Non-Intervention in Non-International Armed Conflict (NIAC): Examination of the Law and the 21st Century Realities

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Abstract

Non-International Armed Conflict (NIAC) is the prevalent type of armed conflict today and it is regulated by International Humanitarian Law (IHL) through treaties, customs and principles. NIAC adversely affects governance and the people especially the civilians. More often than not, NIACs occur in failed States or parts of the territory of the State that have failed. Additional Protocol II, however, prohibits intervention by other Sovereign States in NIACs and the prohibition is absolute. This brings us to the fulcrum of the matter which is the relationship between Public International Law (PIL) and International Humanitarian Law (IHL). This relationship is better expressed in the separation between *jus ad bellum* and *jus in bello*. These two areas of International Law are not mutually exclusive as they are only different sides of the same coin. Self-defence authority is not a "no law zone" and cannot be conducted without the regulatory scrutiny of the means and methods of warfare. The UNSC Resolutions 1456 of 2003 and 1566 of 2004 reinforce the fact that the centrality of IHL is applicable in the fight against terrorism. The law is that non-intervention is absolute in NIAC but

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the realities of the 21st Century do not support that position. This article seeks a middle ground whereby the international community does not keep silent in the face of massive violations of IHL by sovereign States in the name of non-intervention in NIACs. This is an urgent call to build a bridge between theory and practice in the regulation of the employment of military combat power and the protection of the victims taking into consideration the relationship between PIL and IHL.

Key words: *Jus ad Bellum*, *Jus in Bello*, Non-International Armed Conflict (NIAC), Non-Intervention in NIACs, and Armed conflict.

Introduction

There are two legally recognized types of armed conflict under International Humanitarian Law (IHL): International Armed Conflicts (IACs) and Non-International Armed Conflict (NIACs). Each type of armed conflict is regulated by different sets of treaties. The absolute prohibition of intervention in NIAC[3] is observed mostly in the breach. Examples of intervention in NIAC abound: Syria, Libya, Yemen, Mali, etc. There is the urgent necessity for a closer scrutiny of the provision prohibiting intervention in NIAC in line with the 21st Century realities of the devastation brought about by NIAC in many parts of the world including north-east Nigeria. By extension, there is a gulf between the two extremes of *jus ad bellum* and *jus in bello*; and there is the necessity to construct a bridge over that gulf for the protection of the victims in the area of collective action where necessary. This is the crux of this article.

The separation of *jus ad bellum* from *jus in bello* is excellent as they operate in different realms in theory. The practical realities of the employment of military combat power in both realms calls for an adjusted understanding that both should be regulated especially as both realms employ means and methods of warfare. The United Nations Security Council (UNSC) Resolutions 1456 of 2003 and 1566 of 2004 are examples of the adjusted understanding that we are calling for. In those resolutions, the SC called on States to observe for the centrality and application of human rights and humanitarian laws in counter terrorism, an area which had hitherto been regarded as "no law zone" especially since

[3] Protocol Additional to the Geneva Conventions of 12 August 1949and Relating to the Protection of Victims of Non-International Armed Conflict (Additional Protocol II) of 8 June 1977, (hereinafter Additional Protocol II), art. 3 (2).

9/11. The same creative thinking can also be applied in NIAC with regard to intervention to protect the victims and civilian objects.

Generally, International Armed Conflict (IAC) is the preserve of sovereign States under International Law. This is because IAC is an armed conflict that exists between sovereign States. Non-International Armed Conflict (NIAC) on the other hand is, however, the prevalent type of armed conflicts in the world today. Wars since the 1990s have been internal.[4] The reality of NIAC is always felt in the massive violations of protected persons and civilian objects by the parties to the conflict. Armed conflict is generally a matter that concerns the international community as a whole. Armed conflict in one part of the world actually concerns and affects every other part of the world as well. The events in the former Yugoslavia in 1989 and Rwanda in 1994 are still very fresh in our minds and cannot be erased so easily from our memory. Armed conflict, whether international or non-international, is regulated by International Humanitarian Law (IHL) which is one of the aspects of International Law. IHL regulates the means and methods of warfare by mandating parties to an armed conflict to strike a balance between military necessity and humanitarian considerations in attacks. By "means of warfare" we are referring to the weapons and the weapons' system employed in attacks in armed conflict while "methods" refer to the manner in which the "means" is employed in combat activities. "Attacks" means acts of violence against the adversary, whether in offence or in defence.[5] It is, therefore, provided as a basic rule that:

> In any armed conflict, the right of the parties to the conflict to choose methods or means of warfare is not unlimited.
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> It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering.
>
> It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause

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4 Kofi A. Annan, '*We the Peoples': The Role of the United Nations in the 21st Century* (New York: United Nations Department of Public Information, 2000), 43.

5 Protocol Additional to the Geneva Conventions of 12 August 1949and Relating to the Protection of Victims of International Armed Conflict (Additional Protocol I) of 8 June 1977, (hereinafter Additional Protocol I), art. 49 (1).

> widespread, long-term and severe damage to the natural environment.[6]

The ground rules of armed conflict are as provided for in the four Geneva Conventions of 12 August 1949, the two Additional Protocols of 1977, the Third Additional Protocol of 2005, the Rome Statute of the International Criminal Court (ICC) of 1998, principles of IHL, Customary International Law and other relevant treaties of a humanitarian character. NIAC is the reality that armed conflict that breaks out in a sovereign State is of utmost concern to the international community. The concern of the international community in NIAC is not as a result of the conflict itself but as a result of the effects of the armed conflict on the victims as protected persons and its reverberating effects in neighbouring and other countries.

