

PROTECTION OF CIVILIAN POPULATION IN INTERNATIONAL HUMANITARIAN LAW

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Abstract

The underpinning philosophy with far reaching implications in international humanitarian law is overriding consideration of humanity. Protection of persons and objects in situations of warfare flows from the entrenched reality of the principle of distinction in the choice of target and the need to minimize the calamity of war. This paper is aimed at interrogating civilian's persons and objects within the provinces of the law of armed conflict with a view to determining adequacy or otherwise of the extant prescriptions. The paper being a conceptual analysis relied on both primary and secondary sources of data for its analysis and conclusion. It found that most of the provisions on civilian protection are not couched to elicit construction that could command strong obedience. Secondly the paper found also that notwithstanding the superfluity of applicable conventions, protocols, and states practice regarding the subject, compliance and enforcement with the ideal prescription has become deliberately problematic thereby necessitating the pertinent needs for more proactive and robust co-operation amongst States and non-State actors as well suggesting reforms of those implicated prescriptions in order to promote the set out ideals of IHL.

Keywords: Armed Conflict, Civilians, Humane, Persons, Objects

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1. Introduction

From time immemorial to the present day, the scourge of war has brought untold horror, suffering and destruction of countless lives and properties of both those directly involved in war (combatants) as well as civilians.¹ The trauma of war and the attendant depravity, loss, degrading inhumane treatment coupled with incessant obstruction of family lives in the rein of war has become a recurring phenomenon.² International humanitarian law as a branch of public international law that seeks to limit humanitarian consequences of armed conflicts³ as it provides arrays of protection for persons and objects exposed to devastating effects of war thus engendering minimum standards and respect for humanity⁴.

This is underscored by the three most important maxims of international humanitarian law relevant to the conduct of hostilities namely: firstly ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’⁵; secondly, in pursuing this aim, ‘the right of the Parties to the conflict to choose methods or means of warfare is not unlimited’⁶; and thirdly, ‘[t]he civilian population and individual civilians shall enjoy general protection against dangers arising from military operations’.⁷

¹ Nils Melzer (ed), *International Humanitarian Law: A Comprehensive Introduction*, International Committee of the Red Cross, Geneva 2016.

² *ibid.*

³ Also referred to as the ‘Law of Armed Conflict’; Malcolm L Shaw, *International Law*, (6th edn, Cambridge University Press, 2008) 1167.

⁴ Declaration Renouncing the Use, in Time of War of Explosive Projectiles Under 400 Grammes Weight, 29 November / 11 December 1868, hereinafter St Petersburg Declaration; Melzer (fn 1)11.

⁵ *ibid.*, St Petersburg Declaration.

⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977 art 35(1) hereinafter AP I. See also Hague Declarations art 22 which provide that: the right of belligerents to adopt means of injuring the enemy is not unlimited. See further art 23 of the said Declaration which provides absolute prohibition to ‘employ arms, projectiles or material calculated to cause unnecessary sufferings’.

⁷ *ibid.* art 51(1).

Apart from civilian population which are usual soft targets of warfare by state actors and belligerent groups, civilian objects which are normally used for civilian purposes⁸ too are often times not entirely spared from the wilful destruction. The use of high-tech weapons such as landmines, cluster munitions and other explosives devices/ordinances render several theatres of war uninhabitable as both critical infrastructures such as bridges, roads and power stations, cultural property and religious sites amongst other are wantonly desecrated with brazen impunity.

The goals set to be achieved by IHL in this respect is basically to ensure that civilian population and civilian objects are protected from the effect of hostilities as well imposing restraints on the methods and means of warfare through the adoption of the principle of distinction which is of long standing nature, though always revered in breach rather than observance in actual practice.⁹ This principle of distinction is to the effect that parties to the conflict must at all times distinguish between civilian population and combatants and between civilian and military objects and must direct their operations only against military objectives.¹⁰

Bearing in mind the foregoing background, this paper seeks to espouse the legal limits of protection accorded to civilians in armed conflict situations using within the context of applicable rules of international humanitarian law.

2. Research Methodology

This is a qualitative analysis of the legal problems that arise from the international humanitarian law perspective regarding the protection plan for civilians and specific items during armed conflict. The data used in this analysis came from primary sources, including

⁸ For example, dual use objects and objects indispensable for the survival of mankind.

⁹ However, this principle of distinction constitutes 'intransgressible principles of international customary law' which bind all States whether or not they had ratified Hague and Geneva Conventions. See also International Court of Justice's Advisory Opinion on the *Legality of the Threat of Use of Nuclear Weapons* ICJ Reports, 1996, 226-257.

