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## Brewing Insurgency: Implications in Reasoning with Rebels in Armed Conflict

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### Abstract

*It is axiomatic that the world is presently awash with small arms and light weapons (SALW). Although arms and weapons are rarely the root cause of armed conflict, their easy accessibility exacerbate it, leaving in its trail flagrant use of force and gross violation of International Human rights and Humanitarian laws. Non-state combatants have been most culpable in the illicit acquisition and misuse of arms yet question all international and domestic regulations to stem the use and abuse in armed conflicts. It is suggested that considerable legislative efforts and functional judicial mechanism have been advanced to ensure the compliance of Non-State Armed groups to international Humanitarian laws but the profit thereof is still the subject of debate. This study reviews the obligations of Non-State actors during armed conflict and the outcome of such implementation. The study further seeks to inquire if, and to what extent, engaging with Non-state armed groups can encourage respect for International Humanitarian Laws. Considering the review of published literature and other media sources, the study revealed that all enactments binding Non-State Actors lacked effective implementation and enforcement, while the judicial process worked at snail pace. It is concluded that their participation and input in decision making should be encourage to elicit their respect for and increased adherence to humanitarian norms.*

**Keywords:** *Insurgency, small arms and light weapons, armed conflicts, combatants, Non-state armed group and humanitarian law*

### 1. Introduction

The illicit trafficking in Small Arms and Light Weapons (SALW), their proliferation and accessibility have enhanced their illegal acquisition and misuse. A total estimated number of 650 million small arms were in the world as at 2002 with nearly 60% of them in the hands of private individuals.<sup>1</sup> These have directly and indirectly accounted for gun-related deaths, maiming and sexual violation of women and children.<sup>2</sup> The gross estimate of global deaths from homicide, war and suicide in 1998 is 2,272,000. From war, the number totaled 588,000.<sup>3</sup> Families are displaced and compelled to flee the comfort of their homes for an uncertain future, faced with starvation and disease as they struggle against all odds to survive.<sup>4</sup>

Realizing that arms and weapons have become veritable tools in the hands and armory of armed non-state actors, applied to activate violence and criminality, truncate state peace building and democracy efforts and deny development,<sup>5</sup>

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<sup>1</sup> Small Arms Survey, *Small Arms Survey 2002: Counting the Human Cost*, a project of the Graduate Institute of International Studies Geneva, Oxford University Press, 2002, cited in *Shattered Lives: The Case for tough international arms control*. (A1 Index: Act 30/001/2003), Edeko, S. *The proliferation of small Arms and Light Weapon in Africa: A case study in the Niger Delta in Nigeria*, Vol. 1. No. 21 *Sacha Journal of environmental studies*. (2011) pp. 60 – 61 and Obasi N. K., *Small Arms Proliferation and Disarmament in West Africa: Progress and prospects of the ECOWAS Moratorium*, Abuja, Nigeria Apophy production (2002)p.69

<sup>2</sup> Mumbi R., *Raped by a Gun. The Devastating Impact of Small Arms and Light Weapon on the Lives of Women*. IANSA Women's Caucus, 2001, Dybdhal R., Pasagic I., *Truamatic Experiences and Psychological Reactions Among Women in Bosnia During the War*, Vol. 16, *Medicine, Conflict and Survival*, (2000) pp 281-90 and M. Olujic, *Embodiment of Terror: Gendered Violence in Peacetime and Wartime in Croatia and Bosnia- Herzegovina*. Vol. 12 *Journals of Medical Anthropology* (1998) pp 31-50 Cook P. and Ludwig J. *The Cost of Gun violence Against Children* Vol. 12 # 2., *The Future of Children* (2002) pp 87-99.

<sup>3</sup> Small Arms Survey, *Small Arms Survey 2001: Profiling the Problems*, Graduate Institute of International Studies Geneva, Oxford University Press (2001) p. 236, Seet. B and Burham G., *Fatality Trends in United Nations Peace Keeping Operations 1948-1998*, American Medical Association (2000) pp. 598-603.

<sup>4</sup> United Nations High Commissioner for Refugees (UNHCR, 2001a), *State of the World Refugees: Fifty Years of Humanitarian Action*, Geneva: Oxford University Press (2001) 283.

<sup>5</sup> Meril S., *Warehousing Refugees: A denial of Rights, A Waste of Humanity*, Arab Integrated Service Journal (2006), P. 38, Kelly N. and Jean-Francois D., *UNHCR and Current Challenges in International Refugee Protection*. Available at <http://www.pi.library.yorku.ca/ojs/index.php/refugee/article/viewfile/21312/19983> visited on 12/5/2021. Egielemai, O. H., *Demanding Effective Democracy in Nigeria: A Constitutional Provision or*

the international community adopted relevant international human rights and humanitarian laws to control and regulate the ownership, possession and use of arms and weapons in armed conflicts.<sup>6</sup>

Before embarking on any discussion on this subject, it is pertinent to, first and foremost, identify some key words and clarify them in the context in which they appear herein.

### 1.1. Conceptual Definition

Insurgency is an attempt to take control of a country by force, Rebellion,<sup>7</sup> Insurgency would arise, for instance, where a state needs to protect its citizens or properties in an area under the *de facto* control of the rebels.<sup>8</sup> Insurgents were traditionally considered to have international rights and obligations with regard to those states that recognized them as having such a status. Insurgents need only satisfy minimal requirements to be eligible for recognition. According to Antonio Cassese<sup>9</sup>, international law only established certain loose requirement for eligibility to become an international subject. In short, (i) rebels should prove that they have effective control over some part of the territory and (2) civil commotion should reach a certain degree of intensity and duration and may not simply consist of riots or sporadic and short-lived acts of violence.

Small Arms and Light Weapons (SALW). In the Small Arms Survey, 'Small arms and Light Weapons' covers both military-styled weapons and commercial firearms (*handguns and Long guns*), following the definition set out in the Report of the panel of Government Experts on small Arms (UNGA 1997).<sup>10</sup>

- Small arms: revolvers and self-loading pistols, rifles and carbines, assault rifles, sub-machine guns, and light machine guns.
- Light Weapons: heavy machine guns, hand-held under-barrel and mounted grenade launchers, Portable anti-tank and anti-aircraft guns, recoilless rifles, portable launchers of anti-tank and anti-aircraft missile systems, and mortal of less than 100mm caliber.<sup>11</sup>

Armed mean furnished or equipped with weapon of offence or defence.<sup>12</sup>

Conflict is a situation in which people, groups or countries are involved in a serious disagreement or argument.<sup>13</sup> Armed Conflict exists whenever there is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state.<sup>14</sup>

Combatant is a member of the armed forces of a party to a conflict (as well as members of militias and other volunteer corps forming part of such armed force) and member of other militias and volunteer corps, including those of organized resistance groups, belonging to a party to the conflict who shall meet the following conditions: (1) being commanded by a person responsible for his subordinates; (ii) having a fixed distinctive sign recognizable at a distance; (iii) carrying arms openly (iv) conducting operations in accordance with humanitarian laws.<sup>15</sup>

'Non-state' means an individual or entity not acting under the lawful authorization of a state.<sup>16</sup> 'Armed groups' are dissident armed forces that are distinct from the armed forces of a state.<sup>17</sup>

'Non-State Armed group' is considered to be armed group or actor operating *primarily within state borders, engaged in violent attempts to challenge or reform the balance and structure of political or economic power, to avenge past injustices and/or to defend or control resources, territory or institutions for the benefit of a particular ethnic or social group*.<sup>18</sup> 'Humanitarian'. The word 'humanitarian' is derived from *humanitas*, a latin equivalent of *paideia*, a concept developed by Greek sophists who debated the place of reason as humankind's key distinguishing feature. It is associated with notions of philanthropy and altruism as a moral force.<sup>19</sup> According to the International Committee of the Red Cross (ICRC),

perversion? Vol. 15(1) J.juris, Int'l Law & Contemporary issues (2021) pp. 152-168.

<sup>6</sup> The Geneva Conventions of 1949 and the Additional Protocol I and II, The UN Programme of Action to Prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons in All its Aspect (POA), UN firearms protocol and the Arms Trade Treaty (ATT).

<sup>7</sup> Hornby A. S., *Oxford Advanced Learner's Dictionary of current English* 9<sup>th</sup> Edition (2015), 817.