Intervention and non-intervention by the United Nations or other States become inevitable especially where there are violations of the laws that protect civilians and those who are no longer participating in the hostilities, that is, parties to the armed conflict now turned victims. IHL authorizes sovereign States, which are experiencing NIAC, to maintain or re-establish law and order or to defend the national unity and territorial integrity of their States.[7] The authority to maintain or re-establish law and order or to defend the national unity and territorial integrity of their States is predicated on "by all legitimate means."[8] IHL also prohibits intervention, based on the provisions of Additional Protocol (AP) II, in NIAC or in the internal or external affairs of the High Contracting Party in NIAC.[9]

Does the above provision on non-intervention have the final say in NIAC? The question is based on the realities of the 21st Century interventions in NIACs. Examples of intervention abound in Yemen, Syria and Libya. On the other hand, does the provision against non-intervention in IHL affect the provisions of the Charter of the United Nations with regard to "action with respect to threats to peace, breaches of the peace, and acts of

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6 Protocol Additional I, art. 35 (1)-(3).
7 Additional Protocol II, art. 3 (1).
8 Ibid.
9 Ibid, art. 3 (2).

aggression" and regional arrangements in that regard?[10] Put in a different way: is IHL and Public International Law (PIL) mutually exclusive or there is a confluence? It is important to make a few clarifications here. First, IHL does not or attempt to arm-strung the realistic and objective application of combat power for which the military is trained or known for in situations of armed conflict. Second, IHL is not also an authority to employ military combat power, without restraints, in armed conflict especially in NIAC. Finally, there must always be the willingness to strike a balance between military necessity and humanitarianism, which are the bases for IHL, in armed conflict especially in NIAC.

The focus of this article is the examination of the law of non-intervention in NIAC and the 21st Century realities of NIAC with respect to the necessity or otherwise of intervention. This leads to further examination of the relationship between IHL and PIL with respect to the legality and necessity or otherwise of intervention and non-intervention in NIAC. We acknowledge the controversies surrounding the topic of intervention in Internal Law. We do not intend to delve into those in this article.

Non-International Armed Conflict (NIAC)

NIAC is a type of armed conflict recognized and regulated by International Humanitarian Law (IHL) of Armed Conflict.[11] The other legal classification of armed conflict is that known as international armed conflict (IAC) which is also regulated though by a different set of treaties.[12]

There is no definition of NIAC by the treaties that regulate that type of armed conflict but the Common Article (CA) 3 and the AP II describe it as:

> … an armed conflict which takes place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups

[10] Charter of the United Nations (UN) 1945, arts. 39-54. These are the provisions in Chapters VII and VIII of the Charter of the UN.

[11] Geneva Conventions (GCs) I, II, III and IV of 1949, art. 3; Additional Protocol (AP) II of 1977 and the Rome Statute of the International Criminal Court (ICC) 1998.

[12] Geneva Conventions (GCs) I, II, III and IV of 1949; Additional Protocol (AP) II of 1977 and the Rome Statute of the International Criminal Court (ICC) 1998. These are the core treaties but other specific treaties of a humanitarian character also apply in armed conflict.

> which, under a responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol.[13]

The above description takes into consideration three types of NIAC which are armed conflicts between:

(a) Government forces and dissident armed forces;

(b) Government forces and other organized armed groups; and

(c) Armed conflict among the other organized armed groups themselves.

The armed conflict in the north-east part of Nigeria between the Nigerian military and the insurgents since 2009 is in the second category mentioned above.

The important elements in the above description, which can be regarded as conditions for the existence of NIAC, are that the parties to the armed conflict must exhibit the following:

(a) There must be responsible command;

(b) There must be exercise of control over a part of territory;

(c) There must be sustained and concerted military operation; and

(d) The parties must implement the Protocol.

It should be noted that it is not every employment of arms by government forces against dissident armed forces or organized armed groups that translate into NIAC. This is very clear from the provision of AP II which states that "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."[14] This provision is what is generally referred to as the threshold for the

[13] AP II, art. 1 (1).
[14] Ibid, art. 1 (2).

existence of NIAC above which IHL applies and below which IHL does not apply.

The Protocol does not explain what it meant by "internal disturbances and tensions." This generates much confusion especially in this era where States are very eager to declare any opposition group as a terrorist organization and proscribe it.[15]

As stated earlier, the treaties of IHL do not define armed conflict but the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) offers a working definition in *Prosecutor v. Dusco Tadic* thus:

> … an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups within a State.
>
> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place.[16]

The above definition by the tribunal covers both international and non-international armed conflicts.

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15 In Nigeria, three organizations have been declared as terrorist organizations and proscribed in accordance with the Terrorism (Prevention) Act 2011 (as Amended in 2013). These organizations are: Boko Haram and its affiliated groups, Indigenous People of Biafra (IPOB) and the Islamic Movement of Nigeria (IMN).

16 Case No: IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995.

NIAC seeks to protect the victims of armed conflict who are:

> Persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.[17]

From the above, the persons taking no active part in hostilities are the civilians. This is because the principle of distinction, which is a cardinal principle in IHL,[18] is to the effect that in armed conflict, there is a demarcation between the civilians and civilian objects on the one hand and combatants/fighters and military objectives on the other. The former is not allowed, and therefore lacks the legal capacity, to take part in hostilities and their objects are not subject to attacks in armed conflict. The latter are legally authorized to take active part in hostilities and their objectives are susceptible to attacks in armed conflict. The principle, including other essential principles of IHL, does not depend on any treaty provision but is a source of IHL and enforceable as such.[19]

In the second category of protected persons in NIAC are members of the armed forces who have laid down their arms. Their denunciation of active participation in hostilities must be final, conclusive, unqualified and without any equivocation. The denunciation must be voluntary and not based on coercion. This is because, in armed conflict, one cannot be a civilian and a combatant/fighter at the same time. This will amount to an emasculation of the principle of distinction earlier discussed above.

