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**THE APPLICATION OF *JUS IN BELLO* TO INDISCRIMINATE ATTACKS  
IN NON-INTERNATIONAL ARMED CONFLICTS**

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## **ABSTRACT**

This thesis examines the prohibition of indiscriminate attacks in non-international armed conflicts. The world has seen an increase in the number of armed conflicts that are not of an international character. Most of these conflicts have proven to be very destructive and detrimental to persons not taking part in the hostilities. Having in mind the fact that International Humanitarian Law seeks to protect persons not taking part in armed conflicts, this thesis is an appraisal of whether International Humanitarian Law prohibits indiscriminate attacks in non-international armed conflicts.

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## THE APPLICATION OF *JUS IN BELLO* TO INDISCRIMINATE ATTACKS IN NON-INTERNATIONAL ARMED CONFLICTS

*'The complex nature of the challenges before us should not be cause for despair. The abhorrent images of civilians targeted in armed conflicts should not dash our hopes for an era of compliance.'* Gelson Fonseca Jr<sup>1</sup>

### INTRODUCTION

Upon the onset of an armed conflict, International Humanitarian Law kicks in as the *Lex specialis*. The Geneva Conventions of 12 August 1949<sup>2</sup> make a distinction between conflicts of an international character (IACs) and conflicts not of an international character (NIACs). The Additional Protocols to the Geneva Conventions<sup>3</sup> supplement this distinction between IACs and NIACs by establishing a threshold for each of the two types of armed conflict.

For armed conflicts that are international in character, Additional Protocol I<sup>4</sup> provides that International Humanitarian Law (IHL) will only apply in situations set out in Common Article 2. This Common Article 2 talks of situations where there is a declared war or any other forms of armed conflict between high contracting parties to the Convention. It also applies during partial or total occupation of the territory of a high contracting party even if such occupation is not met by armed resistance. Regarding those conflicts that are not international in character, Additional Protocol II<sup>5</sup> classifies them as all other conflicts that do not fall under Article 1 of the Additional Protocol I. Such conflicts should take place in the territory of a high

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<sup>1</sup> Statement by His Excellency Ambassador Gelson Fonseca Jr, the permanent representative of Brazil to the United Nations, on the protection of civilians in armed conflict available at <http://www.un.int/brazil/speech/99d-gfj-protection-civilians-armed-conflict.html>.

<sup>2</sup> See Articles 2 and 4 common to all the four Geneva Conventions of 12 August 1949.

<sup>3</sup> Protocols Additional to the Geneva Conventions of 12 August 1949 as adopted on 8<sup>th</sup> June 1977 by the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law applicable in Armed Conflicts (Geneva, 1974-77).

<sup>4</sup> See Article 1 (3) and (4).

<sup>5</sup> See Article 1.

contracting party and should be between the armed forces of the high contracting party and dissident armed forces or other organized armed groups.<sup>6</sup> Such organized armed groups ought to be under a responsible command and also exercise control of part of the territory in order to allow it to conduct sustained and concerted military operations. However, Additional Protocol II goes ahead to exclude from its scope internal disturbances that do not meet this threshold such as riots and isolated sporadic acts of violence.<sup>7</sup>

The Rome Statute of the International Criminal Court (ICC) defines NIACs as those ‘...armed conflicts that take place in the territory of a State where there is a protracted armed conflict between governmental authorities and organized armed groups or between such groups’.<sup>8</sup> This definition is drawn from the ICTY’s appellate decision on *Tadić*<sup>9</sup>.

Once it has been determined that IHL is indeed the *Lex specialis*, the classification of armed conflicts helps in identifying what specific rules of IHL are applicable to the armed conflict in question. This is attributed to the fact that often different IHL rules apply to the two types of armed conflicts.

Customary IHL establishes the principle of distinction as a rule in both international and non international armed conflicts. This principle states that parties to an armed conflict must at all times distinguish between civilians and combatants. Attacks may only be directed at combatants and may not be directed at persons not participating in

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<sup>6</sup> Ibid.

<sup>7</sup> See Additional Protocol II, Article 1 (2).

<sup>8</sup> Article 8(2) (f) : Paragraph 2 (e) applies to armed conflicts not of an international character and thus does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature. It applies to armed conflicts that take place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

<sup>9</sup> *Prosecutor V Dusko Tadić aka "Dule"*, (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction), IT-94-1, International Criminal Tribunal for the former Yugoslavia (ICTY), 2 October 1995.

the armed conflict.<sup>10</sup>This principle of distinction has further been codified in numerous international conventions and treaties for both international and non international armed conflicts.<sup>11</sup>

Closely related to the principle of distinction is the rule prohibiting indiscriminate attacks. The International Committee of the Red Cross (ICRC) states that the prohibition of indiscriminate attacks has gained Customary IHL status through state practice.<sup>12</sup> With regard to IACs, this prohibition is clearly stated in Article 51(4) of Additional Protocol I to the Geneva Conventions.<sup>13</sup>A definition of what constitutes an indiscriminate attack is further provided.

However, the prohibition of indiscriminate attacks in NIACs is not expressly codified in any of the four Geneva Conventions or their 1977 Protocols. This prohibition was initially included in the Additional Protocol II draft<sup>14</sup> but was, at the last moment, dropped ‘...as part of a package aimed at the adoption of a simplified text’.<sup>15</sup>

It has been argued that the prohibition of indiscriminate attacks in NIACs is in fact included in Article 13 (2) of the Additional Protocol II by inference within the prohibition against making the civilian population the object of an attack<sup>16</sup>. However,

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<sup>10</sup> Customary International Humanitarian Law Rules: Rule 1; The Principle of Distinction between Civilians and Combatants available at [www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule1](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule1).

<sup>11</sup> See *ibid* for the treaties that codify the principle of distinction in both IACs and NIACs.

<sup>12</sup> Customary International Humanitarian Law Rules: Rule 11; indiscriminate attacks (summary), available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11).

<sup>13</sup> According to its Article 1 (3), the Additional Protocol only applies to international armed conflicts provided for under Common Article 2 of the Geneva Conventions.

<sup>14</sup> Draft Additional Protocol II submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols, Article 26(3); ‘The employment of means of combat and any other methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives, are prohibited.’

<sup>15</sup> As per ICRC Commentary on Customary International Humanitarian Law Rules, Rule 11 on the Prohibition of Indiscriminate Attacks in Non international Armed Conflicts available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11).

<sup>16</sup> Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, page 677.

the absence of the express prohibition in Additional Protocol II is what has led to the formulation of this research topic.

The chief interest of Protocol II is the extension to NIACs of the principal rules of protocol I relating to the protection of civilian populations against the effects of hostilities<sup>17</sup>. However, the obvious omission of the prohibition of indiscriminate attacks in Protocol II, as opposed to the express prohibition in Protocol I, raises concerns as to the place of the rule in NIACs. This therefore warrants an in-depth study as to the application of *Jus in Bello* to indiscriminate attacks in non international armed conflicts.

## **QUESTIONS OF LAW**

The following are the main legal questions addressed in this thesis:

1. What is the position of the prohibition of indiscriminate attacks in NIACs under the Four Geneva Conventions and the Additional Protocol II? Is the prohibition implied or simply ignored?
2. Are indiscriminate attacks prohibited in NIACs through other international treaties that regulate NIACs?
3. Has the prohibition of indiscriminate attacks in NIACs gained legal status as a rule in Customary International Humanitarian Law?
4. Is there a gap in the International Humanitarian Treaty Law with regard to indiscriminate attacks in NIACs?
5. If the prohibition of indiscriminate attacks in NIACs has gained customary law status, does Customary IHL fill the gaps in IHL treaty law?

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<sup>17</sup> See Basic Rules of the Geneva Conventions and Their Additional Protocols available at <http://www.icrc.org/eng/resources/documents/publications/p0365.htm>.

## SOURCES OF LAW

The main concern of this thesis is the prohibition of indiscriminate attacks in NIACs. Therefore, I will make reference to the four Geneva Conventions of 12<sup>th</sup> August 1949 and the Additional Protocol II of 1977. I will also consider the Additional Protocol I of 1977 specifically when making comparison to armed conflicts that are international in character.

This thesis will also look at other treaties such as the Protocols II to the Convention on Certain Conventional Weapons<sup>18</sup>. International instruments relevant to NIACs, such as memoranda of agreement between states<sup>19</sup>, will also be considered as sources of law in this thesis.

Most of the armed conflicts that take place in the modern world are not between states but are of a non-international character.<sup>20</sup> Although International Humanitarian Treaty Law is greatly detailed when it comes to IACs, it is significantly less detailed as regards NIACs. Customary IHL bridges this gap. Therefore, this thesis will also look into Customary IHL to determine whether the prohibition of indiscriminate attacks in NIACs has become custom. This will involve a look into state practice. I will also do an assessment of Military Manuals which are applicable or have been applied in NIACs. This thesis will also look at domestic legislation and official statements issued by states with regard to indiscriminate attacks in NIACs. Further,

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<sup>18</sup> Protocol on Prohibitions on the Use of Mines, Booby-Traps and other Devices, as amended, to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May Be Deemed to Be Excessively Injurious or to Have Indiscriminate Effects, Geneva 3<sup>rd</sup> May 1996.

<sup>19</sup> For example the Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law in the Philippines and The Agreement on the Application of International Humanitarian Law between the Parties to the Conflict in Bosnia and Herzegovina.

<sup>20</sup> See statistics by the Armed Conflict Database group available at <https://acd.iiss.org/en/conflicts?tags=CF582C41FE1847CF828694D51DE80C08> [Last visited on 23<sup>rd</sup> August 2014].

decisions of international and quasi-international judicial bodies will also form part of the assessment of customary international law.

## **METHODOLOGY**

The ICRC has a mandate to maintain and disseminate the fundamental principles of IHL.<sup>21</sup> As the protector of IHL, its perspective on indiscriminate attacks in NIACs is important. Therefore, the best starting point would be to look at the ICRC's perspective of indiscriminate attacks. Chapter one will look at the ICRC's definition of indiscriminate attacks. It will also seek to identify where the ICRC gets the definition and whether it is the appropriate working definition for this thesis.

Chapter two focuses on the position of indiscriminate attacks in treaty IHL. This will include an assessment of the IHL treaties that deal with NIAC's. The aim of this chapter is to identify whether there are any treaties that expressly prohibit indiscriminate attacks in NIACs. This chapter also aims to establish the position of the Geneva Conventions of 1949 and the Additional Protocol II of 1977. It seeks to establish whether indiscriminate attacks in NIACs are implicitly prohibited or have been ignored as a whole under these conventional laws.

Chapter III of the thesis will look at the prohibition of indiscriminate attacks in NIACs as a rule under Customary IHL. In this Chapter, I will try to determine whether or not the rule has gained customary law status through state practice and *opinio juris*.

Chapter IV will then sum it all up by identifying whether or not there is a gap in International Humanitarian Treaty Law as regards the prohibition of indiscriminate

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<sup>21</sup> Statutes of the International Committee of the Red Cross, Article 4 available at <http://www.icrc.org/eng/resources/documents/misc/icrc-statutes-080503.htm> [Last visited on 23rd August 2014].

attacks in NIACs. If such a gap does exist, this chapter will show whether Customary IHL fills it. I will also make recommendations as regards the possible loopholes in the law concerning the subject matter of this thesis.

The current view among IHL scholars is that the prohibition of indiscriminate attacks applies to NIACs through the principle of distinction. The lack of its explicit prohibition in the principle treaty provisions applicable to non international armed conflicts does not overrule its application. Sandesh Sivakumaran<sup>22</sup> argues that the prohibition none the less applies as a manifestation of the rule that civilians are not to be made the object of an attack<sup>23</sup> and the absence of its explicit prohibition is inconsequential.

Other scholars who have commented on this obvious omission of the prohibition of indiscriminate attacks in Additional Protocol II argue that this omission is covered by Customary IHL. Helen and Timothy<sup>24</sup>, in their criticism of the Additional Protocols of 1977, choose to refer to this omission of the prohibition of indiscriminate attacks in Additional Protocol II as a mere loss of a provision that had existed in the draft that can be filled through Customary IHL.

