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PROTECTION OF CIVILIANS IN NON-INTERNATIONAL ARMED CONFLICTS: GAPS BETWEEN TREATY LAW AND STATE PRACTICE

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I. INTRODUCTION

The overwhelming majority of armed conflicts in the contemporary world are non-international in character, waged not between States but between governmental forces and organised armed groups, or between such groups themselves, within the territory of a single State.[1] Despite this reality, International Humanitarian Law's (IHL) treaty framework governing non-international armed conflicts (NIACs) remains considerably less developed than the detailed regulatory regime applicable to international armed conflicts. This asymmetry, rooted in the historical reluctance of States to accept external regulation of what was long regarded as an essentially domestic matter of sovereign concern, has produced a body of treaty law that, while progressively strengthened since 1949, continues to leave significant protective gaps for civilians caught within internal conflicts.

This paper examines the treaty framework governing the protection of civilians in NIACs, principally Common Article 3 to the four Geneva Conventions and Additional Protocol II of 1977, and evaluates the persistent gaps between these treaty obligations and actual State practice, drawing on customary international law developments, judicial interpretation, and contemporary conflict examples to assess the adequacy of the existing legal architecture. The analysis proceeds in several parts, tracing the historical development of the treaty framework, examining threshold and classification difficulties, identifying substantive gaps in detention, humanitarian access, targeting, and non-State actor compliance, illustrating these gaps through contemporary conflict practice, addressing the enforcement architecture applicable to NIAC violations, and considering

[1] Int'l Comm. of the Red Cross, Int'l Humanitarian Law and the Challenges of Contemporary Armed Conflicts 9-11 (2019).

ongoing efforts, both legal and institutional, to narrow the divide between treaty text and lived reality before offering concluding observations.

II. HISTORICAL DEVELOPMENT OF THE TREATY FRAMEWORK

A. COMMON ARTICLE 3

The 1949 Geneva Conventions marked the first multilateral treaty effort to extend humanitarian protections to internal conflicts, through the adoption of Common Article 3, so named because it appears in identical form in each of the four Conventions.[2] Common Article 3 establishes a baseline of protection applicable "in the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties," requiring humane treatment of persons taking no active part in hostilities, prohibiting violence to life and person, hostage-taking, outrages upon personal dignity, and the passing of sentences without a regularly constituted court affording judicial guarantees.[3] Often described as a "convention in miniature," Common Article 3 was a considerable achievement given the political resistance of States at the 1949 Diplomatic Conference to any external regulation of internal conflict, yet its brevity, only four substantive paragraphs, left vast areas of conduct in internal conflict entirely unregulated by treaty law.

B. ADDITIONAL PROTOCOL II

Recognising the limitations of Common Article 3, the international community adopted Additional Protocol II (AP II) in 1977, intended to develop and supplement the earlier provision with a more detailed body of rules addressing humane treatment, the protection of the wounded and sick, and the protection of the civilian population against the effects of hostilities.[4] However, AP II's scope of application is considerably narrower than that of Common Article 3. Article 1(1) restricts its application to conflicts between a State's armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of the State's territory as to enable them to carry out sustained and concerted military operations and to implement the Protocol.[5] This territorial control threshold excludes a considerable range of

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[2]Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287.
[3]Id.
[4]Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) pmbl., June 8, 1977, 1125 U.N.T.S. 609.
[5]Id. art. 1(1).

contemporary internal conflicts, particularly those involving fragmented or territorially non-contiguous non-State armed groups, from AP II's coverage, even though such conflicts remain governed by the lower threshold of Common Article 3 and applicable customary law.

