

## Jurisprudence, Refinement and Interpretation of International Humanitarian Law in Non-International Armed Conflict

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### ABSTRACT

*International humanitarian law is a body of rules that regulate means and methods of warfare in an armed conflict to mitigate if not avoid loss of civilian lives and for those who are no longer taking direct part in hostilities. Hence a central instrument of International Law in providing limitations, guidance and responsibility in non-international armed conflict to parties involved. Non-International Armed Conflict is armed conflicts that are not waged between states but between states and militant groups, armed groups, organized militias or insurgency groups. Thus Non-International character. International armed conflicts are monitored and under the legal framework of International Humanitarian Law. This study examines the impact of International Humanitarian Law in non-international armed conflict, explicitly focusing on the applicability of International Humanitarian law, thus International Humanitarian law jurisprudence in Mali and South Sudan. It also focuses on the developments of International Humanitarian by looking at law refinement and legal Interpretation of the law in non-international Armed Conflict and thereby assessing its effect on International humanitarian law as a judicial body.*

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### INTRODUCTION

This research draws its breath from non-international armed Conflict in Mali and South Sudan. As these two shed an indisputable status as far as the classification of non-international armed conflict is concerned. Mali gained its Independence in 1960, followed by prolonged years political instability as the government experienced armed confrontation from armed groups such as the movement national de Libe`ration de` Azwad (National Movement for the Liberation of Azawad, MNLA), Al-Qaeda in the Islamic Maghreb (AQIM), Ansar Dine and the movement for oneness and Jihad in West Africa, MUJAO). While South Sudan, born in 2013, also experienced political and armed confrontation, which came from one main party, the Sudan People's Liberation Movement/Army-in-Opposition (SPLM/A-in Opposition). This research seeks to examine the effectiveness of International Humanitarian Law

jurisprudence in non-international armed conflict by looking at its applicability, refinement and Interpretation. Thus, the four Geneva Conventions and their Additional Protocols are international treaties that were negotiated to limit the barbarity of war by protecting persons not taking part in hostilities. The first and second conventions aim to protect wounded and sick soldiers on land and at sea, respectively. The third convention aims to protect prisoners of war, while the fourth convention seeks to protect civilians. Common Article 3, which cuts across all four conventions, resulted from the need to cover the increasingly common non-international conflicts. Two Additional Protocols were adopted in 1977, and these three additional protocols cover victims of non-international conflict.

## **The jurisprudence of International Humanitarian Law in Non-International Armed Conflict**

### **Application of Common Article 3 Geneva Convention 1949 in Mali and South Sudan**

According to Common Article 3(1) of the fourth Geneva convention 1949, it only mentions being an instrument applicable to armed conflict not of an international character'. Hence it can be applied as an International law instrument in Mali and South Sudan as there are different insurgent groups, small-organized militias fighting against the local authorities. As far as its application to non-international armed conflict is concerned. It does not give a specific and precise definition of non-international armed conflict, nor does it clearly express the meaning of 'armed conflict not of an international character.' This, therefore, raises concerns, which attest to the phenomenon that Geneva Convention-IV, Common Article 3, only offers minimum protection to the civilians, and it's a miniature convention<sup>1</sup>. Also, the literature of this jurisprudence has found neglect and less respect from different states because of its loose nature in defining key factors<sup>2</sup>. Therefore for an International Humanitarian law Instrument with the prime objective to safeguard the lives of civilians by establishing limitations, conditions, obligations to different parties in an International Armed conflict. It is less effective in this regard. As the literature of the law is not profound and executive in nature as far as its application in Non-International Armed conflict is concerned. Unlike in the situation of Mali in which the ministry of justice took the initiative to refer ICC to investigate human rights violations in Mali<sup>3</sup>. As attested by UK Ministry of Defence cited by C.Anthony (2010), "*although Common Article 3 specifically provides that its application does not affect the legal status of the parties to a conflict, states have been, and always will be, reluctant to admit that a state of armed conflict exists*". In this regard, it is evident that Common Article 3 does not provide express obligations and criteria, which would hold states accountable upon a reluctance to apply the provided law. These issues of concern shade a dim light on the applicability of Common Article 3 by the International Community in Non-International Armed Conflict.