¹⁰ AP I art 48.

international treaties like the Geneva Conventions (I–IV) of 1948 and the Additional Protocols I and II of 1977, as well as other treaties about international humanitarian law and rulings from the International Criminal Court, International Court of Justice, and other international criminal tribunals in Rwanda and Yugoslavia, respectively. Journal articles and additional library-based and online resources were also used to gather secondary sources. This methodology was supported by the need to thoroughly investigate current laws and principles, which can only be accomplished using qualitative methods.¹¹

3. Conceptualizing Armed Conflict in International Humanitarian Law

IHL regulations are only applicable during “armed conflicts”.¹² Despite frequent usage in international humanitarian law, the term “armed conflict” is not authoritatively defined in the Geneva Conventions and Additional Protocols I and II. However, in determining the application of the Geneva Conventions, the International Criminal Tribunal for Former Yugoslavia (ICTY) rejected the defence's argument that there were no hostilities at the relevant time and place. In *The Prosecutor v. Tadic*¹³ the accused, a politician from Bosnia who is Slavic and a former member of an armed paramilitary group that supported the attacks on Slavic-run concentration camps in Prijedor, was accused of committing crimes against humanity and grave violations of the Geneva Conventions:

...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...International humanitarian law applies from the initiation of such conflicts...

¹¹Catherine Marshall and Gretchen B Rossman, *Designing Qualitative Research* (Sage Publications;1989) 45-48; David Silverman, *Doing Qualitative Research* (2nd edn, Sage Publications; 2005) 9.

¹²Melzer (n 3)52.

¹³(1996) ICTY 70.

Notably, the nature of armed conflict must be determined first and foremost before determining which of the IHL rules applies in any particular situation. Thus, two types of armed conflicts—international armed conflicts (IAC) and non-international armed conflicts (NIAC)—suffice for the application of international humanitarian law due to the combined provisions of the Geneva Conventions and Additional Protocol I and II. Political history, not military necessity or humanitarian concerns, drives this contradiction.¹⁴

Rules of IHL apply differently depending on whether the armed conflict in question is international or non-international. For clarity, ‘international armed conflicts’ (IAC) is defined as follows:

... All cases of declared war or of any other 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.¹⁵

Therefore, for an armed conflict to be considered an international armed conflict, the opposing state’s recognition of formal belligerency is irrelevant as long as “parties to the conflict” are considered states under the terms of the Additional Protocols and the Geneva Conventions. A High Contracting Party that has ratified or signed the treaty as mentioned above provisions is a state that falls under the jurisdiction of the Geneva Conventions.¹⁶ As a result, “the legal status

¹⁴ Melzer, (n1) 53.

¹⁵ Common article 3 to the Geneva Conventions I-IV.

¹⁶ Armed conflicts derive their international character from the fact that they occur between High Contracting Parties to the 1949 Geneva Conventions. This position also is not oblivious of the fact that by article 96(1) of Additional Protocol 1 certain types of national liberation movements are also recognized as states though not sovereign states under international law.

of the parties involved”¹⁷ and “the nature and character of the hostilities” determine whether an international armed conflict exists.¹⁸

The provisions of all four Geneva Conventions and Additional Protocol I for States that have ratified it apply in all armed conflicts that fit the description above.¹⁹ It is obvious to note that the definition of international armed conflict (IAC) has been further broadened to encompass the following as a result of the aforementioned Additional Protocol I provision:

Armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist 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 concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.²⁰

The purport of this elaborate provision is to widen the protection nest such that more persons and objects are captured into scheme of protection engendered by the spirit and purport of common article 3 of the Geneva Conventions. This Protocol abandons the narrow concept of protected persons used in article 4 of the Fourth Geneva Convention as it opts for an inclusive notion of civilians who are not combatants.²¹ However, as most modern armed conflicts demonstrate, “non-international armed conflicts” (NIAC)²² are not always fought between States alone but between States and organised armed groups.²³ Despite the intense negotiations that resulted in the adoption of the Geneva Conventions, NIAC is defined negatively and narrowly by the

¹⁷Melzer (n1) 54.

¹⁸ Such hostilities are belligerent in nature which may not be coupled with formal declaration of war.

¹⁹ Article 1(3) of the AP I.

²⁰ *ibid* art 1(4).

²¹ *ibid* art 50.

²² Non-International Armed Conflict (hereinafter NIAC).

²³ Melzer (n1) 66.

provisions of the Geneva Conventions as “... armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties.”²⁴

Therefore, the IHL rule on NIAC's material scope of application is restricted to armed conflict that occurs within the territory of High Contracting Parties and only involves a State's armed forces against government opponents' armed forces (belligerents), who are not combatants of another State's armed force.²⁵ In the same related context treaty laws clearly distinguishes internal disturbances such as riot, disorder and banditry from notion of non-international armed conflict and consequently same do not give rise to conflicts known to common article 3 of the Geneva Conventions.²⁶

It should be noted that the material scope of application of common article 3 of the Geneva Conventions commonly regarded as a ‘miniature convention’²⁷ merely identified key duties and prohibitions by prescribing minimum level of protection. NIAC is restricted to a reduced level of armed conflict. Put differently, two aspects of the nature of the conflict must be thoroughly investigated in order to ascertain whether a given armed conflict is an internal disturbance or act of violence and not an international armed conflict: “the intensity of the conflict and the organization of the parties to the conflict”.²⁸

In other words, when armed attacks lack “sufficiently violent and protracted” elements and non-state armed groups are not “sufficiently organised,” they may be classified as internal disturbances, which are punishable under domestic law. In such cases, the Geneva Conventions and Additional Protocol II's protection provisions under

²⁴ Common Article 3 of the Geneva Conventions.

