A CONSIDERATION OF ARMED CONFLICTS IN THE NIGER DELTA UNDER THE PRINCIPLES OF INTERNATIONAL HUMANITARIAN LAW

BY

AWHEFEADA, UFUOMA VERONICA (MRS.)
PG/06/07/123543
LL.B, (Hons) B.L, LL.M

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DELTA STATE UNIVERSITY, ABRAKA

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APPROVAL

This work has been read and approved as meeting requirements of the Faculty of Law, Delta State University, Oleh Campus for the award of Doctor of Philosophy (Ph.D) Law.

_____ _____

Prof. Martin O.U. Gasiokwu ***Date***
Supervisor

_____ _____

Dr. (Mrs.) A.T. Akujobi ***Date***
Co-Supervisor

_____ _____

Prof. Martin O.U. Gasiokwu ***Date***
Dean of Law

DECLARATION

I declare that apart from references to other people's work, which have been duly credited, this work is the result of my personal research; and that this thesis has neither in whole nor in part been presented for Ph.D Degree anywhere.

AWHEFEADA, UFUOMA VERONICA (MRS.)
Student

Prof. Martin O.U. Gasiokwu
Ph.D (Law); B.L.
Supervisor

Date

Date

Dr. (Mrs.) A.T. Akujobi
Co-Supervisor

Date

CERTIFICATION

I certify that this work was carried out by Ufuoma Veronica Awhefeada (Mrs.), in the Department of Private Law, Faculty of Law, Delta State University.

_____ _____

Prof. Martin O.U. Gasiokwu ***Date***
Supervisor

_____ _____

Dr. (Mrs.)A.T. Akujobi ***Date***
Co-Supervisor

DEDICATION

This work is dedicated to the Holy Spirit, the great teacher and comforter, whose constant presence helped me to carry on; and to the memory of my late elder sister, Miss. Okiemute Stella Maduku, whose light went out at dawn: you are remembered with with love *Kaente*, continue to rest in peace. To my children, Jokpeme, Amakashe, Nenesi and Ebruba; for providing a constant stream of sunshine into my life.

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ABSTRACT

The title of this thesis – A Consideration of Armed Conflicts in the Niger Delta under the Principles of International Humanitarian Law - is informed chiefly by the critical economic importance of the region to Nigeria. Like some other countries of the world, Nigeria is currently experiencing an upsurge in the number of internal armed conflicts it has to contend with. Between the years 2005 and 2009, the Niger Delta Region of Nigeria was embroiled in such violent internal armed confrontation between the Federal Government and several militant groups which sprang up in the region. This led to hundreds of civilian and other casualties, the destruction of properties, the sacking of entire communities as well as the displacement of hundreds of civilian population. This thesis undertakes an examination of the nature of the conflict that took place in the region under the principles of International Humanitarian Law regulating non-international armed conflict. This is done to buttress the case for the application of the principles of International Humanitarian Law in cases similar to that which took place in the Niger Delta Region. In carrying out this task, the doctrinal research method which involves research into law as a normative science is adopted. Relevant materials such as primary and secondary source materials including international legal instruments, relevant domestic legislations, relevant decisions of international and domestic courts and tribunals, proceedings of international commissions, UN documents, textbooks, articles in journals, materials from the internet as well as newspapers are referred to. Consequent upon the research carried out, it became apparent that neither the Federal Government nor the militant groups were aware of their obligations under International Humanitarian Law during the pendency of the conflict. This resulted in multiple and severe violations of the principles of this branch of law for which no single person has been made to account. Arising from the above observation and as a panacea to such impunity, this thesis recommends a harmonization of the extant rules of International Humanitarian Law governing such internal conflicts and also, the strengthening of the mechanisms of dissemination and enforcement of same. This work shows succinctly, that the conflict that took place in the Niger Delta region falls squarely within the ambit of International Humanitarian Law regulating internal armed conflicts.

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Criminal Code Act, CAP. C.38 L.F.N. 2004

Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949

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Vienna Convention on the Law of Treaties, 1969

LIST OF ABBREVIATIONS

A.J.I.L.	American Journal of International Law
A.J.P.S.I.R.	African Journal of Political Science and International Relations
All N.L.R.	All Nigerian Law Reports
A.U.L.R.	American University Law Review
B.Y.I.L.	British Yearbook of International Law
C.W.R.J.I.L.	Case Western Reserve Journal of International Law
E.J.I.L.	European Journal of International Law
H.I.L.J.	Havard International Law Journal
I.C.C.	International Criminal Court
I.C.L.Q.	International and Comparative Law Quarterly
I.C.J.	International Court of Justice
I.C.R.C.	International Committee of the Red Cross
I.C.T.R.	International Criminal Tribunal for Rwanda
I.C.T.Y.	International Criminal Tribunal for Yugoslavia
I.D.P.	Internally Displaced Person
I.L.M.	International Legal Materials
I.R.R.C.	International Review of the Red Cross
J.T.F.	Joint Task Force
L.F.N.	Laws of the Federation of Nigeria
M.E.N.D.	Movement for the Emancipation of the Niger Delta
N.D.L.F.	Niger Delta Liberation Force
N.D.P.V.F.	Niger Delta People's Volunteer Force
N.M.L.R.	Nigerian Monthly Law Report
N.W.L.R.	Nigerian Weekly Law Report

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Ph.D THESIS SYNOPSIS

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AWHEFEADA, UFUOMA VERONICA (MRS.)

Mat. No. PG/06/07/123543

SUPERVISORS

PROFESSOR MARTIN O.U. GASIOKWU

DR. (MRS.) A.T. AKUJOBI

DEPARTMENT OF PRIVATE LAW

FACULTY OF LAW

DELTA STATE UNIVERSITY

ABRAKA

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CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

Armed conflict in human relations is today accepted as an unfortunate but inevitable reality. Its history is as old as man. Violent conflicts, aided by advancement in science and technology, have assumed dimensions that would never have been thought possible. From pristine times, man has striven to humanize various forms of armed conflict[1] and as has been noted "attempts to regulate war are as old as war itself." [2]

At the core of international humanitarian law, is the aim of mitigating human suffering caused by armed conflicts. International humanitarian law refers to the body of treaties, conventions, international jurisprudence, internationally recognized principles and customs that govern the conduct of parties to an armed conflict, so as to limit human suffering, particularly of non combatants. It is a branch of international law that seeks to regulate and limit the use of violence during armed conflict by saving those who do not or no longer directly participate in hostilities. This end is achieved by limiting the use of violence during armed conflicts to the amount necessary to achieve the aim of the conflict, which ultimately, is to weaken the military potential of the enemy. International Humanitarian Law has been defined as the branch of international law limiting the use of violence in armed conflicts by: sparing those who do not or no longer directly participate in hostilities and restricting it to the amount necessary to achieve the aim of the conflict, which –

[1] One of the earliest of such attempts was made in the code of Hammurabi written by Hammurabi king of Babylon who lived between 1728-1686 B. C.; the Laws of Manu of ancient India written sometime before the first century BC also contained numerous humanitarian norms. See also II Kings 6:21-23 which proscribes slaying of the captured.

[2] Jocknick, C. and Normand, R., *The Legitimation of Violence: A Critical History of the Laws of War* in H.I.L.J., Vol. 35, Winter 1994 at 55.

independently of the causes fought for – can only be to weaken the military potential of the enemy.[3]

Essentially therefore, the basic principles of international humanitarian law involves the distinction between civilians and combatants, the prohibition to attack those *hors de combat*, the prohibition to inflict unnecessary suffering, the principle of necessity and the principle of proportionality.[4] It involves humanitarian intervention, which simply put, is forceful intervention for the interest of humanity.

In its early stage of development, international humanitarian law was concerned mainly with international wars. However, a number of factors now combine to make international humanitarian law accommodate armed conflicts that were before now purely the internal affairs of a state. Foremost among such factors is the fact that in recent times, there has been a decrease in the number of international armed conflict, which has however been offset by an increase in the number of violence inside countries.

One of the most poignant challenges of the idea of law is its ability to adapt (or be adapted) to novel situations not in existence or not contemplated at the time of its enactment. It is for this reason that international humanitarian law has been made applicable to internal conflicts and should be expanded further to accommodate newer forms of internal confrontations. The conflict that erupted in Niger Delta region a few years ago (and which still lingers),[5] came short of threatening the continued corporate existence of Nigeria. This is an almost novel form of armed conflict which international humanitarian law should be made to accommodate.

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[3] See Sassoli, M., Bouvier, A.A., and Quintin, A., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* 3rd Edn., (ICRC), Geneva, 2011, Vol. 1 at p.93.

[4] See Sassoli, M., Bouvier, A.A., and Quintin, A., *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* Vol. I (3rd ed.)(Geneva, ICRC, 2011).

[5] On October 1st 2010 for example, there were two bomb explosions in Abuja which led to the death of over a dozen persons and for which MEND, a militant group in the Niger Delta has claimed responsibility. Also, in November 2010, there were reported cases of Skirmishes between the Federal Government's Joint Task Force and a new militant group known as the Niger Delta Liberation Force (NDLF) which claimed several lives and rendered many homeless, see *The Guardian* of November 13, 2010.

This proposed dynamism and expansion of the rules of international humanitarian law would serve to stem the tide of impunity rampant in such conflicts and protect helpless civilians and other victims caught up in the maelstrom of internal violence, disturbances and public emergency. These ends will no doubt outweigh whatever notions of state sovereignty that might possibly be eroded in the process.

1.2 Statement of Research Problem

In recent times, conflict in the Niger Delta of Nigeria began sometime in the early nineties as a result of tension between the foreign oil corporations and a number of Niger Delta Minority ethnic groups who felt they were being exploited. A good number of militant groups sprang up alongside other smaller militias, attacking oil installations and subsequently, forces of the Federal Government. These conflagrations were concentrated primarily in Rivers, Delta and Bayelsa States. In the middle of the last decade, the groups had several violent and intense confrontations with the forces of the Federal Government. These led to loss of lives of thousands of innocent civilians. In these conflicts, the state forces failed to protect the civilian population from the violence and actually increased the destruction of citizens' livelihood.

In view of the critical economic importance of the Niger Delata region to Nigeria, the armed conflict in the region has attracted furore and examination both in academic and popular discourses. From the legal perspective alone, the conflict has implications on constitutionalism, human rights, environmental law, torts, property and criminal law among others. However, in carrying out this research, this writer did not find any legal material in which the nature of the conflict has been examined from the perspective of international humanitarian law.

At the core of this research, is desire to bridge this gap and provide a critical source material, which will offer an in depth analysis of the nature of the conflict based on the principles of international humanitarian law having both legal as well as historical academic utility. This will further ensure that the body of knowledge available on the conflict becomes more holistic. No aspect of the conflict should be left to speculation and uninformed discourse.

Further, it would appear that both sides to the conflict (the Federal Government and the various militant groups) were not aware of implications of the conflict under international humanitarian law. Both sides must be made to become aware of their liability under this branch of the law. These

will include matters such as the nature of the conflict, international legal status of the parties, the legality or otherwise of the means and methods of warfare employed, the protection made available to civilians, the wounded, sick and other persons, the individual and collective responsibility of the state and the militants groups for violation of international humanitarian law. This is because, all the high sounding declarations and sentiments expressed in treaties, conventions, protocols and domestic law will be useless and diversionary, if in time of conflict they are disregarded.[6] Given the evidence that internal armed conflicts are on the increase,[7] the regime for the regulation of such conflicts under international humanitarian law appears to be inadequate. There is thus an urgent need to reappraise the current principles to ensure that civilians have adequate protection in the event of such conflict and victims have justice and also to ensure that unnecessary use of force and impunity is punished.

1.3 Aim/General Objective

The general aim/objective of this research is to examine the principles of international humanitarian law relating to non-international armed conflicts using the Niger Delta conflict as a case study to verify if such conflicts can be covered by its provisions.

1.4 Specific Aims and Objectives of the Research

The primary aim of this thesis is to examine the principles of international humanitarian law as it touches on internal armed conflict to see how well adapted it is to cover new situations. This work seeks to expound the frontiers of this area of the law, especially with regards to civilians and other members of the society who are not directly engaged in hostilities to ensure adequate protection for them. The specific objectives of this research are to:

i. Examine the principles of international humanitarian law regulating non-international armed conflict so as to appraise how well adapted it is to accommodate newer forms of internal conflicts that are continually evolving.

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[6] Sagay, I., "Evaluation/Assessment of the Level of Implementation of International Humanitarian Law in Nigeria" in *Implementation of International Humanitarian Law in Nigeria*, Ajala, A., & Sagay,I., (Eds.) ICRC, 1997 where a similar view was expressed.

[7] See Moir, L., *The Law of Internal Armed Conflict*, (New York: Cambridge University Press ,2002) at p. 85.

ii. Trace generally, the origin of conflicts in the Niger Delta region, the causes of the conflict under study, the factors that eventually led to its decline into armed conflict as well as highlight the dominant aspects of the conflict.

iii. Locate the conflict that took place in the Niger Delta region within the extant provisions of international humanitarian laws relating to non-international armed conflict.

iv. Examine the question of responsibility (accountability) for violence under international humanitarian law, and the ability of the law to make the perpetrators of such violence accountable individually and collectively and thereby reduce impunity.

v. Analyse the question of responsibility of the state during and the end of an internal armed conflict, to the parties who took part in the conflict as well as to other persons who do not take part in the conflict but have been affected by it.

vi. Appraise the legal status of the various armed groups involved in the conflict under international humanitarian law as well as the legal basis of their being held responsible under international humanitarian law

vii. Consider the mechanisms of implementation and enforcement available under the provisions of both international and municipal law for violations of international humanitarian law especially in cases of internal armed conflicts.

1.5 Research Methodology

Method is the manner of proceeding adopted by researchers in a bid to gain valid and reliable knowledge about the working of law in society. Methodology is the science of methods and it has been defined as the systematic and logical study of the general principles concerned in the broadest sense with the questions of how knowledge is established, and how others can be convinced that the knowledge is correct.[8] Essentially, four types of legal research have been identified; they include: analytical, historical, comparative and statistical.[9]

The need to ensure accuracy of the information presented in this work necessitated the nature of work undertaken in this research which is at once analytical, historical as well as comparative. Analytical research involves exploration of what the existing law is governing any set of factual

[8] Bulner, M., *Sociological Research Methods: An Introduction*, London: Macmillian Press Ltd., 1977, p.4.
[9] See Gasiokwu, M.O.U., *Legal Research and Methodology: The A-Z of Writing Theses and Dissertations in a Nutshell*, Jos: FAB Educational Books, 1993, p.6.

situation; it entails examining the relevant municipal legislation (whether federal or state) or the relevant international law norm applicable to such situation[10]. Irrespective of the whether the applicable law is municipal or international, recourse is usually had to decisions of relevant judicial panels wherein the law has been applied and tested in order to arrive at acceptable conclusions. Historical research is aimed at describing legal enactments, statutes, institutions or social phenomenon in their unique socio-historical perspectives. Historical research is desirable when it becomes necessary to find out the previous position of either the law or a particular social phenomenon in order to better understand the reason behind the existing law and the course of their evolution. Comparative research on the other hand involves the study of the laws of different states on any given subject-matter; also, more than one regime of legislation may govern a particular scenario – comparative research also involves comparing the various legislations whether domestic or international regulating any given situation.

Chapter two of this work basically involves analytical research wherein the international legal regime of non-international armed conflict is critically appraised. In chapter three of this work, this researcher went into the annals of the history of conflicts and struggles in the Niger Delta region of Nigeria from the pre-colonial era through the colonial era and then the period of militancy. The immediate and remote causes of the conflict are analyzed and the implications of the militant aspect of the conflict examined side by side the provisions of International Humanitarian Law. Also, the historical evolution of the law regulating non-international armed conflict is traced from the origins under the 1949 Geneva Conventions to the present. Also, in chapter four, the origin and development of the legal principle of individual criminal responsibility in non-international armed conflicts is traced from the time of the Nuremberg and Tokyo International Military Tribunals to the present situation under the Statute of the International Criminal Court. Chapter four of this work also analyses the jurisprudence espoused by the said tribunals as well comparing same to the present position of the law under the Statute of the International Criminal Court.

Essentially, two broad categories of legal research are identifiable; doctrinal research and the non-doctrinal research. Doctrinal research involves research into law as a normative science; it involves analysis of statutory provisions (including municipal and international statutes) and relevant case law. Non-doctrinal research on the other hand, studies the actual working of the law as well as the relationship between law and other behavioural sciences. In doctrinal research, emphasis is not

[10] Ibid.

really on legal doctrines and concepts but on people, social values and social institutions.[11] In carrying out this research however, this researcher employed the doctrinal research technique. This work basically examines the law regulating non-international armed conflict situations. Recourse is made to both primary and secondary sources of materials in this area of the law.

In the case of primary sources of the law, references were made to International Conventions, Resolutions, Declarations and Protocols. This work also utilizes relevant local legislations such as the Constitution of the Federal Republic of Nigeria, the Criminal Code etc. Important judicial decisions, such as those delivered by the International Criminal Tribunal for Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the International Criminal Court (ICC), are referred to alongside cases decided by Nigerian courts where necessary.

With regards to secondary sources of the law, references are made to indigenous and foreign literature on international humanitarian law and related materials. These include books, journals articles, chapters in books, conference papers, newspaper articles as well as materials from the internet. Finally, past works in the subject matter of this research are referred to, acknowledged and re-appraised.

1.6 Literature Review

It must of necessity, be emphasized that although textbooks on international law and International Humanitarian Law abound, materials dealing specifically with internal armed conflict as a branch of international humanitarian law are few. So far, this researcher did not encounter any on the humanitarian aspects of the armed conflict of the Niger Delta. Also, with regards to the basic international legal instruments governing this branch of the law, there is the need to have a concise overview. All these constitute the pith of this review. Credit must however be given to the International Committee of the Red Cross (ICRC) which has carried out extensive work on international humanitarian law generally. This is informed by the fact that promoting and strengthening of international humanitarian law is central to the mission of the ICRC and forms part of a cornerstone of its mandate to work for the faithful application of its principles. The major Conventions and other instruments regulating international humanitarian law have been reproduced over the years by the ICRC. These include the 1949 Geneva Conventions (which contains article 3 common to the four Geneva Conventions and which was the first international

[11] Ibid. at p.14.

instrument that sought to regulate non-international armed conflicts) as well as the 1977 Protocols Additional to the Geneva Conventions. Also a very useful publication of the ICRC is their publication, *International Review of the Red Cross, (IRRC),* published once in two months and which has been published since 1960. This publication has dealt extensively and incisively on diverse topics covering various aspects of international humanitarian law and even on its principles regulating non-international armed conflicts. This research draws insights from a good number of these publications, and extends the frontiers of these in this work.

Of particular importance to this work is a special edition published to mark the 20th anniversary of the Additional Protocols.[12] In this edition, several scholars and lawyers who were involved in the codification process of the Protocols were invited to review the workings of these Protocols twenty years later. Therefore, the edition examined the history as well as the philosophy behind the Protocols as well as how well states have adapted to and implemented and enforced its provisions. This edition is very useful in this work especially discussions on Protocol II.

A very important edition of the *IRRC* that is very useful in this research is the June 2011 edition which focused on 'Understanding Armed Groups and the Applicable Law.'[13] This edition examined through the various contributors, the appropriate international legal regime governing the activities of non-state armed groups, their organizational structure, the economic dimensions of the activities of these groups, the reasons behind their decisions to obey or disobey international instruments. Very critically, the legal justification for the binding nature of international humanitarian law provisions for non state armed groups was also discussed.[14] The various contributions are of benefit to this research work, and although references were made to various internal conflicts that have taken place in other parts of the globe, no allusion was made to the Niger Delta conflict. This research work aims at bridging this gap.

[12] IRRC, (Special Edition) No. 320, September-October 1997.
[13] See IRRC, Vol. 93, No. 882, June 2011.
[14] See for example, the contributions of Sassoli, M. and Shany, Y., *Should the Obligations of States and Armed Groups Under International Humanitarian Law Really be Equal?* and Provost R., *The Move to Formal Equality in Internatonal Humanitarian Law- A Rejoinder to Marco Sassoli and Yuval Shany* both in (June 2011), IRRC Vol. 93, No.882, at pp 425 and 437 respectively.

Another groundbreaking work of the ICRC is its 2011 book which comes in three volumes.[15] This work is a vital compendium of relevant materials on IHL including Cases covering national as well as international judgements as well as all the relevant instruments and Documents on international humanitarian law. The first volume is made up of fifteen chapters covering all the major aspects of the law. Of particular importance to this work however, are chapters eleven and twelve which deals with the law of non-international armed conflicts and the implementation of international humanitarian law respectively. The latter chapter has a full section dealing with implementation of the law in time of non-international armed conflict. Volumes II and III provides extensive materials covering cases and other documents on international humanitarian law. These include the texts of Conventions, Regulations, Declarations UN Resolutions, inter governmental documents, Documents of the ICRC, proceedings of meetings, relevant National Legislations and statements. Other materials provided include cases and documents relating to past and present conflicts, reports of Non-Governmental Organisations as well as sundry other materials relevant to the teaching of and research in international humanitarian law. Once again, in this prodigious work, the only reference to conflict that have taken place in Nigeria is with regards to the Operational Code of Conduct for the Nigerian Army issued in 1966 by the then military Head of State, Major General Yakubu Gowon as well as a decision of the Nigerian Supreme Court, *Pius Nwaoga v The State.*[16] Both references relates to the Nigerian Civil War which took place over four decades ago.[17] No reference is made to the Niger Delta conflict. Once again, this is an omission that this work seeks to correct by bringing the Niger Delta conflict into international consciousness.

The Proceedings of the 10th Bruges Colloquium[18] (another publication of the ICRC), comprises of a collection of essays that examines the various classes of armed conflicts under international humanitarian law and the instruments regulating same. More importantly, the colloquium vide the various presentations sought to answer the question as to whether the body of law is still adequate for these conflicts in the light of contemporary realities, as well as how to alleviate suffering during armed conflict. The consensus opinion at the end of the session was to the effect that the current

[15] Sassoli, M., Bouvier, A.A., and Quintin, A., (Eds.) *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* Vols. I, II and III (3rd Ed., Geneva: ICRC, 2011).
[16] [1972] 1 All N.L.R. (Part 1), p.149.
[17] See Sassoli, M., *et al*, *How Does Law Protect in War…,* Op. cit., Vol. II at pp. 953-957.
[18] *Proceedings of the Bruges Colloquium,* Armed Conflicts and Parties to Armed Conflicts Under IHL: Confronting Legal Categories to Contemporary Realities, 10th Bruges Colloquium, 22-23 October, (ICRC) 2009.

streams of international humanitarian law regulations should be adapted to meet the ever changing nature of armed conflict. Aside from the need to harmonise the extant regulations which is canvassed later in this work, the position of the colloquium is much in line with the opinion expressed in this work.

The work of Harris[19] on international law generally is one which provides a ready source book on cases and materials on international law generally. It helps in providing background knowledge on the general principles of international law as well as relevant cases on international law. This book is made up of twelve chapters spanning across the major topics of international law. Chapter ten, which discusses the law of treaties, is particularly useful to this research with regards to the binding nature of international humanitarian law instruments to non-state actors who ordinarily do not take part in the process of their formation nor have a right to ratify same, but whose provisions are considered binding on them nonetheless.

Umozurike's book[20]is a handy introductory text on international law. It explains conventional topics of international law such as sources of international law, international personality, recognition, relationship between international law and municipal law etc. It devotes a full chapter[21] to the examination of international humanitarian law, considering generally and in a concise manner, issues such as historical background and the position of the law in relation to both international and internal armed conflict. The chapter on international humanitarian law is however shallow and lacking in detail and relevant illustrations. Ladan's introductory book[22] also examines in a general manner, relevant topics in both Human Rights as well as International Humanitarian Law. Made up of ten chapters, this book explores the close relationship between both branches of law, highlighting the origin and development of both and the points of intersection as well as how human rights can be protected in times of armed conflict. It further considers the penal responsibility and sanctions for breaches of international humanitarian law as well as its implementation. These contributions provide useful background information from which this works draws from and also improves upon.

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[19] See Harris, D.J., *Cases and Materials on International Law* (5th Ed., London : Sweet & Waxwell,1998).
[20] See Umozurike, U.O., *Introduction to International Law* (3rd Ed., Ibadan: Spectrum Books Limited 2005).
[21] Chapter 18.
[22] Ladan, M.T., *Introduction to International Human Rights and Humanitarian Laws* ,(Zaria: Ahmadu Bello University Press, 1999).

This research work revolves round what transpired in the Niger Delta Region, hence a part of the work focuses on the region and the history of armed struggle therein. Therefore, Wifa's paper[23] which focuses on the problems and challenges facing the region is very relevant to this work. It undertook an overview of the region, its geographic as well as ecological components, cultural heritage as well as identifying the core reason for the unrest in the region as being the failure of governance at all levels, unemployment as well as lack of access to basic necessities of life by the vast majority of the populace. Although it considered the question of access to justice through the court system by the inhabitants of the region, no reference is made to international humanitarian law or redress that can be achieved through the workings of the International Criminal Court. This is another of the gap that this work seeks to bridge.

The Proceedings of a Seminar on the Niger Delta[24] has a thematic resemblance to that of Wifa in that it explores the challenges of the Niger Delta Region. However, the proceedings of this seminar were concerned with the environmental as well as socio-economic and political challenges of the region and no legal perspective was brought in. It however serves as a helpful source material to this research work.

The book by Ajala and Sagay,[25] is a collection of essays by scholars of international affairs and international law respectively. It examined areas such as the historical background to international humanitarian law, its implementation, an evaluation of its operation in Nigeria, Armed conflicts in Africa, the work of the ICRC in Nigeria among others.

In spite of the brilliance of most of the essays, there were some salient omissions that are worth noting. The first essay[26] for example, failed to discuss the drafting history of both the Geneva and the Hague Conventions even though it was meant to be a historical and analytical discourse.

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[23] Wifa, B.M., *Developing a Model Legal and Justice Sector in the Niger Delta: Prospects and Challenges* being a paper delivered at the Niger Delta Development Commission - Nigerian Bar Association Conference on Law, Peace and Development in the Niger Delta Region, 2008 May 4-7, Hotel Presidential, Port Harcourt, Rivers State.

[24] See,Ozo-Eson, P.I., & Ukiwo, U., "Challenges of the Niger Delta", *Proceedings of a Seminar on the Niger Delta,* (Port-Harcourt), Centre for Advanced Social Science (CASS), March 2001.

[25] See Ajala, A., & Sagay, I*., Implementation International Humanitarian Law in Nigeria,* ICRC 1997.

[26] Ajala, A., "Background to International Humanitarian Law and its Implementation", ibid., p. 1.

The essay by Jegede[27] is even more scanty in terms of the actual action of the Federal Government in the Nigerian Civil War which incidentally, was the only case used to examine the implementation of international humanitarian law principles by the Nigerian Government.

Kalshoven and Zegveld's[28] book is a concise exposé on the principal rules of humanitarian law. It examines the object and purpose of humanitarian law, the role played by customs and treaties and the mechanisms of implementation and enforcement. It considers also the history and development of the Hague and Geneva Laws, and the additional protocols of 1977. The book delved further into post 1977 development such as the ICTY, the ICTR the ICC, collective responsibility and compensation for violations, national jurisdiction and individual responsibility and the working of the ICRC.

The strength of this book lies in its simplicity of presentation, making it appeal to persons encountering this area of the law for the first time. Paradoxically however, due to this simplicity and style of presentation, one is hard put trying to figure out if it can seriously be classed as a legal work. This is so because in the presentation of materials, neither footnotes nor endnotes were used. It is therefore difficult to ascertain the sources which the authors relied on.

'International Humanitarian Law: An Anthology',[29] is another work worthy of consideration for the purpose of this research. This book is a collection of well researched essays cutting across virtually all areas of international humanitarian law. It is made up of twelve chapters from different contributors. It gives a thematic discussion of topics and will be very useful to both students and teachers of this branch of law at all levels of study.

It provides a holistic and detailed analysis of the relevant international humanitarian law instruments with ample illustrations of events and conflicts from very early times when the law was still in its formative years to the present. It also provides a comprehensive overview of national and international perspectives and State practice. In all, this book goes a long way to fill the present vacuum in the availability of literature in this area and will be of immense benefit to this researcher.

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[27] Jegede, M.E., *Introduction to International Humanitarian Law: Implementation in Nigeria* in Ajala, A., & Sagay, I., Op. cit.

[28] Kalshoven, F., & Zegveld, I., *Constraints on the waging of War: An Introduction to International Humanitarian Law*, ICRC 2001.

[29] Bhuiyan, J.H., Beck, D.L. & Chowdhury, R.A., (Eds.) *International Humanitarian Law - An Anthology* , (Nagpur: Lexis Nexis, 2009).

Moir's treatise, '*The Law of Internal Armed Conflict*'[30] is a book made up of three hundred and six pages with six chapters and published in the United State of America. Whereas there are volumes of materials on international humanitarian law generally and of traditional wars fought between Sovereign States, this is not so for newer forms of armed conflicts taking place within Sovereign States. This book examines strictly the legal regime of internal armed conflict under International Humanitarian Law. It considers the customary laws of war and belligerent practice, the development of the law for internal armed conflict and the drafting history of Common Article 3. It goes further to examine in detail the provisions of Article 3 Common to the Geneva Conventions and also the additional protocols of 1977. It further X-rays the customary international law regulating internal armed conflicts, human rights in times of such conflict and finally, the implementation and enforcement of the laws of internal armed conflict. This endeavour is therefore a valuable and timely one, in this era when Internal Armed Conflicts are on the increase and the need for testing of relevant laws is of utmost importance.

Gasiokwu's[31] festschrift in honour of Justice Tabai comprises of a wide array of topics on International Law. However, of particular interest to this researcher is the chapter on the implementation of the Law of Armed Conflict in the 21st Century.[32] It examines the obligations of States in the implementation of the law of armed conflict, the possible ways of disseminating humanitarian rules, municipal application of these rules, repression and punishment for violation of these rules, the implementation of international humanitarian law in Nigeria alongside the work of the Nigerian Red Cross Society. It further looks into the concept of individual responsibility and other violations of the rules of international humanitarian law. This work is more or less a wake-up call to sovereign States to be alive to their obligations under international humanitarian law.

1.7 Definition of Terms

There are certain terms that are used repeatedly in this work; they include: the Niger Delta region, international humanitarian law, armed conflict, international armed conflict and non-international armed conflict.

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[30] Moir, L., *The Law of Internal Armed Conflict*, (New York: Cambridge University Press, 2002).