## **Additional Protocol 2 1997 as Applicable law in Mali and South Sudan**

Additional Protocol 2 is regarded as a stepping-stone from Common Article 3, thus an International humanitarian law instrument designed to refine and refurbish the principles enshrined in Common Article 3. Hence the protection of civilians during non-international armed conflict. It is of great essentiality to establish Additional Protocol 2 does not define Internal Armed Conflict but gives its own threshold of application in non-international armed conflict. Thus establishing that Additional Protocol shall only be applicable to conflict not of an international character which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which are under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol. This instrument is applicable to South Sudan and Mali. As in both these countries' insurgent groups, armed groups have been mobile and highly organized. As exhibited by their efforts to even engage in peace agreements with the local authorities. Also, armed groups in Mali have shown that they have a responsible command as they have been conducting coordinated attacks in the north and centre of Mali by using improvised explosives devices planted on roads in Mopti Region<sup>4</sup>. With respect to Additional Protocol 2 as an instrument that was supposed or intended to supplement Common Article 3, it does not establish a landmark as far as defining non-international armed conflicts concerned. This phenomenon is supported by *Yoram Dinstein* (2014) who attest that "Before proceeding to dissect the prerequisites devised by the authors of AP/II for NIACs to be past the post of the second threshold, it is imperative to point out that – just as the preconditions of a NIAC under Common Article 3 are supplemented and not replaced by AP/II"<sup>5</sup>. Hence promulgating the disrespect and less commitment by states to adhere to the Instrument in International Humanitarian Law. However, it is in the Application literature of Additional Protocol 2, that it should be appreciated as it clearly establishes a threshold for its application in non-international armed. They are hence leaving criteria for the application of this instrument as Non-International Armed conflict can no longer be ignored nor denied. In addition,

unlike common article 3, Additional Protocol 2 clearly stipulates its line and boundaries of applicability, thus an Instrument that does not cater to riots, isolated and sporadic forms of violence<sup>6</sup>.

### **ICRC Customary Rules as supplementary rules in Mali and South Sudan**

There is a need to tally a specific threshold of the level of Intensity and Organization by the armed party<sup>7</sup>. The threshold of Intensity and level of organization of the armed groups has been paramount to establish the existence and application of International Humanitarian Law. As it is highly used in practice by International Humanitarian law institutions<sup>8</sup>.

#### *Intensity*

When the violent conflicts broke out in Juba, a lot of civilians sought shelter in the compound of the United Nations Mission in the Republic of South Sudan (UNMISS). From Juba, the fighting rapidly spread across the country, where the armed forces broke up into factions of those loyal to the President (SPLA) and those loyal to the Vice President (SPLM/A-IO).

In December 2013, the United Nations increased troops due to increased violence and massive human rights violations in South Sudan. The United Nations reported that by December 26, the fighting had displaced at least 121,600 people and that at least a thousand people had been killed. On the other side, in Mali, attacks on the Malian forces by armed groups increased extensively. Early in 2018, numerous small attacks were waged towards the Malian forces, as evidenced by an attack, which targeted a military base in Niafunke, which claimed soldiers' lives. Mali has experienced massive human rights violations such as torture, rape and killing of civilians since the commencement of the conflict<sup>9</sup>.

Since the outburst of armed Conflict in Mali, it has been reported that various armed groups have been capitalizing on the conflict to engage in drug trafficking in order to sustain, fund their agenda and buy weapons. Despite the religious contest, the jihadist has been involved in drug trafficking as they control a huge portion of the north<sup>10</sup>. A series of Armed groups have been coordinating a series of bloody attacks in central Mali, as exhibited by the recent attacks on ethnic Dogon village by Fulani-Peulh in Central Mali, which claimed about 100 lives overnight. This shows that various armed groups have been conducting highly organized attacks throughout Mali. In South Sudan, victims and witnesses described how SPLA and aligned forces would storm into villages in the early morning or around dawn, surround the village and start shooting at fleeing civilians. The attackers would then steal cattle, loot entire households and burn down houses and food stocks. This shows the scorched earth policy approach that was taken by SPLA trying to displace people from their homes and terrorizing them so that they won't return to their homes. Looking at all these acts of violence by armed groups, it can be established that customary law, as an International Humanitarian law instrument, is highly applicable in Mali and South Sudan. In light of the role that is played by Customary Law in International Humanitarian Law, Contrary to Common Article 3 and Additional Protocol. Customary law's application isn't only limited to the involvement of High Contracting State in an Armed Conflict. Instead, it covers any situation with protracted violence. This is pivotal as far as the application of International Humanitarian law is concerned. As customary law is not only a vile instrument of state practice but it provides supplementary rules essential to the application for International Humanitarian Law. Hence 'where Common Article 3 and Additional Protocol 2 ends, customary law continues'.

