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# HOW HUMANITARIAN AND HUMAN RIGHTS LAW SHAPE CONFLICTS WITHIN STATES

Dr. Adnan Mahmutovic Ph.D., LL.M.
University of Al Yamamah,
College of Law,
King Fahad Branch Rd
Al Qirawan, Riyadh 13451,
Kingdom of Saudi Arabia
a_mahmutovic@yu.edu.sa
ORCID: 0000-0002-3553-2870

Abstract: *This paper explores the legal status of non-international armed conflicts (NIACs) under international humanitarian law (IHL) and international human rights law (IHRL). It examines treaty and customary law provisions governing NIACs, focussing on the threshold of violence that distinguishes these conflicts from internal disturbances and the involvement of non-state actors. Identifying the applicable legal framework is crucial for ensuring compliance with international law, but determining when a situation escalates to an armed conflict is challenging due to the lack of a precise legal definition. The article delves into key issues such as protecting civilians and their rights in NIACs, emphasising the complexities these situations present. By addressing these challenges, the study advocates for greater accountability among parties to these conflicts. It underscores the urgent need for clearer guidelines and consistent implementation to uphold legal norms and safeguard human rights during internal armed conflicts.*

*Using a doctrinal approach, the research analyses legal texts, treaties, and case law to clarify the boundaries and intersections between IHL and IHRL. It also reviews state practices and judicial decisions to better understand how these bodies of law interact and the factors that influence the classification of a situation as an armed conflict. The article aims to enhance legal clarity and promote uniform application in addressing the unique challenges of NIACs.*

Key words: *Non-International Armed Conflicts; International Humanitarian Law; International Human Rights Law; Legal Framework; Challenges*

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## 1. INTRODUCTION

News coverage and social media often focus on armed conflicts involving non-state armed groups, highlighting the prevalence of non-international armed conflicts (NIACs). These conflicts are characterised by the involvement of a variety of non-state actors, such as armed dissident groups,[1] paramilitary forces, guerrillas, and ethnic or vigilante groups (Franco, 2004). Countries such as Myanmar, Syria, Mali, Sudan, and Colombia have experienced prolonged NIACs, some lasting for decades. However, NIACs are not a modern phenomenon; they have existed long before the rise of the modern state (Dinstein, 2021). Historical examples include the civil wars of the Roman Republic, the fitna of the Islamic Caliphate, and the internal battles of the Chinese Empire. The

[1] Inter-American Commission on Human Rights, Inter-American Yearbook on Human Rights OEA/Ser.L/V/II.102 doc. 9 rev. 1 (1999), Chapter IV.

American Civil War (1861-1865) and the Spanish Civil War (1936-1939) are modern examples that left significant historical impacts (Dinstein, 2021).

Over the past 50 years, NIACs have resulted in genocide and mass killings in Bosnia, Cambodia, Congo, and Rwanda. In the postcolonial period, numerous nations have suffered severe losses due to ongoing NIACs, with some still unresolved or at risk of re-erupting. Despite the brutality of these conflicts, international humanitarian law (IHL) recognises and regulates the conduct of armed groups during such conflicts, while international human rights law (IHRL) traditionally does not extend a similar recognition. However, IHRL is increasingly invoked to establish a clearer legal framework to address the "*shadowland*" between IHL and IHRL in NIACs (Kooijmans, 1999).

The Colombian conflict, Latin America's longest-running conflict, began in the 1960s and involves government forces, rebel groups, and paramilitaries. Political concerns and fears of legitimising rebel groups have made the Colombian government hesitant to grant them legal status. For instance, during the Uribe administration (2002-2010), the government refrained from labelling the situation as an "*armed conflict*", instead classifying it as a "*terrorist threat*" (Rosero, 2013). This reluctance stemmed from fears of conferring belligerency status to the Revolutionary Armed Forces of Colombia (FARC), which would have granted the group a degree of international legal recognition. However, under contemporary IHL, formal recognition is not required for a situation to qualify as an armed conflict, which means that the government could acknowledge the conflict without granting political status to the groups involved.

The international community often hesitates to acknowledge conflicts involving non-state armed groups (NSAGs) due to concerns over legitimising them. For example, it took years to formally recognise the NIAC in Syria, which began in 2011 (Blank and Corn, 2013). This reluctance stems from fears that granting recognition under international law could contradict their domestic classification as unlawful combatants. This caution is evident in the language of Additional Protocol II, which deliberately avoids referring to armed groups as "*parties*." While Common Article 3 of the Geneva Conventions and Additional Protocol II impose obligations on NSAGs in NIACs, the extent of their role in shaping International Humanitarian Law (IHL) remains contentious (Hiemstra and Nohle, 2018). States resist ceding lawmaking power to NSAGs, and domestic definitions of such groups vary significantly. For example, Syria rejected the classification of its conflict by the ICRC as a NIAC, highlighting the political sensitivities involved.

The recognition or nonrecognition of armed groups has profound legal and political implications, influencing the application of IHL, civilian protection, and accountability for war crimes. Non-recognition can also hinder humanitarian negotiations and complicate civilian safety (Abboud, 2016).

This article examines the legal status and classification of NIACs within the framework of IHL and International Human Rights Law (IHRL). The research aims to analyse the evolving legal criteria and frameworks that determine the classification and regulation of NIACs under IHL and IHRL. It seeks to clarify the complexities in distinguishing NIACs from internal disturbances, assess how NIAC standards have been applied in practice, and evaluate the challenges states face in accepting international scrutiny over internal conflicts. In addition, the study investigates how recent developments in conflict dynamics and international jurisprudence influence the interpretation and application of IHL in NIACs.

By examining treaty law, customary law, and international jurisprudence, the research aims to clarify the legal status of NIACs and how both IHL and IHRL can be

effectively enforced to ensure comprehensive protection of individuals during such conflicts.

## 2. THE KEY DEVELOPMENTS

### *2.1 Connecting Human Rights and Humanitarian Law in Times of Conflict*

Armed conflict and widespread violations of fundamental human rights persist despite efforts by the international community. Each crisis underscores the inadequacies of international law, which often seems powerless to prevent even the gravest atrocities, such as genocide in Bosnia, Rwanda, etc. To many, international law appears insufficient to address these violations effectively. Although international lawyers may not fully agree with this bleak assessment, they recognise the theoretical challenges in addressing these issues. Human rights and humanitarian law, though providing a framework of standards, do not offer straightforward solutions to prevent violations of human dignity during war and peace.

On the other hand, significant progress has been made in establishing international norms, with a robust body of human rights and humanitarian law. These rules, while comprehensive, remain incomplete and must evolve to address emerging challenges. Developments such as the establishment of the International Criminal Court and the jurisprudence of tribunals for former Yugoslavia and Rwanda signal progress. However, creating new norms and institutions alone cannot adequately protect individuals. Understanding the root causes of violations, a task often undertaken by sociologists and political scientists, is critical along with exploring the potential of existing legal instruments.

