. 3

When dealing with NIACs it is important to note that Art. 3 does not offer a definition of what constitutes a NIACs³⁵. Hence, this places confusion and disagreements on how States would view and approach NIACs situations. This is because there is no common definition to which both parties can agree to. What makes this a huge problem that must be addressed is that Art 3 is the only part of the Geneva convention that deals with NIACs³⁶. As a result, it is sometimes difficult to make a clear distinction between NIACs from violent banditry or internal disturbances. This can sometimes cause a NIACs to be either classified as a violent banditry or internal disturbances which makes it impossible to enforce the IHL. From this observation,

³² Ibid, 25.

³³ Ibid, 25.

³⁴ Ibid.

³⁵ Charlotte Lindsey, 'Women Facing War: ICRC Study on the Impact of Armed Conflict on Women' (2003) 274pp.23

³⁶ Ibid, 28.

arguments can be made that disagreements between parties to an armed conflict about the exact nature and composition of a NIAC can actually hinder the effectiveness of the IHL. The greater the chances of an agreement between parties to NIAC, the more effective the IHL will be in handling NIACs issues.

States have in most cases been observed to have been denying the existence of NIACs but have been noted to rather classify and consider such conflicts as incidences of upheavals or internal instabilities³⁷. The adoption of Art.3 represented a major development towards dealing with problems of NIACs. This positively contributed towards supporting efforts by the IHL to reduce the intensity and severity of NIACs. Thus, it can be said to have been a key pillar of both the Geneva convention and the IHL in dealing with armed conflicts. Art. 3 can also be considered to be a standard guideline of approaching IACs by the International Court of Justice (ICJ) as it places a huge focus towards human being's welfare³⁸.

1.3.2.1.2 NIACs in the context of AP II

Ever since observations were made that Art. 3 was vague and was not capable of accommodating news changes in warfare methods that were being introduced, the ICRC had to come with a new set of measures that will be able to address these concerns³⁹. This led to the formulation of AP I and AP II in 1991 and 1972 respectively. The main difference was that AP I was mainly restricted to IACs while AP II was dealing with NIACs. The main focus of AP II was to offer support to Common Art. 3. However, it was established that such efforts were fertile and could not yield many results as developing nations were considered to be more resistant against the requirements of the Geneva convention⁴⁰. As a result, all NIACs were not defined and focus was placed on defining armed conflicts which were considered to be intense and these were the only conflicts that were subjected to regulations. But the applicability of Art. 3 is not limited and it extends to cover all NIACs.

AP II comes into force when there is a war that is being fought between insurgent groups and government armed forces and it does not extend to include internal tensions fought between insurgents and other local groups. What therefore may

³⁷ Ibid, 31.

³⁸ Human Rights Council Office of the High Commissioner, *International Legal Protection of Human Rights in Armed Conflict* (2011).

³⁹ Ibid.

⁴⁰ Ibid.

affect the effectiveness of the IHL in dealing with IACs and NIACs is the exclusion of these types of conflicts. This is because ideas will differ and in most cases, these conflicts have a tendency to grow into a severe IAC. Hence, it is not a good move to cater for such conflicts in the event that they have grown in intensity and severity. The major reason for the exclusion of these conflicts is considered to be a theoretical one⁴¹. This implies that the occurrence of these conflicts was considered to be impractical with few chances of occurring. To prove this wrong, a similar type of these conflicts was observed in Lebanon and this exposes the legal limitations and challenges encountered in drafting international laws especially those meant to deal with armed conflicts.

The other reason related to the there has to be some form of organisation that is noticeable with the way the insurgents are being coordinated. This entails that the insurgents must be in a strong position to launch military attacks against a legitimate government. More so, if such conflicts are to be put into considerations then it is important that there be a certain territorial region that has been occupied by the insurgents⁴². The existence of these conditions makes it easy and possible to apply the AP II and what can be seen is that the ability of insurgents to seize control of a certain area provides a strong indication that they are well organised and are in a strong position to launch severe, military attacks against a legitimate government. This protocol, however, does not place much emphasis on the region that has been occupied but focuses on the ability of the insurgents to launch military attacks. But usually, a certain degree of occupation is required⁴³. Such observations, therefore, imply that any NICAs characterised by guerrilla warfare which lead to a periodical and limited occupation of a town are not addressed by AP II. AP II thus makes it clear that the military operation has to be concerted and sustained⁴⁴. This simply entails that the military attacks have to be sustained and persistent.

AP II can be commended because it considers both sides and hence it can be said to be assuming a neutral point of dealing with NIACs. This is evidenced by one of its

⁴¹International Committee and Red Cross, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 89 *International Review of the Red Cross* 1 <http://www.journals.cambridge.org/abstract_S1816383107001294>. Accessed 8 November 2018.

⁴² *Ibid.*

⁴³Christian DR Beaulieu and Andres C Garin, 'The Impact of International Humanitarian Law on Armed Stand-Offs Opposing Aboriginal Peoples to Canadian Authorities: An Overview of the Oka-Kanesatake Crisis' (2002) 62 <<https://www.barreau.qc.ca/pdf/publications/revue/2002-tome-62-1-p159.pdf>>. Accessed 8 November 2018.

⁴⁴ *Ibid.*

core emphases which asserts that insurgents must be in a strong position to apply the AP⁴⁵. In addition, this AP can to a large extent be said to be expressing a high sense of reality since the given circumstances are practically possible and make it convenient for all parties to apply the AP.

Another important thing that can be noted from AP II is that it does not put into consideration the impacts of internal tensions and disturbances which is in line with Art. 3⁴⁶. It is however also important to note that the applicability of Art. 3 is limited. This is because when insurgents are no longer capable of launching military attacks or occupying a region, the conditions that make it possible to apply AP II would have been violated or not met. Hence, it can be said that the AP II deals strongly with NIACs but its applicability is subject to certain conditions which must be met before it can be applied. In addition, it can also be said that the AP II is relatively a practical instrument which captures real situations whilst remaining neutral.

1.3.2.2 Doctrine

There are a lot of legal sources and studies that look at what must be considered to be a NIAC. Foremost, these sources contend that a NIAC takes when armed conflicts which do not fulfil the stipulations or guidelines given by AP I are observed⁴⁷. Hence, NIACs are defined as conflicts that take place within a State and are fought using armed force between rebel groups or insurgents and a legitimate government⁴⁸. The other pertains to hostilities, and the basic idea is that the hostile situation has to be severe and intensive and involves the use of a lot of armed force⁴⁹. The insurgents, on the other hand, must be well organised into different groups or factions that are well positioned to launch dangerous or significant attacks against legitimate government forces⁵⁰.

⁴⁵ Ibid.

⁴⁶ Ibid, 37.

⁴⁷ This guideline is outlined in par. 1 under Art. 1 of AP I.

⁴⁸ Ibid.

⁴⁹ Laura Maria Olson, 'Practical Challenges of Implementing the Complementarity between International Humanitarian and Human Rights Law - Demonstrated by the Procedural Regulation of Internment in Non-International Armed Conflict' (2009) 40 Case Western Reserve Journal of International Law 437.

⁵⁰ OA Hathaway and others, 'The Relationship between International Humanitarian Law and Human Rights Law in Armed Conflict' [2011] Minnesota Law Review (Forthcoming) 1
<http://www.law.yale.edu/documents/pdf/cglc/YLSreport_IHLandHRLlaw.pdf>. Accessed 8 November 2018.

1.3.2.3 Jurisprudence

Basically, Art. 3 has been a huge base upon which NIAC has been defined but its definition has not been expressly given by all the conventions. Hence, decisions to make a judgement on NIAC have been based on a ruling made by the ICTY which confines the definition and judgement to an internal state and being fought being insurgents and government forces using armed force⁵¹.

1.2.3 Special Types of Armed Conflicts

Basically, when looking at armed conflicts one can point to IACs and NIACs but they are also other types of armed conflicts which are bound to occur and are different from these situations⁵². These types of armed conflicts can be considered to be special types of armed conflicts and this study will look at these special types of conflicts in relation to the war of liberation, IACs and conflicts involving the influence of the UN. These conflicts are herein discussed as follows;

1.2.3.1 War of Liberation

War of liberation (WOL): This is a special type of armed conflict that is fought as a result of efforts by citizens of nations desire to express their rights against oppression⁵³. A good example is when a colonised State fights for independence against a colonial ruler. What separates WOL from other types of armed conflicts are the rules that govern armed conflicts.

WOL used to be subject to be governed by the regulations of Art. 3 but changes were observed following efforts by the UN to deal with broader issues being faced as a result of WOL⁵⁴. In order to deal with this problem, Resolution 2105 had to be put in place and it formed a strong base upon which all WOL would be dealt with⁵⁵. The main emphasis was to allow colonised individuals or States to fight for their independence and express their self-determination. As a result, all the subsequent resolutions on WOL were based on stipulations made by resolution 2105 of the

⁵¹ As highlighted under par. Art. 8 of the ICC Statute.

⁵² Ibid, 39.

⁵³ Ibid.

⁵⁴ David Weissbrodt and David Weissbrodt, 'Humanitarian Law in Armed Conflict : The Role of International Nongovernmental Organizations Humanitarian Law in Armed Conflict : (2016) 24 297.

⁵⁵ Patrick Paterson, Kaitlyn Robinson and William J Perry, 'Human Rights and the Law of Armed Conflict : A Selected Annotated Bibliography Center for Hemispheric Defense Studies' (2014) Vol 23.

General Assembly as noted by Res. 3103 (XXVIII) which considered that WOL is an armed conflict⁵⁶. Further developments were made that WOL is classified as IACs in 1974 and this was to use Art. 1 of AP I to deal with WOL in regard or relation to IACs⁵⁷.

The notable thing to look at when dealing with NIACs in relation to WOL is its ability to specifically consider and deal with the different Parties that are engaged in the armed conflict. This is because the Art. 1 specifically mentions that there are three different types of people who can be considered to be under the scope or consideration of WOL and these include citizens of a nation fighting against⁵⁸;

- Racist regimes
- An alien occupation which deals with nations that do not meet the exact or sufficient conditions to be considered a State prior to its occupation with notable examples being drawn from Palestine and Western Sahara. When it comes to Palestine, observations can be made that it is belligerently occupied by Israel and yet it does not belong under the rulership of Israel⁵⁹
- The colonial power which places native people under restrictive conduct and regulations of a colonial power. However, the applicability of WOL in dealing with this issue is now considered not to be effective because all the nations are free from colonial domination⁶⁰.

