

# THE NIGERIAN JURIDICAL REVIEW

Vol. 12

(2014)

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## **NIGERIAN JURIDICAL REVIEW**

**VOLUME 12 (2014)**

To be cited as: **(2014) 12 Nig. J. R.**

**ISSN: 0189 - 4315**

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### CONTRIBUTIONS

The Journal welcomes articles in any area or related subjects for publishing considerations. Articles and correspondence should be forwarded to:

The General Editor,  
Nigerian Juridical Review, Faculty of Law,  
University of Nigeria, Enugu Campus, Enugu, Nigeria.  
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### PUBLISHED BY

Faculty of Law, University of Nigeria,  
Enugu Campus

### PRINTED BY:

Sylva Prints, Enugu & Abuja  
+234-08063978826; +234-08181610325  
[onyekasyvanus@yahoo.com](mailto:onyekasyvanus@yahoo.com); [sylvanusonyekachi@gmail.com](mailto:sylvanusonyekachi@gmail.com)

## FRAMEWORK IN INTERNATIONAL HUMANITARIAN LAW FOR THE CONSTRUCTION OF THE LEGAL STATUS AND RIGHTS OF NON-STATE ACTORS IN CONTEMPORARY ARMED CONFLICT\*\*

### Abstract

*Current events have shown that the more popular means and manner of warfare contemplated by the United Nations Charter has been displaced by the rather irregular nature of armed conflict. Warfare are often waged by non-State agents in the name of freedom fighting or for religious or other motivations. The many war-fronts entertained by States, sometimes trans-boundary in nature and un-contemplated by international rules have created a warped conundrum in international Humanitarian Law for the purposes of according any status known to law to these combatants/insurgents and identifying any rights they may have under the law of armed conflict. This essay is an attempt to identify the problems created by these unconventional conflicts: in categorizing the conflicts, in the award of legal status and in the accord of legal rights to the aggressors or insurgents in question. The paper argues that although the rules, i.e. the Geneva Convention and the Protocols thereto, meant for the award of status and rights to these non-State agents appear inadequate to deal with the current situation, they cannot be left in a limbo. By extension, the application of the Martens Clause of Art 75 of the 1st Protocol to the Geneva Convention can be invoked to provide at least some minimum protection to non-State actors in armed conflict.*

### 1. INTRODUCTION

International humanitarian law, from all intents and purposes, appears not to be designed for the dilemmas of war resulting from hostilities

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precipitated by transnational non-State entities such as Al Qaeda, Hezbollah, IRA, or Boko Haram. The essence of this essay is to determine the status of non-State actors detained in the course of armed conflict, and to extrapolate, as much as possible, the legal protection affordable within the Geneva Convention. The paper will try to find basis for legal protection of non-State actors in armed conflict in the Geneva Convention and draw out some implications for international humanitarian law. The paper is structured into seven parts. Part one is the introduction. Part two states the problem created by the involvement of non-state actors in armed conflict, part of which is that international law of armed conflict was created for the purposes of conflicts involving States. Part three describes the various categories of conflict and the place of the Geneva Convention in regulating these conflicts. Part four examines the combatants' regime under the Geneva Convention as it relates to non-State actors. Part five draws an analysis of the Common Article 3 and its applicability to non-State actors detained in armed conflict. Part six, building on part five, draws attention to the further protection provided in Article 75 of Protocol No. 1 to the Geneva Convention. The paper concludes in part seven that a minimum of protection should be afforded to non-State actors in armed conflicts even though the law did not have them in contemplation.

**2. STATEMENT OF THE PROBLEM**

War and conflict have always been common phenomena in international relations. Against the backdrop of the devastating impact of armed conflict wherever and whenever they happen, sustained efforts are made not only to regulate the frequent use of force, but also to attach humanitarian obligations obtainable in situations where armed force is inevitable. It was therefore in this regard that the event and conduct of the First World War (1915-1919) and Second World War (1939-1945) generated considerable discussions in the international arena around the questions of legitimate use of force as well as the allowable activities in the conduct of hostilities, and more particularly, the treatment of enemy combatants captured during hostilities and at the end of actual hostilities. There has therefore developed over time the often-used terminologies used to describe this

area of the law in the international legal system, namely the concepts of '*Jus ad Bellum*' (Law/Rights for War) and '*Jus in Bello*' (Law/Rights at war). '*Jus ad Bellum*' represents the regime that regulates the legitimate use of force, while '*Jus in Bello*' regulates the international humanitarian obligations assumed by states or groups as they engage in necessary hostilities. Chapter VII of the Charter of United Nations governs the former, while the four Geneva Conventions of 1949 and the three Protocols additional to them, govern the latter.

