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# **NIGER DELTA UNIVERSITY LAW JOURNAL**

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# **NIGER DELTA UNIVERSITY LAW JOURNAL**

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# AN EXAMINATION OF THE BASIC PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF CIVILIANS UNDER INTERNATIONAL HUMANITARIAN LAW

Fagbemi Sunday Akinlolu\*  
&  
Odiaka Ngozi Oluchukwu\*\*

## ABSTRACT

*International Humanitarian Law (IHL) or the law of armed conflict is the law that regulates the conduct of armed conflicts. IHL classifies armed conflict as International armed conflict (IAC) or Non-International armed conflict (NIAC). The dichotomy between the two has over the years become an important threshold question in the determination of which set of rules should be applied during armed conflict either within a country or between two belligerent states. International Humanitarian Law is inspired by the consideration of humanity and the mitigation of human suffering during an armed conflict. Due to this consideration, several principles were developed to protect civilian and non-military objects during such armed conflict. Examination of these principles and rules is the focus of this paper. The objective is to consider the adequacy or otherwise of these principles with a view to offering suggestions for improvement.*

**Keywords:** Humanitarian, Codification, Conflict, Warfare.

## INTRODUCTION

Conflict is a natural phenomenon in human society<sup>1</sup>. Conflict usually takes place whenever people or groups disagree over which goals or values to pursue and the method and timing to be adopted<sup>2</sup>. Conflict usually takes various dimensions. For instance, it may involve a mere exchange of verbal altercations and abusive words between two warring

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<sup>1</sup> I. Azikiwe, "Africa: Conflict Resolution and International Diplomacy", available at <https://books.google.com.ng/books>. date accessed : 11<sup>th</sup> April, 2015.

<sup>2</sup> J. L. Hocker & W. W. Wilmot, *Interpersonal Conflict* (6<sup>th</sup> Ed. New York, 2001), p. 23.

parties; it may also involve the use of sophisticated weapons of war or instruments of warfare. This latter category is referred to as armed conflict<sup>3</sup>.

In human history, the main purpose of warfare is to overcome the opponent by whatever means<sup>4</sup>. More often than not, this is done by disabling the enemy combatants thus rendering them powerless<sup>5</sup>. However, before a conflict attains international dimension, it must be between States or Nations with sovereign power and supreme law-making authority and right to control everything and every kind of activity within its scope of territory. Premised on this, International Humanitarian Law<sup>6</sup> classifies armed conflicts as international armed conflict<sup>7</sup> (IAC) or non-international armed conflict<sup>8</sup>. This qualification is an important threshold question for the determination of which set of rules should apply to the conflict. For instance, in the face of warfare or conflict between two States or Nations, a distinction is drawn between combatants and civilians<sup>9</sup>. This distinction has led to the development of some rules of conduct to govern wars or hostilities between two States. These rules are known as International humanitarian law or the law of armed conflict.<sup>10</sup>

According to *Black's Law Dictionary*,<sup>11</sup> humanitarian law is 'the law dealing with such matters as the permissible use of weapons and other means of warfare, the treatment of prisoners of war (POW) and civilian population in armed conflict and generally the direct impact of law on human life and liberty'. IHL or the law of armed conflict; is therefore

<sup>3</sup> *Ibid.*

<sup>4</sup> L. Wendy & B. Bill, *Modern Warfare: An Overview for World History Teachers. World History Connected* (2005), available at <http://worldhistoryconnected.press.illinois.edu/2.2/bravman.html>, date accessed on 11<sup>th</sup> April, 2015

<sup>5</sup> *Ibid*

<sup>6</sup> Hereinafter referred to as IHL

<sup>7</sup> Hereinafter referred to as IAC

<sup>8</sup> Hereinafter referred to as NIAC. See S. Marco, "Transnational Armed Groups and International Humanitarian Law" (2006), Number 6, *Occasional Paper Series*, p. 10

<sup>9</sup> International Committee of the Red Cross, "Principle of Distinction", available at [https://www.icrc.org/customary-ihl/eng/docs/v2\\_rul\\_rule](https://www.icrc.org/customary-ihl/eng/docs/v2_rul_rule), date accessed 11<sup>th</sup> April, 2015). See *Nigeria's Military Manual (1994)*, which provides thus: 'For both the conduct operations and behaviour in action, the main aim for all commanders and individual combatant is to distinguish combatant and military objectives from civilian persons and object at all time. See also Rule 7 of the International committee of the Red Cross, available at [https://www.icrc.org/customary-ihl/eng/docs/v2\\_cou\\_ng\\_rule7](https://www.icrc.org/customary-ihl/eng/docs/v2_cou_ng_rule7) date accessed: 11<sup>th</sup> April, 2015

<sup>10</sup> What is International Humanitarian Law? Advisory Service on International Humanitarian Law, available at [https://www.icrc.org/eng/assets/files/other/what\\_is\\_ihl.pdf](https://www.icrc.org/eng/assets/files/other/what_is_ihl.pdf), date accessed: 11<sup>th</sup> April, 2015.

<sup>11</sup> A. G. Bryan, *Black's Law Dictionary*, 8<sup>th</sup> Ed., Thomson West, 2004, p. 758.

the law that regulates the conduct of armed conflicts (*jus in bello*)<sup>12</sup>. Humanitarian law is inspired by considerations of humanity and the mitigation of human suffering.<sup>13</sup> It comprises of a set of rules, established by treaty or custom that seeks to protect persons and properties that are or may be affected by armed conflict and limits the rights of parties to a conflict to use methods and means of warfare of their choice".<sup>14</sup>

Traditionally, IHL is the framework that regulates relationship only between states; however, it has evolved to cover a broad range of actors. IHL is notable in this regard, as it recognizes obligations for both states and non-state armed groups that are parties to an armed conflict.<sup>15</sup> In spite of its objectives, IHL has its inherent limits and some of these limitations are that: it does not prohibit the use of violence; it cannot protect all those affected by an armed conflict; it cannot distinguish according to the purpose of the conflict; it cannot prohibit a party to overcome the enemy and it presupposes that parties to an armed conflict have national aims.<sup>16</sup>

