

A LEGAL ANALYSIS OF THE EFFECTS OF ARMED CONFLICTS ON HUMANITY.

BY

NABBUMBA MARTHA MPANGA

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DECLARATION

I Nabbumba Martha Mpanga declare that this dissertation is my original work and to the best of my knowledge it has not been presented for a degree or any other academic award or institution of learning alone except where due acknowledgement and reference has been made in this text.

Signature: _____



Date: _____

28/06/19.

NABBUMBA MARTHA MPANGA

(STUDENT)

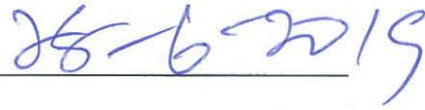
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I confirm that the work in this dissertation was carried out by the candidate under my supervision.

Signature : _____



Date: _____



DR. CHIMA MAGNUS.
(SUPERVISOR)

DEDICATION

I hereby dedicate this work to my beloved parents Mr. And Mrs Jane Mpanga for they have always been there for me during my academic career. May the Almighty God reward you abundantly.

ACKNOWLEDGEMENT

I am grateful to the almighty god for being with me and guiding me throughout the whole period when I was pursuing this degree

I owe acknowledgement to the efforts of my supervisor Dr. Abdullah Kourtagorah for without his guidance and support during the course of this research, this study would not have been a reality.

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LIST OF ACRONYMS

DAV	Division for the Advancement of Women (2002)
ICC	International Criminal Court
ICJ	International Court Of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IDPS	Internally Displaced Persons
IHL	International Humanitarian Law
ILC	International Law Commission
LRA	Lord's Resistance Army
NGOs	Non-governmental organizations
PoC	Protection of Civilians
POW	Prisoners Of War
PTSD	Post-traumatic Stress Disorder
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNDPIL	United Nations and the Declaration on Principles of International Law
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNSC	UN Security Council:
UPDI	Uganda People's Defence FORCE
WID	Women in Development

LIST OF INSTRUMENTS

Additional Protocols I and II 1977

Biological Weapons Convention 1972

Chemical Weapons Convention 1993

Conventional Weapons Convention

Conventional Weapons Convention 1980

Cultural Property Convention 1954

Geneva Convention 1864

Geneva Conventions of 1949

Geneva Gas Protocol

Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Cultural Property Convention) Ottawa Convention 1997

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International criminal tribunals

Lieber Code 1863

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Abstract

Armed conflicts cause significant psychological and social suffering to affected populations and can undermine the long-term mental health and psychosocial wellbeing of the affected population.¹ In situations of armed conflict, communities as well as individuals are often affected in a way which destroys unity and solidarity of the social networks. Households are left without breadwinners, the livelihoods of individuals are threatened and the safety of communities and the human rights of individuals are not preserved. Aside from the physical and emotional trauma of these oppressive and deliberate actions, such events have long lasting effects upon the ability of these communities to recover in the wake of armed conflict.² Existing international legal literature recognizes that parties to armed conflicts and individual combatants are legally required not only to refrain from deliberately attacking non-combatants and civilian objects, but also to take care to ensure (to the extent feasible) that such persons are not killed or injured, and such objects not destroyed or damaged, by accident or incidentally during military operations.

This study will therefore discuss the conventional and customary international humanitarian law (law of armed conflicts). The study will give a legal definition of armed conflicts, it will also discuss the types of armed conflicts as defined by the laws of armed conflicts and will provide the different laws that regulate armed conflicts for example the four Geneva convention and the two additional protocols and others. The study will then focus on the effects of armed conflicts on humanity, it should be noted that the women and children are the categories of people mostly affected by armed conflicts and therefore the study will discuss ways in which the children, women and other protected persons are continuing to be affected by armed conflicts and discuss the mechanisms put in place by the international community to minimize effects of armed conflicts on women, children and other protected persons under international humanitarian law, the chapter will discuss the principles set forth by the international humanitarian law to protect civilian objects and others who have ceased to take part in armed conflicts like the wounded, the sick and the prisoners of war (POW).

¹ Mutibwa, P. (2012). Uganda since Independence: A Story of Unfulfilled Hopes. Trenton N.J: Africa World Press.

² Museveni, Y. (2010). Theoretical Justification of NRM Struggle. In Mission to Freedom: Uganda Resistance News 1981-1985. Kampala: Directorate of Information and mass Mobilization, NRM Secretariat.

CHAPTER ONE

1.0 Introduction

Armed conflicts are defined as open, armed clashes between two or more centrally organized parties, with continuity between the clashes, in disputes about power over government and territory.³ Armed conflicts are of two types: international armed Conflicts and non-international armed conflicts as shall be discussed later in this paper. From the start of 1990 to the end of 1999 there were 118 armed conflicts worldwide, involving 80 states and two Para-state regions and resulting in the death of approximately six million people.⁴ The death and suffering of such a huge number of people manifests that humanity is highly impacted negatively during times of armed conflicts. In response to this suffering States formulated the law of armed conflicts with the main purpose of protecting combatants and non-combatants from unnecessary suffering and to safeguard the fundamental human rights of persons who are not, or are no longer, taking part in the conflict (such as prisoners of war, the wounded, sick, and shipwrecked) and of civilians.⁵ At sea, the law also serves to identify and protect ships flying the flag of states not parties to the conflict. This has since been known as the International Humanitarian Law (IHL). By preventing the degeneration of conflicts into brutality and savagery, the law of armed conflict aids the restoration of peace and the resumption of friendly relations between the belligerents.

The law of armed conflict, being part of international law, is binding on states but it also regulates the conduct of individuals. A violation of the law of armed conflict by the armed forces of a state involves the international responsibility of that state, which may be liable to pay compensation for the violation.⁶ A violation may also involve the prosecution of the individuals concerned for war crimes.⁷ Membership of the armed forces thus requires knowledge of the law of armed conflict. On 30 September 1946, the International Military Tribunal sitting at Nuremberg rejected the assertion that the law of armed conflict only applies to states.⁸ The decisions in hundreds of war crimes trials conducted

³ Dan Smith (2004) Trends and Causes of Armed Conflict, Berghof Research Center for Constructive Conflict Management - Edited version Aug 2004 (First launch Mar 2001) pp 1 Available at <http://www.berghof-handbook.net>

⁴ Ibid at pp2

⁵ Ibid at pp2

⁶ Hague Convention IV 1907 Respecting the Laws and Customs of War on Land (Hague Convention IV), Art 3; Geneva Protocol I 1977 Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I or AP I), Art 91.