In recent times, both legal regimes have been subject to a lot of controversy not just in relation to the interpretation they have received, but also to the entirely unprecedented nature of hostilities that were not contemplated by the regimes that was to regulate them. By these we mean such situations as the invasion of Afghanistan by NATO in 2001 and Iraq by the US in 2003, defended primarily on the invented term of preemptive self-defense; the continued occupation of Afghanistan by NATO forces and Iraq by the US; the treatment of the prisoners caught in the heat of hostilities between the US and the Taliban/Al Qaeda and during the Desert Storm Operation in Iraq; the invasion of Lebanon by Israel in their onslaught against the Hezbollah terrorist/political organization, the current conflict being prosecuted by the Saudi led Army against the Houthis rebel group in Yemen. There is also the conflict being led by Islamic State of Iraq and Levant (ISIL) in Iraq and Syria, the Sudan Revolutionary Front fueling the conflict in Sudan, the Donetsk People Republic in Ukraine responsible for the conflict in Eastern Ukraine, the Fatah and the HAMAS in Palestine, the Free Syrian Army and the Syria Revolutionary Front and the Boko Haram in the North Eastern Nigeria and so on. These are the most recent examples. The common denominator in these recent events in international law is the presence of non-State actors at the centre of these hostilities. Whether they are called terrorists, insurgents, or freedom fighters, they do not represent the State. However, in some situations, it could be claimed that they are being sponsored by some rogue States in pursuit of some interest in the international realm.

The complicated nature of the issue becomes very transparent when one tries to categorize these hostilities in which these actors are involved. The essence of categorizing them is to determine the appropriate legal regime which should govern the conduct of the hostilities as well as how combatants may be treated while detained, that is, the legal status of the non-State actors in conflict. In the recent past, we have seen non-State actors engage in armed conflict with State agents, and we have also seen non-State actors engage in armed conflict

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with *de facto* or *de Jure* government agencies. From the examples we outlined, there is no doubt that armed conflict between State actors has dominated the history of armed conflict. In these circumstances, it becomes very difficult to locate conflicts involving non-State actors as international conflicts or non-international conflicts, and to identify the legal regime which governs them.

In the midst of the uncertainty of the position of the law in these unconventional circumstances, Prisoners of War (POW) have often been branded common criminals, and common criminals making claims to the protection afforded under the status of prisoners of war. As put by the International Committee of Red Cross (ICRC) commentary to the Convention, "there was the risk of ordinary criminals being encouraged to give themselves a semblance of organizations as pretext for claiming the benefit of the Convention representing their crimes as 'acts of war' in order to escape punishment for them."<sup>1</sup> The unsettled position of the law was reflected more profoundly in the jurisprudential tussle found in the case of the *Hamdan v. Rumsfeld*<sup>2</sup>. At the US Supreme Court, it was concluded that the military commission convened to try Hamdan lacks power to proceed because its structure and procedures violate both the Uniform Code of Military Justice (UCMJ) and the Geneva Convention. The US Court of Appeal had earlier argued that the Geneva Convention is not applicable to the armed conflict during which Hamdan was captured and that the war with Al Qaeda evades the reach of the Geneva Convention. What is certain is that the human rights of the defendant (Hamdan) was compromised, owing more to the uncertainty of the regime which governed the hostilities in the event of the invasion of Afghanistan after the tragic event of the September 11, 2001.

**3. NON-STATE ACTORS, CATEGORIES OF CONFLICTS AND THE GENEVA CONVENTION**

Non-State actors in this essay refer to persons who are either sponsored by another foreign State or on their own employ armed aggression against the State, either as insurgents, terrorists or freedom fighters. This show of aggression that often spills into armed conflict

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<sup>1</sup> ICRC Commentary, Commentary to Common Article 3 of the Third Geneva convention: [www.icrc.org/ihl.nsf](http://www.icrc.org/ihl.nsf). Accessed February 18, 2014.