Comparative law offers a promising approach by examining how different legal systems address similar issues, allowing for cross-pollination of solutions. A comparative analysis of human rights and humanitarian law reveals shared goals, such as protecting human integrity, and highlights opportunities for mutual adaptation. In the following section, we will investigate the evolution of systemic similarities and differences between IHL and IHRL legal regimes to evaluate the potential of comparative approaches in addressing violations.

#### 2.1.1 History Separated but Interrelated

The Westphalian system established sovereign equality and non-intervention as central principles, emphasising reciprocal obligations between states. However, the rise of human rights law and the law of armed conflict in the past century has eroded these principles by extending international law into the domestic sphere. International humanitarian law (IHL), one of the earliest branches of public international law, initially focused on state relations and developed from customary law (Schindler, 2003). Some IHL principles date back to the Middle Ages and include concepts like chivalry (e.g., Charter of Medina, Bill of Rights of 1688). Its formalisation began with the 1864 Geneva Convention,[2] followed by various accords aimed at protecting individuals during armed conflicts. IHL emerged from concerns for war victims, while IHRL originated from addressing domestic atrocities, such as the Nazi death camps (Cerna, 1989).

Initially, the connection between IHL and IHRL was overlooked due to the emerging status of IHRL and the concerns of the UN that the integration of IHL might

[2] Convention for the Amelioration of the Condition of the Wounded in Armies in the Field, 22 August 1864.

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undermine the *jus contra bellum* principles. The 1948 Universal Declaration of Human Rights did not address human rights in armed conflict, and this issue was also absent during the drafting of the 1949 Geneva Conventions.

Post-World War II legal advancements, such as the Nuremberg Trials, the Genocide Convention, and the Geneva Conventions, marked a shift in international law from a state-centric to an individual-centric approach. Common Article 3 of the 1949 Geneva Conventions established the complementarity of IHL and IHRL by ensuring humane treatment for noncombatants in non-international armed conflicts (NIACs), prohibiting violence against their life, integrity, and dignity.[3] The existence of such conflicts does not absolve States from their obligations under the American Convention for all persons under their jurisdiction. The United Nations gradually acknowledged the relevance of human rights in armed conflicts. In 1953, the General Assembly invoked human rights during the Korean conflict,[4] and in 1956, the Security Council urged the Soviet Union to respect fundamental rights after invading Hungary.[5]

The interplay between human rights and humanitarian law gained prominence in the late 1960s and early 1970s. By the late 1960s, IHL faced stagnation, while IHRL law flourished, marked by the adoption of the 1966 International Covenants on Civil and Political Rights and Economic, Social, and Cultural Rights, and even more. Given the pressing need to protect victims of conflicts in regions such as Algeria, Nigeria, and the Middle East, a partial integration of human rights and humanitarian law appeared pragmatic.

The 1968 UN International Conference on Human Rights in Tehran significantly advanced this integration. The conference, influenced by the political climate of decolonisation and conflicts like the Six-Day War (Chen, 2021), adopted resolutions combining human rights and humanitarian law principles.[6] For example, Resolution XXIII, adopted at the Conference, emphasised that even during armed conflicts, humanitarian principles must prevail and linked peace with the full observance of human rights. Although its language was vague, the resolution marked a change in how the relationship between human rights and humanitarian law was conceptualised. Resolution XXIII was reiterated in 1968 by UN General Assembly Resolution 2444, entitled "*Respect for Human Rights in Armed Conflicts*," which mandated the Secretary-General to suggest steps to improve the protection of individuals during armed conflict.[7] Subsequent reports by the Secretary-General in 1969 and 1970, titled "*Respect for Human Rights in Armed Conflicts*", significantly contributed to the view that human rights and humanitarian law are closely intertwined.

Building on these reports, the General Assembly adopted Resolution 2675 in 1970, affirming that fundamental human rights, as established in international law, remain fully applicable in armed conflict.[8] These resolutions, leading to the 1977

[3] IACtHR, *Case of the Serrano-Cruz Sisters v. El Salvador*, Judgment, Preliminary Objections, Series C, No. 118, November 23, 2004.
[4] GA Res 804 (VIII) (3 December 1953) UN Doc A804/VIII.
[5] GA Res 1312 (XIII) (12 December 1958) UN Doc A38/49.
[6] A/7720, Report of the Secretary General (1969), Respect for human rights in armed conflicts, 11 para. 19. Available at: https://documents.un.org/doc/undoc/gen/n69/254/40/pdf/n6925440.pdf (accessed on 04.04.2025).
[7] A/RES/2444(XXIII), Resolution of UN. General Assembly (23rd sess. : 1968), Respect for human rights in armed conflicts, 263. Available at: https://digitallibrary.un.org/record/202681?v=pdf (accessed on 20.11.2024).
[8] A/RES/3238(XXIX), Resolution of UN. General Assembly (29th sess. : 1974-1975), Restoration of the lawful rights of the Royal Government of National Union of Cambodia in the United Nations, 269. Available at: https://digitallibrary.un.org/record/189985?ln=en&v=pdf (accessed on 04.04.2025).

Additional Protocols, reflected existing links between the two bodies of law rather than introducing entirely new concepts.[9]

Both human rights and humanitarian law share a core humanitarian concern, although their historical development and scope differ. Humanitarian law, rooted in regulating wartime conduct, predates human rights law but has been influenced by humanitarian values expressed in the Martens Clause of the 1899 and 1907 Hague Conventions and later documents. The Martens clause states that populations and belligerents are protected by international law, based on usages between civilised nations, humanities laws, and public conscience, even in cases not covered by the current Regulations.[10] While human rights law primarily addresses state-individual relationships in peacetime, it draws from humanitarian principles, as seen in the influence of the Universal Declaration of Human Rights on the 1949 Geneva Conventions.

The two bodies of law have influenced each other's evolution. For example, the prohibition of genocide stems from the wartime concept of crimes against humanity, while human rights principles have shaped humanitarian law provisions such as non-discrimination and protections against torture. The 1977 Additional Protocols incorporate human rights principles, such as those reflected in Article 75 of Protocol I, resembling provisions in the International Covenant on Civil and Political Rights.[11]

Scholars proposed the theory of complementarity, suggesting that IHL and IHRL, while distinct, are mutually supportive (Cassimatis, 2007). Three main arguments support this view. First, IHRL fills gaps in IHL, especially where IHL is unclear or limited. For instance, fair trial rights in human rights treaties are broader than those in the Geneva Conventions and Additional Protocols. Second, IHRL offers mechanisms for implementing IHL, as individuals often turn to human rights bodies to address IHL violations due to limited IHL enforcement options. This fills an institutional gap, promoting a pro-human rights perspective in IHL. Third, humanitarian considerations have influenced IHL since the late 19th century, replacing concepts like reciprocity, as seen in the Martens Clause (Shanks-Dumont, 2020).

Despite efforts to align human rights and humanitarian law, significant differences persist, particularly in their scope and relationships. Human rights law primarily governs state-individual interactions during peacetime, focussing on fostering harmony and supporting individual development. In contrast, humanitarian law addresses relationships during wartime, particularly between belligerent states, combatants, and protected persons, and is inherently grounded in hostility.

