THE PRINCIPLE OF DISTINCTION AS THE BULWARK FOR STRENGTHENING PROTECTION FOR VICTIMS OF NON-INTERNATIONAL ARMED CONFLICT: CHALLENGES AND OPPORTUNITIES IN NORTH-EAST NIGERIA

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Abstract

Armed conflict is a dangerous activity that maims, kills and destroys. It is regulated by International Humanitarian Law (IHL) through treaties, customs of war, and principles. One of the principles of IHL is the principle of distinction. The principle is to the effect that in every combat engagement in armed conflict, all the parties to the conflict are to distinguish between civilians and combatants/fighters, and between civilian objects and military objectives. Attacks are to be directed only against combatants/fighters and military objectives. Individual civilians, the civilian population and civilian objects shall not be the objects of attack in armed conflict. The principle is easier to implement in International Armed Conflict (IAC) because of its extensive treaty provisions but it is difficult in Non-International Armed Conflict (NIAC) because of its sparse treaty provisions and the involvement of Non-State Armed Groups (NSAGs) like it is the case in North-East Nigeria. Deploying the doctrinal method of research, this article explores the principle of distinction as a cardinal principle of IHL; its challenges and opportunities in the NIAC in north-east Nigeria. Since IHL regulates the means and methods of warfare, it is not every weapon and it is not every method of warfare that is permissible in armed conflict. Without the principle, humanity would be removed from armed conflict and armed conflict would become total and indiscriminate which are the very aspects that the principle is aimed at in armed conflict.

Keywords: Distinction, Protection, Hostilities, Warfare, Means of Warfare, Methods of Warfare

Introduction

International Humanitarian Law (IHL) is a set of rules, principles and theories that seek to limit the effects of armed conflict for humanitarian reasons.[1] IHL protects persons who are not or are no longer participating in hostilities and it regulates the means and methods of warfare.[2] Those who do not participate in hostilities are generally the civilians, the civilian population, and the non-combatant members of the armed forces like the religious and medical personnel.[3] Examples of those who are no longer participating in hostilities include members of the armed forces who have laid down their arms; those placed *hors de combat* as a result of sickness, wounds, detention, or any other similar

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[1] American Red Cross, *Summary of the Geneva Conventions of 1949 and their Additional Protocols, April 2011*. Available at www.redcross.org/ihl Accessed 21/2/2023.

[2] Ibid.

[3] AP I of 1977, art. 8.

cause.[4] IHL is also known as the law of war and the law of armed conflict.[5] Lord Atkin stated thus in the House of Lords, 'In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace.'[6] One of the functions of law in society, in peace and in war, is to regulate;[7] and that is what IHL does in armed conflict.

The principle of distinction, which is also referred to as the principle of distinguishing, is one of the cardinal principles of IHL.[8] The principle is to the effect that, it is not every person or every object that can be attacked in armed conflict. The principle mandates that in every military operation, the parties to an armed conflict are to distinguish between the civilians and combatants/fighters; and between civilian objects and military objectives. Attacks are to be directed against combatants/fighters and military objectives. This is in line with IHL regulation of the means and methods of warfare. Dinstein refers to the principle of distinction as a cardinal principle in IAC and states that:

> The cardinal principle of distinction between civilians and combatants … is the most fundamental pillar of LOIAC. The history of LOIAC to date can be described as a sustained effort to ensure that civilians (not directly participating in hostilities) are protected from the havocs of war. This has significant consequences when the use of weapons is concerned.[9]

The above principle is also applicable in NIAC though it is very easy to apply in IACs. It is very difficult to apply in NIACs as it is the case in North-East Nigeria since 2009 when the insurgency broke out fully.[10] As to whether the law of war is applicable in internal armed conflict, Green[11] is of the opinion that it does not while Kalshoven and Zegveld state that it does apply and conclude as follows:

> As recorded in earlier chapters, the body of the law of war applicable in internal armed conflicts has grown from its modest beginnings (Article 3 common to the four Geneva Conventions of 1949) to include ever more principles and rules. Protocol II of 1977 was written for internal armed conflict, and the 1954 Cultural Property Convention with its 1999 Second Protocol and the 1980 Conventional Weapons Convention with its Protocol became ever more completely applicable to such conflicts. Beyond treaty law, developments could be noted in the areas of principles and customary law as well. An early example was Resolution 2444 (XXIII) by which the UN General Assembly in 1968 recognized some basic principles of protection of the civilian population as applicable in all armed conflicts. Then, the ICRC in 2005 published its long study on Customary International Humanitarian Law, which posits that the majority of the 161 rules it identified have force of law in internal armed conflict as well.[12]