[31] Gasiokwu, M.O.U., (Ed.) *Contemporary Issues in International Law - Essays in Honour Hon. Justice F.F.E. Tabai J.S.C.*,(Enugu: Chenglo Limited, 2006).

[32] Angwe, B., *The Implementation of the Law of Armed Conflicts in the 21st Century: Some Thoughts on the Impediments* in Gasiokwu , M.O.U., ibid., p.175.

1.7.1 The Niger Delta Region

The Niger Delta region in Nigeria is situated in the southern part of the country and bordered to the south by the Atlantic Ocean and to the East by Cameroon. It is that location associated with the lower Niger, especially where the river splits into major tributaries; Rivers Nun and Escravos. It starts from the Benin basin in the western flank of the region, flows up to Aboh in the north and then to the Imo river.[33] In Nigeria today however, the Niger Delta is now synonymous with oil production; it is assumed that all oil producing communities are part of the Niger Delta.[34]

1.7.2 International Humanitarian Law

If armed conflict breaks out, be it legally or illegally, legitimately or illegitimately, some rules must be applicable in order to regulate the relationship between the parties engaged in hostility. International Humanitarian Law refers to the body of treaties, conventions, international jurisprudence, internationally recognised principles and customs that govern the conduct of parties to an armed conflict, so as to limit human suffering, particularly of non-combatants. It that branch of international law that seeks to regulate and limit the use of violence during armed conflict by saving those who do not or no longer take part in hostilities. It is a branch of public international law which regulates the conduct of warfare, the protection of persons and of goods and the conditions of the states not participating in a war, known as neutrals. This branch of the law is set in motion every time the peace breaks down and hostilities take place.[35]

1.7.3 Armed Conflict

The term armed conflict has now generally substituted the word war under International Humanitarian Law. An armed conflict can be said to be in existence whenever there is any conflict between states or between states and organized armed groups within a state that leads to resort to armed force between states or protracted armed violence between a state and such an

[33] See Isoun, T.T., "Environmental Challenges of the Niger Delta" in *Challenges of the Niger Delta (Proceedings of a Seminar on the Niger Delta)* Ozo-Eson, P.I., and Ukiwo, U., (2001), Centre for Advanced Social Science, p.78.
[34] Under section 2 of the Niger Delta Development Commission (Establishment,etc.) Act, Cap. 86, Vol.11, L.F.N. 2004, nine states are listed as forming part of the Niger Delta: Akwa-Ibom, Bayelsa, Cross-River, Delta, Edo, Ondo, Rivers, Abia and Imo states.
[35] See Kolb, R., and Hyde R., *An Introduction to the International Law of Armed Conflicts* (Oxford: Hart Publishing, 2008) at p.8.

organized armed group.[36] Generally, armed conflicts are categorized as either being international or non-international.

1.7.4 International and Non-International Armed Conflict

An international armed conflict can be defined as any difference arising between two states leading to the intervention of members of the armed forces; it makes no difference how long the conflict lasts or how much slaughter takes place[37]. A non-international armed conflict on the other hand, is a confrontation between the existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms within national territory and reaches the magnitude of and armed confrontation or a civil war.[38]

1.8 Significance of the Study

This study establishes the criminal liability of parties to the Niger Delta conflict, that is, the federal government as well as the various armed groups. It underscores the need for a liberal and dynamic interpretation of the extant rules of International Humanitarian Law regulating non-international armed conflicts as the panacea to impunity during conflicts such as that of the Niger Delta.

[36] See *Prosecutor v. Tadic,* Case No. IT-94-T, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October, 1995, Para.70.
[37] See *Prosecutor v. Munic* et. al., Case No. IT-96-21-T, (Judgment), 16 November 1998, Paras. 184, 208.
[38] See Greenwood, C., "Scope of Application of Humanitarian Law" in Fleck, D., (ed.), *The Handbook of Humanitarian Law in Armed Conflicts* (2nd ed., Oxford: Oxford University Press, 2008), p.54.

CHAPTER TWO

INTERNATIONAL LEGAL REGIME OF NON-INTERNATIONAL ARMED CONFLICT

In its early stage of development, international humanitarian law was primarily concerned with international wars. However, a number of factors now combine to make international humanitarian law accommodate armed conflicts that were before now, purely the internal affairs of a state. Foremost among such factors is the fact that in recent times, there has been a proliferation of internal armed conflicts[39] and a decline in international armed conflicts. For example, prior to 1977 there were conflicts in Algeria in 1954, in the Congo in 1960, in Nigeria between 1967 and 1970. After 1977, there was the conflict in El-Salvador in 1980, in Rwanda in the early 1990s, Bosnia-Herzegovina in 1992, in Chechnya between 1994 and 1996 among several others. The almost unassailable argument for this extension has been that, what is inhumane and consequently proscribed in international wars, are also inhumane and inadmissible in civil strife.

This chapter seeks foremost, to revisit the possible justifications for the foray of International Humanitarian Law into the domestic regimes of non-international armed conflicts (also referred to as internal armed conflict) in order to examine whether they are still tenable and if events in the national and international scene have borne out this incursion. Further, an attempt is made to restate concisely, the law governing non-international armed conflicts and appraise its workings, relevance and practical application in times of armed conflict and how well equipped it is to meet modern challenges. It also examines if there is a need for the adoption of additional treaties to regulate internal armed conflicts or if the extant provisions are sufficient. Also, the significant developments in this area of law since the adoption of the basic instruments are addressed. The role and place of international customs in non-international armed conflicts, the import of the adoption of the Rome Statute[40] on such conflicts, and other minute points are also the focus of this chapter. Finally, informed suggestions have been made on how this area of law can be advanced to meet the challenges of modern realities in the face of ever increasing spate of non-international armed conflicts.

[39]Between December 2010 and December 2013 for example, in the Arab world, there was a wave of internal unrest (both violent and non-violent) which has led the rulers of the countries involved to be forced out of power including countries such as Tunisia, Egypt, Libya, Yemen as well as other on-going conflicts in Syria and Yemen now popularly referred to as the 'Arab spring'.

[40] Statute of the International Criminal Court (Rome Statute) of 1998.

2.1 Categories of Armed Conflicts in International Humanitarian Law and Legal Significance of Classification

Essentially, armed conflicts are broadly categorised into international and non-international armed conflicts. International law was originally concerned with the relations between states. Consequently, in its early years of development, international humanitarian law was concerned only with wars that broke out between states, i.e, international armed conflicts. All forms of internal conflicts were left to the domestic legal regime. However, international humanitarian law is now defined as "the body of rules applicable when armed violence reaches the level of armed conflict whether international or non-international."[41] This definition accommodates what is now regulated by the relevant international instruments governing international as well as internal armed conflicts since in all these instruments, the provisions are meant for the regulation of armed conflicts whether international or non-international. Therefore, non-international armed conflicts are now effectively within the domain of international humanitarian law.

Because there are some salient but important differences between the rules of international humanitarian law applicable during an international armed conflict, and those pertaining to a non–international armed conflict, there is the need to properly define certain terms viz: 'armed conflict' 'international armed conflict' and 'non-international armed conflict'.

2.1.1 Armed Conflict

The 1949 Geneva Conventions do not define armed conflict even though by its Article 2, the provisions of the Convention are meant to apply in all cases 'declared war' or any other form of 'armed conflict'.

It would appear that the substitution of the more general expression 'armed conflict' for the word 'war' makes it difficult for states to evade the consequences of the instruments since states can no longer deny the application on the grounds that it is not engaging in war but only in a police action or legitimate self defence. Pictet defines armed conflicts as:

> *Any difference between two states and leading to the intervention of armed forces is an armed conflict ... even if*

[41] Pejic, J., *Terrorist Acts and Groups: A Role for International Law?* (2004), B.Y.I.L., 75.

> *one of the parties denies the existence of a state of war. It makes no difference how long the conflict lasts or how much slaughter takes place.*[42]

Protocol II enumerates certain situations including internal disturbances and tensions, such as riots, isolated and sporadic acts of violence, and other acts of a similar nature as not being armed conflicts.

The appeals chamber of the International Criminal Tribunal for Yugoslavia (ICTY) in the ***Tadic Case*** stated that armed conflict '*exists whenever these is resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups within a state*'.[43]

2.1.2 International and Non-International Armed Conflict

International armed conflict and non-international armed conflict are the two broad categories of armed conflicts under international humanitarian law. The international humanitarian law conventions do not provide a definition of international armed conflict. However, Common Article 3 to the 1949 Geneva Conventions states that a non-international armed conflict must occur *"in the territory of one of the high contracting parties."* This means that it must occur within the territory of one state. Christopher Greenwood on his part stated:

> *A non-international armed conflict is a confrontation between the existing governmental authority and groups of persons subordinate to this authority, which is carried out by force of arms within national territory and reaches the magnitude of an armed confrontation or a civil war*[44]

Under the provisions of Additional Protocol II of 1977, a non-international armed conflict must take place in the territory of a high contracting party between its armed forces and dissident armed

[42] Pictet, J.S.,(Ed.), *Commentary on the Geneva Conventions of 12 August 1949* (Geneva: ICRC, 1960)p.32.
[43] *Prosecutor v. Tadic*, Case No. IT-94-T, Decision on Defence motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Para. 70.
[44] Greenwood,C., 'Scope of Application of Humanitarian Law' in Fleck, D., (ed.) *The Handbook of Humanitarian Law in Armed Conflicts* (2nd Ed.,Oxford: Oxford University Press, 2008), p. 54

forces or other organized groups under a responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations.[45]

By contrast therefore, an international armed conflict involves a confrontation between two or more states. The International Criminal Tribunal for Yugoslavia (ICTY) defined an international armed conflict as follows:

> *Any difference arising between two states and leading to the intervention of members of the armed forces. It makes no difference how long the conflict lasts or how much slaughter takes place"*[46]

Generally recognized international armed conflict of the last two decades include: the Gulf war of 1990 – 1991, Congo – Uganda in the nineties, the Ethiopia – Eritrea war of 1998 – 2000, the Kosovo conflict of 1999, the Afghanistan war, the Iraq war from 2003 – 2004, the Israel – Lebanon conflict of 2006, the Ethiopia – Somalia conflict of 2006 – 2009 etc.

Also an armed conflict maybe an international armed conflict, involving two or more states even if the organized armed groups are not the regular armed forces of the states involved. This was the case in the Lebanon – Israel war of 2006, where the former was not the regular armed force of the state.

2.1.3 Legal Significance of Classification

The distinction between the categories of armed conflict is important as there are different legal regimes applicable depending on whether the conflict is an international armed conflict or a non-international armed conflict.[47] The Geneva Conventions of 1949[48] and the Additional Protocol I of 1977[49] form the basic treaties regulating international armed conflicts in addition to customary

[45] See Article 1 (1) of the 1977 Geneva Protocol II Additional to the Geneva Conventions of August 12, 1949 and relating to the protection of victims of non-international armed conflicts.
[46] *Prosecutor v. Munic* et. al., Case No. IT-96-21-T, Judgment, 16 November 1998, Paras. 184, 208
[47] See O'Connel M.E., "Saving Lives through a Definition of International Armed Conflicts" in *Proceedings of the 10th Bruges Colloquium* : *Armed Conflicts and Parties to Armed Conflicts Under IHL: Confronting Legal Categories to Contemporary Realities*, ICRC 2010 for a detailed analysis of the categories of armed conflicts.
[48] 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and sick in Armed Forces in the field; Geneva Convention II for the Amelioration of the Condition of wounded, Sick and Shipwrecked Members of Armed force at sea; Geneva Convention III Relative to the Treatment of Prisoners of War; Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.
[49] 1977 Geneva Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts.

international law. For non-international armed conflicts, the basic international instruments applicable are Article 3 common to the 1949 Geneva Conventions, Additional Protocol II as well as customary international law.

Aside from the general significance of the applicable legal regime, there are other important differences that highlight the importance of classification of armed conflicts that should be noted. For one, the law of occupation applies in an international armed conflict but not during non-international armed conflicts. Further, the belligerent privilege and the prisoner of war status with which it is linked is another key difference. For example, what constitutes a legitimate use of force in an international armed conflict will be prosecuted as treason, murder, kidnapping and other domestic offences in an internal armed conflict. Also, during non-international armed conflicts, protection is not based on status (i.e., prisoner of war or protected civilian status), but on actual conduct of the parties, that is, direct participation in hostilities.[50]

The law of non-international armed conflicts therefore, does not accommodate the combatant status for insurgents, does not define combatants and does not prescribe specific rights and obligations for them as is obtainable under international armed conflicts; its provisions do not even use the term "combatant". This is because, no one has the right to participate in hostilities in a non-international armed conflict, a right which is an essential feature of combatant status.

However, in spite of the above differences, certain rules and regimes of the law of international armed conflicts have to be applied in non-international armed conflicts to fill gaps in the applicable provisions, to make the application of certain provisions possible. As a ready example, the law of non-international armed conflicts contains no definition of military objectives or of the civilian population. Such definitions are required, however, to apply the principle of distinction applicable in both types of conflict and the prohibitions to attack civilian population, individual civilian and certain civilian objects.[51]

2.2 Justification for the Regulation of Non-International Armed Conflict by International Law

[50] *The Prosecutor v. Tadic* (ICTY) IT-94-1-A, Appeals Chamber, Judgement, 15 July, 1999, Paras 68,171; *Isayeva v. Russia* European Court of Human Rights, Application No.,57950/00, Judgement, Strasbourg, 24 February 2005; available on http://www.echr.coe.int/Eng/Judgements.htm.
[51] See Articles 13 and 14 of Additional Protocol II.

Traditionally, the regulation of inter-state relations has always been the natural domain and *raison d'etre* of treaty law. The regulation of internal domestic affairs of a state through international law has for centuries been seen as prevented by the barrier of state sovereignty. However, post 1949 developments have shown that most conflicts since the Second World War have been non-international in character.[52] The prevalence of such internal conflicts typified by mindless killings, (especially of civilians), ethnic cleansing, genocide,[53] internal displacements among sundry other issues, underscores the need for more effective legal regulation and accountability.

However the question turns on the fact that since these conflicts are internal, why should they be made subject to international regulation? Several reasons can be advanced why this should be so. In the first place, the effect of war on civilians and other victims of armed conflict whether internal or international is the same. The reality is that human miseries associated with conflict are the same irrespective of the underlying reasons and the nature of the armed conflict. As a matter of fact, certain internal conflict may be more violent, extensive and consumptive of life and value than international armed conflicts.[54] Therefore, the protection afforded those not involved in hostilities during international armed conflicts should in like manner be extended to such persons in cases of internal armed conflict where the need for protection may even be greater. Again, despite their non-international character, internal armed conflict can have a profound effect on international peace and security. Hostilities can spill over to neighbouring states which may also be subject to influxes of refugees fleeing the war zone. Third states may also elect to intervene on behalf of one side or the other of the warring parties thus leading to an escalation of hostilities. Further, in the outbreak of full-fledged internal armed conflict, the criminal law of the state is usually grossly inadequate to deal with such conflict. As has been poignantly stated:

> *A civil war breaks the bands of society and government, or at least it suspends its force and effect; it produces in the nation, two independent parties, considering each other enemies and acknowledging no common judge: therefore of necessity, these two parties must, at least for a time, be considered as forming two separate bodies… things being thus situated, it is very*

[52] Statistics Compiled by the International Peace Institute in Oslo suggests that in the period 1990-1995, seventy three states were involved in armed conflicts of which fifty nine were involved in internal conflict or civil war. See Smith, Dan, *The State of War and Peace Atlas*, (3rd Ed., London: Penguin International Research Institute, Oslo1997), 90-95.
[53] A ready example being the conflict in Rwanda in 1994.
[54] For example, the Rwandan genocide of 1994.

> *evident that the common laws of war, those maxims of humanity moderation and probity… are in civil wars to be observed by both sides.*[55]

Finally, the frontiers of contemporary international law have become enlarged and as such, international law now governs not only the mutual relations of states but also other non-state entities including individuals that are now considered as holders of rights and obligations under international law.[56] Therefore if a government's treatment of its citizens is now regulated by international human rights law without interrogation, its humanitarian protection of its citizens in situations of armed conflict should also be a matter for the entire international community.

2.3 Overview of the Legal Regime of Non-International Armed Conflict

2.3.1 Article 3 Common to the Geneva Conventions

The first international legal provision that covered cases of non-international armed conflict is Article 3 common to the four Geneva Conventions (Common Article 3). It was included in the Geneva Conventions as a sort of *'convention en miniature'* on non-international armed conflicts as distinct from international armed conflicts and it was the International Committee of the Red Cross (ICRC) that started and sustained the inclusion of Common Article 3 in the Geneva Conventions.[57]

Common Article 3 becomes operative in the case of armed conflict not of an international character occurring in the territory of one the high contracting parties. It also applies to the conflicts within a state between the government and the rebel groups[58] or amongst the rebel groups. Also, it provides international protection to persons taking no active part in hostilities including members of armed forces in certain specific situations.[59] In this light, the protection afforded by Common Article 3 is two-fold viz:

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[55] Vattel, Emmerich De, *The Law of Nations* (London: 1760), book III, Chapter 18, 109 -110 quoted in Moir, L., Op. cit., at p. 3.
[56] Cassesse, A., *International Law in a Divided World* 1986 at p. 14.
[57] For a comprehensive study and analysis of the argument, proceedings and outcome of the Diplomatic Conference, See Elder, D. A., *The Historical Background of Common Article 3 of the Geneva Conventions of 1949*. (1979) II C.W.R.J.I.L., 37; Moir , L., *The Law of Internal Armed Conflict* Op. cit. at P. 23-29.
[58] Conflicts in Lebanon during the 1980s and conflicts in Somalia after 1991 are few examples in this respect. See Dieter Fleck, *The Handbook of Humanitarian Armed conflicts*, (Oxford/New York: Oxford University Press, 1995), p.221.
[59] Such as those who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.

i. humane and non–discriminatory treatment and

ii. Prohibition of certain acts (as against enumerated protected persons) by enumerating a number of non–derogable human rights.[60]

Common Article 3 further provides that the wounded and sick be collected and cared for; that an impartial humanitarian body such as the ICRC may offer its services to the parties to the conflict. Parties to the conflict are enjoined to bring into force by means of special agreements all or part of the other provisions of the Conventions. It provides finally, that the application of its provision shall not affect the legal status of the parties to the conflict.[61]

A number of issues arising from the provisions of Common Article 3 call for further scrutiny. The first is the absence of the definition of an 'armed conflict' under the Geneva Conventions. This omission left the states with a wide discretion to determine the existence of an armed conflict. It is not unusual for a state to apply force within its territory for everyday law enforcement operations and for quelling riots and other civil disturbances. Hence, this omission makes it more difficult to determine when an armed conflict has come into being. However, on the other side, it is also argued that this omission has some advantages in that an overly strict definition can make the text of a law more restrictive and so becomes removed from the intention of the framers. Further, that the open texture of Common Article 3 can work as strength by allowing humanitarian protection in as many situations as possible through a broad interpretation of its provisions.

Closely following that absence of definition of armed conflict is the Article's silence as regards the party who is to determine the existence or otherwise of an armed conflict (and the method by which this determination is to be made). This would appear to leave the state as the party to make this decision. States are usually disinclined to bind themselves to rules which could be perceived as favouring political opponents; states can therefore hide behind this lack of definition to prevent the application of humanitarian law by denying the very existence of armed conflict.

[60] See Common Article 3 (1) (a) (-(d).
[61] This last clause was included to forestall the fears expressed by most of the State Parties that such a Convention may affect the legal status of the adversary or rebel groups.

Another issue raised by Common Article 3 that bears reminding is its binding nature for insurgents. Common Article 3 merely states that its provisions are to be observed by agreements reached by parties to the conflict. There is no controversy with regards to states that have elected to be bound by being high contracting parties to the Conventions. This is not the case for insurgents who are not parties to the Convention. Although it is usually taken for granted by Scholars[62] and states that Common Article 3 binds both states and insurgents, there appears to be scant legal basis for this assumption. Under the Vienna Convention on the Law of Treaties, a treaty can only impose rights and obligations upon third parties who assent to them.[63] Therefore, in the absence of such assent, there appears to be no legal basis on which the obligations created by Common Article 3 may be imputed on insurgents.

Another vital omission in Common Article 3 is that it does not provide the definition of ***'armed conflict not of an international character'*** for which its provisions is meant, nor does it define the precise scope of its application. This omission raises two issues; first the ceiling of this category of conflict as distinct from international armed conflicts and secondly, the minimum condition for constituting an armed conflict of non- international character.

An even more disconcerting development in the last decade concerns the legal status of terrorist organizations and their members launching attacks on a foreign soil. Does the scope of application of Common Article 3 extend to cover transnational armed conflict between rebel groups and a foreign government? In *Hamdan v. Rumsfeld*[64] the U.S. Supreme Court extended the protection under Common Article 3 to an AL- Qaeda member as the minimum protection afforded for the conduct of warfare which is not regulated by the Geneva Conventions applicable to international armed conflicts. However the difficulty with this extension is the geographical limitation in Common Article 3, which confines the scope of application to armed conflicts occurring in the territory of one of the high contracting parties.

In spite of the above short-comings, as the first attempt to regulate non-international armed conflicts by international law, Common Article 3 can be said to be a commendable debut; the real challenge however lies with ensuring effective compliance by all parties concerned. Practical

[62] Cassesse, A., *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts* (1981) 30, I.C.L.Q., 416 at 424 where he opined that it is 'undisputed that Article 3 binds insurgents.' See Also Elder, D.A., Op.cit. at 55 among others.
[63] See Article 34-36, Vienna Convention on the Law of Treaties, 1969.
[64] 548 US (2006), at pp. 67-68.

application of Common Article 3 is far from satisfactory. States patterns reveal a pattern of observance more in breach. In the conflicts that occurred in Algeria in 1954, the Democratic Republic of Congo and its post-independence conflict of the early 1960s, and the Nigerian civil war of the late 1960s, also in the more recent conflicts which occurred in Angola, Rwanda, Afghanistan, Chechnya, Bosnia-Herzegovina, Sri-Lanka, etc, there is ample evidence that the international humanitarian law of war and in particular Article 3 were readily disregarded. In the case of Algeria for example, armed violence broke out in 1954, when Algeria attempted to attain political independence from France. France had ratified the Geneva Conventions in 1951, so the question arose as to whether the conditions required for the application of common Article 3 were met. Both the French government as well as the FLN (Algerian National Liberation Front) effectively accepted that the conflict was covered by Common Article 3. However, when the ICRC presented both sides with a draft document whereby they would pledge to observe Common Article 3, neither party accepted.[65]

During the pendency of the conflict, there were several instances of violations of the laws of war and the number of casualties was high. The FLN fought a mainly guerrilla war using terrorist tactics, including the execution of captured French military personnel, the assassination of French and Muslim civilians involved in the administration of Algeria and the fomenting of riots leading to massive civilian casualties. At the height of the terrorist campaign the death rate for civilians was two hundred per month. The record of the French government was not better. It introduced emergency legislation which granted the Algerian authorities wide powers to deal with rebels, leading to the commission of many atrocities, and the prevailing policy of French military commanders was to overcome the insurgency through torture and counter-terrorism. France executed many captured FLN rebels for bearing arms against the State and conducted campaigns of aerial bombardment against FLN strongholds. They also carried out mass arrests and widespread torture to find terrorists, whilst transferring huge numbers of civilians from their homes to 'concentration camps', where many died through illness and disease. Even in conflicts that took place after the coming into force of Additional Protocol II, there were widespread violations of the provisions not only of common Article 3 but also of Protocol II. These violations however, are not as a result of the weakness of Article 3 but reveal the lack of political will on the part of the international community to implement the relevant protections. It also shows that in practice,

[65] See Greenberg, E.C., '*Law and the Conduct of the Algerian Revolution,* (1970) 11 Havard International Law Journal, 37, referred to by Moir, L., *The Law of Internal Armed Conflict,* Op. cit., at p.72.

common Article 3 does not apply automatically and the reluctance of States to accept the applicability of common Article 3, is probably linked to the issue of reciprocity. That is, States are unlikely to honour obligations under common Article 3 where opposing insurgents fail to, and vice versa. Very significantly however, Common Article 3 paved the way for further development in this area of law.

2.3.2 Additional Protocol II of 1977[66]

Protocol II additional to the Geneva Conventions of 1949 (Additional Protocol II) came into existence about three decades after the adoption of Common Article 3. It is the first international instrument that deals solely with non-international armed conflicts and it is devoted exclusively to the protection of the individual and restriction on the use of force during non-international armed conflicts. It supplements Common Article 3 (and does not invalidate it) by strengthening existing rules and introducing new protective provisions and it consists of 28 Articles. The adoption of Additional Protocol II was therefore a new milestone in the protection of victims of civil wars.

Article I spells out the material field of application of the Protocol. It states that it shall apply to all armed conflicts not covered by Additional Protocol I and

> *... which takes place in the territory of a high contracting party between its forces and dissident armed forces or other organized armed groups under responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this protocol.*

Clearly, this provision also takes for granted the issue of its binding nature for insurgents. Additional Protocol II, by this provision, imposes high threshold criteria which apply cumulatively before its provisions can become operative; these conditions in a sense, constitute a positive definition of non-international armed conflict and sets the objective criteria for its application. These criteria can be safely categorized into three as follows: the organizational character, the level of intensity of the armed conflict and thirdly, the capacity

[66] The 1977 Geneva Protocol II Additional to the Geneva Convention of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) UN Doc. A/32/144 (1977).

to implement the protocol.[67] The import of the cumulative application of these criteria is that failure to comply with any of these conditions may mean that a conflict does not qualify as a non-international armed conflict. However, in view of the fact that it is a humanitarian convention, one would expect that its interpretation will take a liberal path to accommodate as much as possible armed conflicts and even national violence which a strict interpretation may exclude.

Certain forms of conflicts are excluded from the scope of application of Additional Protocol II. They include '*...situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a similar nature....'*[68]This exclusion further raises the threshold of application of the Protocol. It would be necessary for this area to be revisited for a possible lowering of the threshold of application.

As for parties that are not subject to this protocol, the preamble provides that such persons '*remains under the protection of principles of humanity, and the dictates of public conscience.'* This provision is rather vague and the equivalent provision in Additional Protocol I (which has a similar clause), is preceded with the provision that protection for such persons shall be under '*principles of international law derived from international customs*[69] is a fuller and more adequate provision.

2.3.3 Analysis of the Content of Additional Protocol II

Article 3 is a proper starting point in any discussion of the content of Additional Protocol II. It is a saving provision that enshrines the principle of non–intervention. It precludes the invoking of the Protocol for the purpose of derogating from the sovereignty of a state party. It addresses other states in very clear terms that *'the Protocol cannot justify any intervention either direct or indirect in the conflict itself or in the internal or external affairs of the state*.'

[67] Shasthri, V.S., "International Humanitarian Law Relating to Non-International Armed Conflicts" in Bhuiyan J.H. et al (Eds.) *International Humanitarian Law –An Anthology*, (Nagpur: Lexis Nexis, 2009) at p. 251.
[68] Article I (2) of AP II.
[69] Article 1(2), 1977 Geneva Protocol 1 Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts.

This provision was included to allay the fears of several delegations to the diplomatic conference that the instrument would be used as a basis for intervention in the domestic affairs of state parties.[70]

Part II of the protocol which is captioned '*Humane Treatment*' consist of three lengthy articles namely: Articles 4, 5 and 6. Article 4 provides for certain 'fundamental guarantees' which apply to civilians and who must be '*persons who do not take a direct part or who have ceased to take part in hostilities'*. They are to be treated humanely without any adverse distinction.[71]

Article 4 also breaks new ground by affording detailed protection to children below the age of fifteen. Children below this age are for example, prohibited from being recruited in the armed forces and from taking part in the hostilities[72] among other provisions. It is only hoped that in the course of time, this provision should be reviewed to make the age of protected children eighteen years. This would be in line with the age limit acceptable under the Child's Right Convention and Child's Right Act.[73]

Article 5 provides for 'persons whose liberty has been restricted.' It is an innovative provision because Common Article 3 had no such special provision for persons under detention. It provides an additional and more comprehensive protection (in addition to the more general restraints of Article 4) for those persons '*deprived of their liberty for reasons related to the armed conflict whether they are interred or detained*.' It provides for two classes of protection for such persons. The first covers treatment that 'shall be respected as minimum' in all cases.[74] The second class of protection afforded concern matters that are to be respected by those in charge of the detainee *'within the limits of their capabilities*' such as accommodation, communication and very importantly prohibiting the carrying of medical experiments on those detained.[75] It is suggested

[70] See Bothe, M., Karl , J., Partsch, Karl J. and Solf Waldemar, A., *New Rules for victims of Armed conflict: Commentary on the Two 1977 Protocol Additional to the Geneva Conventions of 1949* (The Hague: Martinus Nijhoff, 1982), p. 696.
[71] Article 4 outlines a number of inhuman treatment that are prohibited such as taking of hostages, collective punishment, slavery, pillage, rape, enforced prostitution and indecent assault, as well as threats to commit any of the above are all outlawed . See Article 4 (2) (a)-(h) of Additional Protocol II.
[72] See Article 4 (3) AP II.
[73] See Section 277 of the Child's Rights Act, Cap C.50, LFN, 2004, wherein a child is defined to mean any person under the age of eighteen.
[74] These include provision of basic medical treatment for the sick, food, water, access to individual and collective relief, freedom and religion to the same extent as the local civilian population. See Article 5 (1) (a)-(e), AP II.
[75] See Article 5 (2) (a) -(e), AP II.

that this last aspect on medical procedure and experiment should have been made part of the first class of protection as it is too serious a matter to be left to the discretion of those responsible for the detainees.

One significant omission in Article 5 is with regards to visit and inspection by an impartial body (such as the ICRC). This may lead to a cloak of secrecy around the treatment being afforded the detainees by the detaining power. In practice however, such services are usually accepted; nonetheless, it ought to have been expressly provided for in the Protocol.

Article 6 relates to penal prosecutions and it provides for '*the prosecution and punishment of criminal offences related to the armed conflict'*. The judicial guarantees provided are usually provided for in the domestic criminal procedure laws and under the fundamental human right provisions of the constitution of virtually all civilized states.[76] The novel provisions in this Article are on judicial advice and other remedies for convicted persons, the prohibition of the death sentence for children and encouraging the granting of amnesty at the close of hostilities.[77]

Article 6 fails to provide for the principle of *non bis idem.*[78] Also, although there is provision for non-retroactive penalties, it does not prevent someone being found guilty of an offence under vague and unreasonable laws promulgated after the outbreak of hostilities but before the commission of the act. It is suggested that in such circumstances, persons should only be tried and punished under laws existing at the time of outbreak of hostilities.