Recent developments have narrowed these gaps, with crossovers emerging in areas such as "*third generation*" rights in human rights law, which emphasise global solidarity, and the expansion of humanitarian law through instruments like common Article 3 of the 1949 Geneva Conventions. Despite overlaps, these frameworks remain distinct, reflecting divergent purposes—human rights emphasise protecting individuals' dignity and freedoms, while humanitarian law balances humanity with military necessity.

[9] Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949. Available at: https://www.icrc.org/en/publication/0421-commentary-additional-protocols-8-june-1977-geneva-conventions-12-august-1949 (accessed on 10.11.2024).

[10] Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899, par. 69; Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907, par. 77.

[11] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.

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Both systems share a foundation in humanitarian values, yet their practical applications differ. For example, while human rights law prohibits acts like torture in all circumstances, humanitarian law considers such norms in the context of armed conflict. These nuances require careful comparative analysis to avoid oversimplification or misapplication.

The interaction between these systems is multifaceted, encompassing concurrent applicability in armed conflicts, areas of substantive superiority, and gaps in protection (Provost, 2002, p. 10). Efforts such as the proposed Declaration of Minimum Humanitarian Standards[12] aim to address deficiencies, while systemic comparisons reveal structural and substantive insights. Adopted in 1990, the declaration has no formal legal status as a binding treaty (Petrasek, 1998). Instead, it is considered soft law, representing expert consensus on minimum humanitarian standards applicable in all situations of violence and conflict (Crawford, 2012). It acknowledges that in internal conflicts, normal constitutional and legal safeguards often fail, making it necessary to define fundamental protections.

The declaration fills a critical legal gap in NIACs, where both IHL and IHRL may be inadequate. IHL, particularly Common Article 3 and Additional Protocol II to the Geneva Conventions, applies only to conflicts that meet specific intensity thresholds, leaving many so-called *"grey-zone conflicts"* unregulated (Crawford, 2012). Similarly, human rights law can be insufficient due to the limited scope of non-derogable provisions, weak international enforcement mechanisms, and challenges in legally defining conflict situations (Meron and Rosas, 1991). The declaration specifically targets "*grey-zone conflicts*", which do not meet the criteria for applying IHL but still involve significant violence. Although efforts to formally adopt the declaration at the United Nations have stalled, the concept of fundamental standards of humanity has gained traction. The declaration remains an important reference in discussions on protecting human rights and human dignity in conflicts that fall outside the traditional IHL and IHRL frameworks.

By exploring selected themes, normative frameworks, reciprocity, and the translation of norms into practice, this analysis seeks to deepen understanding and inform the development and application of both legal regimes.

### *2.2 How Human Rights and Humanitarian Law Differ on Individual Rights*

Human rights and humanitarian law differ significantly in their approach to individual rights and procedural capacities. Human rights law emphasises granting positive rights to individuals, empowering them to enforce these rights through recognised procedural mechanisms. On the contrary, humanitarian law protects individuals' interests without necessarily granting enforceable rights, often relying on states or other entities to act on behalf of individuals.

International law, traditionally state-centric, has grappled with the dissociation of rights from enforcement. The case law highlighted that procedural incapacity to enforce a right does not negate the existence of the right itself.[13] States, for example, can act on behalf of individuals in international forums, as seen in cases brought to the United Nations Compensation Commission (Lauterpacht, 1950, p. 27). However, mechanisms that allow individuals direct access to enforcement bodies, particularly under human rights law, create rights that are more substantive and actionable.

[12] Declaration of Minimum Humanitarian Standards Adopted by an expert meeting convened by the Institute for Human Rights, Åbo Akademi University, in Turku/Åbo Finland, 2 December 1990.
[13] Peter Pázmány University v. Czechoslovakia, (1933) PCIJ Reports, Ser. A/B No. 61, par. 231.

This distinction reflects the broader normative framework of the two systems. Humanitarian law focusses on safeguarding individuals' fundamental interests during armed conflicts, often mediated through states or collective protections. In contrast, human rights law directly empowers individuals, emphasising personal development, dignity, and state accountability. Despite these differences, the two systems share a fundamental concern for protecting human interests, albeit through distinct methods and mechanisms.

International human rights law unequivocally grants individuals basic rights directly. In cases involving injuries to foreign nationals, there is some debate on the rights-holder, as the offending party is not the individual's state of nationality. However, in human rights law, the state of nationality often emerges as the violator, leaving the individual, or occasionally a group or people, as the sole rights-holder (Henkin, 1979). Attempts to frame human rights primarily as state obligations have generally been met with resistance, emphasising the individual-centric nature of this legal framework. For example, the 1983 ASEAN Declaration of Basic Duties of Peoples and Governments was seen as challenging the universality of human rights rather than providing a viable alternative (Blaustein, Clark and Sigler, 1987).

Human rights apply universally and unconditionally to individuals under the jurisdiction of states bound by international norms, regardless of nationality or location. Treaties like the European Convention on Human Rights and the American Convention on Human Rights broadly define jurisdiction as the power of state, not just its territorial limits.[14] This interpretation establishes that states are responsible for upholding human rights even in territories under their effective control abroad. On the contrary, restrictive formulations such as those in Article 2(1) of the International Covenant on Civil and Political Rights, which binds obligations to the territory and jurisdiction of a state, have been challenged for excluding individuals from occupied or foreign territories.[15]

The direct applicability of many human rights norms underscores their nature as individual rights. These norms often do not require any further legislation to be invoked in national courts, as seen in the European Convention on Human Rights and the International Covenant on Civil and Political Rights. While not all international norms are self-executing, their applicability strengthens the individual's ability to claim rights within municipal legal systems.

Human rights law also reflects broader public policy concerns, as evident in mechanisms such as interstate petitions under human rights conventions and the ability of the European Court to continue cases in the general interest despite the withdrawal of a petitioner.[16] This universality and individual focus distinguish human rights law, ensuring that individuals enjoy rights against any state bound by international norms, irrespective of their geographic or political context.

On the other hand, the normative framework of humanitarian law, aimed at reducing human suffering during armed conflicts, does not grant rights to individuals as explicitly as human rights law does. Early conventions, such as the 1864 Geneva Convention, emphasised protecting human dignity without mentioning rights. This absence continued in the 1899 and 1907 Hague Regulations, with the concept of "*rights*"

[14] ECtHR, Cyprus v. Turkey, app. no. 6780/74 and 6950/75, 26 May 1975; ECtHR, Loizidou v. Turkey (Preliminary Objections), app. no. 15318/89, 23 March 1995, par. 310.
[15] International Covenant on Civil and Political Rights, 16 December 1966, General Assembly resolution 2200A (XXI).
[16] European Convention on Human Rights, Article 37 (1). Available at: https://www.echr.coe.int/documents/d/echr/Convention_ENG (accessed on 12.10.2024).