Premised on the foregoing, IHL represents a balance between military necessity and humanitarian considerations in the context of conflict.<sup>17</sup> In as much as IHL applies to armed conflict, it is germane to state at the onset that it does not cover internal tensions or disturbances such as isolated acts of violence and militancy.<sup>18</sup> In the case of internal conflict such as guerrilla warfare, which has characterized the on-going trend in Africa, the sovereignty of the state is restricted to the interest of individual.<sup>19</sup>

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<sup>12</sup> Understanding the Law of Armed Conflict- The Lawyers Chronicle, available at <http://thelawyerschronicle.com/understanding-the-law-of-armed-conflict/> date accessed: 12<sup>th</sup> April, 2015

<sup>13</sup> GSDRC- Overview of International Humanitarian Law, available at <http://www.gsdr.org/go/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/-principles-and-legal-provisions/overview-of-international-humanitarian-law>, date accessed: 12<sup>th</sup> April, 2015

<sup>14</sup> A. A. Bouvier, "International Humanitarian Law and the Law of Armed Conflict", USA, *Peace Operations Guide* 2012, p. 128

<sup>15</sup> "International Humanitarian Law." Available at <http://ijrcenter.org/international-humanitarian-law>, date accessed: 14, April, 2015

<sup>16</sup> M. Sassou and A. A. Bouvier, "How Does Law Protect in War? (3<sup>rd</sup> ed.) Outline of International Humanitarian Law, Cases Possible Teaching Outlines, Vol. 1, International Committee of Red Cross, (2006), p. 121.

<sup>17</sup> International Humanitarian Law- International Justice Resource centre, available at <http://www.ijrcenter.org/international-humanitarian-law/>, date accessed: 11<sup>th</sup> April, 2015

<sup>18</sup> The essence of statehood is sovereignty, the principle that each nation answers only to its own domestic order and is not accountable to a larger international community, save only to the extent it has consented to do so. Sovereign states are thus conceived as hermetically sealed units, atoms that spin around an international orbit, sometimes colliding, sometimes cooperating, but always separate and apart. See D. J. Bederman, *International Law Frameworks*, 2001, p. 50.

<sup>19</sup> *Ibid*



The focus of this paper is limited to the examination of the basic principles and guidelines for the protection of civilians during wars or hostilities as enunciated under the Law of Geneva and the Law of The Hague. However, for the purpose of exposition, the paper traces the history of Humanitarian Law and how it dovetails to the Law of Geneva and the Law of The Hague and codification of their norms. The paper concludes with closing remarks.

## HISTORICAL BACKGROUND OF THE INTERNATIONAL HUMANITARIAN LAW

Humanitarian law is not entirely new. According to Marco Sassou et al<sup>20</sup>, the law of war is probably as old as war itself. Even in the very ancient times, one can find very interesting – though primitive – customs and agreements containing “humanitarian” elements.

It should be underlined that almost everywhere around the world and in most cultures, these customs have very similar patterns and objectives.<sup>21</sup> In the words of Marcos Sassou et al, this global phenomenon proves two things: a common understanding of the necessity to have some kind of regulations even during the wars and the existence of the feeling that under certain circumstances, human beings, both friends and foes; deserve some protection.<sup>22</sup>

This idea has root in the practice of several religions, In the Old Testament, when the King of Aram waged war against Israel and his armies were captured by the King of Israel who sought to kill them, Prophet Elisha warned him to spare their life. In answer to a question from the King, Elisha said:

Do not kill them. Would you kill those you have captured with your own sword and bow? Set food and water before them, so that they may eat and drink and then go to their master.<sup>23</sup>

A close look at universal history revealed that as early as 3000 years, there were rules which protect certain categories of victims of armed conflicts, or regulations limiting or prohibiting the use of certain means and methods of warfare.<sup>24</sup> In ancient India, there are records, for example, describing the types of weapons that should not be used:

<sup>20</sup> M. Sassou and A. A. Bouvier, *op cit*

<sup>21</sup> *Ibid.*

<sup>22</sup> *Ibid*

<sup>23</sup> 2 Kings 6: 22-23, *Holy Bible*, (New International Version) (Apapa, Lagos: Bible Society of Nigeria, 2014), p.384.

<sup>24</sup> M. Sassou. M. *et al*, *op cit*.

When he fights with his foes in battle, let him not strike with weapons concealed in wood, nor with such as are barbed, poisoned, or the points of which are blazing with fire.<sup>25</sup>

There is also the command not to strike a eunuch nor the enemy. Nagendra posits that: Who folds his hands in supplication.... nor one who sleeps, nor one who has lost his coat of mail, nor one who is naked, nor one who is disarmed, nor one who looks on without taking part in the fight<sup>26</sup>.

Similarly, the Islamic law forbids 'non-combatants who did not take part in fighting such as women, children, monks and hermits, the aged, blind, and insane' to be molested.<sup>27</sup> The first Caliph, Abu Bakr, proclaimed:

Do not mutilate. Do not kill little children or old men or women. Do not cut off the heads of palm trees or burn them. Do not cut down fruit trees. Do not slaughter livestock except for food.<sup>28</sup>

McCoubrey posits that a prisoner should not be killed, as he 'cannot be held responsible for mere acts of belligerency'.<sup>29</sup> Islamic law principle is not limited to non-combatants, thus, in the case of those who refused to convert to Islam, or to pay an alternative tax, Muslims 'were allowed in principle to kill any one of them, combatants or non-combatants, provided they were not killed treacherously and with mutilation'.<sup>30</sup>

In fact, there were rules protecting certain categories of victims in armed conflicts and customs concerning the means and methods of authorizing or prohibiting combatant during hostilities as early as 1000 BC.<sup>31</sup> Although these ancient and often very rudimentary rules were not established for humanitarian reasons, but rather for purely economic purposes, their effects were humanitarian. For example: The prohibition

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<sup>25</sup> The Laws of Manu, VII, 90-92. See also S. Nagendra, "Armed Conflicts and Humanitarian Laws of Ancient India", in Swinarski C., *Studies and Essays on International Humanitarian Law and Red Cross Principles*, The Hague: Kluwer Law International, pp. 531-536

<sup>26</sup> *Ibid.*

<sup>27</sup> K. Majid, *War and Peace in the Law of Islam*. (New York, NY, Law book Exchange, (2006), pp. 103-104.