In conclusion, this thesis aims to show whether there is inadequacy in the Additional Protocol II (as read together with Common Article 3 to the Geneva Conventions of 1949) regarding indiscriminate attacks in NIACs. It also seeks to establish whether or not such inadequacy, if any, is remedied through Customary IHL. By doing this, the place of the rule prohibiting indiscriminate attacks in non international armed conflict will be determined under *Jus in Bello*.

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<sup>22</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012) p. 348.

<sup>23</sup> This is as per *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion [1996] ICJ Rep, para. 78.

<sup>24</sup> Hellen Durham and Timothy L.H. McCormack *The Changing Face of Conflict and the Efficacy of International Humanitarian Law* (eds.) 1999 p. 15-19.

## CHAPTER ONE

### 1. WHAT CONSTITUTES AN INDISCRIMINATE ATTACK IN NON-INTERNATIONAL ARMED CONFLICTS?

#### The ICRC PERSPECTIVE

In order to ensure the fulfilment of its task of disseminating IHL, the ICRC has delegates around the world teaching armed and security forces that an ‘attack may only be directed at a specific military objective. The military objective must be identified as such and clearly designated and assigned. The attack shall be limited to the assigned military objective.’<sup>25</sup> They also teach that an ‘indiscriminate attack affecting the civilian population or civilian objects in the knowledge that such attack will cause excessive civilian casualties and damage’ constitutes a grave breach of the laws of war.<sup>26</sup>

The position of the ICRC on indiscriminate attacks is clear: indiscriminate attacks are prohibited. According to Rule 11 of the ICRC Customary IHL rules, indiscriminate attacks are prohibited in both international and non-international armed conflicts.<sup>27</sup>

With regard to NIACs, the ICRC cites its authority for such prohibition as various practices such as; recent treaty law applicable in NIACs<sup>28</sup>; military manuals which apply to or have been applied in NIACs; national legislation; a number of official statements pertaining to NIACs; and, jurisprudence of the International Court of Justice.<sup>29</sup>

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<sup>25</sup> ICRC Customary International Humanitarian Law Volume II: Practice page 266 paragraph 138; Frederick de Mulinen, *Handbook on the Law of War for Armed Forces*, ICRC, Geneva 1987, para. 428.

<sup>26</sup> Ibid.

<sup>27</sup> See ICRC Customary IHL, Rule 11, available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11) [Last visited on 23rd August 2014].

<sup>28</sup> Such as the Amended Protocol II to the Convention on Certain Conventional Weapons.

<sup>29</sup> Op cit note 27.

The first question to ask is what exactly constitutes an indiscriminate attack in NIACs? Is there a specific form of attack that States consider indiscriminate in NIACs? In essence, what is it that is prohibited?

### **1.1 The ICRC Definition of Indiscriminate Attacks**

The ICRC adopts a three-fold approach in defining indiscriminate attacks. It considers them as those attacks;

- a) Which are not directed at a specific military objective;
- b) Which employ a method or means of combat which cannot be directed at a specific military objective; or
- c) Which employ a method or means of combat the effects of which cannot be limited as required by international humanitarian law...and consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.<sup>30</sup>

The ICRC acknowledges that this definition is set forth in Article 51 (4) of Additional Protocol I applicable to IACs and that no such definition is included in Additional Protocol II with regard to NIACs<sup>31</sup>. Some writers argue that part of this definition has been included in Additional Protocol II by inference within the prohibition contained in Article 13(2) on making the civilian population the object of attack.<sup>32</sup> This argument will be discussed later in the chapter on treaty law.

The ICRC considers this Article 51(4) definition of indiscriminate attacks as the working definition for both IACs and NIACs and argues that State practice shows

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<sup>30</sup> Rule 12: Definition of Indiscriminate Attacks available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule12](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule12) [Last visited on 23rd August 2014].

<sup>31</sup> See *ibid*, summary on the definition of indiscriminate attacks.

<sup>32</sup> Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, p.677.

that this is the customary international law definition that has gained acceptance.<sup>33</sup> It proposes a blurring of the stark distinction between the rules regulating IACs versus those regulating NIACs. It further suggests that there is a set of parallel customary IHL rules addressing NIACs which covers virtually all of the treaty provisions contained in Additional Protocol I to the Geneva Conventions.<sup>34</sup> It is for this reason that the ICRC adopts a definition from the provisions that apply to IACs to cover the whole body of IHL without distinguishing the applicable IHL rules.

For one to adopt this definition of indiscriminate attacks, one would have to ignore the distinction between the rules governing international and non-international armed conflicts. The general point of departure would be that all armed conflicts create a risk of harm to persons not taking part in the conflict. This risk of harm can only be reduced through the application of certain rules across the board. These rules ought to have a similar definition in both types of armed conflict since their purpose is the same; the reduction of the risk of harm created to those persons not taking part in the hostilities. Further, the definition of such rules will have to be obtained more from custom rather than treaties.

The ICTY in the *Martić* case states that there is a body of customary international law applicable to all armed conflicts irrespective of their characterization. This body of law includes general rules or principles to protect the civilian population as well as rules governing means and methods of warfare.<sup>35</sup> This was stated as the Tribunal was determining its jurisdictional competence under Article 3 of the Statute of the

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<sup>33</sup> See ICRC Customary International Humanitarian Law, Rule 12: Definition of indiscriminate attacks available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule12](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule12) [Last visited on 23rd August 2014].

<sup>34</sup> C H Powell and Garth Abraham, 'Terrorism and International Humanitarian Law', 1<sup>st</sup> African Yearbook of International Humanitarian Law 118, (2006) p. 127.

<sup>35</sup> (ICTY) *Prosecutor v Martić* (IT-95-11) 8<sup>th</sup> March 1996 Decision paragraph 11 available at <http://www.icty.org/case/martic/4> [Last visited on 25th August 2014].

Tribunal. The Trial Chamber had to identify the Rules of IHL that had been infringed for the violation to fall within the purview of its jurisdiction as provided for in Article 3 of the Statute.<sup>36</sup> Even though this particular case involved an international armed conflict, the Trial Chamber was of the opinion that this body of customary international rules is applicable to all conflicts devoid of characterization. The applicability of these rules to all armed conflicts, especially concerning the distinction between civilians and military objectives, has been corroborated by the General Assembly Resolutions 2444 (XXIII) and 2675 (XXV)<sup>37</sup> which reflect customary international law<sup>38</sup>.

If a rule exists in customary law, the definition of that rule is also most likely to be found within customary law. Further, if the rules of custom apply to both types of armed conflict without characterization, their definitions also ought to be the same regardless of characterization.

### **1.1.1 Importance of characterization**

As already noted, in its study, the ICRC pays little attention to the distinction between the rules that apply to IACs and NIACs when dealing with indiscriminate attacks. Was this a correct approach taken by the ICRC in its study into the fundamental principles and rules of IHL? The most basic purpose of characterization

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<sup>36</sup> Article 3 of the Statute of the Tribunal provides that the ‘Tribunal shall have power to prosecute persons violating the laws or customs of war’.

<sup>37</sup> Op cit note 35 para. 12: See G.A Resolution 2444, U.N GAOR, 23<sup>rd</sup> Session, Supp. No. 18 U.N Doc. A/7218 (1968) and G.A Resolution 2675, U.N GAOR, 25<sup>th</sup> Session, Supp. No. 28 U.N Doc A/8028 (1970).

<sup>38</sup> See Alvarez, *infra* note 105; See also ICTY in *Tadić* Interlocutory appeal judgment, para. 112; the court held that these resolutions played a twofold role: First, they were declaratory of the principles of customary international law regarding the protection of civilian populations and property in armed conflicts of any kind. At the same time, they were intended to promote the adoption of treaties on the matter, designed to specify and elaborate upon such principles.

of armed conflicts is to determine what rules of IHL apply to the conflict. This is because there are different rules for the different types of armed conflicts.<sup>39</sup>

Is characterization for the purpose of determining the applicable IHL rules important only in treaty law and not in custom? Some writers have argued that in customary IHL, characterization for the purpose of determining which IHL rules apply is irrelevant. This is because even though state practice acknowledges the dichotomy of armed conflicts, it does not distinguish the IHL rules that apply<sup>40</sup>. Some commentators have gone to the extent of referring to the dichotomy of conflicts in customary IHL as ‘arbitrary’, ‘undesirable’, ‘difficult to justify’ and that it ‘frustrates the humanitarian purpose of the laws of war in most of the instances in which war now occurs’<sup>41</sup>. It appears the ICRC conducts its study with this view that in custom, there is no distinction in the rules that apply.

Doesn’t this then cause a lack of certainty in the law whereby characterization is important in treaty IHL but seemingly irrelevant in customary IHL? Does it create a ‘tug of war’ whereby on one side, the purpose of characterization is clear in treaty law while on the other side, customary IHL doesn’t need it? Recently, there are treaty rules of IHL that apply to all situations of armed conflicts without distinction<sup>42</sup>, but the characterization seems to persist. Wilmschurt argues that the persistence of

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<sup>39</sup> Elizabeth Wilmschurt, *International Law and the Classification of Conflicts*, Oxford University Press (2012), p. 34.

<sup>40</sup> See Chapter three on customary IHL where the dichotomy of conflicts is evident.

<sup>41</sup> See James G Stewart, ‘Towards a single definition of armed conflict in international humanitarian law’, *International Review of the Red Cross* Vol.85 No. 850 (2003) p.313; quoting respectively Rene Jean Dupuy and Antoine Leonetti, ‘La notion de conflit arme a caractere non international’ in Antonio Cassese (ed.), *The New Humanitarian Law of Armed Conflict*, Editoriale Scientifica, Naples, 1971, p. 258; Ingrid Detter, *The Law of War*, Cambridge University Press, Cambridge, 2002, p. 49; Collin Warbrick and Peter Rowe, ‘The International Criminal Tribunal for Yugoslavia: The decision of the Appeals Chamber on the interlocutory appeal and jurisdiction in the *Tadić* case’. *International and Comparative Law Quarterly*, Vol. 45, Issue 3, 1996, p.698; W. Michael Reisman and James Silk, ‘Which law applies to the Afghan conflict?’, *American Journal of International Law*, Vol. 82, 1988, p.465.

<sup>42</sup> These include the Biological Weapons Convention 1972, the Chemical Weapons Convention 1993 and the Convention Prohibiting Anti-personnel Land Mines 1977.

characterization is because of the view by states that lack of it (characterization) would undermine state sovereignty.<sup>43</sup> If that is the case, then such a view by states will definitely affect the development of customary international law.

If the distinction of the rules that apply is not important in customary IHL, can the definition of indiscriminate attacks then be obtained through custom? If this is to be the case, then the ICRC definition of indiscriminate attacks is not really a definition adopted from Article 51 (4) of Additional Protocol I, but rather a general definition of indiscriminate attacks from customary IHL that applies to all types of armed conflict and happens to be reiterated and codified in Article 51(4) of Additional Protocol I. The ICRC definition could be the crystallization in treaty law of a customary IHL definition.

**a) Attacks which are not directed at a specific military object**

In its final report to the ICTY Prosecutor, the Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia suggested two elements in an indiscriminate attack. First, it stated that an attack which is not directed at a military objective ‘constitutes the *actus reus* for the offence of unlawful attack’<sup>44</sup>. This unlawful attack further requires a second element which is the criminal intent. Thus, the *mens rea* for the unlawful attack is *intention or recklessness* and not simple negligence’<sup>45</sup> These attacks, most likely, will involve the use of weapons. Therefore, the offence is intentionally using the weapons against civilians without making an effort to direct it at a military object. By launching an attack without considering any specific military target, the launcher recklessly

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<sup>43</sup> See Wilmshurt, op cit note 39, p. 37.

<sup>44</sup> See Benvenuti, infra note 47.

