

1 International Humanitarian Law (IHL) and the Conduct of Non  
2 International Armed Conflict (NIAC)

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6  
7 **Abstract**

8 International humanitarian law, hereinafter called IHL, is defined as the branch of  
9 international law which limits the use of violence in armed conflict by: a. Sparing those who  
10 do not<sup>1</sup> or no longer<sup>2</sup> directly<sup>3</sup> participate in hostilities; b. Restricting it to the amount  
11 necessary to achieve the aim of the conflict, which-independently of the causes fought for 4 -  
12 can only be to weaken the military potential of the enemy<sup>5</sup>



13  
14 *Index terms*—

15 **1 Introduction**

16 a) Definition nternational humanitarian law, hereinafter called IHL, is defined as the branch of international law  
17 which limits the use of violence in armed conflict by: a. Sparing those who do not <sup>1</sup> or no longer <sup>2</sup> directly <sup>3</sup>  
18 participate in hostilities;

19 b. Restricting it to the amount necessary to achieve the aim of the conflict, which-independently of the causes  
20 fought for 4 -can only be to weaken the military potential of the enemy <sup>5</sup> . From this definition, the following  
21 deductions could be made, namely:

22 -That in armed conflict, distinction must be made between civilians and combatants.

23 -That it is prohibited to attack those who are hors de combat.

24 -That it is prohibited to inflict unnecessary suffering -That there is need to observe the principle of necessity  
25 and proportionality in armed conflicts.

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29 <sup>1</sup> For example, civilians <sup>2</sup> For example, those who have surrendered (i.e, the International armed conflict,  
30 prisoners of war) or can no longer participate (such as the wounded, and sick) ?? It the international Humanitarian  
31 Law wants to protect anyone, it cannot consider mainly any casual contribution to the war effort as participation  
32 but only the contribution implementing the final element in the casualty chain, i.e. the application of military  
33 violence. ?? The state fighting in self defence has only to weaken the military potentials of the aggressor  
34 sufficiently to preserve his independence; the aggressor has only to weaken the military potentials of the defender  
35 sufficiently to impose its political will; the governmental forces involved in a non-international armed conflict has  
36 only to overcome the armed rebellion and dissident fighters have only to overcome the control of the government  
37 of the country (or part of it) they want to control. ?? In order to "win the war" it is not necessary to kill enemy  
38 soldiers, it is sufficient to capture them or make them otherwise surrender, it is not necessary to destroy civilian  
39 infrastructure but only objects contributing to military resistance.

40 Parties to a conflict shall at all times distinguish between the civilian population and the combatants in order  
41 to spare the civilian population and civilian object. Neither the civilian population nor civilian persons including  
42 civilian objects shall be the object of attack <sup>6</sup> .Attack shall be directed solely against military objectives <sup>7</sup> .

## 2 b) The Laws Regulating Armed Conflict

The laws regulating armed conflict are found both in the treaty laws and customary international humanitarian law i.e. the Four Geneva Convention of 1949, the Additional Protocols of 1977 and Customary International Humanitarian Law. The first Geneva Convention is on the amelioration of the condition of the wounded and sick of the armed forces on the field. This originated from the 1864 Geneva Convention which was revised in 1906 and further reviewed in 1929. The First Geneva Convention of 1949 merely adopted its text with some additional provisions 8 .

The Second Geneva Convention deals with the amelioration of the condition of the wounded, sick and shipwreck members at sea. This Convention adopted the Hague Convention of 1899 which was revised in 1907 ?? .

The Third Geneva Convention relative to the treatment of prisoners of war which deals extensively with the plight of those taken captive in war is also an adoption of the 1929 Geneva Convention on the same subject matter ??0 .

The Fourth Geneva Convention, is an entirely new text to the earlier ones that had existed before 1949, and it is on the protection of civilian persons in time of war.