Though the above three categories constitute WOL, the ability to fully classify them as WOL relies heavily on the distinction that there is a huge element of armed conflicts that surround them. Such a distinction is important as noted with other armed conflicts because it makes it possible to apply the necessary legal laws. This will also go a long way towards promoting peace during and after armed conflicts. However, AP II requires that the magnitude of the conflicts be of high intensity. But the problem is that most WOL is characterised by guerrilla warfare methods which are also considered not to fall under the scope of NIACs⁶¹. The other problem

⁵⁶ Ibid.

⁵⁷ Ibid, 31.

⁵⁸ Ibid, 34.

⁵⁹ Ibid.

⁶⁰ The Academy, *Human Rights Obligations of Armed Non-State Actors : An Exploration of the Practice of the UN Human Rights Council* (2016).

⁶¹ Barry S Levy and Victor W Sidel, 'Documenting the Effects of Armed Conflict on Population Health' (2016) 37 *Annual Review of Public Health* 205 <<http://www.annualreviews.org/doi/10.1146/annurev-publhealth-032315-021913>>. Accessed 8 November 2018.

pertains to the idea that WOL has a lot of asymmetric hostilities whose fashion is not commonly the same as that of traditional NIACs. However, is still advocated by Art. 1 that the magnitude of violence should be so high so that the governing principles of IACs can be applied⁶². But still, all the Geneva conventions are now being applied into cases and armed conflicts situations involving the occupation of one State by another even though the occupation is not surrounded by hostilities⁶³. This implies that the decision to classify armed conflicts and the need to apply conventions using the intensity of armed conflict is irrelevant. One thing that does not change is that the level of organisation of these conflicts must be well organised and the hostile group must also be capable of enforcing the APs together with the Geneva conventions⁶⁴. Hence, the application of Art. 1 and AP I will be in enforceable whenever a racist, alien or colonial government has occupied a structured and organised legal State.

Ideas were however put forward that liberalisation groups must be representing all the people of that dominated State⁶⁵. The challenge is, however, is having to prove that the interests or all the interests of all people are represented by the hostile group. Moreover, the fact that there are a lot of different people of different cultural and religious values and beliefs which makes it tell if there is just one hostile group or man different hostile groups involved in the WOL.

Considerations can, however, be made that the fact that war is being waged against a legitimate State by an armed group but it requires that the State must also have ratified the Geneva conventions together with its APs. Implying that the inability of a State to ratify the conventions may strongly affect the applicability of the conventions in times of armed conflicts. Which means that a lot of people can suffer in the midst of an armed conflict before a decision is passed on whether intervention should be made to deal with the WOL. Moreover, the decision surrounding the effectiveness of the IHL in dealing with IACs and NIACs can be traced on the decision that the application of APs is not mandatory⁶⁶. Such a move has a problem of affecting the level of which Parties will comply with the IHL. Hence, recommendations will be

⁶² Ibid.

⁶³ Ibid, 53.

⁶⁴ Ibid, 58.

⁶⁵ Ibid.

⁶⁶ Dyan Mazurana and Khristopher Carlson, 'The Girl Child and Armed Conflict: Recognizing and Addressing Grave Violations of Girls' Human Rights' [2006]and Violence Against the Girl Child, 1 <https://faser.essex.ac.uk/armedcon/story_id/000770.pdf>. Accessed 8 November 2018.

made in regards to this observation that there is a greater need to encourage Parties to comply and observe the APs even though they are not obligated to observe them.

But States that are part and parcel of the APs are strongly enforced and obligated to observe all the conventions in the event that they have been involved in an armed conflict with a ratified or non-ratified convention State⁶⁷. We can thus ask if there are any other ways that can be used to determine the enforceability of the conventions and APs without solely basing on ratification. With this idea in mind, it becomes imperative that relying on one criterion to determine the enforceability of the conventions and APs can be ineffective at certain times when hostile and armed conflict conditions are constantly changing. Hence, it can be said that the inherent nature of requirement of enforcement of the conventions and APs affects the effectiveness of the IHL in dealing with IACs and NIACs.

1.2.3.2 Internationalized Internal Armed Conflicts

Internationalized internal armed conflicts (IIACs) can be defined as a conflict that involves the intervention of third-party States which are either in support of the rebel groups or government forces involved in an armed conflict⁶⁸. It is from this definition that observations can be made about the relationship between IACs and NIACs. As a result, both the conventions and APs have been accused of failing to come up with a solid answer as to which part of the IHL can be applied in any of the so many armed conflict situations.

When one desires to look at IIACs, there are two basic issues that must be looked and dealt with is the level at which States are involved in the armed conflicts and the extent to which the principles surrounding IACs will be applied. These two issues can be discussed as follows;

1.2.3.2.1 The extent to which NIACs can be internalised

The notable feature about NIACs is that they can also be internationalised⁶⁹. The internationalisation of armed conflicts is as a result of intervention by third-party States that influences an inter-state conflict between rebel groups and a legitimate

⁶⁷ Ibid.

⁶⁸ Ibid, 59.

⁶⁹ Ibid, 53.

government⁷⁰. But the problem is that the way NIACs can be internationalised is not sufficiently addressed by international law. This follows observations that can be made which show that in NIACs, the conflict is between States and armed groups while in IACs the conflict is between States⁷¹. This distinction is backed by the ICJ and it even has jurisdiction support which can be traced from the Nicaragua case which was considered to that conflicts between Nicaragua and *contras* were NIACs and that they should be governed by NIAC regulations while a conflict between the US and Nicaragua were considered to be an IAC and subject to IACs regulations⁷². Differences were observed in the Yugoslavia case in which the decision was to consider it as both an IAC and NIAC⁷³. This puts questions on the credibility of legal instruments to precisely define and deal with matters in a concisely and not remain vague or ambiguous.

This is one of the reasons why a layman and individuals who are not well versed with legal knowledge are mostly not interested in knowing in improving their knowledge of legal apparatus and apply them in armed conflict and non- armed conflict cases. This problem can, in other words, be considered to be a limiting factor that impairs the credibility and effectiveness of not only the IHL to deal with IACs and NIACs but also on the decisions made by Courts. Hence, it is worthy to note and say that some of the problems that are encountered in using and implementing the IHL in armed conflict situations are as a result on the definition of terms and principles embodied in armed conflicts rules and regulations and this problem is also connected to issues of inconsistency. For instance, say an insurgent has been arrested by armed forces of a third-party State, the APs together with the Geneva conventions become applicable and they should be applied by a third-party State⁷⁴. If the insurgent has been arrested by a legitimate government or State, then AP II and Art. 3 will be applied⁷⁵. The same case applies to civilians who would have participated in hostilities. In the case that there are civilians dwelling in a region that has been taken control by rebel groups which are receiving support from an intervening third-party

⁷⁰ Ibid, 58.

⁷¹ Ibid, 64.

⁷² Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States), ICJ Rep. 1986, § 219.

⁷³ Prosecutor v. Dusko Tadic, Decision of the Defence Motion on Interlocutory Appeal on Jurisdiction, Appeals Chamber, 2 October 1995, 72, at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

⁷⁴ Ibid, 70.

⁷⁵ Ibid.

State, then the situation will be treated as an IAC. in the event that the NIAC has led to a regime change, then the conflict, in this case, is considered as to have been internationalised and would be treated completely as an IAC⁷⁶.

1.2.3.3.2 The Nature of Involvement

This consideration is one of the key issues that play an important part in determining whether a NIAC can be considered to be constituted an IAC. The *jus in bello* and *jus ad bellum* principle, therefore, provide limitations to the extent to which other States can interfere in the affairs of another State involved in an armed conflict⁷⁷. This implies that the fact that the States are allies does not automatically mean that one Party can interfere in its ally's affairs.

This also stipulates that there though are various ways States can use to interfere in an armed conflict situation, it is not every method that can be used to intervene in an armed conflict situation. This is because some of the methods are illegal while others are legal and hence intervening States must ensure that whichever way, they decide to use is legal. Recommendations can be made that the decision to use available methods to intervene in an armed conflict must not cause the situation to aggravate from an internal case to an IAC⁷⁸.

When looking at the level of involvement of third-party States in NIACs, third party States can offer to provide military services in the form of military advisers and experts. But observations must be made that in doing so, the impact of third-party States, in this case, is not enough to consider the NIAC to be considered as IAC⁷⁹. The advantage of providing military experts will be to the advantage of the State which under the threat of the armed conflict. Military advisers will also not be in a position to act on behalf of the third-party State and in most cases, they are to assume a neutral stance though their aim is to offer assistance to the State which is being waged against by the other state in an armed conflict. The conflict will be considered to be internationalised once the military experts begin to act on behalf of their representative government⁸⁰.

⁷⁶ Ibid.

⁷⁷ Reuben E Brigety II, 'Chapter 6 Human Rights in Armed Conflict' 136.

⁷⁸ Ibid, 71.

⁷⁹ Ibid, 59

⁸⁰ Ibid, 64.

The involvement of a State in an armed conflict situation can involve a State sending mercenaries and volunteers to a nation where the NIAC is taking place⁸¹. As noted with the above observation, the same will be said that this type of involvement is also insufficient to be considered that the situation is regarded as an IAC. This can be supported by the argument which States that individuals which are not part and parcel of a particular State will not be held accountable for illegal conduct perpetrated in an armed conflict by a State which they are not an organ too. Focus can, however, shift when the State begins to take part in influencing the conduct of the mercenaries or volunteers towards changing the outcome of the armed conflict in favour of another State. Hence, it is considered that a State that dispatches mercenaries or volunteers to conduct services in a State where an armed conflict is taking place are automatically considered to be directly involved in the NIAC and hence the conflict will be deemed to be internationalised and form part of an IAC⁸².

Material and financial aid can also be used as a form of intervention and aid can be provided to either the rebellious group or to the authoritative government. The decision to decide on whether aid should be regarded as enough to warrant the situation as amounting to IAC is insignificant. The magnitude of the provided aid is not in anyhow effective irrespective of whether it is so huge or whether it will have an effect on either party's ability to wage a conflict⁸³. But the fact that some illegalities are observed and aid are provided, then such aid will not render the involvement as legal. The intervening States can thus be held accountable for breaches in international affairs of another State⁸⁴. There is a circumstance in which aid has been sent in the form of military equipment and ammunition and such cases automatically led the ICTY and the ICJ to regard the intervention as IAC⁸⁵. The decision made on the case was that the ability to prove that the accused State is actually in support and financing the operations of a rebel group results in the armed conflict being considered to be IAC⁸⁶. Moreover, the conduct and operational activities of the rebel faction are also enough to regard the situation as an IAC. The

⁸¹ Ibid, 75.