#### b) *Level of organization*

## **Refinement and Interpretation of International Humanitarian Law in Non International Armed Conflict**

### **Traditional Paradigm of International Humanitarian Law**

It is of great fundamentality to highlight that all the legal instruments of International Humanitarian law emphasize the protection of the rights of civilians not taking direct part in hostilities. They highly highlight the rights and limitations of parties involved in the armed conflict as far as safeguarding the lives of the civilians<sup>11</sup>. However, initially looking at the jurisprudence of International Humanitarian Law. The old Traditional Paradigm of International Humanitarian law always assumed and was designed to cater to the Traditional form of combat between parties involved in the conflict<sup>12</sup>. On the contrary, recently, the non-international armed conflict has changed extremely as non-international armed conflict is encompassed with ruthless attacks targeting the civilians not involved in the conflict. Several issues, such as ethical hatred and forcing compliance from civilians, have brewed this development. This is evidenced in Mali as On November 7, and an alleged Islamist armed group executed the chief of Diaba village, Kola Kane Diallo, 45, in front of his family. Witness suggested this was a warning not to communicate with the Malian army. Also, in Mali Pro-government militias and ethnically allied youth groups have prepared lists of people in the north who would be targeted for reprisal once the government forces retook control, people who helped prepare<sup>13</sup>. In South Sudan, most of the atrocities were carried out against civilian populations taking no active part in the hostilities. Churches, mosques and hospitals were attacked, humanitarian assistance was impeded, towns pillaged and destroyed.

Common Article 3(2) of the Geneva Convention 1949 highlights that humanitarian body such as ICRC may offer their services to parties to the conflict. Also, parties to the conflict have a choice of compliance to all or part of the convention. In this regard, Common Article 3 is not authoritative in nature, but it offers autonomy in compliance with parties involved in a non-international armed conflict. This raises questions as far as the effectiveness of this instrument in serving International

Humanitarian law objectives. International humanitarian law is supposed to provide the rules, which regulate and provide limitations to parties engaged in a non-international armed conflict in order to avoid or mitigate the loss of civilian lives.

International Humanitarian Law, as established by Additional Protocol 2 and Common Article 3 of Geneva Convention, even International Customary law establishes a threshold based on Intensity and organization of protracted groups against each other or a state. But this does not cater to an immediate form of violence or armed conflict, which also results in deaths of Civilians. In the construction of International humanitarian law jurisprudence, the emphasis was put on the 'duration' of Armed Conflict rather than the essence of the conflict itself. In Mali between 16 and 18 April 2018, the SPLA and associated forces, launched attacks in Rubkona to retake Nhialdiu and on the SPLA-IO (RM) position at Jazeera (southwest of Bentiu Town). In the same period, SPLA-IO (RM) and aligned youth attacked locations in Guit, at Kuergeng where there were Taban Deng-aligned forces, and in SPLA controlled Koch town and areas, reportedly killing seven civilians and raiding cattle. This does not pay attention more to the phenomenon of safeguarding the lives of civilians, as claimed by the International Humanitarian law jurisprudence as it does not make casualties top of its priority as far as determining the application of International Humanitarian Law in non-international armed conflict.

### **New Policies in International Armed Conflict**

International humanitarian law jurisprudence has been evolving with stages by paying attention to weaponry innovation and the nature of disputes from Geneva Convention for the Amelioration of the condition of the wounded in armies in the field 1864 up to 2001 Amendment to Article I of the CCW<sup>14</sup>. Looking at all the laws, Amendments and Declaration made within the aforementioned time. There are a few laws and Conventions that address Non-International Armed Conflict, with the exception of the Geneva Convention 1949 and Additional Protocol 2 1979. This can be supported by *Laura Perna*, who attests that "Whilst there



are, however, a huge number of treaty provisions applicable to international armed conflicts, very few provisions are specifically designed to regulate non-international armed conflicts"<sup>15</sup>. This is very central in the discussion of the effectiveness of International humanitarian law in Non-International armed conflict. A considerable amount of laws, conventions have been established and ratified by different countries as far as International Armed Conflict is concerned. On the contrary, less attention has been dedicated to Non-International Armed Conflict. Is there a few resolutions towards countries engaged in Non-International Armed conflict. Thus reactionary Resolutions to places with ongoing Internal conflicts instead of concrete laws that stand bold and offer limitations to parties and regulate Non-International Armed conflict.