The third and final category of protected persons in NIAC are those placed *hors de combat* by sickness, wounds, detention, or any other cause. This category applies to members of the armed forces as well as civilians. They are protected persons because they are helpless in situations of armed conflict. In all, the protected persons must be treated humanely and their

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17 CA 3 (1).

18 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 3rd ed. (Cambridge: Cambridge University Press, 2016), 12.

19 Rome Statute of the ICC 1998, art. 21 (1) (b).

protection should not be based on any adverse distinction as listed in the provision above.

What are the protected persons protected against? CA 3 lists the aspects of their protection and states that the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons, thus:

> (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
> (b) Taking of hostages;
> (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
> (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
>
> (2) the wounded and sick shall be collected and cared for.[20]

The other category of protection is geared towards civilian objects. Civilian objects are protected objects in armed conflict.
Armed conflict is a regulated activity under IHL and all the parties to an armed conflict, including non-State armed groups (NSAGs), are expected to abide by the rules and regulations thereto.

Non-Intervention in Non-International Armed Conflict (NIAC)
The concept of sovereignty is the gravamen of Statehood in International Law. The ability of States to take control of their internal affairs is a major attribute of Statehood which is embedded in sovereignty. IHL does not purport to displace or erode the concept of sovereignty in International Law neither does it diminish its potency and efficacy. That is why sovereignty has a pride of place even in IHL, *via* treaty, as expressed thus:

[20] CA 3.

> Nothing in this Protocol shall be invoked for the purpose of affecting the sovereignty of a State or the responsibility of the government, by all legitimate means, to maintain or re-establish law and order in the State or to defend the national unity and territorial integrity of the State.
>
> Nothing in this Protocol shall be invoked as a justification for intervention, directly or indirectly, for any reason whatever, in the armed conflict or in the internal or external affairs of the High Contracting Party in the territory of which that conflict occurs.[21]

It should be appreciated that IHL is a *lex specialis* that regulates armed conflict in both international and non-international spheres. IHL is *lex specialis* in the sense that it regulates the means and methods of warfare by striving to strike a balance between military necessity and humanitarian considerations for the protection of the victims of armed conflict. Dinstein describes military necessity and humanitarian consideration as the two driving forces, existing at two extreme opposite, that energize the motion of the law of armed conflict.[22]

Non-intervention in NIAC is part of the regulations of NIAC by IHL. Would the international community be silent where there are widespread violations of IHL in any armed conflict in any part of the world? The inaction of the United Nations in Rwanda in 1994 resulted in the Rwandan genocide; the prompt intervention of the North Atlantic Treaty Organization (NATO) in Libya in 2011 resulted in massive humanitarian crisis; and the seeming inaction of the international community in northeast Nigeria is fueling humanitarian crisis even beyond the borders of Nigeria. What then would be the solution to these challenges?

The 21st Century Realities of the Law on Non-Intervention in Non-International Armed Conflict (NIAC)

As stated earlier in the introduction, NIAC is an activity that has the capacity to destabilize any sovereign State, distort governance, create humanitarian crisis and transcend State boundaries into other countries. The transcendent nature of NIAC makes it possible to adversely affect

21 AP II, art. 3 (1)-(2).
22 Dinstein, *The Conduct of Hostilities*, 8.

international peace and security; and this is a matter for the international community. For example, the armed conflict between the Nigerian government forces and the insurgents in the north-east is affecting neighbouring countries of Niger, Chad and Cameroun. That armed conflict has gone on since 2009 with the attendant human casualties and destruction of critical civilian infrastructure like bridges, schools, hospitals and public places. These are all civilian objects and are exempted from attacks in armed conflict.[23]

The member States of the United Nations, on the other hand, confer on the Security Council the primary responsibility for the maintenance of international peace and security.[24] This is basically under International Law and more specifically in Public International Law (PIL).

The realities of non-intervention in NIAC in the 21st century are that absolute prohibition of intervention is impossible to be observed especially where there are widespread violations of IHL in armed conflicts and the attendant humanitarian crisis. Is IHL and PIL mutually exclusive or is there the urgent and emerging necessity for collaboration and cooperation? These, indeed, are the questions and the issues at stake.

The Relationship between IHL and PIL

Jus ad bellum and *jus in bello* Separation

One of the fundamental principles of IHL is the eternal separation between *jus ad bellum* and *jus in bello*.[25] The universal application of IHL to all parties to the conflict is without any adverse distinction based on the nature or origin of the armed conflict or on the causes espoused by or attributed to the Parties to the conflict. The above has many implications. One of such implications is the separation of *jus ad bellum* from *jus in bello*, which Kalshoven and Zegveld elaborate thus:

> The reaffirmation is important because the Charter of the United Nations draw a clear distinction between the two sides in an armed conflict. Under its terms, the inter-state

23 AP II, arts. 13-16.

24 Charter of the UN 1945, arts. 24, 39, 42-46.

25 AP I, Preamble (last paragraph.) This principle, which is generally referred to as the Principle of Separation, is not based on treaty provisions. In fact, principles of IHL are one of the ways in which IHL expresses itself.

> use of force (and, indeed, any 'threat or use of force against the territorial integrity or political independence of any State, or in any other manner inconsistent with the Purposes of the United Nations') is prohibited, whereas recourse to individual or collective self-defence against an armed attack remains permissible. While this distinction between the aggressor and the defending side has effects, as it should, in certain areas of international law, it would be unacceptable and entirely against the very purposes of international humanitarian law, if the distinction were permitted to result in differences in the obligations of the parties to the conflict under the particular body of law.[26]

Is the separation of *jus ad bellum* from *jus in bello* only substantive or both substantive and procedural? Here, *jus ad bellum* is an authority to activate the inherent right to self-defence while *jus in bello* is the regulation of the means and methods of warfare. Does the activation of self-defence authority, which includes and involves the employment of means and methods of warfare, outside the zone of regulation?