International humanitarian law treaty is said to be "one law behind reality", for its promulgation is usually influenced by events. For instance, the First World War witnessed the use of methods of warfare that were, when not completely new, at least, deployed on 6 Article 48 additional protocol 1 and article 13 additional protocol II see also rule 1 CIHL ?? Article 52 (2) additional protocol 1 and rule 7 CIHL 8 First Geneva Convention of August 12, 1949. 9 Second Geneva Convention of August 12, 1949 10 3 rd Geneva Convention of August 12, 1949 an unprecedented scale. These included poison gas, aerial bombardment and the capture of hundreds of prisoners of war. These were not contemplated by the earlier treaties. The Geneva Gas Protocol 1925 which prohibited the use of asphyxiating, poisonous and other gases and bacteriological method of warfare, and the 1929 Geneva Treaty on the protection of prisoners of war, were in response to those developments. ??1 Furthermore, the Second World War which occurred between 1939 and 1945 saw civilians and military personnel killed in equal numbers, as against a ration of 1-10 in the First World War 12 . In 1949, the international community responded to those tragic figures, and more particularly, to the terrible effects the war had on civilians by revising the conventions then in force and adopting a new instrument: the fourth Geneva Convention for the protection of civilians in armed conflict. ??3 The additional protocols of 1977 to the Four Geneva Conventions were responses to the effects in human terms of wars of national liberation, which the 1949 conventions did not cover. With the adoption of the additional protocol 1 of 1977 to the four Geneva Conventions conflicts arising from the struggle for national liberation is now classified as armed conflict of international character ??4 . The International Committee of the Red Cross (ICRC) in its research of ten years came out with a set of rules of customary international humanitarian law which were based on state practices in the nature of official declarations of states. Out of 161 rules of customary international humanitarian laws developed as a result of this research which are based on the provisions of Additional Protocol 1 to the Four Geneva Convention of 1949 which apply in international armed conflict, 136, if not 148, are now equally applicable in non-International armed conflict 15 . The implication of this is that most rules which hitherto apply to only international armed conflict now apply with equal force to non-international armed conflict. Both the Four Geneva Conventions and their Additional Protocols including the customary law on IHL are the laws governing or regulating armed conflicts.

## 3 c) Classification of Armed Conflict

International Humanitarian Law recognizes two types of armed conflict. ??6 ??6 Dietrich schindler, "The different types of armed conflict according to the Geneva Convention and protocols", RCDAL, vol. 1979, pp. 117-163 states are classified as international armed conflicts and are regulated by the Four Geneva Conventions, the additional protocol 1 and customary International Humanitarian Law. A situation where people rise up against colonial domination in exercise of their right to self determination has since the adoption of additional protocol 1 of 1977 been considered as international armed conflict being a war of national liberation ??7 .

Warlike clashes occurring within the territory of a state between the armed forces of the state and the armed group/s or between such groups are known as internal armed conflict and it is regulated or governed by the common article 3 to the Four Geneva Conventions, the additional protocol II and Customary International Humanitarian Law and this is the focus of this paper.

A close look at the laws of armed conflict applicable to either situation of conflict reveals that the Four Geneva Conventions and the additional protocol I dealing on international armed conflicts appear more expansive and all encompassing than the provisions of the law applicable to non international armed conflict i.e. the common article 3 to the Geneva Conventions and additional protocol II 18 . The question is, is this gap that existed before the adoption of Customary International Humanitarian Law necessary? owing to the fact that war, whether international or non-international ultimately ends up in colossal loss to human lives and destruction of civilian objects. This paper will highlight these obvious absurdities and show how it has been ameliorated since the adoption of Customary International Humanitarian Law.

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## 101 4 d) Non International Armed Conflict

102 Non international armed conflict is defined as armed conflict which exists within the territory of a state. It mostly  
103 occurs between the government forces and local armed group/s usually called civil war.

104 Common article 3 to the Four Geneva Convention defines non international armed conflict as one that exist  
105 between state armed forces and non-state armed groups or between such groups themselves.

106 The International Criminal Tribunal for the former Yugoslavia (ICTY) has deem there to be a noninternational  
107 armed conflict in the sense of common article 3: "Whenever there is? protracted armed violence between  
108 governmental authorities and organized armed group within a state 19 "

109 The Additional Protocol II of 1977 defines noninternational armed conflict as a conflict which occur ???  
110 Articles 1(4) & 96(3) of API ???8 For instance, there are no provision for principle of proportionality, precautionary  
111 measures e.t.c in Law regulating non international armed conflict until the adoption of customary international  
112 humanitarian law 19 ICTY The prosecutor v. Dusco Tadic -on the defense motion 1995 within the territory of  
113 a high contracting party between the armed forces and dissident armed forces or other organized armed groups  
114 which, under responsible command, exercise such control over a part of its territory as to enable them to carry  
115 out sustained and concerted military operations and to implement this protocol ??? .