Part III which comprises of Articles 7 to 12 deals with the wounded, sick and shipwrecked**.** It is a more extensive provision than that under Common Article 3 which only provided that '*the wounded and sick shall be collected and cared for*.' This part applies to '*all the wounded, sick and shipwrecked, whether or not they have taken part in the armed conflict'*. A significant provision is that of Article 8 which states that after an engagement, further measures should be taken to search for and collect causalities to protect them against pillage and prevent their being despoiled. Article 12 provides for recognition and respect for the distinctive emblem of the Red Cross. Collection and

[76] In Nigeria for example, it is provided for under S. 36 of the 1999 Constitution which deals on fair hearing and also under the Criminal Procedure Act.
[77] In Nigeria, in the year 2009, the late President Umaru Yar'adua appeared to have taken advantage of this provision (although without alluding to it) when he offered amnesty to the militants in the Niger Delta Region which Offer served to restore relative peace and temporal halt to the hostilities in the region.
[78] i.e., nobody shall be liable to be prosecuted or punished for an offence for which he has already been finally acquitted or convicted.

care for the wounded and sick is at the heart of International Humanitarian Law. This is also at the root of the ICRC, a movement founded by Henry Dunant, generally considered as the father of modern international humanitarian law.[79]

Part IV covers protection for civilian population. The view has been expressed that '*Pre-existing rules of conventional international law applicable in non-international armed conflict did not provide explicit protection for the civilian population against attacks or the effects of attacks.'*[80] Elsewhere, it has also been maintained that:

> *…the chief interest of Protocol II lie in the extension to the non-international armed conflicts of the principal rules of Protocol I relating to the civilian population against the effects hostilities.*[81]

This part spans Article 13 – 18 and it can be said to be an elaboration on the general provisions of Common Article 3. Article 13 prohibits attacks on civilians as well as threats of violence with the aim of spreading terror. This protection shall be enjoyed '*unless and for such time as they take a direct part in hostilities.*' Articles 14 – 16 prohibit acts of war directed against specified object namely objects indispensable to the survival of the civilian population (outright prohibition of the starvation as a method of combat), works and installation containing dangerous forces as well as cultural objects and places of worship.

Article 17 prohibits the forced movement of civilians unless strictly required for military reasons or for their own security. In the event of such a forced displacement, *'all possible measures shall be taken in order that the civilian population may be received under satisfactory condition of shelter, hygiene, health, safety and nutrition'.*[82]

This provision is helpful to ameliorate severe hardships faced by internally displaced persons (IDPs) during armed conflicts.

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[79] Dunant, H., *A Memory of Solferino*, English Ed., I.C.R.C. in 1986.
[80] Bothe, M., et al., Op.cit., at p.667.
[81] Eze, O., *International Humanitarian Law and Intra -State Conflict*s, (Lagos: Nigerian Institute of Advanced Legal Studies, 2005) at p.34.
[82] Due to the severe hardships faced by such internally displaced persons (IDPs) during conflicts, the UN came out with the Guiding Principles on IDPs of 1998. Flowing from this development, the African Union is now the first continental association to come out with a regional treaty on IDPs i.e. the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), October 23, 2009.

Article 18 relates to the provision of humanitarian assistance to the victims of armed conflict which must be of '*an exclusively humanitarian and impartial nature'*. Here a distinction is drawn between humanitarian assistance from relief societies located in the territory of the state party and those from elsewhere. In the latter, such assistance can only be rendered without '*adverse distinction'* and '*subject to the consent of the high contracting party'.* This provision is rather curious and has appropriately been described as '*a step backwards in humanitarian law'.*[84] This requirement of consent would have been much more reasonable if It is required by the party concerned as was provided for in Additional Protocol I. [85] As it stands, it is the state government that reserves the discretion to allow aid to insurgents and victims which it is most likely to refuse, hence this article is a derogation from the humanitarian aim of Protocol II and a limitation to the work of the ICRC.[86] Protocol II being a humanitarian convention ought to have been more liberal in matters touching on aids and reliefs.

The last part of Additional Protocol II is part V spanning Articles 19 – 27. Unlike Additional Protocol I, Protocol II is silent on all aspects of implementation and enforcement. This silence without doubt, reveals the tendency of states to reduce their expression of obligation under it. The only provision that come close to this is Article 19 which reads in full: *'This protocol shall be disseminated as widely as possible.'* This provision exposes the lack of sufficient will on the part of states to commit to monitoring and implementation mechanism.

Articles 20 – 25 provide for matters such as signature, ratification, accession, entry into force, amendment and denunciation respectively. Under Article 25, where a contracting party denounces the protocol, this denunciation shall only take effect six months after the receipt of the instrument of denunciation. If however at the expiration of this time such a party is party is engaged in armed conflict, the denunciation shall not take effect.

It can safely be said that the provisions of Additional Protocol II although having some significant gaps (for example and especially in the aspect of the threshold of application) meet the basic needs of individuals and peoples caught up in the maelstrom of armed conflict because it safeguards the

[84] See Eide, A., "The New Humanitarian Law in Non International Armed Conflicts" in Antonio Cassese (ed.) *The New Humanitarian Law of Armed Conflict* (Editorial Scientifica, Naples, 1979), 277 at 294.
[85] See Article 70 (1), AP I.
[86] The ICRC has as one of its mandate, to ensure at all times, as a neutral humanitarian institution, protection and assistance to military and civilian victims of armed conflict whether international or non-international – see Article 5 (2)(d) Statute of the ICRC and Red Crescent Movement.

fundamental and timeless values. Another value of this Protocol lies in its multicultural backdrop in that all of the world's main powers took part in the drafting process.[87]

However, as earlier observed the commitment of states to monitoring and implementation of this Protocol is weak and half-hearted. This is grossly inadequate and a stronger expression of commitment will be more desirable.

Very fundamentally however, Additional Protocol II reaffirms and crystallizes the three basic functional principles of international humanitarian law applicable in all situations of armed conflict viz: the principles of humanity, of military necessity and of proportionality.[88] Together, these constitute an intangible basis for the protection of the individual whenever armed force is used.

2.3.4 State practice in Relation to Additional Protocol II

As at 31 October 1997, 140 States, including Nigeria, had become parties to Additional Protocol II. In practice, the existence of this Protocol did not stem the tide of internal armed conflict. Since its ratification, there has been internal conflicts in Angola, Mozambique, Somalia, Namibia, (in Africa), in the former Yugoslavia, Afghanistan and Sri–Lanka, in Asia, Haiti and Nicaragua in the Americas. Practice reveals that although many of the rules of Additional Protocol II were violated in the course of the conflict, their applicability was however never contested by the parties.

Since the coming into force of Additional Protocol II, only four states have indicated their willingness to be bound by its provisions i.e. El-Salvador Rwanda, Bosnia-Herzegovina and Russia[89]. In spite of this indication of interest, in the actual conduct of hostilities in these four states as well as other states, very little humanitarian restraint was shown and the catalogue of atrocities committed by government troops range from torture and slaughter of civilians, death squads, bombing of fleeing refugees by army, indiscriminate bombings of civilians and massacre of residents[90] and even attack on food stuffs. At this point however, it is apposite to consider customary international law and its role in non-international armed conflicts.

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[87] See, Junod, S. Sylvie, *Additional protocol II: History and Scope* (1983) 33A.U.L.R., 29.
[88] In the *Tadic* decision, these principle have been qualified as part of customary International law; see *The Prosecutor v. Dusko Tadic*: Decision on the defence motion for interlocutory appeal on jurisdiction, of 2 October 1995, Case No. IT -94-1-AR72.
[89] See Moir, L., Op cit. at 120.
[90] Ibid., p.121.

2.4 Customary International Law and Non-international Armed Conflicts

Customary international law is one of the veritable sources of international law and in terms of hierarchy, it ranks next to international conventions.[91] Customary international laws of war are as old as wars themselves. However, its application to newer forms of armed conflict and especially internal armed conflict is a more recent development. In the Martens Clause contained in Additional Protocol I (dealing with international armed conflicts) for example, reference was made to *'The principles of international law derived from established customs'* whereas under Additional Protocol II, there was no such reference. This shows that the primary legal basis for the regulation of non-international armed conflict is the rules in Common Article 3 and Additional Protocol II; and the application of Common Article 3 as at the time of drafting Additional Protocol II had not 'developed in such a way that one could speak of established custom regarding non-international armed conflicts.'[92]

In the early years of the nineties, the conflict that ravaged former Yugoslavia and Rwanda resulted in the adoption of the UN security council of statutes creating international criminal tribunals to bring those accused of the relevant crime to justice.[93] The decisions of these tribunals are of profound significance being the first set of international judicial bodies which examined and interpreted the scope of Common Article 3.

2.4.1 The International Criminal Tribunal for Yugoslavia (ICTY)

The ICTY was the first of the tribunals to be set up. Among the several cases brought before it, that of *Prosecutor v. Dusko Tadic*[94] is of vital significance. It was in this case that it was first put forward

[91] See Article 38, Statute of the International Court of Justice, 1945.
[92] See Michael Bothe, Karl J., et al, Op. cit., p.620.
[93] For the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of IHL Committed in the Territory of Former Yugoslavia Since 1991, (1993) See UN Doc., S/25704, Annex 32 ILM 1192 (1993). For the Statute of the Tribunal for Rwanda, see 33 ILM 1662 (1994).
[94] See *Prosecutor v. Dusko Tadic,* Appeal on Jurisdiction, Case IT-94-1-AR72 (2October 1995) 35 ILM 32 (1996), hereinafter *Tadic,* (Jurisdiction); *Prosecutor v. Tadic,* Opinion and Judgement, Case IT-94-1-T (7 May

that there is a body of customary international law applicable to internal armed conflict and that the violation of these rules can involve individual criminal responsibility. The most novel evolution and expansion regarding the laws of internal armed conflict was brought about by the appeals chamber of the ICTY in this case (Appeal on Jurisdiction). Tadic objected to the applicability of certain sections of the ICTY Statute to his case on the grounds that these rules were only applicable during international armed conflict whereas the conflict in the region was internal. The appeals chamber dismissed this proposition holding that the jurisdiction of the tribunal to hear cases under Common Article 3 of the court's statute was equally applicable in international and internal armed conflicts. The court further examined the laws of internal armed conflict and how it developed. It stated that the emergence of custom in international law require both state practice and *opinio juris.* The tribunal however placed more emphasis on *opinio juris*, as evidenced by official statements, military manuals and judicial decisions rather than actual state practice due to the difficulty in pinpointing the actual behavior of troops. The decision of the Appeals Chamber in this case as well as several others[95] made it possible to punish individuals for violating Common Article 3. It was observed that:

> *Common Article 3 was declaratory of customary international law and the rules contained there under proscribe a number of acts that (i) are committed within the context of armed conflict (ii) have a close connection to the armed conflict and (iii) are committed against persons taking no active part in hostilities.*[96]

With regards to the relevance of Additional Protocol II to customary law, the Appeals Chambers stated that many of its provisions can now be regarded as declaratory of existing rules or as having crystallized emerging rules of customary law or else as having been instrumental in their evolution as general principles.[97]

The tribunal stated further that civilians were to be protected during non-international armed conflict and asserted further, that customary international law has also developed to regulate the means and methods of warfare in internal conflict. The *Tadic* case also reaffirmed the customary status of crimes against humanity and the fact that they could be committed during internal armed

1997), hereinafter*Tadic* (Judgement); and *Prosecutor v. Tadic*, Judgement of the Appeal Chamber, Case IT-94-1-A (15 July, 1999) 38 ILM 1518 (1999), hereinafter, *Tadic,* (Appeal Judgement).

[95]For example, in *Prosecutor v. Akayesu* at paragraph 608; and also the following ICTY Cases: *Prosecutor v. Delalic* at paragraphs 301-306, and *Prosecutor v. Furundzija* Case No. IT-95-17/1-T at paragraph 138.

[96] See *Tadic,* Appeal Judgment.

[97] See *Tadic* (Jurisdiction), at para. 117.

conflict and that customary international law may not require a connection between crimes against humanity and any conflict at all.[98] The argument of the defence in this case that crimes against humanity[99] cannot be committed in the context of a non-international armed conflict was thus rejected by the Appeals Chamber.

A last important issue that was also considered by the *Tadic* case is that pertaining to individual criminal responsibility i.e., that it attaches to crimes against humanity. Tadic however argued that individual criminal responsibility cannot be imputed if violations are committed during internal armed conflict. His argument may have been borne out of the fact that neither Common Article 3 nor Additional Protocol II sets out criminal liability for violations of its provisions. However, the Appeals Chamber[100] applied the reasoning of the Nuremberg trials that, '*crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced'* and decided that the violations alleged against Tadic resulted in individual criminal responsibility regardless of whether they were committed in an international or internal armed conflict.

2.4.2 The International Criminal Tribunal for Rwanda (ICTR)

The ICTR deals with the issue of the liability of persons indicted for the violation of laws or customs of war and the protections safeguarded in relation to non-international armed conflicts. The prosecutor of the ICTR indicted the accused under different counts. The comments of the trial and appellate chambers of the ICTR in the case of *The Prosecutor v Jean Paul Akayesu*[101] provides a clear insight into the scope and extent of the international humanitarian law relating to non-international armed conflicts. The accused was indicted for the violation of Common Article 3 and Additional Protocol II as incorporated under Article 4 of the statute of the ICTR of 1994. According to the Trial Chamber, Common Article 3 recognised a minimum threshold of humanitarian protection to all persons affected by armed conflict of non–international character and that Protocol II further expanded the scope of this protection. Since international humanitarian law encompasses both international armed conflict and non-international armed conflict, the

[98] See *Tadic* (Appeal Jurisdiction) at para. 141.
[99] Under the ICTY Statute, murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecution on political, racial and religious grounds and other inhumane acts are all listed under the caption of crimes against humanity; see Article 5 of ICTY Statute.
[100] *Tadic,* (Appeal Jurisdiction).
[101] Case No. ICTR-96-4-T, Judgement of 2 September, 1998, 37 I.L.M., 1399.

distinction pertaining to international armed conflict and non-international armed conflicts, emanates from the differing intensity of the conflicts and that such a distinction is inherent in the conditions of applicability specified for Common Article 3 or Additional Protocol II of 1977.

The Trial Chambers stated further that the determination of the intensity of a non-international armed conflict does not depend on the subjective judgment of the parties to the conflict (since states are more likely to minimise the application of the safeguards to the detriment of victims) but on an objective criteria.

The protections afforded by Common Article 3 and Additional Protocol II must be made applicable once it has been established that there existed a non-international armed conflicts. It noted further that the UN Security Council expanded the subject matter jurisdiction of the ICTR more than that of the ICTY by incorporating these two very important international instruments. The incorporation of these two instruments is suggestive that the conflict in Rwanda was a non-international armed conflict.

At the time of the conflict, Rwanda had already ratified both Common Article 3 and Additional Protocol II and they were already in force in Rwanda; the court therefore stated that all the offences spelt out under Article 4 of the ICTR statute also constituted crimes under Rwandan law in 1994, for which their nationals were aware that they were amenable to the jurisdiction of the Rwandan courts in case of commission of these offences. The court stated further that because Common Article 3 and Additional Protocol II are primarily meant to protect the potential victims of armed conflict and addressed to persons who by virtue of their authority are responsible for the outbreak of, or are otherwise engaged in the conduct of hostilities. Therefore, the category of persons to be held accountable in such cases must include (but not limited to) commanders, combatants and other members of the armed forces. Common Article 3 and Additional Protocol II apply to (i) persons of ranks belonging to the armed forces under the military command of the belligerent parties or (ii) persons who were legitimately mandated and expected as public officials or agents of person otherwise holding public authority or de facto representing the government to fulfill the war efforts. It is well established that the laws of war applies equally to civilians as well as combatants.

The court stated finally, that the protection afforded by Common Article 3 and Additional Protocol II applies in the whole territory of a state engaged in hostilities and not just the war front. The

prosecutor must however prove that the accused acted for the government or the rebels in the execution of their respective conflict objectives. An accused will only be held responsible on the basis of individual criminal responsibility if it is proved that by virtue of his authority, he is either responsible for the outbreak of or is otherwise directly engaged in the conduct hostilities. The trial chamber unanimously held the accused guilty of various crimes against humanity which verdict was affirmed by the Appeals Chamber of the court.

2.4.3 The Statute of the International Criminal Court (ICC)[102] and Customary International Law of Non-international Armed Conflict

A final point that needs be made with regards to the development of customary international law relating to internal armed conflict is with regards to the adoption in July 1998 of the Rome statute of the ICC. The adoption of this statute by such a large number of delegates[103] is a clear manifestation of state practice. It further affirms the customary status given to much of the international law relevant to internal armed conflict by the ICTY and ICTR. The crimes created by the statute creating the court are limited to *'the most serious crimes of concern to the international community as a whole'.* These include crimes against humanity, war crimes such as the crimes of genocide and aggression, serious violations of the laws and customs applicable in armed conflict and grave breaches of the Geneva conventions and Additional Protocol II. All these point to the fact that the Statute is reflective of customary international law. Further and very importantly, the statute of the ICC confirms in the most authoritative manner possible that individual criminal responsibility for such violations (whether in international armed conflicts or non-international armed conflict) is now beyond any measure of doubt.

2.5 Binding Force of International Humanitarian Law for Insurgents in Non- international Armed Conflicts

At present, contemporary international humanitarian law takes for granted the fact that its rules governing non-international armed conflicts binds state parties as well as organized armed groups (i.e., insurgents). With regards to state parties, there is nothing controversial in the imposition of obligations upon contracting parties since they have chosen to become parties to such treaties and are accordingly, bound by the terms. However, Common Article 3 and Additional Protocol11 as

[102] 1998 Statute of the International Criminal Court (Rome Statute).
[103] A total of 139 States signed the treaty.

well as rules of customary international law takes for granted the issue of the binding nature of their provisions for insurgents. Common Article 3 provides for example, that its provisions shall apply to *'each party to the conflict'* , while Additional Protocol 11 provides that its provisions shall apply to all armed conflicts which take place in the territory of a High Contracting Party between its armed forces and *'dissident armed forces or other organized armed groups…'* This attempt to bind insurgents raises the question as to how these provisions can impose obligations upon non-state parties who were not party to the Conventions and who ordinarily have no capacity to become parties.

A good number of arguments have been put forward as to why international humanitarian law applicable in non-international armed conflicts should bind organized armed groups. An examination of some these reasons becomes imperative in view of the fact that the reasons behind the binding nature of international humanitarian law for these groups will help promote effective strategies in engaging them to ensure better compliance with its provisions. Also, this examination will help to make clearer what laws binds these groups and which do not and their level of responsibility. An examination of why and which international humanitarian law rules binds these groups also has a direct bearing on reciprocity. If for example, flowing from one of the arguments, if organized armed groups are bound only by customary international humanitarian law, will a state that is in conflict with such a group be bound by treaty provisions of international humanitarian law that is more elaborate or even different from these customary rules? In this section therefore, an attempt is made to analyse the various arguments that have been put forward and highlighting their strengths and weaknesses.

2.5.1 Binding Force via the Doctrine of Legislative Jurisdiction

The first legal justification advanced for the binding nature of international humanitarian law for insurgents is that referred to as the doctrine of legislative jurisdiction. This doctrine is to the effect that insurgents or organized armed groups are bound because the parent state has accepted to be bound by the international humanitarian law treaties, since upon ratification, the Conventions become binding on all of a state's nationals; the legally constituted government having the capacity to legislate for all nationals. According to this construction, the capacity of a state to legislate for all its nationals entails the right of the state to impose upon them obligations that originate from

international law, even if those individuals take up arms to fight that state or another organized armed group within the state. [104]

The main advantage of this doctrine of legislative jurisdiction lies first in the fact that it provides a reason why organized armed groups should be bound by rules to which the parent state has accepted even though the group has not consented to them. Furthermore, it is logical to expect organized armed groups to be bound by obligations contained in international humanitarian law Conventions since it is also expected to benefit by the rights conferred on it by the same Convention or rule. Also, when a state consents to a rule of international law that declares certain conduct to be criminal, the consent of individuals who may be subject to criminal prosecution on the basis of that rule is usually not sought or deemed to be necessary.

However, this absence of consent of the insurgents is one of the factors that limit the supposed applicability of the international humanitarian law to them. This is so because, by virtue of the conflict (although not in all cases), the insurgents are deemed to be renouncing the authority of the said state to legislate for them. Therefore, they do not recognize even the basic laws of that state. This being so, it is untenable to expect them to be bound by the said rule qua the doctrine of legislative jurisdiction. Armed groups by virtue of their act of insurgency are challenging the monopoly of force that states arrogate to themselves.

Another argument advanced against the doctrine of legislative jurisdiction is that it is based on a misconception of the relationship between international law and domestic law in that it fails to distinguish between the binding force of international humanitarian law on organized armed groups as a matter of international law and its binding force under domestic law. The point in issue is however not whether rebels are subjects of domestic law, but their legal standing in international law – that is their status viz-a-viz both the lawful government and third states and the international community at large.[105] This counter argument rests on the assumption that, when states accept a rule of international (humanitarian) law, such a rule becomes part of domestic law, and the subjects of that rule (in this case, individuals who make up an organized armed group), are therefore bound by a rule of domestic, rather than international law. In other words, the nature of

[104] See Sivakumaran, S., *Binding Armed Opposition Groups* (2006), I.C.L.Q., Vol. 55, pp.381-393; Kleffner, J.F., *The Applicability of International Humanitarian Law to Organized Armed Groups* (2011), IRRC , Vol.93, No. 882, pp443-461.
[105] See Cassesse,A., *The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflict* (1981), International and Comparative Law Quarterly, Vol. 30, 1981, p.429.

the rule has changed with the consequence that the doctrine of legislative jurisdiction fails to account for the binding force of international humanitarian law on organized armed groups as a matter of international law. However, it must also be noted that the transformation or non transformation of a rule of international law into domestic law does not detract from the fact that under international law, such rule whether recognizing rights or creating duties, remain a rule. Such rights are recognized at the international plane and before international tribunal and the breach of such duty are also capable of incurring liability.

A further drawback of this doctrine of legislative jurisdiction is that it is founded on the assumption that members of organized armed groups are comprised only of nationals of the parent state; it thus limits the reach of the rules of international humanitarian law to nationals of states that have not ratified the convention who will not be bound by it. In this regard, it is better to argue that the binding nature of international humanitarian law on members of organized armed group stems from the fact that an international rule accepted by a state is binding on all those 'within the national territory of that state' rather than the fact that they are nationals of that state.[106]

2.5.2. Binding Force via the Individual

Another legal justification in favour of the binding nature of international humanitarian law for insurgents is the hypothesis that insurgents are bound by international humanitarian law as individuals under international law. This could occur (provided the parent state is a party) through the Conventions which in keeping with other developments in modern international law treat persons and entities other than states as subjects of international rights and duties.[107]

Also, the binding force of international humanitarian law on individuals has been recognized for a long time. Since individuals are punished for war crimes, it is clear that they bear duties that flow directly from humanitarian law.

In spite of this however, it must be pointed out that international humanitarian law distinguishes between two addressees, that is, parties to an armed conflict (organized armed groups as well as state armed forces), on the one hand, and individuals, on the other hand. Indeed, it is the

[106] See Kleffner J.K., Op. cit., at p. 449.
[107] See *Advisory Opinion on Reparation For Injuries Suffered in the Service of the United Nations,* ICJ Reports 1994, 174 wherein international organizations were recognized as subjects of international law; see also *Trial of the Major War Criminals* before the International Military Tribunal, Nuremberg, where individuals were also held to be proper subjects of international law.

collective nature of political violence and the organization of a group of individuals engaged in such violence that elevates a given situation to an armed conflict. It needs be pointed out that organized armed groups are not merely a sum of all its members. Instead, they are identifiable entities, with political objectives that they pursue by violent means and bearing duties under international humanitarian law independent from the duties of individuals.[108]

In view of this therefore, it is hardly tenable to construe the binding force of international humanitarian law on organized armed groups by reference to its binding force on individuals. To do so negates the fact that the organized armed group as such is an addressee of distinct obligations under international humanitarian law that are independent and separate from those of individuals.

2.5.3 Binding Force Vide Exercise of de facto Governmental Functions

An alternative justification for the binding force of international humanitarian law for insurgents is to the effect that treaties entered into by states are binding upon insurgents provided the rebel authority exercises effective control over part of the national territory. Insurgents are then said to be bound by reason of the fact, and to the extent that they purport to represent the state or part of it. As has been expressed,

> *if the responsible authority at their head exercises effective sovereignty, it is bound by the very fact that it claims to represent the country, or part of the country.*[109]

This follows logically from the fact that treaties are binding for a government which assumes power through revolution (as the insurgents would in the case of victory), since the legal personality of the state remain unchanged. It would be anomalous for insurgents to find themselves bound by the obligation of a convention on attaining overall control of the state, whereas, up to that point, the convention has been unconcerned with their actions, leaving them free to disregard even the most basic obligations despite controlling a sizeable portion of the state's territory.

[108] See Common Article 3 which prohibits the passing of sentences and the carrying out of executions without previous judgement, a duty placed on both state parties and armed groups; also Article 6 of AP11.
[109] Pictet, J.,(ed.), *Commentary to the Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, ICRC, Geneva(1958), p.37.

This argument for the binding nature of international humanitarian law for organized armed group focuses on the organized armed group as a collective entity rather than a collection of individuals which is a drawback on the doctrine of binding force via the individual. It also takes a step further in understanding organized armed groups as autonomous actors that are distinct from states.

In spite of these advantages however, this doctrine also suffers from the state-centric model of explaining the binding force of international humanitarian law Conventions on organized armed groups. This is because, in this argument, the binding force remains the fact that the state that the group strives to represent has accepted a given rule of international humanitarian law. There remains a possibility therefore, that an armed group might raise an argument similar to the one in response to the doctrine of legislative jurisdiction, namely, that the organized armed group rejects the binding force of those rules that have been accepted by the very state against which the group is fighting.

Another weakness of this doctrine is the fact that it is by no means certain that all organised armed groups do in fact want to become the next government of a state. Indeed, it has been shown that parties to armed conflict may at times have an interest not to end an armed conflict and become the new government, but instead, thrive on the general insecurity in the region where they operate, because that insecurity enables them to retain access to economic resources.[110] In these and other cases where the organized armed group do not (aspire to) become the new government, the de facto governmental functions argument fails to convince. The strength of this argument may therefore be limited to a select type of organized armed groups and cannot explain why all organized armed groups may be presumed to be bound by international humanitarian law.

2.5.4 Binding Force by Virtue Of Customary International Humanitarian Law: Organized Armed Groups as International Legal Persons

A fourth explanation that is sometimes offered for why international humanitarian law applies to armed groups is that they are bound by customary international humanitarian law because of the international legal personality that they possess. This was the position taken by the Dafur Commission of Inquiry when it stated that:

[110] See Kleffner , J.K., Op. cit., at p. 453.

> *All insurgents that have reached a certain threshold of organization, stability and effective control of territory, possess international legal personality and are therefore bound by the relevant rules of customary international law on internal armed conflicts.*[111]

An advantage of this justification lies in the fact that the international legal personality accorded to such armed groups is not dependent on the action of the state against which the group is fighting. Instead, it is the international community of states at large that binds them. However, due to the fact that organized armed groups are excluded from the process of customary international humanitarian law formation, the binding force is still more or less imposed upon them and their sense of obligation to such rule is thereby weakened. Furthermore, this explanation does not provide a basis for the binding force of conventional international humanitarian law on insurgent groups. This argument also has the potential of raising objection from states on this explanation that confers international legal personality on armed groups in that it would bestow legitimacy on such groups. This concern was expressed for example, during the negotiations of the Geneva Conventions, in relation to Common Article 3, which ultimately led to the inclusion of the provision that its application 'shall not affect the legal status of the Parties to the conflict.'

2.5.5 Binding Force by Virtue of Consent by Organized Armed Groups

Unlike the above justifications of the binding nature of international humanitarian law rules for organized armed groups that is based on the imposition of the rules on them regardless of their consent, this explanation is hinged on the expression of consent to be bound by a relevant rule by the armed groups. Under Common Article 3 for example, whereas it declares that each party to the conflict is bound to apply, as a minimum the substantive obligations in sections 1 and 2, it still goes ahead to encourage the parties to a non-international armed conflict to conclude 'special agreements' through which all or part of the other provisions of the Geneva Conventions are brought into force. There are also instances where organized armed groups unilaterally declare their acceptance of rules of international humanitarian law, for instance in the form of 'Deeds of

[111] Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General Pursuant to Security Council Resolution 1564 of 18 September 2004, 25 January 2005, para. 172, available at:http://www.un.org/News/dh/sudan/com_inq_darfur.pdf.

Commitment' made under the auspices of *Geneva Call* to ban anti-personnel mines and to further the protection of children from the effects of armed conflict.[112]

This argument based on the consent of the armed group also finds support in the report of the Darfur Commission of Inquiry which combined the argument that international humanitarian law is being imposed upon organized armed groups by virtue of their international legal personality with the argument that organized armed groups are bound because they have consented to the rules in question.[113] One practical problem that this reliance on the consent of armed groups to establish the binding force of international humanitarian law is that it may at times be difficult to establish who in a given organized armed group is competent to express consent to be bound on behalf of such group. This is especially so with respect to more amorphous armed groups or in the situation where different factions of an organized armed group split up because of internal differences or shifting alliances. Also, a more fundamental consequence of requiring consent is that taken to its logical conclusion, such a requirement would mean that no rule of conventional international humanitarian law applies to an organized armed group that has failed to accept being bound by the rule in question. However, armed groups are not likely to out rightly reject all rules and principles of international humanitarian law because such a stance might work to the disadvantage of such a group.[114] Efforts should therefore be concentrated on gradually increasing the acceptance of the rules of international humanitarian law by insurgents, even though this in itself does not guarantee actual compliance with the rules.

In view of the varied and distinct justifications for the binding nature of international humanitarian law rules for insurgents, with each having its advantages and drawbacks, it would be unrealistic to single out any of this doctrines as being ideal for all situations of armed conflict. This imperfection shows that international humanitarian law remains deeply rooted in a state-centric paradigm of norm generation and acceptance. More efforts should therefore be channeled towards identifying and articulating the interest of armed groups in the process of norm making since they are parties to whom such norms will be meant to also govern.

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[112] See generally, http://www.genevacall.org/ and the list of signatories of Deeds of Commitment available at: http://www.genevacall.org/resources/list -of-signatories.htm.
[113] See Report of the International Commission of Inquiry on Darfur, Op. cit., paragraphs 173-174.
[114] See Bangerter, O., *Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not,* IRRC, Vol. 93, No.882, June 2011.