<sup>28</sup> H. Sohail, *Islamic Political Ethics: Civil Society, Pluralism and Conflict*, (Princeton, N. J. Princeton University Press, 2002), p. 211.

<sup>29</sup> M. Hilaire, *International Humanitarian Law*, (Aldershot, United Kingdom: Ashgate Publishing, 1999), p. 8.

<sup>30</sup> K. Majid, *op cit.* pp. 105-106.

<sup>31</sup> A. A. Bouvier and H. Langholtz, "International Humanitarian Law and the Law of Armed Conflict" Peace Operations Training Institutes, USA, (2012), p. 23.

against poisoning wells<sup>32</sup> was originally made in order to permit the exploitation of conquered areas. The first reasons for the prohibition against killing prisoners<sup>33</sup> were to safeguard the lives of future slaves or to facilitate the exchange of prisoners.

Such prohibitions can be found in many different civilizations, throughout the world and throughout history. For example, in many parts of Africa there were specific rules regarding the commencement of hostilities between different peoples that corresponds, to a large extent, to the classical European traditional obligation of declaring war.<sup>34</sup> Moreover, in a treatise called 'The Arts of the War', written in 500 BC, the Chinese writer Sun Tzu, expressed the idea that wars must be limited to military necessity, and that prisoners of war, the wounded, the sick, and civilians should be spared.

The cultural history of Europe also provides examples of both barbarism and humanity. The first significant development in respect to the law of war occurred in 300 BC, with the Greek philosophical school called 'stoicism'. This school advocates a path towards humanity through understanding and 'sympathy', the need to understand and respect each other.<sup>35</sup>

Between the 16<sup>th</sup> and 18<sup>th</sup> centuries, in the Renaissance and Age of Reason, an interesting and humanitarian practice developed in Europe. Frequently, warriors met before the hostilities and decided on guidelines to be respected during the battle. These special agreements could, for example, establish the observance of an armistice two days per week, the obligation to collect the wounded, or a responsibility to release prisoners at the end of the war. Although these agreements were concluded on an *ad hoc* basis, and had a limited scope of application, such precedents played a very significant role in the creation of IHL.<sup>36</sup>

It is from the above historical perspective that IHL developed in the mid-19<sup>th</sup> century. Up to that point, the practice of the accepted rules of warfare reflected the theories of philosophers, priests or jurists with local and special agreements.<sup>37</sup>

Premised on the foregoing, IHL has its roots in the rules of ancient civilization and religion. However, these customs were geographically limited and there were no

<sup>32</sup> This rule was reaffirmed in 1899 in the Hague

<sup>33</sup> The Rule was reaffirmed and developed in the Third Geneva Convention of 1949, p. 1

<sup>34</sup> A. A. Bouvier and H. Langholtz, *op cit*.

<sup>35</sup> *Ibid*.

<sup>36</sup> *Ibid*.

<sup>37</sup> An example of such agreement was the Lieber Instruction of 1863, a Code of Conduct Promulgated by the President of the United States of America during the US Civil War.

international or universal rules.<sup>38</sup> Modern international humanitarian law is made up of two historical streams: the law of The Hague referred to in the past as the law of war proper; and the law of Geneva, or humanitarian law.<sup>39</sup> These two laws could be traced to a number of international conferences from which treaties relating to war and conflict emerged. For example, the Hague Conventions of 1899 and 1907 respectively and the first Geneva Convention drawn up in 1863. The two are branches of *jus in bello*, international law regarding acceptable practices while engaged in war and armed conflict. For instance, the Law of The Hague, or the law of war proper, "determines the rights and duties of belligerents in the conduct of operations and limits the choice of means in doing harm".<sup>40</sup> The Law of The Hague concerns itself with the definition of combatants; establishes rules relating to the means and methods of warfare; and examines the issue of military objectives.<sup>41</sup>

The concern for humanitarian law in times of war could be traced to the activities of concerned individual. The bitter experience of modern warfare prompted the need globally for States to agree to a series of practical rules and codification of the principles of the International Humanitarian Law.

### CODIFICATION OF HUMANITARIAN NORMS

The history of the humanitarian customs as stated above demonstrates the fact that even before the evolution of the Geneva or Hague Conventions, there were ample practices among various religions and cultures in the past to protect civilian and non-combatants during wars or hostilities.<sup>42</sup> As observed above, these customs have geographical limitation as there were no international or universal rules.<sup>43</sup> Two significant incidents led to the development and codification of rules and principles of IHL as is popularly known today.<sup>44</sup> Firstly, the 'law of the Hague' did not begin in the Hague at all but rather,

<sup>38</sup> Custom as a source of International Law, available at <http://www.academia.edu/463928/CUSTOM>, date accessed: 12<sup>th</sup> April, 2015

<sup>39</sup> P. Jean, *Humanitarian Law and the Protection of the War Victims*, (Leyden: Sijthoff, 1975), p. 16.

<sup>40</sup> P. Jean, *Development and Principles of International Law*. (Dordrecht: Martinus Nijhoff, 1985), p. 2.

<sup>41</sup> K. Frits and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, (Geneva: ICRC, March 2001), p. 40.