²⁵ *ibid.*

²⁶ Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims

of Non-International Armed Conflicts (Protocol II), 8 June 1977, hereinafter AP II art 1(2). Furthermore

article 1 of AP II develops and supplements Common article 3 by defining its own scope of application restrictively.

²⁷ (ICTR, 2001).

²⁸ (1997) ICTY 35.

international humanitarian law would not apply to non-international armed conflicts.

It is also important to be mindful that no other part of the Geneva Conventions applies in non-international armed conflicts; only Common Article 3 and possibly Additional Protocol II do. The only article in the Geneva Conventions that addresses multiple types of internal armed conflicts under one roof is Common Article 3, which covers armed uprisings, insurrections, and civil wars.

Due to its universal application and guarantee of humane treatment, Common Article 3 has gained customary international status.²⁹ Insofar as Common Article 3 sets forth the minimal standards of international humanitarian law that apply to both domestic and foreign armed conflicts; it is reasonable to argue that this applies to all forms of armed conflict, regardless of how they are classified.³⁰

It is also necessary to note that, due to the evolving nature of military tactics, an internal armed conflict may become an international armed conflict if armed forces intervene “significantly and continuously,” in which case the Geneva Conventions’ provisions regarding international armed conflict would also apply to non-international conflicts.³¹

4. Systems of Protection in IHL

There are basically three systems of protection in international humanitarian law, namely: general protection which involves in the main civilians and civilian objects discernable by the principle of distinction, special protection for selected categories of protected persons and objects and enhanced protection. In this direction, IHL pursues three fundamental principles which are; first ‘the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy’;³² second, in pursuing this aim, ‘the right of the Parties to the conflict to choose methods or means of warfare is not unlimited’;³³ and third, ‘[t]he

²⁹Pictet, 1952-9).

³⁰ ICJ (1986).

³¹(ICTY, 2006).

³² St Petersburg Declaration.

³³ *ibid.*

civilian population and individual civilians shall enjoy general protection against dangers emanating from armed conflicts'.³⁴ in spite of the broad categorization of protection available in the jurisprudence of IHL, this paper focuses in the main, on concept of civilian protection with particular attention paid to women, children and persons with disabilities in context of their persons and selected objects that are within the parameters of the two most significant goals of IHL.

5. Protection Civilian Population in IHL

Undoubtedly, the ultimate goal of international humanitarian law is to protect civilians from the horrors and scourge of war.³⁵ The principle of distinction, which requires parties to an armed conflict to always and voluntarily distinguish between civilian populations and combatants as well as between civilian objects and military objectives that will be the target of military attacks, is how this is made possible.³⁶

The protective purpose of this hallowed principle becomes achievable only if the keys categories of persons and objects encapsulated in the provisions of the Additional Protocol 1, namely: "civilians" and "combatants" and "civilian objects" and "military objectives" are clearly defined with certainty to avoid the seeming difficulty arising from lack of precision of scope and conditions of protection available to civilians and civilian objects in IHL.

The concept of civilians in IHL is negatively conceived. Civilians comprises of all persons who are neither members of the armed forces of a party to the conflict nor participants in a *levée en masse*³⁷ but includes those civilians such as war correspondents, civilian intelligence and law enforcement personnel³⁸ accompanying armed forces without direct participation in hostilities.

³⁴ Melzer (n1) 80; see also AP I art 51(1).

³⁵ *ibid.*

³⁶ AP I art 48. See also Rules 1 and 7 of the Customary International Humanitarian Law, hereinafter CIHL.

³⁷ *ibid* art 50(1) and (2); Rule 5 of CIHL.

³⁸ However, they qualify to be granted prisoner of war's status when captured.

The concept of civilian protection entails specific prohibition against direct attack³⁹ which has wider connotation in IHL than in ordinary parlance. In the jurisprudence of IHL, attack refers not only to offensive operations, but includes all ‘acts of violence against the adversary, whether in offence or in defence’⁴⁰. The prohibition also covers acts of terror which are intended to cause fear and anxiety among civilian population.⁴¹ Indiscriminate attacks of civilian population are also prohibited. Those outlawed attacks are of a nature that is intended to constitute a strike of purely military objectives as well civilians and their objects without resort to the principle of distinction.⁴² IHL equally prohibit civilians from being used by belligerent groups as human shield during hostilities. This prescription makes it unlawful for belligerents to cause movement of civilians and their objects with the mind of shielding purely military objectives from being legitimately attacked.

The term ‘without direct participation in hostilities’ clearly underscores the essence of the special dispensation accorded this category of persons in IHL. Under IHL, the concept of direct participation in hostilities refers to conduct which, if carried out by civilians, suspends their protection against the dangers arising from military operations. The phrase which derives from common article 3 to the Geneva Conventions and found in most provisions of IHL suffers from lack of precise definition in both the Geneva Conventions and the Additional Protocols notwithstanding the severity of the legal consequences conveyed by the phrase in IHL.

Due to the overriding importance attached to the protection of civilian population, IHL provides to the effect that whenever there is doubt as to civilian status of any person, that person must be considered a civilian to be captured within the extant proactive regime.⁴³

³⁹ AP I art 51(2); CIHL, Rule 1.

⁴⁰ *ibid* art 49(1).

⁴¹ *ibid* art. 51(2); CIHL, Rule 2.

