



Stardom University
جامعة ستاردوم

**Stardom Scientific Journal
of Law and Political Studies**

**Stardom Scientific Journal for Legal and
Political Studies**

**A peer-reviewed academic journal
issued quarterly by Stardom University**

Volume 3 – Issue 2 , 2025

ISSN: 2980-3764





هئية تحرير مجلة ستاردوم العلمية للدراسات "السياسية و القانونية"

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لمجلة ستاردوم العلمية للدراسات السياسية و القانونية

INTERNATIONAL HUMANITARIAN LAW IN NON- INTERNATIONAL ARMED CONFLICTS IN THE CONTEXT OF SOUTH SUDAN

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Abstract

This study critically examines the application of International Humanitarian Law (IHL) in Non-International Armed Conflicts (NIACs), with specific focus on South Sudan. The study explores the legal limits of protection afforded under IHL during internal armed conflicts, the practical challenges to its implementation, and the broader implications for civilian protection and accountability. South Sudan, plagued by recurring internal conflicts since gaining independence in 2011, offers a compelling case study for understanding the operational gaps between legal norms and the realities on the ground.

The study utilizes a doctrinal legal methodology, focusing on primary sources like Common Article 3 of the 1949 Geneva Convention, Additional Protocol II of 1977, and Customary International Law. Secondary sources including reports by the International Committee of the Red Cross (ICRC), The United Nations Mission in South Sudan (UNMISS) and academic commentaries offer contextual foundations. The analysis situates these legal frameworks within the South Sudanese context, where protracted civil war, ethnic-based violence, and state fragility complicate the enforcement of humanitarian norms.

Key findings reveal that while IHL provides a minimum standard of protection in NIACs, its effectiveness in South Sudan is severely hindered by fragmented armed groups, lack of state capacity, limited dissemination of IHL, and persistent impunity for violations. The absence of robust accountability mechanisms and inadequate domestic incorporation of international norms further erode protection for civilians and humanitarian personnel.

The study recommends the reinforcement of legal and institutional frameworks in South Sudan to align with IHL obligations, increased training for state and non-state actors, and the establishment of hybrid or regional accountability mechanisms. Additionally, enhanced humanitarian coordination and support for transitional justice initiatives are essential to bridge the gap between IHL in principle and in practice. Through this legal analysis, the study contributes to broader discourses on the operationalization of IHL in fragile and conflict-affected states.

Key Words: Non-international armed conflict, international humanitarian law, South Sudan, Legal Protection, Geneva Conventions, Additional Protocol II,

Common Article 3, Customary International Law, Civilian harm, Accountability Mechanisms, Humanitarian Challenges.

1. Introduction

International Humanitarian Law (IHL), also known as the law of armed conflicts, is a specialized branch of international law that governs the conduct of hostilities and seeks to protect individuals who are not, or are no longer, participating in combat. Rooted in principles of humanity and the dictates of public conscience, IHL aims to limit the effects of armed conflict by establishing legal obligations for both state and non-state actors. While originally developed in the context of international armed conflicts, a substantial part of modern conflicts is non-international in nature. As such, the relevance of IHL in non-international Armed Conflicts (NIACs) has become increasingly critical, particularly in countries experiencing protracted internal violence.

The core legal instruments governing NIACs include Common Article 3 of the 1949 Geneva convention and Additional Protocol II of 1977, alongside customary humanitarian international law. These instruments establish minimum standards of humane treatment and impose obligations on all parties to the conflict, regardless of their legal status. Despite their significance, the application and enforcement of IHL in NIACs present complex legal and practical challenges, especially in fragile and conflict-prone states.

South Sudan presents a compelling context for the analysis of IHL in NIACs. Since gaining independence in 2011, the country has experienced recurring cycles of civil war, armed rebellion, intercommunal violence, and widespread human rights abuse. The nature of these conflicts, often involving multiple non-state actors, ethnic militias, and a weak central government, raises critical questions about the adequacy of IHL protections and the mechanisms available for their enforcement. This paper aimed to explore the following key study questions:

- what are the legal limits of IHL in non-international armed conflicts?
- how effective is IHL in protecting civilians and regulating hostilities in the context of South Sudan?
- what are the practical barriers to the implementation of IHL in South Sudan?

By addressing these questions, the study seeks to assess the normative framework of IHL in theory and its operationalization in a complex and evolving conflict environment.

The importance of this inquiry lies not only in advancing legal scholarship but also in identifying realistic strategies for enhancing compliance, accountability, and humanitarian protection in South Sudan and similarly affected contexts.