In the foregoing exposition, the meaning of armed conflict, the classes of armed conflict and the relevance of the distinction has been examined. Further, the relevant international humanitarian law relating to non-international armed conflict has also been considered; the shortcomings of the various provisions have also been highlighted. What therefore remains to be said firstly, is that the challenge now remains in the newer forms of armed conflicts (both international and especially internal) that are daily being evolved. In the Niger Delta of Nigeria, there was the severe conflict that engulfed the region and nearly brought the nation to its knees economically between the year 2006 and 2009. Also in Northern Nigeria, there has been the '*Boko Haram'* scourge that takes the form of terrorist activities with transnational implications. In the foreign scene also, there has been the 'Arab spring' of 2012 which is more or less popular uprising against the government that eventually took the form of armed conflict and attracting serious international attention and leading to the toppling of the governments in the respective countries.

It would appear that when the extant rules were adopted, these newer forms of conflict were not contemplated. However, it is impracticable for new rules to be fashioned out at any point when a new challenge arises to regulate these newer forms of conflict. This is because, if new rules were to be constantly evolved to accommodate these newer forms of conflict, it might get to a stage where new rules have to be adopted annually. Therefore, it is suggested that the extant frame work of regulations should be liberally interpreted to accommodate such conflicts.

Furthermore, in spite of the provisions of Common Article 3 and Additional Protocol II, evidence shows that there is still horrific suffering and violations of their provisions during conflicts. How effective are these provisions therefore in protecting civilians during internal armed conflicts? The pattern that has emerged from the practice of states and insurgents shows an unwillingness to apply the enhanced humanitarian protections afforded by Additional Protocol II or even Common Article 3. The protocols did not prevent the massacres in Rwanda or in the former Yugoslavia, in Liberia. However, this is as much the failure of international humanitarian law as well as the failure of civilization. These issues will be addressed in the concluding chapter of this work, where suggestions will be made as to what should be done to halt this trend of impunity.

CHAPTER THREE

OVERVIEW OF ARMED CONFLICT IN THE NIGER DELTA AND AN ANALYSIS OF THE NATURE OF THE CONFLICT UNDER INTERNATIONAL HUMANITARIAN LAW

In almost every sphere of human existence, the availability or scarcity of resources in whatever form has the potential of triggering conflict depending on the way such resources are managed. As a ready example, the availability of resources is the chief cause of conflict that has ravaged Sudan even after it split into two separate countries. This assertion holds for the Niger Delta Region of Nigeria which for over five decades has been the economic heartbeat of the country as a result of the availability of crude oil in commercial quantity. The discovery and extraction of oil in the region led to environmental and social problems associated with almost every stage of oil exploration and exploitation. This ranges from prospecting activities, which involve the destruction of vegetation and farmlands, and human settlements to allow for seismic cutting line. This in turn carries with it the destruction of fish and other forms of aquatic life; noise pollution and damage to health and social well being. The end result of these is the rupturing of the eco-system. Furthermore, there is the production process as well as distribution and their associated problems such as oil spillage from blow-outs, corrosion, equipment failure, operational error, pipeline vandalization among others.

In Nigeria as around the world, oil has been a source of great wealth. But dependence on oil has also fostered conflict, environmental degradation, gross economic injustice, corruption, and short sighted economic policies. Consequent upon the way and manner in which successive governments in Nigeria have handled oil resources in the region, the discovery brought with it deprivations, severe environmental assault, pollution, neglect, disease, depletion of traditional means of livelihood such an fishing and farming.

These have, over the years, engendered restiveness, frustrations and agitations in varying forms from the people of the region. In recent times, the most prominent among these agitations was the activities of several militant groups laying claims to the emancipation of the Niger Delta. During this period, the region became the home base of a plethora of armed militant groups and insurgent organizations dedicated to the socio-economic emancipation of the region. The agitation and

restiveness by the militants among other factors constitute what is now popularly referred to as the Niger Delta crisis.

This chapter aims at examining the facts behind the militancy and militarization of the region. In doing this, it will generally locate the territory referred to as the 'Niger Delta', trace the history and origin of conflict in the region and evaluate the evolution and metamorphosis of the crisis into armed conflict. Also examined are the recognizable militant groups in the region, their operations as well as the reaction of the Federal Government to their insurgent activities. Further examined is how the conflict subsequently degenerated into full fledged armed confrontation between the Federal Government and the armed militant groups. Also, the means and methods of warfare employed by the parties as well as the effect of the conflict on the innocent indigenous peoples and other forms of humanitarian disasters that took place in the heat of the armed conflict is considered. The offer of amnesty to the militants by the Federal Government and the post amnesty period is also examined.

Also at the heart of the discourse in this chapter, is the careful examination of the nature of the conflict that took place in the region with the aim of ascertaining whether it meets the threshold of application of the rules of international humanitarian law relating to non-international armed conflicts. This will help buttress the case for the application of humanitarian law in cases like that of the Niger Delta. A further aim of this chapter is to examine the humanitarian dimensions of the conflict as well as the issue of accountability for violence during the pendency of the conflict. This is expedient in view of the fact that although the state retains the exclusive right to the use of force within its borders, once a conflict reaches a certain level of intensity it ceases to be an entirely domestic affair but one for which the principles of international humanitarian law can be made to apply and the perpetrators of such violence must be made to be accountable individually and collectively for their actions.

3.1 The Niger Delta Territory

The Niger Delta territory is one of the ten major deltas in the world[115]. The term 'delta' is used to describe an area of land where a river is split into several smaller rivers before entering the sea.[116]

[115] The nine other major deltas include the Ganges-Brahmaputra in Bangladesh/India, the Mekong in Southeast Asia, Lena in Russia, Huang He in China, Mississippi in the United States; others are Indus in Pakistan, Volga

Three plausible definitions of the Niger Delta have been identified: they are the scientific, the historical and the political definitions. Scientifically, the Niger Delta is that location associated with the lower Niger, especially where the river splits into major tributaries; Rivers Nun and Escravos. It starts from the Benin basin in the western flank of the region, flows up to Aboh in the north and then to the Imo river. Historically, the Niger Delta refers to the conglomeration of peoples who in 1958 canvassed for special attention that led to the inauguration of the Henry Willinks Commission. It includes the Ogoni Province and Degema. It is significant to note that the definition at that time even excluded the present Port-Harcourt and Warri. The political Niger Delta is a recent phenomenon associated with the Niger Delta Development Commission (NDDC). Politically in today's Nigeria, the Niger Delta has been made to be synonymous with oil production. It is assumed, that all oil producing communities are part of the Niger Delta.[117]

The Niger Delta region in Nigeria is situated in the southern part of the country and bordered to the south by the Atlantic Ocean and to the East by Cameroon. It occupies a surface area of about 112,110 square kilometers. It represents about 12% of Nigeria's total surface area and it was estimated that by the beginning of 2006, its population would be over twenty eight million inhabitants and well over thirty three million in 2010.[118] The Niger Delta region consists of several minority ethic nationalities. These include the Ijaws, Ikwerres,[119] Itsekiris, Ogonis, Efiks and Urhobos. Others are Ibibio, Kalabari, Okrika, Andoni, together with sections of Yoruba and Igbo. Among these, the Ijaw seem by far the largest; the Ijaws occupy the whole of Bayelsa state and are found in all the other states in the Niger Delta except Cross-Rivers state. The region is made up for nine out of the country's thirty six states. They include Akwa–Ibom, Bayelsa, Cross-River, Delta, Edo, Ondo and Rivers States; Abia and Imo States were added under the Niger Delta Development Commission Act[120] as oil producing states thus comprising what has been described as "*the political Niger Delta"*[121] This makes the region coterminous with all of Nigeria's oil producing states. However, it must be made clear that the crisis and militancy that ravaged the region was actually

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in Russia, Orinoco in South America and Tigris Euphrates in Southeast Asia – sourced from http://www.scienceclarified.com/landforms/Basins-to Dunes/ Delta.html/b.

[116]Hornby, A.S., Oxford Advanced Learner's Dictionary of Current English, 7th ed. p. 387.

[117] Isoun, T.T., "Environmental Challenges of the Niger Delta" in *Challenges of the Niger Delta (Proceedings of a Seminar on the Niger Delta*) Ozo- Eson, P.I. and Ukiwo, U., (2001) Centre for Advanced social Science, p. 78.

[118] The Niger Delta Regional Development Master Plan, p. 49.

[119] Alagoa, E.J., *History of the Niger Delta*, (Ibadan: Ibadan University Press, 1972).

[120] Niger-Delta Development Commission (Establishment, etc.) Act, Cap 86, Vol.11, L.F.N., 2004, i.e., Sec.2.

[121] See Isoun, T.T., Op. cit.

concentrated in three core states, viz; Bayelsa, Delta and Rivers where the militant groups were located and also where all the armed conflicts took place.

The Niger Delta region has a vast wetland with a fragile ecosystem acknowledged to be one of the richest in the world.[122] It is home to over 60% of Africa's largest mangrove forest comprising mainly of a distinct aquatic environment which embraces marine, brackish and fresh water ecosystems. It encompasses the most extensive fresh water swamp forest in West and Central Africa, and manifests an intricate network of creeks, rivers, streams, swamps, lakes, besides a stretch of flat and fertile land mass.[123] As will be seen later in this chapter, this landscape in no small measure, helped to facilitate and provide cover for the activities of the militants.

The Niger Delta is the mainstay of the Nigerian economy, as crude oil which is extracted from the region accounts for over 90% of Nigeria's export earnings and of its foreign exchange revenue.[124] Nigeria is the seventh largest producer of crude oil in the world and the largest in Africa. Current daily production of crude oil in Nigeria is over 2 million barrels and almost all of it is produced in the Niger Delta Region.[125]

The *World Bank Report* of 1995 listed five main characteristics of the region to include[126]:

1. The Niger Delta is the least developed area in Nigeria;

2. Per Capita income was less than $280 per annum, with a high rising population;

3. All indices of development such as health, education, sanitation, job creation water and other physical infrastructure were far below acceptable standard;

4. Environmental resources were gradually being degraded and

[122] Fubara, B.A., "The Politics of the Niger Delta" *The Niger Delta Development Commission: Towards a Development Blueprint: Proceedings of the Fourth Memorial Programme in Honour of Professor Claude Ake,* Ozon –Eson, P.I., and Ukiwo U., (eds), Centre for Advanced Social Science, Port-Harcourt, Nigeria, 2001, p. 19.
[123] Afinotan, L.A. and Ojakorotu, V., *The Niger Delta Crisis: Issues, Challenges and Prospects,* A.J.P.S.I.R., Vol. 3 (5), 191 – 198, May 2009; Available online at http://www.academic journals.org/AJPSIR.
[124] *The Niger Delta Crisis*, http/www.dissidentvoice.org/2007/2008.
[125] See the United Nations Development Programme - Niger Delta Human Development Report (2006).
[126] Referred to by Gasiokwu, M.O.U., *Th e Law and Politics of Amnesty in Nigeria: The Niger Delta Militants Amnesty Episode in Perspective*, in Gasiokwu, M.O.U., (ed.), Law Politics and Diplomacy in Contemporary Nigeria: Essays in Honour of Professor B.I.C. Ijomah, (Enugu: Chenglo Limited; 2010) p.277.

5. Extremely poor human capacity and skills base.

In spite of the fact that the Niger Delta produces the wealth that keeps the nation going, there in scant evidence of this in the region especially in the rural areas. As a matter of common knowledge, the living standards and conditions of the indigenous people have worsened since the discovery of oil. This is as a result of the fact that their traditional resources and sources of livelihood have been laid waste by the activities of the multinational oil companies.

In fact the region has been described in the following words:

> *The Niger Delta has been blessed with an abundance of physical and human resources, including the majority of Nigeria's oil and gas deposits, good agricultural land, extensive forests, excellent fisheries,… However, the region's tremendous potentials for economic growth and sustainable development remains unfulfilled and its future is threatened by deteriorating economic conditions that are not being addressed by present policies and actions.*[127]

The more recent report of the United Nations Development Programme - Niger Delta Human Development Report (2006) reveals more of the problems and neglect suffered by the region. It identifies wide ranging environmental changes which have stemmed from oil and gas extraction, industrialization and urbanization. Oil spills and gas flaring have destroyed natural resources central to local livelihood. Energy availability is poor for a region that provides one fifth of the energy needs of the United States. The region relies on imported fuel despite producing over two million barrels of crude oil per day. The network of roads is poor in a region whose wealth is funding gigantic infrastructural development in other parts of Nigeria.

The neglect and problems acknowledged by both national and international institutions have led to agitations from individuals and groups within the region for a better deal from the Nigerian state. The frustrated expectations of the people eventually led to violent agitations and militancy to drive home more forcefully the point being made over neglect and the need for the development of the region that metaphorically lays the golden egg. In the Social Sciences, (political science), there is a theory known as the '*frustration – aggression*' theory which postulates that where there is a gap between the level of value expectation and that of value attainment, it leads to build up of tension

[127] Ibid.

and frustration which in turn produces aggressive behavior.[128] This theory can be relied upon to generally explain the resort to violence by the people of the Niger Delta region.

3.2 History of Conflicts and Struggles in the Niger Delta Region

This section of the work examines from a historical perspective, the remote beginnings conflict and struggle in the Niger Delta region of Nigeria. It starts with an examination of the era of contact with the Europeans and its impact in the region, through the colonial and post-independence era. It goes on to discuss the effect of the civil war in the region and its fall out as well as the post civil war period which all predates the era of militancy. This is to ensure a better understanding of the volatile nature of the Niger Delta.

3.2.1 Legacy of European Contact

Conflicts occasioned by oppressive policies and actions of the wielders of power and authority and consequent struggle for liberation has a very long and chequered history in the Niger Delta that predates the colonial era. It has been observed for example, that the antecedents of the current predicament of the Niger Delta can be traced to the era of gunboat diplomacy[129] and Protectorate Treaties obtained through coercion or the threat of it, in the mid 19th century such as punitive expeditions with death and desolation in its trail.[130] However, it is even possible to trace the distant origin of the culture of exploitation and marginalization of the region to earlier times. Europe for example, was connected to the Niger Delta long before the trade in agricultural produce. This was between the 15th and 18th century when the 300 years long Trans-Atlantic Slave trade holocaust devastated the region, in much the same manner as extractive mineral exploration has underdeveloped the area. The human resource hemorrhage occasioned by the slave trade thus appears to be the distant origin of the culture of exploitation and marginalization of the region.[131]

The exploitative structures of economics and policies introduced by European powers were inherited by the post-independence Nigerian governments. The roots of the current struggle of the Niger Delta people can be found in the politics and trade of the 19th Century. Some of the Princes

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[128] See Afinotan, L.A., and Ojakorotu, V., Op. cit.
[129] Hornby, A.S., *The Oxford Advanced Learners Dictionary* (7th Ed.) defines 'gunboat diplomacy' to mean a way of making another country accept your demands by using the threat of force.
[130] Tamuno, T.N., *The Niger Delta Question*, (Port Harcourt: Riverside Communication, Nigeria) p. 14.
[131] Darah, G.G., "The Socio-Economic and Political Challenges of the Niger Delta", *Challenges of the Niger Delta: Proceedings of a Seminar on the Niger Delta,*, Ozor- Eson, P. I. and Ukiwo, U., Op. cit. at p. 22 – 23.

and merchants of the region fought gallantly against monopolist tendencies of European firms. In this way, they initiated a tradition of radical resistance which has survived till date. Among these were, King William Dappa Pepple of Bonny who was exiled to Clarence in 1854 and died five years after his return in 1861. Jaja of Opobo (Jubo Jubogha), was another wealthy merchant who for challenging the Europeans and exporting oil direct to England was deported to Accra in 1887, tried and Jailed in Jamaica. Nana Olomu of Itsekiri was similarly overthrown in 1894 for opposing British trade monopoly on the Benin River. He was exiled to the West Indies. There is also, the very familiar story of Oba Ovoramwen Nogbaisi of the Benin Empire who resisted the British traders and refused to sign their 'Treaties of Protection' and also denied them direct access to the indigenous farmers. This resistance led to the invasion of Benin in February 1897, where the biggest plunder of art treasures took place. Ovonramwen was dethroned and exiled to Calabar where he died in 1913.[132] It is noteworthy to state that the oppressive tendencies of the European traders were further perpetrated when they metamorphosed into colonialists.[133]

3.2.2 The Colonial and Post Independence Eras

Prior to the attainment of independence in Nigeria, the people of the Niger Delta region still nursed fears of likely domination and repression by the three major ethnic groups (Hausa, Ibo and Yoruba) along whose lines the country had been split into regions. This fear was founded among others on the structural platform of the emerging country which appeared to have accentuated the injustices of the Niger Delta people. For example, they had very little representation in government institutions such as the Federal House of Representatives.[134] More so, the ethnic nationalities which made up the region had been subsumed under either the Eastern or Western region. This arrangement made the Niger Delta to be distant from the regional seats of power and had very little in terms of infrastructure located in the region. This was in spite of its contributions to the national treasury through production of export crops such as palm oil and timbre.

In order to avert marginalization by the big ethnic groups after the attainment of independence, the Eastern Niger Delta Minorities formed the Calabar-Ogoja-Rivers (COR) State Movement which

[132] Ibid.
[133] See generally, Darah, G.G., ibid.
[134] Gasiokwu, M.O.U., "The Law and Politics of Amnesty in Nigeria: The Niger Delta Amnesty Episode in Perspective," in *Law Politics and Diplomacy in Contemporary Nigeria: Essays in Honor of Professor B.I.C. Ijomah*, Gasiokwu, M.O.U., (ed)., (Enugu: Chenglo Limited, 2010) 276 at p. 279.

was inaugurated in 1953 with the late Dr. Udo Udoma as coordinator. The COR territory covered the Oil Rivers Protectorate of 1891.

As a result of pressure from the Niger Delta Minorities, the Colonial Office was forced to set up the Sir Henry Willink Commission in 1957 to inquire into the fears expressed by the minorities in Nigeria and make recommendations on safeguards to be adopted and co-opted into the constitution. Although the Commission recognized that the minorities in Nigeria had genuine fears and apprehensions, it refused to recommend a separate state for the Niger Delta minorities. It however recommended the setting up of the Niger Delta Development Board (NDDB) charged with the responsibility of advising the government of the federation and that of the Western region with respect to the physical development of the Niger Delta. The NDDB was subsequently established by an Act of Parliament.[135]

The Federal Government, the Western and Eastern region governments starved the board of funds and it eventually collapsed. Even when the idea of the NDDB was in due course resuscitated under a new nomenclature - Oil Minerals Producing Areas Development Commission (OMPADEC) - in 1992 by the General Ibrahim Babangida's administration, it was under-funded by subsequent military governments and it also failed. The extant Niger Delta Development Commission (NDDC) established in the year 2000 has also had very minimal impact in the region. This has also led to the setting up of the Ministry of Niger Delta Affairs.

These interventionist agencies, due to the insincerity of government, corruption and mismanagement have been unable to provide solution to the immense development problems of the Niger Delta which still remain grossly under developed. Prior to this time, the situation had already been made worse by succeeding military administrations through the complete removal of revenue allocation for oil producing areas.[136] The final removal of the derivation clause as a mode of revenue allocation from the constitution was effected in 1967 by the then military Head of State, General Yakubu Gowon under the guise of the imperatives of the Civil War. However, by the end of the war, no attempt was made to revert to the former position of 50% derivation. Subsequently, it

[135] Niger Delta Development Board (Establishment) Act, No 19 of 1961 and later, integrated into the 1963 Republican Constitution.
[136] Under S. 140 (1) of the 1963 Constitution, 50% of the Royalty or Mining Rent should be paid by the Federal Government to the Region where such mineral resource was produced, but this was never implemented.

was re-introduced but reduced to 1.3%[137] and then to 3%[138] and then not less than 13% under the 1999 constitution.[139]

Apart from the problem of derivation, there is also the vexatious issue of land ownership in Nigeria, and especially in the Niger Delta. This flowed from the tradition of the colonialist where land ownership (inclusive of its content, natural resources on the surface as well as underneath it) was vested in the colonial state, which held it in trust for the crown.[140] The Nigerian state continued with this practice through the Minerals Act of 1963 and then redefined as the Land Use Decree of 1978. This Act gave the state the power to acquire land for public interest and vesting the entire land in the state. By this enactment therefore, the Nigerian state denied the people of their proprietary rights to their land and turned them into tenants of the state and squatters in their own ancestral homelands. Although these legislations provided for a *usufruct* right for the people,[141] such rights stand automatically revoked when oil or any mineral is explored and produced in the said land. Mining licences are granted to Multi-national corporations with scant regard for the fact that such mining acreages or blocks are the places of abode of the people, their farmlands, communal fish farms and wetlands, sacred groves with cultural and sociological significance among others.[142] To the state and the Multi-national corporations, the acreages are regarded as minefields, where the ultimate interest is to extract the mineral, irrespective of the consequences for the security of the environment and the people. As has been succinctly expressed:

> *In effect, it is a misnomer to talk of environmental degradation in the oil producing communities. For the entire oil producing communities in the Niger Delta have been turned into a minefield as evident in the continuous flaring of gas for 24 hours in the past 50 years. Yet the inhabitants of the oil producing areas are deemed to have no legal basis to protest the relatively reckless manner with which the State, SPDC and other operating oil companies are 'shelling' their*

[137] By the Shehu Shagari Administration, (1979-1984).
[138] By the Mililary Government headed by General Ibrahim Babangida.
[139] See S. 162 (2) of the 1999 Constitution.
[140] See the Mineral Act of 1908 later charged to the Mineral Act of 1914.
[141] i.e., right only to the use of the land, Sec.1 of the Land Use Act, CapL50, L.F.N., 2004.
[142] Omoweh, D.A., *Political Economy of Natural Resource Struggles in the Niger Delta, Nigeria* Covenant University Public Lecture Series, Vol. 1, No. 33, April 2010 at p. 18.

environment and lives. This has fired the aggression of the people against the state and oil companies.[143]

3.2.3 The Civil War Era and its Fall-out

As already pointed out above, the reckless abandon with which the state and oil companies operate across the Niger Delta region with no prospect of applying good oil field practices, raised the consciousness of a critical mass in the region to check the excesses of state/transnational capitalism. While huge revenues accrued to the state from oil export and royalties, the host oil producing communities sank deeper into under-development. This led to serious disaffection and discontent from the people of the region.

It was therefore not surprising that in 1966 after the coup d'etat of January, in a desperate bid for the attainment of self-determination, Issac Adaka Boro (1939 – 1967), through his organization, the Niger Delta Volunteer Service,(NDVS), declared an all–Ijaw Republic – The Niger Delta Peoples Republic (NDPR) in February 1966. The NDVS overran most of the Eastern–Ijaw territory. However, 12 days after the insurgency the NDVS was halted by the counter offensive of the Federal troops and the revolution was thus brought to an abrupt end. Adaka Boro and his compatriots in the struggle were arrested, tried and sentenced to death on June 21, 1966 for treason. The Supreme Court confirmed their conviction on December 5 of the same year.[144] They were however pardoned by General Yakubu Gowon. Boro joined the Federal army during the civil war, attained the rank of Major and was 'killed in action' on the way to liberate Bonny from Biafran occupation. In his autobiography, Boro noted (and which might account for his joining the Nigerian Army) after the creation of Cross Rivers and Rivers State that:

My men and I, with the creation of our own state, are now free to help, not only our people, but also Nigeria to peace, unity, stability and progress.[145]

He did not live long enough to observe that the creation of the two states did not bring to an end the marginalization of the Niger Delta people. As has been observed, his untimely death muted the militant voice of the Ijaws against economic, social and political exclusion for the next 30 years.[146]

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[143] Ibid. at p.19.
[144] See *Boro v. Republic*, [1966] 1 All N.L.R. 266; [1967] N.M.L.R. 163.
[145] Adaka Boro, I.J., The Twelve-Day Revolution (Benin City, Idodo Umeh Publishers, 1982) p.158.

3.2.4. The Post Adaka Boro Era

After the death of Isaac Adaka Boro, there were further resource agitations in the Niger Delta although largely non – violent. The resource struggle at this point in time was not very well articulated. There were several cases of huge oil spills with very damaging effect on the environment with no attempt by the government or the multinational companies to clean up the spills or assess the consequences on the environment.[147] All these bred deep rooted discontent and restiveness among the people. Therefore, from the 1980s, the resource struggle took another dimension, with emphasis now placed on the people's control of the resource found in their region. There were agitations that these resources should be managed by them, to divest the state of its absolute power over natural resources and to have a substantial share in the duties ordinarily accruing to the state.

The enlightened elite in the region began to institutionalize the struggle by forming protest groups, sensitizing the people and mobilizing for membership. The aim of these groups was to pressurize the Nigerian government into rethinking its policies towards natural resource governance. Around the 1990s, the resource struggle had become better articulated and the demands of the agitating groups well spelt out. The agitation at this point in time was still non–violent. Notable among these groups was the Movement for the Survival of the Ogoni People (MOSOP), formed by the late Ken Saro-Wiwa in 1990. Saro–Wiwa used his ethnic territory as the basis of organization and mobilization. The movement penetrated every stratum of society and had a wide grassroots reach. The organization has as its motto 'Freedom, Peace and Justice.' It has among others, three specific aims and objectives namely: to promote and sustain the struggle against all forms of injustice, to create and sustain the identity of the Ogoni people as a separate and distinct nation (within Nigeria) with a right to self- determination and to the control of their resource and their environment, and to ensure that the Ogoni people obtain their rights within the Nigerian state.[148]

The movement subsequently launched the *Ogoni Bill of Rights.* The major beneficiaries of the Ogoni people's oil were the Federal Government and the Multinational oil companies, the most prominent being the Shell Petroleum Development Company (SPDC), which acted in unison to

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[146] Gasiokwu, M.O.U., Op. cit., at p. 281.
[147] Omoweh, D.A., Op. cit. at p. 25.
[148] International Crisis Group: Fueling the Niger Delta Crisis at www.crisis.growp.org.copyright. 1999 – 2008 p. 12.

further impoverish the people of the region and repress any voice of opposition by strong arm tactics and ruthless application of maximum force.

As the relationship between the Ogonis (represented by MOSOP) and the SPDC deteriorated due to the mindless exploitation by the latter of the oil in the land of the Ogonis, four Ogoni chiefs were killed and Saro-Wiwa and eight other environmental activists were hurriedly tried, condemned to death and hung on November 10, 1995 in Port-Harcourt. Their execution attracted wide spread condemnation both nationally and internationally and was commonly referred to as judicial murder. Subsequently, the SPDC was sacked from Ogoni land.

Apart from MOSOP, there was also the Southern Minorities Movement (SMM), which was formed at Eku in Delta State in February 1994. The SMM has as its Motto 'Sovereignty to the People'. Prominent among its founders were Dr. M.T. Akobo, Prof. T.T. Isoun, Chief Henry Bassey among others. In the 1994–1995 Constitutional Conference under the General Sani Abacha regime, the SMM submitted a memorandum wherein it demanded a minimum of 50% derivation formula and the creation of six political zones, including one for the Niger Delta and substantial devolution of power to the zones. The government created the zones (on paper) and approved 13% derivation.[149]

After MOSOP, other ethnic nationalities in the region formed groups and made different demands on the Nigerian state. There was the *Charter of Demands of the Ogbia People*[150] which was made in 1992 by the Ogbia people of Bayelsa State. There was also the popular Ijaw National Congress (INC) whose formation signaled a major breakthrough in the history of Ijaw, the most populous ethnic group in the region. Its first executive was headed by Rev. Dime and it launched the *Kaiama Declaration of 1998,* which articulated the nationalist objectives of the Ijaw people such as the principles of territorial autonomy, resource control and cultural identity. These issues are in congruence with the general trend of self- determination and resource control struggles in the region.

Other ethnic nationalities also documented their demands. The Resolution of the first Urhobo Economic Summit was declared in 1998. The Akalaka Declaration in 1998, the Warri Accord in

[149]Darah, G.G., Op. cit., at p. 28 – 29.
[150] Omoweh, D.A., Op. cit. at p. 28.

1999; the Ikwere Rescue Charter in 1998; the first Niger Delta Indigenous Women Conference in 1999; the Oron Bill of Rights in 1999 and the Niger Delta People's Compact in 2008.[151] The demands of these protesting groups and ethnic nationalities and communities ranged from the right of the people to control the resources found in their region for the development of the people, to the repeal or amendment of laws that usurp the rights of the people.[152] Other demands are the halting of gas flaring and other forms of environmental degradation, immediate withdrawal of the military from the oil producing communities in the Niger Delta and ensuring the holistic security of the people and their resources.

It is significant to recall that sometime in 2002, the government of the core Niger Delta states[153] also made an attempt to take up the resource control struggle. However, as subsequent events would reveal, the efforts of these governors were far from altruistic as they used the struggle as a facade to curry popularity among their people and thus secure a second tenure in office. Hence, at the end of their second term in office, there was no structure on ground to sustain the agitations.

3.3 The Decline into Armed Conflict (The Era of Militancy)

This is the period that heralded the degeneration of the conflict in the Niger Delta to a stage where a number of groups in the region had to employ the use of force or strong pressure to achieve the aims of the struggle which incubated over a long period of unaddressed grievances and disenchantments among communities in the region. The Niger Delta territory became the operational base of a plethora of ethnic militias and insurgent organizations of various kinds dedicated to the socio-economic emancipation of the Niger Delta people. There are also among these groups, some others whose motives were far from altruistic and whose activities border on criminality and terrorism but who latched onto the struggle and used it as a façade for their nefarious activities.

Beginning with ken Saro-Wiwa's MOSOP, the 1990s was characterized by protests and subsequent repressions. The conflict in Delta State for example, opened along many axes between ethnic groups, (usually caused by boundary disputes) within ethnic groups, within communities (usually

[151] Ibid.
[152] Laws such as the Land Use Act of 1978, Cap.L50, L.F.N., 2004; the Oil Pipeline Act of 1990, Cap. O7, L.F.N., 2004.; the Petroleum Act of 2004, Cap.P10, L.F.N., 2004; Nigeria Mining Corporation Act of 2004, Cap.N120, L.F.N., 2004 etc.
[153] Akwa-Iborn, Bayelsa, Delta, Edo, Rivers and Cross-Rivers.

caused by problems associated with sharing of compensation payments by multi-national oil companies) between generations, between the state and communities, and between oil companies and communities. All these kinds of conflicts became increasingly polarized and militarized, as the stakes were raised and weapons became more accessible. Even after the 1999 return to democratic rule, the army, navy and police have regularly been deployed using force as a means of dealing with protests. However, it must be made clear at this stage that armed conflict in the Niger Delta had two basic dimensions to it. There was the inter-ethnic conflicts and struggle for self-determination and freedom from real or perceived domination by other ethnic groups. These ethnic conflicts manifested inclinations towards more specific primordial interests.[154] A ready example is the bloody Ijaw – Itsekiri war of the 1990s. The Ijaw struggle for self-determination led by Adaka – Boro in the 1960s, which was aimed at building a strong and independent Ijaw nation also falls into this category.