Green is of that opinion because wars were only conducted between sovereign States in International Law and not between a sovereign State and a Non-State Armed Group (NSAG) as it is the case in North-East Nigeria between the Armed Forces of the Federal Republic of Nigeria on the one hand and Boko Haram and the Islamic State West African Province (ISWAP) on the other. Secondly, in IACs, there are no thresholds for the trigger of IHL but in NIAC, which is the type of armed conflict

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[4] Common Article 3 to the Four Geneva Conventions (GCs) of 1949.
[5] Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* (3rd Edn Cambridge University Press), 20; American Red Cross, *Summary of the Geneva Conventions of 1949 and their Additional Protocols, April 2011.*
[6] *Liversidge v Sir John Anderson & Anor* [1948] A. C. 206 at 244.
[7] Michael E. Ibanga, *Learning Legal Theory and Legal Method* (Associated Publishers Limited, 1996), 138-139.
[8] Dinstein, *The Conduct of Hostilities,* 12.
[9] Ibid, 72.
[10] International Criminal Court, Office of the Prosecutor, *Report on Preliminary Examination Activities 2013*, para. 218.
[11] Leslie C. Green, *The Contemporary Law of Armed Conflict* (3rd edn. Manchester University Press, 2008), 72.
[12] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th edn. Cambridge University Press, 2011), 221-222.

in North-East Nigeria, the thresholds must be attained before the trigger of IHL as it is provided for thus: 'This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflict.'[13] That provision in article 1 (2) of AP II of 1977 is what is referred to as the threshold in NIAC. The AP II of 1977 does not define what it refers to as '… riots, isolated and sporadic acts of violence and other acts of a similar nature …' but what is not in doubt is that it is assumed that they refer to internal domestic security issues that can be handled by the regular police of the sovereign States as their domestic matters. The threshold in NIAC is further reinforced by the rule of non-intervention in internal matters of the sovereign State.[14] A further challenge as to why Green says that IHL does not apply in NIAC may stem from the use of the term 'war' which is ideally a State versus State activity. That assertion may not be entirely correct because the term 'armed conflict' is used in both the Additional Protocols I[15] and II[16] of 1977 which regulate IACs and NIACs respectively though the term 'war' is predominantly used in the four Geneva Conventions of 1949 which largely regulate IACs. The position of Kalshoven and Zegveld is the position of the law while that of Green is not. The law of war or armed conflict, that is *jus in bello*, is applicable in both IAC and NIAC.

In the year 2000, some States in the northern part of Nigeria, including Borno State, adopted Sharia law as part of their laws. In Borno State, Sharia Law was adopted under Mala Kachalla, as the executive governor, in the year 2000 but its enforcement was low key in spite of the agitation by the people for its full implement. This made Mohammed Yusuf, who later became the founder of Boko Haram, to be disillusioned on the non-enforcement of Sharia in Borno State. He founded Boko Haram, led the group to attacks and violence, was arrested by the military and handed over to the police, and was extra-judicially killed later on 30 July 2009 while in police custody.[17] From then on, Boko Haram resorted to armed attacks on civilians, security forces and defence forces which the Government of Nigeria responded with the use of the military and which is still ongoing as at 2026.

Is the principle of distinction applied by the parties to the NIAC in North-East Nigeria? Okorie confirms that Boko Haram and the State Security Forces recruit children into their ranks to participate in attacks and take a direct part in hostilities in the armed conflict in the northeast part of Nigeria.[18] He discusses the recruitment of children as young as eight years by both Boko Haram and the State Security Forces; and how children are being abducted by the NSAGs and trained in military tactics to participate in the armed conflict.[19] The recruitment of children to take a direct part in armed conflict is a violation of IHL.[20]

In 2011, Boko Haram bombed the United Nations Building in Abuja, the Federal Capital Territory (FCT) killing many civilians. The UN Building is a civilian object because it does not contribute to military action and is, therefore, a protected object. In 2014 and 2018, Boko Haram abducted girls (children) from their schools in Chibok in Borno State and Dapchi in Yobe State respectively. Schools and children are protected in armed conflict and should not, therefore, be the objects of attack. The insurgent group set part of the school in Dapchi on fire after the abduction of the school girls.

This article amplifies the fact that the principle of distinction is an all-important principle of IHL and is applicable in armed conflict. As a result, the principle is applicable in the NIAC in North-

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[13] Additional Protocol (AP) II of 1977,art. 1 (2).
[14] Ibid, art. 3 (1) and (2).
[15] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (AP I) of 8 June 1977.
[16] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (AP II) of 8 June 1977.
[17] Audu Bulama Bukarti, *Violent Extremism in Sub-Sahara Africa: Lessons from the Rise of Boko Haram* (Tony Blair Institute for Global Peace, 2021), 26 – 31.
[18] Hagler Okorie, 'Child Soldiering and Protection: Northeast Nigeria in Perspective,' [2016-2017] (17) (1) *University of Benin Law Journal* (*UBLJ*), 111.
[19] Ibid, 122.
[20] Common Article 3 to the four Geneva Conventions of 1949; Additional Protocol (AP) II, art. 4 (3); Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, arts. 1-4.