2. Methodology

This study employed a legal doctrinal approach, which involved a critical analysis of legal rules, principles, and case law governing IHL in the context of NIACs. The doctrinal method focused on interpreting and systemizing legal sources to assess the normative scope, limitations, and applicability of IHL in South Sudan's internal conflict setting.

The study was grounded in the examination of primary legal sources, including; Common Article 3 of the Geneva 1949 Convention, Additional Protocol II of 1977 to the Geneva Convention, Customary International Humanitarian Law, as codified by the International Committee for Red Cross (ICRC), the statute of the International Criminal Court (Rome Statute), particularly provisions relating to war crimes in NIACs, and relevant decisions of international tribunals, such as the "Tadić Case" from the International Criminal Tribunal for the former Yugoslavia (ICTY), which clarified the definition of NIAC.

The study draws from secondary literature, including peer-reviewed journals articles, legal commentaries, and academic monographs on the evolution and challenges of IHL in NIACs. Key sources include the international review of the Red Cross, Journal of International Humanitarian Legal Studies, and scholarly writings by experts such as Jean-Marie Henckaerts, Sandesh Sivakumaran, and Emily Crawford.

To supplement the legal analysis, the paper incorporates qualitative data derived from reports and publications by international and national NGOs such as:

- Human Rights Watch and Amnesty International.
- findings of United Nations agencies, particularly UNIMSS and Office of the High Commissioner for Human Rights (OHCHR).
- field-based assessments and interviews conducted by humanitarian organizations and monitoring missions operating in South Sudan.
- public statements and training manuals by the ICRC and South Sudanese government institutions on IHL dissemination and compliance.

This combined methodology enables a comprehensive understanding of both the legal framework and the operational realities of IHL in South Sudan. It also allows for a critical assessment of how international norms are interpreted, applied, and at times, ignored in settings of weak governance and fragmented armed conflict.

3. Overview of IHL Applicable in NIACs

IHL applicable in NIACs is primarily aimed at regulating the conduct of hostilities and protecting individuals not participating in the conflict, such as civilians, medical personnel, and those who are “hors de combat” (no longer taking part in hostilities). NIACs differ from international armed conflicts in terms of the parties involved – typically involving conflicts between a state and organized non-state armed groups or between such groups and themselves within the territory of a state. The legal framework governing NIACs is more limited than that of international armed conflicts, but it includes key instruments and principles that remain binding on all parties. The main sources can be discussed as follow:

3.1 Common article 3 of the Geneva convention (1949)

Common Article 3 is often referred to as a “mini-convention” and is considered the cornerstone of IHL applicable in NIACs. It applies uniformly to all conflicts “not of an international character” occurring within the territory of a high contracting party.

The main provisions for this article include: protection for all persons not actively participating in hostilities, including members of armed forces who have laid down their arms or "hors de combat". Absolute prohibition of;

- Violence to life and person (murder, mutilation, cruel treatment, and torture).
- Hostage-taking.
- Outrages upon personal dignity, including humiliating and degrading treatment.
- Passing of sentence and executions without judgment by a regularly constituted court offering all judicial guarantees. There are legal terms for these practices as customary trials and arbitrary executions.

Common Article 3 is binding on both state and non-state actors, and its customary status means it applies regardless of treaty ratification.

3.2 Additional Protocol II (1977)

Additional Protocol II expands and elaborates on Common Article 3, but it only applies in more structured NIACs, where:

- There is an armed conflict between state armed forces and dissident or organized armed groups.
- The armed groups are under responsible command and control, allowing for sustained and concerted military operations.

Key provisions include enhanced protection for civilians against the dangers arising from military operations; prohibition of collective punishment, terrorism, slavery, and pillage; special protection for medical and religious personnel, the wounded, sick and children; regulations on the human treatment of detainees, due process, and non-discrimination.

However, its scope of application is more limited than common Article 3 and does not apply to riots, isolated acts of violence, or internal tensions.

3.3 Customary International Humanitarian Law (CIHL)

IHL plays a crucial role in NIACs, especially where treaty law is silent or not applicable. The ICRC study on Customary IHL (2005) identified 161 rules, many of which apply in both international and non-international armed conflicts.

Examples of customary rules relevant to NIACs include.

- Distinction between civilians and combatants,
- Prohibition of indiscriminate attacks,
- Principle of proportionality,
- Precaution in attack,
- Humane treatment of all people,
- Prohibition of rape and sexual violence,
- Protection of Cultural property and the natural environment,
- Accountability and obligation to investigate war crimes.

Customary IHL binds all parties to conflict regardless of ratification status or recognition under international law, making it a powerful tool for protecting individuals during internal conflicts.