<sup>2</sup> 126 S.Ct.2749 (2006).

may be for political or other reasons, which they find plausible in the context of the ends for which, they have set for themselves. In some instances, the onset of the aggression unleashed by the groups of persons could be against a State foreign to the host State of operation. Here, we think of such groups as the Al Qaeda terrorist organization, the Hezbollah political front, the Palestine Liberation Organization (PLO), the Hamas group, the Syrian Liberation Army, and the Houthis in Yemen. Also included are the various other groups that operate both domestically and internationally and are capable of massive violence against a State, and for which States will likely respond in self-defense with an armed attack.

The Geneva Conventions were designed pre-eminently to regulate the conduct of hostilities among States. Because the Conventions were formulated following the atrocities of the 2<sup>nd</sup> world war, it was considered less important to include conflicts that occur within the state. It was in 1977, that given the prevalence of the civil wars, that there came a protocol designated to regulate internal conflicts. It appears that the reason why international humanitarian law did not take much interest in internal conflicts is that it was assumed to be within the domestic jurisdiction of the States. Under Art 2(7) and Art.2 (4) of the United Nations Charter, both the Security Council and the individual States are to preserve the independence and territorial integrity of States through the policy of non-intervention. However, pursuant to further analysis of the Geneva Conventions and the Protocols, conflicts may be categorized into International and Non-International conflict. In the *Tadic* case,<sup>3</sup> decided following the conflicts in former Yugoslavia by the International Criminal Tribunal for the Former Yugoslavia (ICTY)<sup>4</sup>, it was stated that, "Armed conflict exists whenever there is resort to armed force between States or protracted

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<sup>3</sup> ICTY, Case No. 1T-94-172, p.37.

<sup>4</sup> The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, more commonly referred to as the International Criminal Tribunal for the former Yugoslavia or ICTY, is a body of the United Nations established to prosecute serious crimes committed during the wars in the former Yugoslavia, and to try their perpetrators. The tribunal is an ad hoc court which is located in The Hague, Netherlands. The Court was established by Resolution 827 of the United Nations Security Council which was passed on 25 May 1993. It has jurisdiction over four clusters of crimes committed on the territory of the former Yugoslavia since 1991: grave breaches of the Geneva Conventions, violations of the laws or customs of war, genocide, and crimes against humanity. The maximum sentence it can impose is life imprisonment. Various countries have signed agreements with the UN to carry out custodial sentences.

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armed violence between governmental authorities and organized armed groups or between such groups within a State.” It need be said that the scope of the Geneva Convention inadvertently excludes the conflict, the nature of which involves non-state actors. Without explicitly employing the terms, the above cited case makes allusion to international and non- international conflicts, as used in the Geneva Conventions.

The subtle mention of categories of conflict into international and non-international conflict in the 1949 Geneva Convention appears only in the common Article 3. Presupposing that the three Geneva Conventions are related to conflicts which are international in nature, common Article 3 states that “In cases of armed conflict not of an international character occurring in the territory of one of the high contracting parties, each party to the conflict shall be bound to apply as minimum the following provisions.”<sup>5</sup> Given that at that time, many armed conflicts were inter-state in nature, the 1949 Convention did not expound on the definition of non-international conflict. Thus, proper distinction cannot be made on the basis of law, but on speculation among scholars. This necessitated the formulation of additional Protocols to the Convention, which will separately relate to the victims of international conflict and to the victims of non-international conflict respectively. To obtain the definition of these two categories of conflict, we have to look at the scope of application of the Protocols that were designed specifically to regulate the conduct of States involved in them. Art 3 of the Protocol 1 lays out the scope of application of the Protocol by making reference to Art. 2 common to the Geneva Conventions.<sup>6</sup> The scope of application of the Protocol 1 is as follows:

...the present Convention shall apply to all cases of declared war or 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 occupation meets with no armed resistance.<sup>7</sup>

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<sup>5</sup> Common Art 3 of the Geneva Convention.