This can be witnessed by countless Resolutions imposed by United Nations Security on Mali, including Resolution 2480 (2019). In which the Security Council urges the Malian authorities to ensure that all those responsible for crimes involving violations and abuses of human rights and violations of international humanitarian law, including those involving sexual and gender-based violence, are held accountable and brought to justice without undue delay, and make the protection of civilians its biggest priority as well as dealing with child soldiers<sup>16</sup>. In South Sudan, the United Nations Security Council also requested UNAMID to consolidate the whole-of system-approach to Darfur focused on peacekeeping and providing sustainable solutions to the drivers of conflict with the Mission's current two-pronged approach, in order to prevent relapse and enable the Government of Sudan<sup>17</sup>. It is in line with resolutions made by the Security Council that it can be argued that these resolutions don't offer an effective approach towards issues of non-international armed conflict but instead offer obligations to States to implement measures that safeguard peace and security pursuant to article 25 of United Nations Charter (1945). Hence this does not offer any obligations to armed groups, which are active participants recognized by Additional Protocols 2 (1979) in an internal armed conflict.

In addition, other schools of thought attest that the law applicable in Non-International Armed conflict has continued to develop both conventional and customary International law. It has increasingly been argued that a

large number of rules designed for International Armed conflict now apply equally to non-international armed conflict, most notably by the International Criminal Tribunal for the Former Yugoslavia (ICTY) and the International Committee of the Red Cross (ICRC)<sup>18</sup>. This does not really serve non-international armed conflict well as these rules were primarily designed for international armed conflict, not non-international armed conflict. Considering the rapid developments in non-international armed conflict that require the specific mechanism and legal structure to deal with, adopted rules are incapable of handling such complexities—looking at South Sudan where there is an ethnically-motivated armed conflict which has resulted in the direct attack of civilians not taking direct part in hostilities—also looking at Mali where an issue of identification of belligerent groups, which doesn't have a specific territory, has been a subject for discussion and confusion. It is a too far-fetched phenomenon because non-international armed conflict is a growing and more prevalent subject in International law. Hence direct focus and emphasis on the real developments and legal construction of International Humanitarian Law in non-international armed conflict are required.

### **Narrow Interpretation of the Law**

The characterization of parties to a non-international armed conflict has been an interesting subject, if not controversial in International humanitarian law. This is because Additional Protocol 2 Article 1 of 1979 only mentions of the threshold of identification of belligerent groups in a Non-International Armed Conflict but does not clearly stress the instrument or candidate to determine the aforementioned threshold. This is in consensus with Rene Provost (2004), who attests that "the protocol Leaves open issues of who is to make the determinative characterization of the situation"<sup>19</sup>. Contrary to such complexities, identification of belligerent groups and other armed groups has never been an issue in Mali. This is witnessed in Mali by a significant step that was taken by the Malian government to engage in a tripartite meeting with Ansar Dine and MNLA mediated by ECOWAS in which they established a framework based on inclusiveness, territorial integrity, religious tolerance and unity<sup>20</sup>. Also, in South Sudan, the August 2015 agreement provided for a power-

sharing Transitional Government of National Unity (TGoNU) for thirty months to oversee an ambitious plan for political, security, and economic reforms, including the approval of a permanent constitution and elections for a new government. The agreement was signed by Kiir on behalf of the Sudan People's Liberation Movement-in Government, Machar on behalf of the Sudan People's Liberation Movement in Opposition, former Sudan People's Liberation Movement (SPLM) Secretary-General Pagan Amun on behalf of a group of former senior ministers and SPLM leaders who broke with Kiir and were arrested in the course of the events of December 2013 (known as the Group of Ten [G10] or "former detainees"), and Lam Akol on behalf of South Sudan's "other political parties." Power in the executive and legislative branches, as well as at the state level, was allocated to the government and the opposition in a 53-33 split. This, therefore, illuminates that despite how the identification of belligerent parties by de jure government is controversial and complicated in International Humanitarian Law. Mali and South Sudan have been leading countries involved in Non-International Armed conflict to recognize belligerent groups by even engaging in peace agreements with them in order to ensure peace and security of the civilians. Hence despite the complexities and shortcomings of the Interpretation of International Humanitarian Law, states involved in non-international armed conflict are taking the initiative to recognize and engage in peace talks with belligerent groups.

