

The principle of self-determination and the future relevance of conflicts for national liberation under the 1977 Geneva Protocol

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by

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Introduction

The study will discuss conflicts for national liberation ('CFNL') under the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts, of 8 June 1977 ('Protocol I'). A focal point of the discussion will be the impact of the principle of self-determination on the future relevance of these conflicts.

The terms in Protocol I's provisions which included CFNL should have been ascribed a wider meaning. These provisions currently have a narrow meaning. Furthermore, they presently were couched in defective terminology. The terminology is for instance vague. It does not clearly define what is a 'peoples' involved in such conflicts. The defectiveness of the terminology has deterred the practice of Protocol I in relation to CFNL. In the absence of practice, there is no prospect for any future relevance for CFNL under the protocol. Protocol I's provisions which included these conflicts were therefore a dead letter.¹ The impact of the principle of self-determination turned these provisions of Protocol I into a dead-letter. The principle was used by the drafters of Protocol I to give CFNL a basis for inclusion in the protocol. The resort to the principle of self-determination was because it was at the forefront of the developments related to armed conflicts during that period. However, this reliance on the principle of self-determination has proved problematic. A possible solution is amending those provisions of Protocol I which included CFNL.

Protocol I introduces a new situation of international armed conflict together with two criteria to make these conflicts more ascertainable.² The new situation is CFNL. CFNL are based on the right to self-determination, as enshrined in the

¹ Aldrich GH '*Progressive development of the laws of war: a reply to criticisms of the 1977 Geneva Protocol I*' 26 Van. J. Int'L 693 1985-1986 at 703.

² ICRC '*Protocols Additional to the Geneva Conventions of 12 August 1949, The Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflict (Protocol I)*' (2010, 10) Article 1(3) applies to all armed conflicts between two or more of the parties to the Conventions. Article 1(4) is the new addition.

Charter of the United Nations and the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. CFNL comprise conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes.³

The first criterion to clarify such conflicts is that they are still CFNL whether declared and recognised or not. The second criterion is that even though the territory is totally or partially occupied and there is no resistance the conflicts are still CFNL.

The members of a national liberation movement ('NLM') fight in this type of conflicts. The commentary on Protocol I has defined the situations in the three categories of CFNL. Colonial domination was noted as being the situation of peoples taking arms to free themselves from the domination of another people. Alien occupation was noted as those cases were a NLM fights against partial or total occupation of territories that did not form part of any State. Lastly, all those cases of a NLM fighting regimes founded on racism were noted as situations of racist regimes.⁴ The classifying of the three categories of CFNL was a product of the United Nations practice. The classification embodies one of the definitions used under international humanitarian law ('IHL') for the term 'CFNL'.⁵

IHL aims at decreasing human suffering during conflict.⁶ IHL comprises two primary sources.⁷ The Law of Geneva concerning the condition of victims of conflict in general and The Law of The Hague which relates to conducting an armed conflict.⁸ The Law of Geneva comprises the Geneva Conventions of 12

³ *Ibid.* 10.

⁴ Pilloud et al. 'Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949' (1987, 54).

⁵ Abi-Saab G 'Wars of national liberation in the Geneva Conventions and Protocols' 165 *RECEUIL DES COURS* 366-436 (1979-IV), at 393, CFNL can also refer to historical conflicts against a foreign invader or to dissident movements.

⁶ Kalshoven F 'Constraints on the waging of war' (1987, 26).

⁷ Greenwood C in 'Dieter Fleck's handbook' (1995, 9) the term IHL was used when connected to the Law of Geneva and to the Law of The Hague.

⁸ Erikson JR 'Protocol I: a merging of the Hague and Geneva Law of Armed Conflict' 19 Va. J. Int'l

August 1949 ('the Geneva Conventions'). Protocol I supplements the Geneva Conventions' protections in relation to the victims of international armed conflicts.

The discussion in this study will be in three parts: the history of CFNL; the regulation and a legal opinion. The first part will introduce the main concepts in CFNL. The second part comprises the second and third chapter. The second chapter will discuss the Protocol as the applicable law to CFNL. The third chapter will discuss the three categories of CFNL. The last part comprises the fourth chapter and the conclusion. The fourth chapter will derive a legal opinion from the secondary sources of IHL on the issue of the future relevance of CFNL under the Protocol. Furthermore, the chapter will discuss the impact of self-determination on that position. The conclusion finds the future relevance of CFNL to be limited.

L. 557 1978-1979, at 557-558, IHL has developed along two theoretical lines, that of, The Law of The Hague which regulates the use of force in armed conflicts and The Law of Geneva which relates to the protection of victims of armed conflict.

Chapter One: Self-determination and Conflicts for National Liberation

Chapter one will discuss the background of the principle of self-determination. A specific focus of the discussion will be the principle's influence on the definition for CFNL. Protocol I's inclusion of this definition is discussed at the end.

1.1. The Principle of Self-determination and the Conception of Conflicts for National Liberation

Origin and nature

The principle of self-determination has two inherent facets. The external facet refers to a State's right to sovereignty and independent and external relations.¹ The internal facet refers to the right of all peoples to "freely determine their political status and freely pursue their economic, social and cultural development".² The international community prefers the internal facet as the definition for self-determination.³ The right was initially afforded to a NLM fighting against colonial rule.⁴ However, the right was developed and included other peoples involved in conflicts outside the colonial context. The development began with the United Nations General Assembly Declaration on Granting of Independence to Colonial Countries and Peoples.⁵ This resolution provided that colonialism be discontinued and that alien subjugation of peoples was against the

¹ Danspeckgruber W 'The self-determination of peoples; community, nation and State in an interdependent World' (2002, 5).

² Pilloud et al 'Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949' (1987, 52).

³ Dugard J 'International Law: A South African Perspective', (2011, 102), although people within an existing State do not normally acquire a right to external, that is, the right to secede and form their own State they do acquire a right of internal self-determination. "It is the preferred specie of self-determination".

⁴ Gak N '*The distinction between levee en masse and wars of national liberation*' 5 Slovenian L. Rev 115 2008 at 120.

⁵ Higgins N '*The application of international humanitarian law to wars of national liberation*' Jha 2004, at 29-30, during the decolonisation period the international community gave much theoretical support to those in CFNL most of these messages were founded on the UN GA Res. 1514 (xv) of 1960, <http://sites.tufts.edu/jha/files/2011/04/a132.pdf> last accessed on 10/05/2015 at 13H00.

United Nations Charter. Furthermore, it proclaimed that all peoples possessed the right to self-determination.⁶ The United Nations also created a committee to implement this resolution.⁷ At this stage of the development only peoples involved in the conflicts against colonialism and alien subjugation were afforded this right. The resolutions such as 2105 (xx),⁸ 2446 (xxiii)⁹ and 2592 (xxiv)¹⁰ expanded on this category to include conflicts against racist regimes. The developments culminated in the Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations.¹¹

Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations
This declaration expressly provides the principle that 'peoples under colonial

⁶ GA Res. 1514 (xv) of 1960 Declaration on Granting of Independence to Colonial Countries and Peoples. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1514\(XV\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/1514(XV)) last accessed on 10/04/2015 at 12H00.

⁷ The special committee, on the situation with regard to the implementation of the Declaration on the granting of Independence to Colonial Countries and Peoples. <http://www.un.org/en/decolonization/specialcommittee.shtml> last accessed on 10/04/2015 at 13H05.

⁸ GA Res. 2105 (xx) of 1965 Implementation of the declaration on the granting of independence to colonial countries and peoples. It provided on the denouncement of practices such as colonialism and apartheid furthermore, it recognised the legitimacy of peoples engaged in conflicts against these practices in exercising their right to self-determination. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2105\(XX\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2105(XX)) last accessed on 10/04/2015 at 13H10.

⁹ GA Res. 2446 (xxiii) of 1968 Measures to achieve the rapid and total elimination of all forms of racial discrimination in general and of the policy of apartheid in particular. It provided that the international community should provide those legitimate conflicts against colonial and racist regimes support. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2446\(XXIII\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2446(XXIII)) last accessed on 10/04/2015 at 13H12.

¹⁰ GA Res. 2592 (xxiv) of 1969 Question of American Samoa (...). It provided that the United Nations General Assembly's agreement that self-determination of territories under colonialism was an inalienable right and that the United Nations should offer help to such peoples. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2592\(XXIV\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2592(XXIV)) last accessed on 10/04/2015 at 13H14.

¹¹ (n5, 33).

domination, alien subjugation and those under exploitation have a right to self-determination'. In terms of the declaration, States must not use force to deny the peoples this right. The States are rather under a duty to promote the right to self-determination.¹² In the Preamble the declaration expresses the United Nations General Assembly's conviction that the subjection of peoples to alien subjugation, domination and exploitation is undesirable. Furthermore, the General Assembly regards the peoples right of self-determination as an important component of the law. It is important to apply this principle in order to promote friendly relations built on the principle of State sovereignty.¹³ The United Nations continued through the 1970's to adopt resolutions like 2787 (xxvi),¹⁴ 3314 (xxix),¹⁵ 3382 (xxx),¹⁶ 3103 (xxviii)¹⁷ and 3379 (xxx).¹⁸ The resolutions being adopted were aimed at specific

¹² GA Res. 2625 (xxv) of 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2625\(XXV\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2625(XXV)) last accessed on 10/04/2015 at 13H20.

¹³ *Ibid.*

¹⁴ GA Res. 2787 (xxvi) of 1971 Importance of the universal realization of the right of peoples to self-determination and of the speedy granting of independence to colonial countries and peoples for the effective guarantee and observance of human rights. It condemned colonialism and racism and considered the conflicts against these condemned practices to be legal. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2787\(XXVI\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/2787(XXVI)) last accessed on 10/04/2015 at 13H30.

¹⁵ GA Res. 3314 (xxix) of 1974 On the definition of aggression. Recognised the right of peoples under colonial and racist regimes and under alien subjugation, to receive support from other States when engaged in an armed conflict to overthrow such regimes. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3314\(xxix\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3314(xxix)) last accessed on 10/04/2015 at 13H40.

¹⁶ GA Res. 3382 (xxx) of 1975 same title as 2787(xxvi). Which supported newly formed States and echoed the previous resolutions which affirmed legitimacy to those in conflicts against the condemned practices of racism, alien occupation and colonialism. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3382\(xxx\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3382(xxx)) last accessed on 10/04/2015 at 13H40.

¹⁷ GA Res. 3103 (xxviii) of 1973 Basic principles of the legal status of the combatants struggling against colonial and alien domination and racist regimes. Provided direct aims that proclaimed, *inter alia* both colonialism and apartheid as international crimes. Furthermore, it laid down principles that classified conflicts against colonialism, alien domination and racist regimes as international and these conflicts were not to be suppressed.

instances of conflicts by a NLM fighting in the exercise of their right to self-determination.

The principle of self-determination since its introduction has been developed through the United Nations practice.¹⁹ Self-determination first appeared in the United Nations Charter.²⁰ The principle is regarded as an internal facet of self-determination. The principle has since developed to become a right of peoples involved in conflicts against racism, alien subjugation and colonialism.²¹

However, the developments within the United Nations lacked legal force. The reason is because United Nations resolutions only possess a persuasive effect; they are soft-law unlike the United Nations Charter that is a treaty with binding force. The only resolutions which are binding are those of the Security Council when passed under chapter IV of the United Nations Charter.²²

1.2. The Regulation of a Right to Self-determination by International Humanitarian Law

The old framework

[http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3103\(xxviii\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3103(xxviii)) last accessed on 10/04/2015 at 13H50.

¹⁸ GA Res. 3379 (xxx) of 1975 Elimination of all forms of racial discrimination. Condemned racism as an offence and urged all governments to suppress and to punish this crime. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3379\(xxx\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/3379(xxx)) last accessed on 10/04/2015 at 13H50.

¹⁹ Emerson R ‘Self-determination’ 60 Am. Soc’y Int’l L. Proc. 135 1966, at 136, the United Nations has become the principal platform from which the right of self-determination was proclaimed.

²⁰ Pangalangan R and Aguilina E ‘The privileged status of national liberation movements under international law’ 58 PLJ 1 44 1983 at 56-57.

²¹ *supra*.

²² Graham DE ‘The 1974 diplomatic conference on the law of war: A victory for political causes and a return to the “just war” concept of the eleventh century’ 32 Washington L. rev. 25 1975 at 40.

The regulation of CFNL by IHL seems to be an anomaly as these conflicts involve people within the State fighting against that same State.²³ The conflicts are internal armed conflicts, but possess the status of an international armed conflict.²⁴ The reason for this peculiarity is because of the old legal framework in IHL. The old framework was based on The Law of The Hague which in turn was based on the 1899 and 1907 Hague Conventions.²⁵ The Hague Conventions of 1899 were revised in 1907 to include The Hague Regulations. The Law of The Hague determines the rights and duties of belligerents in the conduct of their military operations.²⁶ The Law of The Hague seeks to attain a balance between military necessity and humanitarian considerations.²⁷ The status of a belligerent under The Law of The Hague required the fulfilment of certain strict organizational requirements.²⁸ In terms of the old framework the conflicts fought by a NLM hardly reached the threshold and were regarded as internal matters.²⁹ Only States were considered by IHL, as only they were capable to fulfil the requirements of international armed conflicts.³⁰

²³ Levie H 'The 1977 Protocol I and The United States' 70 Int'l L. Stud. Ser. US Naval War Col. 339 1998, at 340, internal conflicts had always been considered to be governed by national law.

²⁴ Cassese A 'The status of rebels under the 1977 Geneva Protocol on non-international armed conflicts' 30 Int'l & Comp. L.Q. 416 1981 at 417.

²⁵ Erikson JR 'Protocol I: a merging of The Hague and Geneva Law of Armed Conflict' 19 Va. J. Int'l L. 557 1978-1979, at 557.

²⁶ (n3, 520)

²⁷ *Ibid.*

²⁸ 'Regulations concerning the Laws and Customs of War on Land. The Hague, 18 October 1907 annex to Convention (IV) respecting the Laws and Customs of War on Land '(1907) provides at Article 1 that the requirements to be a combatant are: baring arms openly; observing the laws of war; being organised and under a superior command.

²⁹ Abi-Saab G 'Wars of national liberation in the Geneva Conventions and Protocols' 165 RECEUIL DES COURS 366-436 (1979-IV), at 367, conflicts by liberation movements were traditionally viewed as a species of civil conflicts not subjected to international legal regulation.

³⁰ Sassoli M and Bouvier A 'How does law protect in war' (1999, 89) "according to the traditional doctrine the notion of international armed conflict was limited to armed conflicts between States".

CFNL were therefore deemed as being internal armed conflicts. The result was that more emphasis was placed on the principle of territorial sovereignty.³¹ Ultimately municipal laws would apply to CFNL not IHL.