<sup>6</sup> Art 2 of protocol 1 states “this protocol which supplements the Geneva Convention of 12 august 1949 for the protection of war criminals shall apply in the situations referred to in art. 2 common to those Conventions.

<sup>7</sup> Common Art. 2 of the Geneva Convention

The inference from the above is that an international conflict is one, which exists, or arises between two contracting parties to the Convention. Only States could be parties to the Convention. Thus far, international conflict exclusively refers to an inter-State armed conflict. No stretch of interpretation could logically incorporate any other form of armed conflict. As for non-international conflict, Art. 1 of the Protocol further develops what has been introduced by common Art.3 of the Geneva Convention. It details the material scope or application of the Protocol, which relates to the victims of non-international conflict. It states that the Protocol shall apply to all armed conflict not covered by Art.1 of the Protocol II and which takes place in the territory of a high contracting party between its armed forces and dissident armed forces or other organized group which under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement control.<sup>8</sup> It follows from this exposition that non-international conflict refers to conflict that are internal to the State. However for the victims of the conflict to be covered by the Convention, they must be under an organized responsible command, exercise control over a territory of the State and be amenable to the Protocol I. The ICRC commentary to the Geneva Convention articulates the distinction between the two conflicts as follows: "A non-international armed conflict differs from an international conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory."<sup>9</sup> In the light of the definition of non-State actors offered above, it is difficult to confine the armed conflict involving them to non-international conflict and even if one does, it is even more doubtful that Protocol II will be applicable to them, to define the rights of the victims of such conflict. In the further analysis that will follow, we shall demonstrate the difficulty of applying these regimes to conflicts involving non-State actors.

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<sup>8</sup> See, Art. 1 of Protocol I. The article further indicates in paragraph 2 that the protocol shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts.

<sup>9</sup> ICRC Commentary, General Introduction to the Commentary on Protocol II, no. 4338, [www.icrc.org/ihl-additionalprotocolii1977.htm](http://www.icrc.org/ihl-additionalprotocolii1977.htm)

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**4. THE COMBATANTS REGIME IN THE GENEVA CONVENTION AND  
NON-STATE ACTORS**

The search for the legal status of non-State actors in armed conflict necessitates an investigation into the combatancy regimes of both categories of conflict known to international humanitarian law. By combatant we mean a “person who directly engages in hostilities, which in essence means participating in an attack intended to cause physical harm to enemy personnel or objects”<sup>10</sup>. To be entitled to be a combatant is to be subject of combatant privilege; and to be entitled to combatants’ privileges you must fulfill certain condition as set down in the International Humanitarian Law (IHL). In the first place, technically under the Geneva Convention, the recognition of combatant’s privileges is limited to inter-State or international armed conflict, and therefore is inapplicable in non-international conflict. The conflict in which non-State actors are involved has been described in some quarters as international conflict; hence the persons captured in the heat of hostilities may be subject of combatants’ privilege.<sup>11</sup> In the Geneva Conventions, this privilege is regarded as the Prisoner of War status (POW).

To appreciate the applicability or otherwise of this privilege to non-State actors, we shall examine the relevant provisions of the Geneva Conventions. Art. 4 of the Geneva Convention III defines prisoners of war (POW) as persons belonging to one of the following categories, who have fallen into the power of the enemy. The category in paragraph 2 appears to be the one relevant to our study. It refers to the militias or other members of other volunteer corps, including organized resistance movements, belonging to a party to the conflict and operating in or outside their own territory, even if this territory is occupied .The proviso in that paragraph creates further limitations to the effect that such resistance movements must: 1) be commanded by a person

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<sup>10</sup> R. Goldman & B. Titmore., *Unprivileged Combatants and the Hostilities in Afghanistan: Their Status and Rights under International Humanitarian and Human Rights Law, ASIL Task Force Papers*, (2002) p. 2.