The second dimension of the conflict (which is the central concern of this work), relates to the militant aspect of the struggle which was co-ordinated the Movement for the Emancipation of the Niger Delta (MEND). MEND is the military arm of the Ijaw National Congress (INC), and the umbrella body of the various militant groups in the region. These groups have the intention of bringing the grievances of the Niger Delta people to the authorities by force of arms and other tactics including shutting down and blowing up oil installations. Their professed aim is to sustain the campaign and struggle to reverse the prevalent injustice against the Niger Delta people by force of arms. Without doubt, there appears to be criminal colourations to the activities of the true militant groups as well as other cult groups/gangs which latched onto the professed ideals of the just struggle by MEND. These other groups formed the criminal variant of MEND.

The rise of two major fighting groups, namely, the Niger Delta People's Volunteer Force (NDPVF) and the MEND introduced full scale armed struggle into the resource control agitation in the Niger Delta. Their aim was to fight against all injustices meted out against the Ijaws and the people of the Niger Delta. It is estimated that at the peak of the conflict, there were over fifty armed groups and between twenty and twenty five thousand armed youths operating in the Niger Delta.[155]

[154] Afinotan, L.A. and Ojakorotu, V., Op. cit.
[155] United National Development Programme Report (2007) p. 3.

Hostage taking and attacks on oil facilities were common occurrences, especially since the emergence of the Militant group, MEND. The perception that the 2007 governorship elections were flawed provoked a further escalation of violence and disorder in the region.

The violence by the militant groups was first directed at the oil installations of the multinational oil companies. To curtail these attacks, the federal government deployed the Joint Task force (JTF) to oil installations. The effort of the JTF was met with stiff resistance by MEND resulting in confrontation between the militants and the JTF. When these confrontations degenerated and became more intense, it led to the declaration of a full scale 'oil War' by MEND.

The following is a selection of the names of some of the very important militant groups that operated in the region during the heat of the conflict.[156]

A. The Movement for the Emancipation of the Niger Delta (MEND)

This group emerged sometime in December 2005. Its first attack involved the kidnapping of four expatriate staff of the SPDC from a flow station in Bayelsa State.[157] It articulated a set of demands which includes 100% control of oil wealth and the release of two jailed Ijaw leaders – Mujahid Asari-Dokubo, the leader of a brother militant organization, the Niger Delta People's Volunteer Force (NDPVF), who was under incarceration, and Diepreye Alamieyeseigha, a former governor of Bayelsa State, convicted of corruption. MEND was more or less an Umbrella organization for several other armed groups which operated in the region. It was a sort of conglomeration of distinct militant groups with constantly changing alliances. The leadership of MEND was rather elusive with no clear – cut hierarchical structure. It is generally believed that Henry Okah is the group's leader. Some of the subsidiary groups affiliated to MEND include:

i. Federated Niger Delta Ijaw Communities (FNDIC)

This group operated under the MEND umbrella and is sometimes referred to as WESTERN MEND and was founded in Delta State. It called for Ijaw Self-determination, and opposed both the multinational oil companies and the Nigerian government. It had Oboko Bello as it political leader while Government Ekpemukpolo alias Tompolo acted as its military head.

[156] The list is by no means exhaustive and the information provided is derived from several online postings, newspaper reports and the 2008 World Bank Report on Niger Delta Social of Conflict Analysis.
[157] See Omowe, D.A., Op. cit., at p. 32.

ii. "General" Boy loaf – This is the Pseudonym of the militant leader Victor Ben Ebikabowei, whose organization sometimes referred to as 'Central MEND' operated under the umbrella of MEND in Bayelsa State with similar objectives.

iii. Outlaws – This had Port-Harcourt as its operational base with Soboma George as its leader.

iv. Niger Delta Strike Force (NDSF)

This group also operated under the MEND umbrella in Rivers State and is sometimes referred to as 'Eastern MEND'. It had Farah Dagogo as its leader and was formed in 2005.

B. Niger Delta People's Volunteer Force (NDPVF)

The NDPVF is a militant organization formed sometime in 2003 by Mujahid Asari-Dokubo to protest the rigging of the 2003 general elections. Eventually, what started as a political disagreement snowballed into guerilla warfare for resource control.[158] The NDPVF was the re-in carnation of the NDPVS formed by Adaka Boro in the 1960s. It is an all Ijaw organisation and it is seen as the militant wing of the the Ijaw Youth Council (IYC). The NDPVF demanded for more control of the resources of the Niger Delta region. It condemned the Nigerian State and the foreign oil companies for the pillage of the region's resources. It resolved to reverse the injustice by actualizing the resource right of the people. In 2004, it declared an all out war against the Nigerian government and the oil companies. Asari-Dokubo was eventually arrested in August 2005. In spite of the peace deal offered by the Federal Government in which ceasefire was agreed, he continued to publicly condemn the Federal Government and also breached the ceasefire. He was charged to court for treason, but was released in 2007 following demands from MEND.

C. Niger Delta Vigilantes (NDV)

This organization was formed in 2003 in Rivers State by Ateke Tom, and it is considered to be a rival of Asari-Dokubo. Ateke Tom was among those who accepted the amnesty offer by the Federal Government in 2009.

D. People's Liberation Force (PLF)

[158] See UNDP Report (2007) Op. cit.

This is another of the militant groups led by Egberi Papa a.k.a Soboma George. It was formerly under the MEND umbrella as the Niger Delta Survival Movement (NDSM), but broke ranks with MEND in February 2010.

E. **Egbesu Boys of Africa**

It is also seen as a militant arm of the IYC. It sought for justice and equity for the oil bearing Ijaw communities in the Niger Delta. It was however not a cohesive militant movement, as its members were active in other groups.

3.4 Causes of the Conflict

The violence and social unrest that affected the Niger Delta need to be understood in the context of several factors. Much has been said in the preceding pages about the origins of the armed conflict in the Niger Delta. It was not a conflict that was triggered off by a single incident but one that had been brewing for many years – since 1956 when oil was first-discovered. As it is described in the Sciences, action and reaction are equal and opposite. Some scholars have even explained it based on a theory in the Social Sciences known as *frustration aggression theory*. However, the following are a concise summary of the factors that eventually led to the degeneration of the conflict into a full scale oil war or armed conflict. The issues involved are both historical and institutional. Others are political, social, economic as well as environmental factors.

The first critical factor that has bred distrust in the minds of the people of the Niger Delta pertains to the manner in which the nation is configured since the adoption of federalism. It has been structured in such a manner that the dominant ethnic nationalities have been allowed to overshadow the minorities. It started with the creation of three regions in 1946 and then a fourth one in 1963. In spite of the current fragmentation of the federation into thirty-six states, power is still concentrated in the centre, and this has not been helped by the long years of military rule.

Furthermore, and intricately connected to the issue of limited autonomy given to the state and the dominance of certain nationalities is the issue of fiscal federalism. Unlike in other countries (such as the United States) where the concept of federalism also accommodates fiscal federalism, in Nigeria, only 13% of the revenue generated from the centrally collected oil revenue is given back to the oil producing states as derivation. This is in spite of the fact that the constitution provides that

13% of the oil revenue is the least that may be given to the oil producing states as derivation fund.[159] Even before 1999, the figure was much less than 13%. This issue of derivation otherwise referred to as 'resource control' has been the bane of the struggle of several groups in the region and is part of what eventually snowballed into full fledged armed conflict.

Another factor that has a connection with the armed conflict relates to the general disillusionment of the people with the entire political process since 1999 when the country returned to civil rule. From the 1999 elections to those of 2003 and then 2007, the elections have been constantly characterized by rigging, falsification of results and electoral violence. At the end of the elections, a majority of the youths that were given weapons to use to aid the subversion of the electoral process were left with these weapons and saw the emerging militant groups as an avenue to put these weapons to use and also make money as well as to vent their frustrations against the state.

Furthermore, almost at all levels, there is a consensus that the level of poverty and underdevelopment in the Niger Delta region has in no small measure contributed to the crisis in the region. The mass of the unemployed youths form a ready market for recruitment into the militant groups which holds a promise of wealth to the gullible. The bloated public bureaucracy, due largely to a culture of patronage among the political class has also constrained the quality of public service that the government is able to provide. The system is also plagued by endemic corruption which has made some individuals super rich while others are abysmally poor. All these formed the basis of the agitation.

Another factor that has fuelled the conflict in the Niger Delta is the nature of certain domestic legislations that relate to land and mineral resources. These laws are conceived by the people of the region as laws that *"Rob our peoples/communities of the right to control of our lives and resources."*[160] Some ready examples of such legislation include the Petroleum Act, the Land Use Act etc. These laws have the overriding effect of stripping the indigenes of the ownership of their land and resources and conferring same on the government.

The level of environmental degradation in the region is another sore point that has festered the conflict. There is twenty four hours none stop gas flaring, damage to land, rivers, streams etc, which serve as source of livelihood for the people by oil mining activities and oil spills. This leads to

[159] Section 162 (2) of the 1999 Constitution.
[160]' Kaiama Declaration' of 1998

economic marginalization. The heavy handed and violent reaction of the federal government to these legitimate grievances contributed to the decision of many groups to adopt more radical (and militant approaches) to further the cause of their struggle. In this regard, there is ample evidence of co-operation between the state and the oil companies in the ruthless suppression of the agitations.

Other general factors that have served to exacerbate the conflict include unemployment, insecurity, lack of infrastructure, high cost of living, poverty, etc. All these gradually led to the conflict taking a militant posture. Without doubt, although the Niger Delta people have legitimate grievances, it must be noted that certain groups took advantage of the anarchic situation to engage in criminal activities and violence. Factors driving and supporting the criminalisation include, theft of oil in large scale (bunkering). Some groups, claim it is their way of taking back what the government stole from them. Such funds are also used to pursue the struggle. Also, the manipulation and use of violence in elections, the potential profits accruing from protection of oil companies, and a thriving secondary arms market all form part of the factors that served to exacerbate the conflict.

3.5 Features of the Conflict

The first major feature of militancy in the region involves the attacking and blowing up of oil installations. Oil installations remained a potential target of the militants during the pendency of the crisis.[161] When MEND declared an oil war codenamed 'Hurricane Barbarossa' sometime in September 2008, a flow station was attacked and pipelines burst at Soku Gas plant in Rivers state. A Platform belonging to Chevron (an oil company) was also attacked and a major crude trunk pipeline at Nembe was blown up at many points. This is one of several such attacks. At other occasions, a gas plant and logistics base was set ablaze. It must be noted however, that before such attacks, warnings were usually issued to the companies to vacate the region. The militants using speedboats, carry out their attacks by detonating dynamites, bombs, and hand grenades and other explosives. In June 2008, MEND attacked Nigerian's most strategic offshore oil installation, i.e. the multi-billion Bonga Oil Field which led to its eventual shutting down for several months. In most cases, the Joint Task Force (JTF) could not contain these attacks.

[161] For full report see *The Guardian*, September 28, 2008, at p. 26 – 28.

Such attacks carried with it human casualties in form of victims of the state who are sent to repel the attacks; also workers (especially security men) on the site of such installations. These attacks were aimed at driving home to the federal government, the seriousness of the demand for fiscal federalism.

Another dominant tactic employed by the militants is the taking of hostages of expatriate oil workers. This is used as a bargaining chip to drive home some immediate demands. When in February 2006 MEND started its operation and launched its maiden attack, it did so with the Kidnapping of nine expatriate staff of Wilbros (a contracting firm to the S.P.D.C.), from a flow station in Bayelsa State. MEND used these hostages as human shields by dispersing them into the Ijaw communities of Gbaramatu which were under government aerial attacks and this introduced a new dimension to the conflict. This singular action of MEND led to the termination of government aerial attacks on Gbaramatu Kingdom by the federal troops. The hostages were later released in batches unhurt with the last three set free on March 27, 2006.[162] The rapid spate of taking of oil workers hostage caused the oil companies to evacuate their workers from oil locations, and to close down operation in the region. However, it needs be pointed out that in almost every instance where hostages were taken by the militant groups, they were subsequently released unhurt at the end of negotiations with the federal government.

A further tactic used by the militants involved large scale oil theft (bunkering). The siphoning and transporting of oil is carried out by militant youths (sometimes with protection from politicians and the military). Oil bunkering provided the militant groups the resources to purchase large stock of sophisticated weapons.

On the part of the state, they carried out attacks using both air, land and sea. The State carried out countless aerial bombardments against entire communities (on the guise that these communities are housing the militants). In September 2008 for example, the JTF invaded suspected militant camps in Rivers State using air, land and sea in its attacks, while the MEND responded by declaring and 'oil war' code named "*Hurricane Barbarossa*", blowing up pipelines in the region for one week. The members of these communities were sacked from their homes and become internally displaced persons (IDPS) in other cities. During the pendency of the conflict, there were almost

[162] See *NigerDelta Rising,* Timeline of events (December 1998 toAugust 2009), available at www.nigerdeltarising.org.

countless cases of aerial bombardments of several communities in the Niger Delta region by the men of the JTF. On May 15, 2009 for example, when it became apparent that the militants cannot be overpowered by the firepower of the JTF using infantry fighters, the military JTF deploys four jet fighters, twenty four gunboats and three battalions of the Nigerian army into the creeks, using air, land and sea. The bomb attack is extended to Oporoza, the headquarters of Gbaramatu kingdom. In the attack on the Gbaramatu kingdom, which was carried out with a view of taking over "Camp 5", a MEND militants' stronghold, which lasted for a couple of days, the dead and missing were put at about two thousand.[163] In spite of denials of collateral damage on the part of the JFF, the damage is high on the side of the communities. The conflict is also replete with instances where entire communities were razed down including public facilities such as schools and hospitals by men of the JTF.[164]

There are also instances when the militants have been reported to have opened fire on innocent civilians in a fit of barbarism. The federal forces also had at its disposal, very sophisticated weapons base compared to the militants.

The militants in the Niger Delta did not comprise of a single organization operating under a common leadership with unified ideology. There is no central chain of command although sometimes, two or more groups may come together to execute a particular operation. As a ready example, sometime in September 2008, MEND and the Joint Revolutionary Council claimed it worked together to execute the week long war against the JFF in Elem-Tombia area in Port-Harcourt. The militants were a loose eclectic mix of several aggrieved factions.

Their modus operandi is like that of other armed militias around the world. They place themselves in heavily populated civilian areas, making it difficult to distinguish between fighters from civilians. Also, they take advantage of their superior knowledge of their dangerous and inhospitable home terrain and locate their camps in the heart of their creeks. Their shadowy nature was an asset to them as it made detection and suppression difficult for Nigerian security forces.

Also, there were instances when the militants through the aegis of the MEND, declared ceasefires, to allow for negotiations with the federal government; upon the breakdown of such negotiations, notice is usually given by the militant groups of their intention to resume attack of oil facilities.

[163] See *Niger Delta Rising* Op. cit.
[164] Ibid.

There is also evidence of connivance between the oil companies and the JTF; instances where such companies allow its facailities to be used in committing atrocities against host communities where it drills oil and gas from. For example, in June 2009, MEND claims that the JTF's operation against Gbaramatu communities is undertaken through Chevron's airstrip in Escravos, Delta State.[165]

3.6 The Offer of Amnesty

In spite of the intense military operations by the J.T.F. set up by the federal government, it was unable to effectively halt the activities of the Niger Delta militants. Most of the operations of the J.T.F. ended up bringing death and destruction to thousands of innocent civilians who were forced to flee from their communities which were razed down by the J.T.F. All these drew serious outcry against the federal government. The federal government realized that the continuance of military operations was no longer expedient politically and economically. It had to work out an alternative that would appease the militants and bring an immediate end the armed conflict in the region to allow production of oil to continue. Thus, the option of offer of amnesty was born. In exchange for the surrender of their arms and ammunitions, and in order for the militants to embrace peace, the government promised pardon, reintegration, resettlement and rehabilitation. The offer came with the government setting aside the sum of N50 billion as amnesty fund for resettlement and rehabilitation.[166]

The militants in return, spelt out certain terms upon which they would accept the amnesty offer. They include;[167]

1. That their interests should be represented by their witnesses who will be appointed by them to discuss the amnesty and press for certain conditions and view points;

2. Names of those granted amnesty should be classified to facilitate their easy rehabilitation into society;

3. Their names should be expunged from criminal records on the logic that they are products of government's intransigencies on the Niger Delta question, victims of political class extreme lust for power and rabid ambition, children of necessity, of the high handedness

[165] Ibid.
[166] See Vanguard, Tuesday, June 16, 2009 p.8.
[167] Daily Sun, Wednesday, June 24, 2009 p.10.

and violent suppression of the Niger Delta Struggle by the J.T.F., fall-out of mercenary elders who fed fat from the struggle of the Niger Delta people; and

4. Release unconditionally, Henry Okah, strike out treason charges against Alhaji Mujahid Asari Dokubo, release Soboma Jackreece and close the jail break case pending against Soboma George.

However some other militant leaders rejected the offer of amnesty.

The take off date for the amnesty was August 6, 2009 and the amnesty offer was to remain open for sixty days. During this period, thousands of arms and ammunitions of various kinds were handed over to the government by the leaders of the militant groups and their followers (foot-soldiers) across various cities in the Niger Delta – from Yenagoa in Bayelsa, to Benin City in Edo State to Port-Harcourt in Rivers State. The arms surrendered range from very sophisticated guns, AK 47 riffles, IFN riffles, G. 3 rifles, Machine guns, gun boats, artillery guns and locally made guns.

Years after the offer of amnesty and the implementation of the programmes promised by the Federal Government as part of the package, the issues which led to the deterioration of affairs into full blown armed struggle have not been addressed. No doubt, most of the militants especially the leaders were given huge sums of money as inducement to lay down their arms and others have been sent for training in special camps set up by the government. But the offer of amnesty did not bring to an end militancy and violence in the region. Hence in 2010, there was a resurgence of violence which led to the sacking of entire communities in the region. Very importantly also, the offer of amnesty failed to make provision for the actual victims of the conflicts. These include, innocent civilians who died, leaving behind dependents, those who were maimed and suffer permanent disability, those whose homes and properties were destroyed, those whose means of livelihood were destroyed, those who had to suffer the pain of displacement loosing job, dislocation in their social life as well as innumerable other consequences of the conflict.

3.7 Analysis of the Nature of the Niger Delta Conflict under International Humanitarian Law

Theoretically, the principles of international humanitarian law, regarding armed conflicts appears to be clear cut and straight forward: a regime for international armed conflict and another for non-international armed conflict.

In practice however, the rigid categories recognized under international humanitarian law may be inappropriate to accommodate certain classes of conflicts especially in the light of the ever changing nature of armed conflicts. In reality therefore, armed conflicts are not as clearly defined as the legal categories may suggest since some of the conflicts may not exactly tally with any of the concepts envisaged under international humanitarian law.

Between the years 2005-2009, the Niger Delta Region of Nigeria was embroiled in very violent conflict that erupted between the Federal Government forces on the one hand, and a good number of 'militant groups' on the other. Ordinarily, this conflict is one that is not of an international character.[168] At a cursory glance, it appears convenient to dismiss it as a conflict that cannot be accommodated within the ambit of international humanitarian law. Assuming such stance however, without a careful scrutiny of the conflict alongside relevant international humanitarian law principles, gradually erodes the core values and concerns of international humanitarian law.

Presumably, the rules of international humanitarian law governing international armed conflict have no part to play in the Niger Delta conflict. Focus will therefore be on the instruments and principles of international humanitarian law regulating non-international armed conflicts. This analysis will be tied to the scope of application of the provisions of two main treaty texts: Article 3 common to the 1949 Geneva Conventions and the Additional Protocol II of 1977.[169] This section will examine the criteria for application of these instruments and how these criteria may be interpreted in the light of what transpired in the Niger Delta. Also, the concept of non-international armed conflict must be related to the determination of the jurisdiction of the International Criminal court (ICC) and the relevant provisions in this statute.

3.8 Scope of Application of Article 3 Common to the Geneva Conventions

[168] Under Article 3 Common to the four Geneva Conventions of 12 August, 1949, this is the phrase that is used i.e., 'Armed Conflict not of an International Character'.
[169] The 1977 Geneva Protocol 11 Additional to the Geneva Convention of 12 August, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol 11) UN Doc. A/32/144 (1977).

The provision of Common Article 3 applies in the case of *'…. an armed conflict not of an international character occurring in the territory of one of the High contracting parties.'* Common Article 3 does not define what an armed conflict is but merely states that it must be one 'not of an international character'. By necessary implication therefore, in such conflicts, at least one of the parties involved is non-governmental. Also, such a conflict must take place within a geographical location that is, it is limited to the territory of a High contacting party. These points appear straight forward enough. In the light of this alone, one can say that the Niger Delta conflict is an armed conflict not of an international character in that it takes place within Nigeria (a High contracting party to the Geneva Conventions) between the government forces and a non-governmental armed group.

However, the issue is not as simplistic as such a reading would suggest. This is so because, whereas it is easy to identify an international armed conflict (as use of force by a state against another is not usually a common occurrence between states), it is not so for a non-international armed conflict because, force is frequently used within a state's territory for day to day enforcement actions. Therefore, to determine when such use of force has exceeded the limits of a domestic affair and has transmuted into an armed conflict for which the rules of international humanitarian law regulating non-international armed conflicts applies is very critical.

The absence of definition of 'armed conflict' by Common Article 3 has the potential of working to the advantage of victims and of insurgents who are usually desirous of having a form of international recognition. This lack of definition can permit humanitarian protection in as many situations as possible. The International Committee of the Red Cross (ICRC) has used this lacuna to push the threshold of application as low as possible, seeking to take action in all situations of civil unrest. Hence in its report, the Commission of Experts set up by the ICRC to clarify the law and consolidate humanitarian initiatives, it was stated:

> *…the existence of an armed conflict, within the meaning of Article 3, cannot be denied if the hostile action, directed against the legal government, is of a collective character and consists of a* ***minimum amount of organisation.***[170]

[170] *ICRC Commission of Experts for the study of Aid to the Victims of Internal Conflicts*, Geneva, 25 – 30 October 1962 (Geneva 1962) referred to in Abi – Saab, G., "Non-International Armed Conflict" in UNESCO,

For the provisions of Common Article 3 to apply, the conflict must reach a level that distinguishes it from other forms of violence including 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.'[171] It is generally accepted that low-intensity internal disturbances and tensions are excluded from the ambit of the provision of Common Article 3.

This limit appears to be reached every time the situation can be defined as 'protracted armed violence' which can be assessed against the backdrop of two fundamental criteria:

(a) the intensity of the violence

(b) the organization of the parties.[172]

These criteria are best evaluated on a case by case basis depending on a host of indicative conditions. It has been suggested for example, that one of such conditions with regards to the intensity of the violence can be the collective nature of the fighting or the fact that the state is obliged to resort to its army or armed forces to control the situation as the police force is unable to deal with the situation on their own.[173] Other factors that might help determine the intensity of the conflict include the duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded and displaced persons etc) are all pieces of information that may be taken into consideration. In this regard, there is a very instructive recommendation by a Commission of Experts which stated in part as follows:

> *The existence of an armed conflict, within the meaning of Article 3, cannot be denied, if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organization. In this respect and* ***without these circumstances being cumulative,*** *one should take into account such*

Internal Dimensions of Humanitarian Law (Henry Dunant Institute/UNESCO/Martinus Nijhoff, Dordrecht, 1988), 217 at 225.

[171] Art 1 (2) of Additional Protocol II but also valid for CA 3; See ICRC, *How is the Term ' Armed Conflict' Defined in International Humanitarian Law?,* Opinion Paper, March 2008, p. 3; See also *Prosecutor v. Limaj*, Case No. IT – 03 – 66 – 7, Judgement (Trial Chamber), 30 November 2005, Para. 84.

[172] See ICTY, *Prosecutor v. Tadic*, Case No. I7-94 1 – 7, Judgement (Trial Chambers), Para. 561 – 568 especially Para 562. See also ICTY*, Prosecutor v. Limaj* (Supra).

[173] See Vite, S., *Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations* IRRC, Vol. 91 ,No. 873 ,March 2009, 69 at 76.

> *factors as the length of the conflict, the number and framework of the rebel groups, their installation or action in a part of the territory, the degree of insecurity, the existence of victims the methods employed by the legal government to re-establish order etc.*[174]

With regards to the second criterion (i.e., the level of organization of the parties), it really pertains to the level of organization of the non-governmental armed groups or insurgents as it can be taken for granted that the government armed forces meets this requirement *ab initio*. A certain level of organisation is necessary for such armed group to be regarded as a 'party' to the conflict as a random group of looters and rioters cannot be accepted as being party to a serious armed conflict. Also, without sufficient organization on the part of the insurgents, the net of application would be spread too wide, so that Article 3 would include conflicts which are too limited or small scale to have been intended as a non-international armed conflict.

A number of indicative elements to determine the level of organization can be gleaned from several sources. One of such is that the level of organization must be such that the armed groups are capable of carrying out the various obligations imposed on them by Article 3, which imposes obligations on all sides to the conflict.[175] Others include, the existence of an organisational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.[176] As with the indicative criteria for determining the intensity of the conflict, the above listed conditions for determining the level of organization of the parties do not apply cumulatively. However, both criteria (i.e., level of intensity of violence and level of organization of insurgents) must be met before a conflict can be described as a non-international armed conflict. Otherwise, the situation may be referred to as being mere 'internal disturbances' or 'internal tensions';[177] 'internal disturbances' and 'internal tensions' designate varying degrees of social instability that do not pertain to armed conflict, they have no 'legal' definition even though they appear in Additional

[174] See Pinto, R., (Rapporteur), *Report of the Commission of Experts for the Study of the Question of Aid to Victims of Internal Conflicts*, IRRC, February 1963, 82-83.
[175] See Pictet, J.S., (ed.), *Commentary on the Geneva Conventions of 12 August 1949*, vol. 1,(Geneva, ICRC, 1952) p. 50.
[176] See *Prosecutor v. Limaj* (supra) at Para 168.
[177] See Pictet, J.S., Op. cit., at pp. 49 – 50, See also Vite., S., Op. cit. at p. 77.

Protocol II.[178] They also do not meet the threshold requirement for a non-international armed conflict.

A further question that needs to be considered with regards to determining the nature of the conflict under Common Article 3 is whether there is need to take into account the **motives** of the non-governmental groups involved in the conflict. Advocates of this proposition contend that only groups endeavouring to achieve a political objective may be accommodated. 'Purely criminal' organizations such as mafia groups or territorial gangs would thus be eliminated and could in no way be considered as parties to a non-international armed conflict.[179] This proposition however, has no support under the current position of international humanitarian law. It has even been asserted that with the Mexican drug cartels whose aims are fundamentally criminal, the level of violence caused by them has now reached a level that makes it possible to define this other kind of conflict as War; especially using the subjective barometer that is applied nowadays in classifying a conflict as war; a threshold of 1,000 deaths or more.[180]

In the *Limaj* case,[181] the International Criminal Tribunal for Yugoslavia (ICTY) had occasion to consider this issue of motive when considering the nature of the fighting that took place in 1998 between Serbian forces and the Kosovo Liberation Army. In this case, the defence had challenged the idea that the fighting could constitute an armed conflict, arguing that the operations carried out by the Serbian forces were not intended to defeat the enemy but to carry out 'ethnic cleansing' in Kosovo. The Tribunal rejected that argument by stating that the determination of an armed conflict is based solely on two criteria: the intensity of the conflict and the organization of the parties and pointed out in particular that:

> *The purpose of the armed forces to engage in acts of violence or also achieve some further objective is therefore, irrelevant.*[182]

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[178] For a fuller review of 'internal disturbances' and' internal tensions', see Eide, A., "Internal Disturbances and Tensions" in UNESCO *International Dimensions of Humanitarian Law*, Henry Dunant Institute/UNESCO/Martinus Nijhoff Dordrecht,1988, p. 279 – 295.

[179] Some advocates of this proposition include: Bruderlein, C., "The Role of Non-state Actors in Building Human Security: The Case of Armed Groups in Intra-State Wars*," Centre for Humanitarian Dialogue*, Geneva, May 2000. See also Petrasek, D., "Ends and Means: Human Rights Approaches to Armed Groups", *International Council on Human Rights Policy*, Geneva, 2000, p. 5.

[180] See Blin, A., *Armed Groups and Intra-State Conflict : The Dawn of a New Era,* IRRC Vol. 93, No. 882 June 2011 p. 287 at p. 298.

[181] Op. cit.

[182] *Prosecutor v. Limaj* Op. cit., at Para 170.

To say the least, the position of the tribunal is very rational in view of the fact that practice has shown that a measure of criminality is never lacking in the activities of government armed forces or on the part of insurgents during armed conflict. Further, the motives of armed groups are never uniform and cannot always be clearly identified. Criminal activities such as extortion, drug-trafficking, oil theft (bunkering in Nigerian parlance) are usually carried out to raise funds to prosecute the conflict while at the same time pursuing a political objective. While examining the financing methods of armed group, one writer observed thus:

> *Armed groups use a wide variety of financing methods to sustain their military activities… strategies used by armed groups include, for example, bank robbery, foreign government support, revenue from natural resources, kidnapping, Diaspora remittances, and taxes.*[183]

A further issue that bears reminding at this stage is that Common Article 3 makes no reference to control of territory by the insurgents or armed groups. Therefore, it can be justifiably presumed that under Common Article 3, armed groups should be able to demonstrate a degree of organization and also that the conflict must attain a certain level of intensity, it does not stipulate that these armed groups should be able to control a part of the territory which is a cardinal requirement under Additional protocol II. In practice therefore, a conflict may fall within the material field of application of Common Article 3, without fulfilling the conditions determined by Additional Protocol II. Such conflicts will obviously be governed by the provisions of Common Article 3. This is reinforced by the fact that Additional Protocol II does not modify the existing conditions of application of Common Article 3 but only develops and supplements it. Conversely tough, all the armed conflicts covered by Additional Protocol II are also covered by Common Article 3.