<sup>8</sup> Lanterpacht H., *Recognition in International Law*, Cambridge, (1947) 275

<sup>9</sup> Eibe H. R., *Recognition of Insurgency* in Rudolf Bernherdt (ed). *Encyclopedia of Public International Law*, Vol IV, Elsevier, Amsterdam (2000) pp. 54-6, A. Cassese, *International Law in a Divided World*, Oxford University Press, Oxford (1986) pp 81-5.

<sup>10</sup> United Nation General Assembly (UNGA) *Report of the Panel of Government Experts on Small Arms* (1997). A/52/298 of 27 August.

<sup>11</sup> Ibid.

<sup>12</sup> West Black's Law Dictionary, with Pronunciations, 5<sup>th</sup> Edition Pg. 99.

<sup>13</sup> Hornby A. S., *Oxford Advanced Learner's Dictionary of Current English* (9<sup>th</sup> Edition) (2015) Pg. 318.

<sup>14</sup> *Prosecutor v Dusko Tadic*, Decision on the Defence motion for Interlocutory Appeal on Jurisdiction (Interlocutory Appeal) Case No IT-94-1-AR72 (2 October 1995) 35 ILM 35, Para 70.

<sup>15</sup> Draper G. I. A. D.; *The Status of Combatants and The Question of Guerilla Warfare*, 45 BYIL, (1977) pp. 173, 186. See also Shaw M. N., *International Law*, (6<sup>th</sup> Edition) Cambridge, Cambridge University Press (2008) and Murrík L., *The Distinction Between Combatant and Non-Combatant in the Law of War*, Vol 39 AJIL (1945)p 680-697.

<sup>16</sup> United Nations Security Council (UNSI) *Resolution 1540 (2004)*, 28 April, 2004.

<sup>17</sup> *Article 1, African Union's Convention for the protection and Assistance of Internally Displaced Persons in Africa* (The Kampala Convention).

<sup>18</sup> Conciliation Resources, *Engaging Armed Groups in Peace Processes* (Accord 2004), quoted in V-Dudouct, *Understanding Armed Groups and Their Transformations from War to Politics: A Collection of insider perspectives* conference paper presented at the Sixth Pan-European Conference on International Relations, Turin (2007) p. 4.

<sup>19</sup> Coupland R. *Clinical and Legal Significance of fragmentation of Bullets in Relation to the size of wounds: A Retrospective Analysis*, Vol 319, *British Medical Journal* (1999) pp. 403-6 see also Leaning

Humanitarianism is seen as an inevitable process put into practice as a neutral and impartial exercise in alleviating the suffering of victims of armed conflict, irrespective of their nationality.<sup>20</sup>

Humanitarian laws consist of the rules which in times of war provides for the protection of persons and property affected by armed conflict and regulate the methods and means of warfare.<sup>21</sup> The main sources of humanitarian laws are the St. Petersburg Declaration of 1868, the Hague Conventions of 1899, the Four Geneva Conventions of 1949 and the Additional protocol I and II of 1977.

## 2. The Limit of Legislative Response to Armed Non-State Actors in Armed Conflict

### 2.1. Acquisition and Transfer of Small Arms

Undeniably, there is a direct correlation between illicit small arms acquisition and transfer and international Human rights and humanitarian law violation. Proponents of the accessibility thesis are of the view that when there is ready access to arms, a violent outcome is more likely<sup>22</sup> but the opposing school argued that the availability of firearms deters and therefore reduces violent outcome.<sup>23</sup>

Laying credence to the accessibility thesis generally are the highly publicized mass shootings such as the 1999 Columbine High School Massacre, the 2001 Zug massacre, killing 14 Swiss Law makers and government officials and the Boko Haram insurgency. The most persuasive studies seeking to confirm or establish a relationship between small arms availability and a higher incidence of violence focus on specific age groups (primarily youth and the elderly) and on the gender dimension of violence (with gun availability posing an increased risk of violence against women). Miller et al (2002 pp.273)<sup>24</sup> finds that where there are more guns, Children aged 5-14 are much more likely to become victims of lethal violence than to be protected from it. Kellerman et al (1992)<sup>25</sup> concludes that youth under 24 with a firearm at home are 10.4 times more likely to commit suicide than youth from the same age group whose household are without firearms. The elderly, and in particular white men, in the United States are also at a higher risk of suicide when they have access to handguns (Conwell et al, 2002)<sup>26</sup>. Wiebe (2003)<sup>27</sup> shows that younger and older people, men and women, whites and non-whites are all at an increased risk of violent death if guns are kept at home. It is worth emphasizing here that there is no credible evidence, statistical or otherwise, that allowing citizens to carry concealed handguns produces greater deterrent effect.<sup>28</sup>

Small arms and light weapon problems were placed directly on the United Nations agenda in 1993 by a request from Mali for United Nations assistance in controlling small arms within its territory. The task was given to the United Nations panel of Governmental Experts on small Arms to address the types of arms actually being used in conflict and being dealt with by the United Nations, the nature and causes of the excessive and destabilizing accumulation and transfer of small arms, including their illicit production and trade; and ways and means of preventing and reducing such problems.<sup>29</sup> The panels' recommendations,<sup>30</sup> deliberations by states, cooperation from international and regional initiatives<sup>31</sup> and nongovernmental organisation<sup>32</sup> culminated in the 2001 United Nations Small Arms Conference in New

J., Briggs S. and Chen (eds); *Humanitarian Crises: The Medical and Public Health Response*. Cambridge: Harvard, University Press (1999).

<sup>20</sup> Moorhead C., *Dunant's Dream*. London (1998), Article 81 of the Geneva Convention Relative to the treatment of Prisoners of War.

<sup>21</sup> Levi H., *History of the Law of War on Land*, No 828, *International Review of the Red Cross* (2000) pp. 339-50 and De-Mulinen F, *Handbook of the Laws of War for Armed Forces*, Geneva: ICRC.

<sup>22</sup> Mihorean S., *The Accessibility Thesis Debate*. Background paper. Geneva: Small Arms Survey (2003) and Wille C., *Firearms Use in Homicides and Suicides*, Background paper, Geneva: Small Arms Survey (2003).

<sup>23</sup> Kopel D., *Lawyers, Guns and Burglars*, 43 *Arizona Law Review* (2001) 345, Lott J. R., *More Gun, Less Crime*, Chicago: University of Chicago Press (1998), Lott J. R., *Crime, Deterrence and Right-to-carry concealed Handguns*. Vol. 26 *Journal of Legal studies* (1997)1-65.

<sup>24</sup> Miller et al, *firearm Availability and Unintentional Firearm Death, Suicide, and Homicide Among 5-14 year olds*. Vol. 52, No 2 *TRUAMA Injury, Infection and Critical Care* (2002) pp. 267-75.

<sup>25</sup> Kellermann et al, *Suicide in the Home in Relation to Gun Ownership*. Vol. 327. *The New England Journal of Medicine* (1992) pp. 467-72.

<sup>26</sup> Conwell et al, *Access to Firearms and Risk for Suicide in Middle Aged and Older Adults*, Vol. 10 *American Journal of Geriatric Psychiatry* (2002) pp. 407-16.

<sup>27</sup> Wiebe D., *Homicide and Suicide Risks Associated with Firearms in the Home: A National Case-Control Study*. Vol. 41, Issue 6, *Annals of Emergency Medicine* (2003a) pp. 771-82.

<sup>28</sup> Duggan M., *More Guns, More Crimes*, Vol. 109 No 5. *Journal of Political Economy* (2001) pp. 1086-14, Kovandzic T. V and Thomas B. M., *Right-to-carry Concealed Handgun and Violent Crime: Crime Control through Gun decontrol?* Vol. 2 No 3, *Criminology and public policy* (2003) pp 363-96 and Ebo. A, *Small Arms and Criminality in Nigeria; Focus on Kaduna State*. Background paper, Geneva: *Small Arms Survey* (2003).

<sup>29</sup> United Nations Report of the panel of Governmental Experts on Small Arms, A/52/298, 27 August, 1997, *United Nations Report of the Group of Government Experts on Small Arms in pursuance of General Assembly (GA) Resolution 52/39*, A/54/258, 19 August, 1999.

<sup>30</sup> Ibid

<sup>31</sup> Greene O., *The 2001 Conference and Other Initiatives* Background Paper. Geneva: Small Arms Survey (2001) and Batchelor P., *The 2001 UN Conference on Small Arms: A First Step?* No 60, *Disarmament Diplomacy* (2001).