<sup>11</sup> The US Court of Appeal in the *Hamdan v Rumsfeld* held that the conflict with Al Qaeda is international in scope. But the Supreme Court overruled this. Also such conflict like the Hezbollah-Israel conflict in 2006 will also be regarded as international under this interpretation.

responsible for his subordinates, 2) have a fixed distinctive sign recognizable from a distance, 3) carry arms openly 4) conduct their operations in accordance with the laws of war. It must be emphasized that the reference to the party to the conflict in this proviso relates to the state party referred to in Art 2, which defines the scope of application of the convention. Thus, non-state actors must be acting in concert with a State, which is a party to the convention. On the other hand, if we interpret this proviso to refer to the militias or organized groups acting independently of the State, it is still doubtful whether the combatant privilege would avail them. In many of the conflicts in which we see non-State actors as operative, they have not been seen to fulfill the conditions of applying the law of war in conducting their hostilities. Again, they neither carry fixed distinctive signs like wearing of uniforms, nor are they under a responsible command (most operations from non-State actors do not disclose their chain of command). Their military operations usually take the form of terrorist attack, often with untold casualties on the civilian population. The paradigm example is the conflict between Israeli regular forces and the Hezbollah political front. During the exchange of fire, it was shown that the Hezbollah conducted the hostility without any regard to the laws of war and without prejudice to whether they have any status under IHL. They take refuge in civilian neighborhoods and often target civilians in their onslaught. Under this circumstance, any member of the Hezbollah caught during this conflict may not lawfully claim the status of POW, because they have not fulfilled the conditions under the law. The same is also applicable to the AL Qaeda operatives during the NATO-Afghanistan conflict in 2001. It may be argued that in the case of AL Qaeda, that they were fighting in consort with the Taliban, which was a *de facto* State regular force, and therefore subject to the POW status. But this line of argument fails when you consider that the Al Qaeda had no distinctive sign or uniform during that conflict, and they were not taking orders from the Taliban military command, and never conducted their attack in accordance with the laws of war. They represented an independent military group, which happened to have the sympathy of the *de facto* government of Afghanistan. We have argued so far that in conflicts in which non-State actors are the chief protagonists against a State, the conflict is doubtfully an international conflict. However, even if in some cases, the conflict simulates to an international conflict, the

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persons belonging to the non-State group may not be granted the privileged status of POW since the conditions enunciated under Art.4 of the Geneva Convention are not satisfied.

The POW status confers certain benefits and rights to the captured combatant, the prime of which is that they must be released and repatriated at the end of the hostilities<sup>12</sup>. This latter benefit followed upon the provision of Art. 87 of the Convention, which is to the effect, that “since the detaining power would not prosecute its own soldiers for their illegitimate acts of war, it cannot try prisoners of war for comparable acts”<sup>13</sup>Consequently, the Hezbollah as well as the Al Qaeda cannot take the benefit of the legal status as POW as outlined in the Convention. Fundamentally, they are not parties to the convention and have not satisfied the relevant conditions for POW.

**5. APPLICABILITY OF COMMON ARTICLE 3 AND PROTOCOL II TO  
NON-STATE ACTORS IN CONFLICT**

The common article 3, controversial as it was when it was introduced into the Geneva Convention as a convention in miniature to regulate conflicts not of international character was meant to introduce the governing principle of IHL-application of the rules of Humanity- to such conflict, which seemed to be within the domestic jurisdiction of the State. Thus common Art.3 and its further development in the Protocol II would provide the legal basis for the International Committee of the Red Cross (ICRC) intervention to ameliorate the plight of the civilian, the sick and wounded during such conflicts. As the ICRC commentary puts it: “It merely ensures respect for the few essential rules of humanity which all civilized nations consider as valid everywhere and in all circumstances.”<sup>14</sup> The first issue for clarification in the common Art.3 was the delineation of its scope of application. Its use of the term, “not of international character” clearly excludes all inter-State conflicts, which would include conflicts initiated by the non-State actors under the sponsorship of the rogue States. However, the fear that this provision may be thought to include any act committed by force of arms

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<sup>12</sup> Art. 118 of the Third Geneva Convention

<sup>13</sup> Above, note 10, p. 4.