The substantive separation of *jus ad bellum* from *jus in bello* is mainly to distinguish the emotional propensity for the justification of self-defence as represented by *jus ad bellum* from the factual reality of the regulation of the means and methods of warfare as represented by *jus in bello*. The procedural calibration of the two streams does not, however, favour absolute separation as this would be merely mechanical and unrealistic. This is even so as *jus ad bellum* self-defence always takes the form of use of force with arms and ammunition which are also the very means and methods that are regulated by *jus in bello*.

Furthermore, the issue of counter-terrorism has been at the front burner of the UN system since 9/11. The UNSC, in various resolutions,[27] has stressed the centrality of the adoption of the *jus in bello* procedures even in the prosecution of *jus ad bellum* authority. We therefore urge a common understanding, especially among experts in the field and legal advisers in the military, in this regard. The victims of NIACs will be better protected,

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[26] Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 4th ed. (Geneva: ICRC, 2011), 83.

[27] United Nations Security Council (UNSC) Resolutions 1456 of 20 January 2003 and 1566 of 2004.

via legal strengthening based on the common understanding that absolute separation of *jus ad bellum* from *jus in bello* is not in the best interest of the victims of armed conflict, especially in conflicts of a non-international character.

PIL and IHL

Does the above separation affect absolutely the application of PIL in situations of armed conflict especially NIAC? Put in another way, what is the relationship, if any, between PIL and IHL? It should be acknowledged, however, that the above subject-matter separation between Public International Law (PIL) and IHL seems to be useful only in theory and for beginners. At the zenith of the practical realities of professionalism and expertise in International Law, the separation does not really exist. This is because the traditional State-centric nature of International Law has been doused with the individual as a subject of International Law *via* International Human Rights Law (IHRL) and supported by IHL. IHRL, therefore, introduced into the traditional International Law the concept of individual criminal responsibility.

International Humanitarian Law (IHL) is not a subset or an aspect of Public International Law (PIL). PIL should not be mistaken for General International Law (GIL). This is because, GIL is the general umbrella under which many specialized areas or aspects of International Law is studied such as IHL, PIL, International Human Rights Law (IHRL), International Environmental Law (IEL); International Criminal Law (ICL); Refugee and Internally Displaced Persons' Law (R & IDPs' L); Law of Treaties, Law of International Institutions; International Law of the Seas and so many other specialized aspects of General International Law (GIL). This categorization in specialization under GIL is especially important for beginners like undergraduates in law. It lays a solid foundation for their successful future engagement with the law especially GIL. For professionals, legal experts and legal practitioners, the above explanation is axiomatic in the sense that they ought to know the legal, political and socio-economic implications for the categorization.

PIL is the law that regulates the international relationship among sovereign States which includes individual self-defence authority under the Charter of the United Nations 1945.[28] IHL, on the other hand,

[28] Art. 51.

regulates the means and methods of warfare in International Armed Conflicts (IACs) and in Non-International Armed Conflicts (NIACs). There are many other differences between IHL and PIL which shall be explained in the course of our discussion. More specifically on the issue of armed conflict and on its regulation:

> **Public International Law** governs the relations **between States** themselves, or with and between international organizations. It helps maintain a viable international society. As far as armed conflict is concerned, a distinction is made between ***jus ad bellum*** or the law that outlaws war – essentially the UN Charter that prohibits the use of force in the relations between States, except in cases of self-defence or collective security – and ***jus in bello*** or the law applicable in time of armed conflict. … The latter does not make any judgement on the motives for resorting to force.
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> There are many different **subjects of International Law**, or entities that assume rights and obligations under this legal system. In relation to the issue of the use of force, **the State** – defined as a sovereign entity composed of a population, a territory and a governmental structure – is of course an important bearer of rights and obligations under international law. Consequently, it is responsible for the acts of its functionaries in their official capacity or as *de facto* agents. **Insurgents and liberation movements** also have obligations under international law – in particular, under the law of armed conflict.[29]

The above long quotation is necessary to draw home some of the differences between *jus in bello* and *jus ad bellum* represented by the difference between IHL and PIL.

The reference in the last sentence above to "the law of armed conflict" is to IHL. Some experts refer to this area of the law as IHL while others prefer the use of the Law of Armed Conflict (LOAC). Dinstein, writing in the context of International Armed Conflicts (IACs), states as follows:

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[29] International Committee of the Red Cross (ICRC), *Violence and the Use of Force* (Geneva: ICRC, 2011), 8.

> As far as semantics are concerned, the present writer has opted to employ the umbrella term 'Law of International Armed Conflict' – and its acronym LOIAC – to describe this branch of international law, consisting of both treaty law and customary law. The appellation common in the past used to be 'The Laws of Warfare', which is a translation from the classical Latin trope *jus in bello*. This designation has largely run out of favour, in as much as the same body of law is applicable in fully-fledged wars and in incidents 'short of war' …
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> Another popular coinage, having the stamp of approval of the ICJ … is 'International Humanitarian Law' (IHL). The present writer's preference for LOIAC over IHL must not be misconstrued as having any consequences affecting the substance of the law. The expressions LOIAC and IHL are synonymous, and the choice between them is purely semantic.[30]

The reference above to "the stamp of approval of the ICJ" is to the Advisory Opinion on *Nuclear Weapons*.[31] Kalshoven and Zegveld, however, prefer to combine the two notions by referring to this aspect of International Law as "international humanitarian law of armed conflict".[32]

Furthermore, IHL is a special area in International Law, referred to as *lex specialis*, which is different from, though not contradictory to, human rights law; in fact, IHL and human rights law have a symbiotic co-existence.[33] More specifically:

> The law of armed conflict and human rights law are **complementary**. Both are intended to protect the lives,

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30 Yoram Dinstein, *The Conduct of Hostilities under the Law of International Armed Conflict* 3rd ed. (United Kingdom: Cambridge University Press, 2016), 20. Dinstein has another book on Non-International Armed Conflict with the title "*Non-International Armed Conflicts in International Law*" published in 2014.