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first appearing in the 1929 Geneva Convention Relative to the Treatment of Prisoners of War.[17] The 1949 Geneva Conventions, influenced by the Universal Declaration of Human Rights, included explicit references to the "*rights*" of protected persons (Pictet, 1958, p. 77). Key provisions of the 1949 Geneva Conventions indicate dual ownership of rights by individuals and states.[18] These provisions prohibit states from waiving rights conferred upon individuals and prevent individuals from renouncing their protections. This dual ownership allows both individuals and states to act independently to enforce these rights. However, the practical enforceability of these rights remains limited. For instance, prisoners of war have few mechanisms to act on their rights while in detention, and states are constrained by the realities of conflict.[19] The rights referenced in the Conventions are better understood as minimum standards of treatment rather than enforceable individual rights. For example, the prohibition on derogations through special agreements reflects the establishment of unalterable treatment standards rather than rights akin to those in human rights law (Provost, 2002, pp. 29-32). This distinction extends to other provisions. Article 85 of the 1949 Third Geneva Convention ensures that convicted war criminals retain protections under the Conventions. This principle, once contested, is now reaffirmed in Article 44(2) of the 1977 Protocol I, further emphasising that humanitarian law establishes obligations on states rather than rights for individuals (Dinstein, 1986, p. 345, 354–356). Similarly, Article 5 of the Fourth Geneva Convention, which suspends certain protections based on military necessity, illustrates that humanitarian law standards are tied to security concerns rather than individual entitlements.

The 1977 Protocols, while incorporating elements inspired by human rights law, largely retain the focus on treatment standards. For instance, Article 75 of Protocol I includes due process guarantees derived from Article 14 of the International Covenant on Civil and Political Rights but does not characterise them as individual rights. This reflects the broader trend in humanitarian law of emphasising obligations on states over direct individual rights.

In practice, the enforcement mechanisms of humanitarian law, centred on punitive measures against violations, align with its focus on public order rather than individual entitlements. Humanitarian law norms are generally not self-executing, reinforcing their role as standards of conduct imposed on states rather than rights granted to individuals. This framework reflects the overarching principle that humanitarian law, rooted in international public order, establishes obligations on those wielding power rather than granting actionable rights to individuals.

## 3. THE LEGAL STATUS OF NIACS

### *3.1 Understanding NIACs*

The legal status of NIACs under international law remains complex. Early humanitarian law focused exclusively on interstate conflicts, excluding NIACs, such as civil wars, due to principles of non-intervention, recognition, and state sovereignty (Verzijl, 1978). The Hague Conventions of 1899 and 1907, for instance, applied only to state

[17] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Articles 42, 62, 64, 83 and 96.
[18] Common articles 6 and 7-8.
[19] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 60.

conflicts, protecting individuals as adversary objects, and relying on reciprocity among states.[20]

Since the 19th century, the nature of conflict has evolved significantly, particularly after World War II, leading to a considerable expansion in the regulation of NIACs. The rules governing NIACs today are viewed as an extension of the *jus in bello* norms applicable in international armed conflicts (IACs), which began developing a century earlier. Currently, most armed conflicts are of a non-international nature and take place within the borders of a single state, involving government forces and organised armed groups or, in some cases, multiple organised armed groups without direct state involvement.

The 1949 Geneva Conventions marked a milestone in humanitarian law by expanding protections, though they were primarily aimed at regulating interstate armed conflicts. Common Article 2 to the four Geneva Conventions states that the Conventions apply to all declared wars or any other armed conflicts between two or more High Contracting Parties, even if one party does not recognise a state of war. This absence of a definition has led to various academic (Dinstein, 2005), professional, and judicial efforts to clarify these terms, as seen in *Prosecutor v. Tadić*.[21]

International armed conflict generally refers to interstate conflict. According to the ICRC Commentary, when two states engage in hostilities, it is considered an armed conflict under Common Article 2 (Pictet, 1960). This applies even if one party denies the existence of a state of war. The duration of the conflict, the intensity of violence, or the number of forces involved are irrelevant. It is sufficient for the armed forces of one state to detain enemies under the parameters of Article 4. Even without active hostilities, the act of detaining protected persons is enough to trigger the application of the Conventions, regardless of the number of individuals apprehended.

There have been three key developments in defining NIAC (Crawford, 2010). The initial event took place in 1993 with the formation of the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). These tribunals played a crucial role in elucidating the criteria for NIACs by assessing whether crimes occurred within the context of armed conflict and whether such conflicts were classified as international or non-international. The subsequent significant development arose in the aftermath of September 11, marked by the introduction of the phrase *"war on terror"*. This prompted inquiries into the classification of conflicts that extend beyond conventional boundaries and the applicable international law principles that should govern them. Some have contended that the *"war on terror*" signifies a development in customary international law (Lietzau, 2003, p. 80). However, the difficulty resides in pinpointing adversarial entities, be they terrorist organisations or individual actors. The hostilities in regions like Afghanistan and Iraq have been categorised as non-international armed conflicts, drawing upon Common Article 3, customary humanitarian law, human rights law, and relevant domestic legislation. Nonetheless, events such as the London and Madrid bombings were classified as criminal offences within the framework of international criminal law and human rights law, as opposed to being addressed under humanitarian law. The third significant moment occurred in 2016, when the ICRC Commentaries on the First Geneva Convention re-examined the concept of non-international armed conflict, with particular emphasis on Common Article 3 in response to developments following September 11th.

[20] Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907.
[21] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.

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The commentaries offered a comprehensive analysis of the legal framework relevant to internal conflicts, considering the evolving nature of conflict dynamics.

*3.2 Recognising Convenient Criteria*

Determining what constitutes a NIAC remains contentious, with the concept evolving significantly in recent years. Contemporary NIACs, including asymmetric and transnational conflicts, differ from traditional NIACs of the past (Graham, 2012). Recognising an NIAC requires identifying specific criteria. The ICRC Commentary outlines various factors for establishing the existence of either an international or non-international armed conflict.[22] These factors, described as "*convenient criteria*," help distinguish genuine armed conflicts from brief uprisings (Pictet, 1952).

The applicability of Common Article 3 depends on the circumstances of each conflict, including whether organised armed groups are involved and whether they are capable of sustaining protracted violence and adhering to humanitarian law (Pejić, 2007). Recent interpretations suggest that Common Article 3 can extend beyond the borders of a single state, addressing conflicts that traditional definitions might not capture (Bradley, 2017). This broader application helps prevent gaps in humanitarian protection, especially in complex scenarios.

However, despite these theoretical advancements, states are often reluctant to submit internal conflicts to international scrutiny, complicating the practical application of IHL in NIACs. This hesitancy underscores the challenges of ensuring compliance with humanitarian norms in evolving conflict situations.

Common Article 3 applies to situations involving at least two parties, making it crucial to determine whether non-state armed groups qualify as "*parties*" to a conflict. Unlike identifying state parties, this determination is complex and lacks formal criteria. However, widely recognised standards require that the violence reaches a certain intensity and involves at least two organised parties capable of conducting sustained hostilities.