<sup>14</sup> ICRC Commentary, Supra note 1

within the state was dispersed by Art.1 of the Protocol II that defines the field of application of the common Article 3 as well as the rest of the Protocol. Therein, the armed conflict under scrutiny must be between armed forces of a contracting party and dissident armed forces or other organized group, which must have a responsible command, exercise control of its territory and be willing to implement the protocol. Riots and sporadic acts of violence are expressly outside the contemplation of this provision.<sup>15</sup> Armed attacks by non-State actors like terrorist organization and political fronts (the IRA, the Hezbollah, and the Al Qaeda) are often unleashed against foreign States. Hence, such conflict that involve them may not be described as exclusively internal, since the regular armed force would be involved in conflict that extends beyond their borders, but against a non-State agent. The simple reading of Art.1(1) of the Protocol, which provides that the conflict must take place in the territory of the high contracting State operates to exclude non-State actors operating outside the territory of the State attacked from taking advantage of the guarantees of the common Art.3 and the Protocol II. This is not withstanding that they are under a responsible command and are amenable to the Protocol.

The impasse created by the difficulty of fitting the war against a non-State actor into existing framework of IHL, makes the identification of their legal status problematic. Dinah Pokempner attempts to wriggle out of this problem when he describes such conflicts with Al Qaeda as a 'Globalised non-international armed conflict,' with components that fall squarely within the laws of international conflict while others remain under the laws of internal conflict, regardless of location of the attacks<sup>16</sup>. Granted the globalised nature of the war against terrorism, it is difficult to imagine the application of common Art.3 and protocol II to the conflicts in 2001 that involved the Al Qaeda. In the absence of a new legislation for such conflict, the present law admits of only conflict in the territory of a party to the convention. The contention of Pokempner in disregard for the location of the conflict is an extraneous factor in the law on non-international armed conflict. The location of the conflict is a necessary requirement for the description of non-international armed

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<sup>15</sup> Art 1(2) of the protocol II provides that this protocol shall not apply to situations of internal disturbances and tensions, such as riots and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.

<sup>16</sup> Pokempner Dinah, "The 'New' Non-State Actors in International Humanitarian Law," (2006), 38 *George Wash. Int'L. Rev.* 551, p. 555.

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conflict. Nevertheless, it cannot be held absolutely that these regimes do not apply to non-State actors. Some necessary distinctions need to be made between various types of non-State actors. In recognition of this distinction, Shlomy Zachary asserts: "it may be assumed that wars against guerilla and civil wars are the subject of this provision."<sup>17</sup> By this statement, it excludes terrorist groups and other political military fronts capable or known to cause trans-border harm on civilian populations.

While it is the contention of IHL to ensure that certain guaranteed rights of guerilla fighters or civil warriors are not derogated from by the provision of the guarantees for humane treatment and fair trial, it is however preceded on the willingness of the non-State actors to implement the Protocol during the conflict. The case of insurgents as non-State actors unleashing sporadic violence within the State, in our opinion is not to be considered as armed attack within the definition of the Protocol II. They are matters for the domestic law enforcement measures, and common Art. 3 cannot be imported to grant status to such groups of persons involved in armed conflict. They cannot claim the protection of Art. 6 of the Protocol II, which details the guarantees of "combatants" in internal conflict during penal prosecution, particularly Art. 6 (5) which enjoins the State authorities to grant broadest possible amnesty to persons who have participated in the armed conflict. This provision is in every way similar to the Art. 87 of the 3<sup>rd</sup> Geneva Convention, which prohibits the prosecution by the detaining power of the POW in international conflict and enjoins their release and repatriation to their native State. The difference between the two is that for POW, the repatriation is a demand of the law, while for guerilla or civil war prisoners; it is a question of moral and political expediency.