However, due to the inherent arbitrary nature, the old framework was deemed unsuitable to regulate CFNL.³² The old legal framework became abrogated with the prevalence of CFNL and the cries amongst the international community for the relaxation of the requirements for combatant status.³³

The New Framework

The international pressure led to a paradigm shift.³⁴ The most drastic change was a need to provide IHL protections available to a people other than a State. The drastic change propounded the international community's views to emphasise on the protection of such principles as self-determination of peoples. In this regard the United Nations passed extensive resolutions.³⁵ The international community focused on CFNL as a consequence of the United Nations practice of attaching them to the principle of self-determination. The attachment was because the conflicts were being fought against the denial of a fundamental principle enshrined in international legal instruments like The Declaration on Principles of International Law Concerning Friendly Relations. This declaration resulted in self-determination being viewed as an international legal right.³⁶ The implications of this declaration were that society had been based on a dynastic legitimisation of power, despotism and agreements between rulers. However, self-determination brought forth a new standard to determine legitimate power in the international

³¹ Crawford J 'Brownlie's principles of public international law' (2012, 211) the term sovereignty meant the legal competence which a State enjoyed in respect of its territory.

³² Odermatt J '*Between law and reality: 'New wars and internationalised armed conflict'*' 5 Amsterdam L.F. 19 2013, at 27, in non-international armed conflict the State is the only party that may legally employ armed force.

³³ Green LC 'The contemporary law of armed conflict' (1993, 108-109).

³⁴ (n5, 19) before the Second World War the attention of IHL was on international conflicts. It was however realised that civil conflicts were more prevalent and some regulation was necessary. This change in attitude brought about an evolution in IHL, which up to then had placed emphasis on State sovereignty.

³⁵ *Supra.* 1.1. for GA resolutions.

³⁶ (n5, 31).

sphere namely; the respect for the peoples wishes. The change which caused the promotion of the formation of international entities based on the free wishes of the populations concerned demolished multi-national empires and colonialism.³⁷ The empires and colonialists pursued a uniform way in all nations. However, since each nation comprises different populations, requiring different traditions and norms, those forms of governance became extinct.³⁸ The notion of the State as protector of the elite's interests was replaced with consultation of the people because of this principle.³⁹

The Outcome of the New Framework

Protocol I was adopted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974.⁴⁰ The adoption of Protocol I was aimed at helping victims of international armed conflicts by supplementing the many shortcomings of the Geneva Conventions and updating the outdated Hague Regulations.⁴¹ In order to prevent the arbitrariness of the old framework the protections of IHL were offered to those victims of CFNL.⁴² The national liberation framework created by Protocol I, allowed certain peoples organised into a NLM to fight against those States which had been ignoring the developments in the United Nations resolutions.⁴³ IHL then became applicable to their conflicts. The examples of such States were those of

³⁷ Cassese A 'International law' 2nd edition (2005, 60-61).

³⁸ Donnelly J 'Cultural relativism and universal human rights' 6 Hum. Rts. Q. 400 1984, at 400, cultural relativism was an undeniable fact and furthermore, rules and institutions differed with culture and history. If, for example, you are a Muslim you will have Islamic rules and also because, there was apartheid laws in South Africa, there were now laws aimed at restitution.

³⁹ (n37, 60) "self-determination introduced a new standard for judging the legitimization of power".

⁴⁰ The Final Act annexed to Protocol I found in O.R Vi p3.

⁴¹ (n29, 339).

⁴² (n20, 45-46) the framework for national liberation was based on the right to self-determination.

⁴³ Cassese A 'The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law' 3 UCLA Pac. Basin L.J. 55 1984, at 71, "international rules often had a "rhetoric" value that explained why States were so eager to accept them, despite the fact that they had little authority as legal standards of behaviour".

Israel and South Africa.⁴⁴ The non-adherence by these States led to the international community's support for the NLM involved in CFNL.⁴⁵ When the Geneva Conventions were to be revised the same proponents who had advocated for CFNL amongst the international community succeeded in including such conflicts in the drafts. The proponents succeeded because these conflicts prevailed at that time. The characterisation of CFNL as international armed conflicts meant that the entire IHL was applicable to them.⁴⁶

However, the three categories of conflicts had to have been fought in exercise of self-determination.⁴⁷ Characterising CFNL as international armed conflict brought these conflicts in the domain of conflicts against States. This status came about after many resolutions and efforts by the United Nations.

Protocol I resulted from this stance of regarding CFNL as international armed conflict. Protocol I ensured CFNL enjoy the protection from IHL provisions applicable to conflicts against States.⁴⁸ The Protocol was open for signature in December of 1977.⁴⁹

1.3. Conclusion

The principle of self-determination was developed mostly within the United Nations General Assembly. It was ignited from conflicts against colonialism. In the old framework these conflicts were non-international conflicts. The principle of

⁴⁴ *Ibid.* 68 the United Nations was politically motivated to have adopted resolutions which protected CFNL and the aim was to have promoted by legal means conflicts of liberation fought against *inter alia* military occupation by States like Israel.

⁴⁵ (n29, 407-408) when Protocol I was drafted inviting the legitimate NLM caused a dilemma. The matter was resolved by inviting the NLM which was recognised by its regional organisation.

⁴⁶ (n27, 399).

⁴⁷ (n22, 27-28) history taught us the fact that IHL was developed based on past experience for instance the Geneva Conventions were considered in light of the Second World War. Therefore, when the Geneva Conventions had to be supplemented their shortcomings were assessed, especially, for protecting civilians in contemporary conflicts.

⁴⁸ Mastorodimos K '*The character of the conflict in Gaza: Another argument towards abolishing the distinction between international and non-international armed conflicts*' 12 Int'l Comm. L. Rev. 437 2010, at 451, a NLM is considered under IHL as a State although they lack territory and self-government.

⁴⁹ (n40,3).

self-determination was developed through the United Nations practice where it was merged with the conflicts against alien subjugation and racist regimes. The merger demonstrated that these conflicts had become more relevant due to their prevalence. The developments led to the Declaration on Principles of International Law Concerning Friendly Relations. This declaration expressly stated that the peoples in conflicts against colonial domination, alien subjugation and racist regimes possessed the right to self-determination. The express statement of the right to self-determination was the reason Protocol I's scope of CFNL refers to the Declaration on Principles of International Law Concerning Friendly Relations. However, because the United Nations resolutions possess no legal force, they therefore were not effective and the developments continued.

After realising the arbitrariness of the old framework as only States could legally use force under it. The international community then resolved to put in place a new national liberation framework in IHL. The new framework extended the protections of IHL to CFNL. The category of conflicts in CFNL was thus elevated to international armed conflicts. The category of conflicts had been refined to comprise those conflicts against alien occupation, racist regimes and colonial domination. The peoples right to self-determination remained at the core of CFNL. It was the first time that IHL regulated peoples as a party to international armed conflicts. The focus of IHL had always been on the States. Regulating peoples was a major change hauled by the fact that there was emphasis being placed on the consultation of people. The resultant development led to the very first formal treaty. The formal treaty meant that *a fortiori* the parties in CFNL were now eligible to draw on the protection of IHL.

The Chapter demonstrated the evolution of CFNL from internal to international armed conflict because of Protocol I and with self-determination at the core. The next chapter will aim to look at the specific provisions of Protocol I in relation to CFNL. The discussion will highlight the reforms brought by Protocol I and the intensity required of armed conflict for the applicability. The aim will be to analyse in the third chapter the provisions of Protocol I's applicability to CFNL and ascertain their relevance in that regard.

Chapter Two: The Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

Chapter two will discuss Protocol I's substantive provisions to ascertain a summary of those provisions. The summary of the provisions will be used as a stepping stone when the discussion moves to discuss the threshold for IHL to apply under Protocol I. The determination of the threshold will be utilized as an analysis of the *status quo* when the threshold was high and the extent it has been relaxed. The last part will serve as a restatement of Protocol I's contribution to the development of IHL. The discussion will have traversed through aspects of Protocol I which will enable a conclusion to be reached on the protocol's nature. The exact nature of Protocol I will be beneficial in ascertaining the practical applicability of its substantive provisions to CFNL. The Law of Geneva aims to protect victims of armed conflict in general.¹ A determination of whether The Law of Geneva succeeded in developing a specific framework for the victims in CFNL will ensue. The determination will be ascertained in the last chapter, where the influence of self-determination will be discussed in that regard.

Protocol I, which comprises of six parts, is the *lex specialis* in CFNL.²

2.1. The Substantive Provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

1. The Parts of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

Part One³

¹ Dugard J 'International Law: A South African perspective' (2011, 524).

² Sassoli M '*The relationship between international humanitarian and human rights law where it matters*' IRRC vol. 90 871 2008, at 603, *lex specialis* is the law specifically detailed for the situation.

Part one was titled ‘general provisions’. It contains provisions which provide for aspects such as the definitions, the legal status and Protocol I’s scope.⁴ Protocol I cannot apply independently of the Geneva Conventions. The provisions, for instance, provide that all armed conflicts between two or more of the parties to the Geneva Conventions fall under the scope. Protocol I supplements these conventions, so prospective parties had to be party to them. Furthermore, those armed conflicts between parties to the Geneva Conventions also include CFNL.⁵ Part one of Protocol I has a provision which internationalised CFNL.⁶ A party to CFNL under Protocol I will be able to assert rights espoused in the United Nations Charter and the Declaration on Principles of International Law Concerning Friendly Relations.

Part two⁷

Part two of Protocol I comprises of Articles 8 — 34 which supplement the provisions of the Geneva Conventions.⁸ The provisions which this part supplements are those of the First and Second Geneva Conventions.

In terms of the First Convention parties are to provide care for wounded or sick combatants and the personnel caring for them.⁹ Furthermore, they are to provide protection for the places sheltering these people.¹⁰ The Second Convention is a

³ ICRC ‘Protocols Additional to the Geneva Conventions of 12 August 1949; The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of victims of international armed conflict(Protocol I)’ (1977, 10-13).

⁴ *Ibid.* 10.

⁵ *Ibid.* Article 1(3) and 1 (4).

⁶ Cassese A ‘The status of rebels under the 1977 Geneva Protocol on non-international armed conflicts’ 30 Int’l & Comp. L.Q. 416 1981, at 417, CFNL which were internal conflicts had been ‘upgraded’ by the Protocol to the class of international conflicts. The parties engaged in these conflicts were entitled to formally derive rights and duties from the Protocol.

⁷ (n3, 13-28).

⁸ The ICRC provided that the Protocol, inter alia, extended the Conventions protection to civil medical personnel, equipment and supplies and to civilian units and transports, www.icrc.org/ihl/INTRO/470 last accessed on the 10/04/2015 at 14H00.

⁹ For the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/365?OpenDocument> last accessed on the 10/04/2015 at 14H08.

¹⁰ ICRC ‘The Geneva Conventions of August 12 1949’ (1949, 7).

reproduction of the First Convention.¹¹ However, its terms apply to maritime conflict.¹²

*Part three*¹³

Part three comprises Articles 35 — 47. The articles contain provisions that develop the rules relating to the conduct of hostilities. The Law of The Hague contained these rules prior to Protocol I. The main provisions of The Law of The Hague are: those which distinguish combatants; provide for the methods of conflict and protect cultural property.¹⁴ The Hague Regulations contain these provisions.

Article 35 which is the basic rules provides that the means of conducting hostilities have a limit.¹⁵ The provision basically provides that the means and methods must not cause unnecessary suffering. It must not be the intention of either party that the means and methods cause damage to the environment. Furthermore, Article 36¹⁶ obligates parties to Protocol I to determine if a new weapon violates its provisions and IHL in general.¹⁷ Articles 35 and 36 correspond to the provisions of the Hague Regulations which prohibit means which seek to cause unnecessary suffering without advancing the military aim.¹⁸

Part three also has provisions in Articles 44 — 47 which relate to prisoner of war status.¹⁹ The Third Geneva Convention originally provided for this aspect of

¹¹ For the Amelioration of the Condition of the Wounded, Sick and shipwrecked Members of Armed Forces at Sea. <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/370?OpenDocument> last accessed on the 10/04/2015 at 14H08.

¹² (n10, 10).

¹³ (n3, 30-35).

¹⁴ Green LC 'The contemporary law of armed conflict' 3rd edition (2008, 43-44).

¹⁵ (n3, 30).

¹⁶ *Ibid.*

¹⁷ *Ibid.*

¹⁸ Kalshoven F 'Constraints on the waging of war' (1987, 33) in terms of this law the object of conflict is weakening the military force of the enemy, this includes attacking things as military units and armoured cars.

¹⁹ (n3, 33-35).

captivity.²⁰ The convention embodies the States' desire for all the aspects of captivity to be in accordance with humane regulation by IHL.²¹

*Part four*²²

Part four comprises of Articles 48 — 79. It aims at offering protection to civilians like women, children and journalists against the effects of hostilities. Furthermore, it provides for relief in their favour and their treatment when in captivity. The rules offering protection are the most important provisions in part four.²³ The part also provides these civilians with fundamental guarantees. The Fourth Geneva Convention contained the guarantees prior to Protocol I.²⁴ This convention, *inter alia*, ensures the respect for the dignity of a human person against the effects of hostilities.²⁵ Article 48 of Protocol I reaffirms this provision by providing that to avoid making civilians the subject of the conduct of hostilities parties must at all times distinguish them.²⁶

*Part five*²⁷

Part five comprises Article 81 — 91 which mainly involves measures to enforce compliance with Protocol I. The measures include the ICRC's function to assist and the parties' obligation to disseminate information in times of peace and conflict. Furthermore, this part of Protocol I represses breaches by designating them as crimes.

*Part six*²⁸

Lastly, the provisions in part six relate to signature and ratification. The parties in CFNL need to agree to bind themselves to Protocol I and the Geneva

²⁰ Relative to the treatment of Prisoners of War. <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument> last accessed on the 10/04/2015 at 14H02.

²¹ (n10, 12).

²² (n3, 36-58).

²³ www.icrc.org/ihl/INTRO/470 last accessed on the 10/04/2015 at 14H07.

²⁴ Relative to the Protection of Civilian Persons in Time of War. <https://www.icrc.org/applic/ihl/ihl.nsf/INTRO/380> last accessed on the 10/04/2015 at 14H20.

²⁵ (n10, 16).

²⁶ (n3, 36).

²⁷ *Ibid.* 59-66.

²⁸ *Ibid.* 66-69.