⁴² *ibid* art. 51(4) and (5); CIHL, Rules 11–13.

⁴³ For situations of international armed conflict, this principle has been codified in article 50 (1) AP I. With

6. Women and Children as Part of Civilian Population

IHL rules offers special protection to certain categories of civilian population who are characterized by their special vulnerability to injuries and harm orchestrated during armed conflict. This group of persons include woman and children who deserves enhanced protection beyond the prescription accorded to civilians generally and thus there should be no adverse distinction between them and other civilians. The phrase “adverse” used here means differences in, or preferential treatment based on a person’s specific needs, including in relation to disabilities.⁴⁴

Women and children belong to civilian population who are ordinarily entitled to general protection and deservedly additional special protection in IHL rules. The reason is not far-fetched, Women and children comes under the category of ‘wounded and sick’⁴⁵ for reasons that they bear the greatest burden of armed violence⁴⁶ with significance attention being focused on sexual related violence and thus conscripting to obscurity other forms of deprivation suffered by these category of persons of concern.⁴⁷

regard to non-international armed conflicts, see also *Commentary AP* No 10, 4789, which states that, ‘in

case of doubt regarding the status of an individual, he is presumed to be a civilian’.

⁴⁴ ICRC Commentary on the First Geneva Convention and, in particular, the Commentary on common Article 3, pp. 98–202, paragraphs 565–580, availabledatabases.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument accessed 1st March 2024.

⁴⁵ GC IV art 16 and AP I art 8.

⁴⁶ Judith Gardam and Hilary Charlesworth, ‘Protection of Women in Armed Conflict’ (2000) 22(1) *Human Rights Quarterly* 148–166 available at www.jstor.org/stable/4489270, accessed on 1st March 2024.

⁴⁷ The work of ECOSOC, particularly in relation to Palestinian women and children in occupied territories is an exception to this sweeping generalization. See for example, Situation of Women and Children in the Occupied Arab Territories, U.N. ESCOR, Comm’n on Hum. Rts., 22d plen. mtg., U.N. Doc. E/RES/1982/18

(1982); Situation of Palestinians Within and Outside the Occupied Territories, U.N. ESCOR, Comm’n on Hum. Rts., 19th plen. mtg., U.N. Doc. E/RES/1984/18 (1984); Situation of Palestinian Women, U.N. ESCOR, Comm’n on Hum. Rts., 15th plen. mtg., U.N. Doc. E/RES/1988/25 (1988); Situation of Palestinian Women,

There is an avalanche of contemporary evidence suggesting that women and children suffer disproportionately in comparison to men during armed conflicts as armed conflicts exacerbate inequalities when gleaned from gender perspective and of course depending on the type of societies and the role that women in particular are expected to play.⁴⁸ Women today unfortunately occupy the topmost position on the poverty pyramid drawing attention of most international engagements to the need to ameliorate if not totally eliminating innumerable challenges they are exposed to including those associated with hostilities.⁴⁹

IHL provides special protection for women, expectant mothers as well as mothers with children against any form of attack on their honour and chastity as well as enforced prostitution and further forbids any acts of sexual assault on their persons.⁵⁰ In order to forestall discrimination against women, the Geneva Conventions III adopted a more serious construction with respect to women who are civilian internees and prisoners of war where it provides that 'women shall be treated with all due regard to their sex and shall in all cases benefit by treatment as favourable as that granted to men'.⁵¹

Women in IHL rules also takes benefit of judicial guarantee as other protected persons. In this wise death penalty is not allowed to be carried out against pregnant women or mothers of young or dependent children.⁵²

U.N. ESCOR, Comm'n on Hum. Rts., 13th plen. mtg., U.N. Doc. E/RES/1990/11 (1990); Situation of and Assistance to Palestinian Women amongst notable ECOSOC's interventions on women.

⁴⁸ Gardam and Charlesworth (n43) 150.

⁴⁹ The issue of women in poverty was top of the agenda at the Beijing Conference. See Beijing Platform for Action; See also African Platform for Action adopted by the Fifth Regional Conference on Women, held at Dakar from 16 to 23 November 1994, U.N. ESCOR, Comm'n on the Status of Women, 39th Sess., ¶ 25, U.N.

Doc. E/CN.6/1995/5/Add.2 (1994) for the Advancement of Women, U.N. ESCOR, Comm'n on the Status of Women, 39th Sess., Agenda Item 3(b), ¶ 92, U.N. Doc. E/CN.6/1995/3/Add.1 (1995).

⁵⁰ GC IV and AP I.

⁵¹ GC III arts 14, 16, 49 and 88; GC I-III art 12.

⁵² AP I art 76.3 and AP II art 6.4.

