# WARS OF NATIONAL LIBERATION IN RELATION TO LAWS OF ARMED CONFLICT

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**Abstract**

*Under traditional international law, wars of national liberation were classified as civil wars, however, in contemporary time, it is classified as international armed conflict and as such the legal regimesapplicable in their regulation are the Geneva Conventions and Additional Protocol 1. This type of armed conflict is one in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right to self-determination. This work argues that by virtue of the Article 1(4) of the Protocol Additional to the Geneva Conventions of 12 August, 1945, and Relating to the Protection of Victims of International Armed Conflicts, of 8 June 1977, parties involved in armed conflict of this nature shall be treated in compliance and due regard with the provisions of IHL regimes of laws of armed conflict of international in character.*

***Keywords:*** *International humanitarian law, wars of national liberation, Non-State Armed Groups, Geneva Conventions, Additional Protocols, armed conflict*

## 1.1 Introduction

Wars of National Liberation are variously fought by Non–State Armed Groups (NSAG) who seek self-determination against the state or colonial regime. Under international law, legal instruments which impact on the regulation of armed bearers are ratified by sovereign states only. The outcome of this scenario is that NSAGs fall outside the remit of the international treaty, and as such, their use of force, and use of force against them, is unregulated which is to the determent of combatants and civilians alike. In view of this gap, the International Committee of the Red Cross (ICRC) and some non–governmental organizations, especial, the Geneva Call, engineered a new trend which was to accommodate NSAGS under international humanitarian law (IHL) framework. This work considers the circumstances under which NSAGs, especially national liberation movements could be regulated by the rules of IHL. It shall give overview of the relevant legal provisions that regulate prosecution of armed conflict with the framework of national liberation movement. Earlier, traditional international law did not offer adequate protection to victims of non–international armed conflicts as war of national liberation was ignored by this law. It was not until the adoption of the Geneva Convention for the Protection of War Victims of 1949[1] that provisions of international humanitarian law could be applicable to

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[1] 1949 Geneva Convention (I) of the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; 1949 Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention (III) Relative to the Treatment of Prisoners of War; 1949 Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

wars of national liberation. The four Geneva Conventions of 1949, focusing on the Wounded and Sick on Land and at Sea, Prisoners of War and Civilians, apply to conflicts of an international character. There is one exception among the provisions to this scope of application– Article 3 Common to the Four Conventions, which extends the scope of protection to those involved in conflicts of a non–international character.[2]

The classification of a war of national liberation as an international or a non-international conflict is of central importance with regard to the Geneva Conventions and the protection of the war victims. If a war of national liberation can be regarded as a conflict of an international character, then the *jus in bello* of the Conventions[3] applies to the conflict. However, if a war of national liberation is considered to be a non–international conflict, it is only the rudimentary rules of *Common Article 3* of the Four Geneva Conventions that will apply, thus greatly limiting the protection afforded to those involved in such a conflict.[4]

## 1.2 Clarification of Concepts

### a. War of National Liberation

A War of National Liberation is defined as "the armed struggle waged by a people through its liberation movement against the established government to reach self-determination".[5]It is constituted of a category of NSAGs that appeared predominantly in the decolonization period and relate to peoples self-determination. National liberation movement corresponds to a category of NSAGS who are defined by their objectives (self–determination), the quality of their constituency (peoples) and the conduct and/or quality of the opposing government.[6] In essence, national liberation movements constitute the self-help vehicle of people to achieve self–determination. The right to self–determination has been enshrined in conventional law in various legal provisions, such as *Article I and 55* of the UN Charter,[7] and *Common Article I* of the International Covenant on Civil and Political Rights,[8] and the International Covenant on Social, Economic and Cultural Rights.[9] This is also a *jus cogens* norm binding on all states, as recognized by the International Court of Justice.[10] Nevertheless, because it is very difficult to implement, the right of a people to self–determination often goes ignored or is denied. In many

[2]Regarding the Geneva Conventions and *Common Article 2*, Rivelamira Comments: The only migration to these rigorous provisions was mildly provided for in *common Article 3*, which specified certain minimum standards to be applied in internal conflicts, i.e wars of non – international character.*Common Article 3* required parties to the conflict to be guided by considerations of humanity towards each other – Rivelamira in Swinarski 1984, 230.

[3] About 400 articles

[4] Higgins, N, "The Application of International Humanitarians Law to Wars of National Liberation", *Journal of Humanitarian Assistance*, cited as www.jha.ac/articles/9132, pddf, retrieved 24 August, 2019.

[5]Ronziti, N; Resort to Force in Wars of National Liberation, in Current Problems of International Law, Essays on U.N. Law and the Law of Armed Conflict, 310 – 3553 (Antonie Cassese, Dott, A. GuiffreEditior (eds.), 1975)

[6]Mastorodimos, K, "National Liberation Movements: Still a Valid Concept (With Special Reference to International Humanitarian Law), *Oregon Review of International Law*, Vol. 17, 72.