Conventions in order for these instruments to apply to them because both are treaties.²⁹

The only provision in this part which relates to a NLM involved in CFNL is Article 96(3). It makes provision for the bringing into force of IHL to such conflicts through a declaration.³⁰ This declaration is impossible when the State fighting in a conflict is not a party to either Protocol I or the Geneva Conventions.³¹

Protocol I ends at Article 102. Furthermore, there are two annexes attaching.³²

2. Determining the Threshold for the Application of International Humanitarian Law to a Conflict for National Liberation.

In relation to CFNL there is an old and new framework of regulation. The new framework has not been used.

Conflicts for national liberation under the old framework

The old framework differentiated non-State parties to a conflict. Rebellion consisted of small disturbances which remained within the domestic jurisdiction of a State.³³ Insurgency was determined when the civil unrest intensified to resemble the conduct of an organised conflict between contending factions within a state.³⁴ Lastly, when the insurgents' conducted general armed conflict and occupied a substantial portion of the national territory a condition of belligerency existed.³⁵ These conflicts were legally classified along levels of ascending

²⁹ Abi-Saab 'Wars of national liberation in the Geneva Conventions and Protocols' 165 RECEUIL DES COURS 366-436 (1979-IV), at 399.

³⁰ Baxter RR "International dimensions of humanitarian law; the duties of combatants and the conduct of hostilities" (1988, 102) this is an important provision which provides for unilateral declaration by a NLM to the depositary if they desire to make Protocol I applicable.

³¹ Pilloud *et al.* 'Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949' (1987, 1091-1092).

³² (n3, 70-81).

³³ Pangalangan R and Agiling E 'The privileged status of national liberation movements under international law' 58 PLJ 1 44 1983 at 51.

³⁴ *Ibid.*

³⁵ *Ibid.*

intensity.³⁶ The primary consideration of the old framework was the question of State responsibility to third parties. The question was whether instead of the State, injurious conduct was now attributable to the insurrectional movement.³⁷

Recently IHL regulates international and non-international armed conflicts with two respective protocols.³⁸ The reason for two protocols is because they are two separate types of conflicts.³⁹

The old framework was codified in the Geneva Conventions. Common Article 3 of the Geneva Conventions applies to non-international armed conflict.⁴⁰ The article's provisions imply the requirements of both minimum organisation of the conflicting parties and intensity of the conflict.⁴¹ The factors considered for minimum intensity includes the number of persons and the type of forces fighting.⁴² The factors considered for the minimum of organisation includes the existence of a command structure and disciplinary measures within the non-state armed group.⁴³

Common Article 2 in the Geneva Conventions is applicable to international armed conflicts.⁴⁴ The provision applies when there is a conflict between two High Contracting Parties which is declared or not.⁴⁵

Conflicts for national liberation under the new framework

³⁶ *Ibid.*

³⁷ *Ibid.* 53.

³⁸ Buckley O M 'Unregulated armed conflict: Non-State armed groups, international humanitarian law, and violence in Western Sahara' 37 N.C.J. Int'l L. & Com. Reg. 793 2011-2012 at 810.

³⁹ Macak K and Zamir N 'The applicability of international humanitarian law to the conflict in Libya' 14 Int'l Comm. L. Rev. 403 2012 at 407.

⁴⁰ Common Article 3 GCI, at 36-37/GCII 64-65/GCIII 91-92/GCIV 169-170 <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> last accessed on 10/03/2016 at 12H10.

⁴¹ (n39, 406-407).

⁴² *Ibid.* 407.

⁴³ *Ibid.* 408.

⁴⁴ Common Article 2, GCI, at 36/GCII 64/GCIII 91/GCIV 169 <https://www.icrc.org/en/war-and-law/treaties-customary-law/geneva-conventions> last accessed on 10/03/2016 at 13H10.

⁴⁵ (n39, 412).

The new framework through Article 1(4) of Protocol I adds CFNL to international armed conflicts. The provisions of Article 1(4) imply that without the minimum requirements a resort to general armed conflict or CFNL made IHL applicable to an international armed conflict.

Generally armed conflict used to commence when there was a declaration, by a party to the conflict, that a conflict has begun. Furthermore, if one of the parties issued the other party an ultimatum with a condition that armed conflict will ensue if the condition is not met.⁴⁶ Nowadays, the first strikes between States or a State and a NLM commence the application of IHL to an international armed conflict. This is according to a reading of Common Article 2 of the Geneva Conventions together with the articles of Protocol I.⁴⁷ Protocol I relaxes the requirements of minimum organisation and intensity for as long as Article 1(4) is satisfied. Furthermore, the parties to the conflict must be able to let Protocol I enter into force in their relations. The State must have acceded to Protocol I and the NLM must have made an Article 96(3) declaration. When an NLM has made an accepted declaration it may apply the provisions of Protocol I and the Geneva Conventions against the State party.⁴⁸ The declaration is compulsory because there is no automatic application of IHL treaties to NLM. A NLM has to make a unilateral declaration to that effect.⁴⁹

In this new framework there is no requirement of minimum intensity or otherwise. The requirements for aspects such as intensity do not appear in Common Article 2 of the Geneva Conventions or in Articles 1(4) or 96(3) of Protocol I.⁵⁰ The intensity can be anywhere between insurgency and belligerency as long as the situation referred to in Article 1(4) exists.⁵¹

⁴⁶ ICRC ‘Handbook on the law of war for armed forces’ (1987, 30).

⁴⁷ (n39, 412).

⁴⁸ (n3, 67) Article 96(3) (a)-(c).

⁴⁹ Bilkova V ‘*Treat them as they deserve?! Three approaches to armed opposition groups under current international law*’ 4 Hum. Rts. & Int’l Legal Discourse 111 2010 at 119.

⁵⁰ (n29, 413).

⁵¹ Crowe J and Weston-Scheuber K ‘Principles of International Humanitarian Law’ (2013, 15) CFNL were regulated as interstate conflicts because of the Protocol I’s Article 1(4).

Originally CFNL were non-international armed conflicts. However, Protocol I internationalised them.⁵² The internationalisation implies that these conflicts are basically internal conflicts with the status of international armed conflicts. A non-international armed conflict implies more stringent requirements of organisation and intensity than an international one.⁵³

Protocol I sought CFNL to be treated as international armed conflicts. However, this has not received any practice.

Application of the new framework

In South Africa there was low intensity fighting between the ANC military wing and the government ever since a while after the 1960 Sharpeville massacre.⁵⁴ The United Nations and regional organisations determined because of the massacre that since its drafting Article 1(4) was applicable to the conflict.⁵⁵ However, for Protocol I to be applied to the conflict the State had to accede and the NLM make a declaration. The declaration enables the authority party to CFNL to accede to Protocol I and the Geneva Conventions. However, the state must still be a Party to these instruments.⁵⁶ The ANC made a declaration in 1980 but they failed to comply with all the requirements of Article 96(3).⁵⁷ The ANC failed because South Africa was not a party to Protocol I. The fact that coverage of Protocol I only applies to those CFNL that occur in the territory of States that have ratified it has a potential for abuse by States. The fact is clear from Article 95 which provides a waiting period for Protocol I to come into force between the initial contracting parties and any other State thereafter.⁵⁸ The waiting period is to allow contracting parties' time to establish legislative, administrative measures

⁵² (n6, 417) CFNL which were internal conflicts had been ‘upgraded’ by the Protocol I to the class of international conflicts.

⁵³ (n39, 428).

⁵⁴ Lave TR ‘A nation at prayer, a nation in hate: Apartheid in South Africa’ 30 Stan. J Int'l L. 1994 483 at 511.

⁵⁵ Aldrich GH ‘Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva Protocol I’ 26 Va. J. Int'l L. 693 1985-1986, at 702, Protocol I was drafted with South Africa and Israel as the targeted States.

⁵⁶ (n3, 67) in terms of Article 96(3) (a)-(c).

⁵⁷ (n55, 703) in 1980 the ANC made a declaration to respect the Conventions and Protocol I.

⁵⁸ (n3, 66) there is a six months waiting period for Protocol I to enter into force.

and register the instrument of accession or ratification.⁵⁹ Further concern is the fact that terms colonial domination, racist regime and alien occupation are not suited to determine legal questions like the status of an armed conflict. The terms are not suited for technical accuracy but rather usually used in political rhetoric.⁶⁰ It is also unlikely a State will be willing to voluntarily label itself colonial, alien or racist when facing internal armed dissent.⁶¹ The scope of the provision remains poorly defined.⁶² The decision as to whether the conditions specified in Article 1(4) have been met appear to be subjective and within each States discretion. This notion is evidenced by the United Kingdom's condition in order to be bound by a declaration made by an authority.⁶³ It must expressly recognise such authority making a declaration as genuinely representing the peoples engaged in an Article 1(4) conflict.⁶⁴

States could alternatively argue bias in that there is no procedure to determine what movement is seeking self-determination and qualifies as a NLM in terms of Article 1(4).⁶⁵ The lack of a procedure will result in an unaccountable autonomy by rebel organisations who claim to be fighting for self-determination. The unaccountability is because Article 44(3)⁶⁶ of Protocol I, affords them combatant status even if they commit perfidies of conflict.⁶⁷ It was on this basis that the United Kingdom made a declaration that the terms 'armed conflict' in Article 1(4) excludes all acts of terrorists whether in concert or isolation.⁶⁸

⁵⁹ (n31, 1080-1081) only applied between State parties.

⁶⁰ (n51, 21).

⁶¹ *Ibid.*

⁶² *Ibid.*

⁶³ Declaration by the UK of 2 July 2002, accessed on the 2016/03/11 08H30 at <https://www.icrc.org/applic/ihl/ihl.nsf/Notification.xsp?action=openDocument&documentId=0A9E03F0F2EE757CC1256402003FB6D2>

⁶⁴ *Ibid.*

⁶⁵ (n14, 60).

⁶⁶ (n3, 33).

⁶⁷ Talekar P 'Rethinking Article 1(4) Additional Protocol I: Scope of liberation movements as international armed conflicts, and complexities in determining war crimes' 13 U. Botswana L.J. 103 2011 at 108.

⁶⁸ (n63).

Furthermore, the adversary of the NLM could call these people criminals who represent themselves.⁶⁹ The characterisation is because there are no procedures available to determine the authenticity of NLM. States assert that the fact that there is no procedure can be abused as there can be more than one NLM.⁷⁰ However, it is provided that they may all be recognised. As long as the NLM direct their struggle against the government denying them their self-determination, respond to the definition of Article 1(4) and fulfil the requirements of Article 96(3).⁷¹

Similarly, in the Occupied Palestinian Territories during 1964 in response to emerging conflicts the 1st Palestinian National Council convened. The meeting led to the formation of the Palestinian Liberation Organisation ('PLO') on 2nd June 1964.⁷² The United Nations has considered that the requirement of Article 1(4) was met in this conflict since the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974.⁷³ The PLO secured its role as the representative of the Palestinian people. The PLO did this through their quest for self-determination by gaining recognition from the Arab league and most United Nations member States.⁷⁴ The PLO made a declaration to observe IHL. However, since Israel was not a party to Protocol I the NLM attempted to accede to the IHL treaties. The PLO sent a unilateral declaration in 1982 to apply the Fourth Geneva Convention.⁷⁵

In terms of the postulations by parties involved there has not been practice due to the potential for abuse. Therefore, it is not surprising that Protocol I has not been

⁶⁹ (n29, 412).

⁷⁰ State Parties to Protocol I, accessed on the 2016/03/11 08H00 at https://www.icrc.org/applic/ihl/ihl.nsf?xp_viewStates=XPages_NORMStatesParties&x_p_treatySelected=470. Israel and USA are not parties of Protocol I.

⁷¹ (n29, 409).

⁷² Nagan WP and Haddad AM '*The legal and policy implications of the possibility of Palestinian statehood*' 18 U.C. Davis J. Int'l L. & Pol'y 343 2011-2012 at 363.

⁷³ (n55, 702).

⁷⁴ (n72, 364).

⁷⁵ *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion*, I. C. J. Reports 2004, para 91.

ratified by States which face a NLM like Israel.⁷⁶ States such as South Africa⁷⁷ only become party to Protocol I once their internal or colonial problems had been resolved.⁷⁸ However, there has never been a successful Article 96(3) declaration made *per se* Protocol I.⁷⁹ The armed conflicts in South Africa commenced in 1980 and in the Occupied Palestinian Territories one in 1982 after declarations to apply IHL were submitted. The application of Protocol I depends more on the quality of the authority representing the NLM than on the intensity.⁸⁰ The conflicts commenced not *per se* as international CFNL as per Protocol I, rather as Geneva Common Article 2 paragraph 3 and customarily regulated international armed conflicts. However, the interpretation of a NLM as a power under Common Article 2 paragraph 3 is not generally accepted. The ambiguity led to the drafting of Protocol I.⁸¹

2.2. Important Reforms to International Humanitarian Law by the Substantive Provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts⁸²

New provisions

The most important provisions in regard to CFNL are Articles 1(4) and 96(3) of Protocol I.

⁷⁶ n70.

⁷⁷ n70, South Africa acceded on 11/21/1995.

⁷⁸ (n49, 119).

⁷⁹ *Ibid.* 120 there is no Article 96 declaration after 30 years of regulation of CFNL.

⁸⁰ Schmitt MN and von Heinegg WH '*The scope and applicability of international humanitarian law*' (2012, 43) Protocol I only applies to CFNL if the NLM makes a declaration. A few provisions indicate that the NLM needs to show minimum organisation. The provisions of Protocol I like Article 96 by requiring equal application imply that the NLM has the ability to apply Protocol I. Furthermore, Article 43 which requires some organisation in the armed forces.

⁸¹ *Ibid.* at 38-39.

⁸² Cassese A '*The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law*' 3 UCLA Pac. Basin L.J. 55 1984, at 86, most of the rules of Protocol I relating to the protection of civilians are declaratory of customary law and at the same time make improvements.

Article 1(4)⁸³ extends the scope of Protocol I by providing that the situations of armed conflicts between two or more of the Parties to the Geneva Conventions include CFNL.⁸⁴ Furthermore, Article 1(4) classifies CFNL where peoples are fighting against colonial domination, alien occupation and against racist regimes in the exercise of their right to self-determination as international armed conflicts.⁸⁵ The reason for the classification is to enable all the applicable laws to apply in a designated conflict.

Article 96(3)⁸⁶ provides a means for a NLM to bring Protocol I into force in CFNL by expressing their intention to abide by the Geneva Conventions and Protocol I.⁸⁷ The NLM must satisfy three requirements to express their intention. A declaration of an express undertaking of the authority representing the peoples addressed to the depositary. In addition, they should be engaged in a conflict, defined in Article 1 (4). Lastly, the conflict must be among peoples fighting for self-determination and a party to Protocol I.⁸⁸

When viewed together Articles 1(4) and 96(3) of Protocol I are the operative provisions in relation to CFNL. The compliance with these articles includes CFNL to international armed conflicts and the whole IHL then becomes applicable. The declaration which the NLM makes is unilateral and enables the Geneva Conventions and Protocol I to come into force in the conflict.⁸⁹

Protocol I brings other changes like instead of a High Contracting Party the terminology now refers to a ‘party to the conflict’ which accommodates a NLM. Furthermore, Article 7⁹⁰ provides for meetings between the signatories, that the

⁸³ (n3, 10).