A child is not defined in IHL treaty laws. However in other complimentary provisions of other legal framework which protect children in general terms, definition of a child have been offered in differently worded expressions that utterly defy unanimity. The UN Convention on the Right of the Child⁵³ provides for what could nearly be regarded as a universal yardstick on the definitional conundrum regarding a child. The Convention defines a child as ‘every human being below the age of eighteen years’.⁵⁴

In spite of the foregoing flaws, IHL provide arrays of protection for children as special category of civilians during armed conflicts. For instance children are to be afforded preferential measures during evacuation for compelling reasons with respect to proviso of foods, medical care and effects of war.⁵⁵ Similarly children are prohibited from being engaged in forced or compulsory labour by occupying power⁵⁶ and are entitled to be removed from besieged or encircled area and their cultural environment and education are accordingly protected from violations.⁵⁷ States parties are enjoined to facilitate exchange of family correspondences including those dispersed by war for the purpose of ensuring their reunion with their families.⁵⁸

IHL prohibits sternly the recruitment of children into armed forces or armed groups.⁵⁹ It further provides that where juveniles are forcefully recruited priority should be given to the oldest. It is apt to add that the prohibition against child soldiering has now attained the status of customary international law.⁶⁰ In what seems to be bereft of force of assertiveness, the Additional Protocol I and II to the Geneva

⁵³ United Nations Convention on the Rights of the Child 1989 (adopted in 1990), UNGA Resolution 42/25 Annex to the UN Resolution UN Doc A/44/1989.

⁵⁴ *ibid.*

⁵⁵ GC IV art 50.

⁵⁶ *Ibid* art 5.1

⁵⁷ *ibid* arts 24, 56.

⁵⁸ *ibid* art 25.

⁵⁹ AP I art 72.2; UNCRC art 38.3.

⁶⁰ Report of the Secretary General on Establishment of Special Court for Sierra Leone S/2000/915, 4th October

2000, para 17. This position is also re-affirmed by Rule 136 of the ICRC Customary Study that ‘in international and non-international armed conflicts children must not be recruited into armed forces or armed groups’.

Conventions merely provide that the parties may take “all possible measures” not to recruit child soldiers. This window could be exploited by States parties hiding under the guise of unrestrained discretion inherent in the phrase-‘all possible measures’ in making unhealthy decision regarding recruitment of minors as child soldiers. However, within the framework of the Statute of ICC, conscripting or enlisting children under the age of fifteen years into armed forces or armed groups or using them to participate in hostilities constitute war crime.⁶¹ The dilemma lies in the difficulty with reaching consensus as to minimum age of criminal responsibility of a child for the purpose of drawing up acceptable benchmark. This regrettably is currently lacking.⁶²

Child soldiers who participate in hostilities and captured as prisoners of war by adverse parties must continue to enjoy special protection contemplated for children whether or not they are recognized as prisoners of war or not.⁶³

7. Persons with Disabilities as Civilians

Persons with disabilities are the most vulnerable to attacks and concomitant injuries during armed conflict by reason of their heightened vulnerability. Their condition is further exacerbated by reasons of their sudden flight from their place of habitual residence where they have had access to their source of livelihoods as well as access to health care services.⁶⁴

The protection accorded persons with disabilities in IHL is further strengthened by international human rights law. For instance, there is

⁶¹ Rome Statute of international Criminal Court (Adopted on 17 July 1998) though entered into force on 1 July 2000 (2187 UNTS3)OX1030 , art 8.2.b.xxvi; art 8.2.e.vii.

⁶² For example, the Optional Protocol to CRC raise the age of participation in hostilities from 15 to 18 established a total ban on recruitment below the age of 18. However the Statute of Special Court for Sierra Leone on the other as verified by article 26 thereof, while agreeing with the optional Protocol to the

UNCRC added the phrase- ‘and above the age of 15’ a lacuna which may be exploited by armed recruitment agencies.

⁶³ AP I art 77.

⁶⁴ ICRC, Advisory Service on International Humanitarian Law, *International Humanitarian Law and Persons with Disabilities*, October (2017) 1-4

an avowed recognition of obligations of state parties to ensure the protection and safety of persons with disabilities during armed conflict particularly in the Convention on the Right of Persons with Disabilities and its Optional Protocol.⁶⁵

In specific terms, the protection also extended to prioritizing humanitarian reliefs in favour of persons with disabilities.⁶⁶ In the conduct of hostilities, persons with disabilities are protected against direct attacks and indiscriminate attacks.⁶⁷ Based on this understanding, parties to conflicts are enjoined to take precautionary measures on the needs of persons with disabilities.

Beyond the aura of general protection, IHL rules offer special protection for this category of civilians. Though the precise meaning of the ‘wounded’ and ‘sick’ is not defined with statutory clarity in the Geneva Conventions leaving to interpretation based on common sense and good faith. However, clarity is provided in the Additional Protocol I to the Geneva Conventions which defined the words ‘wounded’ and ‘sick’ and stipulated that the definition also include persons with disabilities.⁶⁸ It follows therefore that myriads of protection against violence, wilful killing and causing serious suffering of harm and injuries which are considered as grave breaches of the Geneva Conventions are also by extension available in favour of persons with disabilities.⁶⁹

Persons with disabilities are not also to be denied medical care as such practice may amount to war crimes. They are also entitled to special in terms of being spared from attacks and to be given support during evacuation, detention and interment.⁷⁰ By reasons of their vulnerability, where they are catalogued as ‘prisoners of war’ during

⁶⁵ Convention on the Right of Persons with Disabilities art 11.

⁶⁶ See GC IV art 23; AP I art 70; AP II, art 18; and Rule 55 of the ICRC customary IHL study (CIH)L.