[7]UN. Charter 1945 article I and 55

[8] International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (NO. 16) at 52, U.N DOC A/6316 (1966)

[9] International Covenant on Economic, Social and Cultural Rights, G.A. res 2200 A(XXI) 21 UN. GAOR Supp. (NO. 16) at 49, UN. DOC A/6316 (1966)

[10] East Timor (*Port v Austria*), 1995, I.C.J. 90, at 90 (June 30)

cases, this denial encourages the creation of national liberation movements and the outbreak of wars aimed at challenging government authority and achieving self–determination through force.

The main spate of Wars of National Liberation occurred in the mid–twentieth Century, however, Wars of National Liberation did not vanish completely after the decolonization period. In fact, according to the report, Peace and Conflict 2008, 26 armed self–determination conflicts were ongoing representing the Palestinian people, the Corsicans in France, and the Chechens in Russia.[11] Additionally, in 2008 the South Ossetians, with support from Russia, declared independence from Georgia after an armed struggle.[12]

### b. **Laws of Armed Conflict**

Laws of armed Conflict also known as international humanitarian law is defined as the branch of international law limiting the use of violence in armed conflict by:

a. Sparing those who do not,[13] or no longer[14] directly participate in hostilities and;
b. Limiting the violence to the amount necessary to achieve the aim of the conflict, this can be – independently of the causes fought for – only to weaken the military potential of the enemy.[15] This body of law sets out detailrules aimed at protecting the victims of armed conflict and restricting the means and methods of warfare.[16] IHL is a collection of those "International rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international armed conflicts and which, for humanitarian reasons, limit the right of the parties to a conflict to use methods and means of warfare of their choice or protect persons and property that are, or may be, affected by the conflict.[17] The chief objective of IHL is to protect the human being and to safeguard the dignity of man in the extreme situation of war. Its provisions have at ways been tailored to fit human requirements, and they are bound to an ideal. The protection of man from the consequences of brute force which in most cases is perpetrated by the state is the objective of this body of law. IHL is therefore, a part of that branch of Public International Law safeguarding human rights from abuse by state power.[18] The law of armed conflict makes allowances for the phenomenon of war and legitimate military goals. At the same time the individual who does not or no longer participates in hostilities must be protected. The conflicting interests of military necessity and humanitarian consideration are dealt with in

[11] Hewitt, J. J; Wilkenfield, J. &Gurr, T. R, *Peace and Conflict,* 2008 14 (Paradigm Publisher, 2007)

[12]Higgin, N. & O Rielly, K, "The Use of Force, Wars of National Liberation and the Right to self determination in the South Ossetian Conflicts", *9 Int'l Crim. L. Rev.* 567, 567 – 574 (2009).

[13] For instance, civilians

[14]Eg; Wounded, Sick or Prisoners of War or those *hors de combat.*

[15]Sassoli, M, *et al*, *How Does Law Protect in War?* Vol. 1 (3rd Edn), Geneva, ICRC, 2011, 93

[16] Hagler, O; "Etiological Perspectives of Contemporary International Humanitarian Law", Rivers State University Journal of Property Law and Contemporary Issues, Vol. 6, NO 1, 2017, 87 – 101; See also; Ibezim, E.C, Contemporary Challenges to International Humanitarian Law. The Private Military Companies: The Military Companies' (2013) *ABSU – PCLJ (Vol*. I) 88

[17] Gasser, H.P, International Humanitarian Law – An Introduction, Being Stuttgart & Venue, Paul Publishers, 1993, 16.

[18] Hagler O, 'Enforcement of International Humanitarian Law: Appraisal of the Role of National Committees', Published Ph.D thesis submitted to the Faculty of Law, ABSU, 2016, 25; See, James Johnson, *Just War Tradition and Restraint of War,* Prince University Press, 198.

rules which limit the use of force in war but do not prohibit it when such use is legitimate.[19] In essence, the rules are meant to protect the individuals but do not aim to an absolute protection from the effect of warfare, which would be impossible. Nevertheless, it must be stated that torture is forbidden in all circumstances, without exception, because even from the military point of view, torture is never necessary.[20] While making no claim that it can put an end to the scourge of war, IHL aims to alternate the unnecessary harshness of war. It is not the purpose of IHL to prohibit war or to adopt rules rendering war impossible. Rather, it reckons with war which is justified only by necessity and must not serve as an end to itself. In the process of the prosecution of the war, *jus in bello* must be adapted to *jus ad bellum*.[21]

The cardinal principle of IHL is that belligerents shall not inflict harm on their adversaries out of proportion with the object of warfare, which is to destroy or weaken the military strength of the enemy. To achieve its objective, a state engaged in conflict seeks to destroy or weaken the war potentials of the enemy made up of two elements, resources in mean and resources in materials, at the least cost of itself.[22]It is from this perspective that the principle of law of Geneva, which stipulates that persons placed *hors de combat*,[23] and those not directly participating in hostilities shall be respected, protected and treated humanely is derived. This principle specifies the following three duties towards the victim of war: to respect them, protect them and treat them humanely.[24]

### c. Self – determination

Self – determination is a human right. Although there are many hortatory references to self – determination in General Assembly Resolutions and elsewhere, the only legally binding documents in which the right to self – determination is proclaimed are the two international