4. Definition of NIACs under International Law

There is no universally agreed-upon definition of NIACs in any single treaty; however, jurisprudence and legal commentary have clarified this issue. The International Criminal Tribunal for the former Yugoslavia (ICTY) in the “Tadic Case” (1995) defined NIAC as:

“Protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.”

Two cumulative criteria generally define a NIAC:

1. Intensity of the conflict, including frequency of attacks, type of weapons used, involvement of armed forces, and number of casualties.
2. Organization of the parties, involving command structure, disciplinary mechanisms, and ability to sustain military operations.

These criteria have been used by international courts and UN bodies to determine whether an internal situation rises to the level of NIAC, thus triggering the application of IHL.

5. Literature Review

The application of International Humanitarian Law (IHL) in NIACs has generated a growing body of scholarly debate, particularly regarding its effectiveness, legal limitations, and practical enforcement in contemporary conflict settings. While IHL has traditionally been state-centric, modern conflicts such as those in South Sudan have challenged its foundational assumptions and mechanisms of accountability.

5.1 The Legal Framework of IHL in NIACs

Similar works, including those by Sandoz, Swinarski, and Zimmerman (1987) as well as ICRC (2005), offer foundational interpretations of Common Article 3 of the 1949 Geneva Convention and Additional Protocol II (1977)¹. These sources

¹ <https://international-review.icrc.org>

emphasize that while IHL guarantees minimum humanitarian protection in NIACs, its treaty-based norms are limited governing international armed conflicts. Scholars like Wilmschurst (2012) argue that the growing reliance on customary international law compensates for these treaty limitations by reinforcing protections regardless of formal ratification².

5.2 Challenges in Enforcement and Compliance

Numerous studies, including ICRC's 2015 report on contemporary armed conflict, identify enforcement gaps in IHL, particularly in contexts involving non-state actors³. The fragmentation of armed groups, the absence of command control structures, and the reluctance of states to cede jurisdiction to international bodies weaken the legal framework's practical impact. Dapo Akande and others have noted that compliance is often shaped by the strategic interests of belligerents rather than legal obligations⁴.

5.3 The Context of the Conflict in South Sudan and Its Legal Qualification.

Scholars and practitioners, including the African Union Commission of Inquiry (2014) and UNMISS reports, have extensively documented atrocities committed by both government and opposition forces⁵. These reports legally qualify the conflict in South Sudan as a NIAC, emphasizing violations of **Common Article 3** and Customary IHL norms. However, Knopf (2013) argues that state fragility and ethicized violence complicate legal classification and the application of protection norms⁶.

5.4 Intersection with Human Rights and Transitional Justice

The interplay between IHL and International Human Rights Law (IHRL) is explored in the works of Clapham (2016) and Megret (2008), who advocate for a holistic approach that integrates IHRL to ensure accountability in NIACs⁷. Given South Sudan's post-conflict aspirations, transitional justice literature, such as that by OHCHR and the Center for the Study of Violence and Reconciliation (2018),

² <https://www.cambridge.org>

³ <https://rcrcconference.org>

⁴ <https://brill.com>

⁵ <https://archives.au.int>

⁶ Kate Almgvist Knopf 'Fragility and State-Society Relation in South Sudan' A research paper from the African Center for Strategic Studies, 2013. Research Paper No:4

⁷ <https://www.researchgate.net>

supports the establishment of hybrid mechanisms like the Hybrid Court for South Sudan, as envisioned in the R-ARCSS⁸.

5.5 Operational and Humanitarian Constraints

Reports by Human Rights Watch (2022) and ICRC (2020) highlight operational constraints in South Sudan, including the targeting of humanitarian workers, denial of access to justice, and lack of legal awareness among armed actors⁹. These practical challenges underscore the gap between IHL theory and filed reality, echoing themes in Terry's (2002) work on humanitarian dilemmas in civil wars¹⁰.

6. Historical Overview of Armed Conflict in South Sudan and Legal Qualification under IHL

South Sudan has experienced protracted armed conflict for decades, both before and after its independence from Sudan in 2011. The country's conflict history can be broadly divided into several phases:

6.1 Pre-Independence Conflicts (1955-2005)

South Sudan was significantly engaged in two major civil wars against the Sudanese government: the First Sudanese Civil War (1955-1972) and the Second Sudanese Civil war (1983-2005)¹¹. These wars were primarily waged along ethnic, religious, and regional divides, leading to millions of deaths and widespread displacements. The Comprehensive Peace Agreement (CPA) signed in 2005 ended the second war and laid the foundation for South Sudan's independence in 2011¹².