The ICRC's Commission of Experts and various judicial decisions, such as the 1995 *Tadić* decision, have outlined the necessary criteria: (1) violence must be intense enough to compel the use of armed forces rather than police, and (2) the non-state armed group must exhibit a minimum level of organisation (e.g., command structure, discipline, and territorial control). The ICTY has elaborated on these requirements in cases like *Prosecutor v. Boškoski and Tarčulovski* and *Prosecutor v. Haradinaj*, where factors such as frequency, duration, severity of clashes, use of military equipment, and impact on civilians are considered to determine intensity. Organisation is evaluated on the bases of command structures, planning capacity, and the ability to engage in agreements such as ceasefires or peace accords.

Article 1(2) of AP/II further clarifies that internal disturbances such as riots or isolated violence do not qualify as armed conflicts, establishing the lower threshold for Common Article 3. The ICTY's assessments have demonstrated that even if violence is widespread, as seen during the Los Angeles riots, it does not meet the NIAC threshold without an organised armed group involved (Greenwood, 2003).

These standards are crucial to distinguish NIACs from internal disturbances, but their application can be complex, depending on the context and evolving dynamics of a conflict.

[22] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949. Commentary of 2016.

*3.3 Broadening the Reach of Common Article 3*

For Common Article 3 to apply, the non-international armed conflict must occur within the territory of one of the High Contracting Parties. However, the International Court of Justice (ICJ) has broadened its interpretation, affirming that Common Article 3 embodies fundamental humanitarian principles applicable in any armed conflict. Some authors have viewed this as indicating a potential third requirement in Common Article 3 (Bradley, 2017), which was largely overlooked until after 9/11. If a geographical condition exists, then the application of Common Article 3 would be suspended if the conflict extends into the territory of another state. Two scenarios highlight this issue (Bradley, 2017):

1. If state armed forces extend their operations against non-state actors into another state, Common Article 3 would cease to apply.
2. If non-state actors cross into another state, a new NIAC could arise if it meets the intensity threshold, and Common Article 3 would only apply once this condition is satisfied.

A broader interpretation is crucial because a strict territorial scope may not suffice to meet humanitarian protection needs. For example, in cross-border conflicts such as Rwanda's operations against the Interahamwe militia in the Democratic Republic of Congo, a narrow reading would imply that obligations under humanitarian law end at the border. In such "*spillover*" situations, the ICRC advocates for both parties to continue adhering to Common Article 3.

The scope of Common Article 3 and Additional Protocol II (AP/II) to the Geneva Conventions differs significantly, as AP/II has a higher applicability threshold. Concerns about state sovereignty led to a more restrictive and explicit text. AP/II applies only when non-state parties control territory sufficient to conduct sustained military operations and enforce its provisions. This criterion parallels the traditional requirements for the recognition of belligerency in international law.

The non-state party must be capable of maintaining military operations and enforcing the Protocol, as its applicability depends on the context of the situation. AP/II specifically governs conflicts involving state armed forces and dissident armed forces or other organised armed groups, excluding conflicts solely between non-state actors. This limitation prevents AP/II from extending humanitarian protection to conflicts that involve only armed groups, as seen in Lebanon, Angola, and the ongoing violence in the Democratic Republic of Congo.

Thus, AP/II's applicability is more limited compared to Common Article 3, which remains legally significant even when AP/II is in effect. Article 1(1) of AP/II supplements and enhances Common Article 3 without modifying its application requirements. Although AP/II does not explicitly mention the role of ICRC in providing services during NIACs covered by the Protocol, this right persists due to the interconnected nature of the two treaty regimes.

However, the application of IHRL to NSAGs remains legally uncertain. Although discussions on their human rights obligations are increasing, the framework is far less defined compared to their recognised responsibilities under IHL. IHRL traditionally applies to states, raising questions about whether and how it can bind NSAGs. The lack of legal recognition for these groups and the state-centred nature of international law make it difficult to hold them directly accountable under human rights treaties. Unlike IHL, which explicitly regulates NSAGs in armed conflicts, IHRL does not provide a clear framework for their obligations.

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Despite these challenges, some suggest that NSAGs may bear human rights responsibilities in certain contexts (Rodenhäuser, 2020). When they control territory and populations, they often assume governance roles, enforcing laws, administering justice, and providing basic services. Some groups even voluntarily commit to respecting human rights norms, signalling a growing awareness of their international responsibilities (Rodenhäuser, 2020). The question of whether IHRL can legally bind NSAGs remains open (Heffes, 2020). As armed conflicts evolve, so does the need for a clearer legal approach to NSAG accountability. Their growing role in conflict zones makes it crucial to address this gap and ensure better protection for civilians under both IHL and IHRL.

### *3.4 Evolving Definition*

Two legal developments have shaped the definition of non-international armed conflicts. AP/II sets a high threshold, applying only to conflicts within a state's territory between its armed forces and organised groups with responsible command, territorial control, and the capacity for sustained military operations. In contrast, Common Article 3 of the Geneva Conventions does not require such conditions. AP/II supplements but does not alter Common Article 3. Thus, there are two types of NIACs: those meeting AP/II's criteria (governed by both AP/II and Common Article 3) and those that only meet Common Article 3's lower threshold.[23] The definition of a NIAC is based on two criteria: the intensity of fighting, indicated by the seriousness, frequency of attacks, and use of government forces,[24] and the organisation of non-state armed groups, which must have command structures, conduct military operations, and adhere to IHL.[25] The ICC Statute introduces a third category, describing "*protracted armed conflict*" between state forces and organised groups, seen by some as an intermediary between Common Article 3 and AP/II. The Rome Statute is considered by some as *lex posterior* to AP/II (Art. 8(2)(f)). The application of IHL to NIACs is determined by facts, not formal recognition, and triggers IHL, limiting the state's use of force and ensuring humanitarian assistance.

## 4. LEGAL FRAMEWORK

At the international level, there is no organisation to promptly and objectively determine the legal status of NIACs at their onset or to classify violent situations as armed conflicts. Instead, states and conflicting parties must decide which legal framework will govern their military operations. A thorough examination of the facts is crucial before making any legal determinations, but this is often complicated by disputed facts. The rules of IHL applicable to NIACs are derived from both treaty and customary law. Although there are numerous provisions and treaties, the treaty-based rules for NIACs remain relatively limited compared to those governing international armed conflicts. Customary international humanitarian law, however, plays a critical role in addressing significant regulatory gaps in the context of non-international armed conflicts.

### *4.1 Treaty Law Provisions*

The four Geneva Conventions of 1949 marked a significant shift by incorporating Common Article 3, which provided a universal text specifically addressing non-

[23] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.
[24] ICTY, *Prosecutor v. Boškoski and Tarčulovski*, Trial Judgment, Case No. IT-04-82-T, Trial Chamber II, July 10, 2008.
[25] ICTY, *Prosecutor v. Limaj, Bala, and Musliu*, Trial Judgment, Case No. IT-03-66-T, November 30, 2005.

international armed conflicts (NIACs). Although its language is broad, Common Article 3 established foundational principles for NIACs, serving as a cornerstone norm in this context.[26] Present in all four Geneva Conventions, it aims to protect civilians by establishing conduct rules for involved parties, earning it the designation as a "*convention within a convention*" (O'Connell, 2009).