[19]Pictet, Jean, *The Geneva Conventions of 12 August, 1949. Commentary*, Vol 4, ICRC, Geneva, 1952; Sandoz, Y, Swinarski, C, & Zimmerman, B (eds.), *Commentary on the Additional Protocol of 8 June to the Geneva Conventions of 12 August 1949*, ICRC, MartinusNijhoff Publishers, Geneva, 1987

[20]*Article 4* of the Hague Regulations of 1907, *Article 13* Geneva Convention III, *Articles 4 and 27* Geneva Convention IV, See also *Articles 50, 51, 130 and 140* of the Four Geneva Conventions, *Article 75* Additional Protocol I and *Article 4* Additional Protocol II.

[21] Hagler, O. 'Evaluation of the Effects of Corruption in the Armed Conflict in Northeast and Other Situations of Violence in Nigeria', *Beijing Law Review*, 2018, 9, 623 – 660, retrieved from http://www.scrip.org/journal/blr,SSN Online: 2159 – 4635; See also, Moir, L, "The Historical Development of the Application of Humanitarian Law in Non – International Armed Conflicts to 1949, in International & Comparative Law Quarterly, Vol 47, 1998, 337 - 61

[22]Pictet, J., *Development and Principle of International Humanitarian Law*, MartinusNijhoff Publishers, Geneva, 1985, 62; See also, Hagler O., "Violation of International Humanitarian Law by Parties to the Armed Conflict in the Northeast Nigeria", International Journal of Business and Law Research, Vol. 6, 2018, 58 – 66, retrieved from www.seahipaj.org, ISSN: 2360 – 8986.

[23]*Common Article 3 (1)* of the Four Geneva Conventions of 12 August 1949. The notion of *hors de combat* in IHL simply implies that combatants who are either wounded, sick, or can no longer engage in combat as a result of any form of incapacitation shall be spared; See also, Draper, G.I.A.D, "The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols of 1979" in *Recueil des Cours*, Vol. 164, Part III, 1979, 1 – 94.

[24]*Article 5* Geneva Convention IV, see also, Farer, I.J, Humanitarian Law and Armed Conflicts: Towards the Definition of International Armed Conflict" in *Columbia Law Review*, Vol. 71, 1971, 37 – 72; Gardam, J (ed), *Humanitarian Law*, Dartmouth Publishing Coy, England, 1999.

covenants.[25] The first paragraph of *Common Article I* States: "All peoples have the right to self – determination. By virtue of that they freely determine their political status and freely pursue their economic, social and cultural development".[26] First clarification is that self – determination is a right that belongs to collectivities known as "people", not to individuals. It is also clear that the said right belongs to peoples and not to minorities.[27] Both *Article 1 and Article 51* of the UN Charter refer to the principle of self – determination,[28] a principle which has often been a source of controversy within the organization, with some membership states regarding self – determination as "a mere standard of achievement towards which member states should strive as an ideal",[29] while others view it as a legal obligation. Over the years, the principle of self – determination has been the source of many General Assembly resolutions and has gradually taken on the mantle of the second option- that of a legal right. During the period of decolonization, the international community gave much theoretical support to those involved in struggles for national liberation. This support came from the various resolutions adopted by the UN and their international and regional organizations. Many of these resolutions were founded on the UN Declaration on the Granting of Independence to Colonial Countries and Peoples.[30] Another example of such support is a resolution adopted in 1964 by the Conference of Jurists of Afro–Asian Countries in Conakry.[31]Resort to arms by colonized peoples was also recognized by the Conference of Non – aligned States in 1964 in Cairo.[32]

The idea that the attainment of liberation was irresistible was echoed in many UN resolutions issued by the General Assembly from 1905 onwards, which reaffirms the legitimacy of the

[25]*Article I* of International Covenant on Civil and Political Rights, Dec. 19 1966, 999 U.N.T.S 171; *Article I* International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S 3.

[26]Article I, ICCPR; *Article I*, ICESCR, See also, Hannum, H. "The Right of Self – Determination in the Twenty –First Century", *Washington and Lee Law Review*, Vol. 55, issue 3, 1998.

[27] Human Rights Committee's General Comment 23 on Article 27 (50th Session 1994) reprinted in Compilation of General Comments and General Recommendations adopted by Human Rights Treaty Bodies, UN DOC. HRI/GEN/I/REV 3 (1997) (XVIII), 1963 (557 UNTS 143) 2101, 1965 (638 UNTS 308); and 2847 (XXVI) 1971 (892 UNTS 119)

[28] Charter of the United Nations (1945) as amended by GA Res. 1991 (XVIII), 1963 (557 UNTS 143) 2101, 1965 (638 UNTS 308), and 2847 (XXVI) 1971 (892 UNTS 119)

[29]Akkerman, R.J, Van – Krieken, P.J and Pannenborg, C. O (eds), *Declaration on Principles: A Quest for Universal Peace,* A.W. Sigthoff, Leyden, 1977.