East Nigeria and should be adhered to by all the parties to the NIAC. The article is divided into nine sections in order to address the issues effectively.

The Concept of Armed Conflict

Armed conflict, to which IHL applies, is not defined in any of the treaties that regulate it. It, therefore, becomes a concept whereby, if not analyzed and explained, it cannot be understood. The four Geneva Conventions (GCs) of 1949 and the two Additional Protocols (APs) of 1977 make provision for the application of the Conventions and the Protocols without defining what the Conventions and the Protocols regulate.[21] An offence must be closely related to the armed conflict to establish liability for war crimes.[22]

The International Criminal Tribunal for the Former Yugoslavia (ICTY), however, defines armed conflict thus:

> An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.[23]

The above definition of armed conflict by the ICTY encompasses both international and NIACs. The above definition makes it clear that International Armed Conflict (IAC) is very easy to determine and trigger the application of the applicable legal regime. It is, however, a different case in NIAC because of the threshold in Additional Protocol (AP) II of 1977.[24]

It is not every situation of the use of arms, within the domestic system, that is regarded as armed conflict to which IHL applies.[25] The consequence of this is that "situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature"[26] are not armed conflicts for the purpose of IHL.

The definition of the ICTY in *Tadic* does not fully explain what an armed conflict is. The ICTR in *Prosecutor v Georges Anderson Nderubumwe Rutaganda*[27] acknowledged the difficulty in defining what an armed conflict was by merely looking at the provisions of IHL treaties and stated that:

> It can thence be seen that the definition of an armed conflict *per se* is termed in the abstract, and whether or not a situation can be described as an 'armed conflict', meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis. Hence, in dealing with this issue, the *Akayesu Judgement* suggested an 'evaluation test', whereby it is necessary to evaluate the intensity and the organization

[21] Geneva Conventions (GCs) I, II, III and IV of 1949 respectively, art. 2. That provision is generally known and referred to 'Common Article 2' because it is 'common', that is, the same in all the four Geneva Conventions of 1949.

[22] *Prosecutor v Georges Anderson Nderubumwe Rutaganda* [2003] Case No. ICTR-96-3-A, Judgement, 26 May 2003, paras. 399-400.

[23] *Prosecutor v. Dusco Tadic*, Case No. IT-94-1-AR 72 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995 [ICTY Appeals Chamber], para. 70).

[24] AP II of 1977, art. 1 (2).

[25] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), s. 217 (2) (c) when the military acts in aid of civil authorities to suppress insurrection, that is not an armed conflict to which IHL applies. Generally, when law enforcement agencies use arms in their operations, it is regarded as law enforcement and IHL does not apply though arms are deployed.

[26] Additional Protocol II of 1977, art. 1 (2). This provision is what is generally referred to as the threshold which must be crossed for there to exist a non-international armed conflict (NIAC) for the trigger of IHL to apply.

[27] [1999] ICTR- 96 – 3.

> of the parties to the conflict to make a finding on the existence of an armed conflict. This approach also finds favour with the Trial Chamber in this instance.[28]

The criteria set by the ICTR in *Prosecutor v Georges Anderson Nderubumwe Rutaganda* are imperative in aid of the determination of what an armed conflict is. In that regard, the tribunal stated the criteria for the existence of NIAC:

> Pursuant to Article 1(1) of Additional Protocol II the material requirements to be satisfied for the applicability of Additional Protocol II are as follows:
> (i) an armed conflict takes place in the territory of a High Contracting Party, between its armed forces and dissident armed forces or other organized armed groups;
> (ii) the dissident armed forces or other organized armed groups are under responsible command;
> (iii) the dissident armed forces or other organized armed groups are able to exercise such control over a part of their territory as to enable them to carry out sustained and concerted military operations; and
> (iv) the dissident armed forces or other organized armed groups are able to implement Additional Protocol II.[29]

The above criteria are in the context of NIAC as the existence of IAC, as stated earlier, is not difficult to determine. In terms of determining the existence of IAC, the ICJ juxtaposed it with that of NIAC and stated thus:

> The conflict between the *contras'* forces and those of the Government of Nicaragua is an armed conflict which is 'not of an international character'. The acts of the *contras* towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts.[30]

The above dictum by the ICJ was in the context of the existence of both IAC and NIAC within the same armed conflict situation depending on the parties involved. It, therefore, means that an IAC can co-exist with NIAC in the same armed conflict situation.

Determination of the existence of armed conflict in North-East Nigeria

Determining the existence of an armed conflict is a pre-condition for the trigger of the applicable legal regime. This is so because there are armed violent situations that resemble armed conflict but when tested in the crucible of IHL, they do not measure up to the standard envisaged for the application of IHL.