⁶⁷ AP I art 51(2); CIHL, Rule 1; AP I art 51(4) and (5); CIHL, Rules 11–13).

⁶⁸ API art 8.

⁶⁹ GC I arts 4 and 12; GC II, arts 5 and 12(1); GC IV, art. 16(1); AP I art 10(1); CIHL, Rule 110.

⁷⁰ GC III, Arts. 16, 30, 49 and 110; GC IV arts 17, 27, 85, 119 and 127; CIHL, Rule 138.

international armed conflict situations, special facilities are to be provided for them pending their repatriation.⁷¹

8. Distinguishing Civilians from ‘Unprivileged Combatancy’

The legally conceived term “civilian direct participation in hostilities” should not be interpreted to align with the contentious notion of “unprivileged combatancy,” whose meaning is nowhere to be found in IHL. Under IHL, two categories of persons namely; civilians directly participating in hostilities and members of the armed forces not entitled to the combatant privilege may be subject of lawful attack and may be prosecuted for offences committed in accordance with penal laws existing in national jurisdictions.

However, the most profound difference between civilians and unprivileged combatants is that civilians directly participate in hostilities on a merely spontaneous, sporadic or unorganized basis, whereas “unprivileged” members of the armed forces do on an organized and continuous basis.⁷²

In consequence, it is obvious that during the pendency of the specific hostile act, civilians directly participating in hostilities lose their protection against direct attack and thus treated as if though they are combatant albeit temporarily. On the converse and based on principle, both privileged and unprivileged members of the armed forces may be directly attacked for the entire duration of their membership, save and except those who are *hors de combat*.

As a matter of necessity, it is imperative to define the phrase ‘combatant’. Combatants on the other hand are members of the armed force of a party to an international armed conflict or members of the organized armed group or fighting force of a belligerent armed group who are parties to non-international armed conflicts.⁷³ This definition

⁷¹ *ibid* GC III art 30.

⁷² Captioned loosely as ‘unprivileged combatancy’.

⁷³ This definition is broadly captured having regards to the Hague Conventions which provides that laws, rights and duties of war also applies to such non state actors provided they complied with extant conditions assimilating them to the character of regular armed forces in accordance with Art.1 of Hague Regulations.

excludes medical and religious personnel who carries out purely humanitarian responsibilities⁷⁴ but is wide enough to incorporate those inhabitants of occupied territory who took up arms spontaneously on the approach of the enemy to resist the invading forces.⁷⁵

Combatants enjoys the privilege of direct participation in hostilities on behalf of a party to an international armed conflict⁷⁶ but suffers the loss of civilian protection by virtue of their status a combatant. The status and privilege of combatant are exclusive to situations of IAC as opposed to NIAC.

Three criteria are incubated in the phrase; direct participation in hostilities, a specific military act must satisfy these legal requirements namely; the harm likely to result from the act must either specifically military in nature or involve death, injury or destruction (threshold of harm, there must exist causal nexus between the act and the expected harm-direct causation and finally the act must be an integral part of the hostilities occurring between the parties to the armed and intended to provide advantage to the belligerent party to the detriment of another.

Relying on these criteria, a permissible distinction must be drawn between activities amounting to direct participation in hostilities and those activities though occurring in the context of an armed conflict are not to be taken as part of the conduct of hostilities between the parties to an armed conflict and thus cannot lead to loss of protection against attack in the context of IHL.⁷⁷

The most significant consequence of engagement in combat/ hostilities is the loss of civilian status and protection against hostilities. The privilege of a combatant is only limited to the right to participate directly in hostilities on behalf of a party to an international armed

⁷⁴ Mercenaries and civilian taking direct part in hostilities are not entitled to the status of combatant in IHL; AP

I art 5(3).

⁷⁵ These group of persons are referred to as “*levée en masse*” are the only armed actors regarded as combatants even though, by definition, they operate spontaneously and lack sufficient organization and command to qualify as members of the armed forces.

⁷⁶ AP I art 43 (2).

⁷⁷ Nils Melzer, *Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law*, (2009) ICRC, Geneva 85.

conflicts as opposed to non international armed conflicts, the privilege that is only resorted to once an individual combatant is captured by the enemy.

9. Protection of Selected Civilian Objects

In the jurisprudence of IHL regarding protection of civilian objects, the central focus lie in distinguishing between ‘military objectives’ and ‘civilian objects’ in the target of attack. This because attacks must be strictly limited to military objectives and that civilian objects may not be the object of attacks or reprisals.⁷⁸ Civilian objects are negatively defined as “all objects that are not military objectives”.⁷⁹

Military objectives, on the other hand, are defined as ‘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’.⁸⁰

If there is any doubt whether an object normally used for 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 is presumed not to be so used.⁸¹

The term “military objective” in the jurisprudence of IHL is not to be treated as an abstraction supposedly laced with undefined superfluity, qualification is therefore based on two definitive criteria. First, the object must contribute effectively to the adversary’s military action. Second, the object’s destruction, capture or neutralization also offers the attacker a definite military advantage which is in concrete and perceptible terms as opposed to speculation.⁸²

Thus, military objectives defined in the context of the above because of the necessity for their usage regains civilian status the moment they no longer make an effective contribution to the enemy’s military

⁷⁸ Geneva Convention IV art 33; AP I art 52(1) and (2); CIHL, Rule 7.