[30] UN Res. 1514 (XV) of 16 Dec. 1960. This declared that (1) The subjugation of peoples to alien subjugation, domination and exploitation constitutes a denial of fundamental human rights, is contrary to the Charter of the United Nations and is an impediment to the promotion of world peace and co operation… (4) All armed action or repressive measures of all kinds directed against dependant peoples shall cease to enable them to exercise peacefully and freely their rights to complete independence, and the integrity of their national territory shall be respected".

[31] This states are follows: "… all struggle undertaken by the people for the national independence or for the restitution of the territories or occupied parts thereof, including armed struggle, are entirely legal; See also, Verwey, W.D., 'Decolonisation and ius ad bellum' in Akkerman& Van Krieken&Pannenborg (eds), *Declarations on Principle. A Quest for Universal Peace,* A.W. Sijthoff, Leiden, 1977, 121 – 40

[32]It was stated thus: "the Process of liberation was irresistible and irreversible. Colonized peoples may legitimately resort to arms to secure the full exercise of their right to self – determination and independence if colonial powers persist in opposing their national aspirations".

struggle for self – determination and thus for national liberation.[33] Following on this trend in 1970 was the Declaration on Principle of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations.[34] This Declaration is significant with regard to the world community's view on self determination, and indeed on wars of national liberation, because its Drafting Committee worked on the basis of consensus and it was also adopted by the General Assembly by consensus. This was the first time the western powers recognized self – determination as a legal right and its denial as a violation of the Charter of UN.[35] Wars of national liberation, which is wars of those seeking self – determination, had been regarded as conflicts of a non–international in nature, falling within the ambit of municipal law, common Article 3 and Additional Protocol II. Therefore, both the use of force by liberation movements to gain self – determination and by government to quell such armed activity was not subject to the prohibition of the use of force in international Law.[36]However, once self – determination was recognized as an international legal right, then the issue of the use of force in wars of national liberation was also altered.

By the 1970 Declaration,[37] wars of national liberation could no longer be viewed as domestic conflicts. Regarding the use of force, the Declaration provides that every state has the duty to refrain from any forcible action which deprives peoples of their rights to self – determination and freedom and independence. It further states that in their action against, and resistance to forcible action in pursuant of the exercise of their right to self – determination, such peoples are entitled to seek and receive support in accordance with the purpose and principles of the charter. This generally implies that force used by national liberation movements or third states to resist a denial of self–determination is, infact, legitimate under the UN Charter.[38] The 1970 Declaration ultimately leads to the conclusion that the whole corpus of *jus in bello* should apply to wars of national liberation as they are conflicts of an international nature caused by a struggle for self – determination which has been denied by force. Through various resolutions, the General Assembly has called for the application of Geneva Conventions to wars of national liberation. This resolution contained the "Basic principles on the legal status of the combatants struggling against colonial and alien domination and racist regimes". Point 3 of the Declaration stated thus:

> The armed conflicts involving the struggle of people against colonial and alien domination and racist regimes are to be regarded as international armed conflicts in the sense of the 1949 Geneva Conventions and the legal status envisaged to applyto the combatants

[33]Eg; GA Res. 2105 (XX) of 1965; GA Res. 2107 (XX) GA Res. 2189 (XXI) of 1966 GA Res. 2326 (XXII) of 1967; GA Res. 2405 (XXIII), GA Res. 2396 (XXIII) of 1968; GA Res. 2547 (XXIV) of 1969

[34] GA Res. 2625 (XXV)

[35]Abi – Saab in Akkerman, R. J. Van – Krieken, P.J and Pannenborg, C.O (eds), *Declarations on Principle. A Quest for Universal Peace* (*Supra*), 370

[36]*Article 2 (4)* of the charter of the United Nations of 1945, as amended by GA Res. 1991 (XVIII), 1963 (557 UNTS 143), 2101 (XXI), 1965 (638 UNTS 308); and 2847 (XXVI) 1971 (892 UNTS 119)

[37] The 1970 Declaration states: "The territory of a colony or other non-self-Governing Territory has under the Charter, a status and distinct from the territory of the state administering it, and such separate and distinct status under the Charter shall exist until the people of the colony or non – self governing territory have exercised their right to self – determination".

[38]Abi–Saab, G; "Wars of National Liberation in the Geneva Conventions and Protocols" in Recueil des Cours, Vol. 165, Part IV, 1979, 353-445

> in the 1949 Geneva Conventions and other international instruments is to apply to the persons
> engaged in armed struggle against colonial and alien domination and racist regimes.[39]

**d. Rebellion**

The concept of rebellion denotes a mere sporadic and isolated challenge to the legitimate authority, conferring neither rights nor duties on the rebels. Rebellion occurs within the precincts of a sovereign state, even if the state of rebellion is recognized by a third state. Rebels are legally treated and regarded as criminals under municipal laws and, if captured, do not enjoy prisoner of war status. Assistance from third states is prohibited by international law rules and provisions and regarded as unlawful intervention and interference with state sovereignty, and thus rebels have no protection under international law. International law purports to give no protection to participants in a rebellion. Rebellion usefully covers minor instances of its internal war of a wide variety; violence protest involving a single issue or an uprising that is so rapidly suppressed as to warrant no acknowledgement of its existence on an extra-nation level. These norms of identifications are however, vague and seldom serve *expressisverbis* to adjust the rebellion as a state of affairs and international actors affected in various ways by its existence. So the criteria of rebellion are quite vague and uncertain and the term rebellion can cover many instances of minor conflicts within a state from violent single – issue protests to a rapid suppressed uprising.