31 Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) ICJ Rep., 226 at 257.

32 Frits Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War* 4th ed. (Cambridge and Geneva: Cambridge University Press and ICRC, 2011), 280.

33 Dinstein, 31-33.

> integrity and dignity of individuals, albeit in different ways. Both also directly address issues related to the use of force.
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> The law of armed conflict has been codified and developed to regulate humanitarian issues in time of armed conflict. It aims at protecting persons not (or no longer) taking part in hostilities and to define the rights and obligations of all parties to a conflict in the conduct of hostilities. Human rights law protects the individual at all times, in peace and war alike; it benefits everyone and its principal goal is to protect individuals from arbitrary behavior by States. For these protections to be effective, international provisions must be reflected in national legislation.[34]

Drawing on the difference between IHL and PIL, Kalshoven and Zegveld state as follows:

> The law of war is often referred to as 'international humanitarian law applicable in armed conflict' or, shorter, 'law of armed conflict' or 'humanitarian law'. While the inclusion of 'humanitarian' accentuates the element of protection of victims and its omission that of warfare, the various phrases all refer to the same body of law. We shall be using the terms interchangeably, as we do with 'war' and 'armed conflict'. The book aims to provide information about the origin, character, content and current problems of the law of war. In the process, we shall come across the other aforementioned relevant bodies of law as well, but our main focus is on the law of war in its proper sense. In the perspective of the law of armed conflict, wars happen: in the past, usually between states; today, more often involving non-state organised armed groups. The legal assessment of recourse to war is a matter for *jus ad bellum*, with the law of the UN Charter as its present centrepiece. For *jus in bello*, i.e. the law relating to the actual waging of war, the occurrence of armed conflict is a matter of fact, and the same goes for the loss of human life and damage to

[34] ICRC), *Violence and the Use of Force*, 9.

> other values it necessarily entails. It should be understood that, rather than granting states or individuals a right to take human lives or bring about such other damage, the *jus in bello* sets limits to acts of war and thereby provides the yardstick by which to measure the justifiability of those acts.
>
> It should also be understood that the limits set by *jus in bello* do not purport to turn armed conflict into a socially acceptable activity like the medieval jousting tournament: their aim goes no further than to prevent wanton cruelty and ruthlessness and to provide essential protection to those most directly affected by the conflict.[35]

The *lex specialis* nature of IHL finds expression in the legal maxim "*lex specialis derogat legi generali*" which means "a special law detracts from the general law".

Furthermore, NIAC is peculiar in the sense that it is regulated by IHL but addressed to "parties to the conflict"[36] which include Non-State Armed Groups (NSAGs), who are not subjects of International Law under PIL but are subjects under IHL for the purpose of implementing and enforcing the regulation of the means and methods of warfare. This is the basis for the Office of the Prosecutor (OTP) of the International Criminal Court (ICC) inclusion of Boko Haram, a NSAG in the NIAC in the north-east part of Nigeria, as a party that has violated IHL in the Report on Preliminary Examination Activities 2019 an 2020.[37] In addition, the Report of the Secretary-General of the United Nations to the Security Council on Children and Armed Conflict in Nigeria 2020 also mentions Boko Haram and the Civilian Joint Task Force (CJTF) as parties to the

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35 Kalshoven and Zegveld, 1-2.

36 Article 3 common to the four Geneva Conventions of 1949. This is the only provision in the four Geneva Conventions of 1949 that regulates NIAC. It is supplemented by Additional Protocol (AP) II of 1977.

37 The Office of the Prosecutor, *Report on Preliminary Examination Activities 2019*, of 5 December 2019, 47-52; The Office of the Prosecutor, *Report on Preliminary Examination Activities 2020*, of 14 December 2020, 64-67. The 2020 Report on Nigeria is on "Completed Preliminary Examinations".

NIAC who have violated IHL in the armed conflict in the north-east.[38] Generally, under PIL, Boko Haram and the CJTF are not subjects of International Law but under IHL, they are subjects of that law.

In addition, there are theories peculiar to each aspect of the specialization of IHL and PIL which cannot be conflated in the two branches of International Law such as "Just War Theory" and *Jus ad Bellum* Self-Defence Targeting Theory". The two theories exist in PIL; they have no place in IHL because they defeat the very aim of IHL by conflating *jus ad bellum* with *jus in bello*. The version of Targeting Theory that is applicable in IHL is "*Jus in Bello* Targeting Theory" which maintains the separation between *jus ad bellum* and *jus in bello*.

In PIL, immunity for certain public and government officials is recognized but in IHL even Heads of State and Governments do not have immunity for crimes committed in armed conflicts.[39] PIL has, as its principal international judicial institution, the International Court of Justice (ICJ)[40] with sovereign States as parties before it while IHL has the International Criminal Court (ICC) as its international permanent judicial institution which is not a court of first instance but is complementary to national or domestic courts with jurisdiction to try individuals who have committed crimes within the jurisdiction of the court.