**6. RESIDUAL PROTECTION: MARTENS CLAUSE-ART.1 (2) & 45(3),  
75 OF THE PROTOCOL 1.**

In the absence of a codified legal term to describe the combatant status of non-State actors in conflict under IHL, scholars have employed various names, which are unfortunately unknown to IHL to somewhat contrast them with the status of detainees recognized under the law. An example of such term is unlawful combatants. We maintain

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<sup>17</sup> Zachary Shlomy, "Between the Geneva Conventions: Where does the Unlawful Combatant Belong?" (2005), 38 *Isr. L. Rev.* 378, p. 389.

immediately that there is no basis for contrast between the combatant prisoners of war and non-State actors, the likes of Hezbollah or Al Qaeda or Boko Haram. The contrast is rather between the civilians' status and the POW status, which are given proper recognition under IHL. The term 'Unlawful Combatants' dating from the US Quirin case of 1942, gained emphatic currency, when the detainees of Afghan conflict did not fit the category of the prisoners of war as defined by the Geneva Convention. Thus, the Bush administration described the captives from that war as unlawful combatants, consequently denying them of the privileges under The Third Geneva Convention for the treatment of POW, and triable under the Military Commissions Act 2006. It must be noted that although unlawful combatant has no legal foundations, it must be distinguished from irregular combatants, which refers to the combatant who pursuant to the Art.43 (4) of Protocol 1 failed to distinguish oneself as a combatant. The person consequently forfeits the right to be a POW, and is subject to trial and punishment for any hostile act during the conflict. Goldman *et al* captures the effects of irregular combatancy as follows: "He was therefore, upon capture not entitled to prisoner of war status and could be tried as a common criminal for his unprivileged combatancy."<sup>18</sup> To employ the term unlawful combatant in the description of non-State actors who are involved in transnational violence, enables the captors to rule out any privileges that may be applicable under the Geneva Convention. To regard them as irregular combatants under Art.43 (2) is to tacitly grant them status for which they are not qualified under the law.

In the absence of any doubt as to the non-applicability of the status and rights of POW to non-State actors involved in transnational violence, there is need to search for other residual provisions that may afford some protection to them under the IHL and Human Right law in general. The first indication of this may be located in the Art.1 (2) of Protocol I, often called the Martens clause because of its history in IHL. This article provides that "In cases not covered by the this Protocol or by any other 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." The provision has been interpreted to mean that the laws of humanity and the dictates of public conscience are the yardstick to be applied if and when the specific provisions of the Convention and the regulations annexed to it do not cover specific cases

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<sup>18</sup> Above, note 10, p. 20.

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occurring in warfare or concomitant to warfare<sup>19</sup>. This clause ensures that even if the parties denounce the Conventions, they remain bound by the principles of international law resulting from custom and dictates of public conscience.

There is unfortunately no explicit codification of these principles of humanity and dictates of public conscience in any international law document, but we find some indications of the intent of referred article in Art.75 of Protocol I. It made direct reference to Art.1 which contains the Martens clause, providing that such person affected by the situation referred to in Art.1 of the Protocol and who are in the power of a party to the conflict and who do not benefit from the more favorable treatment under the convention or under the protocol shall be treated humanely in all circumstances and enjoy as a minimum, the protection provided in the article. Art. 75 then went on to enumerate a host of fundamental guarantees, similar in content and purpose to the fundamental human rights in the International Covenant on Civil and Political Rights (ICCPR). In the light of the argument made in the preceding section, the more favourable treatment under the Convention refers to the POW status which gives rise to a number of protections, and which the non-state actors are certainly not entitled. It also refers to the rights of parties in the conflicts not of international character, of which Protocol II provides a host of guarantees. Except in situations where the non-state actors fulfill the conditions for combatancy, they may not be protected by the protocol. However, the protection afforded in Art.75 of the Protocol, does establish that the Geneva Convention may still provide guidelines as to the protection for them while in conflict, even as it does not define their status in a categorical manner. Furthermore, even when the non-State actor is a terrorist, and is seen merely as a civilian, who as a protected person under the 4<sup>th</sup> Geneva Convention is suspected of engaging in activities hostile to the security of the State, within the meaning of Art.5 of the 4<sup>th</sup> Geneva Convention<sup>20</sup>, he shall nevertheless be treated with humanity

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<sup>19</sup> Meron Theodor, "The Martens Clause, Principles of Humanity and Dictates of Public Conscience" (2000) *AJIL*, Vol.94, No. 1, pp. 78-89, at 80.