<sup>42</sup> A. A. Bouvier and J. L. Harvey, *International Humanitarian Law and the Law of Armed conflict*, available at [http://cdn.peaceopstraining.org/course\\_promos/international\\_humanitarian\\_law/international\\_humanitarian\\_law\\_english.pdf](http://cdn.peaceopstraining.org/course_promos/international_humanitarian_law/international_humanitarian_law_english.pdf), date accessed: 12<sup>th</sup> April, 2015

<sup>43</sup> *Ibid*

<sup>44</sup> J. Policastri and D. S. Sergio, *International Humanitarian Law: Electronic Resource Guide*, available at [http://www.asil.org/sites/default/files/ERG\\_International%20Humanitarian%20Law%20%28test%29.pdf](http://www.asil.org/sites/default/files/ERG_International%20Humanitarian%20Law%20%28test%29.pdf), date accessed: 12<sup>th</sup> April, 2015.

in two localities far away from that city: Washington and St. Petersburg.<sup>45</sup> By the second half of the 19th century, a more systematic approach was initiated in Washington, United States of America, when a German immigrant, Francis Lieber, drew up a code of conduct in 1863, which came to be known as the Lieber Code, for the Union Army during the American Civil War (1861-1865).<sup>46</sup> The Lieber Code provided detailed rules on the entire range of land warfare, from the conduct of war proper and the treatment of the civilian population to the treatment of specific categories of persons such as prisoners of war, the wounded, *franc-tireurs*, and so forth.<sup>47</sup>

Although technically a purely internal document written to be applied in a civil war, the Lieber Code served as a model and a source of inspiration for the efforts undertaken later in the 19<sup>th</sup> century on the international level, to arrive at a generally acceptable codification of the laws and customs of war.<sup>48</sup> The Code also exerted great influence on the subsequent developments and codification of the law of Hague.<sup>49</sup> The journey towards this started in St. Petersburg in 1868. In that year, the International Military Commission, on the invitation of the Russian Government met to examine the expediency of forbidding the use of certain projectiles in time of war between civilized nations.<sup>50</sup> The outcome of the meeting was the making of the Declaration Renouncing the Use, in Time of War, of Explosive Projectiles under 400 grams Weight.<sup>51</sup>

Followed in the heels of St Petersburg's convention was The Hague meeting in 1899, also on the initiative of the Russian Government at the invitation of the Dutch Government. Delegates from twenty-nine out of the existing states at the period met to discuss matters of peace and war.<sup>52</sup> The stated objective of the First Hague Peace Conference was to create conditions precluding further wars. The hope was to bring this

<sup>45</sup> K. Frits and Z. Liesbeth, *Constraints on the Waging of War-An Introduction to Humanitarian Law*, available at [http://www.loc.gov/rr/frd/Military\\_Law/pdf/Constraints-waging-war.pdf](http://www.loc.gov/rr/frd/Military_Law/pdf/Constraints-waging-war.pdf), date accessed: 12<sup>th</sup> April, 2015

<sup>46</sup> Ramzankolachi, "Civilian and Military Conflict", available at <https://ramzankolachi.wordpress.com/page/6/> accessed on 12<sup>th</sup> April, 2015

<sup>47</sup> K. Frits and L. Zegveld, *Constraints on the Waging of War: An Introduction to International Humanitarian Law*, ICRC, (2001), pp. 19-20.

<sup>48</sup> *Ibid*

<sup>49</sup> *Ibid*

<sup>50</sup> Protection of Civilian Population Against Dangers of Hostility, work submitted by the International Committee of the Red Cross at the Conference of Government Expert on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflict, Geneva 24 May – 12 June 1971

<sup>51</sup> *Ibid*

<sup>52</sup> Proceedings of the Hague Peace Conferences (1920) prepared in the Division of the International Law of the Carnegie Endowment for International Peace under the Supervision of James Brown Scot, New York, Oxford University Press

about by making it compulsory for states to submit their disputes to international arbitration, coupled with the convening at regular intervals of an international conference to discuss any problems that might arise in connection with the maintenance of peace.<sup>53</sup>

Although the Conference failed, it did, however, provide a platform for subsequent meetings that later paved way for the codification of The Law of The Hague first in 1899 and second in 1907.<sup>54</sup>

With regard to Geneva Convention, the short history leading to this convention was marked by the involvement during the Crimean War of a number of such individuals as Florence Nightingale and Henry Dunant, a Genevese businessman, who had worked with wounded soldiers at the Battle of Solferino.<sup>55</sup> His experience during that war led to more systematic efforts to prevent the suffering of war victims<sup>56</sup>. Back in Geneva, Dunant published a short book in 1862<sup>57</sup> in which he vividly depicted the horrors of the battle in the following words:

When the sun came up on the twenty-fifth June 1859 it disclosed the most dreadful sights imaginable. Bodies of men and horses covered the battlefield: corpses were strewn over roads, ditches, ravines, thickets and fields...The poor wounded men that were being picked up all day long were ghastly pale and exhausted. Some, who had been the most badly hurt, had a stupefied look as though they could not grasp what was said to them... Others were anxious and excited by nervous strain and shaken by spasmodic trembling. Some, who had gaping wounds already beginning to show infection, were almost crazed with suffering. They begged to be put out of their misery, and writhed with faces distorted in the grip of the death struggle.<sup>58</sup>

In his book, Dunant did not only describe the battle, but tried to suggest and publicize possible measures to improve the fate of war victims. He presented two basic proposals designed to mitigate the suffering of the victims of war: First, the establishment in each country, of national private aid organizations to assist military medical services in a task they were insufficiently equipped to perform; secondly, the adoption of a treaty that

<sup>53</sup> Z. Laura, *The Constraints on the Waging of War-An Introduction to International Humanitarian Law* (4<sup>th</sup> Ed.) Cambridge University Press, p. 59

<sup>54</sup> *Ibid*

<sup>55</sup> ICRC: One Hundred and Fifty years of Humanitarian Action, International Review of the Red Cross, Humanitarian debate: Law, Policy and action Volume 94 Number 888 Winter 2012, p. 6.

<sup>56</sup> *Ibid*

<sup>57</sup> Titled: *Un Souvenir de Solferino (A Memory of Solferino)*

<sup>58</sup> Henry Dunant, *A Memory of Solferino*, ICRC, Geneva, 1986, p. 41

would facilitate the work of these organizations and guarantee a better treatment of the wounded.<sup>59</sup>

The proposals by Henry Dunant were simple, but they have had deep and lasting consequences in that they stirred actions in the following directions. First, the whole system of National Red Cross or Red Crescent Societies<sup>60</sup> stems from the proposal; secondly, the proposal gave birth to the 'First Geneva Convention' in 1864; and lastly, the proposal led to the adoption of the protective emblem of the Red Cross or the Red Crescent<sup>61</sup>.