Be that as it may, the determination of the existence of International Armed Conflict (IAC) is very easy. Whenever the armed forces of two or more sovereign States exchange gunshots or other permissible weapons against each other or one another, even if it is a single gunshot, that is an IAC.[31] There is another addition to the above provisions in Additional Protocol (AP) I of 1977 which also regulates a type of IAC.[32] The provisions in AP I of 1977 supplement the four Geneva Conventions of 1949 in the regulation of IACs. The parties involved in the hostilities determine the existence of IAC in IHL. Determining the existence of an IAC is, therefore, not that complex.[33]

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[28] Ibid, para. 93.
[29] Ibid, para. 95.
[30] *Case Concerning Military and Paramilitary Activities in and against Nicaragua* [*Nicaragua v United States*] (Merits) [1986] ICJ Report 14 at para. 114.
[31] Geneva Convention (GC) II of 1949, art. 2; Additional Protocol (AP) I of 1977, art. 1 (4).
[32] AP I of 1977, art. 1 (4) encompasses armed conflicts aimed at the right to self-determination against colonial domination, alien occupation and against racist regimes.
[33] David E. Graham, 'Defining Non-International Armed Conflict: A Historically Difficult Task,' Kenneth Watkin and Andrew J. Norris (eds.) *Non-international Armed Conflict in the Twenty-first Century* (Naval War College, 2012), 44.

On the other hand, determining the existence of a Non-International Armed Conflict (NIAC) is not always easy because of the fluidity and ambiguity in its existence and the reactions of sovereign States to it when they occur in their territories or they are involved outside their territories. This is mostly because of the inclusion of Non-State Armed Groups (NSAG) as participants in NIAC and the threshold that must be met for armed violence to become NIAC.[34] Determining the existence of a NIAC has always been a historically difficult task.[35] Common Article 3 to the four Geneva Conventions of 1949 and Additional Protocol (AP) II of 1977 regulate NIAC under IHL. AP II provides the criteria that must be met for a NIAC to be in existence which has been judicially noticed in *Prosecutor v Georges Anderson Nderubumwe Rutaganda*.[36] Ibanga and Archibong assessed the criteria for the existence of NIAC and came to the conclusion that the Boko Haram armed activities in the North-East part of Nigeria, as at 2018,was a conflict of a non-international character to which IHL was applicable.[37] We agree entirely with Ibanga and Archibong[38] on the existence of NIAC in North-East Nigeria especially as the armed violence had been below the threshold prior to July 2009 and had crossed that threshold of AP II after July 2009.

In view of the provisions of Common Article 3 to the GCs of 1949 and AP II of 1977, the armed violence in North-East Nigeria has crossed the threshold of AP II and is, therefore, a conflict of a non-international character and IHL is applicable.[39] As a result, the principle of distinction is applicable in the NIAC in North-East Nigeria by all the parties to the armed conflict. The violation of the principle, by the parties to the NIAC in the North-East, is a crime under IHL.

Classification of Armed Conflicts and the Regulatory Framework

Armed conflict is generally classified by IHL treaties into the binary of International Armed Conflicts (IACs)[40] and Non-International Armed Conflicts (NIACs).[41] In the case of IAC, Article 2, common to the four Geneva Conventions of 1949, states as follows:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them.
>
> The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.
>
> Although one of the Parties in conflict may not be a party to the present Convention, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the Convention in relation to the said Power, if the latter accepts and applies the provisions thereof.[42]

AP I of 1977 provides an addition to the categories of IAC thus:

> The situations referred to in the preceding paragraph include armed conflicts in which people are fighting against colonial domination and alien occupation and against racial regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law

[34] Common Article 3 to the four Geneva Conventions of 1949; Additional Protocol (AP) II of 1977, art. 1 (1) – (2).
[35] Graham, 'Defining Non-International Armed Conflict,' 43 – 55.
[36] [1999] ICTR- 96 – 3 at para. 95.
[37] Michael Ibanga and James Archibong, 'The Boko Haram Insurgency: Characterization and Implication for Municipal and International Laws,' in John-Mark Iyi and Hennie Strydom (eds.) *Boko Haram and International Law* (Springer International Publishing AG, 2018): 137-153. Available at books.google.com.ng
[38] Ibid.
[39] Audu Bulama Bukarti, *Violent Extremism in Sub-Saharan Africa: Lessons from the Rise of Boko Haram* (Tony Blaire Institute for Global Change, 2021), 3.
[40] GCs of 1949, art. 2; AP I of 1977, art. 1 (4).
[41] Common Article 3 to the four GCs of 1949; AP II of 1977, art. 1 (1).
[42] Geneva Conventions (GCs) I, II, III and IV of 1949 respectively, art. 2.

> concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.[43]

That is not all in terms of the categorization of IAC under IHL for the regulation of that type of armed conflict and the protection of the victims. Accordingly:

> In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.[44]

The above provision is generally referred to as Marten's Clause after the proponent of the clause at the Diplomatic Conference that gave birth to the Protocol.
In terms of the legal framework for IAC, the core includes the four Geneva Conventions of 1949 excluding CA 3; AP I of 1977; the established principles of IHL including the principle of distinction; and Customary International Humanitarian Law (CIHL).

NIAC, on the other hand, is a conflict not of an international character occurring in the territory of one of the High Contracting Parties.[45] AP II of 1977 moves the stakes higher by describing NIAC and offering a better, though, not conclusive definition of NIAC thus:

> This Protocol, which develops and supplements Article 3 common to the Geneva Conventions of 12 August 1949 without modifying its existing conditions of application, shall apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol 1) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under a 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.[46]

The Protocol makes a further provision, by way of a *caveat*, on the application of the above provision thus: "This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts."[47] This provision is generally referred to as the "threshold."

The applicable legal regime in NIAC includes: CA 3 of the four GCs of 1949; AP II of 1977; the established principles of IHL including the principle of distinction; and CIHL.

A fact that should not be waved aside so easily is that whenever there is a conflict of a non-international character, the major challenge is that of finding the applicable law. Murphy underscores this challenge as he states thus:

> … because of its sparse wording and inherent ambiguities, Common Article 3 raises more questions than it answers, and, in particular, these include issues of when it applies and whether it can be the basis for criminal prosecutions in international or national tribunals. … Moreover, Additional Protocol II is a good example of the unwillingness of States to be governed by international law in their internal conflicts

[43] AP I of 1977, art. 1 (4).
[44] Ibid, art. 1 (2).
[45] CA 3 to the four Geneva Conventions (GCs) of 1949.
[46] AP II, art. 1 (1).
[47]Ibid, art. 1 (2).

> with rebel groups. This is because the 'threshold' of applicability of Protocol II to a non-international armed conflict is extremely high.[48]

It should be appreciated that NIAC is an international law regulation of a domestic activity which is always resisted by sovereign States in the name of sovereignty. This is best captured by Dinstein's title of his book.[49] Kalshoven and Zegveld give further insight into this problem by identifying sovereignty and military necessity as the two evil spirits that have proved very difficult to exorcise in humanitarian law, especially in NIAC.[50]

The principle of distinction as the bulwark of protection in armed conflict

The principle of distinction is provided for in IHL treaties and CIHL. The principle of distinction has been given judicial anointing by the International Court of Justice (ICJ) as one of the cardinal principles constituting the fabric of IHL thus:

> The cardinal principles contained in the texts constituting the fabric of humanitarian law are the following: the first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; states must never make civilians the objects of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants; it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering. In the application of that second principle, states do not have unlimited freedom of choice of means in the weapons they use.[51]

For IAC, Additional Protocol (AP) I of 1977 provides for the principle as a basic rule thus:

> In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.[52]

AP I of 1977 states further that civilian objects shall not be the object of attack or of reprisals; and that civilian objects are all objects which are not military objectives as defined in paragraph 2.[53] Paragraph 2 referred to reinforces the principle of distinction by also defining military objectives thus:

> Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.
>
> In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.[54]

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[48] John F. Murphy, "Will-o'-the-Wisp? The Search for Law in Non-International Armed Conflicts," in Kenneth Watkin and Andrew J. Norris (eds) *Non-International Armed Conflict in the Twenty-first Century* (New Port, Rhode Island: Naval War College, 2012): 17.

[49] Yoram Dinstein, *Non-International Armed Conflicts in International Law* (Cambridge University Press, 2014).

[50] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 3rd ed. (Geneva: ICRC, 2001), 203.

[51] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* [1996] ICJ Reports 226 at 257.

[52] AP I of 1977, art. 49.

[53] Ibid, art. 52 (1).

[54] Ibid, art. 52 (2)-(3).

The above provisions are for IACs. In NIAC, the principle of distinction is also provided for in the following manner:

> The civilian population as well as individual civilians shall enjoy general protection against the dangers arising from military operations. To give effect to this protection, the following rules shall be observed in all circumstances.
> The civilian population as such, as well as individual civilians, shall not be the object of attack. Acts or threats of violence the primary purpose of which is to spread terror among the civilian population is prohibited.[55]

One of the applicable laws before the International Criminal Court (ICC) is the IHL principle[56] which undoubtedly includes the principle of distinction.