<sup>45</sup> ICTY, Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, The Hague, 14 June, 2000, para. 28.

disregards the obvious fact that the attack may strike civilians. In making the decision not to prosecute NATO for war crimes, the Prosecutor used this approach and came to the conclusion that even though NATO made some mistakes, there was no reckless targeting of civilians due to the absence of the *mens rea* aspect required to constitute an indiscriminate attack<sup>46</sup>.

At first instance, this sounds like a good approach. However, it brings about the problem of identifying or proving *mens rea*. The ‘intention’ behind an attack is something that lies within the mind of the attacker and is a difficult thing to identify and prove. This creates a whole list of problems because parties to a conflict may easily claim to have lacked the crucial ‘intention’ while carrying out an armed attack. This places a huge burden of proof on whoever is making the allegations to, figuratively speaking, get into the mind of the attacker and establish what their intention was. This position by the ICTY, as expected, sparked criticism<sup>47</sup>.

The ICRC expounds on these attacks which are not directed at a specific military objective in its study. It refers to Article 52 of Additional Protocol I for the definition of a ‘military objective’. It defines a military objective 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’.<sup>48</sup> Such objects or military installations may be attacked wherever they are and depending on the

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<sup>46</sup> UN Security Council, Press Release, SC/6870, 2 June 2000.

<sup>47</sup> Paolo Benvenuti, ‘The ICTY prosecutor and the review of the NATO bombing campaign against the Federal Republic of Yugoslavia’ EJIL (2001) p. 514.

<sup>48</sup> See the ICRC’s Commentary on the protection of the civilian population available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNID=4BEBD9920AE0AEAEC12563CD0051DC9E>.

circumstances.<sup>49</sup> However, any attack that is made on an object that does not fall within this definition of a military objective is to be considered an indiscriminate attack.

**b) Employing methods and means of combat that cannot be directed at a specific military object**

The ICJ in the Nuclear Weapons Case<sup>50</sup> judged the rule on the prohibition of the use of indiscriminate weapons not only as a customary rule but more specifically *jus cogens*. It stated that ‘states must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilian and military targets’. In this case, we see the court equating the use of indiscriminate weapons with a deliberate attack on civilians and considering the prohibition of the same as a fundamental *jus cogens* in customary IHL. Even though Louise Doswald-Beck<sup>51</sup> argues that this statement should not be overestimated, the definition of indiscriminate attacks can be thought to be subsumed in it and to that regard as a customary law definition. However, one needs to identify what exactly the Court meant by ‘incapable of distinguishing between civilian and military targets’. It is quite obvious that a weapon, being an inanimate object, cannot itself make such a distinction, for this process requires thought.<sup>52</sup> The text of Additional Protocol I may be able to solve this through its Article 51(4) (b) and (c) where it describes the characteristics of ‘methods or means of combat’ as those:

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<sup>49</sup> IHL permits the attacking of military installations except when such attacks could incidentally result in loss of human life, injuries to civilians and damage to civilian objects which would be excessive to the expected direct and specific military advantage.

<sup>50</sup> International Court of Justice, *Legality of the threat or use of nuclear weapons*, Advisory Opinion of 8 July 1996, Declaration of Judge Bedjaoui, President, para. 21.

<sup>51</sup> Louise Doswald-Beck, ‘International Humanitarian Law and the Advisory Opinion of the International Court of Justice on the Legality of the Threat or Use of Nuclear Weapons’, *International Review of the Red Cross*, No.316 (1997).

<sup>52</sup> *Ibid.*

‘(b) ...which cannot be directed at a specific military objective; or

(c) ...the effects of which cannot be limited as required...’.

The use of weapons in an attack which cannot be directed at a specific military objective, or whose effects cannot be limited, may be said to be the use of methods and means of combat incapable of distinguishing between civilian and military targets.

However, one should keep in mind the fact that the ICJ considered the prohibition of indiscriminate attacks as a *jus cogens* rule. Therefore, this rule applies in all armed conflicts regardless of characterization leading one to assume that this definition hinted at by the Court can be considered applicable to both types of armed conflicts. This would fall under part (b) of the ICRC’s definition of indiscriminate attacks which is the employment of methods and means of combat which cannot be directed at specific military object.

The ICTY in the *Martić* case also prohibited the employment of methods and means of combat that cannot be directed at a specific military object. In its 2007 judgment, the Trial Chamber stated that:

‘Indiscriminate attacks, that is, attacks which affect civilians or civilian objects and military objects without distinction, may also be qualified as direct attacks on civilians. In this regard, a direct attack against civilians can be inferred from the indiscriminate character of the weapon used’<sup>53</sup> Even though this case was concerned with an international armed conflict, the Court referred to Article 51(4) (b) of the 1977 Additional Protocol I as a norm of customary law. This customary norm would

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<sup>53</sup> See ICTY, *Martić Case*, Judgment, 12 June 2007, para. 69.

be relevant in the definition of indiscriminate attacks if one is of the view that the same customary IHL norms apply to both types of armed conflicts.

**c) Attacks which employ methods or means of combat the effects of which cannot be limited by international humanitarian law**

The ICRC defines indiscriminate attacks as attacks which employ methods or means of combat the effects of which cannot be limited by IHL. It cites Article 51 (4) of Additional Protocol I as a source of this definition. It also cites military manuals<sup>54</sup> and other verbal state practice<sup>55</sup> to show that this definition has gained customary law status. As discussed above, this customary law definition of indiscriminate attacks can only be used in NIACs if the distinction between the rules that apply to the two types of conflicts is ignored.

There are certain means of combat the effects of which cannot be limited in any circumstance.<sup>56</sup> Such weapons are different from others the effects of which can be restricted in one way or another. For example, a 20ton bomb dropped on a building is more likely to cause effects that cannot be limited compared to a 1ton bomb dropped

<sup>54</sup> See Australia, *The Manual of the Law of Armed Conflict*, Australian Defence Doctrine Publication 06.4, Australian Defence Headquarters, 11<sup>th</sup> May 2006, para. 5.2: (“the effects of which cannot be limited as required by LOAC”); Canada, *The Law of Armed Conflict at the Operational and Tactical Levels*, Office of the Judge Advocate General, 13 August 2001, para. 416.1: (“...those which employ a method or means of combat, the effects of which cannot be limited as required by LOAC.”); Israel, *Rules of Warfare on the Battlefield*, Military Advocate-General’s Corps Command, IDF School of Military Law, Second Edition, 2006, p.26: (“...the attack will not activate resources whose effects are uncontrollable.”); Russian Federation, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Ministry of Defence of the Russian Federation, Moscow, 8 August 2001, para. 54: (“Indiscriminate attacks are... those which employ a method or means of combat which... cannot ensure the required limitation of their effect and the respect of the principle of distinction.”); United States, *The Commander’s Handbook on the Law of Naval Operations*, NWP 1-14M/MCWP 5-12.1/COMDTPUB P5800.7, issued by the Department of the Navy, Office of the Chief of Naval Operations and Headquarters, US Marine Corps, and Department of Homeland Security, US Coast Guard, July 2007, para. 5.3.2.

<sup>55</sup> These include; India, Written statement submitted to the ICJ, *Nuclear Weapons Case*, 20 June 1995, p.3: (India stated that indiscriminate attacks are generally defined as including “those with effects which cannot be limited”); Mexico, Written statement submitted to the ICJ, *Nuclear Weapons Case*, 19 June 1995, para. 77 (d): (Mexico stated: “In accordance with international humanitarian law, indiscriminate attacks are those that can reach both military targets and civilians.”).

<sup>56</sup> See the ICRC’s Commentary on the protection of the civilian population available at <http://www.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?viewComments=LookUpCOMART&articleUNI D=4BEBD9920AE0AEAEC12563CD0051DC9E> [Last visited on 25<sup>th</sup> August 2014].

on the same building. In most cases, the indiscriminate nature of an attack does not depend on the type of weapon used but rather on how it is used.<sup>57</sup> However, there are certain weapons which by their very nature are indiscriminate. The ICRC gives the example of bacteriological means of combat such as poisoning of drinking water.<sup>58</sup> It is difficult to restrict the effects of such means of warfare which is most likely to affect every person without distinction. The use of such means of warfare is considered indiscriminate.

### **1.2 Do States adopt the ICRC definition of Indiscriminate Attacks?**

Thus the question arises whether states have adopted this same definition as the ICRC. This can be identified through their practice.

Essentially, the definition similar to the ICRC's has been adopted by states in various instruments that deal with NIACs. With the exception of subsection (c), the definition has been included in the Amended Protocol II to the Convention on Certain Conventional Weapons<sup>59</sup>. It defines indiscriminate as the use of such weapons 'which is not on, or directed against, a military objective'. It is important to note that this Convention distinguishes between international and non-international armed conflicts. Even though it acknowledges this dichotomy of armed conflicts, the same provisions are to be applied in both types of conflicts without distinction. It states that its provisions shall apply to situations referred to in its Article 1 (IACs) and also to those in Article 3 common to the Geneva Conventions (NIACs)<sup>60</sup>.

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<sup>57</sup> Ibid.

<sup>58</sup> Ibid.

<sup>59</sup> See Amended Protocol II to the Convention on Certain Conventional Weapons, Article 3(8) (a).

<sup>60</sup> See *ibid*, at Article 1 (2): 'This Protocol shall apply, in addition to situations referred to in Article 1 of this Convention, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949. This Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, as not being armed conflicts.'

Further, states have adopted the ICRC definition of indiscriminate attacks in their military manuals which are applicable in or have been applied in NIACs. Such manuals have laid more emphasis on subsection 4(a) of the Article 51 definition, and supported the same using official statements.<sup>61</sup> In their military manuals, states uniformly define indiscriminate attacks as those ‘attacks which are not directed at a specific military objective’.<sup>62</sup>

In conclusion therefore, the working definition of indiscriminate attacks for the purposes of this paper is;

- a) an attack which is not directed at a specific military objective (without considering the intention or *mens rea* behind the attack)
- b) an attack which employs a method or means of combat that cannot be directed at a specific military objective
- c) an attack which employs a method or means of combat, the effects of which cannot be limited under international humanitarian law

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<sup>61</sup> See e.g. the military manuals of Australia, Benin, Ecuador, Germany, Kenya, Nigeria, Togo and Yugoslavia; See also India, Written Statement Submitted to the ICJ, *Nuclear Weapons Case*, 20 June 1995, page 3; The memorandum submitted by Jordan to the Sixth Committee of the UN General Assembly prior to the adoption of UN General Assembly Resolution 47/37 in 1992 entitled *International Law Providing Protection to the Environment in times of Armed Conflict* which stated that it is a war crime to employ acts of violence or a method or means of combat which cannot be directed at a specific military objective.

<sup>62</sup> Benin’s military manual defines indiscriminate attacks as “attacks which are not directed at military objectives and which will probably strike at military objectives and civilians without distinction”; Israel’s manual on the Laws of War states that “in any attack it is imperative to verify that the attack will be directed against a specific military target”; Kenya’s LOAC Manual defines indiscriminate attacks as “attacks which are not directed at a specific military objective and which are likely to strike at military objectives and civilian objects without distinction”; The UK LOAC Manual defines indiscriminate attacks as “attacks which are not directed at a military objective and which are likely to strike at military objectives and civilian objects without distinction”.

## CHAPTER TWO

### 2. ATTACKS IN NON-INTERNATIONAL ARMED CONFLICTS AND TREATY LAW

Historically, rules of IHL (in particular on the treatment and exchange of prisoners and wounded) have been laid down in bilateral treaties. The systematic codification and progressive development of IHL in general and multilateral treaties also started relatively early compared to other branches of international law- in the midst of the 19<sup>th</sup> century.<sup>63</sup> Today, IHL is not only one of the most codified branches of international law, but its relatively few instruments are also rather well co-ordinated with each other.

Treaties have come to be accepted as a binding source (even though only to parties to it) of international law as stated in Article 38 (1) of the Statute of the International Court of Justice. One can argue that treaties are more 'solid' than other sources, such as customary international law, due to their written nature. This written nature makes it easier for one to identify them compared to customary law which metaphorically floats in the air and needs to be grounded by establishing state practice and *opinio juris*; the fact that states are acting out of a sense of legal obligation. The initial step in identifying a rule of international law would be to look at the various bilateral and multilateral treaties available with respect to that specific rule.