116 There is a difference between the definitions of non-international armed conflict under the common article 3  
117 and the Additional Protocol II whereas the common article 3 recognises it as a conflict between the government  
118 forces and the local armed group/s or between such groups themselves. The Additional Protocol II confines it to  
119 conflict between state armed forces and local armed group/s thereby excluding conflicts between such non state  
120 actors ???1 .

121 It is important to note that the treaty laws allowed a distinction between armed conflict covered by the  
122 common article 3 and the Additional Protocol II to the convention since the Additional Protocol II came into  
123 force to supplement the provisions of common article 3. ???2 The statute of the international criminal court  
124 (ICC), which in prescribing as war crimes serious violations of common articles 3 also refers to such conflicts as:  
125 "That which takes place in the territory of a state when there is protracted armed conflict between governmental  
126 authorities and the organized armed groups or between such groups ???3 A 2008 published ICRC opinion paper  
127 on the definition of armed conflict under IHL, defines noninternational armed conflict as follows:

128 Protracted armed confrontation occurring between governmental armed forces and the forces of one or more  
129 armed group or between such groups arising on the territory of a state (party to the Geneva Convention) the  
130 armed confrontation must reach a minimum level of intensity and the parties involved in the conflict must show  
131 a minimum of organization One thing is common in all these definitions, that is the requirement that the conflict  
132 must be such that exists within the territory of a given state, thus making it non international armed conflict  
133 which is commonly referred to as civil war.

## 134 5 e) Non International Armed Conflict and the Application of 135 Common Article 3 to the Four Geneva Conventions

136 The common article 3 provides that in the case of armed conflict not of an international character ???0 Article 1  
137 Additional Protocol II ???1 Provisions of common article 3 and Article 1 APII ???2 Article 1 Additional Protocol  
138 II ???3 Article 8(2)(f) of the statute of the ICC occurring in the territory of one of the High Contracting Parties,  
139 each Party to the conflict shall be bound to apply, as a minimum, the following provisions:

140 1. Persons taking no active part in the hostilities, including members of armed forces who have laid down  
141 their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all  
142 circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith,  
143 sex, birth or wealth, or any other similar criteria.

144 To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with  
145 respect to the above-mentioned persons: (d) The passing of sentences and the carrying out of executions without  
146 previous judgment pronounced by regularly constituted court, affording all the judicial guarantees which are  
147 recognized as indispensable by civilized peoples. 2. The wounded and sick shall be collected and cared for An  
148 impartial humanitarian body, such as the international Committee of the Red Cross may offer its services to the  
149 Parties to the conflict.

150 The parties to the conflict should further endeavour to bring into force, by means of special agreements, all  
151 or part of the other provisions of the present Convention. The application of the preceding provisions shall not  
152 affect the legal status of the Parties to the conflict.

153 The article which is called a miniature convention imposes a minimum obligation on all the parties to the  
154 conflict irrespective of the course fought for or defended. This much was captured in the opening paragraph of  
155 the article which begins:

156 In the case of armed conflict not of an international character occurring in the territory of one of the High  
157 Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provision? It  
158 affords a minimum protection to all those who are not or who are no longer taking active parts in hostilities i.e.  
159 civilians, member of armed forces of the party to conflict who have been captured, wounded or have surrendered.  
160 It provides for humane and non discriminatory treatment for all such persons, in particular by prohibiting acts of  
161 violence to life of person (specifically murder, mutilation, cruel treatment and torture), the taking of hostages, and

## 6 II. APPLICATION OF ADDITIONAL PROTOCOL II TO THE CONDUCT OF NON-INTERNATIONAL ARMED CONFLICT

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162 outrages upon personal dignity, in particular humiliating and degrading treatment. It prohibits also the passing  
163 of sentences and the carrying out of executions without judgment being pronounced by a regularly constituted  
164 court providing all judicial guarantees recognized as indispensable. It also imposes an obligation on the parties  
165 to collect the wounded and sick and to care for them.