The principle of distinction is a vital aspect of Customary International Humanitarian Law (CIHL) and is codified in Part 1 of the CIHL Study which spans six chapters containing Rules 1 to 24 of the CIHL Study.[57] The principle of distinction determines who and what should be attacked and who and what should not be attacked in armed conflict, be it IAC or NIAC.[58]

Challenges of the principle of distinction in North-East Nigeria

The principle of distinction is very difficult to enforce in NIAC because of the direct participation of members of NSAGs who may not be classified into those who have Continuous Combat Function (CCF) and those who do not, as is the case with the regular military, which is the situation in North-East Nigeria with the presence of multiple NSAGs as insurgents. A civilian contractor, for example, that supplies weapons to the military or a non-member of the NSAG who supplies weapons to the NSAG, cannot be said to be protected if he or she is attacked by the opposing side at the time of supply of those weapons. There are non-military employees in the Ministry of Defence or at the Defence Headquarters who may not necessarily perform core military functions. In Nigeria, spouses and children of military officers reside in military barracks with their military-personnel spouses. The above are challenges to the effective implementation of the principle of distinction, especially in NIAC.

Secondly, National Security Forces (NSF), most of the time, do not separate membership in any NSAG into those with CCF and those without CCF. As a result, mere membership in an NSAG renders the member susceptible to attack by the NSF. In this regard and within the context of the US war in Afghanistan with al Qaeda, Cock states thus:

> Finally, all members of organized armed groups in Afghanistan fighting the multinational forces are and remain legitimate military targets 24/7, regardless their function within those groups. As a consequence of their membership, they are precluded from the protections to which all civilians are entitled under international humanitarian law. In case of capture, they will not enjoy POW protection and can be prosecuted for their direct participation in hostilities.[59]

Thirdly, the use of high-tech warfare and the increasing involvement of civilians in remote military operations like cyber attacks and drone strikes are also challenging the effective implementation of the principle.[60]

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[55] AP II of 1977, art. 13 (1)-(2).
[56] Statute of the International Criminal Court (ICC) 1998, art. 21.
[57] Jean-Marie Henckaerts and Louise Doswlad-Beck, *Customary International Humanitarian Law, Volume 1: Rules* (Cambridge University Press, 2005), 1-621.
[58] R. Chesney, 'Who may be Killed? Anwar al-Awlaki as a Case Study in the International Legal Regulation of Lethal Force,' in Michael N. Schmitt (ed.) [2010] (13) *Yearbook of International Humanitarian Law* (TMC Asser Press, Cambridge University Press and Springer, 2011), 3-60.
[59] Chris De Cock, 'Counter-Insurgency Operations in Afghanistan. What about the '*Jus ad Bellum'* and the '*Jus in Bello'*: Is the Law Still Accurate?' in Michael N. Schmitt (ed.) [2010] (13) *Yearbook of International Humanitarian Law* (TMC Asser Press, Cambridge University Press and Springer, 2011), 127.
[60] ICRC, Violence and the Use of Force (ICRC, 2011), 29.

Fourthly, some sovereign States deliberately violate the principle as has been the case in Africa as reported by Meredith. Meredith, quoting directly from the former President of Zimbabwe, the late Robert Mugabe, in the latter's counter-insurgency measures in an audience with the people in rural Matabeleland, states thus:

> We have to deal with this problem quite ruthlessly. Don't cry if your relatives get killed in the process … Where men and women provide food for the dissidents, when we get there, we eradicate them. We do not differentiate who we fight because we can't tell who is a dissident and who is not.[61]

From the above, the violation of the principle is, sometimes, a deliberate State policy by State managers, military commanders and NSAGs in NIAC.

Fifthly, there is no definition of civilians and civilian objects in any of the treaties regulating NIAC.[62] This makes it difficult for the principle of distinction to be implemented in NIAC.

Sixthly, the definition of military objectives does not exist in CA 3 and AP II for NIAC though it does exist in the Amended Protocol II to the Convention on Certain Conventional Weapons[63] and the Second Protocol to the Hague Convention for the Protection of Cultural Property.[64] The challenge is that the definition should have been part of the core treaty provisions that regulate NIAC.

Furthermore, the prevalence of terrorism seems to bury the principle in the dust of counter-terrorism as many sovereign States are not ready to respect and ensure respect for the principle in their combat engagements in counter-terrorism. The conditions for resistance fighters and NSAGs to wear a recognizable uniform and carry their weapons openly became contentious in the aftermath of the 9/11 attacks. When captured by the adversary, are they "unlawful combatants," whether merely in a descriptive sense or by way of formal qualification? And in either case, does this label affect the way they should be treated, be it under Convention III or IV?[65] Again Kalshoven and Zegveld answer the questions thus:

> The latter question became urgent in the post 9/11 years, in what was called the fight against international terrorism. Much has been said and written about it, in particular in consequence of the policy pursued for some time by the United States to deny captured persons suspected of belonging to or supporting the Al Qaeda network treatment as prisoners of war. Here it may suffice to note that issues concerning the application of the Geneva Conventions to a particular person can only arise if this person is captured in, or in relation to, a situation that may properly be regarded as an (international or internal) armed conflict. Terrorist activities planned or committed outside the framework of an armed conflict do not fall within the scope of the law of armed conflict.[66]