C. THE EXPANSION OF CUSTOMARY LAW: THE TADIĆ LEGACY

The treaty framework's limitations were substantially, though not completely, addressed through the development of customary international law, most notably articulated by the ICTY Appeals Chamber in Prosecutor v. Tadić. The Chamber held that a body of customary rules had emerged governing internal armed conflict extending considerably beyond the treaty text, encompassing protections and prohibitions traditionally associated only with international armed conflict, including restrictions on means and methods of warfare.[6] This finding was subsequently reinforced by the ICRC's 2005 Customary International Humanitarian Law Study, which identified that the substantial majority of the 161 customary rules identified were applicable in NIACs, either identically or with only minor variation from their counterparts in international armed conflict.[7] This customary expansion has done much to narrow the formal legal gap between the two conflict classifications, yet, as discussed below, custom's inherently less precise and more contested character introduces its own set of implementation challenges.

III. THE PROTECTIVE GAP: TREATY THRESHOLDS AND CLASSIFICATION DISPUTES

One of the most persistent gaps between treaty law and State practice concerns the threshold questions themselves, namely, when a situation of internal violence rises to the level of an "armed conflict" triggering IHL's application at all, as opposed to remaining governed solely by domestic law and international human rights law. The Tadić formulation, requiring "protracted armed violence between governmental authorities and organized armed groups or between such groups," provides a functional test but one that leaves considerable room for State discretion and denial.[8] States engaged in internal violence frequently characterise the situation as one of mere internal disturbances, riots, or terrorism, thereby seeking to avoid the legal and reputational consequences

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[6]Prosecutor v. Tadić, Case No. IT-94-1-AR72, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, paras 96-127 (Int'l Crim. Trib. for the Former Yugoslavia Oct. 2, 1995).
[7]Jean-Marie Henckaerts & Louise Doswald-Beck, *Customary International Humanitarian Law* xxix-xxxi (Cambridge Univ. Press 2005).
[8]Tadić, Case No. IT-94-1-AR72, paragraph 70.

of acknowledging an armed conflict and the concomitant application of IHL, even where the intensity and organisation criteria appear objectively satisfied.[9] This classificatory ambiguity is compounded by the absence of any centralised international authority empowered to definitively determine conflict classification, leaving the matter to be contested by States, international organisations, and, occasionally, international tribunals only after the fact.

IV. GAPS IN SUBSTANTIVE PROTECTION

A. DETENTION AND DEPRIVATION OF LIBERTY

Perhaps the most significant substantive gap in the NIAC treaty framework concerns the regulation of detention. Unlike the detailed rules governing prisoner of war status and internment applicable in international armed conflict under the Third and Fourth Geneva Conventions, neither Common Article 3 nor AP II establishes a comprehensive legal basis or detailed procedural framework for detention in NIACs.[10] AP II Article 5 addresses the treatment of persons already detained but is silent on the legal grounds justifying internment itself, a gap that has generated substantial disagreement among States, international bodies, and scholars regarding the applicable legal basis for security detention in internal conflicts, with some States relying on domestic law, others invoking an inherent authority derived from IHL by analogy to international armed conflict rules, and human rights bodies frequently insisting that any deprivation of liberty must satisfy the procedural guarantees of applicable human rights law.[11]

B. HUMANITARIAN ACCESS AND RELIEF OPERATIONS

While AP II Article 18 provides that relief actions of an impartial humanitarian character shall be undertaken with the consent of the State concerned, the provision imposes no corresponding obligation on the State to grant such consent where humanitarian needs are demonstrated, a gap that has proven acutely significant in conflicts such as Syria, where government authorities have systematically restricted humanitarian access to besieged areas under opposition control, with limited effective recourse available under the treaty text itself.[12] The UN Security Council's

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[9]Sandesh Sivakumaran, *The Law of Non-International Armed Conflict* 168-172 (Oxford Univ. Press 2012).
[10]Jelena Pejic, *Procedural Principles and Safeguards for Internment/Administrative Detention in Armed Conflict and Other Situations of Violence*, 87 Int'l Rev. Red Cross 375, 378-382 (2005).
[11]Id. at 383-390.
[12]Protocol II, supra note 4, art. 18(2).