Common Article 3 applies to conflicts "*not of an international character*," meaning that at least one party is a non-state actor, and it encompasses conflicts between non-state armed groups alone. It establishes rights and responsibilities that ensure basic protection for civilians and individuals no longer participating in hostilities, prohibiting actions such as murder, hostage taking, and humiliating or degrading treatment. For many years, it stood as the sole written regulation embodying widely accepted humanitarian principles for internal conflicts, mandating that all parties respect the dignity of noncombatants.

The 1977 Additional Protocol II (AP/II) expanded the Geneva Conventions by introducing more specific NIAC regulations, but with a narrower scope than Common Article 3. AP/II "*develops and supplements*" Common Article 3 without altering its application, providing additional protections for detainees, the wounded, medical personnel, and civilians. Unlike Common Article 3, which applies to all NIACs, AP/II requires government involvement and territorial control of rebel groups, thus excluding conflicts solely between non-state actors, such as the Lebanese and Somali Civil Wars. AP/II also emphasises that it does not infringe on state sovereignty or the government's right to maintain law and order.[27]

Article 8(3) of the Rome Statute echoes this stance, stressing that these obligations must be fulfilled by "*all legitimate means*", implying that while governments are responsible for restoring law and order, they must act in accordance with the laws of NIACs. The Rome Statute further affirmed that conflicts solely between non-state groups can be classified as non-international armed conflicts (Article 8(2)(d)). Additionally, Article 8(2) of the 1998 Rome Statute of the ICC enumerates war crimes committed in NIACs, reinforcing the significance of these treaties in the international legal framework.

Several other treaties also address NIACs. For instance, Article 19 of the 1954 Hague Convention for the Protection of Cultural Property obliges parties in NIACs to protect cultural property.[28] The 1999 Second Protocol to this convention reiterates these protections, ensuring their applicability in internal conflicts (Second Protocol to the CPCP, 1999). However, states often classify such conflicts differently, viewing them as stability operations or peacekeeping missions rather than clear-cut armed conflicts.

### *4.2 Customary Law*

Customary international law binds all states except those that persistently objected during its formation. The ICJ, in cases like *Libya/Malta* and *North Sea Continental Shelf*, clarified that customary law arises from state practice and *opinio juris*,

[26] Convention (III) relative to the Treatment of Prisoners of War. Geneva, 12 August 1949, Article 3.
[27] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977.
[28] Convention for the Protection of Cultural Property in the Event of Armed Conflict with Regulations for the Execution of the Convention, 14 May 1954, The Hague, *Laws of Armed Conflicts* 999, 1007.

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with the latter emphasising a sense of legal obligation. [29] Although unanimity is not required, state practice must be sufficiently extensive.[30]

Customary norms for non-international armed conflicts (NIACs) are rooted in general state practice, which serves as the basis for their recognition in international law. However, state practice on specific issues in NIACs remains sparse, leaving much of the customary framework beyond Common Article 3 underdeveloped. This gap has prompted calls for progressive development, driven largely by humanitarian concerns. Although these efforts are commendable, it is essential to distinguish between existing legal norms (*lex lata*) and aspirational goals (*lex ferenda*) to maintain legal clarity (Arajärvi, 2011). Blurring this line risks undermining the legitimacy of customary law.

A prominent example of this effort to expand *lex lata* lies in efforts to strengthen environmental protections during armed conflicts. The International Law Commission's (ILC) 2019 Draft Principles on the Protection of the Environment in Relation to Armed Conflicts reflect this ambition.[31] Principle 13(2) calls for measures to prevent widespread, long-term, and severe environmental damage during armed conflicts, applying equally to NIACs and IACs. Although the principle aspires to strengthen environmental safeguards, its practical implementation remains uncertain, especially given the complexities of contemporary conflicts. The ILC further emphasises the civilian nature of the natural environment through Principle 16(3), which prohibits attacks on environmental elements unless they serve as military objectives. Although this framework aims to enhance environmental protections, it struggles with the practical challenge of distinguishing between military objectives and civilian elements in the fluid and complex dynamics of armed conflict. This tension highlights the broader conflict between ambitious legal principles and the realities of state behaviour in NIACs.

The International Committee of the Red Cross (ICRC) has cautiously endorsed the idea that parties to NIACs may share obligations similar to those in IACs regarding environmental protection (Henckaerts and Doswald-Beck, 2005). The ICRC emphasises the principle of "*due regard for the protection and preservation of the natural environment*", aligning with broader international environmental law, where the duty of due diligence has emerged as a foundational norm (Viñuales, 2020).

The principle of "*due regard*" for environmental protection within the context of military operations is underscored in established legal frameworks (Dinstein and Dahl, 2020). Numerous methodologies have been suggested to address environmental degradation, such as agent-based modelling and simulation (ABMS), which aim to enhance comprehension and evaluation of the environmental repercussions associated with conflicts (Quandeel, 2023). The ICRC has issued guidelines aimed at enhancing environmental protection in the context of armed conflicts (Maurer, 2021). However, current state practice provides little evidence of widespread adoption of these principles in NIACs. Although the natural environment is implicitly acknowledged, it has not yet achieved the status of special customary protection in these conflicts.

The development of customary law for NIACs began with the adoption of the Geneva Conventions in 1949. The Nicaragua Judgment of 1986 cemented Common

[29] ICJ, *Case Concerning the Continental Shelf (Libya/Malta)*, [1985] Rep. 13, 29.
[30] ICJ, *North Sea Continental Shelf Cases (Germany/Denmark; Germany/Netherlands)*, [1969] Rep. 3, 43.
[31] International Law Commission (2022). Texts, instruments and final reports. Protection of the environment in relation to armed conflicts. Available at: https://legal.un.org/ilc/texts/8_7.shtml (accessed on 04.04.2025).

Article 3 as a universally recognised reflection of customary international law, making further debate over its status unnecessary.[32] With its provisions firmly established as customary, the focus has shifted to supplementary instruments like Additional Protocol II (AP/II), which aim to build upon and refine the foundational protections laid out in Common Article 3. This progression underscores the ongoing evolution of NIAC norms as they adapt to the contemporary challenges in armed conflict.

The International Criminal Tribunal for the former Yugoslavia (ICTY) supported this view in the *Tadic* Appeal Decision (1995),[33] asserting that the nature of the conflict does not alter the applicability of these minimum rules.[34] Furthermore, the ICTY recognised that provisions such as Common Article 3, Article 19 of the 1954 Hague Convention, and core elements of Additional Protocol II have become customary law. In *Prosecutor v. Delalic et al.* (1998),[35] the ICTY noted that incorporating internal armed conflict provisions into the 1949 Geneva Conventions was initially groundbreaking, but these norms have since solidified into customary international law.[36]

Many provisions of Additional Protocol II are now accepted as customary international law, binding all parties in NIACs (Tsagourias and Morrison, 2018). These include prohibitions on targeting civilians, starvation, and attacks on objects essential for civilian survival. They also mandate the protection of medical and religious personnel, medical units, and transports, alongside safeguarding noncombatants, the wounded and sick, and individuals deprived of liberty. Other rules prohibit forced civilian displacement and ensure special protections for women and children.