6.2 Post-Independence Civil War (2013-2018)

In December 2013, political tensions within the ruling Sudan People's Liberation Movement (SPLM) erupted into armed conflict between forces loyal to President Salva Kiir and his former deputy Riak Machar.¹³ The conflict quickly took on an ethnic dimension, with widespread violence between Dinka and Nuer

⁸ <https://www.ohchr.org>

⁹ Human Rights Council Fifty-fifth Session, 26 February-5 April 2024. A report of the Commission on Human Rights in South Sudan

¹⁰ <https://www.jstor.org>

¹¹ Clement Pinaud, 'War Genocide in South Sudan' Cornell University Press, 2021. P1

¹² Ibid

¹³ Ibid

communities¹⁴. Despite multiple peace deals, the fighting persisted, leading to massive humanitarian crises, widespread atrocities, and a fractured state structure.

6.3 Revitalized Peace Agreement and Ongoing Violence (2018-Present)

The revitalized Agreement on the Resolution of the Conflict in the Republic of South Sudan (R-ARCSS) was signed in 2018, leading to the formation of a transitional government of National Unity in 2020¹⁵. However, localized violence persisted across several states (e.g., Jonglei, Upper Nile, and Western Equatoria), often involving intercommunal militias, breakaway armed groups, and government forces.

7. Identification of Parties to the Conflict

The South Sudanese conflict has involved a complex and shifting array of actors.

7.1 Government Forces

SPLA, the national army until 2018, South Sudan People's Defense Forces (SSPDF, restructured national army since 2018, presidential guards, and the special forces have also been accused of ethnically targeted violence¹⁶.

7.2 Main Armed Opposition Groups

Sudan People's Liberation Army in Opposition (SPLA-IO), led by Riak Machar, National Salvation Front (NAS), led by Thomas Cirillo, primarily active in equatorial region, South Sudan United Front/Army (SSUF/A), formed by former SPLA Chief of Staff Paul Malong, along with other community –based militias, including “White Army” (Nuer youth militia), Dinka youth militias (Abu Shook), and armed cattle raiders¹⁷.

These groups have operated with varying degrees of organization, territorial control, and command strictures.

¹⁴ Ibid

¹⁵ Ibid

¹⁶ <https://www.cfr.org/global-conflict-tracker/conflict/civil-war-south-sudan>>accessed on may-2025

¹⁷ <https://www.rulac.org/browse/conflicts/non-international-armed-conflict-in-south-sudan>>accessed on June,2025

8. Legal Qualification of the Conflicts under International Humanitarian Law

Under International Humanitarian Law (IHL), armed conflicts are considered NIACs when occurring between governmental forces and organized non-state armed groups, or between such groups themselves, within a single state¹⁸.

The conflict in South Sudan meets the legal criteria for a NIAC based on; intensity and organization of parties, extensive use of heavy weaponry, massive displacement, large-scale killings, and prolonged duration of hostilities. Also, most major opposition groups (e.g., SPLA-IO) have established military hierarchies, command structures, and the capacity to conduct sustained military operations¹⁹.

These factors align with the definition established by the ICTY in the Tadic case and supported by the ICRC's criteria for classifying armed situations. Furthermore, the involvement of multiple factions and intercommunal violence may constitute multiple concurrent NIACs, rather than one unified civil war. Where government forces and organized groups engage in combat without government involvement, IHL rules governing NIACs, especially Common Article 3 and applicable customary rules, are triggered²⁰.

In some cross-border cases where foreign forces have intervened (e.g., Uganda troops supporting the South Sudanese government), there may be elements resembling internationalized NIACs, though the core conflicts remain legally classified as non-international under IHL.

9. Practical Challenges in the Implementation of IHL in South Sudan

Despite the existence of a robust body of IHL applicable to NIACs, the South Sudanese context presents a number of practical and legal challenges that undermine effective protection for civilians and adherence to core IHL principles such as distinction, proportionality, and precaution. These challenges are further exacerbated by institutional weaknesses, gaps in legal frameworks, and limited international accountability mechanisms²¹.

¹⁸ ICRC, 2008. How is the term 'Armed Conflict' defined in international Humanitarian Law? Opinion Paper, International Committee of the Red Cross (ICRC). Accessed June, 5th 2025

¹⁹ Article 3 of Geneva Conventions

²⁰ <https://www.undrr.org/understanding-disaster-risk/terminology/hips/so>

²¹ United Nation Security Council, "Resolution 2683 (2023). Adopted by Security Council at its 933 2nd meeting, on 30 May 2023", available at: <https://digitallibrary.un.org/record/4012126?ln=fr&v=pdf>

9.1 Challenges in Ensuring Distinction, Proportionality, and precaution

The principles of distinction, proportionality, and precaution are fundamental to IHL and aim to minimize harm to civilians and civilian objects; distinction for example requires parties to distinguish at all times between civilians and combatants, and between civilian objects and military targets. Proportionality, conversely, prohibits attacks that may cause incidental civilian harm excessively in relation to the anticipated military advantage. Meanwhile, precautions oblige parties to take all feasible measures to avoid or minimize civilian harm²².