Under the IHL regime, some of the most essential treaties are the Four Geneva Conventions of 1949 and their Additional Protocols of 1977. These Conventions are considered to set out the most fundamental rules regarding the protection of persons

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<sup>63</sup> Marco Sassoli, Antoine A *How Does Law Protect in War: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* ICRC (1999) p. 105.

during an armed conflict. There are other instruments, such as The Hague Conventions of 1907 and the Convention on Certain Conventional Weapons that have a bearing on IHL. However, considering this thesis is about indiscriminate attacks in NIACs, only the treaties that regulate NIACs will be looked at.

From the working definition of this thesis, an indiscriminate attack is:

- 1) an attack which is not directed at a specific military objective;
- 2) an attack which employs methods and means of combat which cannot be directed at a specific military objective;
- 3) an attack which employs methods and means of combat, the effects of which cannot be limited as required by international law and are therefore likely to strike both military and civilian objects without distinction.

Having this in mind, each constituent of this working definition ought to be looked at individually in order to identify the position of treaty law on each.

**i) Attacks which are not directed at a specific military objective**

It goes without saying that one of the key principles of International Humanitarian Law is the principle of distinction which provides that only specific military objectives can be attacked during an armed conflict. Thus, as a corollary of this rule, any attack which is not directed at the military attack is considered indiscriminate.

The Protocol II to the Convention on Certain Conventional Weapons<sup>64</sup>, which is applicable to NIAC<sup>65</sup>, prohibits the ‘placement of such weapons which is not on, or

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<sup>64</sup> Protocol on the Prohibition or Restrictions on the Use of Mines, Booby-Traps and Other Devices (Protocol II), Geneva 10 October 1980.

<sup>65</sup> See Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to have Indiscriminate Effects. Geneva, 10 October 1980. Amendment article 1, 21 December 2001: ‘This Convention and its annexed Protocols shall also apply, in addition to situations referred to in paragraph 1 of this Article, to situations referred to in Article 3 common to the Geneva Conventions of 12 August 1949.’

directed against, a military objective'<sup>66</sup>. This treaty, which has a total of 93 state parties who have ratified or acceded to it with none making a reservation with regard to this prohibition<sup>67</sup>, codifies this prohibition.

Further, attacks which are not directed at a specific military objective are prohibited in Article 3(8) (a) of the Amended Protocol II to the Convention on Certain Conventional Weapons<sup>68</sup>. This amended protocol reiterates the position of the previous protocol that prohibits the placement of any weapons which is not on, or directed against a specific military objective. The Amended Protocol has a total of one hundred signatory States and is applicable to non-international armed conflicts<sup>69</sup>.

From the wide body of IHL treaty law on armed conflicts, the prohibition of such attacks which are not directed at a specific military objective seems to be given provision in only two treaties that deal with NIACs. Even though both the treaties have a hundred (or slightly fewer) signatory States, the question to pose is: are the two treaties enough to regulate the prohibition of indiscriminate attacks in NIACs? In order to answer this question, one would have to firstly determine whether there is a set standard, as regards the numerical value of treaties, for the prohibition to be considered sufficiently regulated in treaty law. This issue will be revisited later in this Chapter.

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<sup>66</sup> Ibid Article 3 (3)

<sup>67</sup> See list of signatory States and reservations available at [http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp\\_viewStates=XPages\\_NORMStatesParties&xp\\_treatySelected=510](http://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&xp_treatySelected=510)

<sup>68</sup> Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996).

<sup>69</sup> See Amended Protocol to the CCW, Article 1 (2).

**ii) An attack which employs methods and means of combat which cannot be directed at a specific military objective**

With regard to the employment of methods and means which cannot be directed at a specific military objective, there are also two multilateral treaties that issue such prohibition: Protocol II to the Convention on Certain Conventional weapons and the Amended Protocol to the Convention on Certain Conventional Weapons. Both the protocols prohibit the ‘placement of such weapons which employ a method of means of delivery which cannot be directed at a specific military object’<sup>70</sup>.

**iii) An attack that employs methods and means of combat the effects of which cannot be limited as required by international law**

It is important to note that no single multilateral treaty that covers non-international armed conflicts makes reference to such attacks whose effects cannot be limited as required by international law. Instead, the Protocols II to the CCW seem to refer to something similar. These two Protocols prohibit the placement of any such weapons ‘which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated’<sup>71</sup>. The question whether the wording of these Protocols is different but intended to prohibit the same thing may arise. On the face of it, the phrase ‘...weapons which may be expected to cause incidental loss of civilian life’ can be construed to mean those weapons whose damage (read as effects) cannot be narrowed down to a specific military objective; that is to say the effects of such weapons cannot be controlled in a manner which

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<sup>70</sup> Article 3(3) (b) of the 1980 Protocol II to the Convention on Certain Conventional Weapons; Article 3(8) (b) of the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons.

<sup>71</sup> Article 3(3) (c) of the 1980 Protocol II to the Convention on Certain Conventional Weapons; Article 3(8) (c) of the 1996 Amended Protocol II to the Convention on Certain Conventional Weapons.

they are thus limited to strictly the military objectives therefore occasioning expectation of incidental civilian life.

However, does the mere fact that one 'expects' the weapon or methods of combat to cause some form of incidental loss mean that such effects of the weapon cannot indeed be limited? The use of the word 'cannot' in the definition (...methods and means of warfare whose effects cannot be limited...) seems to imply some form of uncontrollability whereby the effects are beyond the control of the employer. One can argue that the wording of the prohibition in the Protocols II to the CCW does not insinuate the 'beyond control' nature of the methods and means of combat but rather focuses on the 'expectations' with regard to the end result. One may conclude that, according to the prohibition of the Protocols II to the CCW, the effects may be limited, but with the absence of such limitation the methods and means of combat may be expected to cause incidental loss of civilian life or injury to civilians and civilian objects.

Therefore, depending on how one interprets the Protocols II to the CCW, one can argue that attacks the effects of which cannot be limited as required by IHL are -or are not- prohibited under treaty law.

### **2.1 Are the treaties prohibiting indiscriminate attacks in non-international armed conflicts adequate?**

The most striking thing with regard to treaty law on the prohibition of indiscriminate attacks in non-international armed conflicts is the low number of treaties that make such prohibition. From the section above, one notes that only the Protocol II to the Convention on Certain Conventional Weapons and the Amended Protocol II to the Convention on Certain Conventional Weapons make provisions on the prohibition of

indiscriminate attacks in non-international armed conflicts. This raises the question whether, in a huge body of IHL treaty law on non-international armed conflicts, two treaties are sufficient to regulate the prohibition of such an important rule in IHL.

One can argue that the more a rule of international law is reiterated in various treaties, the more 'solid' it is as law for this shows that it is a widely accepted rule. I use the word 'solid' to mean a rule that is beyond doubt an accepted rule of law. The fact that states think about a specific rule so often that they end up including it in more treaties shows that they consider that rule an essential rule of law. Does this therefore indicate the relevance of numerical quantification of the treaties that prohibit that rule? If there was only one treaty embodying a specific rule of international law, would it be said that the rule hasn't quite become 'law' in its strict sense because of the lack of repeated codification in other treaties?

It is not unusual for writers to refer to treaties as 'evidence' of international law<sup>72</sup>. If the term 'evidence' is to be taken to mean the available body of facts or information indicating whether a belief or proposition is true or valid, then the quantification of such evidence may or may not be necessary. The mere existence of the evidence could be sufficient to indicate the existence (or non-existence) of the rule in international law.

D'Amato however argues that a preferable meaning for the word 'evidence' would be that employed in Article 38 of the Statute of the International Court of Justice. The ICJ Statute states that the Court shall apply 'international custom, as evidence of a general practice accepted by law'. In this sense evidence becomes a synonym for

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<sup>72</sup> Anthony D'Amato *Treaties As a Source of General Rules of International Law* North western University School of Law Faculty Working Papers (1962) page 8 available at <http://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1119&context=facultyworkingpapers>.

‘source’, since in effect a court looks at international custom in order to find evidence of legal precedent for determining the rights and duties of states.<sup>73</sup> Thus, with regard to treaties, one might look at the treaties as the ‘source’ of the rule in international law whereby the wide acceptance (quantification) of that rule might play some significant role in determining its sufficiency.

In international treaty law however, there seems not to be any standard on how many treaties should codify a rule of international law for it to be considered sufficient. Such standards are to be found in customary international law. This absence of a standard in treaty law might partly be attributed to the fact that treaties are considered contracts that primarily bind only the state parties to it. Thus if a treaty enshrines a specific rule, then that rule will be legally binding only on the States party to the treaty.

Should one therefore focus more on the States that are party to the two treaties that prohibit indiscriminate attacks in NIACs instead of the numerical significance of the treaties themselves? Both Protocols roughly have a total of one hundred signatory states that are bound by the prohibition of indiscriminate attacks. This may either seem like a large or small number. If one was to look at the number of signatories as a fraction of the total number of states in the world, 100 states constitute more than half of the total<sup>74</sup>. This would be a good number to show the sufficiency of the treaty law in the regulation of indiscriminate attacks.

However, it is interesting to note that the countries which are specially affected by NIACs are not signatories to the two Protocols to the CCW. According to the Armed Conflict database, the following countries have ongoing NIACs: Afghanistan;

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<sup>73</sup> Ibid.

<sup>74</sup> The United Nations lists a total of 193 member states in the world: available at <http://www.un.org/en/members/index.shtml>.

Somalia; Nigeria; Syria; Iraq; Democratic Republic of Congo; and the Central African Republic among others<sup>75</sup>. None of these countries are signatories to the two Protocols. On this account, one may persuasively argue that treaty law is inadequate in the regulation of indiscriminate attacks considering it does not bind the specially affected state. In fact, one may also argue that this treaty law has not become custom. One the other hand, the fact that the prohibition of indiscriminate attacks in NIACs is codified in treaty law may be sufficient for the regulation of indiscriminate attacks. Under traditional law, the codification of the rule on the prohibition of indiscriminate attacks in NIACs brings the rule into existence in IHL treaty law immediately it is codified in a single treaty. The numerical significance of the treaties will be in establishing whether the rule is customary international law.

## **2.2 Have the treaties been implemented?**

According to the ICRC, for the treaties of IHL to be effective in the regulation of armed conflicts, they must be formally adopted by all States through ratification or accession. States must then enact national legislation and take practical measures in order for the rules to be fully effective.<sup>76</sup> According to the ICRC therefore, ratification or accession is merely the first step; States need to go further and implement these treaties through domestic legislation.

The effectiveness of the treaties in regulating indiscriminate attacks is closely related to their domestic implementation by the signatory states. The mere ratification of the two treaties is not enough; a further domestication is required to ensure that the prohibition becomes an active rule of law. Seemingly, only twelve states have taken

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<sup>75</sup> See the list of ongoing armed conflicts and the affected countries available at <https://acd.iiss.org/en/conflicts?tags=CF582C41FE1847CF828694D51DE80C08>. See also 'List of ongoing armed conflicts' available at [http://en.wikipedia.org/wiki/List\\_of\\_ongoing\\_armed\\_conflicts](http://en.wikipedia.org/wiki/List_of_ongoing_armed_conflicts).

<sup>76</sup> Available at <http://www.icrc.org/eng/war-and-law/ihl-domestic-law/overview-domestic-law.htm>.

the step of national implementation with regard to the Convention on Certain Conventional Weapons.<sup>77</sup> Out of this number, only a handful of the signatories have domesticated the two Protocols to the Certain Conventional Weapons that prohibit indiscriminate attacks in NIACs.

South Africa, through the Prohibition or Restriction of Certain Conventional Weapons Act No.18 of 2008, put a restriction on the use of mines, booby-traps and other devices as well as incendiary weapons in conformity with the Conventional Weapons Convention. The purpose of this Act is to prohibit or restrict those weapons which may be deemed to have indiscriminate effects.<sup>78</sup>

Bosnia and Herzegovina through an amendment of their Criminal Code in 2004 carried out their national implementation by introducing an article which prohibited all use, production, stockpiling or transfer of any weapons prohibited by international law.<sup>79</sup>

Luxembourg through the Law of 29 April 1999 approves the Amended Protocol II of the 1980 Weapons Convention and stipulates the penalties for contravention of the same<sup>80</sup>.