The separation of *jus ad bellum* and *jus in bello* has implications in IHL thus:

> This complete separation between *jus ad bellum* and *jus in bello* implies that IHL applies whenever there is *de facto* an armed conflict, no matter how that conflict is qualified under *jus ad bellum*, and that no *jus ad bellum* arguments may be used to interpret it; it also implies, however, that the rules of IHL are not to be drafted so as to render *jus ad bellum* impossible to implement, e.g., render efficient self-defence impossible.

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38 Secretary-General of the United Nations, *Children and Armed Conflict in Nigeria 2020*, 1-15 being the Periodic Report of the Secretary-General to the Security Council of 6 July 2020 (S/2020/652).

39 Article 27 of the Rome Statute of the International Criminal Court (ICC) 1998.

40 Article 92 of the Charter of the United Nations 1945.

> Some consider that the growing institutionalization of international relations through the United Nations, concentrating the legal monopoly of the use of force in its hands or a hegemonic international order, will return IHL to a state of *temperamenta belli* addressing those who fight for international legality. This would fundamentally modify the philosophy of existing IHL.[41]

The separation of *jus ad bellum* from *jus in bello*, therefore, has many implications. IHL and PIL are regulated by different sets of treaties and conventions but the practical realities of the effects of the two areas of the law call for cooperation and collaboration.

Green also reiterates the importance and the legal implications of the separation of *jus ad bellum* from *jus in bello* thus:

> While the Charter restricts the right to resort to measures of a warlike character to those required by self-defence, its provisions relate only to *jus ad bellum*. Once a conflict has begun, the limitations of Article 51 become irrelevant. This means there is no limitation upon a party resorting to war in self-defence to limit its activities merely to those essential to its immediate self-defence. Thus, if an aggressor has invaded its territory and has been expelled, it does not mean that the victim of the aggression has to cease his operations once his territory has been liberated. He may continue to take advantage of the *jus in bello*, including the principle of proportionality, until he is satisfied that the aggressor is defeated and no longer constitutes a threat.[42]

Green concludes on the issue of the separation between *jus ad bellum* and *jus in bello* that:

> In view of the clearly established criminality of war, it might be queried whether there is any scope for a law of

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41 Marco Sassòli, Antoine A. Bouvier and Anne Quintin. *How Does Law Protect in War?: Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, Volume 1: Outline of International Humanitarian Law* 3rd ed. (Geneva: ICRC, 2011), 15.

42 Leslie C Green, *The Contemporary Law of Armed Conflict* 3rd ed. (United Kingdom: Manchester University Press, 2008), 13.

> war, for it seems inconsistent to assert that a criminal procedure may be conducted in accordance with a legal regime. In fact, the ban on resort to war relates only to the decision to resort to war – the *jus ad bellum*. The purpose of what is known as the law of armed conflict or, more commonly, the law of war – *jus in bello* – is to reduce the horrors inherent therein to the greatest extent possible….[43]

IHL and PIL are different specializations in International Law but the functions of the United Nations Security Council (UNSC) in the maintenance of international peace and security[44] make IHL and PIL complementary. This complementarity does not take away or erode their specialities. In this article, we are exploring the continuous possibility of a symbiotic relationship between IHL and PIL for the protection of the human person in the face of armed conflicts especially the absolute prohibition of intervention in NIAC which is the focus of this paper.

Whatever happens to the individual, especially from State managers, is a matter for International Law as confirmed by many experts including Mullerson,[45] Sassoli[46] and Shaw.[47] Mullerson states as follows:

> In this world, while there hangs over humanity the threat of self-destruction either in the holocaust of a nuclear war or in the process of ecological destruction, yet there has emerged the hope that faced with these new threats humanity will more speedily become aware of its unity, of the interdependence of the fates of all peoples of the world, and unite to combat these threats …
>
> One of the most important issues requiring reconsideration is our approach to the role of the individual both in a given society and in the world as a whole. I feel that we have hitherto over-emphasized the role of the state, of the nation,

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43 Ibid, 20.

44 Chapter VII of the Charter of the United Nations 1945.

45 Rein A. Mullerson, "Human Rights and the Individual as a Subject of International Law: A Soviet View," *European Journal of International Law*, vol. 1 (1990): 33-43.

46 Marco Sassoli, "State Responsibility for Violations of International Humanitarian Law," *International Review of the Red Cross*, vol. 84, no. 846 (2002): 401-434.

47 Malcolm N. Shaw, *International Law* 5th ed., 232.

> and particularly of the classes, forgetting about the human being and humanity. In these times our primary concern should be the interest of humanity as a whole in connection with the global threats to its existence, as well as the rights and freedoms of each human being, for there can be no free society unless every human being who is a member of that society is free …
>
> The new political thinking, by setting the human being at the center of our concerns and calling for the humanization of international relationships, cannot refrain from taking a new approach both to the role of the human being in international relations and of the individual's relationship to international law.[48]

Sassoli, on the other hand, describes the relationship between PIL and IHL as being composed of two layers which are mutually inclusive, thus:

> Public international law can be described as being composed of two layers: the first is the traditional layer consisting of the law regulating coexistence and cooperation between the members of the international society — essentially the States; and the second is a new layer consisting of the law of the community of six billion human beings. Although international humanitarian law came into being as part of the traditional layer, i.e. as a law regulating belligerent inter-State relations, it has today become nearly irrelevant unless understood within the second layer, namely as a law protecting war victims against States and all others who wage war.
>
> The implementation of international humanitarian law may therefore be understood from the viewpoint of both layers. For a branch of law that applies in a fundamentally anarchic, illegal and often lawless situation such as armed conflicts, the focus of implementing mechanisms is and must always be on prevention. The International Committee of the Red Cross (ICRC), the traditional

[48] Mullerson, "Human Rights and the Individual," 33, 34 and 35.