⁷ Dan Smith (2004) Trends and Causes of Armed Conflict, Berghof Research Center for Constructive Conflict Management - Edited version Aug 2004 (First launch Mar 2001) pp 1 Available at <http://www.berghof-handbook.net>

⁸ Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced: Trial of the Major War Criminals before the International Military Tribunal (IMT), vol XXII, 477.

after the Second World War have reinforced the principle of individual criminal responsibility of members of the armed forces or others who violate the law of armed conflict. This principle has been confirmed in the Statutes of the Yugoslavia and Rwanda War Crimes Tribunals and in the Statute of the International Criminal Court.⁹

It is therefore on this ground that this paper analyses the effects of armed conflicts on humanity especially persons who are not, or are no longer, taking part in the conflict (such as prisoners of war, the wounded, sick, and shipwrecked) and of civilians.

1.1 Background to the study

1.1.1 History of the International Legal Framework on Armed Conflicts

The law of armed conflict was traditionally divided into two parts, each named after the city where much of the law was devised. Hague law was largely concerned with how military operations are conducted; Geneva law was concerned with the protection of the victims of armed conflict. The two bodies of law have now merged. However, there is still a distinction between the law relating to armed conflicts between states, known as international armed conflicts, and armed conflicts within the territory of a state, known as internal (or non-international) armed conflicts.¹⁰

1.1.2 Modern History of the Law of Armed Conflict

1.1.2.1 Lieber Code 1863

The most important early codification of the customs and usages of war generally was the Lieber Code issued by President Lincoln to the Union forces in the American Civil War as General Order 100.¹¹

1.1.2.2 Geneva Convention 1864

In the second half of the nineteenth century, greater emphasis was placed on codifying the law of war in treaty form. In 1864, at the invitation of the Swiss government, a conference, attended by the representatives of 16 states, was held in Geneva to draw up a Convention for the Amelioration of the Condition of the Wounded in Armies in the Field. This launched Geneva law as the body of the law of

⁹ See the Statute of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY Statute), adopted by UN Security Council Resolution (UNSCR) 827(1993), Art 7. The corresponding provision in the Statute for the Tribunal for Rwanda (ICTR Statute) established by UNSCR 955(1994) is Art 6. See also the Rome Statute of the International Criminal Court of 17 July 1998 (Rome Statute 1998) Art 25.

¹⁰ See *Hansard* (House of Lords), 16 November 1998, WA140, Baroness Symons of Vernham Dean, written answer to Lord Kennet, pp. paras 3.3 to 3.9 and 16.34.

¹¹ *Instructions for the Government of Armies of the United States in the Field*.

armed conflict that was concerned with the treatment and protection of persons rendered hors de combat (out of action), civilians, and other non-combatants.¹²

1.1.2.3 St Petersburg Declaration 1868

An early agreement dealing with the means¹³ and methods of warfare was the St Petersburg Declaration 1868. Of great importance are the principles, set out in the Preamble, which are relevant to much of the law of armed conflict:

That the progress of civilization should have the effect of alleviating as much as possible the calamities of war;

- That the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy;
- That for this purpose it is sufficient to disable the greatest possible number of men;
- That this object would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable;
- That the employment of such arms would, therefore, be contrary to the laws of humanity.

1.1.2.4 Hague Declarations 1899 and Hague Conventions 1907

Both the Brussels Declaration and the Oxford Manual were, however, influential in the negotiations at the 1899 and 1907 peace conferences that followed at The Hague. The conventions and declarations prepared at the conferences concerned the conduct of armed conflict and underlie that body of the law of armed conflict still known as Hague law. Although these conventions and declarations contained a general participation clause,¹⁴ many of their provisions were, or have become, declaratory of customary law.¹⁵

One declaration of 1899 is still relevant today, Hague Declaration 3, which prohibits the use of dum-dum bullets. Another, which would become relevant to the use of gas during the First World War, was the Hague Declaration of 1899 concerning asphyxiating gases. This prohibited 'the use of projectiles the sole object of which is the diffusion of asphyxiating or deleterious gases'.

¹² The Geneva Convention was revised in 1906, 1929, and 1949.

¹³ For means of warfare, that is weapons, see Ch 6.

¹⁴ A clause stating that the treaty would cease to be binding if a state not party to the treaty became involved in the war, see n 10.

¹⁵ A clause stating that the treaty would cease to be binding if a state not party to the treaty became involved in the war. See para 1.12.

The 1907 conference resulted in 13 conventions and one declaration. States party to Hague Convention IV 1907 were required to issue instructions to their land forces in accordance with the regulations, now known as the Hague Regulations, annexed to the Convention. For the first time, states were required to pay compensation for violations of the Regulations.

However, the Convention did not provide for the prosecution of individuals who violated the Regulations. Trials of these persons were conducted by national tribunals¹⁶ applying customary international law,¹⁷ the Hague Regulations,¹⁸ or, in the case of their own personnel, the national military or criminal code.¹⁹

1.1.2.5 Experience of the First World War

During the First World War, it became clear that the law of armed conflict was inadequate with regard to the treatment of the wounded and sick and prisoners of war and with regard to the use of gas.

In 1929, two new Geneva Conventions were drafted, the first dealing with the wounded and sick and updating the earlier Conventions of 1864 and 1906, and the second dealing with prisoners of war, building on provisions in the Hague Regulations.

Aerial bombardment and its attendant problems have existed as long as man has had the technology to conduct it. The Hague Peace Conference 1899 forbade the dropping of bombs for a period of five years. This was followed by the Hague Regulations 1907.²⁰ During the First World War, air bombardment from aeroplanes at first consisted of no more than dropping hand-held bombs into enemy lines. Later in the war, bombarding the enemy on his own territory from the air became the strategy of all states capable of undertaking it. The belligerents claimed that they were restricting air bombardment to military objectives. While instructions and intentions on both sides reflected a proper regard for the

¹⁶ In the case of the German trials held at Leipzig after the First World War against German accused, these were in accordance with the Treaty of Versailles 1919, Art 228.