Customary international humanitarian law (CIHL) extends beyond Common Article 3 and Additional Protocol II by covering additional conduct of hostilities rules (Tsagourias and Morrison, 2018). These encompass the distinction between civilian objects and military targets, prohibitions on indiscriminate attacks, the principle of proportionality, and protections for specific individuals and areas, such as humanitarian personnel, journalists, and protected zones. It also restricts certain methods of warfare, including the denial of quarter and perfidy.

IHL applies in an NIAC until the conflict reaches a conclusion, typically marked by a peaceful settlement, as seen in the 2016 peace agreement between the Colombian government and the FARC. To hold an armed group legally responsible, it must be "*independent*". An armed group must maintain independent control over its actions, separate from state influence, to bear international obligations. For example, while a group may receive military supplies from a state, it must operate and plan its military strategies independently to assume full responsibility.

The criterion of independence clarifies which groups bear obligations under international human rights law. However, it does not account for complex scenarios in which groups have varying degrees of state affiliation. Strict adherence to the independence requirement often excludes groups operating in international armed conflicts, since they are typically under state control. Nonetheless, some groups may

[32] ICJ, *Military and Paramilitary Activities (Nicaragua v. U.S.)*, 1986, June 27, paras. 218 and 114.
[33] ICTY, *Prosecutor v. Tadic*, Case No. IT-94-1, Appeal Decision, October 2, 1995.
[34] *Ibid*.
[35] ICTY, *Prosecutor v. Delalic et al.*, Trial Chamber, 1998.
[36] *Ibid*.

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retain sufficient independence, such as those referenced in Article 1(4) of Additional Protocol I or de facto authorities.

## 5. IHRL AND NIACS

The relationship between the law of non-international armed conflict and human rights law reveals a complex dynamic. NIAC and IHRL intersect, creating a continuum rather than a strict divide. Although both protect individuals, they differ in their approach: NIAC allows attacks on military objectives based on status, while IHRL demands justification for lethal force as a last resort, regardless of status. In NIACs, combatant status does not exist, as Common Article 3 of the Geneva Conventions and APII do not grant combatant privilege to fighters opposing state forces. Instead, national law applies, meaning that such fighters can be prosecuted for offences like murder or manslaughter after the conflict. Members of organised armed groups are always lawful targets, similar to combatants in international conflicts. Civilians, however, remain protected unless they directly participate in hostilities, in which case they lose their protection for the duration of their involvement and may be lawfully attacked. This rule is recognised in customary IHL and codified in Common Article 3 and Article 13(3) of APII. On the other hand, IHRL mandates equal protection of life unless an immediate threat is present.

Key areas of overlap include protection of life, prohibition of torture, basic criminal justice rights, non-discrimination, protection of women and children, and regulation of the right to food and health (Melzer, 2008). These overlaps are especially evident in NIACs, where IHRL complements IHL's safeguards. The *lex specialis* principle prioritises the law on NIAC in conflict scenarios but does not nullify IHRL obligations, ensuring that IHRL remains relevant (Ashri, 2019).

While human rights law remains applicable during non-international armed conflicts, as reaffirmed by the Preamble of Additional Protocol II, the coexistence of these legal frameworks requires careful navigation. Both systems aim to protect individuals, but their application often hinges on context, presenting challenges when they must operate simultaneously. The complexity intensifies when the law on NIAC and human rights law overlap in both time and space. The ICJ's Wall Advisory Opinion outlined three scenarios: some rights fall solely under international humanitarian law, others under human rights law, and certain areas straddle both.[37] These distinctions reflect the need to reconcile potential conflicts. The principle of *lex specialis*, articulated in the Nuclear Weapons Advisory Opinion, provides a solution by prioritising the more specific law, typically law on NIAC, in situations of overlap or inconsistency.[38] This principle was reinforced in the *Kunarac* Judgment, where the ICTY highlighted the necessity of tailoring human rights norms to fit the specificities of NIAC.[39] The principle of *lex specialis*, rooted in the maxim that specialised rules override general ones, is essential for determining the governing framework during hostilities. For example, the law of armed conflict dictates the permissible use of force in combat, even if such actions might contravene general human rights norms under ordinary circumstances. In other words, in case of conflict, the law on NIAC prevails over the IHRL. Despite its practical value, the *lex specialis*

[37] Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, 43 ILM 1009, at 1038 (2004).
[38] Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996, at 226, 257.
[39] ICTY, *Prosecutor v. Kunarac et al.*, (Trial Chamber 2001), par. 467.

principle is not without controversy. Critics argue that it oversimplifies the intricate interplay between these two legal systems. Nonetheless, it remains integral to contemporary international law, ensuring that the law on NIAC governs the conduct of hostilities while accommodating the broader protections of human rights law where possible. Rather than abolishing human rights law, *lex specialis* temporarily defers its application in favour of law on NIAC where the two conflict.

The European Court of Human Rights (ECtHR) has displayed varying interpretations of the *lex specialis*. In the *Esmukhambetov* case,[40] it acknowledged relevant NIAC provisions, but failed to fully engage with them, while in *Isayeva v. Russia*, the Court appeared to prioritise human rights law over NIAC law, citing the absence of explicit proportionality principles in NIAC treaties.[41] Such decisions risk undermining established customary NIAC norms and create uncertainty in legal frameworks. Proportionality illustrates the nuanced tension between these regimes. Although it is a cornerstone of both human rights law and NIAC, its application differs (Kretzmer, 2009, pp. 27-28). In human rights law, proportionality regulates state actions, ensuring minimal interference with individual rights. In NIAC, proportionality balances military necessity against potential civilian harm, providing a practical tool to limit hostilities. Integrating proportionality into customary NIAC strengthens its coherence and resolves discrepancies with human rights norms.

There is a debate on whether IHRL should be the main legal framework used in NIACs, with IHL being applied only when a particular level of violence is reached (Kretzmer, 2009). While the International Committee of the Red Cross (ICRC) and the IHL community viewed IHRL as idealistic and politically driven, contrasting with the pragmatic and impartial approach needed to alleviate suffering in armed conflicts (Oberleitner, 2015), some authors advocate for the complementary use of both IHL and IHRL to ensure the most effective protection of civilians (Matthews, 2013). Others have described this relationship as convergence (Vinuesa, 1998), or confluence (Quentin-Baxter, 1985). Historically, IHL governed armed conflicts, while IHRL applied in peacetime. The application of IHRL to non-state actors in NIACs is a subject of ongoing debate. There are disputes about the legal justification for holding armed groups responsible under human rights law (Fortin, 2017). Although facing difficulties, there has been a movement towards aligning the regulations that apply to both international and non-international armed conflicts. This has been achieved primarily through the establishment of customary international law (Crawford, 2008).