<sup>20</sup> Where in the territory of a party to the conflict, the latter is satisfied that an individual protected person is definitely suspected of or engaged in activities hostile to the security of the state, such person shall not be entitled to claim such rights and privileges under the present convention as would if exercised in the favor of such individual person, be prejudicial to the security of the state...In each case such persons shall be treated with humanity and in case of trial shall not be deprived of their rights of fair and regular trial... see also art 45(3) of the protocol 1.

and in case of trial shall not be deprived of the rights of fair and regular trial (referred to in Art.75) prescribed by the Convention. In the light of the foregoing provision, which provides for the protection of non-State actors like the Al Qaeda or Hezbollah, the US Military Commissions Act - MCA (2006) must be judged for its propriety. According to some commentators, "the Act is designed so that a non-American designated by the President as an unlawful enemy combatant has no remedy; he's closed out all the courts. Remedies are at the heart of the respect for law. If you don't have a remedy, you are without human rights."<sup>21</sup> Also, the language of the Act says that any alien detained or awaiting such determination is not entitled to Habeas relief. The implication of this is that once a suspect is caught and declared an unlawful combatant for the purposes of the MCA by the Combatant Status Review Tribunal (CSRT), he can be held indefinitely without access to court or justice. The US defence of this position is purportedly on the basis of Art.75 (3), which obliges the detaining power to release the detainees when the circumstances justifying the arrest and detention have ceased to exist. For the US, it is better to err on the side of national security, than to err on the side of human rights protection that potentially may jeopardize protection of lives and property. In the light of this, the US Department of Justice states that detention is not punishment, but a standard law of war that combatants who have been captured may take up arms again and attack the US. The Al Qaeda is still a threat, and technically the hostilities with them have not ceased. Thus, until the last member of the organization is captured and interred, the war rages on. What could be said at this moment in this short essay is that in the MCA, the US interpreted the Geneva Convention in a way that supports its national security policies. The imposition of the term 'unlawful combatants' for any person in conflict remains a doubtful characterization in the contemplation of the Conventions. However, we do not think that the MCA could override the provisions of Art.75, which are not only customary law obligations on the basic rights of undesignated detainees, but also are elementary human rights principles. We do not advocate for the release of any of the detainees, but we do support that the fair trial provisions must be applicable to them. They ought therefore to be tried either under domestic law or international law and if convicted be sentenced. The indefinite detention without trial merely makes a statement that the rule of law has no place in the treatment of non-State actors in armed conflict and that the fundamental guarantees

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<sup>21</sup> Bob Yates, From Hamdan to "Unlawful enemy combatant": The Military Commissions Act, Chicago Lawyer, November 2006, Law Bulletin Publishing Company. <http://Lexis-nexis.com>

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in Art. 75 should be left to the discretion of the detaining State. This, to our mind, contravenes the major objectives for which IHL was set up and which it is committed to defend.

## **7. CONCLUSION**

The Geneva Convention, which remains the reference document for any discussion on international humanitarian law, prescribes the acceptable requirements for the combatant's status either in international conflict or non-international conflict. A person thereby becomes subject to a number of special privileges as provided in the convention, if he meets the requirements. The basic problem which the detainees that are non-State-actors create for the law is that not only are the conflicts not amenable to the main categories of conflict under the Geneva Conventions, but the person captured and detained do not fit into any status either as POW or regular combatant in non-international conflict. In practice, it has become difficult to determine the applicable law in such uncertain circumstances. This paper has shown that although the Geneva Convention fails to put these people under any category so to ensure their protection, the law as it is subtly and by extrapolation, accommodates them without directly anticipating the circumstances for such accommodation. The language used by the law was not specific to non-State actors in any sense of the word.

In the overall nature of many international legislations to take care of nebulous situations, the provisions for fundamental guarantees in Art.75 was found necessary to be part of the law. In the present circumstances, that provision has at last found its importance. This is not to say, that the problem created for instance by the Al Qaeda detainees in Guantanamo bay for IHL does not need to be addressed in a more direct fashion. The Bush administration had tried to get past the problem by describing them as unlawful combatants. Although the law cannot take care of every conceivable situation, the problem created by the non-state actors in armed conflict has come to stay, and is a more reoccurring form of conflict. There is need for a formal protocol to define such conflicts and the status of persons involved as well as the rights of states in such conflicts that are trans-boundary in character, but unfortunately cannot be described as international conflict.