In South Sudan, the application of these principles is severely hindered by:

- Blurring of civilian-combatant lines, as many armed groups recruit local youths, civilians wielding arms, and fighters often do not wear uniforms or insignia.
- Deliberate targeting of civilians is a tactic of war, often resulting in the burning of villages, the killing of civilians, and attacks on aid workers.
- Lack of training in IHL among rank-and-file soldiers and militia members, combined with a culture of impunity.
- Absence of intelligence capabilities to properly verify military targets or assess proportionality in dynamic conflict zones.

These factors result in systematic violations of IHL with devastating consequences for civilian populations.

9.2 Difficulty of Enforcing Civilian Protection in Fragmented Conflicts

South Sudan's conflict landscape is highly fragmented, involving; multiple non-state armed groups with shifting alliances and splinter factions, ethnic militias and self-defense groups with limited command structures or discipline, armed actors operating in remote, poorly governed, and inaccessible areas²³.

This fragmentation poses several challenges such as; no clear chain of command among many groups, making enforcement of IHL and accountability nearly impossible, inconsistent or non-existent commitment to ceasefires and humanitarian norms by splinter factions, inability of the government to exert control over large

²² Ibid

²³ Ibid (1)

areas of the country reduces its capacity to protect civilians and regulate armed actors²⁴.

As a result, humanitarian agencies and monitoring bodies often find it difficult to engage with all parties, conduct needs assessments or ensure safe access to affected populations.

9.3 Gaps in Treaty Ratification and Incorporation into National Law

Although South Sudan ratified key international instruments, there are serious legal and institutional gaps that impede domestic enforcement of IHL²⁵;

- Customary IHL norms have not been domesticated into military codes of conduct
- There is no comprehensive national IHL framework other than the one established in 2012, and limited efforts have been made to integrate IHL training into military or police academies.
- Judicial institutions remain weak, underfunded, and politically compromised, unable to prosecute serious violations.

These gaps not only weaken state capacity to fulfill its IHL obligations but also reduce deterrence of legal accountability.

9.4 Limited Role of International Accountability Mechanisms

South Sudanese's access to international justice and accountability mechanisms is severely restricted due to the situation in South Sudan is not a State Party to the Rome Statute of the International Criminal Court (ICC), this means that the ICC has no jurisdiction unless a referral is made by the UN Security Council- a politically unlikely outcome²⁶. Also, while the African Union proposed a Hybrid Court for South Sudan (HCSS), progress has been stalled due to lack of political will, legal obstacles, and delays in implementation²⁷. Lastly, existing mechanisms such as the Commission on Human Rights in South Sudan (CHRSS) and the UN Panel of Experts are limited to documentation and reporting, with no enforcement powers²⁸.

²⁴ Ibid

²⁵ South Sudan: Human Rights in Review, a Report submitted for the UN Universal Periodic Review by Amnesty International, 40th session of the UPR Working Group, January-February 2022.

²⁶ <https://asp.icc-cpi.int/states-parties>

²⁷ Amnesty.org/en/wp-content/upload

²⁸ Ibid (9)

Thus, victims of war crimes and other IHL violations have few avenues for justice, and perpetrators operate with near-total impunity.

10. Practical Challenges to the Implementation of IHL in South Sudan: Case-Based Analysis

Despite the clear legal obligations imposed by IHL, the reality in South Sudan reflects a persistent and systematic failure to implement and uphold these norms. Numerous reports by the United Nations Mission in South Sudan (UNMISS), Human Rights Watch (HRW), and the ICRC illustrate how various practical challenges continue to obstruct the protection of civilians and the delivery of humanitarian assistance. These challenges include restricted humanitarian access, widespread impunity, insufficient IHL training, and the complex dynamics of a politicized and fragmented conflict²⁹.

10.1 Access Constrains for Humanitarian Actors

Humanitarian Organizations, including UN agencies and NGOs, have repeatedly faced serious obstacles in accessing vulnerable populations, especially in areas controlled by non-state armed groups or engulfed by active fighting³⁰. For example; UNMISS Human Rights Divisions reports (2020-2023) frequently cite blocked humanitarian corridors, targeting of aid workers, and looting of humanitarian supplies by both government and opposition forces³¹. In April 2023, humanitarian access in Leer County (Unity State) was severely hindered due to renewed clashes between SPLA-IO splinter factions, resulting in entire aid shipments being attacked and warehouses destroyed³². HRW (2021) documented instances where local authorities or military commanders imposed bureaucratic delays, altogether affecting humanitarian actors, especially those perceived to support rival communities³³.