In addition, the seeming acceptance of the non-treaty classification of armed conflict as internationalized armed conflict[67] is most likely to erode the efficacy of the principle in military engagements in the future. Okorie defines internationalization of armed conflict thus: 'The notion of internationalization of armed conflict connotes a non–international armed conflict characterized by the intervention of the armed forces of a foreign state.'[68] There is yet another non-treaty identification

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[61] Martin Meredith, *The State of Africa: A History of Fifty Years of Independence* (The Free Press, 2005), 623.
[62] CA 3 of GCs of 1949 and AP II of 1977.
[63] Amended Protocol II to the Convention on Certain Conventional Weapons (CCW) 2001, art. 1 (6).
[64] Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict 1999, art. 1 (f).
[65] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law* (4th ed. Cambridge University Press, 2011), 34.
[66] Ibid, 35.
[67] Hagler Okorie, 'Internationalization of Armed Conflict in Africa: Appraisal of Sub–Saharan African Countries of Democratic Republic of Congo, Somalia and Nigeria,' [2018] (6) (1) *Journal of Law and Criminal Justice* 65-81.
[68] Ibid, 65.

of armed conflict as transnational armed conflict by Benvenisti which is also a type of armed conflict not recognized by IHL treaties.[69]

More so, the principle of distinction does not depend on reciprocity for its validity, legality, applicability and utility in armed conflicts, especially NIACs.

Finally, any discussion of armed conflict outside the base of hostilities is inconsistent with the aim of IHL and is bound to fail in the operational responses for the protection of the victims. Melzer opines that the locution "hostilities" is a portmanteau term embracing all forms of hostile acts undertaken against the enemy.[70] Dinstein explains the concept further by stating thus:

> Hostilities are conducted through the employment of means and methods of warfare … They primarily involve attacks … but also include some ancillary measures … The centre of gravity of hostilities is the planning and execution by all levels of command, from top to bottom, of violence against the enemy … But not all acts of hostilities necessarily involve violence. Hostilities also consist of ancillary non-violent operations, such as gathering intelligence about the enemy, logistics (delivering to combatants armaments, equipment, transportation, food, fuel and other essentials); and running a network of communications (electronic or otherwise).[71]

Hostility is bigger and larger than attack but includes the latter. That is the reason the principle of distinction is crucial so that civilians can remain civilians and be protected while combatants/fighters are permitted to participate directly in hostilities and bear the consequences for such privileges.

Opportunities for the application of the principle of distinction in North-East Nigeria

The NIAC in North-East Nigeria provides one of the opportunities for the application of the principle of distinction in a real combat situation in the country but the parties to the NIAC seem to have thrown away this opportunity by removing the base of the NIAC from hostilities to terrorism[72] and self-defence.[73] The NIAC in North-East Nigeria maimed, killed and displaced many civilians and destroyed many civilian objects including schools, hospitals, homes, markets, farms, etc.[74] This can be attributed only to the non-implementation of and non-adherence to the principle of distinction by all the parties to the NIAC.

The best time to prepare for NIAC in particular and armed conflict, in general, is during peace so as to activate the knowledge gained during training, including the principle of distinction, in times of armed conflict.

The above opportunities seem to have been thrown away in the NIAC in North-East Nigeria due to the non-implementation of the principle of distinction by all the parties to the NIAC. That is a violation of the laws and customs of war for which there is individual criminal responsibility.

Conclusion

Armed conflict is a dangerous activity that has to be regulated for the protection of the victims. And the treaty provisions for the regulation of NIAC are scanty which makes it imperative for the application of the principle of distinction in combat engagements. The following are offered for strengthening the principle especially in the NIAC in North-East Nigeria.

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[69] Eyal Benvenisti, 'The Legal Battle to Define the Law in Transnational Asymmetric Warfare,' [2010] (10) *Duke Journal of Comparative and International Law,* 139-359.

[70] Nils Melzer, *Targeted Killing in International Law* (Oxford University Press, 2008), 273.

[71] Dinstein, *The Conduct of Hostilities*, 2.

[72] Terrorism (Prevention) Amendment Act 2013.

[73] Self-defence does not exist in situations of NIAC. Charter of the United Nations 1945, art. 51; Advisory Opinion on the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* [2004] ICJ Reports 136.

[74]Saskia Brechenmacher, *Stabilizing Northeast Nigeria after Boko Haram* (Carnegie Endowment for International Peace, 2019), 1; Secretary-General of the United Nations, *Report on Children and Armed Conflict*, of 9 June 2020 with Reference No. A/74/845 - S/2020/525, paras. 206 – 216 at 28-29 of the Report. This Report covers the period of January to December 2019. This Report was submitted pursuant to Security Council Resolution 2427 (2018).