<sup>32</sup> Batchelor P., *NGOS and the Small Arms Issue*. No 1 *Disarmament Forum* (2002) PP. 37-40 and Atwood D, *NGOS and the 2001 UN Conference on Small Arms* Background paper Geneva: Small arms Survey (2001).

York<sup>33</sup> where the United Nations Programme of Action to prevent, Combat and Eradicate the Illicit Trade in Small Arms and Light Weapons In All Its Aspect (POA) was negotiated and agreed. Although the POA is not a legally binding instrument, it has become a watershed in the development of international commitment to prevent and reduce small arms trafficking and proliferation. It also provides the main framework for the further elaboration and development of international cooperation in this area. The POA, among other provisions, provide for the effective control on the legal production, holding and transfer of small arms, strengthening or developing agreed norms and measures at the global, regional and national level that would reinforce and further coordinate efforts to prevent, combat and eradicate the illegal trade in small arms, criminalizing unauthorized manufacture, possession, trade and transfer of small arm and light weapons and ensuring compliance with the United Nations Security Council arms embargoes.<sup>34</sup>

Identical provisions hitherto existed in similar international and regional agreement on small arms issues. These agreements all stand in their own rights but mutually reinforcing the POA. These agreement include the United Nations Firearms protocol, the European Union Code of Conduct on arms export (1998), European Union programme for preventing and combating illicit trafficking in conventional arms (1997), the Economic Community of West African states (ECOWAS) convention on small Arms and light weapons, their ammunition and other related materials (2006).<sup>35</sup> The Southern African Regional Action programme on light arms and illicit arms trafficking (1998), the Bamako Declaration on small arms proliferation and the Organization for Security and Cooperation in Europe (OSCE) Document on small arms and Light weapons; among others. Granted that these instruments are not all legally binding, they have mostly generated legally binding commitment. The rules included in the European Union code of conduct on arms exports, for instance, have been integrated into Belgium Law and rendered those rules compulsory in Belgium.<sup>36</sup> There are also the law of the United States, the Firearms Act Cap G8 Laws of the Federation of Nigeria 2004, the Southern African National Conventional Arms Control Act of 2002 and the South Africa Development Community firearms protocol.

Explicitly, a number of regional multilateral agreements and national laws cite human rights as a criterion for authorizing arms export. The criteria provided in the European Union Code of Conduct on arms exports are that members of the European Union will not issues an export license if there is a clear risk that the proposed export might be used for internal repression and that its members will exercise special caution and vigilance in issuing licenses, on a case-by-case basis, (and taking account of the nature of the equipment), to countries where serious violation of human rights have been established by the competent bodies of the United Nations, the Council of Europe, or by the European Union'.<sup>37</sup> These two criteria underline much of the general debate on weapon transfer and human right and humanitarian law violations. International Lawyers and Activists submits strongly that upon deciding a transfer, states are bound by existing international human rights and humanitarian laws. That derivative responsibility lies against a transferring state for violation of international law committed by a recipient where the transferring state is aware of the situation in the recipient state.<sup>38</sup> This is the supply-side approach. We need be reminded that the essence of the limitations placed on transfer and export of arms is to forestall illicit acquisition and misuse of small arms and light weapons by states, non-state actors and even individuals.

Transfer is defined in this context as the reallocation of small arms from the possession, either *de facto* or *de jure*, of one actor to another. There are at least two principal actors involved, the originator and the recipient. These actors can be individuals, groups, such as firms or rebel band or states. Facilitating actors, such as brokers and transport agents, are also often involved in the logistics of the transfer.<sup>39</sup> A transfer is presumed to be legal if it fully conforms to international law and the national law of both the exporting and importing states while an illicit transfer breaks either international or national laws. However, this simple definition often blurs in practice, especially in ambiguous cases where legal or policy exceptions are exploited.<sup>40</sup>

It is disheartening to note that the rules of exportation and transfer are observed more in breach than in obedience. Series of attempts made to trace the use of specific imported small arms in human rights violation proved revealing. Jurgen Grasslin (2003) traced the use of German Heckler & Kosh G3 guns in the human right violation of a Somali woman and a Kurdish man in Turkey.<sup>41</sup> Amnesty international has unearthed several cases of human rights violation with imported arms including finnis bullets used in East Timor, the ammunitions used in the fighting between

<sup>33</sup> Batchelor P. op cit Note 31.

<sup>34</sup> Small Arms Survey, *Small Arms Survey 2002: Counting the Human Cost*. (Supra), Note.

<sup>35</sup> Ibid.

<sup>36</sup> BBC Worldwide Monitoring, *Ministry brings case against Carrier for alleged Arms Smuggling*, Kiev Unit (11 April, 2003), Small Arms Survey, *Small Arms Survey 2004: Rights at Risk*. A project of the Graduate Institute of International Studies, Geneva, Oxford University Press, 2004.

<sup>37</sup> EU (European Union), *European Union Code of Conduct on Arms Exports* (1998) 8675/2/98 DGE – PESC 4.

<sup>38</sup> Gillard E, *What's Legal? What's Illegal?* in Lora Lumpe, ed., *Running Guns: The Global Black Market in Small Arms*. London: Zed Books, (2000)pp 27-52 and Frey B, *The Question of the Trade, Carrying and Use of Small Arms and Light Weapons in the Context of Human Rights and Humanitarian Norms*. Working paper. Geneva: Sub-commission on the promotion and protection of Human Rights (2002). E/CN4/Sub2/2002/39.

<sup>39</sup> Gillard, (2000) opcit, Note 38, *Small Arms Survey, Small Arms Survey 2003: Development Denied*, A project of Graduate Institute of International Studies, Geneva, Oxford University Press (2003) Pg 224-5.

<sup>40</sup> Miller D., *Understanding Small Arms Transfer Dynamics*, Background paper, Geneva: Small Arms Survey 2001, Lumpe L., *The US Arms: both Sides of the Mexico Drug War*. No 16 Summer Covert Action Quarterly (1997) pp. 39-46 and Mariani B. and Angos U; *Transparency and Accountability in European Arms Export Control. Towards Common Standard and Best Practice*. London-Safer World (2000).

<sup>41</sup> Grasslin, J., *Versteck dich Wenn Sie Schiessen*, Munich: Droemer (2003).

Uganda and Rwandese forces over Kisangani in north-east Democratic Republic of Congo in 2000 in which many civilians lost their lives, the Austria Glock pistols in East Timor and 9mm Browning handguns in Jamaica.<sup>42</sup> Similar documentation has been done by Human Rights Watch to trace the origin of weapons in human right violations in both conflict and non-conflict situation. The bullet used by the police force in Zambia in 1977 to inflict serious injury on the opposition leader, Rodger Chongwe was traced back to the manufacturing country, the former Yugoslavia.<sup>43</sup>

Furthermore, armed non-state actors considered by states as illegitimate combatants or 'terrorist' are mostly the beneficiaries of illicit transfer. Patronage by government or states seem to be the leading source of arms, funds and training for the vast majority of non-state actors, though by no means their only source. These patronages are motivated by political, ideological or economic factors. This has been the position during and since the cold war. For instance, the United State and Soviet Union support of Central American non-state actors, during the cold war<sup>44</sup>, American sponsorship of Nicaragua contras between 1981 and 1984,<sup>45</sup> South African's financial and arms support of Mozambique's Renamo in the 1980s,<sup>46</sup> Libya's supplies of arms to the Irish Republican Army (IRA) between the 1970s and the late 1980s<sup>47</sup> and India's arms support to Sri Lanka's Liberation Tigers of Tamil Eelam (LTTE) between 1983 and 1987<sup>48</sup> and Bangladesh's Shanli Bahini between 1976 and 1989.<sup>49</sup> A recent study<sup>50</sup> of the middle East shows that six governments have supported more than 19 non-state armed groups in the region over the last ten years and the most common reasons are to support proxy warfare in order to destabilize or topple a regime, to foster good will with the recipient organization for political purpose or to symbolize their political support of the recipient organization.<sup>51</sup>

States support of non-state action need not be covert, especially when the group is fighting an unpopular government such as the joint support of Russia, Uzbekistan, Tajikistan, Iran and India for the Northern Alliance fighting in Afghanistan against the Taliban.<sup>52</sup> The transfer of military equipment to the Northern alliance became a major public issue after the terrorist attacks in New York and Washington, D.C on the 11<sup>th</sup> September, 2001. The Northern Alliance emerges as perhaps the best-supplied non-state actor in all of 2001.<sup>53</sup>

Arms embargoes represent another unique attempt to curtail illicit possession, transfer and misuse of small arms by non-state actors. The United Nations, the European Union (EU) and the Organization for Security and Cooperation in Europe (OSCE) all have initiated multilateral embargoes while the United States maintain unilateral embargoes.