subsequent practice of authorising cross-border humanitarian access in Syria, most notably through Resolution 2165, illustrates both the practical necessity of supplementing the treaty framework and the political fragility of such arrangements, given their dependence on continued Security Council consensus.[13]

C. COMPLIANCE BY NON-STATE ARMED GROUPS

A further structural gap arises from the treaty framework's uncertain application to non-State armed groups themselves. Although Common Article 3 and AP II bind "each Party to the conflict," including non-State actors, the mechanism by which non-State groups become bound by treaties they did not sign or ratify remains a matter of some theoretical difficulty, generally explained through doctrines of legislative jurisdiction or the customary status of the relevant obligations.[14] In practice, many non-State armed groups possess limited command structures, fragmented internal discipline, or ideological hostility to international law altogether, resulting in systematic non-compliance that treaty mechanisms, designed with State compliance in mind, are poorly equipped to address. Initiatives such as Geneva Call's engagement of armed non-State actors through unilateral declarations of adherence to humanitarian norms represent an innovative but essentially voluntary supplement to the formal treaty regime.[15]

D. TARGETING, THE CONDUCT OF HOSTILITIES, AND VULNERABLE GROUPS

A further area of divergence concerns the regulation of hostilities themselves. While AP II Article 13 prohibits making the civilian population the object of attack, it does not, unlike Additional Protocol I applicable to international armed conflicts, articulate the detailed principle of proportionality or the precautionary obligations governing the conduct of attacks in the same explicit terms.[16] These more granular rules have instead been read into NIACs primarily through customary law, a process that, while doctrinally sound following Tadić and the ICRC Customary Study, nonetheless produces greater interpretive uncertainty in practice than would a directly applicable treaty text, particularly for domestic military forces and non-State armed groups whose legal advisers may have limited familiarity with customary law's less codified contours. Similarly,

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[13]S.C. Res. 2165, paras 2-3 (July 14, 2014).
[14]Sivakumaran, supra note 9, at 245-249.
[15]Geneva Call, Annual Report 14-16 (2020).
[16]Protocol II, supra note 4, art. 13.

protections for particularly vulnerable groups, including children, who continue to be recruited and used in hostilities by both State and non-State forces in numerous ongoing NIACs, and persons with disabilities, who face heightened risks during displacement and detention, remain addressed only indirectly through AP II's general provisions, with more specific protections developed principally through subsequent instruments such as the Optional Protocol on the Involvement of Children in Armed Conflict, which itself depends on ratification and domestic implementation for effect.[17]

V. CASE ILLUSTRATIONS OF THE TREATY-PRACTICE GAP

The Syrian conflict since 2011 offers a stark illustration of the cumulative effect of these gaps. Despite the near-universal acknowledgment that the situation constitutes a NIAC, or a series of overlapping NIACs given the multiplicity of armed actors involved, documented practice has included besiegement of civilian populations, denial of humanitarian access, attacks on medical facilities, and widespread arbitrary detention, each occurring against a backdrop of treaty obligations that, even where clearly applicable, have proven insufficient to prevent systematic violation.[18] The proliferation of armed actors within the Syrian theatre, including State forces, allied militias, an array of opposition groups, and, for a period, the self-proclaimed Islamic State, further complicated classification and compliance, since different bilateral and multilateral relationships among these actors arguably gave rise to distinct, overlapping conflicts subject to differing legal characterisations depending on the degree of external State involvement and control exercised over particular non-State forces, a complexity that treaty law's relatively binary classification scheme was not designed to accommodate with precision.