⁸² Dapo Akande, *Classification of Armed Conflicts: Relevant Legal Concepts* (2012).

⁸³ Ibid, 81.

⁸⁴ Ibid.

⁸⁵ *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States)*, Merits, 27 June 1986, I.C.J. Rep. 1986, § 109 and § 115.

⁸⁶ Ibid.

major problem that can be noted from the Nicaragua case decision is that differences were noted in terms of opinion between the ICTY and the ICJ.

1.2.3.3 Armed Conflicts Incorporating the Involvement of the UN

The role played by the UN in armed conflicts has increased and the UN can be said to be now actively involved in armed conflict situations. The involvement of the UN in an armed conflict situation is best understood by looking at the approval by the UN authorising the other State to use armed force against another State. This can also be looked at the role played by the UN in deploying peacekeepers to monitor the armed conflict situation and maintain peace⁸⁷.

Problems can, however, be noticed with this approach and this is because cases in which the UN is not involved but has approved that another State can use against the other State. This kind of action is totally allowed and the UN is sanctioned to adopt this measure so as to force the State to comply with the requirements of the UN Charter's Art. IV⁸⁸. These types of conflicts are sometimes known as inter-state conflicts and are governed by IACs regulations and this can be noted from a case which involved the armed conflicts fought against Iraq in a move to liberate Kuwait through the role played by the coalition forces in the First Gulf War⁸⁹. On the other hand, the capture of coalition forces by the Iraq forces which went on to display the footages was in violation of the Geneva convention. In such situations, IACs regulations are highly applicable and any violation of such rules can trigger a legal or military response by the UN. Hence, States obliged to resort to using force when dealing with internal armed conflicts. In the event that the situation has grown into an armed conflict situation, all the members of the Geneva convention are legally allowed to intervene⁹⁰. As a result, the armed conflict will be an IAC that will be fought between the Geneva convention ratified members and the intervener. Hence,

⁸⁷ Ibid, 81.

⁸⁸ Mokleiv Nyg, 'Evaluating the Conflict-Reducing Effect of UN Peace-Keeping Operations' (2010) 58 National Conference on Peace and Conflict Research Uppsala 192 <http://stockholm.sgir.eu/uploads/PKO_prediction_SGIR.pdf>. Accessed 8 November 2018.

⁸⁹ Ibid.

⁹⁰ M Sassòli, 'State Responsibility for Violations of International Humanitarian Law' (2002) 84 International Review-Red Cross 401 <http://www.icrc.org/eng/assets/files/other/401_434_sassoli.pdf>. Accessed 8 November 2018.

the intervention by states in response to the regulation and recommendation of the UN constitute an IAC.

The other instance involves the UN playing its role as an international monitoring organisation that is responsible for monitoring armed conflict situation and promoting peace between States⁹¹. The UN thus comes into force through its role to enforce the IHL but the use of the IHL is limited in scope. This is because the IHL cannot be applied to regulate the conduct parties to an armed conflict and UN peacekeepers. This is because States are not encouraged to use force against other states but this is conditional on the fact that the State is acting in self-defence⁹². On the other hand, the ICJ stipulates that the decision to deploy peacekeepers is subject to the willingness of the affected States⁹³. It is must, however, be noted that peacekeepers are sometimes used and placed in nations affected by armed conflicts with different aims but what plays an essential role in ensuring that their conduct or mandate does not interfere and act against any of the armed conflict involved in an IAC. if so, then this will be enough to consider the whole situation an IAC. the involvement of the UN in IACs is as a result of the role played by the UNSC and the use of peacekeepers will be subject to a regulation that the peacekeepers will not perpetrate acts of hostilities⁹⁴. Moreover, the activities of the UN can be said to cause the situation to mount into an IAC in the event that the UN has waged a war in support of another State that is against a State which forms part and parcel of the Geneva convention.

Hence, it can be said that the UN does play an important part in dealing with IACs but its involvement is either as a result of the role played by the UNSC or as a result of the need to provide peacekeepers to deal and contain the armed conflict. With regards to this situation, the role of the UN must not thus lead to armed hostilities against a Geneva ratifying State or by allowing peacekeepers to engage in armed hostilities against another state.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Kai Michael Kenkel, 'Five Generations of Peace Operations: From The "thin Blue Line" to "painting a Country Blue"' (2013) 56 *Revista Brasileira de Política Internacional* 122 <http://www.scielo.br/scielo.php?pid=S0034-73292013000100007&script=sci_arttext>. Accessed 8 November 2018.

⁹⁴ Ibid.

1.4 Challenges of Classifying Armed Conflicts

Once a situation has been considered to be an armed conflict, either as an IAC, internationalised armed conflict or NIAC, the IHL will be totally applicable. The ability to apply the IHL will depend on the successful ability of States to classify armed conflicts into either one of the three types of armed conflicts. There are however ideas which suggest that there are a lot of challenges that can be encountered when States attempt to consider a situation as an armed conflict⁹⁵. Thus, in an attempt to outline how effective, the IHL is in dealing with armed conflicts, this study can thus contend that so long as challenges exist in recognising the existence of armed conflicts and classifying them, then potential limitations which can hinder the effectiveness of the IHL in dealing with IACs and NIACs are more likely to be seen. In order to develop successful strategies and measures that can be used to enhance the effectiveness of the IHL in dealing with IACs and NIACs, it is therefore important to look at these challenges. This part, therefore, highlights some of the key challenges that are encountered by States when classifying armed conflicts. Such is supported by Art. 2 which also contends that the Geneva convention can be applied in such circumstances but the problem is that it does not explicitly disclose detailed information about the intensity of the armed conflict. Hence, it can, on the other hand, be said that such Art. Do not contribute towards improving the conciseness of the intensity of armed conflicts and how it influences the decision to consider a situation fully an IAC or NIAC⁹⁶. These methods of intervention can be discussed as follows;

- Intervention methods involving the provision of troops by another State to a State involved in a NIAC. Such a case is enough to consider the armed conflict an internationalised and in this regard is made in relation to conflicts fought between the Party being combated and the intervening State⁹⁷. Thus, the fact that two States are involved in an armed conflict warrants the applicability of the Geneva convention and this is regardless of the fact that the armed forces are being backed up by the rebel groups or not⁹⁸. Problems will have noticed when the armed conflict is intense and of international

⁹⁵ Ibid, 87.

⁹⁶ Ibid, 90.

⁹⁷ Ibid, 93.

⁹⁸ Ibid.

magnitude which causes challenges in identifying which group is legitimate. Bigger problems have however been observed when other States were noted to be recognising completely different groups as being legitimate⁹⁹.

1.4.1 Theoretical Definition of Non-International Armed Conflict

Foremost, Art. 3 of the Geneva Convention considers that in order for NIAC to be said to exist, an armed situation has to take place within the geographical boundaries of a State or contracting Party and has to be separate from the other types of violence¹⁰⁰. In other words, a NIAC is, therefore, any armed conflict situation that is separate from situations of internal disturbances. Basically, two conditions have been put forward to help in identifying whether the situation should be considered an armed conflict. These conditions include the way the parties are organised and the magnitude of the violence¹⁰¹. This implies that in order for the situation to be considered an armed conflict, then these two conditions must all be fulfilled. The fulfilment of one condition and not the of the other will thus not make the situation an armed conflict. In other words, internal disturbances are situations involving confrontations within a State which do not include NIACs. It is important to note that failure to distinguish or classify NIACs has been influenced by the act of violence, duration and seriousness¹⁰². However, before the Geneva convention was established, internal armed conflicts were classified based on belligerency, insurgency and rebellion¹⁰³.

When citizens of a nation engage in acts of insurrection against their ruling government, such an act is considered to be rebellious¹⁰⁴. Rebellious individuals or citizens are often legally and politically oppressed by the State and hence any rebellious situation is considered to be a political violence as noted by what took place in Kenya in 1992¹⁰⁵.

⁹⁹ This does not render that all these States will be automatically be governed by the Geneva convention and the APs.

¹⁰⁰ Frida Lindström Supervisor and emer Göran Lysén, 'Asymmetric Warfare and Challenges for International Humanitarian Law Civilian Direct Participation in Hostilities and State Response' [2012] Thesis 1.

¹⁰¹ Ibid, 100.

¹⁰² Knut Dörmann and Laurent Colassis, 'International Humanitarian Law in the Iraq Conflict' (2012) 47 German Yearbook of International Law 293 <<http://www.ncbi.nlm.nih.gov/pubmed/23163476>>. Accessed 8 November 2018.

¹⁰³ Ibid.

¹⁰⁴ Ibid.

¹⁰⁵ Ibid, 99.

Traditional international law, on the other hand, considers that insurgency to be a difficult situation to understand which is vague and ambiguous to define¹⁰⁶. It is outlined that the IHL and international law are not clear as to how they define the term insurgency. This is because they do not consider insurgency as illegal but rather considers it to be as a legal act¹⁰⁷. This implies that rebellion and insurgency are lawful situations.

Considerations can, however, be made that any attempt to consider acts of the insurgency may lead to the internationalisation of situations and incidences. This can be supported by ideas which show that the extent to which third party States deal with insurgency varies differently from those of other States¹⁰⁸. As a result, it becomes difficult to determine the limitations or boundaries which insurgency can be restricted to. Alternatively, when it comes to the issue of the scope of insurgency in relation to the IHL and international law, deductions can be made that insurgency is indeterminate. This can further be supported by ideas which strongly contend that other States are more likely to manipulate the idea of insurgency in relation to the way they relate to insurgents¹⁰⁹. Third party States have in some circumstances be considered to be capable of recognising insurgencies but fail to directly declare it¹¹⁰. But in certain circumstances, other States can declare it and actually assume a neutral position towards it. However, once an insurgency has been recognised, there is a high possibility that the conflict will be partially internationalised. Once this is done, third-party States can actually get involved in the conflict without necessarily allowing the situation to lead them to war¹¹¹.

1.4.2 The Changing Nature of Conflicts

The other challenge that can be observed when considering whether a situation should be considered as an armed conflict or not is the being influenced by the changing nature of armed conflicts. This is because a lot of armed conflicts are now being characterised by a lot of different armed and non-incidences or reactions

¹⁰⁶Hans Peter Gasser, 'Collective Economic Sanctions and International Humanitarian Law – An Enforcement Measure under the United Nations Charter and the Right of Civilians to Immunity: An Unavoidable Clash of Policy Goals?' (1996) 56 *Zeitschrift für Ausländisches Öffentliches Recht und Völkerrecht* 871.