Arms embargo is aimed at preventing the flow of weapons and the provision of training and related service to a 'target' government or faction. The embargoes are often accompanied by transport-related sanctions, including aviation sanctions and naval blockades, effected to reduce the cross-board movement of weapons. Multilateral arms embargoes long predate international resolve to stem the small arms question but reached a milestone with the adoption of the POA in 2001, which takes up the issue of arms embargoes in several of its provisions.<sup>54</sup> Security Council arms embargoes are not small-arms specific. They typically cover a wide range of weapons and are mandatory, not mere recommendations,<sup>55</sup>

<sup>42</sup> Amnesty International, *From Indonesia: East Timor Rappid Respond Update 10*; MSP Action July 1999, 21/21/1999 (Internal AI Documents ) (1999). Amnesty International, *Small Arms and Light Weapons and Human Rights abuses: An Analysis of Amnesty International Documentation on 10 Countries from 1991-2002*. Background paper. Geneva: Small Arms Survey (2003), Amnesty International, *Jamaica: The killing of Braeton Seven-Justice System on Trial*. AMR 38/005/2003.

<sup>43</sup> Human Rights Watch (HRW), *Zambia: No model for Democracy*, New York: HRW. May www.hrw.org/reports98/zambia (1998) (visited in May, 2020). Human Right Watch (HRW), *No Questions Asked: The Eastern European Arms Pipeline to Liberia*. Briefing paper. New York: HRW.15 November 2001.

<sup>44</sup> Godnick W., *Small Arm Transfers in Central America*. Background paper. Geneva: Small Arms Survey (2001).

<sup>45</sup> *Case Concerning Military and Paramilitary Activities in and Against Nicaragua*, ICJ Rep, 1986, p. 14.

<sup>46</sup> Claiborne, W., *South Africa, Mozambique form Commission to probe Massacre*. Washington Post, 7 August 1987.

<sup>47</sup> Boyne, S., *Uncovering the Irish Republican Army, Jane's Intelligent Review*. 1 August, 1996.

<sup>48</sup> Gunaratna, R., *Sources of Arms Supplies to the LTTE: Successes and Failures of the Sri, Lanka State in* D. Banerjee (ed.) *South Asia At Gun Point*. Colombia: Regional Centre for Strategic Studies (2000).

<sup>49</sup> The Independent (Bangladesh), *Smugglers Using Names of Foreign Mission*, 1 October, (2000), The Independent (Bangladesh), *Arms and Politics*. 21 March, (2001).

<sup>50</sup> Agence France Presse, *Fledging Somalia Government Accused of Illegally Importing Arms*. 19 February, 2001, Miller, D., *Small Arms and Light Weapons in the Middle East* Background paper. Geneva: Small Arms Survey (2001) and Wilkinson, T., *Palestine's Gun Culture poses political, Social Perils in the Middle East: proliferation of Weapons frustrates Efforts at Law and Order - and leaves civilians living in fears*. The Los Angeles Times, 18 August, (2000).

<sup>51</sup> Miller D. op cit. Note 40

<sup>52</sup> Davies A., *Pakistan in Quandary Over New Sanctions Against the Taliban. Jane's Intelligence Review*. 1 February, (2001), Rashid, A. *The Taliban: First, the War. Far Eastern Economic Review* 2 August, (2001).

<sup>53</sup> Pakistan News Service, *Russia Delivering Weapons to North Alliance*, 9 October (2001) www.paknews (visited in March 2021). The Toronto Star, *Afghan Rebels Expecting Arms from Russia, Iran*. 3 October, (2001). www.thestar.com (visited in February. 2021).

<sup>54</sup> *12<sup>th</sup> Preamble, Articles 15 and 32 of Section II of the POA*

<sup>55</sup> The terms the Security Council uses in an arms embargo resolution indicate whether the measure is mandatory or not. If the embargo is mandatory, the Council will 'decide that the states shall', or 'demand' or 'order' States to take particular action in the operative part of the resolution's preamble, operative section, or both, to chapter VII of the UN Charter, from which the Security Council derives its enforcement powers. Where, by contrast, the Council is only recommending an embargo, it will 'request', 'urge', or 'call upon' UN member states to take such action.

legally bind all United Nations member states. All United Nations member states are obliged<sup>56</sup> to abide by these embargoes, including the adoption of necessary national implementing legislations. They have been used against states but increasingly against non-state armed group including Uniao Nacional Para an independencia Total de Angola (UNITA) in Angola and the Revolutionary United front (RUF) of Sierra Leone. Admittedly, there have been allegations of violation of nearly every arms embargo currently in place. Research proves that in 2002, 54 countries have been linked to shipment of small arms in violation of international arms embargoes effective in 2001.<sup>57</sup> The United Nations has taken this into account and taking steps to hold member states accountable, but the extent to which this impact illicit acquisition and transfer to non-state actors is another question. As of the end of 2003, the Security Council had imposed such 'secondary sanctions' in only one case-against the Charles Taylor government in Liberia as a result of its violation of sanctions against Sierra Leone rebels.<sup>58</sup>

It is therefore becoming increasingly herculean, if not impossible, for small arms instrument and regulation to deter illegal trade in, acquisition and transfer of arms to non-state actor. This is more so, considering that contemporary armed conflicts are being politicized and privatized, and 'an extension of economics by other means'.<sup>59</sup>

## 2.2. Regulation of Non-state Actors in Armed Conflict Situations

The face of warfare the world over has gradually changed since the end of the Second World War. A majority of contemporary armed conflicts are non-international with Twenty-Eight such conflict situations taking place in seventeen states in 2013.<sup>60</sup> Recently, we see only a few numbers of conflicts, if any, occurring between states but more within states some of which have spread into neighbouring countries.

Thousands of non-state armed groups are involved in conflicts and can potentially endanger or protect civilians. By one estimate, there are 1000 non-state armed groups in the Syria conflict alone<sup>61</sup>. They are now more prolific, diverse and unpredictable. The non-state actors are not only parties to the most common type of conflict today but also often responsible for violence against civilians in gross violation of international humanitarian laws. They play prominent roles in facilitating the establishment of criminal and informal economics, undermine and truncate state peace building processes leading to more violence and endangering the efforts of humanitarian aid workers, development professionals and peace keepers.<sup>62</sup>

The International humanitarian Community resolved that armed conflict, whether international or internal, will no longer be left to be fought on the basis of reciprocity which has been from time immemorial. That is, enemy soldiers, for instance, were well treated because there was a vested interest in having the adverse party accord the same treatment to one's own soldiers captured on the battlefield.<sup>63</sup> The exponential growth in human suffering caused by developing military technology and inadequate provision for military medical facilities led to the rise of humanism as a major concern in the regulation of conflict.<sup>64</sup>

The Geneva Conventions of 1949 and the Additional protocol I and II of 1977 have become the corner stone of contemporary international humanitarian laws adopted to regulate combatants and rebels in their means and methods of warfare. The most prominent provisions of these laws that place obligations on non-state actors during armed conflict are the common article 3 of the Geneva Conventions of 1949 and article 1 of the Additional Protocol II of 1977.<sup>65</sup> While the 1949 Geneva Conventions are generally more concerned with international armed conflict, common article 3 create obligation for each party to non-international armed conflict occurring in the territory of one of the contracting parties and provide a series of minimum guarantees for protecting those not taking active part in hostilities, including those rendered *hors de combat* by any cause. It applies in situation of full-scale civil wars to relatively minor disturbances. The additional protocol II develops and supplement the common article 3 without modifying its existing conditions for application. However, it is applicable subject to the satisfaction of its higher thresholds. It clearly does not apply to situations of internal disturbance, riots and sporadic acts of violence.<sup>66</sup>

Despite the divergent views as to the applicability or otherwise of these provisions to non-state actors, including the justifiable principles of legislative jurisdiction and the discursive democracy theory,<sup>67</sup> the United Nations, most times,

<sup>56</sup> Article 25 of the United Nations Charter of 1945.

<sup>57</sup> Small Arm Survey, *Small arm Survey 2002: Counting the human Cost*. P 134 opcit Note 1

<sup>58</sup> United Nation Security Council (UNSC) *Resolution 1343* adopted 7 March. 3/Res/1343 (2001).