⁸⁴ (n29, 395) spoke of alien domination having been changed to alien occupation.

⁸⁵ Clapham A ‘Human rights obligations of non-state actors’ (2006, 273).

⁸⁶ (n3, 67).

⁸⁷ (n31, 1084).

⁸⁸ *Ibid.* 1088.

⁸⁹ *Ibid.* 1089.

⁹⁰ (n3, 13).

depository can convene to resolve general problems concerning application of the protocol.⁹¹

Protocol I has also through Articles 35(3)⁹² and 55⁹³ became the first instrument to provide direct protection to the environment during international armed conflicts.⁹⁴ Furthermore, Protocol I was the first binding treaty to explicitly require the rule of proportionality.⁹⁵ The principle is clearly embedded in Article 51(5)⁹⁶ of Protocol I.⁹⁷

Another first by Protocol I is Articles 76 — 79⁹⁸ of the protocol, which protect women, children and journalists. It is the first time IHL regulates children participating in hostilities. Furthermore, Article 77⁹⁹ requires parties to take all feasible measures and refrain from recruiting persons less than fifteen years of age.¹⁰⁰

Protocol I also facilitates, for the first time ever, The Law of Geneva to regulate The Law of The Hague.¹⁰¹ Protocol I shows by merging the usually separate sources of IHL that the mode of armed conflict directly affects the conditions of its victims.¹⁰²

⁹¹ An example of this meeting was the Geneva meeting of May 2010 ensuring respect for the Fourth Geneva Convention. <http://www.pchrgaza.org/files/2010/Ensuring%20Respect.pdf> last accessed on the 10/04/2015 at 14H00.

⁹² (n3, 30).

⁹³ *Ibid.* 40.

⁹⁴ Schmitt MN ‘Humanitarian law and the environment’ 28 Denv. J. Int’l L. & Pol’y 265 1999-2000 at 275.

⁹⁵ Clarke B ‘Proportionality in armed conflicts: A principle in need of clarification?’ 3 J. Int’l Human.Legal Stud. 73 2012 at 76.

⁹⁶ (n3, 37).

⁹⁷ (n95, 77).

⁹⁸ (n3, 56-58).

⁹⁹ *Ibid.* 56.

¹⁰⁰ Happold C ‘Child soldiers in international law’ (2005, 57).

¹⁰¹ (n29, 429) the Protocol causes for the first time ‘The Law of Geneva’ to extensively deal with ‘The Law of The Hague’ and it improves the protection of civilians in all types of conflict.

¹⁰² Erikson JR ‘Protocol I: A Merging of the Hague and Geneva Law of Armed Conflict’ 19 Va. J. Int’l L. 557 1978-1979 at 559.

Reforms relating to the protection of victims of international armed conflict

Protocol I has provisions which provide more care for wounded combatants or civilian persons from Articles 10 — 13.¹⁰³ In addition, there are also provisions for identifying the caregivers and distinctive emblems for medical units and transports in Article 18.¹⁰⁴ Articles 40 — 42¹⁰⁵ of Protocol I provide that parties are to provide quarter to persons with injury and not attack them.¹⁰⁶ Furthermore, according to Articles 43 — 45¹⁰⁷ if the parties to the conflict capture persons who are in the armed force of either party they are to treat them as prisoners of war.

The provisions relating to medical transport in Articles 21 — 31¹⁰⁸ of Protocol I are more specific. The provision's protection now extends to civilian medical personnel, equipment and supplies as well as to civilian units. The provisions even include in their protection the transportations of supplies by aircraft.¹⁰⁹ The Fourth Geneva Convention had fulfilled this role prior to Protocol I protecting civilians. However, the Fourth Convention had shortcomings because it only covered civilians when they were in the enemy's power. The protection failed to cover the greatest danger from alien or colonial governments on areas not under their control. The situation fell to The Law of The Hague, but it was out-dated and had no provisions on aerial conflict.¹¹⁰ In the Geneva Conventions, medical aircraft were protected when they flew at times and altitudes agreed to by the parties. The protection was insufficient as aircrafts rarely operated under such ideal conditions. Protocol I cures these defects in that Article 1(1)¹¹¹ requires that parties undertake to ensure respect for the protocol in all circumstances.¹¹²

¹⁰³ (n3, 16-17).

¹⁰⁴ (n3, 20).

¹⁰⁵ *Ibid.* 31-32.

¹⁰⁶ *Ibid.* 21-22.

¹⁰⁷ *Ibid.* 32-34.

¹⁰⁸ *Ibid.* 21-26.

¹⁰⁹ Schnidler D and Toman J 'The laws of armed conflict' (1981, 551).

¹¹⁰ (n29, 428).

¹¹¹ (n3, 10).

¹¹² Henckaerts J-M, Doswald-Beck L 'Customary international humanitarian law', volume 2: practice, (2005, 498) the obligation to respect and ensure respect does not depend on reciprocity.

Furthermore, Articles 24 — 31¹¹³ together with Annexure 1¹¹⁴, provides substantive protection for medical aircraft even during hostilities.¹¹⁵

Protocol I also through Articles 32 — 34 require the parties; to search for if lost and report prisoners and those who die while in captivity.¹¹⁶ The parties are to keep track of them and account for their deaths and to return their remains.¹¹⁷ Articles 72 — 74¹¹⁸ of Protocol I apply to the treatment of persons in the power of a party to the conflict.¹¹⁹ Article 75¹²⁰ of Protocol I offers fundamental guarantees such as humane treatment of prisoners and not permitting treacherous conduct against them. Parties are to offer prisoners reasons for their captivity and other fundamental guarantees.¹²¹

Protocol I in Article 85 notes grave breaches as, *inter alia*, transferring parts of the civilian population by the occupying power into the territory it occupies. Also deporting or transferring from this territory to outside territory is a breach.¹²²

Reforms relating to the conduct of hostilities

The distinction of the armed forces from civilians is an important reform relating to conducting hostilities. Protocol I introduces a new definition for armed forces.¹²³ In terms of Article 43(1)¹²⁴ armed forces are to be in an organisation, which is under a superior responsible for the sub-ordinates and they are subject to a disciplinary system.¹²⁵ Furthermore, to protect civilians, Article 44(3)¹²⁶ places

¹¹³ (n3, 23-26).

¹¹⁴ *Ibid.* 70.

¹¹⁵ (n55, 697).

¹¹⁶ *Ibid.* 27-28.

¹¹⁷ *Ibid.*

¹¹⁸ *Ibid.* 53.

¹¹⁹ (n29, 430) in terms of Article 73 the treatment of civilians in an enemy's power including stateless persons should be as protected persons and not be dependent on nationality.

¹²⁰ (n3, 53).

¹²¹ *Ibid.* Article 75 provides substantive legal protection for captured civilians, it provides a minimal standard for protection for all persons in the party's power. This standard depicts that some rights are not to be derogated from even in times of conflict.

¹²² *Ibid.* 61.

¹²³ *Ibid.* 32.

¹²⁴ *Ibid.*

¹²⁵ (n55, 704-706).

members of a NLM in a status superior to all other combatants as it considers them combatants only when they carry arms openly, while engaging in attacks and or when visible to the enemy, before an attack.¹²⁷ The requirements to wear uniform or carry weapons openly were no longer required. The requirements are not relevant to identify combatants for purposes of targeting; they only matter with respect to a combatant's entitlement to prisoner of war status.¹²⁸ Protocol I allows members of the adversary to kill only combatants after ascertaining that they meet the requirements to be a combatant.¹²⁹ If doubt arose as to whether one was a combatant or civilian a rule has been created that they had to be treated as a civilian until the issue was clarified.¹³⁰ When children entered the conflict doubt could arise. In terms of Article 50 of Protocol I civilians are all those not belonging to the armed forces as per the definition in Article 43.¹³¹ The new relaxed criterion subtracts from the principle of equality of belligerents which is fundamental to IHL.¹³² States like the USA and Israel have denied signing Protocol I because of this deviation.

Other provisions such as Articles 48¹³³ and 49¹³⁴ of Protocol I provides that at all times parties to the conflict are to distinguish combatants from civilians. In terms of Article 50(3)¹³⁵ of Protocol I even if there is combatants among civilians their presence do not detract from the civilian nature.¹³⁶ Armed forces of a State or

¹²⁶ (n3, 33).

¹²⁷ Levie H ‘The 1977 Protocol I and the United States’ 70 Int'l L. Stud. Ser. US Naval War Col. 339 1998 at 340-341.

¹²⁸ Richemond-Barak D ‘Articles applicability and application of the laws of war to modern conflicts’ 23 Fla JIntL 327 at 351.

¹²⁹ (n29, 424) the distinguishing of combatants from civilians was in order to protect civilians from hostilities.

¹³⁰ Kalshoven F ‘Remarks by Frits Kalshoven’ 74 Am. Soc'y Int'l L. Proc. 202 1980, at 203, in terms of Article 50(1) of Protocol I.

¹³¹ (n3, 37).

¹³² Sivakumaran S ‘The international law of internal armed conflict’ 9 J. Int'l Crim. Just. 281 2011 at 292.

¹³³ (n3, 36).

¹³⁴ *Ibid.*

¹³⁵ *Ibid.* 37.

¹³⁶ (n29, 429).

members of the NLM must be the subject. The family members of those in a NLM and civilians in the employ of the State are exempt from attack. The principle observed in these articles originates from the principle of distinction. The Principle of distinction originated from The Law of The Hague requiring the prohibition of bombing civilians.¹³⁷ The principle is important in CFNL as the NLM were mostly undistinguishable from civilians. Furthermore, Protocol I prohibits deceitful ruses.

Article 51 — 60¹³⁸ of Protocol I contain changes which provide for the protection of the civilian population and its objects, the natural environment and the taking of precautionary measures in attack.¹³⁹ Articles 57¹⁴⁰ and 58¹⁴¹ require parties to the conflict to take detailed precautions in both planning an attack and ensuring that the dangers of military operations do not harm civilians.¹⁴² Article 58 requires States to avoid locating military objectives next to areas with a dense population.¹⁴³ The detailed precautions were to increase compliance with Protocol I.

Article 53¹⁴⁴ of Protocol I recognises the Hague Convention of 1954. This Convention enshrined the principle that cultural objects should be protected and not be attacked if not used for a military purpose.

2.3. Conclusion

Protocol I's scope provides that it will be applicable to interstate armed conflicts and CFNL. Protocol I was specifically detailed for the situation of CFNL as it directly referred to them in Article 1(4).

Once a NLM complies with Article 96(3) Protocol I will become applicable to their conflict. Articles 1(4) and 96(3) are therefore the operative provisions in relation

¹³⁷ (n112, 3) Article 25 of the Hague Regulations contained the principle.

¹³⁸ (n3, 37-44).

¹³⁹ (n55, 714) Article 56 contained new restraints on attacking objects that contain dangerous forces which could cause severe loses' among the civilian population.

¹⁴⁰ (n3, 41).

¹⁴¹ *Ibid.* 42.

¹⁴² (n29, 430).

¹⁴³ Brownlie I 'Principles of Public International Law, 6th edition' (2003, 4).

¹⁴⁴ (n3, 39).

to CFNL. The articles represent the biggest reforms Protocol I brings to IHL. The operative provisions included CFNL in Protocol I.

The whole six parts of Protocol I were a new development. The parts contain provisions which are a re-statement of The Law of Geneva and The Law of The Hague. However, the provisions have been reaffirmed to up-date and cover any shortcomings.

The Law of Geneva was created to offer protection to the victims of international armed conflict in general. However, it had shortcomings. It did not, for example, have provisions which protect children. Protocol I basically places an emphasis on the victims of international armed conflict by placing civilian safety over military interests. If the parties to the Geneva Conventions become parties to Protocol I they will now apply the conventions as supplemented by it.

The Law of The Hague was created to regulate the conduct of hostilities in international armed conflicts. The main tenets of The Law of The Hague were contained in the Hague Regulations. However, the Regulations' provisions were now out-dated. The Hague Regulations provided, for instance, more onerous requirements to have become a combatant.

Protocol I combined both provisions related to The Law of Geneva and The Law of The Hague in its provisions. The amalgamation was done to confirm that the mode of armed conflict directly affects the conditions of its victims.

Protocol I also brought other notable reforms which offer more protections to the victims of international armed conflicts like CFNL. The discussion identified that even though there is no intensity or organisation requirements Protocol I's applicability to CFNL has a problem. The applicability will be discussed in the next chapter to highlight whether the principle of self-determination has caused any problems.

Chapter Three: Conflicts for National Liberation

Chapter three will begin with a discussion of the category of conflicts which were targeted as CFNL under Protocol I. The discussion will then proceed to discuss the practice in relation to Protocol I and those conflicts. The chapter will close with an explanation of the relationship between CFNL and Protocol I. the discussion will be determining whether indeed there was no practice of Protocol I provisions in these conflicts and the cause of this problem.

3.1. Conflicts for National Liberation

1. Colonial Domination

The conflict between the Front for the liberation of Mozambique ('FRELIMO')¹ and Portugal would have been an example of a conflict against colonial domination. The United Nations criticised Portugal's colonial practice and sent out resolutions which called for the support for the legitimate conflict. The conflict against colonial domination was legitimized due to the support it received from many United Nations resolutions.² In 1974 Portugal's government changed and the new government granted Mozambique full independence.³ The phenomena of colonialism had ceased by the time Protocol I was drafted and came into operation.

The majority of the world's population was subjected to colonial rule before the First World War. However, by 1964 only two percent of the world's population could be regarded as having lacked the right of self-determination.⁴ Although war

¹ Gehrke W 'The Mozambique crisis: A case for United Nations military intervention' 24 Cornell Int'l L. J. 135 1991, at 135, this organisation was formed in 1962 by various groups supporting the liberation from Portugal.

² Pilloud et al. 'Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949' (1987, 43).

³ 13 I.L.M. 1467 1974 'Agreement concerning the self-determination and independence of Mozambique'.