> implementing mechanism of international humanitarian law, acts as a neutral intermediary between States and as an institutionalized representative of the victims of war. At both levels, it prevents and addresses violations, inter alia, by substituting itself for belligerents who fail to fulfil their humanitarian duties. Its approach is victim-oriented rather than violation-oriented. Nevertheless, in legal system violations, once they occur, must also have legal consequences. Violations are committed by individuals. International humanitarian law is one of the few branches of international law attributing violations to individuals and prescribing sanctions against such individuals. This approach, typical for the second layer of public international law, has made enormous progress in recent years.[49]

Shaw traces the State-centric nature of International Law to the schism between natural law and positivism by stating thus:

> The question of the status in international law of individuals is closely bound up with the rise in the international protection of human rights… The object theory in this regard maintains that individuals constitute only the subject-matter of intended legal regulation as such. Only States, and possibly international organizations, are subjects of the law. This has been a theory of limited value. The essence of international law has always been its ultimate concern for the human being and this was clearly manifest in the Natural Law origins of classical international law. The growth of positivist theories, particularly in the nineteenth century, obscured this and emphasized the centrality and even exclusivity of the State in this regard. Nevertheless, modern practice does demonstrate that individuals have become increasingly recognized as participants and subjects of international law.

[49] Sassoli, "State Responsibility for Violations of International Humanitarian Law," 401-402.

> This has occurred primarily but not exclusively through human rights law.[50]

This is further buttressed by the Responsibility to Protect (R2P) Document[51] which also offers an adjusted and improved configuration of the concept of sovereignty, which was the controlling State-centric device in traditional International Law. The Document states specifically thus:

> Thinking of sovereignty as responsibility, in a way that is being increasingly recognized in State practice, has a threefold significance. First, it implies that the State authorities are responsible for the functions of protecting the safety and lives of citizens and promotion of their welfare. Secondly, it suggests that the national political authorities are responsible to the citizens internally and to the international community through the UN. And thirdly, it means that the agents of State are responsible for their actions; that is to say, they are accountable for their acts of commission and omission. The case for thinking of sovereignty in these terms is strengthened by the ever-increasing impact of international human rights norms and the increasing impact in international discourse of the concept of human security.[52]

Here, sovereignty is not a license to impunity but an obligation and responsibility to protect and ensure protection of every individual within the domain of sovereignty even in emergency situations including armed conflict.

Furthermore, the concept of individual criminal responsibility was introduced by IHRL, re-calibrated by IHL[53] and made a game-changer in the hitherto traditional State-centric configuration of International Law. The contribution of IHL to the development of International Criminal Law

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50 Shaw, *International Law*, 232.

51 International Commission on Intervention and State Sovereignty (ICISS), *The Responsibility to Protect* (Ottawa: International Development Research Centre, 2001), paras. 2.1; 2.14 and 2.15 at 11 and 13 respectively.

52 Ibid, para. 2.15 at 13.

53 Rome Statute of the International Criminal Court (ICC) 1998, art. 25.

(ICL), especially in the area of erosion of State immunity for Heads of States and Governments for grave violations[54] of human rights and the regulation of means and methods of warfare, cannot be overemphasized.

In addition to the above, self-defence authority[55] does not necessarily trump the regulatory scrutiny of IHL.[56] What it portends is that *jus ad bellum* is not a "no law zone" but can also be regulated by *jus in bello*, especially whenever the factual situation of the employment of military combat power by the parties to the conflict, is established. This was emphasized by the United Nations Security Council (UNSC) in Resolution 1456 of 20 January 2003 in relation to counter-terrorism thus:

> States must ensure that any measure taken to combat terrorism comply with all their obligations under international law, and should adopt such measures in accordance with international law, in particular international human rights, refugee, and humanitarian law.[57]

Finally, the protection of the victims of armed conflict, especially victims of non-international armed conflict, is an interdependent and complex reality that straddles many aspects of International Law especially International Human Rights Law, International Criminal Law, International Environmental Law, Refugee and Internally Displaced Persons' Law, Law of Treaty, with IHL at the centre.[58] In practice beyond theory, PIL and IHL should, therefore, be seen as different sides of the same coin.

The Challenges

In his report, Annan acknowledged the dilemma of intervention and sought to tackle it as follows:

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54 Ibid, art. 27.

55 Charter of the United Nations 1945, art. 51, that is, *jus ad bellum*.

56 Technically also referred to as *jus in bello*.

57 United Nations Security Council, *Declaration on the Issue of Combating Terrorism*, being UNSC Resolution 1456 adopted by the Security Council at its 4688th meeting, on 20 January 2003. Available at http://unscr.com/en/resolution/1456. Accessed on 20 December 2019.

58 The rational for the emphasis on the different branches of International Law is because they set the standard for domestic law to follow as they are products of international consensus and multilateral treaties.

In my address to the General Assembly last September, I called on Member States to unite in the pursuit of more effective policies to stop organized mass murder and egregious violations of human rights. Although I emphasized that intervention embraced a wide continuum of responses, from diplomacy to armed action, it was the latter option that generated most controversy in the debate that followed.

Some critics were concerned that the concept of 'humanitarian intervention' could become a cover for gratuitous interference in the internal affairs of sovereign States. Others felt that it might encourage secessionist movements deliberately to provoke governments into committing gross violations of human rights in order to trigger external interventions that would aid their cause. Still, others noted that there is little consistency in the practice of intervention, owing to its inherent difficulties and costs as well as perceived national interests – except that weak States are far more likely to be subjected to it than strong ones.

I recognize both the force and the importance of these arguments. I also accept that the principles of sovereignty and non-interference offer vital protection for small and weak States. But to the critics I would pose this question: if humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica – to gross and systematic violations of human rights that offend every precept of our common humanity?