¹⁷ The *Llandovery Castle Case* (1920) 2 Annual Digest (AD) 436 (Case No 235), in which the officers of a U-boat were sentenced by the Leipzig Supreme Court for firing upon and killing contrary to international law survivors of a torpedoed hospital ship carrying a number of Canadian medical personnel; The *Peleus Trial* (1946) 1 Law Reports of Trials of War Criminals (WCR) 1, another case of attacking the shipwrecked; and The *Hadamard Trial* (1947) 1 WCR 46, which was concerned with the killing of allied civilian nationals contrary to international law.

¹⁸ The *Dreierwalde Case* (1947) 1 WCR 81, which was concerned with the killing of captured RAF personnel contrary to Art 23(c).

¹⁹ For recent examples, see the US trials of personnel accused of crimes against prisoners of war or enemy civilians during the Korean and Vietnam wars, eg. *US v Keenan* (1954) 14 CMR 742; *US v Calley* (1969/71; 1973) 46 CMR 1131; 48 CMR 19; 1 Mil Law Reporter 2488. The Canadian and Belgian cases arising out of UN operations in Somalia in 1993 (*Korad Kalid v Paracommando Soldier, Osman Somow v Paracommando Soldier, R v Boland, and R v Seward*) are abstracted in M Sassoli and A Bousier, *How Does Law Protect in War?* (1999) 1062-1085.

²⁰ The only clear rule of air bombardment to be found in the Hague Regulations 1907 (HR) is the prohibition of the bombing of undefended places, HR, Art 25.

principles of the law of war, the circumstances and techniques of the time prevented accurate bombing and there were many instances of loss of civilian life and damage to civilian objects disproportionate to the military advantage gained.

An attempt was made in 1923 to arrive at some measure of international agreement with the Draft Hague Rules of Aerial Warfare (Hague Rules 1923).²¹ Although these draft rules were never adopted by states, they did to a large extent reflect general principles and customary rules and were treated as an attempt to apply these to air operations. During the period between the World Wars, however, there were several instances of bombardment conducted with little or no regard to the distinction between military targets and civilian objects. However, one leading expert on the law of war wrote in 1933:

If a military objective is situated in such a densely populated neighbourhood, or if the circumstances of the case are otherwise such that any attack upon it from the air is likely to involve a disastrous loss of non-combatant life, aircraft are bound to abstain from bombardment.²²

1.1.2.6 Geneva Gas Protocol

One treaty of the inter-war years that is still significant today is the Geneva Gas Protocol 1925.²³ In practice, having regard to the many reservations, it amounted to a prohibition of the first use of chemical and biological methods of warfare.

The 1899 Declaration had a very limited scope and has been replaced by the Geneva Gas Protocol 1925. That Protocol prohibited 'the use in war of asphyxiating, poisonous or other gases, and of all analogous liquids, materials or devices'. It did not, however, prohibit their manufacture or acquisition. Some states, including the United Kingdom,²⁴ entered reservations on ratification to the effect that the Protocol would cease to be binding if the enemy failed to respect its provisions. For these states, the Protocol amounted to a ban on the first use of chemical weapons. In the years since 1972, some states that earlier made reservations to the Protocol have withdrawn those reservations either partially or completely, principally

²¹ For an exposition of the Draft Hague Rules of Aerial Warfare 1923 (Hague Rules 1923), see A Roberts and R Guelff (eds), *Documents on the Laws of War* (3rd edn 2000) (Roberts and Guelff, Documents) 139–153.

²² J M Spaight, *Air Power and War Rights* (2nd edn 1933) 210. See also speech by Prime Minister Neville Chamberlain to Parliament on 21 June 1938, *Hansard* (House of Commons Debates) vol 1337, col 937.

²³ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare 1925 (Geneva Gas Protocol 1925).

²⁴ The first such reservation was that of France and provided: (1) The said Protocol is only binding on the Government of the French Republic as regards States which have signed or ratified it or which may accede to it. (2) The said Protocol shall ipso facto cease to be binding on the Government of the French Republic in regard to any enemy State whose armed forces or whose Allies fail to respect the prohibitions laid down in the Protocol. Similar statements,

or statements to the effect that the Protocol would be applied on the basis of reciprocity, were made by many states.

on account of the prohibition contained in the Biological Weapons Convention or the Chemical Weapons Convention.²⁵

In 1970, the United Kingdom stated that CS and other such gases were outside the scope of the Protocol. The USA, on ratification of the Protocol in 1975, declared their understanding that it did not apply to riot control agents and chemical herbicides but that, as a matter of policy, the use of riot control agents and chemical herbicides would be restricted.²⁶ Of course, the Protocol only applies in time of armed conflict so has no bearing, in any event, on the use of CS gas in the course of peacetime riot control. The Geneva Gas Protocol was the principal basis for asserting the illegality of the use of chemical weapons in the Iran-Iraq conflict 1980-88.²⁷

1.1.2.7 Experience of the Second World War

The Second World War was a watershed for the law of armed conflict. The inadequacies of the existing law were again exposed. This was in part due to the fact that not all the belligerents were parties to the Geneva Conventions 1929. The treatment accorded to prisoners of war often fell well below acceptable international standards.²⁸ The Hague Regulations were insufficient to guide properly the authorities in control of vast areas of occupied territory and even these rules were frequently ignored and harsh measures were adopted to counter the activities of partisans. The notion of total war, where civilians were heavily involved in war-supporting industries, area bombing methods, siege warfare, long-range rockets, and atomic weapons together led to extremely heavy civilian casualties. Above all, there was an absence of treaty provisions to protect civilians who were subjected to deportation and extermination as part of a concerted policy of genocide.

The Second World War witnessed extensive bombing offensives, which resulted in the destruction of many civilian areas in the United Kingdom, Germany, Poland, Japan, and elsewhere. During this period of conflict there was no written code of law specifically governing air warfare and binding on the belligerents. Air operations, especially when directed against ground targets, were, however, arguably subject to the same general principles of customary international law and certain treaty obligations as

²⁵ Roberts and Guelff, Documents, 156.

²⁶ Roberts and Guelff, Documents, 165-167.

²⁷ Roberts and Guelff, Documents, 157.