¹⁰⁷ *Ibid.*

¹⁰⁸ *Ibid.*, 102.

¹⁰⁹ *Ibid.*, 106.

¹¹⁰Ilia Siatitsa and Maia Titberidze, 'Human Rights in Armed Conflict from the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges' 291.

¹¹¹ *Ibid.*

which are affecting the way States, third-party States and non-State actors are responding to a conflict¹¹². Armed conflicts have changed a lot and most of the armed conflicts that have been observed in the past years are now involving a lot of groups such as drug cartels, transnational armed groups like Al Qaeda, multinational corporations and private military companies¹¹³. When such changes are compared in relation to the IHL, observations can be made that the IHL has not changed enough to account for such changes¹¹⁴. Thus, challenges can be said to exist in terms of the effectiveness of the IHL in addressing IACs and NIACs. This is because it has not been effectively amended to deal with the nature of changes in armed conflicts that have evolved a lot.

1.4.3 War Against Terror

Ever since the attack on the USA on September 11, efforts to combat terror against transnational groups such as Al Qaeda have been on a high increase¹¹⁵. The problem is that there has been a lot of arguments surrounding the idea if an international law such consider the fight against terror as an armed conflict¹¹⁶. This can be supported by observations made which points out that prevailing statutory approaches do not clearly differentiate between armed conflict and terrorism¹¹⁷. Moreover, it is sometimes believed that it is difficult to place a clear distinction between a freedom fighter and a terrorist. This can be evidenced by deductions which have been made which pointed out that under Para. 256f, Ch. 38 of the US Code 22 defines terrorism as politically motivated and pre-planned acts of violence that are committed by clandestine agents or sub-national groups against non-combatants¹¹⁸. Controversies can be seen when one looks at the definition provided by the UN which defines it as efforts to initiate a social or political change by intentionally attacking civilians¹¹⁹. This is because in most cases when such definitions are given, one can face difficulties in clearly separating a terrorist group and a resistance movement. Moreover, the former uses force in bringing about

¹¹²Duxbury, Alison. "Drawing lines in the sand-characterising conflicts for the purposes of teaching international humanitarian law." *Melb. J. Int'l L.* 8 (2007): 259.

¹¹³ *Ibid.*

¹¹⁴ *Ibid.*

¹¹⁵ Based on the September 11 attacks that were launched against the US by Al-Qaeda forces led by Osama Bin Laden.

¹¹⁶ Geneva Convention I, 1864.

¹¹⁷ *Ibid.*

¹¹⁸ US Code 22 Ch. 38. Par. 256f.

¹¹⁹ Geneva Convention II, 1906

political changes while the latter are in opposition against forms of occupation. This is similar to what was observed when Mau Mau fighters invaded farms belonging to Europeans in Kenya¹²⁰. But it is worthy to note that if such actions by Mau Mau fighters were undertaken in the modern twenty-first century then one would consider them to be acts of terrorism. This problem has however been rectified by the Geneva Convention of 1937 which clearly defined terrorism as criminal incidences aimed at perpetrating terrorism that lead to a destruction of property and endangerment of people's lives¹²¹. This definition is however made in relation to four articles which individually address separate items. That is,

- Art. 1, par. 1 directly deals with the criminal acts of terrorism.
- Art. 2, par. 2 looks at the property damages that have been inflicted as a result of acts of terrorism.
- Art. 2, par. 3 deals with how terrorism acts endanger the lives of the public.
- Art. 2, par. 5 places focus on the manufacture, procurement and provision of ammunition.

Thus, from the above observations, it can be deduced that the Geneva Convention plays a huge role in addressing challenges in classifying acts of terrorism whether they should be regarded as armed conflicts or not. The broader definition provided by the Geneva convention can also be said to be way clearer and not vague as noted from other statutory instruments such as the IHL which does not give a clear distinction of terrorism and how it relates to armed conflict.

The other problem that can be noted is that current modes of terrorism are no longer being characterised by direct involvement of States. Yet, on the other hand, the IHL considers that armed conflicts are in three basic categories. Currently, the dynamics of international terrorism have changed a lot and States are now battling a lot against transnational groups such as Al-Qaeda and the Islamic State of Iraq and the Levant (ISIL)¹²². To make matters worse, the IHL has been criticised for failing to consider

¹²⁰Mau Mau uprising: Bloody history of Kenya conflict. BBC, 7 April 2011.

Accessed from <http://www.bbc.com/news/uk-12997138>> Accessed on 17 March 2018.

¹²¹ Geneva Convention III,

¹²² Ibid.

IAC between non-state actors and States¹²³. This has a problem allowing armed groups to enjoy the same rights which are accorded to normal armed forces.

In simple terms, the IHL faces problems when it comes to the issue of determining whether an individual should be considered as a combatant or a terrorist. Chadwick (1996) considers that the IHL also faces self-determination problems when it comes to terrorism and though some acts are considered not to be unlawful by the IHL, the fact that they are committed by domestic insurgents makes it a clear indication of terrorism. This can be noted from the confusion which was observed with the Hamdan case in which Hamdan a Yemeni national was charged by the Columbia District Court for unprivileged belligerent murder, allegedly attacking civilians and civilian objects¹²⁴. Objectives were made by the US government citing that the Geneva convention cannot be applied to Hamdan's case since the conflict was not regarded as an armed conflict¹²⁵. Yet Hamdan was insisting that a trial could not be done until his prisoner of war status has been duly accorded to him in line with the Geneva convention using what is termed the *habeas corpus principle*¹²⁶. As a result, it can be noted that different views towards armed conflicts are highly visible and the Court considered an IAC to be between States and yet Art. 3 made it clear that protection is awarded to rebels involved in NIACs¹²⁷. Though the decision was made in Hamdan's favour, it still places concern on different perceptions that can be made about IAC, NIACs and terrorism.

1.5 Importance of Classifying Armed Conflicts

The idea to classify or not to classify armed conflicts is one of the key concerns that should be addressed. This is because it affects the application of the IHL and the IHL cannot be applied before a situation is considered to be an IAC or NIAC. Once a situation has been regarded as an armed conflict, the IHL will begin to apply with

¹²³ Ibid, 115.

¹²⁴ Salim Ahmed Hamdan v Donald H Rumsfeld, Secretary of Defense, 415 F 3d 33 (2005).

¹²⁵ Ibid.

¹²⁶ Ibid.

¹²⁷ Geneva Convention IV.

immediate effect¹²⁸. This is important because it makes it possible to protect civilians, civilian property and regulate the conduct of belligerent parties.

The importance of classifying armed conflicts can be traced to remarks made by Duxbury which outlines that failure to properly classify situations as armed conflict has humanitarian and legal repercussions¹²⁹. Moreover, the importance of classifying armed conflicts can be linked to the relationship that exists between the IHL and human rights law. The IHL also seeks to ensure that the civilians' dignity and rights are protected during armed conflicts and that parties involved in armed conflicts are observing legal restrictions that given their conduct especially against non-combatants and the environment¹³⁰. This is clearly outlined using the principle of distinction which contends that there should be a clear distinction that must be made by parties about combatants and non-combatants¹³¹. This shows that the inability to classify armed conflicts will give belligerent parties freedom and a free will to engage in non-ethical and human rights violations (HRVs) activities.

The UN Security Council (UNSC) is more dominant in situations or armed conflicts and classifying armed conflicts, therefore, allows a wider scope in the operations of the UNSC towards efforts to promote peace and curbing HRVs. The UNSC has also been noted to be effective in dealing with certain armed conflict cases of as it would impose political and economic sanctions as a way of trying to control the behaviour or conduct of parties involved in an armed conflict¹³².

It must, however, be noted that classifying armed conflicts does not offer a guarantee that parties will adhere to the requirements of the IHL or if it will stop breaches of international law and other human rights laws during armed conflict. This can be supported by arguments which contend that a lot of armed conflicts have still continued to take place even after successful efforts had been made to effectively recognise the situation as an armed conflict.

With regards to the idea of classifying armed conflicts, one can thus argue that the IHL does not effectively place a clear distinction between what should be regarded as an armed conflict or not. More so, the idea of classifying armed conflicts has been

¹²⁸ Ibid.

¹²⁹ Ibid, 29.

¹³⁰ Ibid, 99.

¹³¹ Ibid, 100.

¹³² Ibid, 102.

accused to be politically motivated by States and some States are considered to have used it to settle political scores against other States¹³³.

1.6 Select Issues of the Protective Scope of IHL in IACs

When it comes to the idea of dealing with IACs and NIACs, deductions can be made that IACs are highly regulated by the IHL as opposed to NIACs. This is because both the Geneva conventions, Hague Laws and the AP I apply to IACs¹³⁴. The IHL has been commended to be a powerful legal tool of dealing with IACs. This is because the ICRC contends that the IHL has to a large extent being capable of curbing suffering experienced during and after armed conflicts¹³⁵. The ability of the IHL to deal with IACs can be related to the number of States that have ratified the Geneva conventions. A total number of 191 States have ratified the Geneva conventions since its inception in 1949 and this is a huge reflection of customary international law¹³⁶. The ability and effectiveness of the IHL in dealing with IACs will be addressed by looking at how it approaches issues relating to the participation in hostilities, conduct of hostile matters, the issue of military objectives, the influence of the principle of proportionality, efforts to establish precautionary measures and the influence of the concept of occupation. These six important elements are herein discussed as follows;

1.6.1 Participation in Hostilities

In IACs, civilians are entitled by the IHL to total protection from attacks but can fall outside the protection of the IHL when they get themselves involved in direct hostilities¹³⁷. This implies that it is not just immunity civilians will lose from involving themselves in direct hostilities but can be held accountable for unlawful conducts¹³⁸. As a result, the participation of civilians in hostilities is enough to allow them to be levelled as belligerents or combatants. But the problem has been as always, as usual, in dealing with civilians that have been found guilty of participation in

¹³³ Ibid, 106.

¹³⁴ Geneva Convention IV

¹³⁵ Ibid.

¹³⁶ Ibid.

¹³⁷ Red Crescent, 'International Humanitarian Law and the Challenges of Contemporary Armed Conflicts' (2007) 89 International Review of the Red Cross 719

<http://www.journals.cambridge.org/abstract_S1816383107001294> Accessed 8 November 2018.