e. **Insurgency**

Traditionally, insurgents were considered to have international rights and obligations with regards to those states that recognized them as having such as status. To be eligible for such recognition insurgents need only satisfy minimal conditions:

> International law only establishes certain loose requirements, for eligibility to become an international subject. In short, (1) rebels should prove that they have effective control over some part of the territory, and (2) civil commotion should reach a certaindegree of intensity and duration (it may not simply consist of riots, or sporadic and short – lived acts of violence).
> It is for states (both that against which the civil strife breaks out and other parties) to appraise – by granting or with holding, if only implicitly, recognition of insurgency – whether these
> requirements have been fulfilled.[40]

With regard to an insurrectional group recognized as such by the relevant state, it is clear that there are certain international rights and obligations that flow from this status, depending on the terms of the recognition.[41] Under this traditional international law, insurgents, who were

[39] *Ibid.*

[40] Cases, A, *International Law* (Oxford: Oxford University Press, 2nd edn, 2005) 125; See also Cassese, A, *International Law in a Divided World* (Oxford: Oxford University Press, 1986) 81 – 85; Clapham, A, *Human Rights Obligations of Non – State Actors*, Oxford, Oxford University Press, 2006) 271.

[41] Reidel, E. H, "Recognition of Insurgency" in Bernhardt, R (ed) "Encyclopedia of Public International Law", Vol. IV (Amsterdam: Elsevier, 2000b) 54 – 56.

recognized by the state against which they were fighting, not only as insurgents, but also expressly as belligerents, became assimilated to a state actor with all the attendant rights and obligations which flow from the laws of international armed conflict[42]. Presently these recognition regimes have been replaced by compulsory rules of IHL which apply when the fighting reaches certain thresholds. Although the theoretical possibilities remain for states to bestow rights and obligations on rebels by recognizing them as either insurgents or belligerents, it makes more sense today to consider rebels (unrecognized insurgents) simply as addresses of international obligations under contemporary international humanitarian law, especially the obligations contained in *common Article 3* to the Four Geneva Conventions of 1949, in Protocol II of 1977 to the Geneva Conventions, and in *Article 19* of the Hague Conventions on Cultural Property of 1954.

Generally, insurgency is of a more serious gait than rebellion. Incidentally, there is no universally acceptable definition of insurgency, leaving much confusion around the concept. There are two concepts or schools of thought regarding the status of insurgents in international law. Scholars as Higgins and Greenspan hold the view that conferring the status of "insurgents" on a group brings than out of the corpus of municipal law and elevate then onto international law forum. Castren and his group hold the view that the status of insurgency does not confer any rights or duties on the group and that they are still subject to municipal criminal law.[43] However, it seems practically that the status of insurgency elevates the group out of the domestic realm into the quasi–international law status.[44]

While the threshold of insurgency is unclear, it seems to be the case that insurgency constitutes a civil disturbance which is usually confirmed to a limited area of the state's territory and is supported by a minimum degree of organization.[45] An analysis of the law relating to insurgence leads to the conclusion that certain characteristics must attach to rebels for them to become insurgents:[46] which is sufficient control over territory and requisite military force to incur interest of foreign states because of the possibilityof the actions of the insurgents having an adverse effect on foreign states. The right of insurgents is limited to the territorial boundaries of the state involved, however, insurgents are allowed to enter into general agreement and arrange for humanitarian protection through the ICRC. However, it is also generally agreed that other rights, for instance, right to blockade, which attach to belligerents, do not, in fact, also attach to insurgents.[47] Insurgency could be partially internationalized conflict or a rebellion without fully bringing it to the standard of belligerency. Therefore, insurgency is regarded as potential belligerency.[48] Recognition of insurgency has mainly been substituted by **Article 3** of the Geneva Conventions and in some cases, by unilateral declarations of parties to a conflict made

[42]*Ibid.* 47 – 50.
[43] Wilson, H. A*., International Law and the Use of Force by National Liberation Movements*, Clarendon Press, Oxford, 1988
[44] Falk, R. A, "James Tormented: The International Law of Internal War" in Rosenau (ed), *International Aspects of Civil Strife*, Princeton University Press, New Jersey, 1964, 185 – 248
[45]Merron, P. K, *The Law of Recognition in International Law. Basic Principles*, TheEdwnMellen Press, Lewiston/Queenston/Lampetor, 1994.
[46]Wilson, H – A; Supra.
[47] Ibid.
[48]Menon, P. K; Supra.

upon the request of the ICRC, to the effect that for a specific conflict they would agree to apply certain principles of the humanitarian law. This happened in Algeria (1953 – 1952), in the Congo (1962 – 1964), in the Yemen (1962 – 1967) and in Nigeria (1967 – 1970).