⁴ Mushkat M 'The process of decolonization international legal aspects' 2 U. Balt. L. Rev. 16 1972-1973 at 16.

was outlawed, national liberation conflicts against colonialism were regarded as being legitimate conflicts by the United Nations and other States were called to support them. The most important resolution the United Nations passed in this regard was the Declaration of 1960 on the Abolishment of Colonial Regimes.⁵ The United Nations attitude ignited a trend of sovereignty amongst previously colonised territories.⁶ This was the era of decolonisation.⁷

As their former colonisers' denounced colonialism African countries steadily gained independence.⁸ The major territories rebelled and engaged in armed conflict against Portugal after support had been shown against colonialism.⁹

FRELIMO began an armed conflict against Portugal amidst this era of decolonisation.¹⁰ The NLM was engaged in an intensive conflict against Portuguese control.¹¹

The peoples rebellion was caused by Portugal not acknowledging their right to self-determination in the colonised territories.¹² Portugal had maintained that the African territories were a part of its State.¹³

⁵ *Ibid.* 23.

⁶ Blishchenko IP 'The national liberation movement and international humanitarian law' 12 Mil.L. & L. War Rev. 308 1973 at 309.

⁷ Roy A 'Postcolonial theory and law: a critical introduction' 29 Adel. L. Rev. 315 2008, at 334, decolonisation involves the change of status in a territory from colonial to independent.

⁸ Saito NT 'Decolonization, development, and denial' 6 Fla. A & M U. L. Rev. 1 2010-2011, at 2, in 1957 Ghana was the first African colony to gain her independence.

⁹ Santos AJ 'Portugal: from empire to nation-state' 9 Fletcher F. 125 1985, at 129, Angola in 1961, Mozambique in 1963 and in Guinea-Bissau in 1964.

¹⁰ Tharoor S 'The messy afterlife of colonialism' 8 Global Governance 1 2002, at 1, decolonisation was no longer a contested issue and furthermore, neither was colonialism seen as a threat to the peace and security since there were no longer empires which if withdrew or maintained would cause armed conflict.

¹¹ (n1, 137).

¹² Emerson R 'Self-determination' 60 Am. Soc'y Int'l L. Proc. 135 1966, at 138, the Portuguese denied Mozambique the right to self-determination and provided that it was a part of their empire.

¹³ (n4, 29).

2. Racist Regime

The situation which took place in South Africa was widely regarded as a conflict against a racist regime falling under the domain of CFNL.¹⁴ The conflict was between the former South African government and the African National Congress ('ANC').¹⁵ The government had enforced discriminatory laws.¹⁶ The discriminatory laws collectively represented the government's apartheid policy which sought to promote white dominance.¹⁷ In response an armed conflict was waged by the NLM in the country.¹⁸

The government was voted for by a minority percentage of the population and this minority controlled the majority percentage of the land.¹⁹ The remainder of the land, termed native reserves and locations, was allotted to the majority of the population. The majority of the population comprised of indigenous peoples whom the government unfairly discriminated against on the sole ground of race. In terms of Protocol I this discrimination could be resisted through armed conflict by the NLM in exercise of their right to self-determination.²⁰

¹⁴ Aldrich GH '*Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva Protocol I*' 26 Va. J. Int'l L. 693 1985-1986, at 702, Protocol I was drafted with South Africa and Israel as the targeted States.

¹⁵ Macozoma S '*The ANC and the transformation of South Africa*' 2 Brown J. World Aff. 241 1994-1995 at 241.

¹⁶ Bouckaert PN '*The negotiated revolution:South Africa's transition to a multiracial democracy*' 33 Stan. J. Int'l L. 375 1997, at 377, after the popular party won power in 1948 it introduced an apartheid system which based on white dominance and the separation of the races.

¹⁷ Burdzik J and Van Wyk D '*Apartheid legislation 1976-1986*' 1987 Acta Juridica 119 1987, at 122, through a complicated system of governance the black population was placed on a path of separate development.

¹⁸ Scalia KA '*A delicate balance: The effectiveness of apartheid reforms in the struggle for the future of South Africa*' 6 Fla. J. Int'l L. 177 1990-1991, at 182-183, the country was under a state of emergency and had widespread civil strife until the 1980s. The conflicts between the government and liberation organisations were due to the apartheid policy.

¹⁹ Dugard J '*Racism and repression in South Africa:The two faces of apartheid*' 2 Harv. Hum. Rts. J. 97 1989, at 98, even though they were the majority, black South Africans were precluded from voting in the national elections.

²⁰ (n17, 121) apartheid was displayed in all its glory in the South African statute book of 1976.

In light of the government's disregard of international developments in law the United Nations passed numerous resolutions. The resolutions discouraged apartheid and supported any NLM which fought against racist regimes.²¹ The case of *S v Marwane* 1982 (3) SA 717 (A) showed the arbitrariness of the South African government regarding freedom fighters as terrorists. Furthermore, the United Nations resolutions expressed dissatisfaction with the government's racist policies.²² States like the USA enacted legislation which prohibited a lot of trade and export to South Africa.²³ The conduct depicted the international community's undesirability of South Africa's practices. Apartheid was eventually outlawed.²⁴

The combined pressures exerted on the government led it to agree to negotiations with the ANC.²⁵ The case of *Azanian peoples' organisation (AZAPO) and others v truth and reconciliation commission and others* 1996 (4) SA 562 (C) shows that part of the negotiation process included a truth and reconciliation phase, where those who committed atrocities would be granted amnesty if they told the truth. Families of deceased victims wanted the court to refuse amnesty in this case.

The government agreed to negotiations because of the heavy burden of being considered as an outlaw by the international community. It did not agree through the armed conflict which was formally suspended after the agreement.²⁶ On the 27th of April 1994 South Africa held its first free and fair democratic elections for all in line with the principle of self-determination.²⁷

²¹ Butcher GT '*The unique nature of sanctions against South Africa, and resulting enforcement issues*' 19 N.Y.U. J. Int'l L. & Pol. 821 1986-1987, at 828, South Africa's adherence to apartheid raised problems in regard to denial of the right to self-determination.

²² Gorelick ER '*Apartheid and colonialism*' 19 Comp. & Int'l L.J. S. Afr. 70 1986, at 76, resolutions like GA Res.2105(XX) of 1965, 2054 B(XX) of 1965; 2202(XXI) of 1965; and 2307(XXII) of 1967.

²³ (n21, 833-834).

²⁴ (n17, 123).

²⁵ *Ibid.* 121 the President of South Africa in his opening address to Parliament confirmed that the government was embarking on creating a framework for equal opportunities.

²⁶ (n16, 388) in the Pretoria Minute of August 7, 1990, the ANC formally suspended its armed conflict.

²⁷ Welsh D '*South Africa's democratic transition*' 2 Brown J. World Aff. 221 1994-1995 at 222.

3. Occupation

Nowadays we refer to ‘occupation’ which is the effective control of a power over a territory to which that power has no sovereign title.²⁸

Prior to this definition there were different types of occupations like belligerent occupation which is a by-product of military actions during war.²⁹ Also the Fourth Geneva Convention included cases of total or partial occupation of a High Contracting Party. Lastly, Protocol I refers to alien occupation where only resistance triggers the situation into an international armed conflict.³⁰

The conflict between Israel and the Palestine Liberation Organisation ('PLO') in the Occupied Palestinian Territories was one of the conflicts which Protocol I had targeted.³¹

The PLO is the organisation which was tasked with mobilising Palestinians for their eventual liberation.³² The territory of Palestine which was formerly a part of the Turkish Empire was taken and converted into an administered State.³³ Britain was the mandatory power which administered Palestine until 1948 whereby the territory was vested in the United Nations.³⁴ The United Nations General Assembly then recommended that their member States committee develop a plan for the future government of Palestine.³⁵ The recommendation was accepted and the committee submitted a plan that the territory was to have been

²⁸ Benvenisti E 'The international law of occupation' (2012, 3).

²⁹ *Ibid.* 2.

³⁰ *Ibid.* 3.

³¹ *Op cit.*n14.

³² Macintyre RR '*The Palestine Liberation Organization: Tactics, strategies and options towards the Geneva Peace Conference*' Journal of Palestine Studies, Vol. 4, No. 4 1975 65 at 65. <http://www.jstor.org/stable/2535602> last accessed on the 1/31/2015 at 11H00.

³³ *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion*, I. C. J. Reports 2004, p. 136 at 165, para 70.

³⁴ GA Res. 181 (ii) Future government of Palestine, at 132, provided that the mandate for Palestine shall terminate not later than the 1st of August 1948. [http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/181\(II\)](http://www.un.org/en/ga/search/view_doc.asp?symbol=A/RES/181(II)) last accessed on 10/04/2015 at 13H15.

³⁵ *Ibid.* 132, part 1, section B.

partitioned into an Arab and a Jewish State with a Special International Regime for the City of Jerusalem.³⁶ However, after Britain evacuated the proposed Jewish State proclaimed itself Israel and furthermore, on the strength of the United Nations General Assembly Resolution 181, declared its independence.³⁷ Thereafter, conflict has erupted between Israel and the other Arab territories due to Israel having annexed territories demarcated as Arab territories. Israel attempted to have these territories incorporated into its own territory. The United Nations Security Council interfered by sending out resolutions dissuading the mode in which the territories were acquired.³⁸ Israel attempted to relinquish these territories but has mainly remained in a state of occupation.³⁹

Protocol I sanctions the denial of a peoples right to self-determination through alien occupation with armed conflict.

The conflict has continued because Israel is still in military occupation of the territories demarcated as part of the proposed Arab State and had even built a barrier.⁴⁰ IHL has not applied because of the unique status of the Occupied Palestinian Territories as territories with no prior governments.⁴¹ Also the two major instruments on occupations the Hague Regulations and the Fourth Geneva Convention do not provide meaningful guidelines for deviations from the rules of occupation.⁴²

The conflict could no longer be classified as being a category of CFNL against alien occupation. The conflict now exceeds the scope of CFNL because the PLO

³⁶ *Ibid.* 133 para.3.

³⁷ (n33, para 71).

³⁸ SC Res. 242 (1967) emphasised on the inadmissibility of territory acquired by conflict. <http://unispal.un.org/unispal.nsf/0/7D35E1F729DF491C85256EE700686136> last accessed on the 1/31/2015 at 11H05.

³⁹ (n33, para 72-78).

⁴⁰ Report of the Secretary-General prepared pursuant to GA Res. ES-10/13A/ES-10/248 at 2 <http://unispal.un.org/UNISPAL.NSF/0/A5A017029C05606B85256DEC00626057> last accessed on the 1/31/2015 at 11H10.

⁴¹ (n28, 206).

⁴² (n28, 244) the Hague Regulations does not envision a peace treaty lasting so long as in the Occupied Palestinian Territories and the Fourth Geneva Convention does not envision a long occupation.

was no longer regarded as a NLM, but referred to by the United Nations and other States as an Observer State.⁴³ In 2014 the Observer Palestine State acceded to Protocol I.⁴⁴

3.2. The Substantive Provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts, Practice in Conflicts for National Liberation

The conflict in Mozambique

The conflict which occurred in Mozambique had preceded the time Protocol I was drafted. However, it was doubtful that Portugal would have signed the protocol. The doubt emanated from Portugal's insistence that the African territories were part of the Portuguese State.⁴⁵ In support of its contentions the State of Portugal provided Article 2(7) of the United Nations Charter as its defence.⁴⁶ The article provides that nothing in the Charter authorises the United Nations to intervene in matters which are essentially within a States' jurisdiction.⁴⁷ Colonial domination has remained in the past, since Protocol I had been drafted, as it was halted by decolonisation. The situation which now prevailed was non-self-governing territories like Western Sahara.⁴⁸ Western Sahara was previously colonised by

⁴³ Whitman CF 'Palestine's statehood and ability to litigate in the International Court of Justice' 44 Cal. W. Int'l L.J. 73 2013-2014, at 81, The 'State' of Palestine is a member of several international organizations, including UNESCO and the Arab League, and is also a "Non-Member Observer State" to the UN.

⁴⁴ In April 2014 the PLO as the Observer State of Palestine acceded to Protocol I. https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&x_p_treatySelected=470 last accessed on the 12/01/2015 at 11H20.

⁴⁵ (n4, 29).

⁴⁶ Winslow A 'The Addis Ababa conference' 35 Int'l Conciliation 3 1963-1965, at 21, Portugal relied on a strict interpretation of Article 2(7) and stated that nothing was more important than its territorial integrity.

⁴⁷ The Charter of the United Nations Article 2(7) <http://www.un.org/en/sections/un-charter/chapter-i/index.html> last accessed on 10/03/2016 at 10H00.

⁴⁸ Boleslaw AB 'International law: a dictionary' (2005, 93) non-self-governing territories is the term used by the United Nations system for territories "whose peoples have not yet attained a full measure of self-government".

Spain.⁴⁹ The matter in the territory was now one of decolonisation and under the supervision of the United Nations.

The conflict in South Africa

Protocol I was not applied in the South African conflict. Furthermore, the former South African government had maintained that the peoples of South Africa exercised their right to self-determination and they collectively sought the policy of apartheid.⁵⁰ It did not want to be called a racist regime therefore forwarded defence. The government's defence was an obstacle for those who advocated that Protocol I was applicable to the conflict. The proponents for applicability of the Protocol argued that the government's racist policies denied the peoples their right of self-determination.⁵¹ The government's position was that it was executing the peoples right to self-determination.⁵² The defence did not reflect the true state of affairs as only a minority voted and the majority was excluded from voting.

The main reason for Protocol I not being applied was that for the duration of the conflict the former South African government had not been a party to it.⁵³ The negative connotations attributed to the State involved in CFNL by Protocol I led it

⁴⁹ Smith JJ '*Western Sahara: the failure and promise of international law*' 69 Advocate Vancouver 179 2011, at 180.

⁵⁰ (n22, 75-76) "The United Nations will only recognise one people of South Africa as defined by the territorial limits of the state. Apartheid is thus a question of what might be called internal self-determination, that is, that the people of an existing state must have the right to define the structure of the state".

⁵¹ GA Res. 2307 (xxii) of 1967 The Policies of Apartheid of the Government of the Republic of South Africa <https://documents-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/236/42/IMG/NR023642.pdf?OpenElement> last accessed on 10/03/2016 at 13H20 recognises the peoples conflict for *inter alia* fundamental freedoms.

⁵² McCorquodale R '*South Africa and the right of self-determination*' 10 S. Afr. J. on Hum. Rts. 4 1994, at 12, the South African government said its policies were misunderstood particularly in regard to the 'homelands' policy of 'separate development'. The government considered that these policies were in fact an exercise of the right of self-determination.