The effectiveness of the two treaties in the regulation of indiscriminate attacks in NIACs may be evidenced by this implementation. The fact that the treaty law has been domesticated in a number of the signatory states shows that indeed the prohibition is operational under international humanitarian treaty law.

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<sup>77</sup> See ICRC National Implementation Database on the Conventional Weapons available at [http://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawdByCountry.xsp?xp\\_topicSelected=GVAL-992BUN](http://www.icrc.org/applic/ihl/ihl-nat.nsf/vwLawdByCountry.xsp?xp_topicSelected=GVAL-992BUN).

<sup>78</sup> Act No. 18 of 2008 available at <http://www.info.gov.za/view/DownloadFileAction?id=90496>.

<sup>79</sup> Law Amending the Criminal Code of Bosnia and Herzegovina, 2004 Article 193(a), Official Gazette of BiH, No 61/04 of 29 December 2004.

<sup>80</sup> Law of 29 April 1999 approving Protocol II (Amended) and Protocol IV of the UN Weapons Convention, (1980) available at <http://www.legilux.public.lu/leg/a/archives/1999/0050/a050.pdf?page=1>.

### **2.3 Prohibition of Indiscriminate attacks in non-international armed conflicts: implied or ignored?**

The Four Geneva Conventions of 1949 apply to armed conflicts that are international in nature. Common Article 3 however, is the only provision in these Conventions that deals with armed conflicts that are of non-international character. One notes that this Common Article 3 does not have an express prohibition of indiscriminate attacks in NIACs. This can be read in two ways. First, the provisions of Common Article 3 are the only legally binding provisions of the Geneva Conventions of 1949 dealing with NIACs and any rule outside this Article basically leaves the NIACs in an unregulated IHL vacuum.<sup>81</sup> Thus, the law as provided for in Common Article 3 should be read in a strict sense, therefore giving the undesired result that indiscriminate attacks in NIACs are not prohibited under the Four Geneva Conventions of 1949 and more specifically under Common Article 3.

Secondly, one can argue that the fact that Common Article 3 states that ‘parties to the conflict may endeavour to bring into force, by special agreements, all or part of the other provisions of the Conventions’, establishes a more liberal reading of Common Article 3. This is to say that any other rule of international law covered in the Four Geneva Conventions relating to IACs (including the prohibition of indiscriminate attacks as per Article 51(4) of Additional Protocol 1) may be applied *mutatis mutandis* to NIACs. This should however be done through the signing of special agreements by the parties to the conflict. This second approach seems more favourable since it widens the scope of Article 3 to incorporate the prohibition of indiscriminate attacks in NIACs.

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<sup>81</sup> Jelena Pejic, ‘The protective scope of Common Article 3: more than meets the eye,’ International Review of the Red Cross Volume 93 Number 881, March 2011 p. 2.

Whichever line of thought one might choose to adopt, it is quite clear that the Four Geneva Conventions of 1949, through Common Article 3, do not expressly prohibit indiscriminate attacks in NIACs.

On the other hand, Additional Protocol II to the Geneva Conventions is the instrument that governs NIACs in detail. It is considered an extension of Common Article 3<sup>82</sup>. The absence of the prohibition of indiscriminate attacks in this Protocol is quite conspicuous especially in comparison to its counterpart Additional Protocol I relating to IACs. More interesting is the fact that the prohibition of indiscriminate attacks in NIACs had been included in the Draft Additional Protocol II.<sup>83</sup> In Article 26(3) of the Draft, ‘the employment of means of combat, and any other methods which strike or affect indiscriminately the civilian population and combatants, or civilian objects and military objectives’, was prohibited. In particular, the Draft Protocol prohibited:

- a) to attack without distinction, as one single objective, by bombardment or any other method, a zone containing several military objectives, which are situated in populated areas and are at some distance from each other;
- b) to launch attacks which may be expected to entail incidental losses among civilians population and cause the destruction of civilian objects to an extent disproportionate to the direct and substantial military advantage anticipated.

According to the ICRC, this prohibition was ‘dropped at the last minute as part of a package aimed at the adoption of a simplified text’.<sup>84</sup> Thus, there is a lack of the

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<sup>82</sup> See General introduction to the Commentary on Protocol II, available at <http://www.icrc.org/applic/ihl/ihl.nsf/Treaty.xsp?documentId=AA0C5BCBAB5C4A85C12563CD002D6D09&action=openDocument>.

<sup>83</sup> Draft Additional Protocols to the Geneva Conventions of August 12, 1949 submitted by the ICRC to the Diplomatic Conference leading to the adoption of the Additional Protocols.

<sup>84</sup> See ICRC Customary International Humanitarian Law, Rule 11 on Indiscriminate Attacks in non-international armed conflicts available at [http://www.icrc.org/customary-ihl/eng/docs/v1\\_rul\\_rule11](http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule11).

express prohibition of indiscriminate attacks in NIACs in Additional Protocol II to the Geneva Conventions of 1949.

One of the arguments is that this omission of indiscriminate attacks in Additional Protocol II to the Geneva Conventions is balanced out by an inference from the general protection provided for in paragraph 1 of Article 13 of the Protocol.<sup>85</sup> The proponents of this argument suggest that a careful examination of Article 13(2) of Protocol II ought to be done to determine whether it covers any type of indiscriminate attacks covered initially in the Draft Protocol and currently in Article 51(4) of Additional Protocol I to the Geneva Conventions of 1949. This argument however places a heavy burden on the aspect of ‘general protection’ as issued by Article 13 of Protocol II<sup>86</sup> since a definition of ‘general protection’ will be required.

In order to interpret ‘general protection’, one can use the theories of treaty interpretation set out in Article 31 and Article 32 of the Vienna Convention on the Law of Treaties.<sup>87</sup> Even though Additional Protocol II falls outside the temporal scope of the Vienna Convention<sup>88</sup>, the articles in the Vienna Convention regarding the interpretation of treaties have gained customary law status and can be used to interpret all treaties.<sup>89</sup>

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<sup>85</sup> Michael Bothe, Karl Joseph Partsch, Waldemar A. Solf (eds.), *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982 page 676-677.

<sup>86</sup> Ibid.

<sup>87</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p.331, available at: <http://www.refworld.org/docid/3ae6b3a10.html> [accessed 24 August 2014].

<sup>88</sup> Article 4 of the Convention provides that the Convention only applies to treaties between states that have been entered into after the coming into force of the Convention (which was 1980). It states that: ‘Without prejudice to the application of any rules set forth in the present Convention to which treaties would be subject under international law independently of the Convention, the Convention applies only to treaties which are concluded by States after the entry into force of the present Convention with regard to such States’.

<sup>89</sup> See Territorial Dispute (*Libyan Arab Jamahiriya/Chad*), Judgment, ICJ Reports 1994 p. 21; Oil Platforms (*Islamic Republic of Iran v United States of America*), Preliminary Judgement, ICJ Reports 1996 (II) p. 812.

Following the theory of interpretation of treaties using the preparatory works, general protection in Article 13 involves a prohibition on making civilians or civilian objects the object of direct attack; a requirement to avoid excessive collateral damage as a result of attacks on military objectives; an obligation on the part of the party in control of the civilian population to refrain from using civilians as shields for his military operations and to take appropriate and feasible protective measures against the effects of attacks.<sup>90</sup> Seemingly, the prohibition of indiscriminate attacks falls under this definition of 'general protection' and can thus be inferred through the provisions of Article 13. But one will have to firstly work under the premise that Article 13 of Protocol II is a simplified version of the Draft Protocol which chooses to focus more on the general protection of civilians and thus encompassing every other protection (through the various prohibitions) that goes unmentioned within it.

A criticism of this approach of inferring the prohibition of indiscriminate attack in Article 13 would be to question in essence the purpose of deviating from the Draft Protocol by creating a simplified text with 'general protection' in Additional Protocol II and not doing the same for the Additional Protocol I governing IACs. The fact that the protection of civilians and civilian objects through the prohibition of indiscriminate attacks is so fundamental in the principles of IHL seems to warrant a more express and precise codification. The prohibition ought to be expressly stated as done in Additional Protocol I and as proposed in the Draft Protocol, rather than a simplified and loose general protection that may lead to countless debates and loopholes in interpretation of such inference.

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<sup>90</sup> See Kalshonev, F. 'Reaffirmation and development of international humanitarian law applicable in armed conflicts: The Diplomatic Conference, Geneva, 1974-1977. Part I: Combatants and Civilians' 8 NYIL (1977), p. 107-135; as quoted by Bothe, *ibid* p. 299.

Therefore, the deviation from the Draft Protocol in the name of ‘adopting a simplified text’ leaves the absence of the prohibition of indiscriminate attacks in Additional Protocol II sticking out like a sore thumb and brings out the issue of ‘implied prohibition’ which is more of a subjective matter.

In Conclusion therefore, the prohibition of indiscriminate attacks in NIACs under treaty IHL is codified in a small number of treaties that cover NIACs. The relevance of the numerical value of the treaties containing such prohibitions may seem relevant in determining the universality of the rule but does not in any way affect its position in treaty IHL. The absence of the prohibition in the Four Geneva Conventions and the Additional Protocol II is also noteworthy and raises concerns as to the existence of such loopholes in the protection of civilians and civilian objects.

## CHAPTER THREE

### 3. INDISCRIMINATE ATTACKS IN NON INTERNATIONAL ARMED CONFLICTS: CUSTOMARY INTERNATIONAL HUMANITARIAN LAW OR NOT?

*‘Customary International Law is the generalization of the practice of states. This cannot be established by citing cases where coastal states have made extensive claims, but have not maintained their claims by the actual assertion of sovereignty over trespassing foreign ships...The only convincing evidence of State practice is to be found in seizures, where the coastal state asserts its sovereignty over the waters in question by arresting a foreign ship and maintaining its position in the course of diplomatic negotiation and international arbitration.’<sup>91</sup>*

According to the definition given by the Statute of the International Court of Justice (ICJ), Customary International Law is ‘a general practice accepted as law’.<sup>92</sup> Thus, for a practice to obtain Customary International Law status, it needs to be a general state practice which is engaged in (or refrained from) out of a sense of legal obligation (*opinio juris*).<sup>93</sup>

In the *Fisheries Case*<sup>94</sup>, the International Court of Justice came to the conclusion that in the identification of State practice, which is of paramount relevance in the formation of Customary International Law, one can simply give weight to the verbal rather than the physical acts of states. This decision was subject to criticism. In his

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<sup>91</sup> See *Fisheries Case (United Kingdom v Norway)* [1951] ICJ Rep. 116, dissenting opinion of Judge Read, page 191

<sup>92</sup> See Statute of the International Court of Justice, Art.38 (1) (b).

<sup>93</sup> See *North Sea Continental Shelf* (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands), Judgment, 20<sup>th</sup> February 1969 [1969].

<sup>94</sup> *Ibid*: Following the promulgation of Norwegian legislation delimiting its fisheries zone in 1935, the United Kingdom protested and suggested recourse to the Permanent Court of International Justice. Pending resolution of this dispute, Norway stated that it would deal leniently with foreign shipping vessels which breached its legislation but in 1948, because no agreement had been reached, it abandoned this policy and a considerable number of United Kingdom trawlers were arrested and condemned.

dissenting opinion, Judge Read (as expressed in the quote above) was of the opinion that in the absence of enforcement with regard to the verbal act, State practice cannot be established. Going with this school of thought, one might be led to believe that a state that verbally takes a certain stand on a matter but does not physically act in accordance with that verbal stand, has not established State practice.