Dunant's book enjoyed enormous success throughout Europe. Although it did not present entirely original ideas, the merit of the book is in large part due to the timeliness of its message. At that time, a private welfare association existed in Geneva: The Society for the Public Good. Its President, Gustave Moynier, was impressed by Dunant's book and proposed to the members of the Society that they try to carry out Dunant's proposals. This suggestion was accepted and five members of the Society, Messrs. Dunant, Moynier, Dufour, Appia and Maunoir, created a special committee in 1863 called the 'International Standing Committee for Aid to Wounded Soldiers'. This committee 15 years later became the International Committee of the Red Cross (ICRC).<sup>62</sup>

In 1863, the Committee convened military and medical experts at a conference in Geneva. The aim of that meeting was to examine the practicability and feasibility of the proposals made by Dunant. The results of the meeting were encouraging, and the members of the Committee persuaded the Swiss Federal Council to convene a diplomatic conference, whose task would be to give a legal form to Dunant's proposals<sup>63</sup>. To this end, a diplomatic conference was held in 1864 in Geneva and the 16 states represented finally adopted the 'Geneva Convention of 22nd August 1864 for the Amelioration of the Condition of the Wounded in Armies in the Field'.

Its result was an International Treaty open to universal ratification,<sup>64</sup> in which states agreed to voluntarily limit their own power in favor of the individual. For the first time, armed conflict became regulated by written, general law.

<sup>59</sup> K. Frits and L. Zegveld, *op cit.* p. 26-27.

<sup>60</sup> There are 188 Societies around the world presently.

<sup>61</sup> Humanitarian Debate: Law, Policy and Action. International Conference of the Red Cross and Red Crescent. International Review of the Red Cross Volume 19 Number 876, 2009, p. 12

<sup>62</sup> K. Frits and L. Zegveld, L., *op cit.* pp. 26-27.

<sup>63</sup> A. A. Bouvier and H. Langholtz, *op cit.*, p. 23.

<sup>64</sup> That is an agreement not limited to a specific region or conflict with binding effects on the States that would formally accept it. See also C. Greenwood in Fleck Dieter, *The Handbook of Humanitarian Law*

In ten concise articles, the First Geneva Convention gave a legal format to Dunant's proposals and established a special status for medical personnel. The fact that this conference lasted less than 10 days provides a clear indication of the general support given to the propositions. Of course, this original convention has been replaced by more modern and comprehensive treaties. However, it illustrates in a concise manner the central objectives of humanitarian law treaties<sup>65</sup>.

The Law of Geneva is directly inspired by the principle of humanity. It relates to those who are not participating in the conflict, as well as to military personnel *hors de combat*<sup>66</sup>. It provides the legal basis for protection and humanitarian assistance carried out by impartial humanitarian organizations such as the ICRC.<sup>67</sup>

In sum total, the Geneva Conventions are the result of a process that developed in a number of stages between 1864 and 1949. It focused on the protection of civilians and those who could no longer fight in an armed conflict. As a result of World War II, all four conventions were revised, based on previous revisions and on some of the 1907 Hague Conventions, and readopted by the international community in 1949. Later conferences have added provisions prohibiting certain methods of warfare and addressing issues of civil wars.<sup>68</sup>

The first three Geneva Conventions were revised, expanded, and replaced, and the fourth one was added, in 1949. These Conventions are listed below:

1. The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field was adopted in 1864. It was significantly revised and replaced by the 1906 version called The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field, the 1929 version, and later the First Geneva Convention of 1949 christened The Geneva Convention (1) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.<sup>69</sup>

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*in Armed Conflict*, (United States of America: Oxford University Press, 2008), p. 22; Pictet (1985) *op cit.*; Convention for the Amelioration of the Condition of the Wounded and Sick in Armies" International Committee of the Red Cross.

<sup>65</sup> *Ibid.*

<sup>66</sup> M. Mashaël, International Humanitarian Law. The National Ribat University, p. 5

<sup>67</sup> Pictet, *op cit.*

<sup>68</sup> Children and Conflict in a Changing World, available at

[http://www.unicef.org/publications/files/Machel\\_Study\\_10\\_Year\\_Strategic\\_Review\\_EN\\_030909.pdf](http://www.unicef.org/publications/files/Machel_Study_10_Year_Strategic_Review_EN_030909.pdf), date accessed: 12<sup>th</sup> April, 2015.

<sup>69</sup> Geneva Convention (1929). Available at

[http://www.revolvy.com/main/index.php?s=Geneva%20Convention%20%281929%29&item\\_type=to pic](http://www.revolvy.com/main/index.php?s=Geneva%20Convention%20%281929%29&item_type=to pic), date accessed: 13<sup>th</sup> April, 2015



2. The Geneva Convention Relative to the Treatment of Prisoners of War was adopted in 1929. It was significantly revised and replaced by the Third Geneva Convention of 1949.<sup>70</sup>
3. The Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War was adopted in 1949.<sup>71</sup>

There are three additional amendment protocols to the Geneva Convention and these are:

- i. Protocol I (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts. As of 12 January 2007 it had been ratified by 167 countries.
- ii. Protocol II (1977): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts. As at 12 January 2007 it had been ratified by 163 countries.
- iii. Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem. As at June 2007 it had been ratified by seventeen countries and signed but not yet ratified by an additional 68.<sup>72</sup>

The Geneva Conventions of 1949 may be seen, therefore, as the result of a process which began in 1864. Today they have 'achieved universal participation with 194 parties. This means that they apply to almost any international armed conflict.'<sup>73</sup> The Additional Protocols, however, have yet to achieve near-universal acceptance, since the United States and several other significant military powers like Iran, Israel, India and Pakistan are currently not parties to them.<sup>74</sup>

## PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF CIVILIANS DURING WAR

The word 'principle' is described as a moral rule or a strong belief that influence the taking of action<sup>75</sup>. In law, principle is entailed in set of basic rule, law or doctrine.<sup>76</sup>

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<sup>70</sup> Ibid

<sup>71</sup> Ibid

<sup>72</sup> ICRC: Protocol Additional to the Geneva Convention of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol 1) 8 June 1977.

<sup>73</sup> C. Greenwood, *op cit*.