²⁸ See, e.g., The Nuremberg Judgment (1947) XXII IMT 451-453.

bound armed forces on land.²⁹ Similarly, certain rules of naval warfare, such as those requiring respect for hospital ships, were applicable to air operations against naval targets.

1.1.2.8 War crimes trials

As a result of events during the Second World War, International Military Tribunals were established at Nuremberg and Tokyo to try the major war criminals of the Axis powers. These tribunals had the power to deal not only with war crimes but also with crimes against peace and crimes against humanity. The latter were defined, and identified as crimes under international law.³⁰ Whilst there is considerable overlap between crimes against humanity and war crimes, war crimes (violations of the laws and customs of war) are directly related to a state of armed conflict whereas crimes against humanity (inhumane acts committed against the civilian population in peace or in time of armed conflict) are not necessarily linked to a state of armed conflict.³¹ The Nuremberg Tribunal confirmed that the Hague Regulations were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war³² and, as such, applicable to all belligerents whether parties to the Convention to which the Regulations were annexed or not. Although subsequent attempts were made to codify principles established by the Nuremberg Tribunal, such codes did not meet with universal acceptance.³³ However, Article 7 of the ICTY Statute and Article 6 of the ICTR Statute,³⁴ address the matter of individual criminal responsibility and both embody important Nuremberg principles. This approach has been taken further by the Statute of the International Criminal Court (ICC).³⁵

After the Second World War, apart from international military tribunals, there were many war crimes trials in national courts of various types (both civil and military) in countries occupied by Allied forces. British military tribunals so acted under the authority of the Royal Warrant for the Trial of War Criminals of 14 June 1945.

1.1.2.9 Geneva Conventions 1949

Geneva law was totally revised in 1949 with four new Conventions dealing with the protection of:

²⁹ Although in the Charter of the Nuremberg International Military Tribunal indiscriminate bombardment was made a crime cognizable by the tribunal, the judgment did not contain any definite reference to the subject.

³⁰ Under Art 6 of their respective charters.

³¹ See *The Barbie Case* (1987) 78 ILR 125, 136; ICTY Statute, Art 5; ICTR Statute, Art 3; Rome Statute, Art 7.

³² Nuremberg Judgment (1947) XXII IMF 467-497 (see n 8).

³³ International Law Commission, Draft Code of Offences Against the Peace and Security of Mankind 1954.

³⁴ *Ibid* at para 1.36.

³⁵ *Ibid* para 1.38.

- I. the wounded and sick (replacing the Conventions of 1864, 1906, and 1929);³⁶
- II. the wounded, sick, and shipwrecked at sea (replacing Hague Convention X 1907);³⁷
- III. prisoners of war (replacing the Convention of 1929);³⁸ and
- IV. civilians.³⁹

All four Geneva Conventions apply:

- in any international armed conflict, whether war is declared or not, and even if one of the parties does not recognize the existence of a state of war;⁴⁰ or
- If there is a partial or total occupation of another state's territory, even if the occupation has met with no armed resistance.⁴¹

Unlike the Hague Conventions 1907, the Geneva Conventions expressly reject the 'general participation clause' approach and apply as between parties even though one of the other belligerents is not a party to the Conventions. In addition; if a state which is not a party to the Conventions abides by their provisions, the belligerents who are parties are also obliged to observe the Conventions in relation to that state.

In practice, the Geneva Conventions are of virtually universal application and are generally considered to embody customary law.

The Geneva Conventions extend to internal armed conflicts a minimum of humanitarian protection,⁴²

The Conventions also establish for the first time an express obligation on states to bring to justice individuals who commit certain war crimes. States are obliged to bring before their courts persons in their jurisdiction, whatever their nationality, who are alleged to have committed 'gravebreaches'⁴³ of the

³⁶ Geneva Convention I 1949 for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva Convention I or GC I).

³⁷ Geneva Convention II 1949 for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Geneva Convention II or GC II).

³⁸ Geneva Convention III 1949 Relative to the Treatment of Prisoners of War (Geneva Convention III or GC III).

³⁹ Geneva Convention IV 1949 Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV or GC IV).

⁴⁰ Whether an international armed conflict exists is a question of fact.

⁴¹ Common Art 2 of all four Geneva Conventions.

⁴² Common Art 3 of all four Geneva Conventions.

⁴³ The definition of grave breaches is in GC I, Art 50; GC II, Art 51; GC III, Art 130; and GC IV, Art 147.

Conventions, or, if they prefer, hand such persons over for trial by another party to the Conventions which has made out a prima facie case against the alleged offender.⁴⁴

1.1.2.10 Cultural Property Convention 1954

In response to the destruction and looting of cultural property that had taken place during the Second World War, the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Cultural Property Convention) was concluded in 1954 under the auspices of the United Nations Educational, Scientific and Cultural Organization (UNESCO). A Second Protocol to this Convention was adopted in 1999.⁴⁵

This Convention places an equal obligation on defenders and attackers by requiring states to refrain from uses of cultural property that would expose it to danger in armed conflict and to refrain from acts of hostility against cultural property.

Cultural property is 'movable or immovable property of great importance to the cultural heritage of every people'.⁴⁶

1.1.2.11 Biological Weapons Convention 1972

Biological weapons were finally prohibited under this Convention.⁴⁷

1.1.2.12 Additional Protocols I and II 1977

A major development in the law of armed conflict was the adoption in 1977 of two Protocols Additional to the Geneva Conventions of 1949.⁴⁸ Additional Protocol I deals with international armed conflicts and Additional Protocol II deals with internal armed conflicts.

⁴⁴ GC I, Art 49; GC II, Art 50; GC III, Art 129; GC IV, Art 146. The United Kingdom (UK) gave effect to the Conventions in UK law by the Geneva Conventions Act 1957. Section 1 of the Act makes the commission of a grave breach by any person, whether in or outside the UK, an offence under UK law, triable by UK courts.

⁴⁵ Second Hague Protocol for the Protection of Cultural Property in the Event of Armed Conflict 1999 (Second Hague Protocol).

⁴⁶ Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954 (Cultural Property Convention 1954 or CPC), Art I.

⁴⁷ The UN Convention on the Prohibition of Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction 1972 (Biological Weapons Convention 1972 or BWC).

⁴⁸ Additional Protocol I, see n 7; Geneva Protocol II 1977 Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II or APII). The UK gave effect to these Protocols by the Geneva Conventions (Amendment) Act 1995, which came into force on 28 July 1998.