¹³⁸ Ibid.

hostilities. The ICRC together with other legal international bodies has been facing challenges in dealing with issues of civilians who have been captured by enemies whilst in the midst of participating in hostile activities¹³⁹. In most cases, there are more likely to be judged or trialled as prisoners of war as postulated by the Geneva conventions. More so, such individuals can be considered to be out of the scope of the protection of the IHL. This is however conditional and the fourth Geneva Convention asserts that so long as these individuals met the nationality requirements of the fourth Geneva convention, they will be under the full protection of the IHL irrespective of the fact that they have participated in direct hostilities. Individuals who do not meet such conditional requirements are however catered for by AP 1 under Art. 75 and Art. 3 of the Geneva convention¹⁴⁰.

1.6.2 Conduct of Hostile Matters

The IHL regards that the hostile situation must be of an armed nature so that the situation can be classified as an IAC¹⁴¹. The nature of hostility must thus be severe and of high intensity. Hostility matters are governed by the AP 1 but considerations have been made that the legal aspects of AP I are vague and that this has necessitated individuals to come up with different interpretations of not only APs but also of the Geneva conventions¹⁴². Differences in interpretation of the IHL are in most cases more likely to cause discrepancies in the way parties practically apply the legal laws. Such differences are caused by the changing nature of military objectives, precautionary measures, occupation and proportionality.

1.6.3 The Issue of Military Objectives

Art. 52. 2 of AP 1 contends that military attacks must be confined to military objectives¹⁴³. Hence, civilians and any target that falls outside the category of military objectives is not deemed suitable for launching an attack against. In other words, military objectives can be said to be targets that if attacked, their use, purpose, location and nature will help contribute towards a military advantage of an armed

¹³⁹ Ibid, 134.

¹⁴⁰Indr Lechimiakyt , ‘Preservation of Environment in Times of Non-International Armed Conflict. Legal Framework, Its Sufficiency and Suggestions’ (2013) 20 Jurisprudence 569
<<https://www3.mruni.eu/ojs/jurisprudence/article/view/971>>. Accessed 8 November 2018.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³Drafting Committee, ‘The Manual on the Law of Non- International Armed Conflict’ 75
<<http://www.iihl.org/iihl/Documents/The Manual on the Law of NIAC.pdf>>. Accessed 8 November 2018.

force either through neutralisation, capture, partial or total destruction¹⁴⁴. It is through AP I that the aspect of distinction will be enhanced and ability to curb unnecessary attacks as well too. Thus, the effectiveness of the IHL in dealing with IACs and NIACs can be drawn from this observation and conclusions can be made it makes it possible to curb unnecessary civilian deaths. We can determine the effectiveness of the IHL in dealing with IACs by looking at the extent to which they will reduce an enemy's resistance and willingness to continue engaging in fights. However, there are ideas which suggest that the definition of military objectives is subject to a number of factors and subjective interpretations¹⁴⁵. Hence, it can thus be said that the desire to determine the exact contextual definition of military objectives requires a lot of broad understanding and research of the governing principles. But the main emphasis is to reduce the number of unnecessary damages on both civilians and civilian properties.

The effectiveness of the IHL can be undermined when looking at the issue of dual-use objects which are objects that can be classified as either military or civilians which include bridges and airports. The use of objects by armed personnel can, however, result in that object being classified as a military object and this can create tensions as to if it is lawful to attack it or not. It can, however, be deemed to be unlawful if the expected effects result in a huge toll of civilian deaths¹⁴⁶. Hence, the IHL seeks to reduce the level of damages suffered by civilians but what may affect its effectiveness is vagueness in legal principles and interpretation problems.

1.6.4 The influence of the Principle of Proportionality on the Conduct of Hostilities

Whether the IAC has been considered legal or not, the IHL seeks to ensure that the level of damages suffered is proportionate to what is morally acceptable. When launched attacks result in severe damages in property and civilian deaths or both, the resultant situation is termed disproportionate as stipulated by Art. 51 of AP I¹⁴⁷. the major problem with this Article has been based on the level of criticisms that were which showed that it is not precise when it comes to the wording of certain

¹⁴⁴ Ibid.

¹⁴⁵ Ibid, 137.

¹⁴⁶ Ibid, 140.

¹⁴⁷ Ibid, 143.

terms¹⁴⁸. Once an article has been discovered to be having impreciseness problems, it can easily be foreseen that other potential users of the Article are more likely to encounter problems which are more likely to be related to interpretation and applicability. Hence, it can result in contradictory remarks and perceptions as Parties are more likely to apply it in such a way that the outcome will be in its favour. In addition, some of the terms that are used in these articles are also believed to be vague and difficult to understand especially to a layman¹⁴⁹. Hence, one can contend that the use and applicability of articles and provisions of the Geneva convention and the IHL are more confined to those that have a strong legal background. As a result, parties that are willing to apply the IHL are more likely to be dissuaded from applying because of the lack of know how. One cannot apply what he or she does not know and there are a lot of complications, time and monetary disadvantages a person will suffer from going through the process of acquiring the required understanding.

There are situations which involve a dilemma on whether to pursue an attack or preserve civilian lives. Recommendations made by the IHL posit that in the event that a deadlock has been reached on whether to go ahead with an attack or preserve civilian lives, the ultimate decision must be made based on the need to preserve civilian lives or objects¹⁵⁰. But will this always be the case especially when the person or groups under attack are hostile belligerents or rebels such as Al-Qaeda or ISIL? Chances are very high that armed force is more likely to pursue military attacks so as to please their commanders and be commended for a job well done for eliminating their enemies. The idea that the intended benefits or outcome of a military attack in an IAC must be huge and direct is thus an important matter to consider when looking at the effectiveness of the IHL in handling IAC matters. Armed forces are strictly encouraged to launch attacks during an armed conflict on the condition that the resultant outcome is going to result in a direct and concrete military advantage¹⁵¹. The same applies to civilian damages and civilian property is not to be attacked even though it is being used by military officials which is enough to consider

¹⁴⁸ Ibid.

¹⁴⁹ Deidre Willmott, 'Removing the Distinction between International and Non-International Armed Conflict in the Rome Statute of the International Criminal Court' (2004) 5 Melbourne Journal of International Law 196.

¹⁵⁰ Ibid.

¹⁵¹ Hannes Eechaute, 'Non-International Armed Conflict : A Trigger for the Rules on Targeting ?' 129.

it a military target¹⁵². Such objects include telecommunications facilities and electrical grids and industrial infrastructure. This is because attacks on these objects will compromise the future lives and survival of the public and hence prohibiting attacks will go a long way towards preserving future lives.

The IHL thus can be said to be a major instrument that serves to protect the lives of people including the future lives of those that are to continue living. This follows observations that have been made which showed that it also seeks to regulate disproportionate attacks which may compromise future wellbeing standards and survival chances.

1.6.5 An Overview of Efforts to Establish Precautionary Measures

In order to fully understand the operational capabilities of the IHL when used to deal with IACs, it is important to look at how it deals with precautionary measures to prohibit and restrict civilian damages and targets. Art. 57 of AP I, therefore contends that when planning on launching attacks considerations must be made that precautionary measures are put in place to curb damages to civilian objects as well as loss of civilian life¹⁵³. But most the planning strategies are considered to be based on what is military feasible in the event of preventing and guarding against attacks¹⁵⁴.

The role played by the IHL towards dealing with IACs is not just to positively influence the behaviour of the attacking side but also that of the defending side¹⁵⁵. This is because civilian lives are not only lost when an attacking side attacks another side but also when one side launch an attack in self-defence. Hence, the idea of precautionary measures is to guide both parties into taking precautionary measures that will help guard against the destruction of civilian property and the deaths of civilians.

Prohibitions of the IHL also contend that under no circumstance should civilians be used as targets. The use of civilians as targets in IACs has been a major problem to

¹⁵² Ibid.

¹⁵³ Ibid, 149.

¹⁵⁴ Ibid, 151.

¹⁵⁵ Elizabeth More, 'International Humanitarian Law and Interventions Rwanda, 1994' (2007) 2 Genocide Studies and Prevention 155.

reckon with and this can be traced to armed conflicts observed in Africa in which children and women were being used as shields.

Criticisms can be levelled against AP I on the base that it considers that a defending side in an armed conflict has a total burden of ensuring that civilians are fully protected¹⁵⁶. In actual fact, the attacker also needs to ensure that civilians are totally protected. In actual fact, both sides have taken standard military measures that guard against unnecessary attacks. This is because the ability to establish possible preventive measures is essential in preserving unnecessary undesired consequences. Yet the AP I, has been considered to be more favourable to the defender but the burden must be proportionally distributed between the two parties.

1.6.6 The Influence of the Concept of Occupation

Matters governing the occupation of a State are outlined under the 4th Geneva convention which stipulates that either partial or full occupation of a State whether with the use of military force or not, constitute a case against the occupation¹⁵⁷. Occupying powers are considered to be willing to displace legal governmental structures and replace them with their own systems. There seem to exist ideas which show that there is always a way to functionally occupy territories without endangering the lives of civilians¹⁵⁸. The extent to which functional approaches can be used to deal with the effects of armed conflicts are theoretically high and in practical terms, functional approaches have never been put into real means of occupying terms.

1.7 Ravaging Effects of Armed Conflicts

It has always been noted that armed conflicts are noted desirable and have had a severe negative effect on both society and the environment¹⁵⁹. Much of the effects of armed conflicts have been severely felt and borne by human beings who happen to be perpetrators and initiators of armed conflicts. The notable effect of armed conflicts pertains to the loss of human life. It is estimated that more than 180 000 people died

¹⁵⁶ Ibid.

¹⁵⁷ Levy and Sidel.

¹⁵⁸ Ibid.

¹⁵⁹ Ibid, 155.

as a result of armed conflicts in 2014¹⁶⁰. Much of the deaths attributed to armed conflicts have been noted to have taken place in Africa with countries like DRC and Somalia, Syria and Yemen topping the list¹⁶¹.

The other effect of armed conflict can be said to be displacement of civilians from their homes. In the event of armed conflicts, civilians are forced to flee their homes in search of better and secure places where they can take refuge. It is not always guaranteed that civilians will find suitable and safe shelter or refuge. Much of the civilians have been noted to end up wandering the streets with no place to go or leave¹⁶².