3.9 Scope of Application of Additional Protocol II

Article 1 (1) and (2) spells out the material field of application of this protocol. It states that the protocol develops and supplements' Article 3 *without modifying its existing conditions of application*. Its provisions therefore apply to non-international armed conflicts:

[183] Wennmann, A., *Economic Dimensions of Armed Groups: Profiling the Financing Costs and Agendas and their Implications for Mediated Engagements,* I.R.R.C., Vol. 93, No. 882, June 2011, 333 at 337.

> *which take place in the territory of a High contracting party between its armed forces and dissident armed forces or other organized armed groups which under a responsible command, exercise such control over a part of its territory as to enable them carry out sustained and concerted military operations and to implement this protocol.*

Situations of internal disturbances and tensions are excluded from its material field of application[184] much in the same vein as Common Article 3. These include 'riots, isolated and sporadic acts of violence and other acts of a similar nature' as not being armed conflict.

The terms defining the material field of application of Additional Protocol II are clearly worded and very stringent. It thus limits its scope of application more than that of Common Article 3. The non-governmental forces or armed groups are expected to demonstrate a high degree of organization and must be under a 'responsible command' and also exercise 'territorial control' (this latter requirement of territorial control is absent in Common Article 3). This further restricts the scope of application of the protocol, and is meant to enable the armed groups to carry out 'sustained and concerted military operations and to implement the Protocol.'

This requirement of territorial control has come under severe criticisms. It has been observed for example that it is a requirement that is almost impossible to meet except in full blown civil wars[185] and also that the provision was:

> *… too restrictive in view of the nature of modern and particularly guerilla warfare …. Such a requirement would then exclude from the ambit of protocol II many, if not most, of the contemporary types of internal armed conflict and would confine it to the relatively rare cases of characterized civil War; it would thus severely limit its real significance and usefulness.*[186]

[184] Article 1 (2) AP II.
[185] Abi-Saab, R., "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern*,"* in Delissen, A.J.M., and Tanja, G.J., (eds.), *Humanitarian Law of Armed Conflict:Challenges Ahead: Essays in Honour of Frits Kalshoven* (Martinus Nijhoff, Dordrecht, 1991), 209 at 216.
[186] CDDH/I/SR.24; VIII, 229 at 235, referred to in Moir, L., *The Law of Internal Armed Conflict*, (Newyork:Cambridge University Press, 2002) p. 106.

Also, there is no such requirement under Article 1 (4) of Additional Protocol I[187] for national liberation movements.

In view of the above difficulties that will be encountered in practice to identify situations that meet the criteria of application established by Additional Protocol II, the practical way to get round it would be to adopt a broad and liberal interpretation in keeping with the spirit of humanitarian law.

Accordingly, temporary control that is even geographically limited should suffice to justify the application of Additional Protocol II. The ICRC adopted an intermediate position on this issue, accepting that territorial control can sometimes be 'relative, for example when urban centres remain in government hands while rural areas escape their authority.'[188]

It is apposite to emphasize once again that the additional restrictions provided for in Article 1 (1) only define the field of application of the Protocol and do not extend to cover the entire law of non-international armed conflicts. Common Article 3 thus preserves its autonomy, and is more extensive in the number of situations it can cover.

In view of the foregoing exposé on the nature of non-international armed conflicts, it is safe to assert that the Niger Delta conflict is a non-international armed conflict falling squarely within the ambit of Common Article 3. The conflict took place in the territory of a High Contracting Party. Again, the hostile actions of the militant in bombing oil installations is in reality, an economic missile targeted at the federal government – this is borne out by the swift action of the Federal Government which eventually led to open confrontation between the forces of the Federal Government and those of the militant groups. This point made, the question then turns on whether the conflict satisfies the two criteria earlier pointed out i.e. did the intensity of the violence and the organisation of the militants amount to one that can be described as a non-international armed conflict for which Common Article 3 (and then Additional Protocol II) will apply?

There are a good number of reasons to be advanced why the only answer to this poser should be in the affirmative. In the first instance, the intensity of the attacks compelled the government to resort to the use of the armed forces (the J.T.F.) as the regular Nigerian police would not have had

[187] Geneva Protocol I, Additional to the Geneva Conventions of 12 August, 1949, and Relating to the Protection of Victims of International Armed Conflict.
[188] Sandoz, Yves, Swinarski, Christophe and Zimmerman , Bruno (eds.) *Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC, Martinus Nijhoff, Geneva 1987, Para 4467.

the least impact on the military force of the militants. This resort to the armed forces as pointed out above is an indication of the intensity of the conflict. The duration of the conflict and the frequency of attacks is also an important factor. The Niger Delta conflict spanned a period of over four years (2005–2009). Even in 2010, there were still pockets of attacks which were repelled by the J.T.F. In the heat of the crisis, the frequency of the attacks by both sides reached a frightening dimension as attacks took place almost daily by either side with casualties abounding on both sides.

Furthermore, with entire communities being sacked as a result of aerial bombardments, there were well documented cases of internally displaced persons and communities.[189] This without doubt, cannot be waived off as a matter for the internal or domestic legislation. In the thick of these brazen violations, the government continually denied its involvement in the killing of its citizens.[190] This is not unexpected as states have always had reservations about exposing its activities to the scrutiny of international community or having international regulations apply to its affairs which no matter how crassly it amounts to fundamental violations of citizens liberties, would still prefer to play down the enormity of the events.

As observed earlier, the degree of insecurity at the time of the conflict is a factor that goes to determine the intensity of the conflict. In the heat of the conflict in the Niger Delta, the level of insecurity in the conflict zones become so high that a good number of multinationals were forced to shut down operations and flee from the region, while entire communities became deserted, to return only after a long time when relative normalcy had been restored.

A more pungent way of determining whether the conflict is so intense as to come within the ambit of the provisions of Common Article 3 is to ask, *can the events that took place be described as situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts of a_similar nature?* With the number of militants involved in the conflict (easily ascertained by the number of those who accepted the amnesty offer) and the mass of

[189] See *The Urhobo Voice*, December 13, 2010, wherein it was reported that the J.T.F. killed over 1500 citizens in Gbaramatu and Okerenkoko, both in Delta state, and the attack was described as 'genocide'. See also *Sunday Vanguard*, December 5, 2010, where it was also reported that there were mass killings in the Niger Delta by the J.T.F.

[190] See for example, *The Guardian*, Sunday September 28, 2008, p.71, where after killing scores of civilians through aerial bombardments, the J.T.F. came out to publicly deny killing of civilians in Tombia communities in Rivers state.

sophisticated weapons surrendered at various locations by different militant groups,[191] the answer to this question is definitely negative. Another point to be made is the fact that the offer of amnesty cannot take place outside the context of an armed conflict. Similarly, the Nigerian government will not deploy the full weight of its armed forces, including the use of its naval war ships as well as jet fighter aircrafts to quell an ordinary internal tension.

A point for further consideration is the level of organization of the insurgents (militants). Here, it is necessary to observe that obedience to the provisions of international instruments usually has very little to do with the ability of the insurgents to so do but a combination of a good number of factors ranging from the group's objective, it's military advantage (or disadvantage) and what international humanitarian law means to such groups.[192] More importantly however, this requirement of ability to implement the provisions as a precondition for the provisions to apply has the potential of detracting from the ideals of an international humanitarian law instrument which should be held to apply to as many conditions as possible. It further reveals an almost unwholesome intention on the part of the drafters of the instrument to make the provisions binding for the government only in so far as the insurgents have the ability to be bound. This diminishes the spirit of the instruments which should ordinarily carry unilateral (and not reciprocal) obligations whose application has nothing to do with the conduct of either party.

The requirement of an organisational chart delimiting the command structure in the armed group[193] is one that cannot be taken too seriously. Most armed groups are made up of semi-literates to stark illiterates and school drop-outs who are not bothered about an organogram of the power hierarchy. These fighters know their leaders (either as generals' or 'commanders') and that suffices for them. In the case of the Niger Delta militants, the leaders were known not only to the fighters but also to the federal government who at various times entered into talks with them. At the height of the conflict, the vice president even had to travel to the creeks of the Niger Delta, to

[191] See Gasiokwu, M.O.U., "The Law and Politics of Amnesty in Nigeria: The Niger Delta Militants Amnesty Episode in Perspective," in *Law*, *Politics and Diplomacy in Contemporary Nigeria: Essays in Honour of Professor B.I.C. Ijomah*, Gasiokwu, M.O.U., (ed., Enugu, Chenglo Limited,2010), p.276 at pp.298-301,where the events surrounding the offer of amnesty and the surrender of weapons by the militants has been well chronicled.

[192] See Bangerter, O., "Reasons Why Armed Groups Choose to Respect International Humanitarian Law or Not", I.R.R.C., Vol. 93 No. 882, June 2011.

[193] See p.16 above.

have direct talks with the leaders of the militant groups geared towards bringing the conflicgt to an end.[194]

During the pendency of the conflict in the Niger Delta, the various armed groups were able to launch operations and attacks with two or more groups sometimes coming together to launch an attack after which they revert to the status quo ante.[195] – More so, the various groups had their ways and means of recruiting and training new combatants. They also had their own rules which regulated their affairs even though not in the form of written codes. As a ready example, it was the practice of these armed groups to issue warnings to the multinationals to vacate their locations before launching any major attack.[196] This was to minimize human casualties. Also, hostages are usually taken and held as bargaining chips and as part of an unwritten code, such hostages are set free at the end of negotiations; there is hardly any instance of a report where such hostages were killed at the end of the day. Furthermore, at the onset of peace talks with the federal government, it was the custom of the militants to declare ceasefire which is usually respected; even when such talks break down, notice is issued, calling off such ceasefire, and the date of resumption of attacks on oil installations is also announced.

A point that even needs to be made with regards to these indicative criteria for determining the level of intensity of the conflict and also of the organisation of the insurgents is the fact that they do not apply cumulatively. With what has been exposed above, the Niger Delta conflict falls squarely within the type of conflict envisaged by the provisions of Common Article 3.

It has been observed in some quarters that the activities of the militants are tinged with elements of criminality.[197] Although this may be true, this does not affect the applicability of IHL instruments as already noted. In practice, it is hardly tenable to divorce the activities of fighters from some level of criminality whether by the government forces or the armed groups. Also, some of these elements of criminality (oil theft and kidnappings in the case the Niger Delta conflict) were perpetrated to prosecute the professed intention of the armed groups. Even at that, it is questionable whether it will be correct to assert that the armed groups were mere criminal gangs.

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[194] See *Niger Delta Rising* (Timeline of Events, December 1998-August 2009) Op.cit.
[195] See *The Guardian*, September 28, 2008, p.26, where it was reported that MEND and the NDPVF forged an alliance to attack an oil facility i.e., the Olubiri Flow Station operated by SHELL.
[196] See note 10 above.
[197] See Gasiokwu, M.O.U., (supra) at p. 288.

With regards to the provision of Additional Protocol II, the Niger Delta conflict may also be held to be a conflict coming under its provision for which the above arguments i.e., with regards to the level of intensity of the conflict and of the organization of the insurgents still stands. The only point of distinction is the requirement of 'territorial control'. Again as observed above, this has the potential of excluding from the ambit of the protocol most of the contemporary types of armed conflicts thereby defeating the humanitarian intention of the Protocol. Hence, territorial control can be interpreted to mean "temporary control" which is geographically limited, for example, control of the creeks by the Niger Delta militants. It could also mean 'relative control' as in control of the rural areas. More critical however, is the fact that the control of territory was not within the professed objectives of the militants.

In the final analysis therefore, whereas the Niger Delta conflict easily falls within the ambit of Common Article 3, subject to the interpretation of 'territorial control' that is adopted, it can also be accommodated within the meaning of Additional Protocol II.

3.10 Observance of the Fundamental Principles of International Humanitarian Law in the Niger Delta Conflict

As already mentioned above, the fundamental principles of International Humanitarian Law includes the principle of humanity, of distinction,(that is between civilians and combatants, civilian object and military objectives), the principle of necessity, (as a limit to military action),the principle of proportionality, the prohibition on causing unnecessary suffering, and the independence of *jus in bello* (humanitarian rules to be respected in warfare) from *jus ad bellum* (the legality of the use of force). These principles are not based on a separate source of international law, but on treaties, custom and general principles of law. These principles express the substance and meaning of the plethora of rules in International Humanitarian Law; they make the rules understandable and have to be taken into account when interpreting them.

The principle of humanity requires that those who do not take part in the armed conflict, that is, protected persons, should be treated humanely. This principle is clearly expressed in common Article 3 as well as in Articles 3 and 4 of Additional Protocol II. Under Additional Protocol II, Article 3 prescribes humane treatment for persons taking no active part in hostilities and proscribing a number a number of acts that are considered inhumane. Article 4 defines persons that are

considered protected persons within the ambit of Article II. The principle of humanity provides the foundation for all of the detailed rules of International Humanitarian Law; it requires a belligerent to treat protected persons with respect and not to mistreat, damage nor threaten protected persons. It also requires that a belligerent must defend protected persons from evils and sufferings brought about by armed conflict, and make sure they are not exposed to undue dangers. The principle of humanity also encompasses the principle of equality, that is, belligerents must not engage in adverse discrimination against protected persons.

The principle of distinction on the other hand requires that belligerents distinguish between military objectives and civilian persons or objects at all times, and attack only military objectives. This is a fundamental principle that underlies International Humanitarian Law and is a norm of customary International Humanitarian Law applicable to both situations of international as well as non-international armed conflict situations.[198] The principle of necessity requires that the belligerent only adopts such measures as are necessary to overpower the enemy and to bring about its surrender. The aim of any armed conflict should not be seen as the destruction of as much of the adverse belligerents property as possible; rather, the proper aim is to destroy and to kill as few as possible and to cause such damage only to the extent necessary to overpower the enemy.

The principle of proportionality requires that all military measures taken by belligerents must be proportionate to the aim they seek to accomplish. It means that the military advantage obtained by a particular operation must outweigh the damage caused to civilians and civilian object by that action.[199]

While the armed conflict in the Niger Delta region lasted, the forces of the federal government failed to show respect for these fundamental principles of International Humanitarian Law. The well documented cases of indiscriminate aerial bombardments carried out by the federal government forces violates all the basic principles of International Humanitarian Law. There was no attempt to distinguish between civilians and the militants, nor between civilian objects and military objectives. This also runs contrary to the principle of humanity, of necessity and of proportionality.

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[198] See Henckaerts, J.M., and Doswald-Beck, L., (eds), *Customary International Humanitarian Law Volume I: Rules* (Cambridge, Cambridge University Press, 2005), also available at www.icrc.org, Rule 1.
[199] Ibid., Rule 14.

This assertion also holds true for the several cases where entire communities were razed down by the JTF including public facilities such as schools and hospitals. There is obviously no military advantage to be achieved from the razing down of entire towns and villages; obviously, it was meant to be punitive and to create fear and panic among the innocent civilians that did not take up arms against the state. On the part of the militants, there is a recorded case of where expatriate oil workers that were held hostage were dispersed into the communities as human shields to prevent aerial attacks by the federal government forces. This also runs counter to the fundamental principles of humanity. Also, the events that played out during the conflict showed that the federal government and its forces did not attempt to protect the innocent civilians from the effects of the hostilities in line with the principle of humanity.

3.11 The Relevance of the Rome statute of the International Criminal Court[200] in the Niger Delta Conflict

The jurisdiction of the International Criminal Court (ICC) extends over non-international armed conflicts (or armed conflict not of an international character) where there are (i) serious violations of Article 3 and (ii) other serious violations of the laws and customs of war that are applicable in those situations.[201] In both instances, it is provided that the relevant provisions do not apply to 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature.'[202] Under serious violations of Common Article 3, it lists a number of acts that constitutes these violations when committed against persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause:

(i) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

(ii) Committing outrages upon personal dignity in particular, humiliating and degrading treatment etc.

[200] International Criminal Court (Rome Statute) of 1998.
[201] Ibid., Article 8(2)(c)and(e).
[202] Ibid., Article 8 (2)(d) and (f).

In the case of other serious violations of the laws and customs of war applicable in non-international armed conflict, the statute lists a number of acts, such as intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities; buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives. Also, pillaging a town or place, even when taken by assault; committing rape or any other form of sexual violence. Ordering the displacement of the civilian population for reasons related to the conflict, unless the security of the civilians involved or imperative military reasons so demand. All the above and some other acts listed as constituting violations of the relevant provisions were all acts that were commonplace during the Niger Delta conflict.

With regards to the material field of application, the ICC statute clarifies the notion of what non international armed conflict is in the case of 'other serious violations'. Article 8 (2) (f) provides that in such cases, the rules must apply to armed conflict that take place in the territory of a state, when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups.

Other points that needs be noted with regards to the statute of the ICC is the fact that by its provision violators can be held guilty individually (i.e. individual criminal responsibility) for their actions during the conflict.[203] Also, is the irrelevance of pleading of 'official capacity' as well as the responsibility of commanders and other superiors for crimes within the jurisdiction of the court committed by forces under their or her effective command and control. It is also worth noting that the crimes within the jurisdiction of the court are not subject to any statute of limitation.[204]

It would appear that with regards to non-international armed conflicts, what the Rome Statute of the ICC did, basically, is to codify the existing rules of customary international humanitarian law and streamline the relevant applicable rules. It identified two types of non-international armed conflicts namely: conflicts within the meaning of Common Article 3 and secondly, protracted non-international armed conflict. It does not however create a new type of non-international armed conflict but only streamlines the types for which the jurisdiction of the statute extends, and therefore applies only to the exercise of the court's jurisdiction.

[203] See Article 25, ICC Statute.
[204] Ibid., Article 29.

CHAPTER FOUR

INDIVIDUAL CRIMINAL RESPONSIBILITY AND THE RESPONSIBILITY OF STATES IN NON-INTERNATIONAL ARMED CONFLICTS

The proliferation of internal armed conflicts in recent times calls for a constant inquiry into the present state and the future direction of the criminal aspects of international humanitarian law applicable to non-international armed conflicts. This is critical in view of the fact that one of the problems confronting international humanitarian law relates to its treatment of violations of its principles (i.e., enforcement), especially those caused by individuals and the extent to which these violations would be penalized. The sovereignty of states and their insistence on maintaining their sovereign authority is one factor that severely limits the reach of the law during and after such conflicts.

Whereas, it is taken for granted that individual criminal responsibility usually arises in cases of violations of international humanitarian law principles during international armed conflict, the position is not so clear when it comes to non-international armed conflicts. It has been observed for example, that 'international humanitarian law applicable to non-international armed conflicts does not provide for individual penal responsibility.'[205] This assertion appears borne out of the fact that nothing in the provisions of Common Article 3[206] and Additional Protocol II[207] sets out criminal liability for violation of its provisions and in the case of the latter, it even fails to outline any grave breaches. However, there is no moral justification and no truly persuasive legal reason for treating

perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars. For these reasons, this chapter is concerned with an inquiry into the origins and development of the principle of individual criminal responsibility. Also, what is implied by the term as espoused by the relevant International Criminal Tribunals. This starts with the jurisprudence expounded by the Nuremberg and Tokyo Tribunals, and more importantly, that of the Yugoslavia and Rwandan

[205] Plattner, D., *The Penal Repression of Violations of International Humanitarian Law Applicable in Non-International Armed conflicts* (1990), 278 IRRC 409 at 414.
[206] i.e., Article 3, common to the four Geneva Conventions of 12 August, 1949.
[207] 1977 Geneva Protocol II Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts.

Tribunals which came up much later in time. Furthermore, this chapter considers whether the rules of international humanitarian law applicable in non-international armed conflict do in fact govern the conduct of individuals and whether a violation of those rules attract individual criminal responsibility and if this responsibility emanates from international humanitarian law as it stands today. Also examined is whether and at what point individual criminal responsibility arises during such conflicts and how the decisions reached by the various tribunals impacted on this principle. Also, the current position of the law as reflected in the Statute of the International Criminal Court[208] and the impact of the tribunal decisions on this are also considered. Current challenges in this area of the law have been identified and suggestions proffered for possible reform.

This chapter will further analyse the responsibility of the state during the pendency of as well as after non-international armed conflicts under international humanitarian law. It will in the light of this, examine the actions of the Federal Government during and after the Niger delta armed conflict whether it corresponds to what is expected of it under International Humanitarian Law as well as the factors that might have been responsible for any failings in this regard and how it can be overcome in future.

4.1 Origin and Development of the Principle of Individual Criminal Responsibility: The Role of the Nuremberg and Tokyo Tribunals

The first milestone that had profound effect on international criminal law was the trials of major war criminals held in Nuremberg and Tokyo after the Second World War. However, prior to this time, the ground work for incriminating individuals on the basis of war crimes being treated as grave violations of the law applicable in international armed conflicts was already being formulated. After the First World War for example, the Treaty of Versailles[209] of 28 June 1919 under Articles 228 and 229 established the right of the Allied Powers to try and punish individuals responsible for 'violations of the laws and customs of war'. This Treaty established that Kaiser William II of Germany, whom it publicly arraigned 'for a supreme offence against international morality and the sanctity of treaties'[210] and those who had carried out his orders were personally

[208] 1998 Statute of the International Criminal Court, ao known as, The Rome Statute.
[209] i.e., 1919 Treaty of Peace Between the Allies and The Associated Powers and Germany (Treaty of Versailles).
[210] See Art. 229, The Treaty of Versailles.

responsible. It thus recognized the right of the Allied and associate governments to establish military tribunals for the purpose of prosecuting persons accused of having committed war crimes. Thus, the responsibility not only of the states, but fundamentally, of individuals was established as a principle of international law allowing grave breaches of international humanitarian law to be prosecuted by international tribunals established for that purpose.

This position was further developed when after the Second World War there was agitation within the international community for the need to prosecute persons responsible for serious violations of the laws of war, with regards to both the traditional responsibility of states as well as the personal responsibility of individuals.[211] The horrendous nature of the crimes committed by the Nazis and the Japanese made it easy for the Allied powers to enter into an agreement to establish an international military tribunal. Therefore, on August 8, 1945, the Governments of France, the United Kingdom, the United States and the then USSR, acting in the interest of the United Nations and by their representatives duly authorized thereto, signed in London, an Agreement for the Establishment of an International Military Tribunal for Nuremberg.[212] The Commander-in-Chief of the occupying forces in Japan established the Tokyo Tribunal for the same purpose.[213] The tribunals were meant:

> *for the trial of war criminals whose offences have no particular geographical location whether they be accused individually or in their capacity as members of organisations or groups or in both capacities*[214]

The Nuremberg Tribunal was meant to operate in accordance with a Charter annexed to the Agreement. The criminal jurisdiction of these tribunals encompassed such crimes as crimes against humanity, war crimes and crimes against peace. It embraced the scope of activities conducted or performed by leaders, organisers, instigators and accomplices who had taken part in the formulation or execution of a common plan or conspiracy to commit any of these crimes.

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[211] Shasthri, V.S., "Individual Criminal Responsibility for Violations of international Humanitarian Law*"* in *International Humanitarian Law: An Anthology*, Bhuiyan J.H., et al., Op. cit., (eds., 2009 Lexis Nexis, Butterworths Wadhwa Nagpur, India 2009), 181 at p.187.
[212] London Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis 8 August, 1945 and Charter of the International Military Tribunal (Nuremberg), (hereinafter, London Agreement).
[213] 1946 Charter of the International Military Tribunal at Tokyo.
[214] See Art. 1, London Agreement.

The adoption of the Charters of the Nuremberg and Tokyo Tribunals advanced the process of codification of international humanitarian law since the Charters defined a series of criminal offences for which individuals could be held accountable. Also, courts were instituted that took effective action and set out a series of universally recognized principles. The Nuremberg and Tokyo trials greatly contributed to the formulation of case law regarding individual criminal responsibility under international law and marked the beginning of a gradual process of precise formulation and consolidation of principles and rules during which states and international organizations launched initiatives to bring about codification through the adoption of treaties.[215]

It was at the Nuremberg trial that the court upheld and reiterated the legality of punishing individuals for crimes against international law. It was submitted on behalf of the defendants that international law is concerned with the actions of sovereign states, and provides no punishment for individuals; and further, that where the act in question is an act of state; those who carry it out are not personally responsible but are protected by the doctrine of the sovereignty of state. The tribunal rejected these arguments holding that it has long been recognised that international law imposes duties and liabilities upon individuals as well as upon states. The court then asserted:

> *crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law been enforced.*[216]

However, the advancement of the law at this stage with regards to responsibility of individuals pertained only to war, that is, armed struggle between two or more states and was yet to be extended over the conflicts that took place within states i.e., non-international armed conflicts. The primary legal bases for the regulation of non-international armed conflicts are contained in Common Article 3 and Additional Protocol II, which provisions were yet to evolve at that time.

4.2 Contributions of the Ad Hoc Tribunals for Yugoslavia and Rwanda

[215] See Shastri , V.S., Op. cit., wherein developments in international law with regards to the principle of individual criminal responsibility after the Nuremberg and Tokyo trials but prior to the setting up of the Yugoslavia and Rwandan Tribunal in the 1990s was examined.

[216] See Trial of the Major War Criminals before the International Military Tribunal, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents and Proceedings, Nuremberg 1947; 1946 (1947) 41 A.J.I.L. 172.

In the early 1990s, armed conflict broke out in former Yugoslavia and in Rwanda. This resulted in severe violations of international humanitarian law during the conflict. The widespread atrocities committed during the conflicts led to the adoption by the United Nations Security Council of statutes creating International Criminal Tribunals to bring those accused of violations of the relevant law to justice.[217] The first Tribunal to be established was that of Yugoslavia closely followed by that of Rwanda.[218] The UN Security Council acted in pursuance of the rules set forth in chapter VII of the United Nations charter (in addition to a request by the Government of Rwanda). The International Criminal Tribunal for Yugoslavia (ICTY) was given power under articles 2 and 3 of its statute to prosecute persons responsible for serious violations of international humanitarian law in respect of violations of the 1949 Geneva Conventions, violations of the laws and customs of war, genocide as well as crimes against humanity.

It has been asserted that the offences listed in articles 2 and 3 indicate that the Security Council considered the armed conflicts in Yugoslavia as international.[219] However, in one of the most significant decisions of the ICTY, *Prosecutor v. Dusko Tadic,*[220] it was suggested for the first time, that there is a body of customary international law applicable to internal armed conflicts, and that the violation of these rules can involve individual criminal responsibility. In examining the power of the court to prosecute persons for 'violations of the laws or customs of war' as provided in Article 3 of the ICTY statute, the court held that the provision was meant to encompass all violations of international humanitarian law not covered by any other provision in the statute. More specifically however, it was held to cover among others, infringements of the provisions of the Geneva Conventions other than grave breaches, violations of Common Article 3 and other customary rules

[217] See UN Resolution 808 (1993), for that of the Yugoslavia Tribunal and UN Resolution 955 (1994) for the Rwandan Tribunal.
[218] See, Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of Former Yugoslavia, 1993 UN Doc. S/25704, Annex 32 ILM 1192 (1993) for the Statute of the Tribunal for Rwanda, See, 33 ILM 1602 (1994).
[219] See Meron, T., '*International Criminalisation of Internal Atrocities'* (1995) A.J.I.L. vol. 89, No 3 p. 554 at 556.
[220] See generally *Prosecutor v. Tadic*, Appeal on Jurisdiction, case IT – 94 – 1 – AR 72 (2 October 1995), 35 ILM 32 (1996), hereinafter *Tadic,(jurisdiction); Prosecutor v. Tadic*, Opinion and Judgments Case IT – 94 – 1– T (7 May, 1997), 36 ILM 908 (1997), hereinafter *Tadic* (Judgment); and *Prosecutor v. Tadic* (Judgement) of the Appeals Chamber case IT – 94 – 1 - A (15 July 1999) 38 ILM (1518) 1999 hereinafter *Tadic* (Appeal Judgment).

on internal armed conflicts, and violations of agreements binding on the parties to the conflict qua treaty law.[221]

Tadic had initially claimed that Articles 3 of the court's statute was inapplicable in his case as it was applicable only to international armed conflicts, whereas, the conflict taking place in the former Yugoslavia was internal. On appeal against the jurisdiction of the Tribunal, he changed his defence to claim that there was, in fact, no armed conflict taking place in the prijedor region at the time when the crimes were alleged to have taken place. The appeals chamber in dismissing this proposition, went further to assert that the jurisdiction of the Tribunal to hear cases under Article 3 of the Tribunals statute was nevertheless, *equally applicable to international as well as internal armed conflicts.*[222]

The court went on to consider if individual criminal responsibility arises in cases of internal armed conflict. This issue came up for consideration in the *Tadic case* because Tadic argued that, even if there are certain general principles applicable to both international and internal armed conflicts, these rules carry no individual criminal responsibility if violations are committed during an internal armed conflict.

It is worth recalling that nothing in Common Article 3 sets out criminal liability for violation of its provisions. Additional protocol II is the same, even failing to outline grave breaches. It has even been claimed that violations of article 3 have, in fact, never been treated as crimes under international law. However, as the Trial chamber in *Prosecutor v. Delalic*[223] stated:

> *The fact that the Geneva conventions themselves do not expressly mention that there shall be criminal liability for violations of common article 3 clearly, does not in itself, preclude such liability.*

The tribunal held further that, the assertion that those violations of the conventions which are not grave breaches entail no individual criminal responsibility cannot be supported. Under the Yugoslav Tribunal, individual criminal responsibility arises primarily under article 7 (1) of the statute which provides as follows:

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[221] See *Tadic* (Jurisdiction) at paragraph 89.
[222] See *Tadic* (Jurisdiction) at paragraph 70; also the conflict was held to have both international and internal aspects at paragraph 77; this position was supported by the Trial chamber in *Tadic* (judgement) at paraphs 678 – 608, where the conflict in Prijedor was held to be internal; however, *in Tadic,* (Appeal Judgement), the Appeals Chamber characterized the conflict as international.
[223] Case No. IT – 96 – 21 – T, Judgement of 16 November, 1998 at paragraphs 308 – 316

> *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 5 of the present statute shall be individually responsible for their crime.*

Where an accused has directly engaged in violations of humanitarian law, the application of article 7 (1) is straight forward. The trial chamber in *Tadic* (Judgement) was also faced, however, with the more complex issue of participation in, rather than the direct commission of offences. The chamber held that the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law; also, since his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during or after the incident. He will also be responsible for all that naturally results from the commission of the act in question.[224] This approach has subsequently been followed by both the ICTY and the ICTR.[225] It has been canvassed that at the time of adoption of the ICTY statute, breaches of Common Article 3 were criminal under international law.[226] This position has been taken a step further by the following:

> *If violations of international laws of war have traditionally been regarded as criminal under international law, there is no reason of principle why, once those laws came to be extended (albeit in attenuated form) to the context of internal armed conflicts, their violation in that context should not have been criminal, at least in the absence of a clear indication to the contrary.*[227]

Coming back to the *Tadic* (jurisdiction) case, the appeals chamber was of the same view and while stretching the reasoning reached in the Nuremberg Trials that 'crimes against international law are committed by men not abstract entities…', decided that those violations alleged against Tadic resulted in individual criminal responsibility regardless of whether they were committed in the context of an international or an internal armed conflict. In showing that states do in general, intend to criminalise serious breaches of the customary rules and principles of internal armed conflict, the Appeals Chamber cited several instances of international practice. These included the

[224] See paragraphs 670-687.
[225] See, for example, *Prosecutor v. Delalic* Op. cit., at paragraph 329 as well as *Prosecutor v. Akayesu* at paragraphs 471 – 485.
[226] See Meron, T., Op. cit., at 560.
[227] Greenwood, C.J., *International Humanitarian Law and the the Tadic Case* (1996),7 E.J.I.L., 265 at 280-281.

military manuals of several countries such as Germany, New Zealand, the United States as well as the United Kingdom. These were used to establish individual criminal responsibility for violations of international humanitarian law as it applies to internal conflicts.[228] Also, national legislations implementing the Geneva Conventions as well as other unanimously adopted United Nations Security Council Resolutions stating that violations of humanitarian law of non-international armed conflicts carry with them criminal responsibility were used by the appeals chamber in the Tadic case to establish the point.