<sup>74</sup> Understanding the Law of Armed Conflict: The Lawyers Chronicle, available at <http://thelawyerschronicle.com/understanding-the-law-of-armed-conflict/>, date accessed: 13<sup>th</sup> April, 2015

<sup>75</sup> A. S. Homby, *Oxford Advanced Learner's Dictionary of Current English*, (8<sup>th</sup> ed.) (Oxford University Press, .2010), p. 1164.

<sup>76</sup> A. G. Bryan, *op cit*. 1231.

Within the context of the IHL, there are various humanitarian principles which are contained in International Conventions, some of them are clearly implied and some derive from customary law. These principles specify the obligations of states in very precise terms. For instance, the Fourth Geneva Convention focuses on the civilian population. The two additional protocols adopted in 1977 extend and strengthen civilian protection in international<sup>77</sup> and non-international<sup>78</sup> armed conflict thus forbidden direct attacks against civilians. A "civilian" is defined as "any person who does not belong to the armed forces," including non-nationals and refugees.<sup>79</sup>

Below are the rules and principles of IHL which seek to protect civilians.

### **i. Principle of distinction**

The principle of distinction protects civilian persons and civilian objects from the effects of military operations. It requires parties to an armed conflict to distinguish at all times between civilian population and combatants and between civilian objects and military objectives on the one hand, and civilians and civilian objects on the other; and to direct their operation only to military objectives.<sup>80</sup> It also provides that civilians lose such protection should they take a direct part in hostilities. In addition, they are liable to punishment if they take part in the hostilities.

The principle of distinction has also been found by the ICRC to be reflected in state practice; it is therefore an established norm of customary international law in both international and non-international armed conflicts.<sup>81</sup>

Furthermore, Articles 13, 14, 15 and 16 of Additional Protocol II extend protection to objects indispensable to the survival of the civilian population such as foodstuffs, agricultural areas, crops, live stocks, drinking water installations and supplies of irrigation works; works and installations containing dangerous forces, if by so doing will cause the release of dangerous force and consequent severe losses among the civilian population and cultural objects, works of art or places of worship.<sup>82</sup>

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<sup>77</sup> Additional Protocol I.

<sup>78</sup> Additional Protocol II.

<sup>79</sup> Additional Protocol I, Article 50 (1).

<sup>80</sup> Article 48 of the Additional Protocol I. See also "International Humanitarian Law" available at [ijrcenter.org/international-humanitarian-law](http://ijrcenter.org/international-humanitarian-law), date accessed: 1<sup>st</sup> April, 2014

<sup>81</sup> ICRC, 2005b, vol.1.

<sup>82</sup> Jeffrey. J.D. Waging Waterfare: Israel, Palestinians, and the Need for a New Hydro-logic to Govern Water Rights Under Occupation <http://nyujilp.org/wp-content/uploads/2010/06/44.1-Stein.pdf> (accessed on 13th April 2015)

## ii. Necessity and Proportionality

Necessity and proportionality are established principles in humanitarian law. Under IHL, a belligerent may apply only the amount and kind of force necessary to defeat the enemy. Further, attacks on military objects must not cause loss of civilian life considered excessive in relation to the direct military advantage anticipated. For instance, it is forbidden for the combatant to employ weapons, projectiles and materials and method of warfare of a nature to cause superfluous injury or unnecessary suffering or employ methods or means of warfare which are intended, or may be expected to cause wide spread, long-term and severe damage to the natural environment.<sup>83</sup>

Also every feasible precaution must be taken by commanders to avoid civilian casualties. Such steps include but not limited to the removal of civilian population and objects from the vicinity of military objectives or locating military objectives within or near densely populated areas.<sup>84</sup> The principle of proportionality has also been found by the ICRC to form part of international customary law.

## iii. Principle of Humane Treatment

The principle of humane treatment requires that civilians be treated humanely at all times.<sup>85</sup> Common Article 3 of the GCs prohibits violence to life and person (including cruel treatment and torture), the taking of hostages, humiliating and degrading treatment, and execution without regular trial against non-combatants, including persons *hors de combat* or wounded, sick and shipwrecked. Civilians are entitled to respect for their physical and mental integrity, their honour, family rights, religious convictions and practices, and their manners and customs and any other similar criteria.<sup>86</sup>

The principle of humane treatment has been affirmed by the ICRC as a norm of customary international law, applicable in both international and non-international armed conflicts.

## iv. Principle of non-discrimination

The principle of non-discrimination is a core principle of IHL. Adverse distinction based on race, nationality, religious belief or political opinion is prohibited in the treatment of

<sup>83</sup> See Article 35, Additional Protocol I.

<sup>84</sup> Articles 57 and 58 of the Additional Protocol I. See generally F. J. William, "The Rule of Proportionality and Protocol I in Conventional Warfare" *Military Law Review*, vol. 98, (1980), pp.541-595; G. Judith, "The Proportionality as a Restraint on the Use of Force", *AYIL*, vol. 20, (1999), pp. 161-173 and P. Tom, "The Proportionality Principle in the War on Terror", *Hague Yearbook of International Law*, vol.15, (2002), pp. 3-15.

<sup>85</sup> See Article 27 of the Geneva Convention IV.

<sup>86</sup> K. Frits and L. Zegveld L., *op cit.*, pp. 134-136. See also Article 75 (1) of Additional Protocol I

prisoners of war (POWs). Combatant who fall into enemy hands are prisoners of war from the moment they are captured. POWs are in the hands of the enemy power, but not of the individual or military units who have captured them. This means that the Detaining Power is responsible for everything that happens to them.<sup>87</sup>

The opening sentence of Article 13 of the Geneva Convention III provides *inter alia* that POWs must at all times be humanely treated; hence they may not be arbitrarily killed. POWs are also permitted to maintain relations with the exterior and in this circumstance; they can communicate with their relations as to their capture, state of health, transfer to a hospital or another camp amongst others.<sup>88</sup>

By virtue of Articles 3 and 13 of the Geneva Convention, civilians and *persons hors de combat* are entitled to protection. All protected persons shall be treated with the same consideration by parties to the conflict, without distinction based on race, religion, sex or political opinion.<sup>89</sup> In line with Article 75 of the Additional Protocol I, each and every person affected by armed conflict is entitled to have his fundamental rights guaranteed, without discrimination.<sup>90</sup> The prohibition against adverse distinction is also considered by the ICRC to form part of customary international law in international and non-international armed conflict.<sup>91</sup>

#### v. Women and Children

Women and children are granted preferential treatment, respect and protection. Women must be protected from rape and from any form of indecent assault. Children under the age of eighteen must not be permitted to take part in hostilities.<sup>92</sup> For example, with regard to female prisoners of war, women are required to receive treatment 'as favourable as that granted to men'.