These constraints violate IHL obligations under Common Article 3 and customary IHL, which require parties to allow and facilitate impartial humanitarian relief for civilians in need.

²⁹ Ibid

³⁰ Nicki Bennett 'Humanitarian access in South Sudan' Humanitarian Practice Network, 2013.

³¹ Ibid

³² Ibid

³³ <https://www.hrw.org>

10.2 Impunity and Weak Accountability Mechanisms

The lack of meaningful legal accountability for serious violations of IHL remains one of the most entrenched barriers to compliance in South Sudan. UNMISS (2022) reported that perpetrators of mass killings, sexual violence, and attacks on schools and hospitals are rarely prosecuted, even when identities are known³⁴. For example; following the brutal violence in Tambura County (Western Equatoria) in 2021, which left over 100 civilians dead and thousands displaced, no significant prosecutions were initiated against military officers allegedly involved. The government's failure to operationalize the Hybrid Court for South Sudan, as provided under R-ARCSS, reflects a lack of political will to address impunity³⁵. This widespread impunity not only emboldens perpetrators but also undermines trust in the peace process and the rule of law.

10.3 Lack of IHL Training Among Armed Actors

Many members of the armed forces and militias lack basic knowledge of IHL principles, which contributes to deliberate or reckless targeting of civilians and civilian objects³⁶. Examples: according to the ICRC's South Sudan annual report (2022), the organization conducted IHL workshops for over 5,000 soldiers and police officers, but noted that coverage remains insufficient, especially among local militias and breakaway factions³⁷. In the 2018 Wau clashes, SPLA-IO and local youth militias were accused of executing civilians and razing villages, actions reflecting a complete disregard-or ignorance of the rules of distinction and proportionality³⁸. Child recruitment and the use of sexual violence as a weapon of war documented by both UNICEF and the CHRSS, also point to inadequate training and discipline within armed ranks³⁹.

Without structured and regular IHL training, especially for new recruits and irregular forces, compliance remains unattainable.

³⁴ <https://www.state.gov>

³⁵ <https://www.ajol.info>

³⁶ <https://casebook.icrc.org>

³⁷ Ibid

³⁸ Ibid

³⁹ <https://www.unicefusa.org>

10.4 Politicization and Fragmentation of Conflict Parties

The South Sudanese conflicts are marked by multiple overlapping layers of political and ethnic tensions, which result in fragmented allegiance and the breakdown of command strictures⁴⁰. The case study of Jongolei and the splintering of SPLA-IO are the two key cases to be emphasized. In Jongeli State, the intercommunal violence between Dinka, Nuer, and Murle armed groups is often execrated by political manipulation of ethnic grievances, making negotiated humanitarian access nearly impossible⁴¹. On other hand, the splintering of SPLA-IO into factions loyal to Riak Machar and Gen. Simon Gatwech Dual has led to internal clashes, during which civilians have been caught in crossfire or targeted in retaliatory raids, as reported by UNMISS in 2022⁴². Fragmentation also makes ceasefire monitoring and IHL enforcement nearly impossible, as new armed actors regularly emerge with no established codes of conduct or obligations to previous agreements⁴³.

The dynamic makes the principles of distinction and proportionality extremely difficult to enforce and undermines coherent peacebuilding and protection strategies.

The challenges of IHL implementation in South Sudan are not merely theoretical; they are grounded in the lived experiences of civilians who continue to bear the brunt of armed conflict. Through documented violations and cross-based analysis, it is clear that: humanitarian access is systematically obstructed, accountability mechanisms are weak or non-functional, armed actors lack sufficient knowledge and training in IHL, the fragmented and politicized nature of the conflict undermines uniform compliance.

Addressing these challenges will require a multi-pronged approach; revitalizing the Hybrid Court for South Sudan, expanding IHL training, ensuring political will for accountability, and facilitating consistent engagement between humanitarian actors and all conflict parties. Without such interventions, the normative power of IHL in South Sudan will remain severely constrained.

⁴⁰ Ibid 13

⁴¹ Ibid

⁴² <https://www.aljazeera.com>

⁴³ UNMISS Report, 2022

11. Critical Assessment of IHL in the Context of South Sudan: Theory versus Reality

Despite the comprehensive framework provided by IHL for the regulation of NIACs, its practical application in South Sudan reveals profound gaps between legal theory and on-the-ground realities. A critical analysis of this disparity exposes the limits of IHL in addressing contemporary armed conflict complexities, while also underscoring the need for its complementarity with other legal regimes, particularly International Human Rights Law (IHRL) and transitional justice mechanisms.