In the identification of State practice in this dissertation, I will not only consider the verbal acts by States, but will equally attempt to identify whether those States in fact assume the same stand through physical practice. It is important to also note that the mere fact that States engage in a practice does not mean that the practice is not customarily prohibited. The condemnation of such acts by other States may actually strengthen the characterization of that prohibition as Customary International Law.<sup>95</sup>

In the recent past, the identification of customary international humanitarian law rules that govern NIACs has developed significantly. Up until the mid 1990's, the thought that there were more than a simple handful of customary rules applicable in NIACs was not taken seriously and identifying those rules themselves proved to be problematic.<sup>96</sup> Since the mid 1990's however, the customary international humanitarian rules applicable in NIACs have grown considerably although there is some debate on which rules have gained customary status.<sup>97</sup> The identification and cataloguing of these customary rules in IHL can be attributed to the 2005 Customary IHL study by the ICRC.<sup>98</sup>

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<sup>95</sup> Michael N. Schmitt, E. Wilmshurt and Susan Breau (eds.) *The Law of Targeting in Perspectives on the ICRC Study on Customary International Humanitarian Law* (2007) p. 133.

<sup>96</sup> Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* (2012) p. 55.

<sup>97</sup> Ibid.

<sup>98</sup> J-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law Volumes I and II*, Cambridge University Press, (2005): The study conducted pursuant to a mandate from the 1995 International Conference of The Red Cross and Red Crescent, took nearly 10years to conclude and involved some 150 experts.

### 3.1 STATE PRACTICE

The importance of state practice in establishing customary international law goes without saying. One can argue that state practice is at the heart of customary international law. This is because only practice can constitute a custom.<sup>99</sup> Thus, in order to establish customary international law, the most fundamental thing would be to show practice. This view can be supported by the wording of Article 38 (1) (b) of the Statute of the ICJ which refers to ‘international custom, as evidence of a general practice accepted as law.’<sup>100</sup> However, one can easily question whether practice strictly refers to what is done by states or can also include practice by international non-state actors. One notes that, in its study, the ICRC includes statements by non-state actors as part of practice. The legitimacy of this approach needs to be addressed. What are the proper sources of evidence of state practice? What acts should we be looking at? According to Brownlie<sup>101</sup>, the sources include diplomatic statements and correspondence, executive practices, domestic legislation and judicial decisions. For the purposes of customary IHL, military manuals on the law of armed conflict are also a source of evidence of state practice.

Rosalyn Higgins argues that Customary International Law can also be identified by taking a look at the practice of the United Nations through its resolutions and official statements issued by its officials.<sup>102</sup> She believes that customary law is not only found in the sum total of the individual acts by States, but also in their collective acts. These collective acts of States, if repeated and acquiesced by sufficient numbers and

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<sup>99</sup> Brian D Lepard, *Customary International Law: A New Theory with Practical Implications* Cambridge University Press, (2010) p. 23.

<sup>100</sup> ICJ Statute, Article 38, para. 1(b).

<sup>101</sup> Brownlie, Ian, *Principles of Public International Law 7<sup>th</sup> ed.* Oxford University Press (2008).

<sup>102</sup> Rosalyn Higgins, *The Development of International Law through the Political Organs of the United Nations* Oxford University Press (1963) at p. 2.

in sufficient frequency, will eventually attain the status of law.<sup>103</sup> Therefore, the United Nations acts as a clear and very concentrated focal point for state practice. Since its establishment, the UN has increased the number of occasions on which States could act collectively and on the basis of the law.<sup>104</sup>

Jose Alvarez further argues that nowadays, neither judges nor diplomats have the patience to comb through laborious diplomatic exchanges to identify custom.<sup>105</sup> It is much easier to get this evidence of custom through legislative treaties created by international organizations. Thus, the international organizations provide shortcuts for finding evidence of custom.

Obviously, such an argument raises concerns especially among those who believe that customary international law should be derived only from the practice of states since States are the primary subjects of international law. Critics may also argue that the resort to the UN as a source of evidence of custom seems to give more priority to the rhetoric of States over their physical actions. However, one cannot deny the fact that the UN provides promptly produced and readily accessible evidence of state practice.

### **3.1.1 The ICRC on State Practice to Establish the Prohibition of Indiscriminate Attacks as Customary IHL**

By looking at the ICRC study, one notes that it does not come up with any particularly new approach of establishing customary IHL<sup>106</sup> with regard to the prohibition of indiscriminate attacks. It uses the traditional approach of establishing state practice and *opinio juris*. The ICRC study makes a compilation of all the

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<sup>103</sup> Ibid.

<sup>104</sup> Ibid.

<sup>105</sup> Jose E Alvarez *International Organizations as Law-makers* Oxford University Press (2006) p. 592.

<sup>106</sup> For a statement as to its approach, see *Customary International Humanitarian Law, Volume I: Rules*, xxxi.

relevant practice which includes treaties, military manuals, national legislation and case law.

### **3.1.1.1 Military Manuals**

Military manuals are meant to guide the armed forces of a State on how to conduct themselves during an armed conflict. They include all forms of instructions, such as manuals, directives and teaching instructions, given to the security and armed forces. From these Manuals, one can easily identify the position of a State on how its armed force conducts itself during an armed conflict, hence establishing State practice. It is next to impossible to look at Military Manuals from all States in the world. Therefore, this thesis will focus on a selected few; specifically states that are considered as military super powers together with various states that are involved in ongoing armed conflict.<sup>107</sup>

As already discussed in Chapter One of this thesis, the distinction between the rules which apply in the two types of armed conflicts seems to be ignored. Therefore, in this Chapter, I will discuss military manuals in two categories: those that prohibit indiscriminate attacks in NIACs and those that prohibit indiscriminate attacks without characterization of the armed conflict.

From the military manuals look at in this thesis, only two states prohibit indiscriminate attacks specifically in NIACs. These are the United Kingdom and France<sup>108</sup>.

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<sup>107</sup> See the states listed in chapter two as states that are most affected by armed conflict. From this list, only the Nigerian Law of Armed Conflict was accessible.

<sup>108</sup> United Kingdom Ministry of Defence: *The Manual of the Law of Armed Conflict* (Oxford) 2004; France, *Manuel de Droit des Conflits Armes*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armes, 2001.

Firstly, the United Kingdom Manual on the Law of Armed Conflict applies only in IACs except where otherwise specified<sup>109</sup>. The most obvious example of such an exception is Chapter 15 which is devoted to NIACs. This Manual is a description of the law as at July 2004. Generally, indiscriminate attacks are prohibited under this Manual<sup>110</sup>. In Chapter 15, the Manual considers that '[w]hile it is not always easy to determine the exact content of the Customary International Law applicable in NIACs, guidance can be derived from the basic principles of military necessity, humanity, distinction and proportionality.<sup>111</sup> Under this same Chapter, the Manual prohibits attacks that are not directed against military targets.<sup>112</sup> The Manual however acknowledges the fact that there's no specific rule on indiscriminate attacks under Customary Law but the principle of distinction prohibits attacks that are not aimed at a specific target.<sup>113</sup>

Secondly, according to the Law of Armed Conflict Manual of 2001<sup>114</sup>, the position of France is that the law of armed conflict 'requires commanders to take precautionary measures in the preparation and execution of the attacks to limit damage and ensure that they do not have indiscriminate effects'<sup>115</sup>. According to this Manual, the law of armed conflict as expressed in it applies to both international and non-international armed conflicts without distinction.<sup>116</sup>

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<sup>109</sup> See UK LOAC manual, *ibid* para. 1.9, p. 3.

<sup>110</sup> See Chapter 5.23 on the Prohibited Methods of Warfare on p. 68.

<sup>111</sup> See Chapter 15.15.

<sup>112</sup> *Ibid*.

<sup>113</sup> See Chapter 15.15.1.

<sup>114</sup> France, *Manuel de Droit des Conflits Armés*, Ministère de la Défense, Direction des Affaires Juridiques, Sous-direction du droit international humanitaire et du droit européen, Bureau du droit des conflits armés, 2001 p.85

<sup>115</sup> It states '*Le droit des conflits armés oblige les commandants à prendre des mesures de précaution dans la préparation et dans l'exécution des attaques pour en limiter les effets et s'assurer qu'elles n'ont pas d'effets indiscriminés.*'

<sup>116</sup> On the section '*When does IHL apply?*' (*Quand s'applique-t-il*): the manual states that it may be in international armed conflicts but also in non-international armed conflicts. '*Il peut s'agir d'un conflit armé international, mais aussi d'un conflit armé non-international*'.

On the other hand, there are several other military manuals that prohibit indiscriminate attacks without separating the two types of armed conflicts. Such states include the US, Russia, France, Israel, South Africa and Nigeria.

The United States of America through its Air Force Pamphlet prohibits indiscriminate attacks. It states that '[p]articular weapons or methods of warfare may be prohibited because of their indiscriminate effects'.<sup>117</sup> However, the pamphlet does not make a distinction between international and non international armed conflicts as regards indiscriminate attacks. In addition, one cannot fail to note the use of the word 'may' in the wording of the prohibition of indiscriminate attacks, which means that situations may arise where such prohibition is waived.

The Russian Federation's Military Manual of 1990 prohibits 'the launching of an indiscriminate attack affecting the civilian population or civilian persons in the knowledge that such attack will cause excessive loss of life, injury to civilians or damage to civilian objects'.<sup>118</sup> In addition to the Military Manual, the Russian Federation's Regulations on the Application of IHL of 2001<sup>119</sup> goes ahead to state that 'it is...prohibited to launch indiscriminate attacks while conducting combat operations'. These manuals do not distinguish between the two types of armed conflict.

The position of Israel is that the 'Israeli Defence Forces does not engage in indiscriminate attacks'. This is according to Israel's Law of War Booklet<sup>120</sup>, a report

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<sup>117</sup> United States, *Air Force Pamphlet 110-31, International Law- The Conduct of Armed Conflict and Air Operations*, US Department of the Air Force, 1976, Chapter 6-3 (c).

<sup>118</sup> Russian Federation, *Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister No. 75, 1990, Section 8(g).

<sup>119</sup> Russian Federation, *Regulations on the Application of International Humanitarian Law by the Armed Forces of the Russian Federation*, Ministry of Defence of the Russian, Moscow, 8 August 2001, Section 54.

<sup>120</sup> Report on the Practice of Israel, 1997, Chapter 1.4 referring to Law of War Booklet (1986) pp.4-5.

which expresses the practice of Israel. This booklet does not specify what type of armed conflict it applies to.

The South African Law of Armed Conflict Manual<sup>121</sup> makes it a grave breach to launch ‘an indiscriminate attack which affects the civilian population or civilian objects in the knowledge that such attack will cause excessive loss of life, injury to civilians and damage to certain civilian objects’.

The practice of Nigeria is expressed in the Report on the Practice of Nigeria<sup>122</sup> which interprets the prohibition of malicious destruction of property, buildings, churches and mosques provided for in the Nigeria’s Operational Code of Conduct as a prohibition of indiscriminate attacks.

### **Other Military Manuals**

According to a study into the practice of IHL by the International Committee of the Red Cross<sup>123</sup>, several other states have established practice by prohibiting indiscriminate attacks through their military manuals. Military manuals of Argentina, Australia, Belgium, Benin, Canada, Cameroon, Ecuador, Germany, India, Indonesia, Italy, Kenya, Netherlands, New Zealand, Spain, Switzerland, Sweden and Togo all prohibit indiscriminate attacks.<sup>124</sup> This set of practice seems to cover both categories of conflict since no distinction is made by the ICRC.

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<sup>121</sup> South Africa, *Law of Armed Conflict Manual of 1996*, para.37 (b).

<sup>122</sup> Report on the Practice of Nigeria, 1997, Chapter 1.4 referring to *Operational Code of Conduct for Nigerian Armed Forces, Federal Military Government of Nigeria, July 1967 para. f-g.*

<sup>123</sup> ICRC *Customary International Humanitarian Law, Volume II: Practice 2005* Chapter 4 page 249.