Armed conflicts can also be blamed from the growing number of refugees moving across the globe. In 2017, it was noted that there was a huge refugee problem in Europe as a result of refugees fleeing countries like Yemen and Syria¹⁶³. The receiving nations were sometimes reluctant to accommodate more refugees. During periods of migration, refugees are sometimes abused and killed and this can be evidenced by a case in which a journalist was arrested and assaulted and could not be treated fairly and the reason being that he was a refugee¹⁶⁴. Refugees, on the other hand, have also been blamed for criminal offences that take place in States in which they have sought a refugee status¹⁶⁵. Granting a refugee status has no single assurance that the refugee will be able of holding up to the prescribed rules and regulations of the awarding States. In the event that a refugee has failed to secure gainful employment either as a result of restrictive laws, he may end up resorting to criminal offences such as stealing. Most nations are so afraid to accommodate refugees because of health and disease issues¹⁶⁶. This further puts refugees at risks of being abducted, abused or killed. Hence, it can be said that the notable effect of

¹⁶⁰ Richard Norton, Global armed conflicts becoming more deadly, major study finds. The Guardian (Wednesday 20 May 2015). Accessed from <https://www.theguardian.com/world/2015/may/20/armed-conflict-deaths-increase-syria-iraq-afghanistan-yemen> on 17 March 2018.

¹⁶¹ Ibid.

¹⁶² Max Roser (2018). "War and Peace". Published online at OurWorldInData.org.

Retrieved from: <https://ourworldindata.org/war-and-peace> [Online Resource] on 17 March 2018.

¹⁶³ Ibid.

¹⁶⁴ Davidson Helen. Refugee and journalist Behrouz Boochani released after arrest on Manus. The Guardian (Tuesday 23 November 2017). Accessed from <https://www.theguardian.com/australia-news/2017/nov/23/refugee-and-journalist-behrouz-boochani-arrested-in-manus-as-squad-steps-in> Accessed 17 March 2018.

¹⁶⁵ Ibid.

¹⁶⁶ Ibid.

refugee moving across the globe in search of places to settle, creates problems for other States which are not involved in the armed conflicts. This can be evidenced by the xenophobia attacks that were launched against foreigners in South Africa¹⁶⁷. The attacks were based on claims that foreign in South Africa have contributed to the rising unemployment levels which created stiff competition for lowly available jobs between domestic nationals and foreigners.

an A lot of children have been recorded to being recruited into armed forces illegally and this violates their human rights¹⁶⁸. This is because children will be recruited against their will and most children have been noted to be forced to perform dangerous acts such as shootings, suicide bombings, massacres and so on. Such violates stipulations made by the Geneva convention as well the human rights law.

A lot of armed conflicts have been characterised by a lot of incidences of sexual abuses against women and underage girls. Women and children have remained the most vulnerable groups of individuals in armed conflicts¹⁶⁹. Rebels and other armed forces have also taken advantages of the women and children's weakness and they exploited them against their will to their satisfaction. This has mostly been in the form of rape and forced drug trafficking, suicide missions so as to be warranted of security, food and shelter in times of trouble. Sexual violence against women and children still remains an issue in armed conflicts despite a lot of effort being devoted toed to curbing the inhumane criminal offences¹⁷⁰.

Little has however been established about the environmental effects of armed conflicts and studies contend that armed conflicts we result in environmental destruction on the condition that the arms and ammunition us result in mass destruction. As can be noted when weapons contaminate the atmosphere with dangerous pollutants which threaten both human, plant and animal life¹⁷¹. Massive bombs can destroy the natural look of landscapes and alter drainage patterns.

¹⁶⁷ Vincent Williams, Xenophobic attacks in South Africa: Not a completely new phenomenon, 22. May 2008. Accessed from <https://www.boell.de/en/navigation/foreign-affairs-security-3460.html> on 17 March 2018.

¹⁶⁸ The recruitment of underage persons to serve in military activities either against their will or through misleading causes.

¹⁶⁹N. A. '1997_HR_Violations_Women_War.pdf'.

¹⁷⁰ Ibid.

¹⁷¹Daniel Berlingher, 'The Effects of the International Contract for Sale of Goods' (2017) 19 Journal of Legal Studies 96.

CHAPTER TWO

OBLIGATIONS AND SCOPE OF THE IHL AND COMPLIANCE ISSUES

<<http://www.degruyter.com/view/j/jles.2017.19.issue-33/jles-2017-0007/jles-2017-0007.xml>>. Accessed on 8 November 2018.

2.1 Obligation and Scope to Enforce Compliance with the IHL

Foremost, it can be noted that when it comes to the issue of ensuring compliance to the IHL, the IHL itself is limited in scope. This can be evidenced by the fact that Art. 1 of all the Geneva conventions strongly encourages parties to an armed conflict to observe stipulations made by the IHL¹⁷². This implies that any incidence of violation of the IHL is strictly prohibited and not encouraged. Art. 1 also goes further to outline that efforts to support violations of the IHL will not be entertained¹⁷³. Such actions imply that selling or transferring weapons to States that will use such weapons to perpetrate war crimes. This can be traced to actions by a State to willingly help a State to commit an illegal act is prohibited by Art. 16 of the International Law Commission Draft Articles on State Responsibility and is considered to be a violation of the IHL¹⁷⁴. Obligations can be placed on other States and considerations can be made that it is their obligations to put restrictive measures against other States that are perpetrating IHL violations as supported by Art. 1. However, this does not imply that a specific outcome has to be reached but instead implies that all the necessary measures must be taken to curb violations at all costs and as such will include the freezing of assets, refusing to offer rights to an over-flight and not selling arms to perpetrators. The scope to enforce compliance with the IHL as stated under Art. 1, it applies to both IACs and NIACs¹⁷⁵.

2.2 Prevailing IHL Bodies and Mechanisms

When looking at the compliance with the IHL, there are bodies that are responsible for enforcing compliance and such compliance is enforced using a given set of mechanisms. The notable body which is used to enforce the IHL is the ICRC and it can be recognised to have been playing a huge role towards promoting compliance with the IHL¹⁷⁶. The ICRC has been responsible for coming up with activities and programmes that help to implement IHL treaties and enforce their compliance. However, there is a greater need to enhance the role of the ICRC towards helping victims of armed conflicts¹⁷⁷. Though much consideration can be placed towards curbing IACs and NIACs, care must also be placed towards victims of armed

¹⁷² Ibid, 162.

¹⁷³ Ibid, 164.

¹⁷⁴ Ibid, 167.

¹⁷⁵ Ibid, 168.

¹⁷⁶ Office of the High Commissioner.

¹⁷⁷ Ibid, 165.

conflicts. It is sometimes insufficient to determine the effectiveness of the IHL solely by looking at the ability of the IHL to curb IACs and NIACs. But rather must be judged based on the extent to which the IHL helps not to reduce the number of victims suffering from the effects of IACs and NIACs.

On the other hand, when examining the IHL mechanisms it is important to note that its mechanisms are still playing a major role. But a lot of amendments still need to be made to enhance its effectiveness. This follows initial observations that have been made which showed that new armed conflicts methods and techniques are being developed on a constant basis and yet the rate at which the IHL has been amended to cater for such changes is very low¹⁷⁸. Meanwhile, the ineffectiveness of IHL mechanisms can be pointed towards the lack of ability and political will by parties to ensure that the IHL is enforced and complied to. Moreover, lack of knowledge and financial challenges that have been noted to exist are considered to be as a result of the lack of ability and political will by parties¹⁷⁹. In addition, most parties do not have the necessary understanding of the IHL mechanisms and this tends to affect the level of compliance with the IHL. Parties that lack of ability and political to enforce and comply with the IHL do not usually have an incentive to acquire knowledge and understanding about the operational capability of the IHL and how it can be used to regulate IACs and NIACs.

Efforts to promote compliance to the IHL can also be linked to the effectiveness of the IHL mechanisms in dealing with IACs and NIACs. To a relatively large extent, IHL mechanisms are believed to be lacking effective use in real life situations and this tends to affect their effectiveness¹⁸⁰. Hence, it can be said that the use and effectiveness of IHL mechanisms determine the extent to which the IHL can be complied with during and after IACs and NIACs. In consideration of this argument, it is therefore important to ensure that prevailing IHL mechanisms are reinforced to boost their effectiveness. Moreover, these mechanisms should be used in conjunction with other human rights mechanisms and in that way, their scope and ability to deal with IACs and NIACs will be greater.

¹⁷⁸Hathaway and others.

¹⁷⁹ Ibid, 171.

¹⁸⁰William Abresch, 'A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya' (2005) 16 *European Journal of International Law* 741.

2.3 Modern IHL Supervision Instruments

Ideas still continue to show that there is greater need to come with new instruments that can be used to supervise the use and effectiveness of the IHL. This can be supported by ideas which have shown that prevailing IHL instruments are weaker and surrounded with a lot of limitations¹⁸¹. However, developing new instruments means that such instruments must conform to certain prescribed conditions. In order to ensure that the new instruments will be capable of performing better than the previous instruments, the new instruments must not be partial and neutral¹⁸². Effective instruments must also be capable of operating on their own without requiring the approval of Parties involved in IACs and NIACs. Existing IHL instruments do sometimes fail to put into consideration of the burden imposed on States and costs suffered as a result of IACs and NIACs. Hence, it is important to ensure that there are new instruments that are being developed to cater for such issues.

Challenges are however being encountered when one tries to formulate new principles upon which new instruments can be developed. The most challenging factor is the operational environment upon which such instruments will be used¹⁸³. Both the legal and operational environment in which the new instruments will be used is deemed not to be conducive enough to allow new instruments to be developed. The best way to develop new instruments is to come up with regional or ad hoc mechanisms but the process must be gradual and nowhere, in any case, has it ever been an instant thing. This must be supported by periodic reporting of the progress made as well as shortfalls and possible measures to boost their effectiveness towards promoting compliance to the IHL in dealing with IACs and NIACs.

However, it is important to note that coming up with new instruments will not necessarily help in improving compliance with the IHL¹⁸⁴. This is because previous instruments have been failing and introducing more instruments can result in fragmentation of the IHL. There is no guarantee that new instruments will be met

¹⁸¹ Ibid.

¹⁸² Ibid.

¹⁸³ Ibid, 171.

¹⁸⁴ Ibid, 173.

with enthusiasm, acceptance and respect. Hence, chances that they will be ineffective in curbing IACs and NIACs will also be high.

2.4 Factors affecting the Compliance of Parties and States to the IHL During Armed Conflicts

It is sometimes incomplete and ineffective to come up with measures that are targeted at improving both compliance to and the effectiveness of the IHL in dealing with armed conflicts without looking at the issues that affect its operational capacity. This part, therefore, examines the key challenges that affect the compliance of Parties and States to the IHL with IACs and NIACs.