11.1 Theoretical Adequacy of IHL versus South Sudan's Reality

IHL, as articulated in Common **Article 3, Additional Protocol II**, and Customary IHL, is designed to provide minimum protection for civilians and persons (hors de combat) during NIACs. The core principles: distinction, proportionality, necessity, and precaution, aim to constrain the conduct of hostilities and preserve humanitarian space.

In contrast, South Sudan demonstrates the limited enforceability and practical reach of these norms:

- Widespread targeting of civilians by both state and non-state actors contradicts the principle of distinction.
- Sexual violence, forced displacement, and attacks on humanitarian workers are pervasive and often systematically employed, in direct violation of IHL.
- Armed actors often lack capacity or will to apply legal norms, due to poor training, fragmented command, and ethnic-driven motivations.
- The government's failure to implement IHL domestically or punish violations further broadens the gap between law and practice.

Thus, while IHL theoretically applies, its effectiveness is undermined by weak institutions, politicized violence, and impunity.

11.2 Does IHL Sufficiently Address Modern NIAC Complexities?

South Sudan exemplified many of the emerging complexities of NIACs:

- Multiplicity and fragmentation of armed groups with shifting allegiances and lack of centralized command.
- Ethnic, Political, and Economic motivations behind violence.
- Hybrid warfare tactics, including disinformation, localized militias, and intercommunal conflict.

IHL, especially treaty-based law, does not fully accommodate these dynamics, as Common **Article 3 and Additional Protocol II** are minimalist in scope, offering limited procedural obligations and few enforcement mechanisms. The state-centric architecture of IHL struggles with conflicts involving non-state groups that do not seek to govern but to terrorize or retaliate. There is no compulsory mechanism for compliance, leaving enforcement to domestic systems or international ad hoc responses, frequently absent or ineffective.

Consequently, IHL alone is insufficient to regulate or resolve modern intrastate conflicts, especially in fragile contexts like South Sudan.

11.3 Complementarily with International Human Rights Law (IHRL)

Given IHL's limitations, IHRL becomes a crucial complementary framework. While IHL governs conduct during hostilities, IHRL applies at all times, including peacetime and transitional periods. Rights to life, due process, liberty, and freedom from torture continue to apply, even amid conflict.

In South Sudan, State actor remains bound by human rights obligations under treaties such as the International Covenant on Civil and Political Rights (ICCPR) and the African Charter on Human and Peoples' Rights. However, judicial and legislative frameworks remain underdeveloped, and civil society is often suppressed, limiting the enforcement of human rights protections. The UNIMSS human rights Division and African Commission on Human and Peoples' Rights have played monitoring roles but lack binding authority or follow-up mechanisms.

Hence, while IHRL offers broader protection, its impact depends on political will and institutional functionality.

12. The Role of Transitional Justice Mechanisms

Transitional justice mechanisms offer long-term and victim-centered response to systematic violations of IHL and IHRL. These mechanisms-including truth commissions, hybrid courts, reparations, and institutional reforms- are crucial for accountability, healing, and non-recurrence.

In South Sudan, the Revitalized Agreement on the Resolution of the Conflict (R-ARCSS) provides for the creation of a Hybrid Court for South Sudan, a Truth, Reconciliation and Healing Commission, and a Compensation and Reparation Authority. However, progress remains stalled due to lack of implementation, resistance from political elites, and limited public participation.

Without these mechanisms, the structural drivers of conflict-including impunity, ethnic marginalization, and institutional collapse, remain unaddressed, undermining both legal compliance and sustainable peace.

13. Recommendations for Strengthening the Implementation of IHL in South Sudan

In light of the legal analysis and practical challenges outlined, the following suggestions are proposed to improve the effectiveness of IHL in South Sudan's NIACs context

13.1 Strengthen National Legal Frameworks Aligned with IHL

- Review and reform national laws to ensure alignment with IHL norms on the protection of civilians, the treatment of detainees, and the conduct of hostilities.
- Establish clear criminal liability for war crimes, including those committed during NIACs, with robust prosecutorial and judicial procedures.

13.2 Increase Training and Dissemination of IHL Among Armed Groups

- Expand IHL education and mandatory training programs for members of the SSPDF, police, and all armed opposition groups.
- Include customary IHL principles and case-based scenarios in military curricula, emphasizing distinction, proportionality, and civilian protection.
- Partner with ICRC and civil society organizations to facilitate outreach to non-state actors and community-based defense groups, especially in conflict-prone areas.