166 It has been affirmed by the International Court of Justice in 1986, that the provisions of common Article 3  
167 reflect customary international law and represent a minimum standard from which the parties to any type of  
168 armed conflict must not depart. ??4 As could be gleaned from this article, no provision was made with regard  
169 to the status of captured combatants as they were left at the mercy of detaining powers having been denied  
170 the prisoners of war status. The article by implication empowers the detaining power to prosecute, convict and  
171 sentence captured combatants that have falling into their hands provided that judicial guarantees recognized by  
172 civilized peoples are observed and followed. It should be noted that common article 3 does not apply to situations  
173 of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar  
174 nature. It does not also affect the legal status of the parties to the conflict.

## 175 6 II. Application of Additional Protocol ii to the Conduct of 176 Non-International Armed Conflict

177 The spate of civil wars that took place post 1949 exposed the limit of the provisions of common article 3 and its  
178 inability to effectively address issues bothering on international Humanitarian Law arising from such conflicts.  
179 Parties to these conflicts also did not help matters as they Lacuna inherent in the said common article 3 were  
180 not plugged through agreement for the application of other provisions of Convention as provided in the article.

181 For instance provision of aid to wounded and sick combatants, the protection of medical facilities, the status of  
182 prisoners of war , the protection of civilian population, relief operations and so on were all lacking in the provision  
183 of common article 3. The application of all these provisions would have been made possible through agreement  
184 of parties in such conflict which was allowed by the article. These serious limitations in the provision of common  
185 article 3 triggered more agitations for the protection of victims of internal armed conflicts through the adoption  
186 of new laws to supplement and streng then it, and this was achieved through the effort of ICRC which gave birth  
187 to additional protocol II ??5 The additional Protocol II did not repeal nor pretend to abrogate or supersede the  
188 provisions of common article 3, but rather came into force to supplement it. This much is captured in its article  
189 1 which provides expressly that:

190 The protocol develops and supplements article 3 common to the four Geneva Convention of 12 th August,  
191 1949 without modifying its existing conditions of applications. It goes on to say that the protocol: Shall apply  
192 to all armed conflicts which are not covered by Article 1 of the protocol 1 Additional to the Geneva Conventions  
193 of 12 th August 1949, and relating to the protection of Victims of International Armed Conflicts and which takes  
194 place in the territory of a High contracting Party between its armed forces and dissident armed forces or other  
195 organized armed groups which, under responsible command, exercise such control over a part of its territory as  
196 to enable them to carry out sustained and concerted military operations and to implement this protocol.

197 Its application is therefore predicated on the satisfaction of the following conditions in the exercise of military  
198 of operations by the armed group, i.e. de facto control of part of the national territory, being under a responsible  
199 commander, ability of the insurgents or armed groups to carry out a sustained and concerted military operations  
200 and to implement the protocol. Once these conditions are satisfied, the conflict is termed noninternational armed  
201 conflict to which additional protocol II applies regardless of the reason for the recourse to use of armed force.

202 Like common article 3, Additional Protocol II provides for the humane and non-discriminatory treatment of  
203 all those who are not, or who are no longer, taking a direct part in hostilities ??6 . It expands the protection  
204 provided by common article 3, by including prohibitions on collective punishment 27 , acts of terrorism 28 , rape  
205 29 , enforced prostitution and indecent assault, slavery 30 and pillage 31 . It sets out specific provisions and  
206 protections for certain categories of persons such as children 32 , persons deprived of liberty for reasons related  
207 to the conflict 33 , persons prosecuted for criminal offences related to the conflict 34 , persons who are wounded,  
208 sick and shipwrecked ??5 , medical and religious personnel 36 , and the civilian population 37 (attacks on civilian  
209 populations, starvation 38 as a method of combat, and forced displacement 39 are all prohibited).