<sup>59</sup> Keen, D., *The Economic Functions of Violence in Civil Wars*. Adelphi, Papers 320 Oxford/London: Oxford University Press and the International Institute for strategic studies (1998).

<sup>60</sup> Cassey-Maslen S., *The War Report: Armed Conflict*, Oxford, Oxford University Press (2014)

<sup>61</sup> The Carter Centre, *Syria: Country-Wide Conflict Report #4*, 11 (2014) 11

<sup>62</sup> Hofmann C. and Schneckecker U., *Engaging Non-State Armed Actors in State and Peace building: Options and Strategies*, International Review of the Red Cross 93 (883) (2011) Pp 1-19, Turns D., *The Law of Armed Conflict (International Humanitarian Law)* in M.D Evans (ed), *International Law*, Oxford University Press, Oxford (2014) 821-853.

<sup>63</sup> Nsirimovu A., *Human Rights Education Techniques in Schools: Building Attitudes and Skills*, Port Harcourt, Nawa Publishers (1994), Bellow E., *African Customary Humanitarian Law*, Oyez Publishing Ltd/ICRC, Geneva (1986) 26, Diallo Y., *African Tradition and Humanitarian Law*, II ICRC Geneva (1978) p. 4-5 and Y. B Ashoor, *Islam and International Humanitarian Law*, No. 215, ICRC Geneva (1980) p. 65.

<sup>64</sup> Turns D., op cit Note 62

<sup>65</sup> *Common Article 3 of the Geneva Conventions of 1949, Article 1 of the Additional protocol II of 1977 to the Geneva Convention of 1949*

<sup>66</sup> Ibid

<sup>67</sup> Clapham A., *Human Rights obligations of Non-State Actors in Conflict situations*, Oxford University Press, Oxford (2006), A. Cassese, *The Status of Rebels under the 1977 Geneva protocol on Non-*

state the situation clearly before the parties in its resolutions insisting that the humanitarian rules provided under the common article 3 should be complied with in a particular conflict.<sup>68</sup> The United States Supreme Court, most recently, has pointed out the applicability of common article 3 with regards to the procedural guarantees offered by the military commissions due to try individuals captured in Afghanistan during the conflict there between the United State and Al Qaeda. The Court held that the common article 3 to the Geneva Conventions applied to that conflict.<sup>69</sup>

However, whatever the position of the parties to the internal conflict, it has become clear that, not only are armed groups bound as parties to the conflicts by common article 3 to the Geneva Convention, they are also bound by the provisions of the Additional Protocol II. The international Committee of the Red Cross (ICRC) Commentary to the protocol simply asserted this to be the case:

The deletion from the text of all mention of 'parties to the conflict' only affect the drafting of the instrument, and does not change its structure from a legal point of view. All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.<sup>70</sup>

For the avoidance of doubt, parties to armed conflicts including non-state actors who are not parties to the Geneva Conventions are still under obligations under the conventions to apply the provisions of international humanitarian law. This is on the basis that the 1949 Geneva Conventions are now so widely accepted and attained their 195<sup>th</sup> accession (by South Sudan) in 2013. They are therefore considered to have passed in their entirety into customary international law. In 2004 the Appeal Chamber of the Sierra Leone special court<sup>71</sup> held that:

'it is well settled that all parties to an armed conflict, whether states or non-state actors are bound by international humanitarian law, even though only states may become parties to international treaties'

Furthermore, those countries that did not adopt the Additional Protocol II are also not exempted from the application of its provisions. In any event, the preambles to the Additional Protocol II restate thus: That, in the case not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of public conscience.

### 2.3. Extent and Limit of Implementation of Extant Laws

Although the Geneva Conventions have been ratified by almost every state on the face of the planet, the implementation and enforcement were problematic, but for the symbolic link between the international humanitarian law and the international criminal law. This sparked a renewed interest and development in humanitarian law. The genocide in Yugoslav and the Rwanda massacres of 1994 compelled the establishment of two international Criminal Tribunals by the United Nations Security Council under chapter VII of the United Nation Charter to prosecute persons responsible for serious violation of international humanitarian law in their territories.<sup>72</sup>

The Rome Statute of the International Criminal Court is a follow-up to and an inspiration from the ad hoc international criminal Tribunals and a re-enactment of the International Military Tribunal Statutes creating the Nuremberg and Tokyo Military Tribunal of 1945. The Nuremberg Military Tribunal enunciated the concept of individual responsibility summed up in the famous statement of the Tribunal thus:

Individuals have international duties which transcend the national obligation of obedience imposed by the individual state..... Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crime can the provisions of international law be enforced.<sup>73</sup>

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*International Armed Conflict*, Vol. 30 ICRC (1981) 416-39, 424-6, See Sassoli M.: *The Implementation of International Humanitarian Law: Current and inherent Challenges*, 10 year book of international Humanitarian law (2007) 45, 63.

<sup>68</sup> Resolution 1214 (1998), 8 December, 1998, Preambular Para 12: Paragraph 12 reads 'Demands that the Afghan factions put an end to discrimination against girls and women and other violations of human rights as well as violations of international humanitarian law, and adhere to the international norms and standards in this sphere.'

<sup>69</sup> *Handen v Rumsfeld* 548 U. S. (2006), P. 66 of the slip opinion

<sup>70</sup> Zegveld L., *Accountability of Armed opposition Groups in International Law*, Cambridge University Press, Cambridge (2002) Pp 49-51, Lyndsay M., *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge (2002), Meron T., *Human Rights and Humanitarian Norms as Customary Law*, Clarendon, Oxford (1989), Sandoz C., Swinarski C. and Zimmerman B. (eds), *Commentary on the Additional protocols of 8 June, 1977 to the Geneva Convention of 12 August 1949*, ICRC/Nijhoff, Geneva/Dordrecht, 1987.

<sup>71</sup> *Ethiopia-Eritrea Claims Commission, Partial Awards on the Claims Relating to prisoners of War* (2003) 42 ILM 1056 and 1083, *Prosecutor v Sam Hinga Norman* (case No. SCSL-2004-14-AR72(E), Decision on Preliminary Motion Based on lack of jurisdiction (Child Recruitment), Decision of 31 May, 2004, para 22, T. Meron, op cit Note 70, J. M. Henckaerts and L. Doswald-Beck, ICRC, *Customary International Humanitarian Law*, Cambridge University Press, 2005.

<sup>72</sup> Ryngaert C., *Imposing International Duties on Non-State Actors and the Legitimacy of International Law*, forth coming in Noortman M. and Ryngaert C. (eds), *Non-State Actors Dynamics in International Law: From Law-Taking to Law-Making*, Aldershot, Ashgate, (2010), Clapham A., *Extending International Criminal Law beyond to Corporations and Armed Opposition Groups*, 6 *Journal of International Criminal justice*, (2008) 899.

<sup>73</sup> Shaw M. N., *International Law*, (6<sup>th</sup> edition) Cambridge University Press, (2008), R. Cryer, *International Criminal Law*, in Evans M. D. (eds), *International Law*, Oxford University Press, 4<sup>th</sup> Edition (2014) 752,

The Rome Statute was negotiated and adopted at the Rome Diplomatic conference of plenipotentiaries on 17<sup>th</sup> July 1998<sup>74</sup> and the international criminal court, unlike the two ad hoc international criminal Tribunals, is the product not of a binding Security Council resolution but of an international treaty. States, while being prepared to accept the creation of geographically limited and temporarily constrained Tribunals by the Security Council action, were not willing to be so bound by the establishment of a permanent international court with much more expansive jurisdictional coverage without express consent.<sup>75</sup>

The statute codifies many customary law crimes that developed through centuries of uniform and consistent state practices. The court's jurisdiction is genocide, crime against humanity, war crimes, including grave breaches under the international humanitarian law and the crime of aggression.<sup>76</sup> The court exercise universal jurisdiction concerning the trial and punishment of offenders without regard to the official position of the perpetrator with the potential to exact punishment in the midst of a crisis<sup>77</sup> unlike the *ad hoc* tribunals which deliver only *ex post facto* justice. The court deflate the umbrella of official immunity that heads of state and other Senior States official insulate themselves after perpetrating various crimes.<sup>78</sup> With the guidance of its principle of complementarity, the court, in cooperation and collaboration with the national courts hold offenders accountable, not only to deliver retributive justice but also make provision for restitution for victims of atrocious crimes from the pocket of the criminals.<sup>79</sup>