**f. Belligerency**

Belligerency is the condition of being in fact engaged in war. A nation is deemed a belligerent even when resorting to war in order to withstand or punish an aggressor. A declaration of war is not required to create a state of belligerency. Through the application of the laws of war to civil wars, the doctrine challenges the state–centric model of international law, which goes back to the US Civil War during which it was affirmed by the US Supreme Court in 1862 Prize Cases and then codified in the 1863 Lieber Code.[49]Recognition of belligerency by the government side implies that the major part of international humanitarian law becomes applicable to a non–international armed conflict.[50] Belligerency is the final category of a challenge to the established government recognized by international law, and involves a conflict of a more serious nature than either rebellion or insurgency. Recognition of belligerency formalizes the rights and duties of all parties to a war. In order for a conflict to pass into the category of belligerency, certain characteristics must attach to it, otherwise referred to as conditionalities for recognition. These include the following:

a. the insurgents had occupied a certain part of the state territory;
b. established a government which exercised the rights inherent in sovereignty on that part of territory; and
c. if they conducted the hostilities by organized troops kept under military discipline and complying with the laws and customs of war.

Thus belligerents could only be recognized if the hostilities had assumed the attributes of war.[51]

According to Higgins, the criteria for recognition of belligerency are:

a. The existence within a state of a widely spread armed conflict;
b. The occupation and administration by rebels of substantial portion of territory;
c. The conduct of hostilities in accordance with the rules of war and through armed forces responsible to an identifiable authority;
d. The existence of circumstances which makes it necessary for third parties to define their attitude by acknowledging the status of belligerency.[52]

The situation regarding recognition of belligerency is more concretely defined than that of rebellion or insurgency. The rights and duties of belligerents are clearer. Once a state of belligerency has been recognized, the belligerent group becomes a subject of international law which incurs some of the rights and obligations of states, including the rights and duties of

[49] Max, P., *Oxford Public International Law*, Oxford, ValentinaAzarora, 2015

[50]Sassoli, M., et al, *How Does Law Protect in War*, *supra*

[51]Schlindler, D., "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", in Recueil des Cours, Vol. 163, 1979, 116 – 63

[52] Higgins, R., "International Law and Civil Conflict", in The International Regulation of Civil Wars, Luard (ed), 1972, 169 – 861; Luard, E, "Civil Conflict in Modern International Relations, in Luard (ed), *The International Regulation of Civil Wars*, Thames and Hudson, London, 1972, 7 – 25.

international humanitarian law. However, in practical terms, belligerency has not, in fact been recognized in any conflict in many years even though some situations over the years, for instance, the Nigeria–Biafra conflict in 1967, the Algerian conflict and the civil war in Nicaragua would have reached the threshold of belligerency.

## 1.3 Rules and Principles of Laws of Armed Conflict applicable in Wars of National Liberation

Before 1949, members of national liberation movement were treated as criminals under municipal law. This was the common practice of states and under traditional international law before international humanitarian law dealt with non – international conflicts in *common Article 3* of the 1949 Geneva Convention. The first attempt to codify this regime was found in Francis Lieber's Code,[53] which was formulated for use in US Civil War – the first war of the modern era. During the course of this war, non – international conflict, 'combatants' on both sides were generally treated as legitimate combatants and were also treated as prisoners–of–war if captured. With the adoption and ratification of the Fourth Geneva Convention of 1949 for the protection of victims of war, the provisions of IHL became applicable to wars of National Liberation. The Geneva Conventions of 1949 focus on the wounded and sick on land, and at sea, prisoners of war and civilians and these apply to conflicts of international in character. However, *common Article 3* of the Four Geneva Conventions provides for scope of protection for those involved in conflicts of non – international in character. The classification of a war of national liberation as an international or a non – international conflict is of central importance with regard to the Geneva Conventions and the protection of war victims. If a war of national liberation can be regarded as a conflict of an international character, then the whole *jus in bello* of the conventions applies to the conflict.[54] In another development, if a war of national liberation is considered to be a non – international conflict, it is only Common Article 3 of the Four Geneva Conventions that will apply which generally limits the protection afforded to those involved in such a conflict.

### 1.3.1 Application of the Geneva Convention of 1949

The Geneva Conventions of 1949 automatically changed the perception of the concept of war under international law. The conventions provide for both declare war and all other armed conflicts between states regardless of the intensity of the conflict.[55]

#### i. International Armed Conflict

As indicated earlier, wars of national liberation could benefit and be regulated by the Geneva Conventions of 1949 under some conditions.[56] Granted that the Conventions are, in principles, open only to sovereign states, they contain two provisions which could be of use to wars of national liberation. These include the following:

[53] Lieber Code, Instructions for the Government of Armies of the United States in the Field

[54] The Four Geneva Conventions have about 400 Articles.

[55] See, *Common Article 2 (1)* of the Geneva Convention of 1949.