International armed conflicts

Additional Protocol I codifies existing principles of customary law and introduces important new treaty provisions relating to international armed conflicts. It sets out detailed rules on targeting and the means and methods of warfare and expands on the concept of grave breaches.

It extends the range of persons entitled to combatant status as well as the rights and guarantees afforded to civilians and medical services. It includes provisions on civil defence, mercenaries, and the protection of the environment. The definition of international armed conflict is itself expanded to include certain conflicts fought by peoples 'in exercise of their right of self-determination'.

Internal armed conflicts

Additional Protocol II develops and supplements the humanitarian protection provided by Common Article 3 of the Geneva Conventions of 1949 in internal armed conflicts. International law has historically regulated relations between states.

A state's internal affairs, including responsibility for the maintenance of law and order and the defence of territorial integrity against domestic insurgents, were largely regarded as the exclusive business of the state concerned. The notion of international law regulating a conflict occurring within a state would generally have been regarded as being at variance with this approach. However, it was possible for insurgents in an internal armed conflict to be recognized as belligerents and for the law of armed conflict to apply.

The internal use of force against criminal and terrorist activity is not regulated by the law of armed conflict unless the activity is of such a nature as to amount to armed conflict. However, human rights law would apply.⁴⁹

Sometimes, as a matter of policy, governments and armed forces have applied basic principles drawn from the law of armed conflict, in such matters as the treatment and interrogation of detainees, even in situations in which the law of armed conflict did not formally apply.

Although the Geneva Conventions 1949 dealt primarily with international armed conflict, an attempt was made, in Article 3 common to each Convention, to provide basic rules in internal armed conflicts

⁴⁹ AP II, Art 1(2) excludes internal disturbances and tensions such as riots and isolated and sporadic acts of violence, as not being armed conflicts.

for the protection of those who take 'no active part in hostilities, including members of the armed forces who have laid down their arms or those placed hors de combat by sickness, wounds, detention, or any other cause'. Additional Protocol II builds on that basic framework.

In practice, many armed conflicts have at the same time certain aspects which have the character of an internal armed conflict, while other aspects are clearly international. For example, an internal conflict may become internationalized, with the armed forces of outside states actively involved. Different parts of the law of armed conflict may, therefore, apply to different phases or aspects of the conflict. There is thus a spectrum of violence ranging from internal disturbances through to full international armed conflict with different legal regimes applicable at the various levels of that spectrum. It is often necessary for an impartial organization, such as the International Committee of the Red Cross, to seek agreement between the factions as to the rules to be applied.

1.1.2.13 Conventional Weapons Convention 1980

The Convention⁵⁰ has five Protocols dealing with:

- I. the prohibition of the use of weapons the primary effect of which is to injure by fragments that cannot be detected by X-rays;
- II. the regulation of mines⁵¹, booby-traps and similar devices;⁵²
- III. the prohibition of the use of air-delivered incendiary weapons against targets in populated areas and the regulation of the use of other incendiary weapons;
- IV. the prohibition of the use of laser weapons designed to cause permanent blindness; and
- V. explosive remnants of war.

1.1.2.14 Chemical Weapons Convention 1993

This Convention⁵³ introduces a complete ban on the development, production, stockpiling, retention, transfer, or use of chemical weapons.

1.1.2.15 International criminal tribunals

International criminal tribunals were established by the UN Security Council:

⁵⁰ UN Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects 1980 (Conventional Weapons Convention 1980 or CWC).

⁵¹ Anti-personnel mines are prohibited altogether by the Ottawa Convention 1997, see para 1.37.

⁵² There are two such Protocols: the original version of 1980 and an amended version of 1996. Some states are parties to the original and some to the amended Protocol. The UK is a party to both Protocols.

⁵³ Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction 1993 (Chemical Weapons Convention 1993 or CWC).

- a) in 1993 to deal with grave breaches, war crimes, genocide, and crimes against humanity committed in the former Yugoslavia since 1991;⁵⁴ and
- b) In 1994 to deal with genocide, crimes against humanity, and violations of Common Article 3 of the Geneva Conventions and of Additional Protocol II committed in Rwanda or by Rwandans in neighbouring states in 1994.⁵⁵

1.1.2.16 Ottawa Convention 1997

This Convention⁵⁶ prohibits the use, development, production, acquisition, stockpiling, retention, or transfer of anti-personnel mines and requires the destruction of stocks. It does permit the retention of small stocks for training purposes.

1.1.2.17 International Criminal Court

On 17 July 1998, another milestone in the development of the law of armed conflict was reached with the Rome Statute of the International

Criminal Court.

The court has jurisdiction over genocide, crimes against humanity, and war crimes committed after the entry into force of the Statute.⁵⁷

The Statute applies to a wider range of situations than armed conflict because of the extent of the concept of crimes against humanity. The Statute is explained in Chapter 16.⁶⁷

1.1.2.18 Naval warfare

This outline of the history and development of the law of armed conflict has concentrated mainly on the law relating to armed conflict on land and in the air. Prize law, as part of international law exclusively applicable in wartime, was well developed by the sixteenth century. The Paris Declaration 1856 was the first multilateral treaty to deal with naval warfare. The Geneva Convention 1864 was adapted for maritime warfare in 1899 and several of the Hague Conventions 1907 deal with naval matters.

⁵⁴ UNSCR 827(1993).

⁵⁵ UNSCR 955(1994).

⁵⁶ Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction 1997.

⁵⁷ The ICC also has jurisdiction over the crime of aggression, but only after a definition and conditions for the exercise of jurisdiction have been agreed to and included in the Statute under the amendment procedure; see Art 5(2) of the Statute

All these laws were put in place to protect all people protected by the international humanitarian laws from suffering and they keep advancing with the advancement of the means of war fair around the world.