The obligations of armed non-state actors are definite and unequivocal under the statute. The provisions of the common article 3 of the Geneva Conventions and the Additional Protocol II to the Geneva Convention are replicated under the statute.<sup>80</sup> The International criminal Tribunal, the special court of Sierra Leone and the International Criminal court all have jurisdiction to prosecute violations of common article 3 and those of the Additional protocol II to the Geneva Convention.<sup>81</sup> Many of the activities of the non-state actors that amount to international crimes also amount to domestic crimes for which states are ever ready and do not hesitate to prosecute and punish them individually as 'armed bandits, terrorists and common criminals. In essence, the international humanitarian community has made considerable legislative efforts to hold perpetrators, mainly the non-state armed groups, accountable for violation of humanitarian laws, while the courts, in spite of their shortcomings, are not leaving any stone unturned in their judicial responsibilities to enforce the law.<sup>82</sup>

However, being formally bound by the law does not infer willingness to comply with such law. The willingness to comply is crucially dependent on the perception of consent to or participation in the formation of the law one is bound by. This gives a sense of 'ownership' of the rules and increasing the tendency and willingness to uphold the rule. This informs the reason the non-state actors remain undeterred in their violation of their obligations under the international humanitarian law in the face of all legislative enactment and judicial mechanism advanced to ensure compliance.<sup>83</sup>

### 3. Engaging with Non-State Actors in Armed Conflict

The foregoing review highlights the futility in the legislative and judicial control of the acquisition and misuse of small arms and light weapon by non-state actors, founded mostly on lack of consent to be bound thereby. Will engaging the non-state armed groups therefore encourage their respect for the international humanitarian law? Dawn Steinhoff<sup>84</sup> explained the term 'engaging' as referring to several types of contact with armed groups, including advocacy, negotiation, mediation, liaison or interaction.<sup>85</sup> Engagement could be initiated by a state, non-state actor, or intermediary to explore, enable, instigate or sustain opportunities for contact with or between the parties to the conflict.<sup>86</sup> The several ways to

Ryngaert C., *Non-State Actors and International Humanitarian Law*, Working paper, institute for International Law Katholieke University, Leuven, (2008).

<sup>74</sup> Udombana N. J., *Africa and the International Criminal court*, Lecture delivered at the 13<sup>th</sup> Justice Idigbe Memorial lecture organized by the faculty of Law, University of Benin, Benin city-Nigeria on the 5<sup>th</sup> December, 2012, E. Alobo, *The Role of the International Criminal Court (ICC) in the Fight Against Impunity*, M. N. Shaw op cit Note 73.

<sup>75</sup> Shaw M. N. op cit. Note 73

<sup>76</sup> International criminal court (called ICC) statute, Article 5

<sup>77</sup> Kastner P., *The ICC in Darfur-Saviour or spoiler*, 14 *ILSA Int'L & Comp. Law* (2007) 145-146

<sup>78</sup> Article 27 of the ICC Statute

<sup>79</sup> Article 75 of the ICC Statute, Bassiouni M. C., Special Rapporteur, *The Right to Restitution, Compensation and Rehabilitation for Victims of Gross Violation of Human Rights and Fundamental Freedom-Final Report of the Special Rapporteur, Cherif Bassioun M.*, Submitted in accordance with Resolution 1999/33, 18 January, 2000, PMBL, E/CN.4/2000-62.

<sup>80</sup> Article 8 of the ICC Statute

<sup>81</sup> Article 8 of the ICC Statute, *Article 4 and 5 of the International criminal Tribunal statute of Rwanda, and Article 3 of the special court of Sierra Leon statute*

<sup>82</sup> Redress, *No Time to wait: Realising Reparation for Victims before the international criminal court* (2019), *Prosecutor v Akayesu*, judgment, case No ICTR-95-45-T Trial Chamber 1(2 September 1998, 755,756, 757, *prosecutor v Tadic*, judgment, case No IT-94-1-A Appeal Chambers, 15 July 1999, 38 ILM 1518, 47, 153, 456, 76, *Prosecutor v Lubanga*, Judgment, pursuant to Article 74 of the ICC Statute. Case No ICC-01/-4-01/06, 14 March 2012, 765.

<sup>83</sup> Ryngaert C. op cit Note 73.

<sup>84</sup> Steinhoff D., *Talking to the Enemy: State Legitimacy Concerns with Engaging Non-State Armed Groups*, Texas International Law Journal (2010)

<sup>85</sup> McHugh G. and Bessler M., *U. N Office for the coordination of Humanitarian Affairs (OCHA), Humanitarian Negotiations with Armed Groups: A Manual for practitioners* 87 (2006), available at <http://ochaonline.un.org/humanitariannegotiations/Documents/Manual.pdf>(visited in May, 2020) [OCHA.MANUAL On NEGOTIATION WITH ARMED GROUP]

<sup>86</sup> Conciliation Resources Accord, *Choosing to Engage Armed Groups and Peace processes*, glossary at 99, available at <http://www.c-r.org/our-work/accord/engaging-group/content/php>(visited in May, 2002).



facilitate engagement may be by the execution of a memorandum of understanding by a state or a Non-governmental organization with a non-state actor,<sup>87</sup> through a unilateral agreement or declaration to comply with International humanitarian law<sup>88</sup> or concluding a verbal agreement.<sup>89</sup> The basis for engagement may include negotiating ground rules for humanitarian action,<sup>90</sup> negotiating humanitarian access<sup>91</sup>, or organizing the protection of civilians.<sup>92</sup> Engagement or negotiation between parties to armed conflicts was pre-empted and authorized under the international humanitarian laws<sup>93</sup> yet parties to conflict, particularly the state, have failed to take advantage of those provisions.

The common article 3 unequivocally provide that<sup>94</sup>

the parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present convention.

Engaging with non-state actors comes with numerous benefits including the protection of vulnerable groups which is the original focus of humanitarian law.<sup>95</sup> Kofi Annan called on states in 2001 to encourage negotiations, stating:

Whereas Government is sometimes concerned that... engagements might legitimize armed groups, these concerns must be balanced against the urgent need for humanitarian action. It is the obligation to preserve the physical integrity of each and every civilian within their jurisdiction, regardless of gender, ethnicity, religion or political conviction, that should guide governments in exercising their sovereign responsibility.<sup>96</sup>

Engagement with non-state actors is equally very vital considering that they use all sorts of unorthodox weapons and techniques in armed combats culminating in unnecessary human suffering. As a result of the brutal nature of attacks by armed groups, states often feel justified in employing harsh military measures to retaliate and are reluctant to consider alternative responses.<sup>97</sup> Encouraging respect for international humanitarian law is another necessary reason for engagement with non-state actors. Armed groups do not have equal strength and resources with states that will enhance their compliance with the international humanitarian law.<sup>98</sup> They lack traditional military command and structure and have the tendency to violate regulations on the means and methods of war considering their informal training, and absence of accountability for non-compliance.<sup>99</sup> Therefore, engagement serve as a mechanism by which non-state actors can participate in humanitarian norm building.<sup>100</sup> The group consents to the norms by special agreement when negotiating, as opposed to customary laws which apply to them through the territorial state,<sup>101</sup> by being involved in negotiating the conduct that it will eventually adhere to, could create a sense of ownership over the law. This leads to greater compliance.<sup>102</sup> Moreover, a negotiated agreement with a non-state actor constitutes a binding obligation which, if violated, may lead to prosecution by the state with the support of the international community.<sup>103</sup> A typical agreement is the San Jose Agreement executed between El Salvador and the Frente Farabundo Marti Para la Liberacion Nacional (FMLN) of 26<sup>th</sup> July 1990.<sup>104</sup> The preamble to the said agreement includes the following paragraph:

Bearing in mind that the frente Farabundo Marti Para la Liberacion Nacional has the capacity and the will and assumes the commitment to respect the inherent attributes of the human person.<sup>105</sup>

This agreement, being also signed by the Representative of the United Nations Secretary General (Alvaro de Soto) together with arrangement for the United Nations monitoring, suggests that this would constitute an agreement governed by international law between entities recognized as having the requisite international status to assume rights and

<sup>87</sup> Ocha Manual on Negotiation with Armed Groups (Supra)

<sup>88</sup> Clapham A.op cit Note 67

<sup>89</sup> Ewumbue-Monono C., *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, 864 International Review of the Red Cross (2006) 905, 911-13

<sup>90</sup> Ocha Manual on Negotiation with Armed Group (Supra)

<sup>91</sup> Ibid

<sup>92</sup> Ibid

<sup>93</sup> *Common Article 3 of the Geneva Conventions, Article 96 (3) of Additional protocol 1 of 1977.*

<sup>94</sup> *Common article 3 (Supra)*

<sup>95</sup> *Abi-Saab G., Wars of National Liberation in the Geneva Conventions and Protocols* in 165 *Recueil Des Cours* 363, 365 (Academic de Droit International ed. 1979), Kellenberger, J., *The challenges facing the International Committee of the Red Cross in the Twenty-First Century*, in *Making the Voice of Humanity Heard*. 5, 8 (Liesbeth Lijnzard et al. eds, 2004).