[56] Abi – Saab, G, "Wars of National Liberation and the Laws of War" in *Annalesd'EfudesInternationales*, Vol.3, 1972, 93 – 117.

a. *Common Article 60/59/139/155* regarding accession to the Convention. This provision provides thus:
From the date of its coming in force, it shall be open to any power in whose name the present convention has not yet been signed, to accede to this Convention.

b. *Common Article 2 (3)* of the Four Geneva Conventions. It provides that:

> Although one of the Powers, in conflict may not be a party to the present Conventions, the Powers who are parties thereto shall remain bound by it in their mutual relations. They shall furthermore be bound by the convention in relation to the said power, if the latter
> accepts and applies the provisions thereof.

The terms "power" or "powers" in these two provisions can be taken to include national liberation movements. These movements can accede to, or accept to be bound by, the Geneva Conventions under either Common Article 60/59/139/155 or Common Article 2 (3), thus bringing the whole corpus of *jus in bello* into application in wars of national liberation. This work is not unware that it was not the intention of the drafters of the 1949 Conventions to allow none State Parties or "Power" to benefit from the provisions of the Conventions. This is so as the main spate of wars of national liberation did not take place until the 1960's and did not come within the treaty negotiating radar in 1949.[57]
A scholar noted thus:

> It seems plausible to argue that in 1949 the states gathered at Geneva neither took wars of national liberation into account nor envisaged the possibility for national liberation movement to be become a contracting party to the Conventions or at anyrate to be allowed to be bound by them.[58]

This work adopts the argument of Dietrich Schlindler to the effect that despite the fact that the drafters of the Geneva Conventions did not contemplate the application of the Conventions on wars of national liberation, but parties to that conflict could be seen as "Power" within the meaning of the provision of the convention.[59] He posited thus:

> The fact that in 1949 the authors of the Conventions considered colonial wars non international conflicts in the sense of Article 3

[57] In the opinion of the creators of the conventions of 1949, wars which today are characterized as wars of liberation were considered as non – international conflicts. The territory of the colonies was looked upon as part of the territory of the mother Country. See, Pictet, J.,*The Geneva Conventions of 12 August 1949: Commentary*, 4 Volumes, ICRC, Geneva, 1952.
[58]Cessese, A; "Wars of National Liberation and Humanitarian Law" in Swinarski (ed), *Etude et essays sur/e droit international humanitarian et surles principles de la croix – Rouge* – en honneur de Jean Pictet, MartinusNijohff Publishers The Netherlands, 1984, 313 – 24.
[59]Schlindler, D. &Toman, J., (eds), *The Laws of Armed Conflicts,* 3rd ed., Martinus Nijhoff Publishers, Dordecht, 1988.

> cannot be decisive in this respect. For the conception in the minds of the authors of a treaty is not relevant to its later interpretation.[60]

Furthermore, *Article 51* of the Vienna Convention on the Law of Treaties of 1969 provides that a treaty is to be interpreted with regard to the ordinary meaning conferred on its terms in their context and in the light of its object and purpose. In this direction, if the term "Power" is interpreted according to the objective and purpose of the Geneva Conventions, it does not seem out of place to regard a liberation movement as a "Power".

ii. **Non – International Armed Conflict**

As said earlier, traditionally and prior 1949, wars of national liberation were regarded as purely non – international armed conflictsor simply, civil wars and thus falling outside the scope of application of all provisions of the Geneva Conventions except for common Article 3. Prior to World War II, the attention of the laws of war was focused on conflicts between sovereign states. However, it was realized that civil wars were becoming more prevalent and that some form of regulation of such conflicts was necessary. The above position generated controversy at the 1949 Diplomatic Conference whose goal was to revise the Geneva Conventions. While traditional international law had always held that civil wars were purely municipal concern, one of the aims of the 1949 Conference was to bring non – international armed conflicts within the jurisdiction of the law of war. This attempt paid off eventually through the provision of Common Article 3. The said article provides thus:

> In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be boundto apply, as a minimum, the following provisions…

The article provided protection for the following:

a. Civilians
b. Combatants wounded, sick, internees,

The following acts were prohibited on the above persons/individuals:

a. Murder, mutilation, cruel treatment and torture;
b. Taking of hostages;
c. Degrading and humiliating treatment;
d. Passing of sentences and carrying or executions without judicial trial first.

The provision enjoins parties to a conflict to enter into special agreement to bring into force all or part of other provisions of the convention. It states that the application of the provisions of the article or convention shall not affect the legal status of the parties to the conflict. *Common Article 3* is a milestone towards the development of the law of war. This indeed, was the first

[60] Schindler, D., "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols" in *Recueil des Cours*, Vol 163, 1979, 116 – 63

attempt to legally regulate non –international armed conflicts in treaty law. This provision seek to apply the most basic principles enshrined in the Geneva Conventions to non – international armed conflict, however, it falls short of the application of the whole corpus of IHL. While Common Article 3 is similar to the full range of provision contained in the Geneva Conventions in that it extends protection to those caught up in non – international armed conflicts regardless of the rebel's cause, this protection is much less than that afforded in situations of international armed conflicts.