1.2 Statement of the problem

The law on armed conflicts makes it mandatory for all people to be treated humanely in all circumstances and 'without any adverse distinction based upon race, colour, sex, language, religion or belief, political or other opinion, national or social origin, wealth, birth or other status or on any other similar criteria'.⁵⁸ The protected person's honour, family rights, religious convictions and practices, and the manners and customs must in all circumstances be respected. They must be humanely treated and protected against all acts or threats of violence, insults, and public curiosity. Women must be specially protected against any attack on their honour, in particular against rape,⁵⁹ enforced prostitution, and any form of indecent assault. Subject to special provisions relating to health, age, and sex, protected persons must receive equal treatment without any adverse distinction based, in particular, on race, religion, or political opinion.⁶⁰ Customary IHL prohibits the use of weapons causing superfluous injury or unnecessary suffering.⁶¹ Despite the legal protection of protected persons, they have increasingly become the predominant victims of armed conflict. The targeting of civilian populations has emerged, whether it is as a strategic mechanism to obtain further war objectives or as a war objective itself. Nevertheless, against this rising targeting of civilians is the development of the international protection principles. The increase in conflicts characterized by grave violations of human rights on a massive scale has led to the issue of whether international law permits states and the international community to react to such cases, including the use of force where governments fail to protect their own people. This issue has become a central theme in the United Nations agenda. It has become apparent from this that a new debate is needed in relation to what can be done to help people who are facing mass atrocities, including the need for a strong and relevant UN strategy to address challenges in modern conflicts in order to avoid negative impacts of armed conflicts on humanity.

⁵⁸ AP I, Art 75(1).

⁵⁹ In the case of *Prosecutor v Delalić (Celebići Case)* (1996) 38 ILM 57, the International Criminal Tribunal for the Former Yugoslavia (ICTY) held that rape was capable of amounting to torture under international humanitarian law. This was confirmed in *Prosecutor v Furundžija* (1998) 121 ILR 218.

⁶⁰ GC IV, Art 27. See also AP I, Arts 75(1) and 76. For provisions covering the arrest, detention, internment, and punishment of women, see para 9.8.

⁶¹ Jean-Marie Henckaerts and Louise Doswald-Beck, "Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering" in *Customary Humanitarian Law Vol I: Rules* (Cambridge: ICRC and Cambridge University Press, 2009) online: <<http://www.icrc.org/customaryihl/eng/docs>> [hereinafter ICRC Study].

1.3.1 General objective

The general objective of the study will be to analyze the effects of armed conflicts on humanity.

1.3.2 The Specific Objectives of the study are:

- i. To analyze the existing conventional and customary international humanitarian law (law of armed conflicts) which governs international armed conflicts?
- ii. To establish the international mechanism to protect against the effects of armed conflict on humanity.
- iii. To propose reforms and recommendations on how to protect humanity against any future armed conflicts situation in global context of outbreaks.

1.4 Research questions.

- i. What is the existing conventional and customary international humanitarian law (law of armed conflicts) which governs international armed conflicts?
- ii. Whether there are any effects of armed conflicts on humanity?
- iii. Whether there are any international mechanisms to protect against the effects of armed conflict on humanity?
- iv. What do you propose as reforms and recommendations on how to protect humanity against any future armed conflicts situation in global context of outbreaks?

1.5 Hypothesis

War has been transformed into butchery and belligerents strike army and civilian population alike without any distinction between the two. However, all abuses lead to a reaction... International conscience demands the condemnation of all these barbarous proceedings. The world is amazed and stunned before these rivers of blood, these hillocks of bones, these mountains of ruins... A new crusade is being gathered together against these abuses.... We are conscious of the will of all those whose lives, whether as hostages, deportees, or on the field of battle, were sacrificed to the madness of men who believed that the protection of human beings was merely a figment of the brains of intellectuals... All these martyrs do not demand revenge but they cry out that their sacrifice shall not have been in vain. They ask to be the last victims of these theories according to which man exists only for the State and not

the State for the happiness of its citizen.”⁶² This paper is therefore based on the hypothesis that protection of humanity against negative impacts of armed conflicts is vital and has been done through the international legal framework in place however enforcement of the laws in place is still a very big challenge to the institutions in charge. It is on this ground that the researcher intends to provide recommendations and reforms to the stake holder to improve on the enforcement of international humanitarian laws in place to protect humanity against the effects of armed conflicts.

1.6 Significance of the study

This paper specifically aims at making a contribution to the existing literature focusing on armed conflicts within the international legal framework in relation to the protection of humanity against the impacts of armed conflicts.

This paper seeks to make a contribution to the discourse and applicability of the law of armed conflicts by exploring its effectiveness in protecting humanity against the negative impacts of armed conflicts. In order to ascertain the efficacy and workability of the legal and normative framework in relation with the protection of civilians, the study investigates whether the law on armed conflicts is applied in practice to limit the effects of armed conflicts on humanity.

The recommendations of the study will help governments and other international agencies to develop policies that are more effective in preventing wars and forced migration caused by armed conflicts. Researchers and scholars may also find the study useful as a basis of further research.

1.7 Methodology.

The study is desk-based research to the extent that is based on International and national legal materials. Government reports, UN reports, Press note, Non- government organization reports and National Institution’s annual reports and related books and Journals are examined. Most of materials are taken from internet. The study also examines various cases including those of National Human Rights Commission as well as UN agencies reports regarding the subject.

1.8. Limitations.

The term armed conflicts exists in several different fields of law. This paper is mainly limited to international humanitarian law. The description of international humanitarian law strictly limited to the concept of armed conflicts, disregarding the application of any rules associated with the definition.

⁶² Professor Michel Pismazoglu, see Geoffrey Best, *War and Law Since 1945*, Oxford: Oxford University Press, 2002, p. 93. See also Prelim. Conf., 1946.

In the historical perspective, it is not possible to give any exhaustive or pro-found description of this within the frames of this paper. Thus, I have limited myself to clearly distinguishable patterns and key events, as identified and analyzed in relevant doctrine.

1.9 Literature review

Gary Solis,⁶³ a retired Lieutenant Colonel of the U.S. Marines, retired Professor of Law at the U.S. Military Academy and former Director of WestPoint's Law of War Program, is well situated to provide a thorough and detailed examination of the IHL. In his book, *The Law of Armed Conflict*,⁶⁴ he examines the difficulties of defining a legal objective, interprets legal definitions of 'military objective', evaluates the legitimacy of potential targets based on use, examines the process of making targeting decisions, and looks at the law surrounding indiscriminate attacks.⁶⁵ These are important areas to examine as they are often points of ambiguity or disagreement within the field. For example, given the differing interpretations of military objective noted above, this can affect whether something is seen as legitimate or illegitimate target for military action.