Similarly, the conflict in Yemen has seen protracted disputes over humanitarian access and blockade measures affecting civilian populations, with limited practical enforcement of the applicable Common Article 3 and customary law obligations, notwithstanding extensive documentation of violations by UN-mandated investigative bodies.[19] The Yemeni conflict further illustrates the compounding effect of an internationalised NIAC, given the involvement of a

[17] Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict art. 1, May 25, 2000, 2173 U.N.T.S. 222.
[18] U.N. Human Rights Council, Rep. of the Indep. Int'l Comm'n of Inquiry on the Syrian Arab Republic, U.N. Doc. A/HRC/46/54, paras 45-58 (2021).
[19] U.N. Human Rights Council, Rep. of the Group of Eminent Int'l and Regional Experts on Yemen, U.N. Doc. A/HRC/42/17, paras 30-42 (2019).

foreign-led coalition supporting the recognised government, on questions of both classification and accountability, since the coalition's operations have been subject to a patchwork of national, regional, and international scrutiny mechanisms of varying effectiveness, none of which has proven capable of ensuring comprehensive compliance with applicable humanitarian obligations throughout the conflict's duration. These examples collectively demonstrate that the treaty-practice gap is not merely a matter of doctrinal ambiguity but reflects deeper structural weaknesses in the international system's capacity to translate agreed legal norms into consistent operational compliance, particularly in protracted, multi-actor conflicts where political interests frequently outweigh considerations of humanitarian compliance.

VI. ENFORCEMENT AND ACCOUNTABILITY MECHANISMS

The enforcement architecture available for NIAC violations remains considerably weaker than that applicable to international armed conflicts. The grave breaches regime under the Geneva Conventions, which establishes universal jurisdiction and mandatory prosecution obligations, applies formally only to international armed conflicts, leaving serious violations in NIACs to be addressed, if at all, through the comparatively underutilised category of "war crimes" under customary law and the jurisdiction of international tribunals.[20] The Rome Statute of the International Criminal Court represented a significant advance in this respect, incorporating an expanded list of war crimes applicable in NIACs under Article 8(2)(c) and (e), yet the Court's jurisdiction remains constrained by considerations of complementarity, referral mechanisms, and the practical and political limitations affecting the initiation and progress of investigations, particularly in situations involving non-States Parties.[21]

VII. TOWARD NARROWING THE GAP

Several developments offer some prospect of narrowing the persistent gap between treaty law and State practice. The continued elaboration of customary international law, informed by the ICRC's ongoing practice and opinio juris database, provides an evolving and increasingly detailed body of rules capable of supplementing the treaty text's gaps, particularly regarding detention and the conduct of hostilities.[22] International human rights law's continued application during armed

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[20] Henckaerts & Doswald-Beck, supra note 7, at 568-572.
[21] Rome Statute of the International Criminal Court art. 8(2)(c), (e), July 17, 1998, 2187 U.N.T.S. 90.
[22] Henckaerts & Doswald-Beck, supra note 7, at xlv-xlviii.

conflict, as affirmed by the International Court of Justice in its advisory opinions on the legality of nuclear weapons and the construction of a wall in the occupied Palestinian territory, offers an additional and increasingly significant layer of protection, particularly in relation to procedural safeguards for detention that the IHL treaty framework leaves comparatively underdeveloped.[23] Additionally, the growing practice of UN Commissions of Inquiry and fact-finding missions, while lacking direct enforcement authority, has contributed to an expanding body of documented practice that increasingly informs both diplomatic pressure and, in some instances, subsequent judicial or quasi-judicial accountability processes.

VIII. THE ROLE OF REGIONAL MECHANISMS

Regional human rights and humanitarian frameworks have, to varying degrees, supplemented the universal treaty regime governing NIACs, though their contribution remains uneven across regions. The African Union's Kampala Convention, the first binding regional treaty specifically addressing the protection of internally displaced persons, an especially vulnerable population in NIACs, imposes obligations on States Parties to prevent displacement, protect displaced populations, and facilitate durable solutions, obligations that considerably exceed the comparatively thin protections available under AP II itself.[24] Similarly, the jurisprudence of the Inter-American Commission and Court of Human Rights has, in a number of cases arising from internal conflicts in Latin America, applied IHL as an interpretive aid to the American Convention on Human Rights, effectively using regional human rights machinery to supply enforcement mechanisms that IHL's own treaty framework lacks.[25] The European Court of Human Rights has similarly engaged with IHL principles in cases arising from internal conflicts within Council of Europe member States, although its jurisprudence has at times been criticised for insufficient sensitivity to the distinct legal framework that IHL provides for conduct during active hostilities, illustrating the interpretive tensions that can arise where human rights bodies, designed primarily for peacetime application, are called upon to adjudicate conduct occurring within an armed conflict.[26] No comparable binding regional framework exists in Asia or the Middle East, regions