It is also imperative to attest that International Humanitarian law jurisprudence's contribution and coverage as far as its application is overlooked if not missed. In its entirety, International Humanitarian law emphasizes the inclusion and application of the law in non-international armed conflict. This is evident in the Interpretation of the text of Common Article 3(2), which stressed the application of the law even if the state of non-international armed conflict is not established by the parties involved. This phenomenon of International Humanitarian law as a body of law that has a broad understanding of the nature and complexities around non-international law. Is supported by T Ferraro (2013), who further attests that "there is no indifference in the application of International Humanitarian Law to belligerent groups as it is to states"<sup>21</sup>. With respect to this

phenomenon, it can be established that the Interpretation of International Humanitarian Law isn't only recognized as narrow but offers a general base as far as its application to non-international armed conflict.

Looking intensively at Common Article 3 of the Geneva Convention, it can be argued that the use of 'minimum' in defining the scope of the protection under Common Article 3. Draws Interpretation of the whole document as an Instrument that lacks resoluteness and seriousness towards establishing obligations and safeguarding civilian lives. This is exhibited by the statement made by the Soviet delegate to the Diplomatic Conference of Geneva of 1949, in which he regarded the Geneva Convention as a 'Miniature Convention'<sup>22</sup>. As a result of all this it can be established that despite the fact that Common Article 3 of Geneva Convention offer protection, obligations and limitations. The literature of the instrument offers narrow Interpretation to parties in Non International Armed conflict as far as protection, obligations and limitations is concerned. This has negative implications as far as drawing compliance by different states and armed groups in Non International Armed conflict, as less respect and adherence is shown nor given to Common Article 3 of the Geneva Convention. However Sandesh Sivakumaran (2012) contest against this phenomenon, as he establishes that it is a mistake to consider the traditional assumption that states do not recognize the existence of Non International Armed conflict or agree to apply International humanitarian law<sup>23</sup>.

### **Complexity of Terms**

It is important to note that the current jurisprudence for International Humanitarian Law in non-international armed conflict does not provide a clear definition of key terms used in hostilities<sup>24</sup>. Such as 'civilians, armed forces and attacks.' This is evident in several treaties and statues that used the term 'Civilian' without defining it<sup>25</sup>. Michael Bothe and others (1982) are of the view that the terms "dissident armed forces or other organized armed groups under responsible command" in Article 1 of Additional Protocol II inferentially recognized the essential conditions of armed forces, as they ap<sup>26</sup>ply in international armed

conflict and that it follows that civilians are all persons who are not members of such forces or groups" <sup>27</sup>. Therefore from this view, the definition of civilians is implied, as it is anyone not covered under the threshold of active and direct participants in non-international armed conflict. This has negative implications as far as the Interpretation of International Humanitarian law is concerned, as there are complications in terms of establishing the qualifications and threshold of direct participants to armed conflict. Also, without a clear definition of key terms comes complications and evasion of responsibility and obligations by parties involved in the non-international armed conflict.

## **Conclusion**

It is imperative to establish that International humanitarian law efforts in non-international armed conflict have been magnified and put under a microscope due to trends of neglect and less effectiveness of the body of law in this respect. This has been substantiated by the loose nature of IHL jurisprudence is establishing authoritative literature that provides obligations to parties involved in a NIAC. However, the contribution of International Humanitarian law should not be overlooked or missed as it has an immense contribution to the developments of International law. This paper establishes that IHL should transform and evolve from the traditional paradigm paying attention to the transformation present in NIAC. It also sheds light on the disconnect of the Interpretation of IHL in the context of NIAC with the IHL mandate of safeguarding, mitigating or avoiding the loss of innocent lives in non-international armed conflict. It is in light of the Interpretation of IHL, and this paper attests that despite the shortcomings and Interpretation of IHL states involved are now taking the initiative to recognize and engage in peace talks with belligerent groups. After a clear examination of the Jurisprudence, refinement and interpenetration of international humanitarian law, it is clear that focus and emphasis should be directed towards the actual developments that are transcending in non-international armed conflict is required.

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