We confront a real dilemma. Few would disagree that both the defence of humanity and the defence of sovereignty are principles that must be supported. Alas, that does not tell us which principle should prevail when they are in conflict.

Humanitarian intervention is a sensitive issue, fraught with political difficulty and not susceptible to easy answers. But

> surely no legal principle – not even sovereignty – can ever shield crimes against humanity. Where such crimes occur and peaceful attempts to halt them have been exhausted, the Security Council has a moral duty to act on behalf of the international community. The fact that we cannot protect people everywhere is no reason for doing nothing when we can. Armed intervention must always remain the option of last resort; but in the face of mass murder it is an option that cannot be relinquished.[59]

The above challenges as ably adumbrated by the former Secretary-General of the United Nations have also been acknowledged by Kalshoven and Zegveld in the context of humanitarian law thus:

> The question at issue in humanitarian law, no matter how varied and complicated, can be reduced to two fundamental problems: viz., the problem of balancing humanity against military necessity, and the obstacles to doing so posed by State sovereignty. Sovereignty and military necessity are the two evil spirits in our story – and evil spirits we will not be able to exorcise soon.[60]

It must be emphasized that *jus in bello* regulation exists and has its full meaning in striking a balance between military necessity and humanitarian considerations for the sake of the victims. Dinstein refers to military necessity and humanitarian considerations as the two driving forces energizing the motion of LOAIC; and they operate in opposite direction.[61]

The challenges to non-intervention in NIACs are many and varied, some of which are: sovereignty; territorial integrity; political independence; military necessity; denial by sovereign States of the existence of NIAC; etc. Furthermore, the eternal separation of *jus ad bellum* from *jus in bello* is a principle of IHL which must be observed in armed conflict. In addition, PIL and IHL are different aspects of International Law but are

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59 Kofi A. Annan, *We the Peoples: The Role of the United Nations in the 21st Century* (New York: United Nations Department of Public Information, 2000), 47-48.

60 Kalshoven and Zegveld, *Constraints on Waging War* 3rd ed., 203.

61 Yoram Dinstein, *The Conduct of Hostilities*, 8.

not mutually exclusive. Finally, the prohibition of intervention in NIAC is absolute as provided for in AP II.

Recommendations

The 21st Century realities of the devastation that can be caused by lingering NIAC are well known in the international community and have been exposed in the lingering NIAC in north-east Nigeria for more than a decade. What should be done in the circumstances? *Jus ad bellum* authority is not a "no law zone."

The break out of *jus ad bellum* or activation of *jus ad bellum* authority should necessarily trigger the regulatory scrutiny of *jus in bello* since it is means and methods of warfare that are employed in both areas.

PIL and IHL, though different areas of International Law, are not mutually exclusive. An adjusted understanding of the two areas is highly recommended especially for the sake of the regulation of NIACs and the protection of the victims.

Whether intervention is referred to as humanitarian, peacekeeping, or protection of the civilian population, the egregious violations of the regulation of *jus in bello* in the 21st century calls to question its absolute prohibition in NIACs.

The UNSC has the mandate to take action for the maintenance of international peace and security. The actions that the UNSC can take are peaceful measures and measures for collective security. The UNSC has taken actions to fulfill the above mandate and this has been acknowledged by the Appeal Chamber of the International Criminal Court for the former Yugoslavia (ICTY) thus:

> Indeed, the practice of the Security Council is rich with cases of civil war or internal strife which is classifies as a 'threat to the peace' and dealt with under Chapter VII … It can thus be said that there is a common understanding, manifested by the 'subsequent practice' of the membership of the United Nations at large, that the 'threat

> to the peace' of article 39 may include, as one of its species, internal armed conflict.[62]

We are not calling for the convergence of PIL and IHL but the practical realities of the 21st Century NIAC … calls for a different perspective in its outlook; the practical realities of effective regulation of NIAC and the protection of the victims thereof.

Conclusion

In this article, we examined the absolute prohibition of intervention in NIACs *vis-à-vis* the 21st Century realities of NIACs. The study of the situation was carried out within the ambit of PIL and IHL as expressed in the eternal separation of *jus ad bellum* from *jus in bello*.

PIL and IHL are different sides of the same coin but should be seen as reinforcing each other and not as a constraint on or impediment to each other. There should be a bridge between theory and practice in the application of PIL and IHL especially as they relate to the regulation of the employment of military combat power and the protection of the victims of NIAC. The absolute prohibition of intervention in NIAC is not realistic in the 21st Century NIACs which have the capacity to spill over into other countries.

Furthermore, experts in IHL should have a good working knowledge of other aspects or areas of International Law. This has been reiterated by Wyatt in his discourse on International Environmental Law in the intersection of various areas of International Law in the effective realization of the objectives of each specialization in International Law, thus:

> It is for this reason that serious practitioners of international environmental law must bring to their work knowledge not just of general international law but also of a range of other areas of international law. For environmental damage in the marine environment, law of the sea is likely to be relevant, and where environmental damage is caused by a foreign investor, investment law will almost certainly come into

62 *Prosecutor v. Tadic*, Case No. IT-94-1-AR72 of 15 July 1999.

> play. If environmental damage occurs in the context of armed conflict, international humanitarian law and potentially also international criminal law will obviously need to be addressed.[63]

Our goal was to find a middle ground in the legal complexity between *jus ad bellum* and *jus in bello* in the area of the absolute prohibition of intervention in NIACs in order to attain a better regulation of the employment of military combat power in order to protect the victims and the civilian objects thereof.

[63] Julian Wyatt, "Law-making at the Intersection of International Environmental, Humanitarian and Criminal Law: The Issue of Damage to the Environment in International Armed Conflict," *International Review of the Red Cross*, vol. 92, no. 879 (2010): 605.