2.4.1 Differences in Legal Ideologies

When it comes to the idea of assessing the effectiveness of the IHL in dealing with IACs and NIACs, it is worthy to note that differences in legal ideologies are one of the key issues that can stand as an obstacle to the effectiveness of the IHL. This most of the available legal instruments are subject to different interpretations¹⁸⁵. Parties and States to an armed conflict often interpret and use legal principles in a way that favours them and this may contradict with the required legal standards and procedures required for an effective functioning of the IHL. This problem is as a result of the idea that different States have different legal structures and policies and hence they will approach armed conflicts in a totally different way¹⁸⁶. When parties or States involved in an armed conflict approach differently IACs and NIACs, significant disturbances and challenges can be encountered when trying to apply the IHL and enforce compliance. This is because the IHL is a unified body of international laws that seek to create a harmonised legal system which different States can effectively and satisfactorily comply with.

2.4.2 Inherent Legal Structures

There are a lot of contradictions that can be observed with most international laws such as the IHL and such contradictions have a negative effect on efforts to promote compliance to the IHL. The first contradictions relate to given definitions which are

¹⁸⁵Siatitsa and Titberidze.

¹⁸⁶ Ibid, 171.

either contradictory or incomplete in nature¹⁸⁷. This can be supported by the idea that international laws are based on definitions which international lawmaking bodies deem to be feasible yet States will always devise their own definitions in relation to domestic circumstances and legal systems¹⁸⁸. Hence, efforts by States to curb armed conflicts problems can contradict with the stipulated definitions and requirements of the IHL. Secondly, it can be noted that there are contrasting arguments within the IHL itself and mostly with other international laws such as the Geneva convention. Such is similar to what was observed with the Hamdan case in which he argued that a ruling cannot be made until he was accorded a prisoner of war status and yet the US government argued that he has to be sentenced in line with the stipulations of the Geneva conventions¹⁸⁹. There are some scholars who argue that the IHL is in most cases vague and ambiguous and this extends to include other internal law instruments and Articles¹⁹⁰. Whenever a law is considered vague and ambiguous, chances are very high that not all the Parties or States will comply with it.

2.4.3 Political Differences and Tensions

Just as any State will experience political differences and tensions, it is unavoidable that Parties and States to an armed conflict will engage in conflicts. Any imposed or adopted legal framework is not always supported by individual members of the society as well as other States¹⁹¹. Society is bound to disagree to legal mechanisms that may be introduced by its government and also international bodies can express dissatisfaction to legal approaches adopted by States. The former can be evidenced by uprisings, demonstrations and civil wars while the latter can be evidenced by the involvement of other States and the third Part States in the internal affairs of another States. This can actually be noted from the Zimbabwean case in which the international community including the USA and Britain were expressing huge concern over the land distribution exercises that was carried out by the former

¹⁸⁷Oskar NT Thoms and James Ron, 'Do Human Rights Violations Cause Internal Conflict?' (2007) 29 Human Rights Quarterly 674 <<http://muse.jhu.edu/journals/hrq/summary/v029/29.3thoms.html>>. Accessed 8 November 2018.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid, 178.

¹⁹⁰ Ibid.

¹⁹¹ Sam Mcfarland, 'Human Rights 101 ':

president of Zimbabwe Robert Mugabe in the year 2000¹⁹². Moreover, the enforcement of the IHL on Parties involved in an armed conflict can sometimes be met with resistance since not all Parties and States will agree to the agreements of the IHL. This can be evidenced by an idea which suggests that the IHL has a lot of extent being breached and violated by States¹⁹³. Thus, so long as there are political differences and tensions, compliance to the IHL will always be difficult and met with resistance.

2.4.4 Changing Nature of Armed Conflicts

Legal instruments like the IHL and the Geneva convention were established at a time when armed conflicts had not evolved into sophisticated ways, intensity and severity. Modern armed conflicts are now varying a lot from traditional armed conflicts methods that were used before the 21st century¹⁹⁴. Modern methods of armed conflicts are now being characterised by a lot of technology usage and the use of transitional groups. For example, the use of drones to launch an attack against a region or State, Cybercrimes as noted by confrontations between the USA and Russia of hacking the US elections¹⁹⁵. Such activities are difficult to regulate using the IHL and even to enforce compliance to the IHL as the IHL has not yet been amended to account and deal with such problems¹⁹⁶. When armed conflicts become sophisticated, the pressure will be placed on international organisations such as the UN and international human rights organisations to come up with new legal frameworks that can account for such sophisticated changes. Problems will be encountered when other States are not on the same wavelength whether in terms of technological or legal development. Hence, compliance levels to the IHL or proposed measures will always be different.

¹⁹²Robert Mugabe admits Zimbabwe's land reform flaws. BBC News, (27 February 2015). Accessed from <http://www.bbc.com/news/world-africa-31663267> Accessed 18 April 3, 2018.

¹⁹³ Ibid, 181.

¹⁹⁴ Ibid, 185.

¹⁹⁵ The Council on Foreign Relations. Russia, Trump, and the 2016 U.S. Election (February 26, 2018). Accessed from <https://www.cfr.org/backgrounder/russia-trump-and-2016-us-election> on 18 April 3, 2018.

¹⁹⁶Natalia Buchowska, 'Violated or Protected. Women's Rights in Armed Conflicts after the Second World War' (2016) 2 International Comparative Jurisprudence 72 <<https://www.sciencedirect.com/science/article/pii/S2351667416300324?via%3Dihub>>. Accessed 8 November 2018.

2.4.5 Lack of Proper Enforcement Mechanisms

Compliance is in most cases difficult when there are no effective mechanisms to enforce compliance¹⁹⁷. This is because legal laws such as the IHL are international established and enforced¹⁹⁸. States do however comply by enforcing by adopting and strengthening compliance by reinforcing and reiterating the importance of the IHL in their own geographical boundaries. But the major limitation is that the legal power of international bodies and laws is limited and hence cannot be imposed on other States. Both adoption and compliance efforts to the IHL are always to the discretion of parties involved in armed conflicts¹⁹⁹. States have got some freedom of choice and they are often relatively free to exercise such freedom. This is the main reasons why ratification of international laws such as the IHL is always difficult and is done by relatively few States. The other problem is related to the lack of an international police that can effect arrests on violating individuals²⁰⁰. Perpetrators usually see it easy and feasible to breach international laws when they know quite well that there are no repercussions to be suffered from committing such offences. As a result, the level of compliance to the IHL will to a greater extent remain low. This can sometimes be traced to the number of effective arrests that have been made since the adoption and implementation of the IHL. The IHL has been greatly criticised of failing to arrest perpetrators of gross HRVs and most of the offenders are still roaming around with no punishment of judgement suffered whatsoever²⁰¹.

2.5 Promoting Compliance with the IHL in Armed Conflicts

It is painful sometimes to note that some of the States and bodies are tasked with the enforcement of the IHL lack the practical ability and political will to enforce compliance with the requirements of the IHL. Even Parties involved in armed conflicts have been accused of showing no respect to the IHL as they will be busy concentrating on attaining their self-interests and meeting their individual demands²⁰². This problem does not only affect the IHL but it is also affecting other international laws.

¹⁹⁷ Ibid, 189.

¹⁹⁸ Ibid.

¹⁹⁹ Ibid, 192.

²⁰⁰ Lubell.

²⁰¹ The Dss and others, 'Disaster Summary Sheet Armed Conflict' 1.

²⁰² Ibid, 197.

Efforts to improve compliance to the IHL have long been spearheaded by the ICRC as noted by its conduct to come up with activities and develop operational strategies that will help to enhance the legal value and effectiveness of the IHL during armed conflicts and even during periods of peace²⁰³. Efforts to promote compliance to the IHL are considered to be a priority to the ICRC and highlights how committed international organisations are towards curbing IACs and NIACs²⁰⁴.

It is reported that States and other actors have in the past collectively engaged in cooperative agreements to come up with new measures that help to ensure that all parties involved in an armed conflict have a sense of respect towards the IHL. This has been made possible through education and awareness programmes that were introduced in the academic fraternity as well as in armed forces²⁰⁵. Most of the armed forces regulations are considered to be now including measures to ensure and promote respect to the IHL²⁰⁶.

On the other hand, efforts to promote compliance to the IHL can be said to have taken a deeper role as evidenced by the fact that domestic regulations and legislations have to a large extent been amended and new structures put in place to accommodate provisions made by the IHL²⁰⁷. This can be evidenced by observations made that some States are now having committees such as the National IHL committee that caters for IHL developments²⁰⁸. These committees play an important role as they have in ensuring that perpetrators of IHL crimes are brought to justice and the necessary compensation has been paid to the victims. Such actions reinforce efforts by the International Criminal Court (ICC) and the international criminal tribunals (ICT) to bring to book all individuals who have committed gross war crimes. This has gone a long way of curbing IHL violations.

Though the above measures were put forward towards promoting compliance, it still remains to be figured out as to how exactly compliance can be attained in the midst of an armed conflict. But provisions can be noted to exist under Art. 1 of the Geneva convention which contends that third party States must ensure that parties to an

²⁰³Committee.

²⁰⁴ Ibid.

²⁰⁵ Ibid.

²⁰⁶ Ibid.

²⁰⁷Jelena Pejic, 'The Protective Scope of Common Article 3: More than Meets the Eye' (2011) 93 International Review of the Red Cross 189.

²⁰⁸ Ibid.

armed conflict putting a lot of effort towards respecting the IHL. This is reinforced by the AP I under Art. 89 which contends that cooperation to the stipulations made by the UN is required and must be observed at all cost by contracting parties²⁰⁹. Thus, it is in line with this regard that the importance of third parties is emphasised.

Efforts to ensure compliance can be said to have gone a long way and they went on to include the use of debates and seminars so as to stimulate creative thinking. Notable seminars and debates on IHL compliance were recorded to have taken place in Belgium, Bruges, Mexico City, Kuala Lumpur, Pretoria and Cairo in 2003.

It can be deduced that international organisations such as the ICRC have been playing a greater role towards promoting compliance with the IHL. This helps towards enhancing the effectiveness of the IHL in dealing with IACs and NIACs.

²⁰⁹ Ibid, 202.

CHAPTER THREE

DISCUSSION OF FINDINGS, CONCLUSIONS, RECOMMENDATIONS AND SUGGESTIONS FOR FUTURE STUDIES

3.1 Discussion of Findings

The study sought to determine the extent to which IHL mechanisms have been employed in relation to their scope and objectives to enhance effectiveness in handling IACS and NIACs matters. Based on the given ideas, it can thus be noted that the IHL does play its part in dealing with IACs and NIACs. However, there are a lot of factors that are affecting the effectiveness of the IHL in dealing with IACs and NIACs.