⁵³ ICRC 'Protocols Additional to the Geneva Conventions of 12 August 1949; The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of victims of international armed conflict(Protocol I)' (1977, 67) in terms of Article 96(2) A State had to be a party to Protocol I to be bound by its provisions.

to not be a party. The State would not become a party as it did not consider itself a racist regime, due to that being a concession to violating international obligations. In such situations the NLM could at least make known their intentions to apply the Geneva Conventions. The ANC unsuccessfully attempted to abide by the Geneva Conventions.⁵⁴

The conflict in the Occupied Palestinian Territories

In the conflict which occurred in the Occupied Palestinian Territories Protocol I was not applied due to the main reason that Israel was not a party to it.⁵⁵ Israel did not want to have been regarded as an alien occupier. If a State is not a party to Protocol I a declaration was not possible. The NLM could make a declaration to apply the Geneva Conventions.⁵⁶ The PLO attempted to accede to the Fourth Geneva Convention in 1982.⁵⁷

In cases of occupations the Fourth Convention is the applicable *lex specialis*.⁵⁸ This Geneva Convention has provisions which concern the occupation of territories.⁵⁹ However, the PLO attempt to accede was considered valid, but not accepted.⁶⁰ Furthermore, Israel had denied the application of the Fourth Convention. The Israeli government stated that the Occupied Palestinian

⁵⁴ (n14, 703) in 1980 the ANC made a declaration to respect the Geneva Conventions and Protocol I. However, the declaration was not made in the context of Article 96(3).

⁵⁵ (n53, 67).

⁵⁶ (n2, 1091).

⁵⁷ (n33, para 91).

⁵⁸ Kolb R and Hyde R 'An introduction to the International law of armed conflicts' (2008, 229-230) the main sources which govern belligerent occupation are the Hague Regulations and the Fourth Geneva Convention. However, the Hague Regulations are not so exclusive and are outdated leaving the more detailed Fourth Geneva Convention to complete the work started by the Hague Regulations.

⁵⁹ Pictet JS 'The new Geneva Conventions for the protection of war victims' 45 Am. J. Int'l L. 462 1951 at 474.

⁶⁰ *Ibid.* The depositary stated that it was not in a position to decide whether "the request from the Palestine Liberation Movement in the name of the 'State of Palestine' to accede" *inter alia* to the Fourth Convention" could be considered as an instrument of accession.

Territories were neither a State nor a territory occupied or controlled by Israel.⁶¹ In these *sui generis* circumstances, Israel as a matter of policy applies to its military operations in the Occupied Palestinian Territories the rules governing both international and non-international armed conflicts.⁶² However, a committee on the Occupied Palestinian Territories, provided that the territories remained occupied territory and that Israel was obliged in its actions there to comply with the Fourth Geneva Convention.⁶³ Israel was not a party to Protocol I and further denied application of the Geneva Conventions in the Occupied Palestinian Territories.⁶⁴ Protocol I is not applicable to the parties' conflict if they are not party to the Geneva Conventions. The denial of the Geneva Conventions' applicability made the application of Protocol I impossible because it supplemented those Conventions.⁶⁵ The situation is worsened because international law is based on consent.⁶⁶

(n40, 8 at para. 3 annexure 1) Israel provided it has not incorporated the Fourth Geneva Convention and furthermore, it does not consider this convention applicable to the occupied territory as the territory did not belong to a sovereign before it was annexed.

⁶² Darcy S and Reynolds J '*An enduring occupation: the status of the Gaza Strip from the perspective of international humanitarian law*' 15 J. Conflict & Sec. L. 211 2010 at 212 -213.

⁶³ *Ibid.* 213.

⁶⁴ (n40, 8 at para. 3 annexure 1).

⁶⁵ (n53, 10) Article 1(1) read with 1(3) of Protocol I.

⁶⁶ Guzman AT 'Against consent' 52 Va. J. Int'l L. 747 2011-2012 at 748.

3.3. Conclusion

In terms of the issued United Nations resolutions all the conflicts which were targeted to constitute CFNL at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 had fit the mold. However, these resolutions merely have persuasive effect.

The conflict in Mozambique was constantly referred to by the United Nations resolutions as a conflict against colonial domination. It was used as a model to depict a conflict against colonial domination at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 when Protocol I was drafted. However, by the time that Protocol I came into force decolonisation had ceased the practice of colonisation. The residue of this practice was non-self-governing territories. Furthermore, inferring from Portugal's insistence that there was no colonial domination as Mozambique was a part of its territory; it would not have signed Protocol I. The inference is justified by the other targeted States also not becoming a party to Protocol I.

South Africa had not become a party throughout the duration of its conflict with the ANC. At the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 this conflict was considered by the international community as a conflict against a racist regime. However, judging from its refusal to sign or accede to Protocol I the South African government had not agreed with the categorisation. Furthermore, the government provided a defence which curtailed any arguments that advocated for Protocol I's applicability to the conflict in its territory.

The same attitude displayed in the South African conflict was visible in the conflict in the Occupied Palestinian Territories between Israel and the PLO. The facts were also very similar as both conflicts were targeted at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974, save that this conflict was against alien occupation. Israel has never become a party to Protocol I throughout the conflict. It provided a defence which dispelled any notion of Protocol I being

applicable to the conflict. Furthermore, since the Fourth Geneva Convention was the *lex specialis* in occupations Israel also denied this conventions' applicability.

The three categories of CFNL have not received any application of Protocol I. The targeted States have not become a party to Protocol I.

In terms of Article 1(4) of Protocol I, which defines CFNL, the conflicts were 'purported' CFNL because this provision has not been applied. When a State party to 'purported' CFNL was not a party to Protocol I a declaration from the NLM was impossible.

Protocol I and the targeted CFNL share no relationship of application. In both the conflicts in South Africa and Israel Protocol I was ignored rather the regulation of the old framework was employed.

In all these conflicts there has not been a declaration which has been accepted. This was shown to have been caused by States not acceding to Protocol I.

A legal opinion can now be deduced on whether self-determination is the cause of this problem.

Chapter Four: The Legal Position of Conflicts for National Liberation

Chapter four will begin with a discussion of the secondary sources of IHL in relation to the operative provisions of Protocol I.⁶⁷ Thereafter, the present position of CFNL will be discussed. The chapter will close with a legal position of the principle of self-determination and the future relevance of CFNL under Protocol I.

4.1. The Operative Provisions of the Protocol Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts

Article 1(4)

Article 1(4) was aimed at specific conflicts.⁶⁸ The specific three categories in this article are exclusive.⁶⁹ The conflicts were because of this exclusivity described in specific emotive terms like “alien occupation” for the one in the Occupied Palestinian Territories.⁷⁰ However, the terms used were considered as being subjective. Israel for instance regardless of being called an alien occupier by the United Nations has never formally agreed to the term. It was the first time IHL considered subjective factors as a consideration for application.⁷¹

⁶⁷ In terms of the International Court of Justice Statute, Article 38(b). ICJ Statute, accessed on the 20/04/2015 9H00 at www.ICJ.CIJ.org/documents/index.php/p=/4&p2=2&p3=0 writings of eminent authors and judicial opinions are a source of IHL.

⁶⁸ ICRC ‘Protocols Additional to the Geneva Conventions of 12 August 1949; The Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of victims of international armed conflict(Protocol I)’ (1977, 10) Article 1(4).

⁶⁹ Pilloud *et al.* ‘Commentary on the Additional Protocol of 8 June 1977 to the Geneva Conventions of 1949’ (1987, 54).

⁷⁰ Aldrich GH ‘*Progressive development of the laws of war: A reply to criticisms of the 1977 Geneva Protocol I*’ 26 Va J’Int’L 693 1985-1986, at 702, the use of emotive terms made them unlikely to have been applied. The language may deter those States that were targeted, if a State was in a conflict it was unlikely to agree that it falls under Article1 (4).

⁷¹ Hughes-Morgan D ‘*The new law of Geneva*’ 11 Int’L. 111 1977, at 112, it was doubtful whether Article 1(4) of Protocol I would provide more protection to victims, because it was the first time it would be necessary to make judgement on the status of a conflict and the motives of the combatant parties to decide whether the provisions of IHL would apply.

The provision referring to CFNL has not been used and it has eventually been abrogated by disuse.⁷² The conflicts have therefore remained in the past.

The situation of colonial domination was halted by the completion of decolonisation.⁷³ The mode of colonial domination to acquire territory is now invalid. The State of India attempted to extend this fact and called on the reversal of all gains acquired through that practice.⁷⁴ The argument was rejected although it reflected a true fact. The extension found no support due to the doctrine of intertemporal law. The doctrine acknowledges the invalidity of colonial domination presently. However, it maintains that the titles acquired before this invalidity remained valid.⁷⁵

In the *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory opinion*⁷⁶ racist regimes were discouraged.⁷⁷ Racism was eventually regarded as being illegal.⁷⁸

In regards to conflicts against alien occupation there were no longer territories which do not belong to a State.⁷⁹ The only instance of alien occupation was the one in the Occupied Palestinian Territories. However, Israel has vehemently denied being in alien occupation for the duration of the conflict. Furthermore, it has provided that the Fourth Geneva Convention was not applicable to the Occupied Palestinian Territories on the ground that Jordan and Egypt

⁷² Abi-Saab G 'Wars of national liberation in the Geneva Conventions and Protocols' 165 *RECEUIL DES COURS* 366-436 (1979-IV) at 382.

⁷³ Kolb R and Hyde R 'An introduction to the international law of armed conflict' (2005, 77) "third world States managed to include conflicts of decolonisation within the definition of international armed conflicts, where IHL applies. Today this is substantially obsolete, since decolonisation has been completed".

⁷⁴ Harris DJ 'Cases and materials on international law' 6th edition (2004, 220-223).

⁷⁵ Dugard J 'International Law: A South African perspective' (2011, 127).

⁷⁶ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970) Advisory opinion*, I. C. J. Reports 1971, p. 16.

⁷⁷ *Ibid.* para 133.

⁷⁸ (n4, 718) Article 85(4)(c) noted apartheid as a grave breach of Protocol I and international law.

⁷⁹ (n9, 131).

respectively, had no valid claim to the territories prior to the 1967 conflict.⁸⁰ The territory has since been declared an Observer State of Palestine. The issue of observer status exceeded Protocol I's scope as the territory now has a sovereign. Protocol I does not seek to regulate a States' status.⁸¹

It has been forwarded that the analysis of there being subjective factors was based on a misunderstanding. The belief is that these emotive terms rely on the NLM regarding them as such. The belief has been clarified as a misunderstanding because the wording does not refer to the intention of the NLM but to their objective situation.⁸² However, the subjective view of a misunderstanding prevails. The State parties had never applied Article 1(4) of Protocol I in their conflict.

Article 96(3)

Article 96(3) of Protocol I has certain requirements for the NLM to make a declaration.⁸³ The express undertaking by the NLM poses no issue however the other requirements were problematic.

One of the requirements is that the NLM must be the representative of the people.⁸⁴ The terms such as 'self-determination' and 'peoples' found in Article 1(4) of Protocol I even after being debated periodically still were not agreed on.⁸⁵ The provision in Article 96(3) refers to Article 1(4) which makes the provision indeterminable as Article 1(4) refers to vague concepts like peoples and therefore susceptible to abuse by the parties to the conflict.⁸⁶

⁸⁰ *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion*, I. C. J. Reports 2004, p. 136 at para 120 and 122.

⁸¹ (n2, 11) Article 4 provides that the application of Protocol I "shall not affect the legal status of the Parties to the conflict. Neither the occupation of a territory nor the application of the Geneva Conventions and Protocol I shall affect the legal status of the territory in question".

⁸² (n6, 380).

⁸³ (n2, 67).

⁸⁴ *Ibid.* Article 96(3) an authority representing the peoples may make the declaration.

⁸⁵ Cardenas EJ and Canas MF 'The limits of self-determination' found in 'Self-determination of peoples: Community, Nation and State in an interdependent world' edited by Danspeckgruber W (2002, 102).

⁸⁶ (n6, 378) concepts used in Article 1(4) like 'peoples' were said to have been vague to be a basis for law making.

It is submitted that most IHL concepts have a margin of vagueness. The margin allows the international community to come to grips with new concrete phenomena not covered in the old rules.⁸⁷ What matters in regard to such terms is that they possess a minimum hard core standard which allows for legal determination.⁸⁸ Article 1(4) of Protocol I, for instance, requires certain elements to be present in order for an armed conflict to fall under the rubric of CFNL.⁸⁹ If these elements were viewed separately they would have a wide meaning therefore other requirements of Article 1(4) narrowed them down.

The method of reading the terms together to narrow down the definition was employed in the *Legal consequences of the construction of a wall in the occupied Palestinian territory advisory opinion*.⁹⁰ The court was asked to clarify the consequences which resulted from Israel's presence in the Occupied Palestinian Territories. The court acknowledged the existence of a Palestinian people entitled to the right to self-determination. The Court also found that the fact that a barrier had been constructed in the territories interfered with the Palestinian peoples right of self-determination.⁹¹ It can be deduced that when there is a peoples being denied self-determination Article 1(4) of Protocol I was applicable. However, the denial of self-determination must be because of racism, colonial domination and alien occupation.

Furthermore, there is no procedure of ascertaining the authentic NLM in terms of Article 96(3) of Protocol I. The method of reading the provision with other requirements is suggested. An example of using this method is to read Article 96(3) in conjunction with the requirements for combatant status.⁹² The peoples lodging the Article 96(3) declaration, for instance, had to exhibit a high level of

⁸⁷ Pangalagan et al 'The privileged status of national liberation movements under international law' 58 PLJ 1st quarter 44 1983, at 63, in the old framework of CFNL ascertaining the phases of belligerency and insurgency which were between rebellion and Statehood was vague and susceptible to many interpretations.

⁸⁸ (n6, 379).

⁸⁹ Gardam J 'Protocol I to the Geneva Conventions: A victim of short sighted political considerations?' 17 Melb. U. L. Rev. 107 1989-1990 at 121-122.

⁹⁰ (n14, 136).

⁹¹ *Ibid.* para 118.

⁹² (n23, 127).

organisation.⁹³ Furthermore, as warranted by the *travaux préparatoires* of Protocol I's Article 1(4), the authority mentioned under Article 96(3) was limited to those which were recognised by the relevant intergovernmental organisation.⁹⁴

In terms of Article 96(3) in order to make a declaration the NLM must be involved in an Article 1(4) conflict. However, the only conflict which was ascertainable was the one against colonial domination. The Declaration on Principles of International Law Concerning Friendly relations provided that the separate status of a colony was limited to the period prior to the exercise of the right of self-determination. The provision basically meant that the peoples could only exercise the right to self-determination once.⁹⁵ The definition of the other conflicts against racist regimes and alien occupation posed an issue.⁹⁶

Lastly, the NLM can only make the declaration when it is involved in a conflict against a party to Protocol I.⁹⁷ Even though a NLM makes a unilateral declaration a State must be party to Protocol I or the provisions will bind the NLM only.⁹⁸ The provision is discriminatory to a NLM because the provisions of IHL are State-centered.⁹⁹ The declaration is impossible if the State had not acceded and was not bound. The State-centeredness was further shown by the control of State machinery such as the judiciary.¹⁰⁰ Furthermore, the provisions were modelled on interstate conflict.¹⁰¹ It will not be realistic to expect a NLM to undertake obligations which were traditionally dependent on Statehood.¹⁰² Others amongst the international community expressed opposite views. According to them

⁹³ *Ibid.*

⁹⁴ *Ibid.*128.