4.3 The International Criminal Tribunal for Rwanda

Unlike the statute of the ICTY, that of the ICTR was predicated on the assumption that the conflict in Rwanda is a non-international armed conflict. The subject matter jurisdiction of the Rwandan statute encompasses three principal offences including: genocide (article 2), crimes against humanity as well as serious violations of Common Article 3 to the Geneva Conventions and Additional Protocol II (articles 4 and 5) both being provisions that apply when armed conflict is internal and not international. It is worth noting that this is the first time that violations of common article 3 and Additional Protocol II were being expressly made to be criminal by the provision of an international statute. The inclusion of these enactments was significant and important in that their inclusion provided a safety net in case the crimes of genocide and crimes against humanity may not sufficiently cover the field. Also, the trend towards regarding Common Article 3 and Additional Protocol II as bases for individual criminal responsibility was accentuated in reports concerning atrocities in Rwanda. Having determined that the conflict in Rwanda constitutes a non-international armed conflict, the independent commission of experts on Rwanda asserted that Common Article 3 and Additional Protocol II and the principle of individual criminal responsibility are applicable.[229]

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[228] This same argument was made by Graditzky who cited military manuals of several states as well as state declarations, national legislations, jurisprudence of national courts, Security Council Resolutions and the work of the International Law Commission to show that individual criminal responsibility arises in internal conflicts. This was however prior to the establishment of the International Criminal Court; See Graditzky, T., *Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflict* (1998) IRRC No. 322.

[229] UN Doc. S./1994/1125, annex, paragraphs 90 – 93 (1994), referred to in Meron, T., Op. cit. at p. 561.

In *Prosecutor v. Akayesu,*[230] the ICTR concluded that the violation of these norms (Common Article 3 and article 4 of Additional Protocol II) entails as a matter of customary international law, individual responsibility for the perpetrator.[231]

The ICTR pointed out that Rwanda has acceded to the Geneva Conventions on 5 may 1964 and to Additional Protocol II on 19 November 1984. Also, that the territory of Rwanda was the scene of a civil war between the governmental forces (FAR) and the RPF under the command of General Kagame, both of which were organised armed groups. The RPF started to increase their control over the territory in mid-may 1994 and sustained military operations were carried out until the cease fire of 18 July 1994; the sentence therefore states that the requirements had been met for the application of Protocol II.

4.4 The Statute of the International Criminal Court and Individual Criminal Responsibility: The Beginning of the Present

The ICTY and ICTR highlighted a good number of principles of international humanitarian law especially on individual criminal responsibility in their jurisprudence. When the statute of the International Criminal Court (Rome Statute)[232] was to be enacted, these principles, (which consist of interpretations of the provision of the statutes of the tribunals), were taken into consideration. All through the process leading to the adoption of the Rome statute for the International Criminal Court, it was widely accepted that the concept of individual criminal responsibility for crimes (including the acts of planning, instigating and assisting in the commission of such crimes) was essential and should accordingly be explicitly stated in the adopted text.[233]

Eventually, when the statute of the court was adopted, the principle of individual criminal responsibility was expressly provided for under Article 25. The section provides that the court shall have jurisdiction over natural persons, and that a person who commits a crime within the jurisdiction of the court shall be individually responsible and liable for punishment in accordance with the provisions of the statute. Article 25 (3) provides further:

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[230] Case No. ICTR – 96 – 4 – T, Judgement of 2 September, 1998, 37 ILM 1399 (1998).
[231] Ibid., at paragraph 617.
[232] 1998 Statute of the International Criminal Court.
[233] See *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, vol. 1 UN Doc. A/51/22 (13 September 1996) at paragraph 191.

In accordance with this statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the court if that person:

(a) Commits such a crime, whether as an individual, jointly with another person or through another person, regardless of whether that person is criminally responsible;

(b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

(c) For the purpose of facilitating the commission of such a crime, aids, abets, or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide;

(f) Attempts to commit such a crime by taking actions that commences its execution by means of substantial step, but the crime does not occur because of circumstances independent of the person's intentions. However, a person who abandons the effort to commit the crime or otherwise prevents the completion of the crime shall not be liable for punishment under this statute for the attempt to commit that crime if the person completely and voluntarily gave up the criminal purpose.

Three forms of commission is provided for under Article 25(3)(a) which includes direct commission of a crime contained in the statute by an individual, commission of a crime along with another, in which case, both become criminally responsible. The third form of responsibility involves the perpetration of a crime through another person, whether or not the actual perpetrator or agent is criminally responsible. The requirement that the actual perpetrator does not have to be an

innocent agent is important because the commission of a crime through another can now entail criminal responsibility even where the agent himself is equally culpable. This is likely to be the case where the indirect perpetrator stands in an official capacity of authority and control over the actual agent and has the ability to issue orders for the commission of the crime as provided in paragraph 3 (b) and also command responsibility under Article 28 of the statute.

Criminal responsibility for acts which contributes to the commission of a crime but which does not amount to direct commission by the individual in question is covered by sub-paragraph (c). The Trial Chambers in *Tadic* (Judgement), held that such an act must have 'directly and substantially affected the commission of the offence'.[234] 'Substantial' was explained to mean that the contribution has an effect on the commission of the crime; also, the actual presence of the accused at the commission of the crime is not necessary.[235] However, it was also held that simply being present at the commission of the crime can result in criminal responsibility, provided that such presence 'had a significant legitimizing or encouraging effect on the principals'.[236]

Subparagraph (d) deals with the responsibility of an individual aiding and abetting the commission of an offence by a group. Hence, Moir was off the mark when he asserted that this sub-paragraph deals with 'group responsibility' rather than individual responsibility.[237] This provision requires a very high level of subjective intent or knowledge of an accused of the intention of the group to commit the crime.

Article 25(3)(e) provides for incitement to commit genocide. There is a fundamental difference between incitement to commit genocide and the alternative forms of liability arising from the preceding provisions – in contrast to the crimes covered in subparagraph (b), (c), and (d), there is no requirement that the crime of genocide be either committed or attempted. Therefore, an individual who directly and publicly incites genocide is criminally responsible even if no further action is taken by anybody towards that end. This position is very much in line with the position of the ICTR in *Prosecutor v. Akayesu* where, considering the issue of violation of Article 2 (3) (c) of the Rwandan statute, the trial chamber held that genocide clearly falls within the category of crimes so

[234] *Tadic* (Judgement) at Paragraph 692.
[235] Ibid., at paragraph 691
[236] Ibid., at paragraph 232.
[237] See Moir, L., *The Law of Internal Armed Conflict*, (New York: Cambridge University Press, 2002), p. 174.

serious that direct and public incitement to commit such a crime must be punished as such, even where such incitement failed to produce the result expected by the perpetrator.[238]

Subparagraph (f) imposes criminal responsibility for an attempt to commit any crime within the jurisdiction of the court. However, where such an attempt is abandoned or such a person turns around to prevent the commission of the crime, there will be no responsibility under this provision. However, issues arising from this provision include the point in time until which abandonment is possible, when abandonment is truly voluntary and whether abandonment is not in fact an evidence of an attempt. These points have been explained and the provision considered a necessity:

> *Since the possibility of abandonment is recognised in all modern legal systems and can, therefore, be truly considered as a general principle of international law. It also makes sense in that it creates an incentive for the perpetrator to withdraw from the commission.*[239]

An important issue that calls for careful scrutiny that touches on reciprocity viz-a-viz individual criminal responsibility for violations of international humanitarian law. In the *Kupreskic case,* the defence sought to rely on the *tu quoque* principle, whereby the commission of similar offences by the enemy affords a valid defence.[240] The Trial chamber rejected the argument on two grounds: first, that there is in fact no support either in state practice or in the opinion of publicists for the validity of such a defence, and secondly, that 'the *tu quoque* argument is flawed in principle.'[241]

In this regards, it needs be pointed out that obligations created by Common Article 3 and Additional Protocol II under international humanitarian law are absolute and unconditional rather than reciprocal. Such obligations exist to protect the interest not of states but of individuals as human beings. Therefore, compliance with the rules of international humanitarian law is not and cannot be dependent upon the reciprocal performance of these obligations. Accordingly,

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[238] *Prosecutor v. Akayesu,* Op. cit., at paragraph 562.
[239] Ambos, K.., *'Article 25: Individual Criminal Responsibility'* in Triffterer , O.,(ed.), *Commentary on the Rome Statute of the International Criminal Court; Observers Notes, Article by Article* (Nomos Veriagesgesell Schaft, Baden - Baden, (1999), 475.
[240] *Prosecutor v. Kupreskic*, Case No.IT – 95 – 16 – T (Judgement, 14 January 2000).
[241] Ibid., at paragraphs 515 – 520. The ICTY cited the rejection of the principle by the US Military Tribunal following the Second World War, and the final report of the Commission of Experts created prior to the establishment of the ICTY.

'individual criminal responsibility for serious violation of humanitarian law may not be thwarted by recourse to arguments such as reciprocity.'[242]

The age at which individual criminal responsibility arises for the purpose of the ICC is pegged at 18 years. The court will therefore not exercise jurisdiction over a person who was under the age of 18 at the time of the alleged commission of crime.[243] In view of the fact that very appalling atrocities have been known to be committed by 'boy soldiers' and also the fact that only persons above 15 years may be enlisted (it is a crime to enlist any one below the age of 15),[244] persons of this age should also have been made to be individually responsible for their actions.

4.4.1 Individual Criminal Responsibility and Official Capacity/Command Responsibility

The statute of the ICC has by its provision, ruled out the evasion of criminal responsibility on the basis of the official position of an accused[245]. This is very much consistent with the position in international law where it is accepted that the official position of the accused cannot prevent individual criminal responsibility.[246] This position is important because it recognizes the criminal responsibility for those involved not only in the direct commission of crimes, but also in the planning and instigation of such crimes at very high levels of government.

Closely related to the issue of official capacity is that of responsibility of commanders and other superiors over their subordinates. This is covered by article 28 of the statute of the ICC. This section covers both the responsibility of military commanders as well as those of non-military superiors. It is a well established fact that a good number of those involved in the planning and instigation of violations of international humanitarian law are non-military, such as political leaders. As soon as one recognizes that the position of head of state or political leader affords no defence to criminal responsibility, so it must also be the case that command responsibility can attach to those

[242] Ibid., at paragraph 517 – 518.
[243] See Article 26 of the Statute of the ICC.
[244] Ibid., Article 8.
[245] Ibid., Article 27.
[246] Article VII of the Nuremberg Charter upholds this principle: the House of Lords in the UK has also upheld this principle in the Pinochet's Case when it held that Pinochet was not entitled to immunity as a result of his position; see *R. v. Evans and the Commissioner of Police for the Metropolis, ex parte Pinochet* (1999) 2 All E.R., 97.

individuals. Instances abound of political leaders and public officials being held responsible under this principle.[247]

This concept of responsibility of commanders is provided for under both the ICTY and the ICTR statutes.[248] The ICTY has held that the principle of command responsibility is 'a well-established norm of customary international law' and that it can arise 'either out of the positive acts of the superior (sometimes referred to as "direct" command responsibility) or from his culpable omissions ("indirect command responsibility") or command responsibility *stricto sensu'*.[249]

To prove the responsibility of commanders and other superiors, all that is required, is proof of effective control over his or her subordinates. It has therefore been held as follows:

> *Individuals in positions of authority whether civilian or within military structures, may incur criminal responsibility under the doctrine of command responsibility on the basis of their de facto as well as de jure positions as superiors. The mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility.*[250]

4.4.2 Individual Criminal Responsibility and Superior Orders

The issue of superior orders is necessary in determining the effect of such orders in either avoiding or lessening criminal responsibility. Under Article 33 of the statute of the ICC, superior orders do not relieve a person from criminal responsibility except in the case where any of the three preconditions listed in the Article is met, in which case, the subordinate escapes responsibility. These include instances where the person is under a legal obligation to obey orders, where the order is not manifestly unlawful. The only rider being that, orders to commit genocide or crimes against humanity are deemed to be manifestly unlawful orders.

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[247] The ICTY in *Prosecutor v. Aleksov ski*, Case No. IT – 95 – 14/1 (Judgement of Appeals Chamber, 24 March 2000) held that it does not matter whether the Appellant was a civilian or military superior; what must be proved is that he had power to prevent or to punish the crimes…; See also *Prosecutor v. Kayishema and Ruzindana* case No. ICTR – 95- 1 at paragraph 213 where the ICTR held that 'the application of criminal responsibility to those civilians who wield the requisite authority is not a contentions one'.

[248] See Article 7(3) of the ICTY Statute as well as Article 6 (3) of the ICTR Statute both provisions being almost *ipsissima verba.*

[249] *Prosecutor v. Delalic,* Op. cit., at paragraph 333.

[250] Ibid., at paragraph 354.

These preconditions to responsibility appear very confusing; this is because it is usually taken for granted (especially in military circles) that subordinates are usually under, a 'legal obligation' to obey orders, if they are not aware that such order was unlawful and the order was not manifestly unlawful. It would appear that such a person is free from punishment because his situation approximates defences like duress, coercion or error which also excludes criminal responsibility.

From the time of the Nuremberg trials, this question of superior orders has been addressed. The Nuremberg Charter provides in Article VIII, that superior orders did not negate criminal responsibility, but could be considered as a factor in mitigation where the interest of justice so required. This stance has been upheld by the statutes of the ICTY and the ICTR in articles 7 (4) and 6 (4) respectively.

The statute of the ICC also makes provision for the requisite mental elements required to establish criminal responsibility. They include 'intent' and 'knowledge'.[251] 'Intent' in relation to conduct means that the person intends to engage in the conduct while in relation to consequence, that the person intends to cause that consequence or is aware that it will occur in the ordinary course of events. 'Knowledge' means awareness that a circumstance exists or a consequence will occur in the ordinary course of events. Both these elements are expected to be present contemporaneously. The requirement of intent is straight-forward enough but that of imputing knowledge is one that has the potential of enclosing within its ambit, persons with no such knowledge.

4.4.3 Grounds for Excluding Criminal Responsibility

Under its article 31, the ICC statute enumerates a number of factors that might serve to negate criminal responsibility. This includes mental defect, intoxication, actions carried out in reasonable self defence or defence of property or acts as a result of duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm. The court also has power to exclude criminal responsibility for grounds other than those listed in this article if such a ground is derived from an applicable law as set forth in article 21.

[251] See Article 30.

The defences spelt out under article 31 are all defences that are common in most national legislations. In Nigeria for example, these defences are recognised both under the Criminal Code, the Penal Code as well under the 1999 constitution.[252]

Articles 32 also provides for mistake of fact or of law. A mistake of fact is a ground for excluding criminal responsibility only if it negates the mental element required by the crime. A mistake of law however is not a ground for excluding criminal responsibility except if it negates the mental element required by such a crime or as provided under article 33 (i.e. superior orders).

4.5 Individual Criminal Responsibility in Operation before the International Criminal Court

A good number of cases and situations have been brought before the ICC. The ICC has opened investigations into eight situations in Africa including Uganda, The Democratic Republic of Congo, Dafur (Sudan), Central African Republic, Kenya, Libya, Cote d'Ivoire and Mali. Of these eight, four State parties to the Rome statute (Uganda, the Democratic Republic of Congo, Central African Republic and Mali) have referred situations occurring in their territories (i.e. non-international conflicts) to the court. Two were referred by the United Nations Security Council (Darfur and Libya) while two were begun *proprio motu* by the prosecutor (Kenya and Cote d' Ivoire).[253]

In Uganda, the case *The Prosecutor v. Joseph Kony, Vincent Otti, Okot Odhiambo and Dominic Ongwen* is currently being heard before the pre- trial chambers. All four accused persons in this case are allegedly criminally responsible for various charges on the basis of their individual criminal responsibility under *Article 25(3) (a) and 25 (3) (b)* of the Rome statute for several counts on crimes against humanity and war crimes.[254]

Five cases have been brought before the relevant chambers of the ICC on the situation in the Democratic Republic of Congo. One of these is the case of *The Prosecuor v. Thomas Lubanga Dyilo.*[255] He was found guilty by the Trial Chambers and convicted of committing, as *Co-perpertrator* war crimes consisting of enlisting and conscription of children under the age of 15years into the

[252] See for example, sections 24, 25, 32 of the Criminal Code; sections 51, 52, 59 and 60 of the Penal Code as well as section 33(2)(a) of the 1999 Constitution which makes provision for similar defences.
[253] See International Criminal Court-Wikipedia, the free Encyclopedia mh., sourced on 16/2/2013.
[254] See official website of the ICC-http://www2-ICC-CPI-int/menus/ICC/Home, sourced on 17/2/2013: all the cases cited in this segment of the work are gotten from this source.
[255] ICC-01/04-01/06.

*Force Patriotique Pour la Liberation du Congo (*Patriotic Force for the Liberation of Congo) (FPLC), and using them to participate actively in hostilities in the context of an armed conflict not of an international character from 1 September 2002 to13 August 2003 punishable under article 8(2)(e)(vii) of the Rome Statute.

In *The Prosecutor v. Germain Katanga*[256]*,* the accused is alleged to have committed *through other persons,* within the meaning of article 25(3)(a), three crimes against humanity (murder, sexual slavery and rape) and seven war crimes. The charges against him were however severed.

The Prosecutor v. Mathieu Ngudjolo Chui[257] is another case that has been brought before the ICC with regard to the Democratic Republic of Congo. The accused was alleged to have committed, *through other persons,* within the meaning of Article 25(3)(a) of the Rome statutes, three counts of crimes against humanity and seven counts of war crimes. He was however acquitted by the trial chambers on 18 December 2012. The office of the prosecutor has appealed the verdict.

A handful of persons have also been charged with various crimes been before the ICC with regards to the crisis in Dafur (Sudan). In *The Prosecutor v. Ahmed Muhammad Harun and Ali Muhammad Ali Abd-Rahman,*[258] both accused persons (at large) are alleged to be criminally responsible on the basis of their individual criminal responsibility under articles 25(3)(b) and 25(3)(d) of the ICC statute for various counts of crimes against humanity and war crimes.

In *The Prosecutor v. Abdullah Banda Abakaer Nourain and Saleh Mohammed Jerbo Janus*[259] as well as in *The Prosecutor v. Abdel Raheem Muhammed Hussein*,[260] all accused persons are accused as being criminally responsibility as *indirect or co-perpetrators* for various counts of war crimes. The trials are still ongoing.

In Kenya, several cases are ongoing before the ICC with accused persons being charged either for individual criminal responsibility as either indirect co-perpetrator or contributor. In *The Prosecutor v. William Samoi Ruto and Joshua Arap Sang*,[261] Mr. William Samoei Ruto is charged as an indirect co-perpetrator pursuant to article 25(3)(a) of crimes against humanity while Mr. Joshua Arab Sang

[256] ICC-01/04-01/07.
[257] ICC-01/04-02/12.
[258] ICC-02-/05-01/07.
[259] ICC-02/05-03/09.
[260] ICC-02/05-01/12.
[261] ICC-01/09-01/11.

is accused of having otherwise contributed (within the meaning of article 25(3)(d) to the commission of several crimes against humanity. In *The Prosecutor v. Francis Kirimi Mathaura*[262] *and Uhuru Muigai Kenyatta,* both accused persons are charged as indirect co-perpetrators pursuant to Article 25(3)(a) of the Rome statute for committing various counts of crimes against humanity. The trials are ongoing.

In Libya, charges have been pressed against top government functionaries who acted as indirect co-perpetrators in committing crimes against humanity such as murder and persecution.[263] However, the charges against Muammar Gaddafi who was commander of the armed forces of Libya as well as the Head of State for whom a warrant of arrest had also been issued by the court was terminated consequent upon his death.

In Cote d'lvoire, the former president is facing trial for crimes committed between 2002 and 2010. In *The Prosecutor v. Laurent Gbagbo*[264] as well as *The Prosecutor v. Simone Gbagbo,*[265] the accused are alleged to bear individual criminal responsibility as indirect co-perpetrator for various counts of crimes against humanity. Both cases are still in the pre-trial stage.

In the case of Mali, investigations are still ongoing and no person has been charged before the ICC.

4.6 Individual Criminal Responsibility of Parties to the Niger Delta Conflict

The main parties to the conflict consist of the Nigerian State vide its Joint Task Force on the one hand and the various militant groups on the other. Both sides were in one way or the other, complicit in the crimes and other atrocities that were commonplace during the pendency of the conflict.[266] The members of the armed forces that took part in the operations that constituted violations of the provisions of the Statute of the International Criminal Court,[267] whether as a result of official position or as commanders or other superiors over their subordinates are liable individually for such actions. Also, individual criminal responsibility arises when subordinates in the J.T.F acted in compliance with superior orders and in violation of the provisions of the Statute of the International Criminal Court. Such activities include the series of intentional aerial

[262] ICC-01/11-01/11.
[263] See *The Prosecutor v. Saif Al-Islam Gaddafi and Abdullah Al-Senussi* , ICC – 01/11 – 01/11.
[264] ICC – 02/11 – 01/12.
[265] ICC – 02/11 – 01/12.
[266] Already discussed in chapter three of this work.
[267] Notably the provisions of Article 8.

bombardments and other attacks carried out against civilian populations and other individual civilians (who were not taking part in the hostilities), as well as their buildings and properties. There were also several instances of acts violence to life and person as well as murder, cruel treatment and torture. Other actions for which the members of the J.T.F would ordinarily be liable include the pillaging of towns as well as ordering the displacement of civilian populations when neither their security nor military necessity not so demand.

By the same token, the leaders and members of the various militant groups are ordinarily liable for crimes committed during the pendency of the conflict. The liability of the militants would however have been mostly under the provisions of domestic criminal legislations which outlawed most of their activities such as the blowing up of oil installations, kidnappings and oil pipeline vandalisation. However, the individual responsibility of the militants has been obliterated by the offer of amnesty by the Federal Government and its acceptance by a large number of the militants

In the foregoing exposition, it has been shown that in the early stage of development of international humanitarian law, individual criminal responsibility was considered as arising only in international armed conflict. However, with the adoption of Additional Protocol II and its express inclusion in the Statute of the ICTR, this principle became extended to non-international armed conflicts. Consequently, individuals are now being held accountable for their actions in spite of the type or nature of the conflict. Also, with the adoption of the statute of the ICC and the express recognition of this principle, it is now untenable to argue that the perpetrators of atrocities committed in internal conflicts should be shielded away from international justice just because their victims are of the same nationality.

A worrisome trend that has become evident is the general reluctance of states to try individuals who are complicit in activities recognized as crimes under the ICC Statute. Most states prefer instead, to refer the matter to the ICC. An international crime for which individual responsibility might arise is an act which the international community recognizes as not only a violation of state criminal law, but one which is so serious that it must be regarded as a matter for international concern. In spite of this however, the enforcement of international humanitarian law cannot be left to the ICC alone. The ICC can never be a substitute for national courts. Hence in its Article 1, the principle of complementary jurisdiction (between the ICC and national courts) is enunciated. National systems of justice have a vital and principal role to play.

A further issue not unrelated to the above is the fact that a good number of individuals who ought to be facing charges before the ICC are at large. Here again, the effort of domestic security apparatus cannot be overemphasized. In this regard, states should not shy away from investigating and prosecuting their nationals who commit crimes defined by the statute of the ICC but bring them individually to justice. The office of the Prosecutor of the ICC charged with the weighty responsibility of investigating and prosecuting individuals should at all times, never allow political or other prejudices to colour its sense of reasoning and the exercise of its discretion. The offer of amnesty at the close of hostilities is acceptable; however members of armed groups who fail to accept should be arrested and prosecuted and not executed in a clandestine manner. The State should also make bold to accept and apologise for atrocities committed by members of its armed forces during the period of hostilities. Genuine efforts should also be made in paying adequate compensation to persons whose relations were killed or properties destroyed as a result of the conflict.

4.7 Obligations of the State towards Implementing International Humanitarian Law during Non-international Armed Conflicts

Under international humanitarian law, States have a principal role to play with regards to the implementation and enforcement of its principles within its territory. Implementation in this regard simply means measures that must be taken outside areas of conflict and in time of peace as much as in time of war.[268] These measures are necessary to ensure that all people, both civilian and military are familiar with the rules of international humanitarian law; that the structures, administrative arrangements and personnel required for the application of its principles are in place and that violations of international humanitarian law are prevented and punished where necessary. Essentially, the powers exercisable by a state with respect to its territory extend to three critical jurisdictions. It includes the power to make law, (legislative jurisdiction), the power to interpret or apply the law (adjudicative jurisdiction), and the power to take action to enforce the law (enforcement jurisdiction). In all of these areas, the state has fundamental roles to play with regards to its obligations under international humanitarian law (outside the fundamental guarantees enunciated in the basic instruments).

[268] Nigeria for example has for long ratified the Geneva Convention as part of its obligation in implementing International Humanitarian Law, see the Geneva Convention Act, Cap G3, L.F.N., 2004.

With regards to the legislative jurisdiction, States have the primary responsibility of domesticating the provisions of international instruments freely entered into so as to make the provisions apply unfettered within its jurisdictions. In Nigeria, it is the National Assembly that has the primary responsibility of making such treaties to apply domestically. This is because the constitution expressly provides that "no treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".[269]

Under international humanitarian law, the perpetrators bear individual responsibility for the violations they commit, and those guilty of serious violations must be prosecuted and punished. In this regard therefore, the repression of war crimes, crimes against humanity and genocide (all crimes that can be committed during a non-international armed conflict), is crucial in ensuring respect for international law and to the interests of justice. The chief responsibility for this repression lies with States forming part of the State's legislative as well as enforcement jurisdiction. As part of the State's law making powers, it must ensure that the substantive and procedural criminal law and the judicial system of the State must enable it to prosecute and bring to trial persons allegedly responsible for these crimes. A major problem of international humanitarian law lies in the enforcement of its rules especially with regards to non-international armed conflicts. This is because, neither common Article 3 nor Additional Protocol II contain provisions governing their enforcement. The ICC however has jurisdiction over crimes committed during non-international armed conflicts.[270] In spite of this, problems concerning the actual apprehension and trial of violators would not automatically disappear. There is still the need for states to muster the political will to bring those accused to justice.

In the case of the Niger Delta conflict, there has been no instance of apprehension and prosecution of persons who ordinarily should have been made to account for violations of international humanitarian law committed during the pendency of the conflict. This is partly as a result of the fact that the Federal Government in a bid to bring an end to the conflict, made the offer of amnesty to the militants which had the effect of exculpating those who accepted the offer of any guilt, that is, for participation in hostilities or taking up arms against the state. This action of the government

[269][269]See Section 12of the 1999 Constitution; this provision was upheld by the supreme court in *Abacha v. Fawehinmi,*(2000) 6 N.W.L.R. Pt.660, p.228 SC.
[270] Under Article 8 of the ICC Statute.

is very much in line with the requirement under international humanitarian law wherein it is provided thus:

> *At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained*[271]

However, there were some militants that denounced the offer of amnesty; there is no evidence of prosecution of such persons as the government through its organ the JTF simply executed them while purportedly trying to apprehend them. More importantly, there is no evidence of prosecution of members of the JTF who carried out a good number of the violations. Crimes against humanity are subject to universal jurisdiction.[272] With the acceptance that breaches of Common Article 3 and the laws and customs of war entail international criminal responsibility must also come the acceptance that these acts are equally subject to universal jurisdiction. All states have the right to exercise jurisdiction over offenders. The success of universal jurisdiction is dependent upon individual states enacting the relevant laws and taking the necessary steps to implement them. However,

> *The record of national prosecutions of such international norms as the grave breaches is disappointing even when the obligation to prosecute or extradite violators is unequivocal. A lack of resources, evidence and, above all, political will has stood in the way.*[273]

Irrespective of the above however, sanctions can be brought against law breakers as part of enforcement measures against individuals alleged to have violated international humanitarian law. This will entail their prosecution and trial by the State at the end of hostilities by the apparatus of the state. This is in line with the provision of the Geneva Convention which provides that 'all States must seek to ensure respect for the Convention in all circumstances'.[274]

4.7.1 Judicial Guarantees in International Humanitarian Law as Part of State Obligation

[271] Article 6 (5), Additional Protocol II.
[272] Meron, T., *International Criminalisation of Internal Attrocities* A.J.I.L.,vol. 89,(No. 3), 1995 at p. 569.
[273] Ibid., pp. 555-556.
[274] See Article 1 of the Geneva Conventions I-IV.

To bring those who have committed atrocities to justice, an independent judiciary ought to represent a safeguard against unfair trials. State organs other than the judiciary are responsible for bringing those people before the courts. While it is unlikely that excesses committed by the armed forces of the State (the J.T.F) will be addressed thoroughly, those by the insurgents might be overzealously prosecuted.[275] To ensure the fair trial of such persons therefore, international humanitarian law has laid down elaborate provisions to ensure the fair trial of such persons whether during an international armed conflict or a non-international armed conflict.