13.3 Promote Accountability Through Hybrid or Regional Mechanisms

- Operationalize the Hybrid Court for South Sudan (HCSS) as stipulated in the R-ARCSS, ensuring it is independent, well-resourced, and victim-sensitive.
- Support complementary regional accountability mechanisms through the African Union and IGAD to bolster judicial credibility and regional ownership.
- Establish Mobil courts or truth-telling platforms at the community level to promote reconciliation and address grievances in post-conflict settings.

13.4 Enhance Humanitarian Coordination Under the UN Cluster System

- Strengthen the UN-led cluster coordination system to ensure rapid, integrated response to emerging humanitarian needs, especially in hard-to-reach areas.
- Improve communication between UN agencies, NGOs, and national authorities to avoid duplication and enhance civilian protection during humanitarian operations.
- Facilitate humanitarian access negotiations with all conflict parties, including local militias, through neutral intermediaries and community leaders.

14. Key Findings

This study on International Humanitarian Law in Internal Conflicts: Limits of Protection and Practical Challenges- A Legal Analysis in the Context of South Sudan yields the following key findings:

14.1 IHL Provides a Foundational but Limited Legal Framework for NIACs

- Common Article 3, Additional Protocol II, and Customary IHL establish minimum standards for the protection of civilians and the conduct of hostilities in NIACs.
- However, these instruments offer limited enforcement mechanisms, particularly in contexts where state institutions are weak or complicit in violations.

14.2 South Sudan's Conflicts Qualify as NIACs but Expose the Fragility of IHL in Practice

- The ongoing conflicts between government forces and armed opposition groups, as well as intercommunal violence, meet the thresholds of organized armed groups and protracted violence under IHL.
- Despite formal applicability, IHL protections are routinely violated, including attacks on civilians, sexual violence, and obstruction of humanitarian aid.

14.3 Fragmentation and Politicization undermine Compliance with IHL

- The proliferation of armed factions, some with no clear command structures, creates enforcement and dissemination challenges.
- The politicization of violence along ethnic lines erodes respect for IHL principles like distinction and proportionality.

14.4 Accountability Mechanisms Remain Inactive or Ineffective

- Widespread impunity persists for grave breaches of IHL, with minimal domestic prosecution of war crimes or command responsibility.
- The Hybrid Court for South Sudan, a central accountability mechanism in the peace agreement, has not been established due to political resistance.

14.5 Humanitarian Operations Are Severely Constrained

- Access denial, bureaucratic obstruction, and insecurity significantly hamper the delivery of humanitarian assistance.
- Humanitarian actors and infrastructure are frequently targeted, violating both IHL and international human rights law.

14.6 Limited IHL Awareness Among Armed Actors and the Population

- Many armed combatants and commanders lack basic knowledge of IHL, and there is insufficient institutional capacity to disseminate legal norms.
- Community-based and informal militias are particularly disconnected from formal IHL frameworks.

14.7 Complementarity with IHRL and Transitional Justice is Crucial but Underdeveloped

- International human rights obligations continue to apply during armed conflict but remain poorly enforced in South Sudan.
- Transitional justice measures such as truth-telling, reparations, and institutional reform are essential but largely unimplemented.

These findings highlight the pressing need for a multi-dimensional approach to IHL compliance that includes legal reform, accountability, training, and humanitarian coordination tailored to South Sudan's unique conflict dynamics.

15. Conclusion

This study has critically examined the application, limits, and challenges of IHL in the context of NIACs, with a specific focus on South Sudan. The findings reveal a significant gap between the theoretical protections offered by IHL and the harsh realities faced by civilians and humanitarian actors on the ground.

Although Common **Article 3**, **Additional Protocol II**, and **Customary IHL** establish essential legal standards for the conduct of hostilities and the protection of non-combatants, the South Sudanese experience demonstrates the fragility of these protections in the face of armed fragmentation, political manipulation, impunity, and institutional collapse. The persistent targeting of civilians, the obstruction of humanitarian relief, and the lack of accountability for serious violations reflect a systematic failure to uphold IHL norms.

To address these challenges, it is imperative to develop realistic, context-sensitive strategies that enhance compliance with IHL in NIACs. This includes strengthening domestic legal frameworks, ensuring accountability through hybrid and regional mechanisms, increasing IHL training for all armed actors, and strengthening coordination within the humanitarian system.

Ultimately, the protection of civilians in fragile states like South Sudan cannot be left to legal instruments alone. It requires sustained political will, international support, and robust institutional engagement. As South Sudan continues to grapple with cycles of violence and transition, there is an urgent need to reinforce the legal and moral imperative to safeguard human life and dignity in times of conflict.

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سنوي عن جامعة ستاردوم

العدد الاول - المجلد الثالث 2025م

رقم الإيداع الدولي : ISSN 2980-3764