210 It is unfortunate, that the protocol also failed to make provisions for prisoner of war status to combatant who  
211 falls into enemy's hand. Like the common article 3, the protocol leaves the combatants who are in the hands of  
212 detaining power at their mercy. Thus, the detaining power is at the liberty to prosecute, convict and sentence  
213 this combatant under their penal legislation provided they are afforded judicial guarantees i.e. independence of  
214 the court, right of defence, individual responsibility, non-retroactivity of penalties, presumption of innocence,  
215 information on Judicial remedies 40 e.t.c. It also prohibited the pronouncement of death penalties on the person  
216 who were under the age of 18 years at the time of the offence and its execution on pregnant women or mother of  
217 young children ??1 .

218 The provisions of the additional protocol II appear restrictive in its application, as its application can only  
219 be invoked upon the satisfaction of all the conditions laid down in the article. Whereas a conflict could be  
220 regarded as having attained the threshold of non-international armed conflict under the common article 3 to  
221 Geneva Conventions by reason of the expansive nature of its provisions, such conflicts may not pass as one when  
222 assess against the back drop of the provisions of the additional protocol II and the conditions it set out to be

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223 satisfied. Interestingly both laws apply as the protocol is said to be supplementary to the provisions of common  
224 article 3 which it does not repeal nor abrogate.

## 225 7 a) Application of Customary International Humanitarian

226 Law to Non-International Armed Conflict

227 The provisions of the laws regulating armed conflict of international character as contained in the four Geneva  
228 Convention in 1949 and additional protocol I appear more expansive than the laws in common 771 Article 4(2)  
229 (g) APII 772 Article 4(3) (3) (a-e) APII 773 article 3 and the additional protocol II which govern noninternational  
230 armed conflict. Consequently, lesser protections were afforded victims of internal armed conflict than those of  
231 international armed conflicts. This is regrettable, especially when it is considered that both wars result ultimately  
232 to the death and suffering of victims. For instance, whereas provisions were made for proportionality 42 of attack  
233 and precautionary 43 measures under the laws regulating international armed conflict, such were clearly lacking  
234 in the provisions of common article 3 and the additional protocol II which regulate non-international armed  
235 conflict. This lacuna is now filled with the adoption of customary international humanitarian law which makes  
236 provision for the principle of proportionality in attack and the precautionary measures in attack and against the  
237 effect of attack respectively 774 .

238 This rules applied to both international and noninternational armed conflict therefore reliance could be placed  
239 on them to question the proportionality or otherwise of an attack in the conduct of noninternational armed  
240 conflict or lack of precautionary measures exhibited by belligerents in such conflict which hitherto couldn't have  
241 been the case under the common article 3 and additional protocol II.

242 Prior to the adoption customary international law, the provisions of additional protocol II only applies where  
243 it has been rectified by practice to conflict, but with coming into force of these customary rules all the provisions  
244 of additional protocol II are now considered to part of customary international law binding on all parties to non  
245 international armed conflict. These rules include the prohibition of attacks on civilians 775 , the obligation to  
246 respect and protect medical and religious personnel 776 , medical units and transports 47 , the prohibition of  
247 starvation 48 , the prohibition of attacks on objects indispensable to the survival of the civilian population, the  
248 obligation to respect the fundamental guarantees of persons who are not taking a direct part 779 , or who have  
249 ceased to take a direct part, in hostilities, the obligation to search for and respect and protect the wounded,  
250 sick and shipwrecked 50 , the obligation to search for and collect the dead 51 , the obligation to protect persons  
251 deprived of their liberty 52 , the prohibition of the forced movement of civilians 53 , and specific protection for  
252 women and children 774 .

253 This assertion is more strengthened by the decision in Tadic's case which established that the rules on the  
254 conduct of hostilities in international armed conflict have been widely accepted as being very similar to those  
255 applicable to internal armed conflict 55 having assumed a customary international law status. Also in Blaskic's  
256 case, the trial chambers stressed that customary international law prohibits unlawful attacks upon civilian and  
257 civilians properties whatever the nature of conflict 56 , while it similarly held in Strugar's case that article 52  
258 of additional protocol 1 referred to in connection with attacking civilian objects, is a reaffirmation and real  
259 formulation of a rule that has previously attained the status of customary international law 57 . b) Jurisdiction  
260 to Punish for Violation of these Laws

261 In guaranteeing the application of International Humanitarian Law to the conduct of non-international armed  
262 conflict, special tribunals and courts were set up to try violators of the provisions of these laws regulating such  
263 conflicts. This is done, notwithstanding that these breaches occurred in the territory of a given state which enjoys  
264 absolute sovereignty 58 and where its criminal law and procedures would have ordinarily applied.