*Common Article 3* of the Geneva Convention impacts on wars of national liberation by virtue of its applicability, even though minimally. Firstly, owing to the fact that the provision concerns non – international armed conflict, there is the presumption that one of the parties to the conflict is not a state and therefore, the issue of whether a national liberation movement can come without the remit of this provision is easily answered in the affirmative. Again, it is conceivable that this provision could apply to such a conflict, with the threshold for common Article 3 not even being as high as that for recognition of belligerency. However, it must be reiterated that the protection which would be afforded to those involved in wars of national liberation under Common Article 3 is of minimal nature. While a High Contracting Party is under no obligation to afford the protection guaranteed by Article 3 to those involved in a non – international armed conflict against them (possibly a national liberation movement), *common Article 3* also provided additional duty on parties by stating that "the parties to the conflict should further endeavor to bring into force, by means of special agreements, all or part of the other provisions of the present conventions.[61] This means that if a national liberation movement was deemed to come within the scope of Common Article 3, it and the parent state are also encouraged to apply all the other provisions of the Geneva Conventions relating to international armed conflicts, thus offering a much broader base of protection to those involved in wars of national liberation, including a limit on the means and methods of warfare and on the conduct of hostilities.

### 1.4 **State Practice**

There was a similitude of applicability of Geneva Conventions during the war of national liberation in Nigeria in 1967 – 1970(Nigeria – Biafra war). However, the Nigerian government did not formally recognize the application of the Geneva Conventions including Common Article 3. But, the Federal Government issued a Code of Conduct to its troops which required them to treat Biafran Prisoners as prisoner of war. The government also issued orders for the protection of civilians, and civilian property, religious sites and building. Again, the Red Cross also regularly visited Federal Government – held prisoners.[62]

Similarly, on the part of Portugal, it refused to recognize the applicability of the Geneva Conventions, and Common Article 3, in the conflicts in its territories of Guinea Bissau, Angola and Mozambique and resorted to the use of its municipal criminal law to combat the conflicts. This position changed in 1974 as the state (Portugal) invited ICRC to visit its prisoners of war. Also, the National Liberation Front of Algeria between 1956 and 1958 declared its intention to

[61] *Common Article 3 (2)* of the Geneva Convention of 1949

[62] Wilson, H.A., *International Law and the Use of Force by National Liberation Movement*, Clarendon Press, Oxford 1988

be bound by the provisions of the Geneva Convention on Prisoners of War in relation to the Federal Prisoners and subsequently issued orders to its combatants to comply with IHL. Following the above the Provisional Government of the Republic of Algeria (GPRA) notified the depositary of the Geneva Convention that is the Swiss government, of its accession to the Geneva Conventions in 1960. The Swiss government then notified the other High Contracting Parties of the Geneva Conventions but made a reservation to the accession because it did not recognize the GPRA.[63] The French government, on its part, in 1956 during that Algerian War recognized the applicability of Common Article 3 as the National Liberation Front of Algeria (FLN) threatened reprisals if executions of captured FLN members continued.[64]

Furthermore, in 1969, the Palestinian Liberation Organization (PLO) communicated to the Swiss Federal Political Department that they were willing to accede to the 1949 Geneva Conventions on condition of reciprocity. However, the Swiss government did not communicatethis offer to accession to the High Contracting Parties because they believed that the PLO was not a state party as it did not govern its own territory, and at this stage it had not formed its own provisional government. In 1980, the African National Congress (ANC) of South Africa, made a statement regarding to ICRC of their willingness to apply and be bound by Geneva Conventions of 1949. After ANC was the provisional government established in the Western Sahara by the Polisario (SDAR). This group declared the applicability of the Geneva Conventions on its operations. It allowed the ICRC to visit Moroccan prisoners of war held by the Polisario Front.

## 1.5 Conclusion

Wars of armed struggle waged by a people through its liberation movement against the established government to reach self – determination have occupied a space in international humanitarian law and international law. Owing to the fact that wars of national liberation are emotive and often led to violence of a savage nature and destruction on a large scale, there is grave urgency for the application of the Geneva Conventions and Additional Protocols. This stems from the sheer seriousness of wars of national liberation and the fate of those involved in the wars. The emphasis and importance placed on state sovereignty has been to be detriment of humanitarian protection of those involved in wars of national liberation.

By refusing to acknowledge a *Common Article 3* or a Protocol II conflict situation, the states' own civilians fail to benefit from the protective measures embodied in these provisions. Also, by failing to acknowledge a Protocol II conflict situation, states deny legitimacy to national liberation movements as well as the right to these movements to fulfil their wish, and indeed, right of self – determination as accepted by the UN and by the international community as well as affectively denying many innocent people the right to benefit from the protection of international humanitarian law. If national liberation movements could be allowed to agree to be bound by and apply the Additional Protocols and Geneva Conventions and benefit from reciprocity, this could result in less death, damage and destruction. Therefore wars of national liberation should be subject and subordinated to the rules and principles of IHL.

[63] Ibid; 51

[64] Von Tangen, P. M, *Prisoner, Peace and Terrorism*, Macmillian Press Ltd; Great Britain 1998