First, there is a need for training and re-training of all the parties to the NIAC in the North-East on the regulation of the means and methods of warfare in times of peace and armed conflict. The Ministry of Education both at the Federal and State levels can do this by including the teaching of elementary aspects of IHL in the school curriculum for primary and secondary schools and in religious education. The reason for such inclusion is because children of that age-range are being recruited by Boko Haram; and those who do not attain formal schools can be captured in the informal religious education in the North-East. The security and defence forces can also be engaged in this as part of their out-reach programmes in the North-East part of Nigeria.

Second, the government response to the armed violence by the NSAGs should have an operational basis no matter the provocation. The line between *jus in bello* and *jus ad bellum* should not be blurred in operational tactics.[75]

Third, the principle of distinction should be included and amplified in the Rules of Engagement (RoE) training manuals for military and law enforcement officers by the Ministry of Defence; the Nigeria Police Force and other security agencies engaged in counter-insurgency in the North-East part of Nigeria.

Fourth, the Ministry of Education should collaborate with the National Orientation Agency (NOA) in public education of the general populace on the principle of distinction in order to fulfil Nigeria's international law obligation to disseminate AP II as widely as possible.[76] This aspect will also be targeted at NSAGs and would-be NSAGs.

Fifth, NIAC in particular and armed conflict in general should be confined to the base of hostilities and every operational response should also be based on that by the parties, the Nigerian Armed Forces and the NSAGs, to the armed conflict since IHL is addressed to them.[77]

Sixth, the National Assembly should, as a matter of urgency, domesticate the APs I and II of 1977 in accordance with the provisions of the CFRN 1999[78] in order to make those treaties part of Nigerian laws.

Seventh, the Nigerian justice system should be activated to investigate, prosecute and punish all those involved in the violation of the principle of distinction in the NIAC in North-East Nigeria.

Finally, all the members of the Multi-National Joint Task Force (MNJTF) operating in the NIAC in the North East should be made to undergo training and re-training on the principle of distinction before full and/or further engagement in the NIAC.

In conclusion, the principle of distinction is actually the bulwark and a fire-wall for strengthening protection for the victims including civilians and civilian objects in armed conflicts, especially in NIAC. Without the principle, attacks in armed conflict would become indiscriminate and total; and that would be akin to the removal of humanity from armed conflicts.

The principle is the fulcrum which revolves around the two driving forces of armed conflict[79] which are: military necessity and humanitarian considerations. The principle is a rule for the High Contracting Parties (HCPs) to the Additional Protocols (APs) I and II of 1977 by virtue of their treaty obligations under International Law. It is a principle for those States that are not HCPs to the APs I and II of 1977. The principle has attained the status of Customary International Humanitarian Law (CIHL) for the HCPs and the non-State Parties by virtue of the CIHL Study of 2005.

The NIAC in North-East Nigeria should be discussed and the operational combat activities of all the parties featured on the *jus in bello* operational combat base of hostilities. Hostilities are the parameters within which armed conflicts, be they international or non-international, take place. Outside hostilities, there is no armed conflict. Hostilities comprise both combat and non-combat, attack and non-attack, activities within IHL. We agree entirely and conclude with Corn in his insistence that

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[75] Geoffery S. Corn, 'Self-Defence Targeting: Blurring the Line between the *Jus ad Bellum* and the *Jus in Bello*,' in Kenneth Watkin and Andrew J. Norris (eds) *Non-International Armed Conflict in the Twenty-first Century* (New Port, Rhode Island: Naval War College, 2012): 56-92.

[76] AP II of 1977, art. 19.

[77] Ibid, art. 1 (1).

[78] Constitution of the Federal Republic of Nigeria (CFRN) 1999 (as amended), s. 12 (1).

[79] Dinstein, *The Conduct of Hostilities,* 8-9.

military combat operations in armed conflict should not be conflated with military combat operations in self-defence as the two are poles apart. According to him:

> Accordingly, the scope of permissible violence justified by the *jus in bello* is fundamentally different from that tolerated through the exercise of peacetime defence...
> Attempting to substitute *jus ad bellum* principles for their *jus in bello* variants is not only confusing; it fundamentally degrades target engagement authority…
> Instead, the nature of the threat and the authority invoked by the State to respond to that threat must dictate the existence of armed conflict. When States utilize armed forces and grant them the authority to engage opponents pursuant to the LOAC rule of military necessity – an invocation revealed by the employment of deadly force as a measure of first resort – it indicates the existence of an armed conflict. It is the *jus in bello,* and not the *jus ad bellum*, that must regulate such operations.[80]

And when the above scenario is in existence, the principle of distinction should be an integral part of the *jus in bello* regulation of the combat engagement of all the parties, including the NIAC in North-East Nigeria.

[80] Corn, 'Self-Defence Targeting,' 77-78.