265 For instance, the international criminal tribunal for the former Yugoslavia (ICTY) was established by virtue  
266 of UN Security Council Resolution no. 827 to prosecute persons responsible for serious violation of international  
267 humanitarian law committed in the territory of former Yugoslavia since 1991 779 .

268 Following unprecedented killings in the Rwandan Conflict, the UN Security Council through its resolution no.  
269 955 established the international tribunal for Rwanda (ICTR) 1994 to try individual responsible for genocide  
270 and other serious violation of international humanitarian law during the 1994 civil war in Rwanda and Rwandan  
271 citizens responsible for such violations committed in the territory of neighbouring states between 1 st January,  
272 1994 and 31 st December 1994 770 The special court for Sierra Leone was also established in 2002, unlike the  
273 ICTY and ICTR, it was not established by UN Security Council Resolution but was jointly set up by the UN  
274 and the government of Sierra Leone. It was an independent court that combined international law with domestic  
275 criminal legislation.

276 The Rome statute provides for full prosecution of persons accused of crime of genocide, war crimes, crime  
277 against humanity and crime of aggression 62 III.

## 278 8 Conclusion

279 The scope of the laws regulating armed conflict of non-international character was until the adoption of customary  
280 international humanitarian law restrictive when compared with the laws applicable to international armed conflict.  
281 Fortunately enough, the current tendency in practice of international law with respect to armed conflict is to  
282 bridge this gap in application of International humanitarian law rules in both conflict situations.

283 This has greatly been demonstrated by the jurisprudence of international criminal tribunals 63 . State practices  
284 and adoption of treaty rules have also helped moving the law of non-international armed conflict closer to the  
285 law of international armed conflict 64 .

286 It is submitted that the application of different legal regime to these two conflict situations is most unnecessary  
287 and should be totally eliminated since in any these conflict situations the same unbridled violence and murderous  
288 weapons cause just as much injury and destruction to victims. War is war and fought with virtually the same  
289 weapons at both levels of the conflict.

290 The coming into effect of customary international humanitarian law rules after ten (10) years of great research  
291 by the ICRC has caused these differences to gradually disappear. For out of 161 rules of customary international  
292 humanitarian law, many of which are based on Additional Protocol 1 applicable as a treaty to international armed  
293 conflict, 148 now apply to non-international armed conflict. Therefore, where treaty rules differ on the application  
294 of International Humanitarian Law rules in these two different situations of armed conflict, the convergence could  
295 be justified by the application of customary international humanitarian law. It is noted that the applicable law  
296 governing internal armed conflict excludes cases of riots or isolated, sporadic acts of violence. The implication of  
297 this, is that such situations are governed by domestic laws of the state and not covered by relevant International  
298 Humanitarian Laws governing internal armed conflict. It is recommended that those situations be governed and  
299 regulated by the International Humanitarian Laws rather than subjecting them to the municipal laws of the state  
300 which could be invoked to suppress same, thereby frustrating a genuine agitation which ordinarily would have  
301 been tolerated by the international legal order.

302 **9 Volume XV Issue II Version I**



Figure 1:

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<sup>1</sup>Military and Para Military activities in and against Nicaragua, 1986 I.C.J Reports. P. 114, Para 218 & 219.

<sup>2</sup>For the Legislative history Protocol II, the following documents should be consulted: Conference of Government Experts on the

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304 [See generally the customary international humanitarian law rules] *See generally the customary international*  
305 *humanitarian law rules,*

306 [See Tadic's case supra] *See Tadic's case supra,*

307 [The text of Rome statute circulated as document A/CONF. 183/ 9 of July (1998)] *The text of Rome statute*  
308 *circulated as document A/CONF. 183/ 9 of July, 1998. 10 th November, 1998, 12 th July, 1999, 30 th*  
309 *November, 1999, 8 th May, 2000, 17 th January, 2001, and 16 th January, 2002. July 2002. (See Rome statute*  
310 *of ICC 1998. Articles 5,6,7and 8)*