Jose-Thota Betsy, also violations of the civilian immunity norm and seeks to understand their occurrence. Whereas Solis identifies potential issues in the law, Betsy seeks to identify the source of violations in practice, though his focus remains staunchly on civilians and armed conflict.⁶⁶ Betsy conducted interviews with experts in IHL and with belligerents in African conflicts to conclude that the continuing occurrence of violations of civilian immunity are the result of a disconnect between the interpretation of legal protections for civilians in the minds of IHL experts and the interpretation of the same in the minds of belligerents.⁶⁷ While Betsy identifies this as a potential explanation for continuing violations, he unfortunately does not propose any solutions to resolve the discrepancy in interpretation.

Michael Schmitt, in his article, "The Principle of Discrimination in 21st Century Warfare,"⁶⁸ also gives an in-depth examination of the requirement to distinguish between civilian and military. Beginning with an analysis of the current state of the principle, Schmitt then proceeds to examine the effects growing

⁶³ Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010)

⁶⁴ Note: the term Law of Armed Conflict [LOAC] used by the military and given the military perspective from which Solis book is written it uses this term as opposed to IHL. This thesis will stick with the term IHL.

⁶⁵ Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010) at 519-555.

⁶⁶ Betsy, *ibid* at 113-145 (as he examines the results of interviews with belligerents from conflicts in Africa and IHL experts on their understandings of permissible civilian targets in conflicts).

⁶⁷ Betsy, Jose-Thota. "The fog of protection: Contested meanings and deliberate civilian deaths during armed conflict" (PhD Dissertation; University of Pittsburgh, 2011) [Accessible on Pro Quest] [hereinafter Betsy];

⁶⁸ Michael N Schmitt, "The Principle of Discrimination in 21st Century Warfare" (1999) 2 Yale Hum Rts & Dev LJ 143 (HeinOnline) at 150. [hereinafter Schmitt (1999)]

economic and technological disparity, religious and ethnic discord, the increasingly blurred lines between military and civilian, and the development of information acquisition and dissemination.⁶⁹ On the whole, Schmitt determines these trends pose a threat to the principle of discrimination as they tend to increase the desire, and ability perhaps, to broaden the definition of valid targets and decrease the incentive to protect the humanitarian aspects of the law.⁷⁰ In an effort to avoid or limit the negative direction in which Schmitt predicts these trends are leading, Schmitt advocates in favour of strengthening the role of international organizations and coalitions of States in enforcing humanitarian standards, arms control and an overall limiting of the universe of legal targets.⁷¹ Schmitt's conclusion that limiting the universe of legal targets would help protect the principle and the humanitarian aspects of the law of armed conflict is very persuasive. Unfortunately, he does not propose any specific means by which to limit the universe of legal target.

Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law".⁷² This article provides a thoroughly positivist examination of military necessity in IHL and international criminal law. It isolates the role of military necessity as an exception to certain specific rules of IHL prohibiting certain actions when those actions are required to attain a military objective. While the work of Betey and Schmitt tends to focus on the civilian costs of violations of the discrimination principle, Hayashi focuses on the destruction of civilian property. While there is potential to consider the environment as a civilian object, as discussed by Jean-Marie Henckaerts and Louise Doswald-Beck in the ICRC's study on customary IHL,⁷³ Hayashi does not address the potential consideration of the environment, instead focusing on tangible property such as buildings, vehicles, etc. While the above articles provide a traditional and very useful analysis of law, they fail to appreciate the many other powerful sources and tools of law. There is a tendency towards overemphasizing conventional laws while under appreciating customary law, norms, and principles. This is why Jean-Marie Henckaerts and Louise Doswald-Beck's Customary Humanitarian Law Vol I: Rules, done for the ICRC, is such an important resource when examining IHL. Customary IHL is a valid source of international law just as conventions are, as demonstrated by Article 38(1) of the ICJ Statute, which lists

⁶⁹ Schmitt, *ibid* at 153-158 (economic and technological disparity), 158 (religious and ethnic discord), 158-161 (blurred lines between military and civilian), and 162-170 (development of information acquisition and dissemination).

⁷⁰ *ibid*

⁷¹ Schmitt, *ibid* at 177-181.

⁷² Nobuo Hayashi, "Requirements of Military Necessity in International Humanitarian Law and International Criminal Law" (2010) 28 Boston U Intl'l L J 39. [hereinafter Hayashi]

⁷³ ICRC Study, *supra* note 49 at Rule 45.

the most authoritative sources of public international law.⁷⁴ The ICRC's study is the most thorough and extensive study of state practice and *opinio juris* conducted by a well-established and well-respected body, and only the holding of the ICJ that something is a customary law of war would be more authoritative and conclusive.

Torres⁷⁵ points out that forced marriages of girls and women by armed opposition groups have been documented in recent armed conflicts in Sierra Leone (1991-2001), Liberia (1990-2003), Uganda (1986-present), the Democratic Republic of Congo (1998-present), Algeria (1994-present), Kashmir (1990-present) and elsewhere. In Algeria and Kashmir, armed opposition groups have abducted girls and women with impunity and no cases to date have been brought to national or local courts. Forced marriages have also been committed by state armed forces. For example, from 1980-2000, Indonesian security forces in East Timor forcibly married Timorese girls and young women and forced others into prostitution. Prior to 2001, Taliban fighters in Afghanistan made death threats against families to handover their girls and young women and forced the families to complete marriage contracts. Today in Afghanistan, armed opium dealers and jihadi commanders are forcibly marrying girls and young women.

According to **Mohanty**⁷⁶ the violations experienced by girls and young women subjected to forced marriages are often severe and long-lasting and encompass a number of psychological, emotional, physical, social, economic and cultural elements. Among these elements are forced pregnancy, child-bearing and the raising of children born of rape in societies where those children are often rejected and physically abused including the withholding of food and medicines by extended family members and community members. These young mothers report that because they are often cut out of family and social networks, they struggle to provide education, food and health care to their children born due to forced marriage.⁷⁷ Many of these young mothers have lost many years of education and lack the skills needed to pursue productive livelihoods, which are exacerbated due to the stigma they face from their past experiences and their exclusion from social networks.