⁹⁵ *Ibid.*123.

⁹⁶ *Ibid.*122 there was a lack of any accepted legal meaning for the conflicts against alien occupation and racist regime.

⁹⁷ (n2, 67) Article 96(1).

⁹⁸ *Ibid.* Article 96(2) read together with (3).

⁹⁹ Sassoli M ‘Ensuring respect of international humanitarian law’ IHLS 1 (2010) 5-51, at 7, “international law remained State-centred, it was made by States and mainly addressed to States”.

¹⁰⁰ (n6, 416).

¹⁰¹ *Ibid.* 382-383 CFNL can start out as guerrilla conflict and then turn into conventional conflict.

¹⁰² (n23, 118).

practical experience illustrated that despite the disparities in resources of parties involved nothing prevented a NLM from respecting the principles of IHL.¹⁰³ However, whether or not a NLM was capable to comply with Protocol I's substantive provisions was an ancillary issue. They primarily had to satisfy the requirements of Protocol I's Article 96(3).¹⁰⁴

The operative provisions have a plethora of issues like having out-dated and vague terms. However, the main issue is the subjective terms. IHL is ordinarily concerned with the rules dealing with various aspects of the conduct during armed conflict. It does not consider the justification for resort to armed conflict.¹⁰⁵ CFNL have no precedent because of this intrusion in IHL.¹⁰⁶

However, the revision of Protocol I was unlikely because amendments to treaties are difficult. Furthermore, there is a lot of States which have acceded to the treaty.¹⁰⁷

4.2. The Present Position of Conflicts for National Liberation

The status of self-determination in the hierarchy of norms

The hierarchy of norms which grades the customary norms can explain away the lack of State practice. International and national judicial bodies recognise the hierarchy with human rights norms at the top.¹⁰⁸ It mostly plays a big role in the interpretation of norm conflict in conflicts.¹⁰⁹ In terms of this hierarchy there are obligations *erga omnes* norms. These are norms which embody an obligation which the State owes to the international community. Furthermore, all States

¹⁰³ O.R.VIII, p32, CDDH/SR.4 para. 46.

¹⁰⁴ (n3, 1090) the effects of the Article 96(3) declaration are to confer on the NLM the same rights and obligations as a Party to the Geneva Conventions and Protocol I.

¹⁰⁵ Okimoto K 'Distinction and relationship between Jus ad bellum and jus in bello' (2011, 7) in Latin this is called *Jus in bello*.

¹⁰⁶ Neff SC 'War and the law of nations' (2005, 357) others saw CFNL as an unwelcomed intrusion of ideological considerations.

¹⁰⁷ Streicher S 'Privileging asymmetric warfare? Part I: Defender duties under international humanitarian law' 11 Chi. J. Int'l L. 425 2010-2011 at 430.

¹⁰⁸ de Wet E 'The international constitutional order' (2006) 55 ICLQ 51–76 at 55.

¹⁰⁹ *Ibid.* 58.

have an interest in their enforcement.¹¹⁰ The hierarchy also recognises international *jus cogens* norms.¹¹¹ These are norms which the international community regards as peremptory and only another norm of the same *jus cogens* character can modify.¹¹² The right of peoples to self-determination has attained the status of *jus cogens*.¹¹³

The impact of the democratic entitlement

The status of the principle of self-determination led to a change in IHL where the international community now preferred a consultative and peoples based form of governance like democracy.¹¹⁴ It was during this time that a democratic entitlement emerged and prohibited certain political regimes like apartheid.¹¹⁵ The democratic entitlement is a view that only democracy validates governance.¹¹⁶ The democratic entitlement caused the international community to shift from authoritarian to democratic politics. However, most attempts at democratisation were fragmented.¹¹⁷

As a result of these developments the States which were targeted did not want to lose their legitimacy. The targeted States understood that any State which violated a *jus cogens* would not have any legitimacy in the international community. The international community had resolved that legitimacy depended on a normative expectancy of a community of States being met.¹¹⁸ The States

¹¹⁰ (n9, 38).

¹¹¹ Walsh L ‘The destruction of cultural property in the former Yugoslavia as a war crime’ 4 Willamette Bull. Int'l L. & Pol'y 59 1996 at 76.

¹¹² Crawford J ‘Brownlie’s principles of public international law’ (2012, 594-596).

¹¹³ Vanhullebusch M ‘The international court of justice’s advisory jurisdiction on self-determination’ 1 Sri Lanka J. Int'l & Comp. L. 25 2015, at 28-29, the right of self-determination of peoples is recognised by the international community of states as a *jus cogens* norm.

¹¹⁴ Franck MT ‘The emerging right to democratic governance’ 86 Am. J. Int'l L. 46 1992, at 91, the international community is moving toward a democratic entitlement.

¹¹⁵ d’Aspremont J ‘The rise and fall of democracy governance in international law: A reply to Susan Marks’ EJIL (2011), Vol.22 No.2, 549-570, at 551, indeed a new democratic rule had supplemented the prescriptions as to how power should be exercised at the domestic level.

¹¹⁶ (n48, 47).

¹¹⁷ Marks S ‘What has become of the emerging right to democratic governance?’ EJIL (2011), Vol.22 No. 2, 507 at 515.-524.

¹¹⁸ (n48, 46).

faced with CFNL denied that Protocol I was applicable. A States acceptance would have been considered a concession that they were violating a *jus cogens* norm. The targeted States therefore did not become party to Protocol I.

The reason for the present position

The conflict in the Occupied Palestinian Territories was the only one which remained out of the three categories of CFNL.¹¹⁹ However, it was never recognised in terms of Protocol I. A main reason for these conflicts to cease was because of the international community being inclined towards consultative governance such as democracy.¹²⁰ The international community had aristocratic rule before this change, which favoured practices such as colonial domination. A peoples who freely determine their political status through democracy will be expressing their right of self-determination. Furthermore, the democratic entitlement which emerged has been reversed. Contemporary practice illustrated this reversal for example on the basis of security, by the terrorist attacks on the United States of America.¹²¹ The international community now places less emphasis on governments originating in free and fair elections but rather on their respect of human rights and good governance.¹²² A yardstick for determining legitimate authority was left behind by the democratic entitlement; this is the respect for human rights and good governance. The international community now exhibits a preference of respect for the peoples right to self-determination and human rights as a condition for recognising Statehood.¹²³ The condition is in addition to the four characteristics a State should possess to be recognized as a State.¹²⁴ The decline of undesired practices such as colonialism and racism was caused by the emergence of the democratic entitlement during the time period in

¹¹⁹ Nash M ‘Contemporary practice of the United States’ 88 Am. J. Int’l L. 1994, at 752, CFNL seem redundant save for the situation of the Palestinians.

¹²⁰ (n48, 47) there is an emerging norm which requires democracy to validate governance. This emerging norm is becoming a requirement of the law.

¹²¹ (n51, 514-515) provides there are new issues of arbitrary detention, racial discrimination and infringement of privacy.

¹²² (n49, 559).

¹²³ (n9, 82).

¹²⁴ ‘Montevideo Convention on the rights and duties of States of 26 December 1933’ , at 2, Article 1 states that the characteristics for a State are: a defined territory; a permanent population; some form of government and the capacity to enter into relations with other States.

which Protocol I was drafted and the ninety's.¹²⁵ A NLM is considered under IHL as a State although they lack territory and self-government.¹²⁶ A NLM was supported as it was in line with the developments in IHL. Furthermore, other States shunned away from expressly indicating their involvement in undesired practices which were against developments like self-determination and democracy.

Customary international law

Customary international humanitarian law provisions apply to a conflict without being signed by the parties to that conflict.¹²⁷ The provisions bind all parties regardless of the type of conflict they are involved in.¹²⁸ An intention to be bound by a norm and the use of a specific norm in relations creates customary international humanitarian law. Acts like the accession to a treaty evidence an intention to be bound.¹²⁹ Furthermore, when a norm is generally used between parties their conduct evidenced practice.¹³⁰

Many norms derived from the Hague Regulations and the Geneva Conventions had become customary international humanitarian law norms.¹³¹ The customary nature of the Hague Regulations and the Geneva Conventions was corroborated by the court's decision in the *Legal consequences of the construction of a wall in the occupied Palestinian territory, advisory opinion*. Israel was found to have breached IHL. The breach was because Israel's presence violated the Hague

¹²⁵ (n48, 46-47) the democratic entitlement is an emerging law, which requires that government's instituted to secure the inalienable rights of their citizens derive their just powers from the consent of the governed. It is becoming a requirement for international law.

¹²⁶ Mastorodimos K 'The character of the conflict in Gaza: Another argument towards abolishing the distinction between international and non-international armed conflicts' 12 Int'l Comm. L. Rev. 437 2010.

¹²⁷ (n6, 399).

¹²⁸ Paust J 'The importance of customary international law during armed conflict' ILSA J.Int'l & Comp.L 601 2005-2006 at 601.

¹²⁹ (n9, 29-30) this element can be described as a feeling on the part of States that they were bound by a rule.

¹³⁰ (n9, 26) *opinio juris* was evinced by, inter alia, diplomatic correspondence and treaties.

¹³¹ Henckaerts J-M, Doswald-Beck L 'Customary International Humanitarian Law', volume 2 practice (2005, 396) An example is the principle of distinction derived from the Hague Regulations. The principle is now codified in Protocol I.

Regulations, which applied customarily.¹³² The provisions of the Fourth Geneva Convention were also found to be applicable in the territory.¹³³

Certain provisions from Protocol I such as humane medical attention and special protections for women and children were found to have met the requirements to become customary international humanitarian norms.¹³⁴ However, Protocol I's operative provisions have not consolidated into customary norms because there has not been any practice of those provisions. An intention to be bound exists because the majority of States have acceded to Protocol I.¹³⁵

The intention was evident as early as at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974.¹³⁶ In the case of *S v. Sagarius* 1983 (1) SA 833 (SWA) the accused who was a member of a NLM supported this view.¹³⁷ He contended that he was entitled prisoner of war status under contemporary IHL. The court stated that because South Africa had not ratified Protocol I, it was not bound by it to offer prisoner of war status. However, due to a lack of State practice and no precedent having been set this view was negated.¹³⁸ The operative provisions have not settled in customary international law.¹³⁹ The case of *S v. Petane* 1988

¹³² (n14, para 89).

¹³³ *Ibid.* para 101.

¹³⁴ Hogue LL '*Identifying customary international law of war in Protocol I: A proposed restatement*' 13 LoyLA Int.L Comp LJ 1990 279 at 297.

¹³⁵ https://www.icrc.org/applic/ihl/ihl.nsf/States.xsp?xp_viewStates=XPages_NORMStatesParties&x_p_treatySelected=470 last accessed on the 12/01/2015 at 11H26.

¹³⁶ Cassese A '*The Geneva Protocols of 1977 on the humanitarian law of armed conflict and customary international law*' 3 UCLA Pac. Basin L.J. 55 1984, at 71, "the adoption of Article 1 testified to the formation of a general rule binding on all States at the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 whether they ratified or not".

¹³⁷ *S v. Sagarius* 1983 (1) SA 833 (SWA).

¹³⁸ (n23, 124) although most States accepted that the right of self-determination was a principle of customary international law they were not prepared to accept the practical results of this acceptance as enshrined in Protocol I.

¹³⁹ (n45, 70) Protocol I has not met the requirements of State practice and *opinio juris* necessary

(3) SA 51 corroborates this stance as the accused asserted that Protocol I was customary.¹⁴⁰ The court dismissed the case on the grounds that there was insufficient State practice which supported such a rule.¹⁴¹

A conflict which involves a NLM would be regulated by the old framework. In terms of the old framework the conflict would have been treated as a non-international armed conflict and Common Article 3 of the Geneva Conventions was applicable. However, a NLM can make an undertaking to apply the Geneva Conventions if the State is not a party to Protocol I but to the conventions. The NLM will apply Common Article 2 paragraph 3 of the Geneva Conventions which applies to international armed conflict. Geneva Convention Common Article 2 was applicable to the ANC. If the State is not a party to Protocol I and the Geneva Conventions like in the Occupied Palestinian Territories conflict, then the NLM can make a unilateral commitment to all matters not covered by customary law.¹⁴² The new framework for regulating CFNL has not become customary.

4.3. Conclusion

The secondary sources indicate that the operative provisions of Protocol I are defective. Article 1(4) of Protocol I has subjective terms which have tainted the objective pool of IHL. The terminology brought vertical considerations into the normally horizontal regulation. The provisions of IHL normally regulate the overall way in which hostilities were conducted and not how they started. The provisions of Article 1(4) have become abrogated by disuse and out-dated. The conflicts against colonial domination, a racist regime or alien occupation in exercise of self-determination no longer occur. The only such conflict which remained was the one in the Occupied Palestinian Territories. However, Israel's denial of Protocol I's applicability meant the conflict could not be regarded as a part of CFNL. Article 96(3) of Protocol I was also defective due to the terminology and state-centeredness. The article has used vague terms which are susceptible to

for the attainment of customary international law status. Some basic human rights provisions were customary law other provisions concerning issues like the status of a NLM were more controversial.

¹⁴⁰ *S v. Petane* 1988 (3) SA 51.

¹⁴¹ *Ibid.* 67.

¹⁴² (n3, 1119).

abuse. Furthermore, the State has the last say regarding Protocol I's applicability. If the State was not a party a NLM could not make an Article 96(3) declaration.

The position is that States which were targeted never did become a party to Protocol I. The States did not want to lose their legitimacy due to the developments which had occurred. The developments included self-determination having made a peoples a role player in IHL. The States thereafter began to respect peoples wishes and were inclined to a democratic origin of States. The democratic entitlement destroyed practices like apartheid. Even when the entitlement diminished, it still left a yardstick to determine legitimacy in IHL. The yardstick was the respect for human rights and good governance. The targeted States did not want to be seen as backward facing and lose their legitimacy as the international community had a normative expectation of States. The targeted States rather provided a defence than agree that Protocol I was applicable.