Foremost, it can be noted that the IHL is an effective statutory apparatus that can be used to deal with both IACs and NIACs. But when it comes to identifying how effective the IHL is in dealing with individual armed conflicts, a lot of differences will be observed. Hence, it can be said that the effectiveness of the IHL in dealing with armed conflicts is however mainly restricted to IACs and the IHL can be said to be weaker when it comes to handling NIACs. This can be evidenced by the fact that only Art. 3 and AP II are devoted towards dealing with NIACs²¹⁰. Still, these two apparatuses are also considered to be insufficient and that they should be supported by other local and international laws so that they will be capable of handling IACs and NIACs matters during and after armed conflicts²¹¹.

Secondly, it can be said that the ability of the IHL to differently classify all existing armed conflicts plays an important role towards ensuring the effectiveness of the IHL. This is because once it has been identified and recognised that surely an armed conflict is taking place, the IHL will immediately become fully functional and applicable²¹². Hence, it is impossible to apply and enforce the IHL when it is still yet to be clarified that an armed conflict is taking place. It is in this regard that the

²¹⁰ Ibid, 208

²¹¹ Lindström Supervisor and Göran Lysén.

²¹² Pieter Serneels and Marijke Verpoorten, 'The Impact of Armed Conflict on Economic Performance' (2015) 59 *Journal of Conflict Resolution* 555 <<http://journals.sagepub.com/doi/10.1177/0022002713515409>>. Accessed 8 November 2018.

effectiveness of the IHL can be determined after it has been possible that it is applicable. This will go a long way towards ensuring that potential and future violations will not continue since perpetrators will no longer be free to continue committing offences knowing quite well that they will face judgement. Moreover, once armed conflicts have been classified and the IHL applied into effective operation, other international organisations such as the UNSC will be in a strong force to freely help in controlling the armed conflict and help promote peace.

It is however not easy to classify armed conflicts and this problem will go a long way to affect the effectiveness of the IHL in dealing with armed conflicts²¹³. This is because the initial problem lies with the definition of IACs and NIACs which have to some extent be considered to be too theoretical²¹⁴. Such a problem has led to different States adopting their own definitions which they see to be fit for them in relation to armed conflict offences being perpetrated and how their legal system is prepared to handle such problems. On the other hand, it is important for States to come up with legal improvements in their statutory frameworks so as to curb newly devised methods of armed conflicts.

However, this has a problem of conflicting with the requirements of international laws such as the IHL. Hence, on an international level, it is sometimes difficult to enforce compliance and improve the effectiveness of handling IACs and NIACs matters. Moreover, the changing nature of armed conflicts is making it difficult to curb armed conflicts and even improve the effectiveness of the IHL in dealing with armed conflicts. This is because armed conflicts in armed conflicts are now taking a new shape and are now including an increased role of transnational groups and technological techniques which the IHL is still yet to be amended to handle. The IHL still has a long way to go when it comes to dealing with terrorism. The ability of the IHL to handle terrorism is being affected by differences in views concerning definitions and approaches towards terrorism. Contradictions are being observed as to whether terrorism should be considered to be an armed conflict or not²¹⁵. Moreover, the way in which States and international bodies approach terrorism is

²¹³ Ibid, 213.

²¹⁴ Ibid.

²¹⁵ Ibid.

totally different and this negatively affects the decisions as to whether the IHL should be applied or not.

When looking at how international organisations influence the effectiveness of the IHL in dealing with armed conflicts, considerations can be made that international organisations have a huge role to play. Such can be noted from observations made which showed that a lot of effort is being done to ensure that both armed groups whether transnational or non-transnational and States fully respect and comply with the IHL. Such efforts have to a large extent being conducted by the ICRC which has been introducing programmes and activities to promote awareness and respect of the IHL²¹⁶. However, the main challenges that make it look as if these international organisations are not playing their role of enforcing and improving compliance with the IHL during and after armed conflicts are lack of ability and political will by parties involved in armed conflict. The reason is that parties to an armed conflict are motivated by the need to win the armed conflict and show their dominance over the other Party. Hence, they will go the extra mile of violating or not complying with the IHL so as to ensure that their targets are achieved and needs are met.

If we are to put the idea that there are factors which are undermining the effectiveness of the IHL in dealing with armed conflicts, deductions can be made that the IHL is not effective in this regard²¹⁷. Notable challenges that are affecting the effectiveness of the IHL in dealing with armed conflicts are differences in legal ideologies, inherent legal structures, political differences and tensions, changing nature of armed conflicts and lack of proper enforcement mechanisms. So long as these challenges still continue to exist, it is therefore impossible to ensure and guarantee that the IHL will be effectiveness in dealing with IACs and NIACs.

The existence of problems or challenges undermining a legal law such as the IHL does not mean that the legal law is no longer useful and effective. This is simply an indication that there are improvements that need to be made. With this idea in mind, it can thus be said that the IHL has been playing major roles towards dealing with IACs and NIACs but its usefulness and effectiveness is being hampered by the growing number of challenges. It is on the other side important to note as well that

²¹⁶Conflict Related and Gender Based, 'Legal Factsheet' 1.

²¹⁷Douglas Wedderburn-maxwell, 'Classic Distinctions and Modern Conflicts in International Humanitarian Law Exploring the Struggles and Consequences of Maintaining the between Peace and War and International and Internal' 1.

the importance and effectiveness of the IHL are sometimes judged on things that are usually observable and yet in some circumstances, it should be judged based on what the IHL has managed to prevent. This implies that the IHL has managed to prevent a lot of armed conflicts and is still preventing the occurrence of armed conflicts though there are still a number of conflicts that are being observed as noted with Syria, Yemen, Ukraine etc. This argument goes along with the idea that the existence of rules and regulation provides an indication of the kind of judgements and punishments perpetrators will face for violating international laws. Hence, in most cases, the perception and fear that they will suffer when a judgement is imposed on them dissuade them from committing an offence during and after armed conflicts. Hence, it can thus be concluded that the IHL has to a large extent been preventing future violations during and after armed conflicts.

Compliance on the other hand is one area that can be used to determine how effective the IHL has been and is in dealing with both IACs and NIACs. This follows observations that are still being made that not all States were, are and will comply with the stipulations of the Geneva Conventions and its APs as well as the IHL. So long as the number of parties and States who are refusing to comply to the requirements of the IHL remains high, conclusions will still be made that the IHL is not effective in enforcing compliance of States and Parties to observe armed conflicts regulations.

Lastly, it can be noted that the prevailing IHL mechanisms are effective in dealing with IACs and NIACs but their effectiveness is limited and there is a greater need to devise new mechanisms that will improve both respect, enforcement, compliance and the effectiveness of the IHL in dealing with armed conflicts.

3.2 Conclusions

In line with the given ideas, conclusions can therefore be made that the IHL is an effective legal apparatus that can handle both IACs and NIACs matters but its effectiveness is more biased towards IACs. Conclusions can be made that it is important to ensure that there is a clear separation or distinction between the prevailing types of armed conflicts. Such distinction plays an important role towards ensuring that the IHL and other international laws can be applied and enforced and

that international bodies like the UNSC can effectively intervene to promote peace during and after armed conflicts. However, it can be reckoned and concluded that it is not always easy to classify armed conflicts and this is because of the theoretical definitions of IACs and NIACs, changing nature of armed conflicts and war against terror.

International organisations such as the ICRC and the UNSC are playing an important role towards promoting the effectiveness of the IHL in dealing with IACs and NIACs. This follows their ability to come up with programmes and activities that are aimed at promoting respect and compliance with the IHL. However, their roles are being affected by the lack of ability and political of parties involved in an armed conflict and those that are not directly involved in the armed conflicts.

More so, the applicability and enforcement of all the conventions together with the APs is subject to ratification. This entails that failure to identify or prove that a State has ratified the conventions and the APs will not require the concerned State to observe the convention and the APs. This, therefore, has implications on asking if there exist other ways that can be used to determine the decision to enforce and observe convention and the APs without solely concentrating on ratification.

Conclusions can also be made that the notable challenges that are affecting the ability and willingness of parties involved in an armed conflict to comply with the IHL are differences in legal ideologies, inherent legal structures, political differences and tensions, changing nature of armed conflicts and lack of proper enforcement mechanisms.

Lastly, it can be concluded that armed conflicts have changed a lot with new and sophisticated ways of perpetrating armed conflicts being introduced, the IHL and other international laws have not yet been amended to deal or cater for such changes. This has a tendency to affect their ability to curb IACs and NIACs. Hence, conclusions can also be made in line with this argument that there is greater need to devise new mechanisms that will improve both respect, enforcement, compliance and the effectiveness of the IHL in dealing with armed conflicts. This is relatively possible but requires that both States and Third-party States to an armed conflict be involved in devising corporative measures to deal with both IACs and NIACs.

3.3 Recommendations

Based on the discussions that have been made, conclusions can, therefore, be made that;

- There is a strong need to devise new mechanisms that will improve both respect, enforcement, compliance and the effectiveness of the IHL in dealing with armed conflicts.
- Amendments need to be made regarding the scope of the IHL in handling new methods of armed conflicts that are developing.
- Efforts must be placed towards ensuring that there are a legal harmonisation and unification of legal terms, definitions and principles by both States and international bodies. This will go a long way in minimising contradictions, vagueness and ambiguity of legal apparatus.
- When devising new measures to deal with both IACs and NIACs, it is important to encourage international bodies to come up with measures that will alleviate challenges undermining the effectiveness of the IHL and efforts to promote compliance.
- There is also a greater need to encourage and improve the role played by the ICRC to ensure respect and compliance with the IHL through the introduction of a wider number of intensive IHL awareness and education programmes.
- States must not significantly differ in formulating their legal frameworks towards addressing armed conflicts but must rather ensure that their actions are in line with efforts to promote compliance with the IHL.
- Courts such as the ICJ and other supreme courts are encouraged to make their decisions based on principles that will help contribute towards improving consistency as noted with problematic challenges that are still being observed with the Tadic case. Hence, any previous issues that have affected the consistency of decisions made by Courts must be addressed in current and future court decisions.

3.4 Suggestions for Future Studies

The study provides a detailed and combined insight of the effectiveness of the IHL in dealing with armed conflicts. Other studies can focus on examining the effectiveness

of the IHL in dealing with individual types of armed conflicts. Suggestions can also be made that future studies can also look at the effectiveness of the IHL in dealing with armed conflicts in relation to individual States as cases studies.

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