In addition to claims of formal equality, IHL mandates special protections to women, providing female prisoners of war with separate dormitories from men to protect them against sexual violence.<sup>93</sup>

<sup>87</sup> K. Frits and L. Zegveld, *op cit.*, p. 58. See also Article 12 of the Geneva Convention Relative to the Treatment of Prisoners of War of August 12, 1949.

<sup>88</sup> See Article 70 of the Geneva Convention III

<sup>89</sup> Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949.

<sup>90</sup> GSDRC: International Legal Framework For Humanitarian Action, available at <http://www.gsdr.org/go/topic-guides/international-legal-frameworks-for-humanitarian-action/concepts/-principles-and-legal-provisions/overview-of-international-humanitarian-law> , date accessed: 13<sup>th</sup> April, 2015

<sup>91</sup> *Ibid*

<sup>92</sup> See Chapter II, Articles 76-78 of Additional Protocol I

<sup>93</sup> Articles 14, 16, 24, 27 of Geneva Convention III and IV and Articles 76-78 of the Additional Protocol I. ,

**vi. Journalist**

By Virtue of Article 79 of the Additional Protocol I, journalists engaged in dangerous professional missions in areas of armed conflict shall be considered as civilians within the meaning of Article 50 of the Geneva Convention.<sup>94</sup> The protection offered by this Article is only potent provided that such journalists do not take actions affecting their status as civilian. The journalists in this category may also carry the identity of the States of which they are nationals.<sup>95</sup>

**CHALLENGES IN THE PROTECTION OF CIVILIANS DURING ARMED CONFLICT**

During armed conflict, hundreds of thousands of civilians lose their lives, others suffer greatly, thousands have a disruptive life and others are forced to flee their homes.<sup>96</sup> While IHL establishes a comprehensive legal framework to protect civilians from the effects of military operations, this stands in stark contrast to the situations that civilians in conflict-affected areas actually face on ground.<sup>97</sup>

Civilians account for a high proportion of the victims in most contemporary armed conflicts, whether as an unintended result of the fighting or because they are deliberately targeted by belligerents. Even in situations where the parties are seemingly committed to implementing their obligations under IHL, military operations often result in high numbers of civilian casualties and widespread destruction of civilian property.<sup>98</sup>

Many government and non-state armed groups during internal conflict use civilians as shields and target civilians as a military tactic in order to achieve their objectives. Human shielding involves the use of persons protected by international humanitarian law, such as prisoners of war or civilians to deter attacks on combatants and military objectives. This is labelled 'Counter-targeting' in military parlance.<sup>99</sup> The tactic hardly represents a new

<sup>94</sup> Protocol Additional to the Geneva Convention of 12<sup>th</sup> August 1949 and Relating to the Protection of Victims of International Armed Conflict (Protocol 1), 8 June 1977.

<sup>95</sup> Press Freedom Survey of 186 Countries, available at <http://www.worldaudit.org/presstable.html>, date accessed: 13<sup>th</sup> April, 2015)

<sup>96</sup> G. Fitsum, Protection of Innocent Civilians in Intra-State Armed Conflict under International Humanitarian Law: Darfur-Sudan (2012), available at [www.academia.edu](http://www.academia.edu), date accessed: 13<sup>th</sup> April, 2015

<sup>97</sup> W. Camilla, "Protection of Civilians under International Humanitarian Law: trends and Challenges". Norwegian Peace building Resource Centre. August 2011, available at [www.operationspaix.net/DATA/DOCUMENT/6547](http://www.operationspaix.net/DATA/DOCUMENT/6547), date accessed: 13<sup>th</sup> April, 2015

<sup>98</sup> *Ibid*

<sup>99</sup> Counter-targeting is 'preventing or degrading, detection, characterization, destruction and post-strike assessment of targets by any means'. Defense Intelligence Agency, Saddam Hussein's use of Human shields and Deceptive Sanctuaries: Special Briefing for the Pentagon Corps, February 26, 2003,

battlefield phenomenon. Shielding occurred, for instance, in both the American Civil War and the Franco-Prussian War.<sup>100</sup>

Civilians are the main casualties of war worldwide.<sup>101</sup> The vast majority of armed conflicts today are within a sovereign territory and have continued for decades despite efforts of international community to find solutions.<sup>102</sup>

The Security Council of the U.N has continued to grapple with a number of serious protection challenges in situations on its agenda with mixed results.

While the Council was able to respond to the crisis in Mali to stabilize the situation there and prevent further attacks against civilians, it remained deadlocked over the situation in Syria where the killing of civilians continued unabated.<sup>103</sup> On the humanitarian front, there was some progress with the adoption of a presidential statement on humanitarian access, but its impact on such situation has been limited.<sup>104</sup>

Divisions among the Council members also hampered an effective response to continuing protection concerns in places like Sudan and South Sudan. At the country-specific level, analysis shows that the council continued to systematically include protection provision in relevant resolutions and presidential statements adopted over the course of 2012 but there were no significant changes in the protection mandates of existing council-authorized missions. In 2013, the Council established a new peacekeeping operation with a mandate to protect civilians from physical violence, the U.N Multidimensional

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available at <http://www.defenselink.mil/news.Feb2003/g030226-D-9085M.html>, date accessed: 13<sup>th</sup> April, 2015

<sup>100</sup> J. M. Spaight, *War Rights on Land* (1911). Interestingly, during the Civil War, the Union Commander in Alabama ordered that secessionist preachers be placed on trains to deter attacks. See W. Winthrop, 'Military Law and Precedents'. (2<sup>nd</sup> ed.) (1920)