International humanitarian law relating to non-international armed conflicts prohibits the passing of sentences and the carrying out of executions in violation of *'judicial guarantees which are recognized as indispensable.'*[276] Additional Protocol II stipulates, concerning offences committed in connection with an armed conflict that no sentence may be passed, and no penalty executed in the absence of a conviction previously pronounced by a court offering the essential guarantees of independence and impartiality. In addition, it spells out the procedural safeguards that must be respected.[277] The main principles and judicial guarantees include the following:

i.The principle of individual criminal responsibility.[278]

ii.The principle of *nullum crimen et nulla poena sine lege*[279]

iii.The principle of *non bis idem.*[280]

iv. The right of the accused to be judged by an independent and impartial court and without undue delay.[281]

v. The right of the accused to be informed of the offence he is charged with.[282]

[275] In the case of the Niger delta conflict however, as already explained , amnesty was granted to the militants by the Federal Government, not so much in keeping with the spirit of international humanitarian law, but to bring a quick end to the hostilities which was telling severely on the economy. This assertion can be borne out by the fact that some militants who failed to accept the amnesty offer were not apprehended and brought to justice but mercilessly killed by the state. See Vanguard of May 22, 2011 which reported the aerial bombardment carried out by the J.T.F on the camp of 'General' John Togo, one of the militants who reneged on the offer of amnesty, on May 12, 2011 which left him mortally wounded and eventually led to his death two days later i.e., on May 14, 2011.
[276] Article 3 Common to the Geneva Conventions.
[277] Article 6 AP II.
[278] Article 6(2)(b), AP II, Article 25 ICC Statute; discussed in chapter 5 of this work.
[279] Article 6(2)(c), AP II and Article 23 ICC Statute.
[280] Article 6(2) AP II and Article 20, ICC Statute.
[281] Article 6(2) AP II and Article 67(1) and 67(1)(c) ICC Statute.

vi. The rights and means of defence, for example the right to be assisted by a qualified lawyer freely chosen and by a competent interpreter.[283]

vii. The presumption of innocence.[284]

viii. The right of the accused to be present at his trial.[285]

ix. The right of the accused not to testify against himself or to confess guilt.[286]

x. The right of the accused to have the judgement pronounced publicly.[287]

xi. The right of the accused to be informed of his rights of appeal.[288]

In furtherance to the duty to prosecute, states are also obliged to cooperate with the ICC in the formers' exercise of jurisdiction which is only complementary to that of states. The ICC will only exercise its jurisdiction only when a state is unwilling or unable to genuinely carry out the investigation or prosecution.[289] Article 86 of the ICC Statute stipulates that the States Parties must cooperate fully with the ICC in its investigation and prosecution of crimes within its jurisdiction, namely genocide, crimes against humanity, war crimes[290] and the crime of aggression (once a provision is adopted defining the crime of aggression). The ICC may also invite any State not party to its Statute to provide assistance on the basis of an ad hoc arrangement, an agreement or on any other appropriate basis.[291]

The ICC may thus transmit a request for the arrest and surrender to the ICC of a person to any State on the territory of which that person may be found, and must request the cooperation of that State

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[282] Article 6(2)(a) AP II; Article 67(1)(a)ICC Statute.
[283] Article (6)(2)(a) AP II; Article 67(1)(b),(d),(e) and (f) ICC Statute.
[284] Article 6(2)(d)AP II; Article 66 ICC Statute.
[285] Article 6(2)(e) AP II, Article 67(1)(d), ICC Statute.
[286] Article 6(2)(e) AP II; Article 67(1)(g), ICC Statute.
[287] Article 76(4) ICC Statute.
[288] Article 6(3) AP II.
[289] Article 17(1)(a) ICC Statute.
[290] 'Genocide', 'crimes against humanity' and 'war crimes' are extensively defined under the provisions of Articles 6, 7 and 8 of the Statute of the ICC.
[291] Ibid., Article 87(5)(a).

in the arrest and surrender of such a person.[292] It may also request the provisional arrest of the person sought, pending presentation of the request for surrender and the documents supporting the request as specified in Article 91.[293]

In addition, under Article 93, States must comply with requests for assistance concerning:

i.The identification and whereabouts of persons or the location of items;

ii.The taking of evidence, including testimony under oath, and the production of evidence, including expert opinions and reports necessary to the ICC;

iii.The questioning of any person being investigated or prosecuted;

iv.The service of documents including judicial documents;

v.Facilitating the voluntary appearance of persons as witnesses or experts before the ICC;

vi.The temporary transfer of persons as provided;

vii.The examination of places or sites, including the exhumation and examination of grave sites;

viii.The execution of searches and seizures;

ix.The provision of records and documents;

x.The protection of victims and witnesses and the preservation of evidence;

xi.The identification, tracing and freezing or seizure of proceeds, property and assets and instrumentalities of crimes for the purpose of eventual forfeiture, without prejudice to the rights of bona fide third parties; and

> *any other type of assistance which is not prohibited by the law of the requested State, with a view to facilitating the investigation and prosecution of crimes within the jurisdiction of the ICC.*

[292]Ibid., Article 89.
[293] Ibid.,Article 92.

Under Article 88 of the Statute, States Parties must ensure that there are procedures available under their national law for all of these forms of cooperation. Conversely, upon the request of a State party to the Statute, the ICC may provide assistance to that state in an investigation into or a trial in respect of conduct which constitutes a crime within the jurisdiction of the ICC or which constitutes a serious crime under the national law of the requesting state. The ICC may also grant a request for assistance from a state which is not party to the Statute.

4.7.2 Dissemination of International Humanitarian Law Rules as a Fundamental Obligation of States

Compliance with rules of international humanitarian law by parties to armed conflict presupposes that such parties were conversant with the provisions of such rules prior to the outbreak of hostilities. There must be more likelihood of the relevant laws being observed if those involved in the conflict are aware in advance of their legal obligations. Steps towards encouraging such a culture of compliance will therefore involve the dissemination of that law as required by both Additional Protocol II and the Geneva Conventions of 1949. Each of the Geneva Conventions requires that:

> *The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.*[294]

As of necessity, this must include the provisions of Common Article 3, so that a degree of knowledge of the laws governing non-international armed conflict ought to be imparted to a State's entire population. On its part, Additional Protocol II requires that the Protocol be '*disseminated as widely as possible*'[295] The obligation placed on State Parties by this provision is not a cumbersome one and it gives the state a lot of freehand as to the method it will adopt in carrying out this obligation to disseminate. More importantly however, this responsibility appears to require education of the military and their legal advisers as well as the civilian population with emphasis on the training of the former.

[294] Geneva Conventions Articles 47,48, 127,144.
[295] Article 19, Additional Protocol II.

4.7.3 Obligation of State to Victims of Conflict

At the heart of every humanitarian discourse is a consideration of the effect of the conflict on the *victims of armed conflict* and potential victims, how they can be helped and how their rights must be respected. The term 'victims of armed conflict' refers to persons who meet the criteria defined in the relevant legal framework in international humanitarian law. These include the wounded, sick, shipwrecked, prisoners of war whether they are members of the armed forces or other militias. Also, medical personnel, chaplains and in general, all civilians and other persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause. Aside from the protections to be afforded the victims during the pendency of the conflict (discussed in chapter two), the plight of victims usually extends beyond the duration of conflict. Therefore, the state has a prominent role to play in assisting victims of conflict at the end of hostilities.

Under the statute of the ICC, there is two-fold protection afforded victims – protection of victims and their witnesses during participation in proceedings as well as reparation to victims.[296] During proceedings, the court (by virtue of the principle of complementarity enunciated under Article 1 of the ICC statue, the court exercising jurisdiction might be a national court and not necessarily the ICC) is obliged to take appropriate measures to protect the safety, physical and psychological well-being, dignity as well as the privacy of victims and witnesses. In this regard, the court shall have regard to factors such as the age, gender, health, as well as the nature of the crime. Also, proceedings may be conducted in camera as against the principle of public hearing provided for in Article 67 for the purpose of protecting the victims or their witnesses.

With regards to reparation to victims, the court is obliged to establish principles relating to reparations to, or in respect of victims, including restitution, compensation and rehabilitation. It may make an order directly against a convicted person specifying appropriate reparations to, or in respect of victims, including restitution, compensation and rehabilitation. It is noteworthy to state that under Article 93, States Parties are obliged to comply with the requests by the court (in

[296] Articles 68 and 75 of the Statute of the ICC.

accordance with the procedures of national law), to provide assistance in relation to investigations or prosecutions with respect to the protection of victims among other matters.[297]

Aside protections to be afforded victims by states (through the machinery of the courts), states also have fundamental obligations to victims who have suffered internal displacement as a result of non-international armed conflict. The displacement of civilians during armed conflict is usually as a result of parties to a conflict failing to comply with the principles of international humanitarian law. Displaced persons are persons fleeing within their own country from armed conflict. Whereas international humanitarian law protects those displaced as a result of an international armed conflict by granting them the right to receive items essential to survival,[298] civilians displaced by internal armed conflict enjoy similar but less detailed protection under Common Article 3 as well as Additional Protocol II. Protocol II for example prohibits forced movement of civilians in the following words:

> *The displacement of the civilian population shall not be ordered for reasons related to the conflict unless the security of the civilians involved or imperative military reasons so demand. Should such displacements have to be carried out, all possible measures shall be taken in order that the civilian population may be received under satisfactory conditions of shelter, hygiene, health, safety and nutrition.*[299]

It must be noted that obligations of the state with regards to internally displaced persons in Africa is now covered by the provisions of the African Union Convention for the Protection and Assistance of Internally Displaced Persons (a.k.a. the Kampala Convention).[300] This Convention is the first legally binding continental instrument that effectively transforms the operational IDP category into a definite legal status.

Generally, the Kampala Convention aims at establishing a legal framework for preventing or mitigating internal displacement, protecting and assisting IDPs and promoting durable solutions and mutual support among states parties. IDPs are defined under this Convention to include:

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[297] Article 93(1)(j) Statute of the ICC.
[298] See Article 23, GC IV; Article 7 Protocol I.
[299] Article 17, AP II.
[300] African Union, Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), adopted on October 23, 2009, 49 I.L.M. 86. This Convention built on the UN Guiding Principles on Internal Displacement which is a non-binding instrument on internal displacement which provided guidance to all relevant actors in providing protection to IDPs.

> *persons or groups who have been forced or obliged to flee or to leave their homes or places of habitual residence, in particular as a result of or in order to avoid the effects of armed conflicts, situations of generalized violence or violations of human rights….*[301]

The conventional framework for the protection and assistance of IDPs is based on the assumption that States bear the primary responsibility to respect, protect, and fulfill the rights to which the internally displaced are entitled, without discrimination of any kind.[302] Accordingly, the text of the Convention establishes a series of obligations on state parties during all the different phases of displacement. Foremost among these obligations are those to prohibit and prevent arbitrary displacement, to respect and ensure respect and protection of IDPs human rights, to ensure individual criminal responsibility and accountability of non-State actors involved in activities causing or contributing to displacement, and to maintain the civilian and humanitarian character of the protection and assistance of IDPs.[303]

It has been shown in this chapter that the conflict which took place in the Niger Delta is one that is effectively covered within the ambit of the international humanitarian law instruments governing non-international armed conflict. During the conflict, it was covered by the Cable News Network (CNN). There were also condemnations from several quarters internally and externally over the horrendous killings and other violations that took place. However, years after the offer of amnesty by the Federal Government, no question is being asked about the responsibility of the state for violations of international instruments to which it is a signatory. The office of the Prosecutor of the ICC which is charged with the responsibility of initiating investigations into such events[304] has failed to do so. This failure does not in any way detract from the fact that the conflict is one within the purview of international humanitarian law. In Nigeria for example, the Economic and Financial Crimes Commission, (EFCC), and the Independent Corrupt Practices (and other related offences) Commission, (ICPC), both bodies charged with investigating and exposing corruption by public office holders have demonstrated a propensity to investigate only high profile matters usually involving millions of Naira. This does not detract from the fact that every day, offences involving financial misappropriations and bribery of smaller scale by public officers are taking place. It only shows that as a result of certain constraints and factors, these bodies tend to limit their activities to

[301] Article 1(k) Kampala Convention.
[302] See preamble as well as Article 2(d) Kampala Convention.
[303] Kampala Convention, Article 3 (1)(a, d, f-i); States Parties are also required to register IDPs.
[304] Ibid., Article 15.

the ‘bigger cases’. In much the same vein, the office of the Prosecutor of the ICC might be bugged down by the number of matters it has to investigate and in the process, might be constrained to leave out others. Therefore, there should be an expansion of the office of the Prosecutor so that it can cover more grounds. More importantly, the Nigerian government should live up to its responsibility to bring those guilty of crimes involving violations of international humanitarian law to book in line with the principle of complementarity. This should be irrespective of whether violators are part of the government forces or not.

On the part of the militants, they also perpetrated a good number of violations. However, they have been given blanket exculpation by the offer of amnesty which was accepted. However, a handful of militants that rejected the offer should have been apprehended and prosecuted and not arbitrarily executed as was done to ‘General’ John Togo in 2010.

Finally, the position of international humanitarian law regulating non-international armed conflicts as it currently stands needs to be revised and the separate instruments harmonized and streamlined. This will no doubt go a long way in making the law clearer and more accessible.

CHAPTER FIVE

SUMMARY, CONCLUSION AND RECOMMENDATIONS

5.1 Summary

Nigeria, like other countries of the world, is currently grappling with incidences of internal violence. In the South, there has also been low level violence such as the failed insurgency in Kokori in Ethiope East Local Government Area of Delta state where some band of militants (Movement for the Liberation of the Urhobo People (LIMUP), attempted to start some form of militant activities which was deftly suppressed by the military.[305] These pockets of unrest which continue to claim lives daily are pointers to the fact that the subject of internal armed conflict in Nigeria as in other parts of the world, is one whose end might not be immediately in sight. This therefore necessitates constant and concerted inquiries into the causes, effects as well as legal implications of such conflicts in order that informed recommendations can be made to stem the tide.

In this work, the focus was on the conflict that ravaged parts of the Niger Delta between 2005 and 2009. The conflict was properly identified as a form of internal armed conflict within the relevant provisions of international humanitarian law regulating such conflicts. It was shown in this work that what took place in the Niger Delta is properly an internal armed conflict within the ambit of international humanitarian law governing such internal conflicts as distinct from other forms of internal disturbances and tensions such as riots and other isolated and sporadic acts of internal violence which does not fall within the domain of international humanitarian law. It was pointed out that while full blown international wars are on the decline, non-international armed conflicts are now more rampant and international humanitarian law is now more active in this sphere.

Consequent upon the above, a detailed analysis of the principles of international humanitarian law regulating non-international armed conflicts was undertaken. It was discovered that the term 'war' has gradually given way to the more liberal and acceptable expression 'armed conflict' which has the flexibility to accommodate more forms of conflict which ordinarily might not have been captured by the term war. This development coupled with the absence of a definition of what an

[305] See *The Guardian*, Tuesday, December 3, 2013 for details.

armed conflict is under the relevant Conventions enables humanitarian protection to be afforded in as many situations as possible through a broad and liberal interpretation.

The types of armed conflict recognized under international humanitarian law were also identified as being international and non-international armed conflicts. It was revealed that the form of classification of a conflict determines the regime of international humanitarian law that will be applicable. This leaves room for ambiguity as some conflicts might start as internal but become internationalized either through spillover effect or as a result of intervention from other states or insurgent groups with base in these other states.

The sovereign nature of states predisposes them towards shielding their internal affairs from external scrutiny. In spite of this, international humanitarian law has been made to cover non-international armed conflicts. An examination of the international humanitarian law regulating non-international armed conflicts was undertaken, wherein it was shown that there are two main streams of statutes governing non-international armed conflicts aside from customary international humanitarian law viz: Article 3 common to the Geneva Conventions and Additional Protocol II. This position leaves much room for ambiguity which is unlikely to advance the cause of international humanitarian law since the provisions of Article 3 are more liberally couched and accommodating than those of Additional Protocol II.

Also, this work undertakes a factual survey of the Niger Delta region and the ensuing conflict was also carried out. The territory was properly identified as well as its topography and essential characteristics which were streamlined. It was disclosed that the armed conflict which is the focal point of this work did not extend to the whole of the region, but was limited to some Local Government Areas in about three states in the region. The various groups that were involved in the conflict as well as their modus operandi were highlighted. This is in addition to the remote and immediate causes of the struggle which was addressed with the chief cause identified as being related to the mode of management of the crude oil located in the region by the federal government. This has resulted in impoverishment of the people as well as environmental degradation which has resulted in the unrest and taking to arms by militants from the region. The armed struggle portrays to a reasonable extent, the desire of the militants, to take by the force of arms, what has been denied them by the government. It was brought to the fore that the offer of amnesty by the federal government and its acceptance by a majority of the leaders and members

of the militant groups was the masterstroke that eventually brought about relative peace and respite from the armed conflict in the region. This action of the government is very much in line with what is recommended under Additional Protocol II:

> *At the end of hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict….*[306]

In the case of Nigeria however, there are two issues that can be elicited from the action of the government; the first is that hostilities had not ended when the amnesty was offered as it was used as a bait to cajole the militants to lay down their arms. Secondly, it is not clear if the government was influenced by the above provision in its offer of amnesty to the militants as no reference was made to it.

Pivotal to this research however is the examination of the nature of the Niger Delta conflict side by side the principles of international humanitarian law relating to non-international armed conflicts. This foray brought to light pungently, the fact that in actuality, what transpired during the conflict meets the threshold of criteria spelt out under the relevant instruments of international humanitarian law governing internal armed conflict for the conflict to be properly regarded as a non-international armed conflict, especially under the provisions of Common Article 3. This therefore strips the conflict of domesticity and the state of its cloak of sovereignty to shield it from external scrutiny. This notwithstanding, the conflict was not taken up by the office of the Prosecutor of the ICC being the body invested with the powers to investigate the said conflict to determine whether or not there are cases requiring prosecution.

Also highlighted is the enormous responsibility the state is saddled with under international humanitarian law prior to, during and after the cessation of hostilities. It would appear that the federal government having ratified and domesticated the two relevant instruments was oblivious of its obligations under them.

Accountability for atrocities perpetrated during armed conflicts, the apprehension, prosecution and punishment of perpetrators is critical to international humanitarian law. This is made possible by the principle of individual criminal responsibility. This work undertook an examination of the

[306] Article 6(5) of Additional Protocol II.

operation of this principle during non-international armed conflict and it was pointed out that neither Common Article 3 nor Additional Protocol II sets out criminal liability for violations of its provisions. This notwithstanding, the Statute of the ICC recognizes the possibility of holding individuals accountable for various crimes that took place during a non-international armed conflict.[307] It must be pointed out that in the case of the Niger Delta region, the principle could not come into operation consequent upon the offer of amnesty by the federal government and further, by its failure to prosecute persons who failed to accept the offer. Also, the state despite having severally violated provisions of International Humanitarian Law during the conflict vide its agent the Joint Task Force, neither accepted nor apologized for the atrocities; it has also not offered compensation to the civilian victims of the conflict whose homes, means of livelihood, relations (including in some cases, the breadwinners), were destroyed and killed by the forces of the state.

5.2 Recommendations

A critical objective of international humanitarian law is the limitation of human suffering occasioned by armed conflict. The following suggestions are made in line with the core goal of international humanitarian law, and if implemented, will go a long way in not only drastically reducing the suffering caused by violence during internal armed conflicts in Nigeria (and beyond), but also reducing the incidents of such conflict to the barest minimum.

1. International law should be made to forestall situations that can give rise to armed conflict that would necessitate the application of its principles. This can be achieved for example by having an intelligence gathering unit attached to the office of the Prosecutor of the ICC. This body will have the duty of studying situations globally that has the potential of degenerating into full blown conflict and drawing the attention of the government of the state in question to the danger posed by the state of affairs. This can be by way of a formal advice which should also be forwarded to the UN Security Council for further action and interventions. This is without prejudice to the powers of the UN Security Council under

[307] See Article 8 of the Statute of the ICC, discussed in chapter 5 above.

Article 38 of the Charter of the UN. Furthermore, the UN should show more interest in the internal affairs of states that can engender violence.[308]

2. The threshold of violence needed for the international humanitarian law regulating non-international armed conflict to apply is very high especially under the provisions of Additional Protocol II. The provision of Common Article 3 is more liberal and concerted efforts should be made to harmonise and streamline the provisions of both instruments. In carrying out this task, the position of Common Article 3 on the threshold of violence should be adopted in order to afford the application of international humanitarian law relating to non-international armed conflicts to cover more situations of internal violence. The returns in terms of the human lives that will be saved in the process will be far more valuable than whatever notions of state sovereignty that will be encroached thereby.

3. The current position that exists under international humanitarian law whereby one set of law exists to regulate internal armed conflict and another regulating international armed conflict leaves much to be desired. This is because a conflict may have both internal and international dimensions; an armed conflict that started off as an internal affair might spill into neighbouring states or non-state insurgents might receive aid and other form of support from foreign sponsors hence altering the nomenclature of the conflict. Therefore, efforts should be geared towards having a single legal regime governing all situations of conflict whether internal or international.

4. Under international law, there is a general prohibition of international armed conflicts;[309] there is no equivalent provision with regards to internal armed conflict. Such a provision should be incorporated into the Charter of the United Nations. This can be by way of expanding the extant provision of Article 2(4) of the UN Charter or creating a new section altogether to provide for this. It will serve the purpose of causing states to be aware that what is being done within the state is now subject to international scrutiny and cause the state to be more cautious in its use of force during domestic conflict situations.

[308] In the conflict in Somalia for example, the UN Security Council authorized the use of force to protect the delivery of humanitarian aid even though the conflict was internal – see UN Security Council Resolution 794 (1992).
[309] Under Article 2(4) of the Charter of the United Nations.

5. Although international humanitarian law is not applicable during situations of internal disturbances and tensions which do not meet the threshold of violence required under international humanitarian law regulating non-international armed conflict, a minimum of humanitarian standard should be made applicable. In this regard, the Turkur/Abo Declaration of Minimum Humanitarian Standard[310]comes in highly recommended. This Declaration affirms minimum humanitarian standards which are applicable in all situations, including internal violence, disturbances, tensions and public emergency and which cannot be derogated from under any circumstances. Therefore, even when governments refuse or neglect to follow the provisions of international humanitarian law instruments which they have ratified, this Declaration becomes especially useful as affording a minimum humanitarian standard below which no government should fall.

6. The grant of amnesty to insurgents at the end of hostilities, their subsequent training and rehabilitation is commendable and to be encouraged. However, government should desist from the use of patronage as a tool to mollify insurgents. In Nigeria, there is evidence that the government aside from granting amnesty to militants, went ahead to award multi-million dollar contracts to some of the militant leaders.[311] This development is strongly condemnable and worrisome since it has the potential of encouraging militancy. Also, in the event of subsequent insurgencies, militants might not be assuaged with only the offer of amnesty as they may insist on similar form of patronage from the government before agreeing to lay down their arms. This should be discouraged. Furthermore, granting of amnesty to those who committed very serious violations of international humanitarian law is to be discouraged; on the contrary, they should be investigated and prosecuted.

7. In addition to amnesty, to facilitate the process of reconciliation, governments may elect to set up truth/reconciliation commissions to unearth the real facts and causes behind the armed conflict. This would have the advantage of helping the government ascertain those whose incomes and other means of livelihood were destroyed to enable it pay adequate compensation. Therefore, unlike what happened after the Niger Delta conflict where government failed to compensate victims of the conflict, concerted efforts should be made

[310] Adopted by an expert meeting convened by the Institute of Human Rights, Abo Akademi University in Turkur/Abo Finland, 2 December, 1990.
[311] See *Vanguard* of 20th March, 2012, which carried the report of several multi-million dollar contracts awarded to Tompolo, an ex militant leader.

to compensate such victims. Under international humanitarian law, there is a general obligation for a state responsible for violations of to make full reparation for the loss or injury caused. This would also aid in breaking any possible vicious circle of violence by preventing such victims from resorting to violence as a way of venting their anger against the state. In this regard, there is a ready precedent in the action of the Russian Federation wherein residents who suffered as a result of hostilities received compensation which was paid out of the federal budget.[312]

8. To ensure accountability for violence during armed conflict, states must ensure that crimes committed by its armed forces during the pendency of the conflict are investigated and prosecuted in line with the obligation of states under international humanitarian law. In Nigeria, this was not done at the end of hostilities in the Niger Delta as all other issues were conveniently swept under the carpet after the offer and acceptance of amnesty. Such an attitude encourages impunity and has a corrupting effect on the part of the members of the armed forces, who act with no fear of imminent punishment when carrying out wanton destruction of lives and property not based on the requirement of military necessity. Also, Nigeria is yet to domesticate the provisions of Additional Protocol II as well as the Statue of the International Criminal Court years after ratifying same. This implies that these provisions have no force of law within Nigeria; therefore, as a matter of urgency, the National Assembly should consider these instruments and pass same into law with relevant amendments where necessary.[313]

9. The Nigerian government should as a matter of urgency, take more proactive steps to address the core issues that led to the armed violence that engulfed the region during this period. If it fails to do so, it will realize that offer and acceptance of amnesty will not put a final end to the armed conflict in the region as well as other parts of the country. Issues such as underdevelopment, unemployment, environmental degradation amongst others

[312] See Sassoli, M., Bouvier, A. and Quintin, A.,(Eds.), *How Does Law Protect In War?Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law,* Vol.III (3rd Ed.,Geneva: ICRC,2011) at 2574.

[313] This will be in line with the provision of Section 12 of the 1999 Constitution which provides that no treaty between the Federation and other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.

should be given very serious attention. Also, bodies such as the Niger Delta Development Commission (NDDC) charged with the responsibility of developing the region should be manned by persons with track records of service and integrity; the activities of such bodies should also be very closely monitored to ensure that they are acquitting themselves creditably of the duties with which they are charged.

10. The public at large and those who are likely to be protagonists in armed conflicts should be properly instructed and trained in international humanitarian law. This is because, while the basic moral principles of international humanitarian law may be self-evident, the detailed rules are not always self-explanatory. This knowledge, even though might not guarantee compliance, will lead to their gradual acceptance and subsequent implementation. To this end, the teaching of international humanitarian law in military institutions and other tertiary institutions will be very useful. Bodies such as the ICRC can also champion carrying out instructions on the elementary principles of international humanitarian law on military formations and units to enhance enlightenment by ordinary ranks of the armed forces.

11. International humanitarian law is binding for state parties as well as non-state armed groups during non-international armed conflicts. However, most non-state armed groups do not feel bound and in most cases are not even aware that they are bound. In this regard therefore, ways might be explored as to how armed groups could be encouraged to accept international humanitarian law formally, so as to foster a sense of obligation. Such commitment from insurgents though might not translate into obedience, is nevertheless important as it places on them the burden of compliance. Common Article 3 encourages parties to non-international armed conflicts, including armed groups, to conclude agreements putting all or parts of international humanitarian law into force. Armed groups can also be encouraged to make unilateral declarations in which they undertake to respect international humanitarian law. Here again, the example the *Geneva Call*[314] is worthy of mention and emulation.

[314] *Geneva Call* is a neutral and impartial humanitarian organization dedicated to engaging non-state actors (NSAs) towards compliance with norms of International Humanitarian Law and human rights law. To this end, *Geneva Call* engages NSAs into *inter alia* respecting the anti-personnel mine ban and cooperating with humanitarian organizations to reduce the effects of those mines, it thus developed unilateral Deeds of

12. To achieve the ends of the principle of individual responsibility for crimes committed in times of armed conflict, fair trial and prosecution of individual suspects should be undertaken by states at the end of hostilities. This will help to build confidence and facilitate reconciliation in post-conflict societies. Such prosecutions should be well publicized as this can serve to deter crimes in on-going and future conflicts. In Nigeria for example, the Northern Elders Forum (NEF) has made public its intention to sue the Chief of Army Staff, and six other persons to the ICC for extra judicial killings by soldiers in Bama (in Borno state), for the role they played while battling members of the Islamic Terrorists sect, *Boko Haram*.[315] In the same vein, other public spirited individuals and associations in the Niger Delta can take a cue from this action of the Northern Elders Forum and do likewise with regards to the gruesome killing of civilians by the Joint Task Force (JTF), during the Niger Delta crisis.

13. More states should seek to complement national efforts by applying the principle of universal jurisdiction. By this principle, foreign States can investigate and prosecute war criminals for crimes committed in States other than theirs'; they may also elect to extradite such persons for prosecution in their country of origin. The application of this principle can be an essential stimulus for justice and reconciliation in the country of origin of the perpetrator. A successful application of this principle will also require cooperation between states, especially on issues of evidence and extradition. Therefore, states need to adapt their national legislation to the recognized standards of international humanitarian and criminal law and to ensure that they have a fair and credible judicial system.

14. In addition to the foregoing, and in furtherance of their role as the guardian of international peace and security, the UN Security Council should endeavour to make available adequate and continued supply of funds to support international efforts whether by the UN or by individual States to bring to justice perpetrators of grave violations of international humanitarian law.

15. At the end of hostilities, States should take steps to address the plight of persons displaced as a result of the conflict. Such internally displaced persons are forced to leave their homes

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Commitment by which these NSAs undertake to observe the norms of the Ottawa Convention (i.e., on ban of anti-personnel mines). See www.genevacall.org.

[315] See *Saturday Vanguard*, January 18, 2014.

and suffer from severe deprivation, lack of shelter, insecurity and discrimination. National authorities should not turn a blind eye to their plight, but work out a coordinated platform for addressing their plight.

16. The track record of the ICRC in terms of provision of humanitarian aid to victims of armed conflict is profound and worthy of commendation. However, other non-governmental as well as domestic civil society organizations such as religious bodies, charities, and sundry other domestic associations should strive to complement the efforts of the ICRC in this regard. They should employ their knowledge of the local context, and their sensitivity to the needs of the local populations and to local cultural norms to assist in times of conflict.

17. The role of the media in times of armed conflict cannot be overemphasized. If information is misused or transmitted inaccurately during such times, the consequences can be deadly. In the light of this, both the print and electronic media must ensure that accurate information is disseminated at all times during internal armed conflicts. Atrocities committed by any party in the conflict must be dispassionately reported without exaggeration or concealing of facts so that the plight of the victims as well as other civilians is brought to public attention. Governments should therefore strive to ensure that the freedom and independence of the media is well guarded so that the needs of all parts of society are well served in times of internal armed conflict.

5.3 Contributions to Knowledge

This research work has made the following contributions to knowledge:

i. The research has identified the remote and immediate causes of armed conflict in the Niger Delta region of Nigeria.

ii. It established that the armed conflict that took place in the Niger Delta region is a non-international armed conflict that falls within the jurisdiction of international humanitarian law and the need to prosecute persons who violated the rules of international humanitarian law during the pendency of the conflict.

iii. The work has pointed out the difficulties in enforcing international humanitarian law rules of engagement on both State forces and insurgents as well as indicated how these difficulties can be surmounted.

iv. It has provided source materials and background information for future research on armed conflicts.

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