Human rights law itself provides for exceptions to the deprivation of life under specific circumstances. Article 2(2)(c) of the European Convention on Human Rights permits the use of force "*no more than absolutely necessary*" to quell riots or insurrections. This flexibility underscores the need for separate frameworks tailored to different challenges. However, the dynamics of NIACs often demand more comprehensive protections and obligations, particularly concerning fighters and civilians who receive both supplementary protections and the corresponding responsibilities.

The divergence between human rights law and NIACs lies in their fundamental purposes. Human rights law seeks to protect individuals from state abuse, focussing on

[40] ECtHR, Esmukhambetov et al. v. Russia, app. no. 23445/03, 29 March 2011, par. 76.
[41] ECtHR, Isayeva et al. v. Russia, app. no. 57950/00, 24 February 2005, par. 168–201.

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the relationship between the state and its citizens. By contrast, IHL aims to mitigate the impact of armed conflict by regulating hostilities and providing protections that extend to all parties, including non-state actors. This broader scope complicates the enforcement of human rights obligations against insurgent groups, which often lack the organisational capacity to uphold responsibilities similar to those of states.

While both frameworks centre on human dignity, they differ significantly in approach. IHL legitimises acts such as lawful killings in combat and detention under prescribed conditions, which run counter to the prohibitions established by human rights law.

However, these differences do not render NIACs and human rights law entirely incompatible. Their interaction on a practical level often reveals opportunities for complementarity. Human rights norms can supplement IHL, particularly in safeguarding civilian populations during conflicts. By respecting the distinct roles of each framework, their interplay can strengthen protections in armed conflicts without compromising the integrity of either system.

Common Article 3 of the Geneva Conventions offers no greater protection than IHRL, as it applies only when the laws of war are triggered, potentially weakening the right to life under IHRL. The International Court of Justice (ICJ) in its Advisory Opinion on Nuclear Weapons clarified that whether a deprivation of life is arbitrary during a conflict is governed by international humanitarian law (IHL) as *lex specialis*. The ICJ also noted that the use or threat of nuclear weapons could violate the right to life under the ICCPR, which mainly applies during peacetime, but remains relevant during conflict unless Article 4 derogations are invoked. Thus, the right not to be arbitrarily deprived of life persists in armed conflict, regulated by IHL as *lex specialis*.

The coexistence of NIAC and IHRL is reinforced by ICJ advisory opinions and judgments.[42] The ICJ highlighted that when both legal regimes apply, NIAC prevails as the specialised law. This was reaffirmed in 1996 when the ICJ examined whether the use of nuclear weapons violated international law, specifically Article 6 of the ICCPR, which safeguards the non-derogable right to life.[43]

The ICJ addressed human rights law in armed conflict and occupation in two cases: the 2004 Advisory Opinion on Israel's separation wall in Palestinian territories[44] and the 2006 conflict between the Democratic Republic of Congo and Uganda (Armed Activities on the Territory of the Congo).[45] In the latter, the ICJ held Uganda responsible for human rights and humanitarian law violations as an occupying state.

## 6. CHALLENGES IN APPLYING IHL

The application of IHL to NIACs poses significant challenges, particularly in protecting civilians and prosecuting war crimes, which are essential for ensuring accountability. One major issue is the classification of conflicts. IHL applies differently to IACs and NIACs, and distinguishing between the two can be complex. For example, the

[42] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, paras. 106-13, July 9.
[43] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, July 8, 1996, I.C.J. Reports 1996, par. 25.
[44] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, reproduced in document A/ES-10/273 and Corr.1
[45] ICJ, Democratic Republic of the Congo v. Uganda, Judgment, I.C.J. Reports 2005, p. 168, par. 216.

conflict in Syria was classified as a NIAC by the ICRC, affecting the legal framework for civilian protections. However, the Syrian government rejected this designation, illustrating the disputes that can arise when defining the nature of a conflict.

The legitimacy of actors in NIACs also complicates IHL's application. Assessing factors such as the intensity of violence and the organisation of armed groups is subjective, leading to inconsistent application of IHL (Ruys, 2021). This inconsistency undermines civilian protection and complicates war crime prosecutions. Asymmetric conflicts, where there is a power imbalance between parties, present additional challenges. In such contexts, distinguishing combatants from civilians is difficult, as seen in the Mindanao conflict, where local residents acted as part-time insurgents (Ferrer and Cabangbang, 2012). This fluidity complicates the application of IHL and civilian safety.

The prosecution of war crimes in NIACs is further hindered by unclear legal frameworks. Although IHL prohibits acts such as murder, torture, and rape of civilians, its enforcement is challenging. The ICRC's NIAC designation allows for war crime prosecutions, but it is not legally binding and can be contested by the conflicting parties. Additionally, legitimacy concerns regarding non-state armed groups complicate efforts to hold their members accountable (Ruys, 2021).

Despite the aim of IHL to reduce suffering, it cannot fully address the broader political, economic, and ideological issues affecting civilians in conflict zones. Enhanced respect for IHL would improve civilian protection, but modern conflicts present significant challenges to its interpretation and implementation (Droege and Durham, 2021). A perception gap between the promises of IHL and its enforcement, as highlighted by the media and NGOs, undermines the credibility of the law and the willingness to comply (Sassòli, 2007).

To strengthen legal accountability, it is crucial to address these ambiguities by ensuring consistent conflict classification, refining criteria for assessing NIACs, and improving legal frameworks for war crime prosecutions. Bridging the gap between the theoretical protections of IHL and its practical application is also necessary to restore its credibility and effectiveness.

## 7. CONCLUSION

The relationship between IHL and IHRL has evolved significantly, particularly after World War II. Legal milestones such as the Nuremberg Trials and the Genocide Convention shifted the focus of international law toward individual rights. Common Article 3 of the 1949 Geneva Conventions underscored this shift by mandating humane treatment in NIACs. Despite their shared humanitarian goals, IHL and IHRL differ fundamentally: IHRL governs state-individual relations during peace, emphasising dignity and freedom, while IHL focusses on wartime conduct, balancing humanity with military necessity.

In NIACs, IHL permits actions like lawful killings and detention under strict conditions, whereas IHRL prioritises individual protections, even in conflict. Both frameworks overlap in areas such as the right to life, the prohibition of torture, and basic justice. However, conflicts arise when their rules diverge. The *lex specialis* principle addresses these tensions by prioritising IHL in hostilities while maintaining relevance of IHRL where applicable.

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States often avoid recognising NIACs to sidestep IHL obligations, opting instead for the universal application of IHRL. This hesitation comes from fears of legitimising non-state actors and the need to uphold state sovereignty. Instead, they prefer to label these groups as criminal or terrorist organisations, maintaining their authority while avoiding any legal recognition of opposing forces. This creates gaps in regulating non-state actors, undermining protections for civilians. Future research should explore practical enforcement of these norms in real-world conflicts and establish clearer criteria for identifying NIACs and non-state actor responsibilities. By respecting their distinct purposes and leveraging their complementarities, IHL and IHRL can collectively enhance protections in armed conflicts.

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