<sup>101</sup> See Necrometrics Estimated total for the entire 20<sup>th</sup> century, available at <http://necrometrics.com/all20c.htm>, date accessed: 13<sup>th</sup> April, 2015

<sup>102</sup> G. Fitsum, *op cit*

<sup>103</sup> In a year characterized by mass protests and other challenges to entrenched leadership that frequently provoked violent reactions, the Security Council continued in 2011 to grapple with the question of protecting civilians in a manner consistent with the United Nations Charter, as the 15-member body remained seised of a wide range of conflicts- such as the birth of South Sudan, the Palestinian application for membership in the Organization and other developments. The Council adopted 66 resolutions — 40 of them concerning Africa — and issued 22 presidential statements. Once again it strove for consensus, with only five texts requiring a vote, although two on the Middle East suffered vetoes — one by the United States and the other by China and the Russian Federation. See *Civilian Protection Remains Atop Security Council Agenda In 2011 Amid Violent Suppression Of Mass Protests, Birth Of New Member State: Security Council Press Release* (2012)

<sup>104</sup> *Protection of Civilians in Armed Conflict: Security Council Report*. <http://www.securitycouncilreport.org/cross-cutting-report/protection-of-civilians-in-armed-conflict.php?print=true> (accessed on 13<sup>th</sup> April 2015)

Integrated Stabilization Mission in Mali but on the implementation of protection mandates, it was discovered that the Council's request for benchmarks and indicators to measure progress has not been fully implemented.<sup>105</sup>

Enforcing International Humanitarian Law along with human rights law is still one of the most challenging tasks, even though the permanent International Criminal Court has come into function.<sup>106</sup> The Statute of the I.C.C also known as the Rome Statute entered into force since the 1<sup>st</sup> of July 2002 and has been established as Independent Court to investigate and bring individuals who commit war crimes, crimes against humanity, torture and genocide to justice. ICC can prosecute individuals responsible for serious breaches of IHL with jurisdiction over crime regardless of when or where they were committed.<sup>107</sup>

The U.N Security Council has passed resolution 1593 based on the provision of article 13(b) of the ICC Statute against Sudan requesting the ICC to investigate war crimes committed by the Government of Sudan and all other parties in Darfur conflicts. The ICC argues that the resolution is binding on all U.N member states even though Sudan is not a party to the Rome Statute and has not consented to its jurisdiction. The ICC has issued an arrest warrant against Sudanese president for genocide crimes against humanity and war crimes.<sup>108</sup> Some African leaders and prominent African figures have criticized the role of the ICC because so far all active cases held under the court are from Africa. The ICC which has the highest member states from Africa, more than any other region, has been criticized for targeting Africa and not considering gross atrocities committed in other parts of the world.<sup>109</sup>

The attempt of the ICC to prosecute a sitting African head of state, Omar Hassan al Bashir of Sudan, has been highly debated among African leaders and thereafter the African Union has decided not to cooperate with ICC to arrest the president. For this reason, the A.U. has also requested the United Nations to suspend the warrant of arrest against the president.<sup>110</sup> The implication of this is that even where the abuse of the right

<sup>105</sup> Building Justice and Security in Post Conflict Environment: The Security, Conflict and International Conference Symposium 2014, Department of Criminology, University of Leicester.

<sup>106</sup> G. Fitsum *op cit*

<sup>107</sup> International Criminal Court: Information for Human Right Defenders, available at <https://www.frontlinedefenders.org/book/export/html/12787>, date accessed: 13<sup>th</sup> April, 2015

<sup>108</sup> Protection of Civilians in Armed Conflict: Security Council Report, available at <http://www.securitycouncilreport.org/cross-cutting-report/protection-of-civilians-in-armed-conflict.php?print=true>, date accessed: 13<sup>th</sup> April, 2015

<sup>109</sup> War Crimes Prosecution Watch: The International criminal court. School of Law, Case Western Reserve University, Volume 9 Issue 12, 2014.

<sup>110</sup> G. Fitsum, *op cit*.

of civilians during armed conflict is inflicted by a sitting head of state, there is no likelihood of him being prosecuted, thereby encouraging the breach of International humanitarian law

## CONCLUSION

Generally, each and every person affected by armed conflict is entitled to have his fundamental rights guaranteed without discrimination. Similarly, his personal honour, convictions and religious practices must be respected and no attacks must be made whether by a civil or military agent on his life, his health, his physical or mental integrity and dignity. However, as noted in this paper, the rules regulating the conduct of hostilities, as well as humanitarian access and assistance, are more detailed in International Armed Conflict and seem adequate. For instance, the treaty rules applicable to international armed conflict (IAC) are close to 600, while those applicable to non-international armed conflict (NIAC) are less than 30. This lopsidedness can pose a challenge because the majority of contemporary conflicts most especially in African regions are non-international armed conflict.

As a matter of fact, the challenges posed by non-international armed conflict was aptly captured in a paper presented by the President of the International Committee of the Red Cross at the 28<sup>th</sup> Meeting of Committee of legal advisers on public international law (CADHI) held between 13-14 September, 2004 where he said, *inter alia*: 'Non-international armed conflicts; most of the time is characterized by low intensity of fighting and high intensity of suffering by the civilian population. It costs much more human lives than international terrorism.....'<sup>111</sup>

Although one may seek protection under the rules of Customary International Law in the case of non-international armed conflict, due to the enormous challenges which non-international armed conflicts now pose on innocent civilians, which, of course, is the focus of various principles and rules of international humanitarian law, there is the need to amend and improve the various rules of the Geneva Convention and The Law of The Hague to make them apply *mutatis mutandi* to non-international armed conflict. Doing this will give room for certainty and accessibility in the interest of humanity.

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<sup>111</sup> J. Kellenberger, "The Relevance of International Humanitarian Law in Contemporary Armed Conflicts", *Being the text of a paper presented at the 28<sup>th</sup> meeting of the Committee of Legal Adviser on Public International Law (CADHI), held between 13-14 September, (2004) at Lausanne, available at <http://www.icrc.org/web/eng/siteeng0.nsf/html/66EMA9>, p. 1.*