<sup>124</sup> Ibid ;see also Argentina, *Law of War Manual (1989)*, paragraph 4.03; Australia, *Defense Force Manual (1994)*, S. 921; Belgium, *Law of War Manual (1983)*, page 27; Benin, *Military Manual (1995), Fascicule III*, page 13; Canada *LOAC Manual (1999)* page 4-3,see also page 6-3,page 7-5 and page 8-5; Cameroon, *Instructor’s Manual (1992)* page 113 and 149; Ecuador, *Naval Manual (1989)*, paragraph 6.2.5; Germany, *Military Manual (1992)* paragraphs 401 and 404; India *Army Training Note (1995)* page 4/24, paragraph 17; Indonesia, *Military Manual (undated)*, paragraph 109; Italy, *IHL Manual (1991)*, Vol. 1 paragraph 85; Kenya, *LOAC Manual (1997)*, Précis No. 4 page 3; Netherlands, *Military Manual (1993)*, page V-4; New Zealand, *Military Manual (1992)* paragraph 517; Spain, *LOAC Manual (1996)*, Vol. 1 paragraph 4.4.c; Sweden, *IHL Manual (1991)*, Section 3.2.1.5;

## Conclusion on Military Manuals

It is important to note that the number of military manuals looked at in this thesis constitute a very small fraction of military manuals and directives in the world as a whole. However, this fraction may be sufficient to identify practice among States.<sup>125</sup> Apart from the United Kingdom Manual on the Law of Armed Conflict and the France LOAC manual, all the other Military Manuals looked at in this thesis do not make specific provisions for NIACs but rather prohibit indiscriminate attacks in international armed conflict or as a general prohibition.

One can argue that the general prohibition of indiscriminate attacks in these military manuals covers NIACs as an extension and should not be interpreted specifically in reference to IACs. This would be to say that from the military manuals, the prohibition of indiscriminate attacks in NIACs is implied through the general prohibition.

However, this still leaves some questions as to why there is no clear and express prohibition of the indiscriminate attacks as done in the UK Law of Armed Conflict Manual. One may argue that whatever is not expressly covered in the military manuals leaves a loophole in the directives issued to the armed and security forces. Therefore, although there is, through the military manuals, state practice showing the prohibition of indiscriminate attacks in IACs, state practice is not established when it comes to the prohibition of indiscriminate attacks in NIACs unless States have adopted the ICTY approach where the same rules apply across the board.

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Switzerland, *Basic Military Manual (1987)*, Article 193 (1) (b); Togo, *Military Manual (1996)*, *Fascicule III*, page 13.

<sup>125</sup> International Court of Justice, *North Sea Continental Shelf case*, Judgment, 20 February 1969, ICJ Reports 1969: In this case the ICJ came up with the doctrine of 'specially affected' states. This doctrine provides that it is not essential for a majority of states to have actively participated as long as the 'specifically affected states' are represented.

### 3.1.1.2 Other State Practice

The ‘Friends of Syria’<sup>126</sup> core group of countries, which consists of Britain, Egypt, France, Germany, Jordan, Italy, Qatar, Saudi Arabia, Turkey, the United Arab Emirates and the United States, strongly condemned President Asaad’s regime’s escalating indiscriminate attacks by use of chemical weapons and scud missiles together with brutality on the ground.<sup>127</sup>

States have condemned the indiscriminate attacks carried out by the Muslim extremist group Al Shabaab in Somalia<sup>128</sup>. The African Union, which comprises of 54 African States,<sup>129</sup> condemned indiscriminate attacks on public places by warring parties in the Somali conflict. The Republic of South Africa condemned ‘in the strongest terms the bomb attack that targeted a building housing Turkish Embassy staff in Mogadishu, Somalia on the evening of 27 July 2013’.<sup>130</sup> Similarly, the Turkish and the US governments both condemned the indiscriminate attack by the Al Shabaab militia group saying it was ‘cowardly and contrary to international humanitarian law to launch an attack on civilians’.<sup>131</sup>

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<sup>126</sup> The ‘Friends of Syria’ (sometimes referred to as the ‘Group of Friends of the Syrian People’) is an international diplomatic collective of countries and bodies convening periodically on the topic of Syria outside the UN Security Council. The collective was created in response to a Russian and Chinese veto on a Security Council resolution condemning Syria. Available at [http://en.wikipedia.org/wiki/Friends\\_of\\_Syria\\_Group](http://en.wikipedia.org/wiki/Friends_of_Syria_Group) [last visited on 25th August 2014].

<sup>127</sup> Available at <http://aoav.org.uk/2013/friends-syria-strongly-condemn-regimes-attacks/>.

<sup>128</sup> The extent and nature of armed violence, and the level of organization of the non state armed group (the Al-Shabaab), mean that the situation has reached the threshold of an armed conflict. Since Somalia is fighting a non state armed group, the armed conflict is qualified as being of a non-international character. This is as per the Geneva Academy of International Humanitarian Law and Human Rights, available at <http://www.geneva-academy.ch/RULAC/index.php>.

<sup>129</sup> Through the Chairperson of the African Union Commission for Somalia, Ambassador Boubacar Gaoussou Diarra, available at [http://news.xinhuanet.com/english2010/world/2010-05/01/c\\_13275400.htm](http://news.xinhuanet.com/english2010/world/2010-05/01/c_13275400.htm).

<sup>130</sup> This was an indiscriminate bomb attack carried out by the Al Shabaab militia group which claimed six lives including one Turkish official, a university student and two Somali security guards. The press release by the Government of the Republic of South Africa is available at <http://www.southafrica.be/press-release-80/>.

<sup>131</sup> Available at [http://www.sabahionline.com/en\\_GB/articles/hoa/articles/newsbriefs/2013/07/28/newsbrief-01](http://www.sabahionline.com/en_GB/articles/hoa/articles/newsbriefs/2013/07/28/newsbrief-01).

With regard to the NIAC in Nigeria<sup>132</sup>, States have publicly condemned the indiscriminate attacks by the Boko Haram and its affiliates. The United States of America designated the Boko Haram as a foreign terrorist group and condemned the indiscriminate use of force both by the group and by the government towards the insurgence.<sup>133</sup> Zambia, through a statement by the President Michael Sata, condemned attacks on a church by the Boko Haram that killed 39 people on Christmas day near the Abuja capital.<sup>134</sup> Russia similarly, through a statement by its President, Dmitry Medvedev, condemned the ‘cruelty and cynicism...’ of the attacks by Boko Haram on the churches on Christmas day.<sup>135</sup>

### **Conclusion on Other State Practices**

From the examples given above, it seems that most states do condemn indiscriminate attacks and the use of indiscriminate weapons during NIACs. Such condemnation is done through official government statements and through regional organizations such as the African Union, which represent the views of their member States.

Once again, one can note that in as much as states do publicly condemn indiscriminate attacks, very little attention is paid to the classification of the armed conflict. It is unclear as to whether states make the condemnation as an extension of the prohibition of indiscriminate attacks in IACs or whether they have simply blurred

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<sup>132</sup> The Boko Haram, which is an extremist Muslim group, seeks strict implementation of Islamic Law throughout Nigeria. It has been behind countless terrorist attacks in Nigeria since 2010, targeting police stations, barracks, markets, churches and the UN headquarters in Abuja. The ICRC and the ICC have both classified the conflict between the Nigerian government and the Boko Haram organization as a Non international Armed Conflict.

<sup>133</sup> Special background briefing on designation of Boko Haram and Ansaru as foreign terrorist organizations and as specially designated global terrorists by Senior Administration Officials via teleconference on the 13<sup>th</sup> of November 2013 available at

<http://www.state.gov/r/pa/prs/ps/2013/11/217532.htm>.

<sup>134</sup> Available at <http://www.lusakatimes.com/2011/12/28/president-sata-condemns-terror-attack-nigeria/>.

<sup>135</sup> Available at <http://eng.kremlin.ru/news/3278>.

the lines of distinction and apply the prohibition as a general rule. One cannot tell whether States in fact think that they are dealing with armed conflict at all.

Notwithstanding their position on the distinction between the two types of armed conflict, the obvious position is that states do publicly condemn indiscriminate attacks and thus the rule against indiscriminate attacks could perhaps be said to have gained Customary IHL status through this general prohibition.

### **3.1.1.3 The Practice of the United Nations**

The United Nations condemned the indiscriminate attacks made by the Syrian government and the armed groups during the ongoing Syrian conflict that initially started out as a non international armed conflict. Through its Secretary General, Ban Ki Moon, the UN voiced its concerns over the continuous and indiscriminate use of heavy weapons and mortar shelling in the ongoing conflict.<sup>136</sup>

In 2007, the UN Security Council adopted a resolution concerning the Somali NIAC where it stressed ‘the responsibility of all parties and armed groups in Somalia to take appropriate steps to protect the civilian population in the country, consistent with international humanitarian; human rights and refugee law, in particular by avoiding any indiscriminate attacks on populated areas’.<sup>137</sup> In addition, the President of the UN Security Council in a statement regarding the same Somali conflict condemned in particular the indiscriminate shelling of heavily populated areas in Mogadishu.<sup>138</sup>

In the year 2004, the President of the Security Council in his official statement concerning the situation in the Darfur region of Sudan, expressed his concern, on

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<sup>136</sup> Available at

<http://www.un.org/apps/news/story.asp?NewsID=46860&Cr=syria&CrI=#.UuogJc74vfy>.

<sup>137</sup> UN Security Council Resolution 1772 of 20<sup>th</sup> August 2007, para.19.

<sup>138</sup> UN Security Council, Statement by the President, UN Doc. S/PRST/2007/13, 30 April 2007, p.1.

behalf of the Security Council, at the ‘continuing reports of large scale violations of human rights and of international humanitarian law in Darfur, including indiscriminate attacks on the civilians’.<sup>139</sup>

The General Assembly, in a resolution adopted in 1996 regarding the armed conflict in the Sudan, expressed its concerns about ‘continuing deliberate and indiscriminate aerial bombardments’ by the Government of Sudan of civilian targets in Southern Sudan, in clear violation of IHL, and at the same time urging the government to cease such attacks.<sup>140</sup>

Through several resolutions adopted within the period of 1995 to 1998, the United Nations Commission on Human Rights called upon the Government of the Sudan to ‘cease immediately the deliberate and indiscriminate aerial bombardment of civilian targets and relief operations’.<sup>141</sup>

#### **3.1.1.4 The International Criminal Tribunal for the Former Yugoslavia**

In its decision on the defence motion for interlocutory appeal on the jurisdiction in the *Tadić* case in 1995, the ICTY Appeals Chamber held that rules of Customary IHL have developed that regulate NIACs. To reach this conclusion, the Tribunal referred to various sources; including, *inter alia*, the behaviour of belligerent States; governments and insurgents; the action of the ICRC; UN General Assembly Resolutions 2444 (XXIII) of 1968 and 2675 (XXV) of 1970; military manuals and declarations issued by regional organizations. The Appeals Chamber stated that these

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<sup>139</sup> UN Security Council, Statement by the President, UN Doc. S/PRST/2004/18, 25<sup>th</sup> May 2004, p.1.

<sup>140</sup> UN General Assembly, Res. 51/112, 12 December 1996, preamble and para.8.

<sup>141</sup> UN Commission on Human Rights, Res. 1995/77, 8 March 1995, preamble and para.16; UN Commission on Human Rights, Res. 1996/73, 19 April, 1996 para.12; UN Commission on Human Rights, Res. 1997/59, 15 April 1997, para.15; UN Commission on Human Rights, Res. 1998/67, 21 April 1998, para.15.

rules covered areas such as the protection of civilians against effects of hostilities; in particular protection against indiscriminate attacks.<sup>142</sup>

### **Conclusion on State Practice**

In order to determine whether the rule prohibiting indiscriminate attacks in NIACs has gained customary IHL status, we look at military manuals, other forms of state practices (obtained through official government statements), the practice of the United Nations and other regional organizations and finally international judicial bodies.

From the study done in this thesis, it is noteworthy that most of the military manuals looked into prohibit indiscriminate attacks. However, not all of them specify whether such prohibition is with regard to NIACs. The military manuals take a more general approach in their prohibition and leave one with the assumption that the prohibition is inferred in both types of armed conflicts. Such lack of specificity may be considered as a loophole in the prohibition of indiscriminate attacks in NIACs by the military manuals. However, it may also be considered as the vanishing of the traditional distinction between laws applicable to IACs and those applicable to NIACs.