⁷⁹ AP I art 52(1); CIHL, Rule 9.

⁸⁰ *ibid* art 52(2); CIHL, Rule 8.

⁸¹ AP I art 52(3).

⁸² Melzer (n78)92

action or an attack against them no longer offers a definite military advantage.⁸³

While the precise meaning of the terms ‘effective contribution’ and ‘definite advantage’ depend on the facts and circumstances of each case, the underpinning basis of these terms is predicated on the need to curtail excessively permissive targeting in the course of armed hostilities.⁸⁴

I. Dual Use Objects

It is common to note that almost any civilian object can be deployed for military purposes and therefore captioned as being used for military objective during the pendency of such use. Objects which are used for dual purpose are often problematic in the jurisprudence of IHL in that distinction becomes pretty difficult. Objects such as social infrastructures and amenities -roads, bridges, airports, railways, communication networks, power facilities amongst several others fall under this category.

To ascertain whether a particular dual use object qualifies as military objectives, the extent of its ‘effective contribution’ to the enemy’s military action and its destruction, neutralization or capture offers a definite military advantage, it qualifies as a military objective notwithstanding its simultaneous civilian use. The harmful impact that an attack against a dual use object is expected to bring to bear on the civilian population is not relevant for its tagging as a military objective, but must be taken into consideration in the assessment as to whether the attack was in the first place proportional or not.⁸⁵

Consequently where the incidental harm to civilian is disproportionately excessive in relation to the military advantage forecasted, the attack would be declared unlawful.⁸⁶ Proportionality assessment may only be helpful when attacks are directed against lawful targets. The guiding criterion to determining proportionality is tied round the term “excessiveness” which is relative.⁸⁷

⁸³ *ibid* 92.

⁸⁴ *ibid*.

⁸⁵ *ibid* (n78) 101.

⁸⁶ AP I art 51(5)(b); CIHL, Rule 14.

⁸⁷ Melzer (n75) 101

II. Specially Protected Civilian Objects

a. Cultural Property

The conduct of armed hostilities has inevitably resulted in wanton destruction of cultural property which is considered the common heritage of humanity. The massive destruction from aerial bombardments following the horrors of the World War II clearly validates the renounced consciousness on the imperative of protection of cultural property.

Recognizing the significance of this loss, the international community adopted the 1954 Hague Convention on Cultural Property and its two Protocols of 1954 and 1999. Additional Protocols I and II also contain provisions protecting cultural property.⁸⁸

In IHL, cultural property is defined as “comprising essentially any secular or religious movable or immovable property of great importance to the cultural heritage of all people, such as monuments of architecture or history, archaeological sites, works of art, books, museums, and libraries and other buildings containing cultural property.”⁸⁹

In order to ease identification, cultural property protected under IHL are expected to be marked with the emblem of the 1954 Convention, a downward pointed blue square shield on a white background.⁹⁰ The markings itself is not a condition precedent for the special protection but a mere indication.⁹¹

Belligerent parties must safeguard their own cultural property against attacks by the opposing parties whether their own or those belonging to territory of other States.⁹² Imperative military necessity may only the sole ground for derogation from these obligations and there must

⁸⁸ AP I arts 38, 53 and 85; AP II art. 16.

⁸⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, 14 May 1954, art 1.

⁹⁰ *ibid* arts 16 and 17.

⁹¹ *ibid* arts 2 and 4.

⁹² *Ibid* art 4(1).

be no feasible alternative to obtain military advantage in the circumstances.⁹³

The limited successes of the system of “special protection” captioned in the Hague Convention on Cultural Property led to the adoption of the Second Protocol which was adopted in 1999 that introduced an innovative system of “enhanced protection” with respect to cultural property. Thus to qualify for enhanced protection under the Second Protocol, a specific cultural property must satisfy these conditions namely that: firstly it represents cultural heritage of the greatest importance to humanity; secondly it enjoys the highest level of protection in domestic law; thirdly it is not used for military purposes or to shield military sites and has been formally declared not to be intended for such use.⁹⁴

In order to further halt wanton destruction of cultural property, The Hague Convention on Cultural Property and its Second Protocol also require State to domesticate the criminalization of these atrocious acts in their national penal laws.⁹⁵ Within the context of international criminal law, destruction of cultural property constitutes war crimes in the Rome Statute of ICC. The decision of International Criminal Court in *The Prosecutor v. Ahmad Al Faqi Al Mahdi*,⁹⁶ marked a water shed as far as prosecution for destruction of cultural heritage is concerned. In this case Al Mahdi was on 27 September 2016 convicted by the Trial Chamber of the war crime of directing an attack against buildings dedicated to religion and historic monuments which were not military objectives, pursuant to article 8(2)(e)(iv) of the Rome Statute.

The momentous joy that heralded this decision was somehow short lived as the same Court in a recent case of *The Prosecutor v. Bosco Ntaganda*⁹⁷ where the ICC departed from its own decision, in a matter

⁹³ *ibid* art. 4(2); AP I art. 57(3).

⁹⁴ Second Protocol to the Hague Convention on Cultural Property art. 10.