[23] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, paras 105-106 (July 9).
[24] African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa arts. 3-5, Oct. 23, 2009, 52 I.L.M. 397.
[25] Abella v. Argentina, Case 11.137, Inter-Am. Comm'n H.R., Report No. 55/97, paras 155-161 (1997).
[26] Hassan v. United Kingdom, App. No. 29750/09, Eur. Ct. H.R. paras 100-106 (2014).

that have in recent decades experienced some of the most protracted and civilian-costly NIACs, a further illustration of the geographically uneven distribution of supplementary legal protection beyond the universal treaty minimum.

IX. TOWARD A MORE EFFECTIVE PROTECTIVE FRAMEWORK

Addressing the gaps identified above does not necessarily require wholesale treaty revision, an unlikely prospect given the persistent political sensitivities that have historically constrained NIAC regulation. Several more incremental measures merit consideration. First, greater investment in the ICRC's confidential dialogue with parties to NIACs, including non-State armed groups, may do more to secure practical compliance than further treaty elaboration, given that many of the identified gaps stem from implementation failures rather than genuine ambiguity in the underlying rules.[27] Second, expanded use of UN Security Council and General Assembly practice to authorise and legitimise humanitarian access arrangements, building on precedents such as Resolution 2165 concerning Syria, could provide a more institutionalised supplement to Article 18 of AP II, particularly where Security Council consensus can be secured or alternative General Assembly mechanisms invoked in cases of Council deadlock. Third, continued support for specialised investigative and documentation bodies, including UN Commissions of Inquiry and non-governmental documentation initiatives, strengthens the evidentiary foundation necessary for eventual accountability, even where immediate prosecution is not feasible, preserving the possibility of future justice as political circumstances evolve. Finally, greater engagement with non-State armed groups themselves, whether through initiatives such as Geneva Call or direct ICRC engagement, offers a pragmatic avenue for improving compliance among actors who, by definition, fall outside the direct treaty-making capacity of the international system, but whose battlefield conduct remains central to civilian protection outcomes in practice.

X. CONCLUSION

The treaty framework governing the protection of civilians in non-international armed conflicts, anchored in Common Article 3 and Additional Protocol II, represents a considerable, if incomplete, achievement in extending humanitarian regulation to the most prevalent form of

[27] Int'l Comm. of the Red Cross, Enhancing Protection for Civilians in Armed Conflict and Other Situations of Violence 12-15 (2008).

contemporary armed conflict. Yet significant gaps persist between the letter of these treaty obligations and the realities of State and non-State practice, spanning questions of conflict classification, the substantive regulation of detention, humanitarian access, targeting, and the practical enforceability of obligations against non-State armed groups. While customary international law, human rights law, regional mechanisms, and evolving international judicial practice have done much to narrow these gaps since 1949, the persistence of large-scale civilian suffering in contemporary NIACs, from Syria to Yemen and beyond, underscores that the challenge lies not merely in the further elaboration of legal rules but in strengthening the political will and institutional mechanisms necessary to ensure their effective implementation on the ground.

Ultimately, the trajectory of this body of law since 1949 suggests that incremental, interpretive, and institutional development, rather than dramatic treaty renegotiation, is likely to remain the primary vehicle through which the protective gap continues to narrow. Sustained scholarly and practitioner attention to the interaction between treaty text, customary law, human rights jurisprudence, and regional practice will therefore remain essential to ensuring that the law governing non-international armed conflict continues to evolve in step with the evolving character of internal conflict itself.