However, with regard to the other national practices by states and the United Nations looked into, it seems that the rule prohibiting indiscriminate attacks in NIACs is gaining customary IHL status. This is attributed to the uniform position by most states that such indiscriminate attacks are a breach of international law.

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<sup>142</sup> Adopted from the study on Customary International Humanitarian Law by the ICRC, available at [http://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule11](http://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule11); ICTY, *Tadić Case*, Interlocutory Appeal, 2 October 1995, para.100-127.

### 3.2 *OPINIO JURIS*

*Opinio Juris* is considered as an essential element of customary international law. In the 1969 North Sea Continental Shelf Case, the ICJ stated that ‘not only must the acts concerned amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it’.<sup>143</sup> The principle *opinio juris sive necessitatis* means that states in their practice must feel that they are conforming to some form of legal obligation. It is an important element of customary international law because it helps to distinguish legal custom from what states do as mere social habit. Michael Byers<sup>144</sup> points out that *opinio juris* enables one to distinguish between legally relevant and legally irrelevant State practice.

From the definition itself, a paradox seems to arise whereby the whole concept of *opinio juris* proposes that State practice becomes legal only after States perceive it to have been legal. This is to say, for the practice to be legal; it has to have been legal. Many commentators have noted this paradox. Finnis<sup>145</sup> argues that *opinio juris* is paradoxical because ‘it proposes that a customary norm can come into existence (i.e. become authoritative) only by virtue of the necessary erroneous belief that it is already in existence (i.e. authoritative). Other commentators<sup>146</sup> while identifying this paradox argue that it is harmless so long as the only problem at issue is the identification of existing customary law. In as much as this paradox is a major point of concern regarding *opinio juris*, it will not be dealt with in detail in this thesis.

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<sup>143</sup> See North Sea Continental Shelf Case 1969 ICJ Rep. 3 para. 77.

<sup>144</sup> Byers Michael, *Custom, Power and the Power of Rules: International Relations and Customary International Law*, Cambridge University Press (1999) p. 148.

<sup>145</sup> Finnis J M, “Authority.” *In Authority ed. Joseph Raz*, New York University Press (1990) page 180.

<sup>146</sup> See D’Amato Anthony, *The Concept of Custom in International Law*, Cornell University Press, (1971) p. 73-74.

It is without doubt that *opinio juris* plays an important role in identifying customary international law. How then do we determine its existence? What is the proper criterion for identifying *opinio juris*? Some scholars believe that uniform state practice in itself is evidence of *opinio juris*.<sup>147</sup> This argument suggests that there is a presumption of *opinio juris* unless proven otherwise. Other scholars have questioned the need for *opinio juris* at all. Maurice Mendelson argues that the ICJ does not bother to look for proof of *opinio juris* where there is a well-established practice thereby rendering it unimportant.<sup>148</sup> The International Law Association also stated that it not necessary to establish *opinio juris* which is the subjective element before a customary rule can be said to have come into existence.<sup>149</sup>

From the study done by the ICRC on customary IHL, one notes that the ICRC simply affirms that for a customary rule to exist, the requirements of state practice and *opinio juris* must be present. It points out that in most cases both the two elements are evidenced by the same acts. Therefore, once one has established ‘sufficiently dense’ state practice, *opinio juris* can be presumed. The ICRC in the study states that;

“It proved very difficult and largely theoretical to strictly separate elements of practice and legal conviction. More often than not, one and the same acts reflect both practice and legal conviction... When there is sufficiently dense practice, an *opinio juris* is generally contained within that practice and, as a result, it is not usually necessary to demonstrate separately the existence of an *opinio juris*”<sup>150</sup>

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<sup>147</sup> See North Sea Continental Shelf Case, Dissenting Opinion of Judge Lachs in the ICJ, 1969 (‘the general practice of states should be recognized as prima facie evidence that it is accepted law’).

<sup>148</sup> See Brian D Leppard, *Customary International Law: A New Theory with Practical Applications* Cambridge University Press (2010) p. 22; Mendelson Maurice, ‘The subjective element in customary international law’ *British Yearbook of International Law* 66 (1995) p. 206-207.

<sup>149</sup> International Law Association, London Conference (2000) Committee on Formation of Customary (General) International Law ‘Final Report of the Committee: Statement of Principles Applicable to the Formation of General Customary International Law’ Section 1, Commentary para. (b) (4).

<sup>150</sup> ICRC *Customary International Humanitarian Law, Volume I* (2005), p. xl.

According to Wilmschurt<sup>151</sup>, the ICRC thought that the need to draw a strict line between practice and *opinio juris* was generally unnecessary. The establishment of uniform State practice prohibiting indiscriminate attacks is sufficient to establish a customary rule.

However, this approach by the ICRC received criticism specifically by the United States government<sup>152</sup>. The US believes that the correct methodological approach would be to assess both elements separately.<sup>153</sup> It further pointed out that even if one was to accept the merger of the two elements, the ICRC in its study failed to provide a test for determining when state practice is ‘sufficiently dense’ so as to excuse the failure to substantiate *opinio juris*.<sup>154</sup>

Even though the criticism by the US government seems valid, it is obvious that there cannot be a mathematical threshold for the density of state practice. This is because the density of the state practice primarily depends on the subject matter.<sup>155</sup> Some legal issues will occur more than others thus generating more state practice. For example, the issue of indiscriminate attacks on civilians is discussed almost on a day to day basis and is covered in most military manuals. On the other hand, an issue such as the use of nuclear weapons doesn’t occur as often. One only needs to compare such two instances to see that there cannot be a mathematical or fixed threshold for state practice.

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<sup>151</sup> Elizabeth Wilmschurt and Susan Breau (eds.) *Perspectives on the ICRC Study on Customary International Humanitarian Law* Cambridge University Press (2007) p. 24.

<sup>152</sup> John B Bellinger and William J Haynes, ‘A US government response to the International Committee of the Red Cross study on customary international law’ *International Review of the Red Cross*, Vol. 89, number 866 June 2007, p.466.

<sup>153</sup> *Ibid.*

<sup>154</sup> *Ibid.*

<sup>155</sup> Jean-Marie Henckaerts ‘Customary humanitarian law: a response to US comments’ *International Review of the Red Cross* vol. 89 number 8666, June 2007, p. 475.

Therefore, one can persuasively argue that as long as state practice on the prohibition of indiscriminate attacks seems extensive and virtually uniform, *opinio juris* can be presumed.

## CHAPTER FOUR

### 4. THE LAW PROHIBITING INDISCRIMINATE ATTACKS IN NIACS: LOOPHOLES AND REMEDIES

#### 4.1 Introduction

Recently, the world has witnessed a great shift from the traditional armed conflicts between states to conflicts that are non international in nature. This shift creates an urgent need to re-evaluate the laws of armed conflict that deal with NIACs. It is only through such re-evaluation that the same protection enjoyed by civilians in IACs can be extended to NIACs. The aim of this thesis was to critically analyse the application of *jus in Bello* to indiscriminate attacks in NIACs. This was to be done through an assessment of treaty and customary IHL in order to identify whether such attacks are indeed prohibited. This thesis was founded on the basic fundamental principle of distinction which provides that civilians should not be made the object of attacks. This thesis also sought to identify, if any, the loopholes in the law prohibiting indiscriminate attacks in NIACs. After an in-depth analysis of the law together with the ICRC perspective, this thesis comes to the conclusion that indiscriminate attacks are prohibited in NIACs. Such attacks are prohibited in both treaty and customary IHL. However, there are loopholes in the law that need to be addressed.

#### 4.2 Loopholes in the law prohibiting indiscriminate attacks

The spirit of IHL is to ensure that all persons not taking part in an armed conflict are protected. In order to protect these persons, the law has to be foolproof. The ICRC should ensure that the fundamental principles underlying the protection of civilians should not have loopholes. It is only then, that IHL shall fully achieve its goal of reducing the number of civilian casualties in armed conflicts. From the chapters in

this thesis, various gaps can be identified. These gaps in the law are evident in both treaty law and customary IHL. This section seeks to point out those gaps and to identify whether the two regimes of law complement each other in a bid to fill them.

First, a major issue is the number of treaties prohibiting indiscriminate attacks in non-international armed conflicts. As already discussed in the chapter on treaty law, these two treaties may prove insufficient in the regulation of indiscriminate attacks in a world that is currently experiencing more NIACs than IACS. IHL has played a major role in protecting civilians during inter-state conflicts. It has also ensured that warring states abide by certain standards regarding the protection of civilians during the conflict. This would not have been possible without the comprehensive body of treaty IHL governing IACs which expressly prohibit indiscriminate attacks. One can argue that such efficient regulation of the protection of civilians can also be achieved in NIACs through ensuring that the prohibition is reiterated in more existing treaties. Also, the fact that states which are specially affected by NIACs are not party to the treaties makes the gap in treaty IHL more worrying. However, customary IHL steps in to fill this gap. As discussed, all parties who are not signatories to treaties prohibiting indiscriminate attacks in NIACs are bound by the same prohibition under customary law. Through state practice and *opinio juris*, this dissertation establishes (in chapter 3) that customary IHL prohibits indiscriminate attacks in NIACs.

Secondly, the absence of the express prohibition of indiscriminate attacks in NIACs in Article 3 common to the Geneva Conventions and their Additional Protocol II of 1977 is a huge gap in treaty IHL. It is expected that an instrument which was specifically created to protect victims of NIACs should expressly prohibit indiscriminate attacks. Despite the reasons discussed in chapter 2, this gap hinders the effective protection of persons not participating in the armed conflict. Once again

customary IHL steps in to fill this gap in the Geneva law by applying the prohibition of indiscriminate attacks in Additional Protocol I as custom.

Thus, should customary law always be used as the fall back plan for such an important prohibition that is meant to protect civilians? One can argue that both regimes of IHL need to expressly prohibit indiscriminate attacks. Therefore, the following recommendations can be made.

### **4.3 Recommendations**

1. In order to illustrate the importance of the prohibition of indiscriminate attacks, a significant revision of Additional Protocol II to the Geneva Conventions should be done. This revision should involve the inclusion of the prohibition of indiscriminate attacks in NIACs. It should further include a clear definition of what constitutes such attacks. The prohibition can be included as an amendment of Article 13 of the Additional Protocol II thus making it similar to Article 51 of Additional Protocol I. This recommended amended Article 13 of the Additional Protocol II of 1977 should include paragraph 4 and 5 which state:

*“4. Indiscriminate attacks are prohibited. Indiscriminate attacks are:*

- a) those which are not directed at a specific military objective;*
- b) those which employ a method or means of combat which cannot be directed at a specific military objective; or*
- c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol;*

*and are consequently, in each such case, are of a nature to strike military objectives and civilians or civilian objects without distinction.*

*5. Among others, the following types of attacks are to be considered as indiscriminate:*

- a) *an attack by bombardment by any methods or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects; and*
- b) *an attack which may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”*

This amendment will serve as the crystallization in treaty law of the existing customary IHL prohibition of indiscriminate attacks in NIACs.

**2.** Secondly, the ICRC which is tasked with promoting the effective application of IHL should urge states that are mostly affected by NIACs to sign and ratify the instruments prohibiting indiscriminate attacks. These states (such as those mentioned in chapter two of this dissertation) should be encouraged to sign and ratify Protocol II and Amended Protocol II to the CCW. This will act as a first step towards ensuring the effectiveness of the application of treaty IHL to indiscriminate attacks in NIACs.

**3.** In light of the changing realities in IHL, more research and study should be done on the importance of characterization of armed conflicts. The ICRC should assist in determining whether the dichotomy of conflicts has been rendered useless by the changing circumstances. As seen in this thesis, the position of characterization of conflicts in modern IHL is unclear. This lack of clarity seems to cause more harm than good. The ICRC or other concerned international organizations may also seek advisory opinions from judicial bodies in a bid to clarify this issue.

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