<sup>96</sup> The Secretary General, *Report of the Secretary General on the Protection of Civilians in Armed Conflicts*, Para 3, delivered to the Security Council, UN.DOC.S/PRST/2008/18 (May 27, 2008), L. Hosn, *The ABCs of the Geneva Conventions and their applicability to modern warfare*, 14 *New Eng. J. Int'l & Comp. L* (2007) 135, 166.

<sup>97</sup> Harvard University program on Humanitarian Policy and Conflict Research & Geneva Graduate Institute of International Studies, *Empowered Groups, Tested Laws, and Policy Options* (2007) 18 ('Empowered Groups')

<sup>98</sup> Cherit Bassiouni M., *The New Wars and the Crisis of Compliance with the Laws of Armed Conflict by Non-State Actors* 98 *Crim. J. L. & Criminology* (1997-1998) 711-749

<sup>99</sup> Ibid

<sup>100</sup> Best G., *War and Law Since 1945* (1994) 251

<sup>101</sup> Zegveld L., *Accountability of Armed Opposition Groups in International Law* Cambridge University Press, Cambridge (2002) 49-51

<sup>102</sup> *Empowered Groups (Supra)*

<sup>103</sup> *Prosecutor v Galic*, ICTY, 98-29-T, Trial Chamber, Judgment, 5 Dec (2003) Para 95

<sup>104</sup> *See the San Jose agreement between EL Salvador and the Frente Farabundo Marti Para La Liberacion Nacional (FMLN) signed by both sides on 26 July, 1990* UN.DOC.A/44/971-5/21541 of 16 August 1990, Annex.

<sup>105</sup> Ibid

obligations under international law.<sup>106</sup> In such situation, the commitment of the non-state actor stretch beyond the laws of armed conflict.

It is therefore surprising that despite the possible benefits, engaging with non-state groups is not a customary practice among states.<sup>107</sup> It has been the conviction of the states that engagement with non-state actors will confer legitimacy on these groups. This fear has driven states to ensure that non-international armed conflicts are not subject to same rules as international conflicts. The states are careful in their assessment of the legal outcome of legitimizing armed group before deciding whether to engage insurgents since such legitimacy affect the members' liability under domestic law, determines its level of equality with the state, and perhaps grants the rebels a place at the international negotiation table.<sup>108</sup> This suspicion is, however, allayed considering the concluding provision of common article 3 of the Geneva conventions which postulate that engagement with insurgents shall not alter the legal status of the parties to the conflict.<sup>109</sup>

It is argued in some quarters that the states' fear of legitimacy is a mere façade and not their real concern. The fact that some members of the international community are incentivized to engage shows an inference that legal implications are not necessarily critical impediments to all non-violent engagement.<sup>110</sup> What can be more detrimental to a state than any loss in the state's capacity to apply domestic laws is the political legitimacy that an insurgent group gains from legal recognition. The gain in political and moral legitimacy that a group will attract through adherence to humanitarian norms will be far reaching and can occasion much discomfort to a state.<sup>111</sup> This may imply that the group earn political rights when they gain legal recognition. That is, the states do not want to compromise their political integrity and relationships with the international community. This is more so, where a particular government is unpopular.

Engagement with non-state actors has made major in-road into internal conflicts and international humanitarian law violations. Apart from the San Jose agreement, there have been numerous examples of agreements of various kinds, including Bosnia and Herzegovina, Liberia, the Philippines, Colombia, Sudan and Uganda.<sup>112</sup>

The Deed of Commitment is the more formal and structured type of undertaking pioneered by the Geneva Call, a Non-governmental Organisation based in Switzerland. A Deed elicit commitment to humanitarian norms from non-state actors and enabled them to 'take ownership' of and responsible for them.<sup>113</sup> They are executed by the leaders on behalf of the groups and counter-signed by Geneva Call and the government of Canton of Geneva (custodian of the Deed) and they provide a tool to increase accountability.<sup>114</sup> Insurgents are encouraged to be parties to Deeds because engaging with a neutral Swiss-NGO elevates them to a level of responsibility and respectability while their legal status remains unchanged. Endorsement of a Deed by a non-state actor is crucial. It thereby holds itself committed to implement its undertaking under the Deed and to cooperate with Geneva call's monitoring. Implementing Deeds of Commitment include issuing orders, revising internal policies, dissemination and training, monitoring, and disciplinary measures. The monitoring of Deeds is conducted at three stages: Self-reporting by the group concern, third-party monitoring and field missions by Geneva Call to ensure compliance.<sup>115</sup>

It is the finding of Geneva Call that engagement with non-state actors can increase adherence to humanitarian norms and secure the life and properties of civilian population.<sup>116</sup> There has been high level of cooperation and compliance with the provisions of the Deeds executed leading to the destruction of more than 20,000 stock piled landmines, the demobilization of hundreds of conscripted child soldiers, and the launch of new humanitarian assistance programmes in non-state armed group-controlled territories. As at 2016, 49 armed groups had endorsed the Deed on Mines, 18 executed the Deed on child soldiers and 16 the Deed on sexual violence accounting for more than 50 non-state actors in all.<sup>117</sup> There is more likelihood to reach agreement where conflicts are protracted and where groups are well organized and control territories<sup>118</sup> while the agreement may help to ground war crimes liability in the international criminal Tribunals as was the case in the former Yugoslavia.<sup>119</sup>

<sup>106</sup> Zegveld L., Op cit Note 101

<sup>107</sup> Santos Jr. S. M., *A Critical Reflection on the Geneva Call Instrument and Approach in Engaging Armed Groups on Humanitarian Norms: A Southern perspective* (2003) 1-2.  
[http://www.armedgroups.org/sites/armedgroups.org/files/santos\\_paper.pdf](http://www.armedgroups.org/sites/armedgroups.org/files/santos_paper.pdf) (visited in May, 2020).

<sup>108</sup> Steinhoff D. op cit Note 84

<sup>109</sup> Ibid

<sup>110</sup> Ibid

<sup>111</sup> Ibid

<sup>112</sup> Ibid

<sup>113</sup> Bangerter O., *Internal Control: Codes of Conduct within Insurgents Armed Groups*, Occasional Paper 31, Geneva; Small Arms Survey (2012) 7-8

<sup>114</sup> Bongard, P. and Sommer J., *Monitoring Armed Non-State Actors Compliance with Humanitarian Norms: A look at International Mechanisms and the Geneva Call Deed of Commitment*, 93 ICRC (2011) 673, 676, Sassoli M., *Engaging Non-State Actors: The New Frontiers for International Humanitarian Law in Geneva call: Exploring Criteria and Condition for engaging Armed Non-State actors to Respect Humanitarian Law and Human Rights Law*, Conference Report pp. 8, 15-16.

<sup>115</sup> Hoffman C., *Reasoning with Rebels: International NGO's approaches to engaging Armed Groups*, SWP Research Paper (ii September, 2012) 15, Geneva Call, *Deed of Commitment*, <http://www.genevacall.org/how-we-work/deed-of-commitment> (visited in June, 2020)

<sup>116</sup> Bongard P., *Engaging Armed Non-State Actors on Humanitarian Norms: Reflections on Geneva Call's experience*, No 58 *Humanitarian Exchange* (2013) pp. 9, 10

<sup>117</sup> Bongard and Sumer, op cit.