⁹⁵ *ibid* art 13.

⁹⁶ *Prosecutor v. Ahmad Al Faqi Al Mahdi*, ICC-01/12-01/15, Judgment and Sentence (September 27, 2016) [hereinafter *Al Mahdi*, Judgment and Sentence].

⁹⁷ ICC-01/04-02/06 Judgment (July 8, 2019) [hereinafter *Ntaganda*, Judgment; Emma A. O'Connell, ‘Criminal Liability for the Destruction of Cultural Property:

eminently based on similar facts. The Court introduced by this decision the concept of ‘within the course of hostilities’ in fanning avenue for distinguishing the present case from the past- *The Mahdi* case.

The prohibition of destruction of cultural property has equally attained the status of customary international humanitarian law as mark of further recognition of significance of contribution of cultural property to mankind.⁹⁸

b. Objects indispensable to the Survival of the Civilian Population

Starvation has always been traditionally used as method of warfare by parties to armed conflict. IHL stoutly prohibits this cruel method of gaining military advantage.⁹⁹ It is therefore unlawful to attack, destroy, remove or render useless objects indispensable to the survival of the civilian population such as food items, agricultural areas, crops, livestock, drinking water and irrigation systems with the sole purpose of denying civilian population access and sustenance or the adverse party.¹⁰⁰

However, where such object are used exclusively for the purposes of sustaining armed forces of the opposing party or in direct support of military action, the IHL prohibition do not apply.¹⁰¹ Just like the case with cultural property, derogation from these prohibitions may be allowed by reason of imperative military necessity for the defence of national territory against invasion but must be limited only to that territory where the State in question exercises control.¹⁰²

10. Observations and Conclusions

The Prosecutor v. Bosco Ntaganda’ (2022) 15 (1) *DePaul Journal for Social Justice* 1-64 Available at:

<https://via.library.depaul.edu/jsj/vol15/iss1/3> accessed on 6 March 2024.

⁹⁸ CIHL, Rules 38–41.

⁹⁹ AP I art 54(1); CIHL, Rule 53.

¹⁰⁰ *ibid* art. 54(2); CIHL, Rule 54.

¹⁰¹ *ibid* art. 54(4); CIHL, Rule 147.

¹⁰² *ibid* art. 54(5).

IHL scheme of protection of civilian population and their object as highlighted in this paper is indubitable. There are innumerable provisions in the jurisprudence of IHL that underscores this philosophy of human treatment which has been identified as the corner stone of this branch of international law. Effectiveness of these set standards is plaque with paucity of compliance and enforcement by belligerent parties.

The principle of distinction has been particularly helpful in streamlining protection for civilian during armed conflicts, the absence of which would have deepened the blurry demarcation between those in dire need of protection and those actively involved in hostilities. The lack of definition of the notion of direct participation in hostilities in IHL treaty laws (even though it evolved from the phrase "taking no active part in the hostilities"¹⁰³ leaves much to be desired. In order to mitigate the danger of inappropriate interpretation, the notion must be interpreted in good faith in accordance with the ordinary meaning given to its constituent terms in their context and in the light of the objects and purposes of IHL.¹⁰⁴

With respect to women as part of civilian population, IHL protection entrenched in their favour is somewhat illusory. The rules are drafted in different languages than with respect to provisions dealing with other civilians. Emphasis is placed on the idea of protection rather than prohibition.¹⁰⁵ What is more, breaches of the rules are not treated as serious in order to be captured within the legal radar of grave breaches of the conventions.¹⁰⁶ There are also concerns that the barefaced absence of definition of a child in IHL treaty laws also contributes to the fog that beclouded attempt at congregating consensus on the minimum age of criminal responsibility. IHL prohibition against child soldiering without the necessary compliments of the meaning of a child like every draw backs identified in the application of IHL rules insofar as they remained unchanged as aptly opined by Christine Chinikin

¹⁰³ As used in the Common article 3 to the Geneva Conventions I-IV.

¹⁰⁴ This is sufficiently provided for in art 31 (1) Vienna Convention on the Law of Treaties 1969.

¹⁰⁵ Judith Gardam, 'Women and the Law of Armed Conflict: Why the Silence?' (1997) 46 *International and Comparative Law Review* 57.

¹⁰⁶ Gardam and Charlesworth (n 43)159.

would be tantamount to ‘a triumph of form over substance’.¹⁰⁷ With States differing in their interpretation of meaning of a child, the special protection earmarked for children as part of civilian population in this respect remains phony.

The trajectory of IHL rules in the protection of civilians in terms of their persons and objects is not all about failures. The insertion of an *ominibus* prescription in IHL treaty laws that resolve in favour of any person whenever they are doubt as to whether such a person is a civilian is legendary. The provision has in a single breadth knowingly removed an inherent danger of unintended launching of attack against illegitimate targets.

The way forward resonates round call for reforms to reflect the compelling dynamics that has questioned efficacy of IHL rules as presently constituted. It is still doubtful whether the conservative posture of International Committee of the Red Cross as guidance of IHL would pave way for more proactive ways of addressing host of concerns highlighted.

¹⁰⁷ Christine Chinikin, ‘Feminist Interventions into International Law’ (1997) 19 *Adelaide Law Review* 13,16.