The situations were left to be regulated by customary law. However, those provisions which regarded CFNL as international armed conflicts were not customary. The regulation which became applicable was the old framework. The framework employed the Geneva Conventions to regulate these situations. However, the Geneva Conventions application depended on whether the State party to the conflict was party to them. On the one hand if the State was a party, then the Geneva Conventions Common Article 2 paragraph 3 was applicable. The NLM could make a declaration outlining their intention to abide by this framework. On the other hand, if the State was not a party then the NLM could make a commitment to all matters not covered by customary law. The present position depicted that CFNL had no future relevance under Protocol I and no revision could rectify this state of affairs. The CFNL were never recognised as such, in terms of Protocol I, throughout the duration of the conflicts.

The Conclusion

The study sought to find out whether there was a future relevance for CFNL under Protocol I's operative provisions. The question was premised on the presumption that the principle of self-determination had an adverse effect on the operative provisions terminology. The adverse effect deterred practice of Protocol I in relation to CFNL.

The impact of the principle of self-determination

A peoples right to self-determination first appeared in the United Nations Charter. Thereafter, most United Nations resolutions which sought the end of colonial domination were based on it. The conflicts against colonial domination mostly resemble an external facet of self-determination. The external facet denotes a right to secede, however the international community prefers the internal facet. The internal facet of self- determination's main consideration is affording peoples the freedom to choose their political status and pursue their social, economic and cultural development.

The United Nations began to affiliate the peoples right to self-determination with certain conflicts with the 1960 Declaration on Granting of Independence to Colonial Countries and Peoples. This resolution outlined that in conflicts against colonial domination the exploited peoples had a right to self-determination. In subsequent resolutions the affiliation widened to include conflicts against racial regimes and alien subjugation. The developments eventually led to the Declaration on Principles of International Law Concerning Friendly Relations. It expressly provides that the peoples under colonial domination, alien subjugation and racist regimes have a right to self-determination. The international community was undergoing a change from an authoritative rule to a consultative form of governance. It was in the midst of this change where the peoples right to self-determination received a lot of attention. The conflicts against colonial domination, racist regimes and alien subjugation were at their prime during this time. In subsequent developments the three conflicts were refined to those against colonial domination, racist regimes and alien occupation.

At the forefront of these developments were the peoples right to self-determination. The right introduced a peoples in the previously elitist and aristocratic system of governance. The peoples right to self-determination had brought forth a new standard with which legitimate power in the international sphere would be determined. The standard was the respect for the peoples wishes. At the time in terms of the United Nations the conflict against colonial domination had just ended between FRELIMO and Portugal. However, the conflicts against a racist regime in South Africa and alien occupation in the Occupied Palestinian Territories were underway. The people fighting in these conflicts had already been afforded a right to self-determination. The peoples right to self-determination is a product of the United Nations practice. However, the United Nations resolutions are only persuasive they do not possess binding force. In light of the changes which were occurring at that time the law had to be reaffirmed. The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 was then convened with the aim of extending the regulation of IHL to the prevalent conflicts. The extension was to maximise the protections of victims involved in such conflicts. The result would be Protocol I which ushered in a new national liberation framework.

In the old framework the conflicts against colonial domination, a racist regime and alien occupation were regarded as internal conflicts. The conflicts involved a non-State entity against the State. The conflicts were therefore not regulated by IHL but rather domestic laws. Only States were regulated by IHL.

The Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 had been convened to supplement the law which applied to the victims of international armed conflicts. The prevalent conflicts were internal conflicts and were not regulated by IHL which caused a dilemma at the conference. However, the plight of the victims could not be ignored. The drafters of Protocol I then sought a basis of including these prevalent conflicts under the regulation of IHL. The drafters ultimately agreed on the United Nations practice of basing their support for conflicts against colonial domination, racist regimes and alien occupation on the principle of self-determination. The drafter's inserted Article 1(4) in Protocol I's

scope. The Article includes all conflicts against colonial domination, racist regimes and alien occupation fought in exercise of the right of self-determination. Article 1(4) thus provided a definition for CFNL in line with their right to self-determination, as enshrined in the Charter of the United Nations and The Declaration on Principles of International Law Concerning Friendly Relations. Furthermore, it categorised these conflicts as international armed conflicts. A NLM could accede to the Protocol through an Article 96(3) declaration. The article provided the NLM with a unilateral means to have brought IHL into force in their respective conflict. Article's 1(4) and 96(3) are Protocol I's operative provisions in relation to CFNL. The protocol introduced the new national liberation framework which could be accessed by an authority not only States.

A NLM that complied with the operative provisions would have been enabled to attain the protections from IHL for their conflict. Protocol I ensured that CFNL enjoyed the protections of IHL normally applicable to conflicts against States. The protections from The Law of Geneva relating to the victims of international armed conflicts in general as supplemented by Protocol I's new provisions. Furthermore, they would access the protections of The Law of The Hague relating to the conduct of hostilities. The protections are available from Protocol I in a revised and more comprehensive format. However, there was another condition that the State party to the conflict had to be a party to the Geneva Conventions and Protocol I. Protocol I supplements the Geneva Conventions therefore prospective parties had to be party to the conventions.

Protocol I was motivated by the conflict in Mozambique to have included conflicts against colonial domination. However, the conflict which occurred in that territory had ceased when Protocol I was adopted. Similarly, Protocol I targeted South Africa and the Occupied Palestinian Territories for the conflicts against a racist regime and alien occupation respectively. In South Africa the majority of the people could not vote during the conflict. The people there were discriminated by the minority of the population. The discrimination was based solely on race. The conflict in South Africa for all intents and purposes seemed to have been a conflict against a racist regime. However, there was no practice of Protocol I throughout the conflict. The South African government never acceded to the protocol throughout the conflict. The government then conceded to negotiations

with the NLM when racial discrimination became a crime against humanity. In the Occupied Palestinian Territories, Israel annexed territories demarcated as Arab territory. Israel continued its presence and even built a barrier in the territory. The United Nations discouraged this annexation and termed it as an alien occupation. However, there was no practice of Protocol I in the conflict between Israel and the PLO. Israel was not a party to Protocol I. Furthermore, the NLM has since become an Observer State and now exceeds Protocol I's scope for CFNL. An Observer State can accede to Protocol I like other States. The practice of Protocol I's operative provisions remains elusive. In the new framework there is no requirement of minimum intensity or otherwise. A non-international armed conflict implies more stringent requirements of organisation and intensity than in an international armed conflict. The conflict has to meet the definition of Article 1(4) of Protocol I to be part of the CFNL. Furthermore, to derive the protections from IHL the NLM had to make a Protocol I Article 96(3) declaration. After the declaration is accepted the NLM will be involved in a conflict for national liberation with the whole IHL applicable. However, this situation is the ideal. It presupposes that the State is a party to Protocol I and the Geneva Conventions and an Article 96(3) declaration is accepted. The ideal has never been achieved. In reality the targeted States were not parties of Protocol I and no declaration has been accepted. All the updated and new provisions introduced by Protocol I have not seen the light of day in relation to CFNL.

The study found the operative provisions terminology to have defects. The terminology is vague because it employed words which were not definite. The word 'peoples' for instance, has no clear meaning. Furthermore, there is no definition as to who are the peoples to exercise their right to self-determination.

The terminology in the operative provisions is short-sighted. The terminology does not reflect a consideration of reasonably foreseeable developments. The developments included the conclusion of CFNL and the emergence of a democratic entitlement. No territory remains *terra nullius*, decolonisation completed colonialism and racism was outlawed. The drafters should have reasonably foreseen these developments and not included only three CFNL. The territories of the world were either under a sovereign State or administered by the United Nations. Decolonisation was complete and only non-self-governing

territories remained. The completion of the conflict between Portugal and FRELIMO before the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 was convened illustrated this state of affairs. Lastly, the norm against racial discrimination had been receiving considerable support. It was foreseeable that it would eventually be outlawed.

The defences postulated by the targeted States highlighted the defect of the inherently subjective terms in Protocol I's operative provisions. The terms like a colonial domination, racist regime and alien occupation indirectly refer to the State party as a colonialist, a racist regime or an alien occupier. No State ever came forth to disclose that it was a colonialist, a racist regime or an alien occupier. The terms denoted negative connotations and a State would not agree to be either of those forms of regime. A more welcomed approach was to provide a defence. The former South African government had defended against Protocol I's application in the South African conflict. It provided that the people of South Africa desired the discriminatory practice occurring in its territory. The government forwarded that the South Africans had exercised their right to self-determination. However, technically only the minority of the South Africans had voted. In the Occupied Palestinian Territories Israel also forwarded a defence to prevent Protocol I from finding application in their conflict. Israel forwarded that the territories did not belong to a sovereign State prior to their annexation. Accordingly, the Geneva Conventions and subsequently Protocol I could not apply as there was no sovereign State. The Geneva Conventions provide that alien occupation occurs when territory belonging to a sovereign was occupied. The defences indicated the subjective terms and their propensity to deter practice. Since it was the first time subjective factors were used in IHL there was no precedence for CFNL. Furthermore, there was no standard which was observed to determine what the terms meant. The terms were therefore left to States and the NLM to assert that they were involved in CFNL. In the conflicts in South Africa and the Occupied Palestinian Territories the respective NLM had not complied with the requirements of Article 96(3). In South Africa the ANC failed to make a declaration of intent and the PLO had attempted to accede to Protocol I

as a State. None of their attempts had succeeded. The states never acceded to Protocol I and this made any declaration impossible.

Protocol I has not been applied in situations of CFNL because of its operative provisions being defective. The terminology is subjective, vague and short sighted. However, the main defect which deterred practice was the subjective nature of the terms. The short-sightedness and vagueness emanated from this defect.

The reason the negative connotations deterred practice by the targeted States was because of the developments in IHL. The international community had been developing along a path which afforded peoples more emphasis. The peoples were thus offered protections like the right to self-determination so they could be protected in their prevalent conflicts. The people where now consulted more. The consultation with the people gave a State legitimacy in the international sphere. Protocol I placed peoples in the realm of IHL. The democratic entitlement emerged in this climate where emphasis was placed on people. The international community emphasised on governments which originated from free and fair elections. The democratic entitlement has since been reversed. However, it left a yardstick in the international community. All new States had to observe human rights and good governance. It would have been distasteful of a State to agree that it was denying people their rights amidst these developments. It would be distasteful if the State had denied the peoples their right to self-determination. All the States therefore shunned the violation of a peoples right. The States which were in violation sought defences as a subterfuge of their true conduct. The States did not want to be outlaws in the international community. It was therefore not surprising that Protocol I had not been ratified by States which faced a NLM like Israel. The States such as South Africa only became a party to Protocol I once their internal or colonial problems had been resolved.

The matter of States forwarding a defence was further complicated by the fundamental principle of consensus in IHL. All treaties are only binding on a State once it consents. A State could not be forced to accede to a treaty.

Protocol I's operative provisions have not received practice just attempts because of the defects in the terminology. In both targeted conflicts in Israel and South

Africa Protocol I did not receive application. The targeted States did not become party to Protocol I. Protocol I's operative provisions will not receive any practice because these were the only instances of CFNL. In absence of practice the provisions will not become customary. The future relevance for CFNL is therefore limited.

The defective terminology was a result of basing CFNL on the peoples right to self-determination. The peoples right to self-determination therefore had an adverse effect on Protocol I's operative provisions. The adverse effect has diminished the practice in relation to CFNL under Protocol I. The peoples right to self-determination limited the type of conflicts to become international armed conflicts to three categories. The limitation was because the right of self-determination had been used prior to the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts of 1974 to condemn colonial domination, racist regimes and alien occupation. The right was then used to legitimise CFNL. The right of self-determination epitomised all three oppressions as they were denials of the right. The irony was that self-determination was to have placed an emphasis on a peoples in IHL. However, the overall impact of the influence has limited the relevance of CFNL under Protocol I.

Final remarks

CFNL as per Protocol I have never occurred. The only instances of these conflicts were the targeted ones. However, the States involved in them denied being involved in CFNL. The States subsequently did not accede to Protocol I. The conflict in South Africa had ended without application, the State was not a party and only acceded to Protocol I after the conflict ceased. The conflict in the Occupied Palestinian Territories now exceeds Protocol I's scope for CFNL. The conflict exceeds the scope of CFNL because it was now a conflict between States. Israel has never acceded to Protocol I. The non-adherence by the targeted States made the international community offer support to a NLM involved in CFNL. A new national liberation framework was then created to regulate the conflicts in States which continued with undesired practices like colonialism and racism. However, even with the new national liberation framework the targeted States continued their disobedience. The targeted States

were able to continue because of the principle of consensus in IHL. A State cannot be forced to accede to a treaty. The principle of consent allowed the targeted States to continue with their disobedience. However, Protocol I's provisions are becoming customary. The provisions will start as *erga omnes* and eventually become *jus cogens*. Protocol I's operative provisions which recognise CFNL as international armed conflicts will not become customary. The operative provisions have not been practiced. The lack of the operative provisions practice is further exacerbated by the fact that these conflicts no longer appear. CFNL have no future relevance under Protocol I. The future relevance of CFNL under Protocol I is not necessarily limited because of the peoples right to self-determination. The limited relevance is also caused by other factors like state-centredness and no practice. However, when we look at the developments and how CFNL became regulated by IHL we find that self- determination was at the core.

The operative provision's defects can be cured when Protocol I is used with a guideline. However, this suggestion evidences some need for the operative provisions revision. The revision would cover all the scapegoats alleged States party to a CFNL utilised. Other instances also illustrate the need for revision. However, because CFNL no longer occur this will not be necessary. The only last remnant being in the Occupied Palestinian Territories. However, the State did not accede and the conflict now exceeds the scope to Protocol I. The need for revision of Protocol I's operative provisions in regard to CFNL is therefore negated. Furthermore, it is doubtful the need would arise and amending multilateral treaty rarely occurs.

CFNL, as found in Protocol I's operative provisions, have no future relevance. The only significance possessed by CFNL would be for documentation. A record of CFNL will document the once prevalent conflicts which are now not desired by the international community. However, Protocol I is not to be considered as an unnecessary instrument since it also applies to interstate conflicts. The rules which were brought by Protocol I as reforms are still useful. The rules like those offering protections to women and children have become customary. The new rules will be used in interstate conflicts.

The peoples right to self-determination was a paradox in IHL. When the drafters employed the peoples right to self-determination they sought to save those in CFNL by offering them protections of international armed conflicts. However, the peoples right to self-determination ended up being the destroyer of that ideal. The right has the status of *jus cogens* from which the international community accepts no derogation. CFNL are a species of denial of the principle of self-determination. The CFNL were indirectly made obsolete because a State which violated a *jus cogens* was undesired by the international community. The targeted States denied that Protocol I was applicable and did not become a party to it.

Figuratively, the drafters were caught between a rock and a hard place with only one way to exit. Literally, it was either they used the principle of self-determination to provide CFNL with a basis in IHL or not. At least they attempted.

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