<sup>118</sup> Mark, M. *Increasing Respect for International Humanitarian Law in Non-International Armed Conflict Geneva*; ICRC (2008) p. 17

<sup>119</sup> *Prosecutor V Galic (Supra)*

However, the process is not without limitations. There must be willingness on the part of the groups to cooperate. Some groups, particularly radical Islamic sects, out rightly reject the international humanitarian law, while others do not want to engage on sensitive issues such as improvised explosive devices, hostage-taking or human shield. Some groups have encountered difficulties in the implementation of all of their obligations after the execution of the Deed as a result of limited resources, capacity and expertise. There has been restriction of access by states, criminalized dialogue under the auspices of counter-terrorism, or impose 'no engagement' funding condition. Faith and confidence in the process could be undermined by states' persistent violation of humanitarian norms.

### 3.1. Engagement with Non-State Actors in Nigeria

In acknowledgement of the futility in pursuing the Niger-Delta militancy issue through counter-insurgency, the Nigeria government established the Truth and Reconciliation Commission in Rivers State in 2008 presided over by Late Honourable Justice Kayode Eso to investigate the cause of the protracted armed conflict in the Niger-Delta region of Nigeria and to make recommendation therefore.<sup>120</sup>

Niger-Delta is an oil rich region in Nigeria where the Anglo-Dutch oil giant, shell petroleum Development Company (Shell), discovered, explored and exploited oil since 1956. It is acclaimed to be the Second oil largest deposit or reserve in Africa after that of Libya.<sup>121</sup> The exploration and exploitation of petroleum oil in the Niger-Delta left the region as the most polluted in the world.<sup>122</sup> The extent of the pollution is said to be 50 times the pollution unleashed in the Exxon Valdez tanker disaster in Alaska, United State over the past half century.<sup>123</sup> In 2009, Amnesty International bemoaned and called for concern the gross environmental right violation occasioned by the level of oil spillage in the Niger-Delta.<sup>124</sup> This environmental degradation resulted in unprecedented poverty and under development in the area and this culminated in agitation by youths resulting in the proliferation of militia groups which targeted their grievances at the oil companies and their employees in the form of pipeline vandalization, hostage-taking, kidnapping and sometimes outright-murder.<sup>125</sup> These agitations heavily impacted the economy of the Federal government which in 2006 lost about N500 million and \$6.3 billion in 2008<sup>126</sup> respectively. The situation in the Niger Delta at the time attracted diverse analysis and description. The Resident Coordinator of the United Nations system in Nigeria, Alberic Kacou called the Delta 'a place of frustrated expectation and deep-rooted mistrust'.<sup>127</sup> Ikelegbe described the region as a place 'generally restive, with pockets of insurrection and armed rebellion'.<sup>128</sup>

The unrest and instability called for the establishment of the 2008 Commission which recommended amnesty for the members of the non-state actors who participated directly or indirectly in the commission of offences associated with militant activities in the Niger-Delta, in furtherance to the provision of the Constitution of the Federal Republic of Nigeria 1999.<sup>129</sup> Thus the Federal government's Amnesty programme was born with the presidential proclamation of amnesty on the 25<sup>th</sup> June, 2009 which lapsed on the 4<sup>th</sup> October 2009.<sup>130</sup> The programme was preceded by a framework for disarmament, demobilization and rehabilitation or reintegration of the ex-militants, put together by the presidential committee on Amnesty and disarmament of militants in the Niger Delta. It aimed at the ex-militants surrendering and handing over all equipment, weapons, arms and ammunitions including the renunciation of membership of any militia group.<sup>131</sup>

The cooperation of the groups was reciprocated with series of programmes designed by the federal government to benefit the ex-militants, including the payment of allowances, education and vocational training of ex-militants in foreign institutions of learning, granting of unconditional pardon to all ex-militants implicated in offences associated with the Niger Delta militant activities while cleanup programmes are being planned by the Federal government in the affected areas.<sup>132</sup> This was the level of the Nigeria government's engagement with the Niger-Delta non-state actors, and three years after the proclamation of amnesty, violence dropped in Niger-Delta and crude oil production rose back up to 2.6 million barrels per day.<sup>133</sup>

<sup>120</sup> Tubobanimi J., Reconciliation Commission: Amaechi Speaks on killing, Sekibo, King Accused, The Hard Truth News, June 5-11, 2008 Pg. 2.

<sup>121</sup> Ayankola M., *Niger Delta crippling Oil and Gas Production Investment*, The Punch, 26 May, 2009, Pg. 12.

<sup>122</sup> Onyekakeyah L., *Biodiversity: A forgotten Stuff in Nigeria*, The Guardian 3 August, (2010)73

<sup>123</sup> Khor M., *Pay Developing Nations for Eco-disasters*, Vol 49 South Bulletin (2010) pp 2-4.

<sup>124</sup> Amnesty International, *Nigerian Petroleum Pollution and Poverty in the Niger Delta*, Summary, London Amnesty International Secretariat (2009).

<sup>125</sup> Osumah O. and Aghedo I., *Who Want to be a Millionaire? Nigerian Youths and the Commodification of Kidnapping*, No.128 VOL. 38 *Review of African Political Economy*, (2011) pp. 277-287.

<sup>126</sup> Okeke M., *Govt. to Spend N71.7b on NDDC in 2008*, The Guardian, (2007) p80.

<sup>127</sup> Duggan C. S. M., *Nigeria: Opportunity in crisis*, Harvard Business school, N9-709-048, Rev., 14 August, 2009.

<sup>128</sup> Ikelegbe A. O., *The Economy of Conflict in the oil Rich Niger Delta Region of Nigeria*, Vol. 14 No. 2 *Nordic Journal of African Studies* (2005) pp. 208-234.

<sup>129</sup> See Section 175 of the Constitution of the Federal Republic of Nigeria 1999.

<sup>130</sup> Nigeria First, *Amnesty Proclamation Pursuant to section 175 of the constitution of Nigeria, being text of President Yar'Adua's Amnesty Proclamation on 25 June, 2009*  
[http://www.nigeriafirst.org/Printer\\_8923.shtml](http://www.nigeriafirst.org/Printer_8923.shtml)(accessed in February, 2021).

<sup>131</sup> Ibid

<sup>132</sup> Folarin S., *Niger-Delta Environment: Ogoni Crisis and the state*, Vol. 7 No. 1(2007) 37, Vidal J., *Niger Delta oil spills clean-up will take 30 years*, say UN. The Guardian, 4 August 2011, <http://ourworld.unu.edu/en/niger-delta-spills-clean-up-will-take-30-years-says-UN> (accessed in March, 2021).

<sup>133</sup> Ubhenin O. E., *The Federal Government's Amnesty Programme in the Niger Delta: An Appraisal*,

In spite of the 'success story' attributed to the amnesty programme by the federal government, skeptics concluded otherwise. Dimiearl Von Kimedi says the Niger Delta conflict is 'just on pause. The challenge is to move from pause to stop',<sup>134</sup> Chris Newson is of the opinion that 'the amnesty process opened a door for stabilization but did not reduce the long-term potential for violence or deal with root conflict issues',<sup>135</sup> Duggan even dub it 'opportunity in crisis'.<sup>136</sup> These opinions may not be misplaced. The Nigeria government tasked its political will to tackle the Niger-Delta insurgency through engagement with militia groups. It is a complex process just initiated but with more dedication, transparency and expertise, internal conflict in Nigeria will be a thing of the past and that peace that defies all understanding will overshadow the nation.

#### 4. Conclusion/Recommendation

The International humanitarian community went great length in securing the lives and property of civilians and those combatants taking no active part in hostilities during armed conflicts. This effort become more commendable in relation to internal conflicts where parties are either reluctant to abide by international humanitarian law or lack the wherewithal to comply.<sup>137</sup>

Irrespective of the advancement of humanitarian treaties and judicial process evolved to ensure compliance, parties to internal armed conflict still violate these rules in their acquisition and transfer of arms and engagement during armed conflict. It therefore lay credence to the conclusion that there is a limit to which legislative and judicial regulation and protection can encourage adherence to humanitarian rules.

Engagement, on the other hand, is less coercive and gives room for parties to have a say in the negotiation and regulation process.<sup>138</sup> This creates the tendency for parties to uphold the rules and increase respect for international humanitarian law. It is a clarion call for states to place the safety of their citizens far and above the crave for legal and political integrity of their government and encourage dialogue during armed conflict. The benefits of engaging with non-state actors are obvious and will create peace and ease of governance.

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<sup>134</sup> Henshaw D., *Nigeria's former oil Bandits now collect government cash*, Wall street Journal, 22 August, 2012. [www.wsj.com/article/SB100014240](http://www.wsj.com/article/SB100014240) (accessed in March 2021).

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