⁷⁴ Statute of the International Court of Justice, June 26, 1945, 59 Stat 1055, 33 UNTS 993. [hereinafter ICJ Statute]

⁷⁵ Torres, A.B. (2012). FMO Thematic Guide: Gender and Forced Migration. New York: Washington D C

⁷⁶ Mohanty, C. Russo, A. & Torres, L. (Eds.) 2012. Third World Women and the Politics of Feminism. Bloomington: Indiana University Press.

⁷⁷ McCallin, M & Fozzard, S. (2013). The Impact of Traumatic Events on the Psychological Well-being of Mozambican Refugee Women and Children. Geneva: International Catholic Child Bureau. MDGs: Basics.

Lukwago⁷⁸ argues that the violence and harms suffered by women and children in contexts of armed conflict and political repression are many and are often interlinked. The links create destructive synergies of loss and suffering: violence inflicted on women harms women; some harms expose women to further violence and additional harms; and serious, even life-altering or life-threatening harms result from forms and violence and repression in which women are not the primary targets of conflict yet are decisively affected by it. The specific experience of women and children in armed conflicts greatly depends upon their status in societies before armed conflict breaks out. This is not to suggest a simple continuum of violence, in which the gendered and structural violence of everyday life is somehow only more magnified during armed conflict.⁷⁹ Such theoretical discussions cannot account for nor do they reflect the shattering experience of discontinuity, the sense of enormity and outrage, or the terror, despair, and social ruin of victims in many instances of violence in conflict.

According to **Kavuma**⁸⁰ where cultures of violence and discrimination against women and children exist prior to conflict, they are likely to be exacerbated during conflict. Similarly, if women are not allowed to partake in the decision-making structures of a society before conflict, it is usually difficult for them to become involved in decisions around the conflict itself or the peace process and transitional period. Thus, gender relations as intersected and shaped by ethnicity, class, caste, and age in pre-conflict situations often set the stage for women's, girls', men's, and boys' experiences and options during armed conflict. The reports and studies on the effect of armed conflict was traditionally tended to incorporate women in the general category of civilians and have hence failed to highlight the different ways in which men and women experience armed conflict.⁸¹

Indra⁸² assert that women and children owing to their position in the society are affected by wars differently than men. There are problems resulting from situations of conflict are, however, very often neglected. It is important, therefore, to focus attention on these issues and create awareness about the rights women and children have in these circumstances as well as present possible means to improve their situation. In traditional societies and mostly in Africa women are often categorized into two identities that is, as the wives of men and mothers of children. They are perceived as symbols of honor.

⁷⁸ Lukwago, K. (2013). *The Politics of National Integration in Uganda*. Nairobi: Coign Publications.

⁷⁹ Levine, S. & Chastre, C., 2004, *Missing the Point: An Analysis of Food Security Interventions in the Great Lakes*. Humanitarian Practice Network at Overseas Development Institute: London

⁸⁰ Kavuma, R. (2006). *Uganda and Millennium Development Goals*. *The Weekly Observer* 27 April: 1- 5. rimkav@Ugandaobserver.com.

⁸¹ Jalloh, S. (2011) *Conflicts, Resources and Social Instability in Sub Sahara Africa: The Sierra Leone Case in International* *Afrikaforum*, 37. Jg Germany, , Pages 166-180.

⁸² Indra, D. 2010. *Engendering Forced Migration: Theory and Practice*. Oxford: Berghahn. International Association for the study of Forced Migration (IASFM).

As women are dependent on their husbands or fathers; death, disappearance or detainment of these men often have serious consequences on them.⁸³ Widow-hood is socially stigmatized and becoming a widow means possible isolation, loss of dignity and individual identity, since widows become dependent on their relatives. They are frequently denied inheritance and property rights.

Hall⁸⁴ asserts that in situations of armed conflict, the sense of frustration and powerlessness may be manifested in a number of ways and in many cases, the worst hit victims are the women. Such a situation is compounded by the polarization of gender roles which frequently occurs during armed conflict. An image of masculinity is sometimes formed which encourages aggressive and misogynist behavior. On the other hand, women may be idealized as the bearers of a cultural identity and their bodies perceived as 'territory' to be conquered. Troops as well as rebels may also use rape and other forms of violence against women to increase men's subjugation and humiliation.

According to **Gibney**⁸⁵ since the beginning of the armed conflict between the government and the armed groups organized violence has almost become an everyday occurrence in several parts of the state. The state is one of the world's most heavily militarized places where special laws are currently promulgated. According to Garry and Pearsall, in situations of conflict and particularly those involving religious identities, women and children are targeted in specific ways.⁸⁶ In times of conflict, particularly religious conflict, it is women who carry the honor of the community on their backs and bodies and defiling their bodies usually through rape is a way of hitting back at the other community. What this implies is that in most cases, the woman's identity becomes objectified as one that can be used to dishonor the other community.

Ferris⁸⁷ asserts that that the general breakdown in law and order which occurs during conflict leads to an increase in all forms of violence. The tensions of conflict and the frustration, powerlessness and loss of traditional male roles associated with widowhood may be manifested in an increased incidence of domestic violence against women and children. Studies have now established that women experience armed conflict in different ways than men. The effects of armed conflict on women vary across cultures

⁸³ Hostile to Democracy, (2013). The Movement System and Political Repression in Uganda. New York: Human Rights Watch.

⁸⁴ Hall, M. (2012), Preface, in: Kane. S. M and Yohe. G. W. (Eds). Societal Adaptation to Climate Variability and Change. Kluwer Academic Publishers.

⁸⁵ Gibney, M. (2009). Kosovo and Beyond, Popular and Unpopular Refugees. Forced Migration Review 8, 28-30.

⁸⁶ Garry, A. & Pearsall, M. (2007). Women, Knowledge and Reality in Feminist Philosophy. New York: Routledge.

⁸⁷ Ferris, E., (2012), 'Women, War and Peace,' Research Report No. 14, Life and Peace Institute, Uppsala, Sweden.

depending upon the role of women in particular societies. As El-Bushra note one thing is clear: armed conflict often exacerbates inequalities that exist in different forms and to varying degrees in all societies and that make women particularly vulnerable when armed conflict breaks out.⁸⁸ Of the more than one billion people living in poverty today, the majority are women. They are more- over, generally disadvantaged in terms of education and are considerably less mobile because of their traditional role of caring for others. Furthermore, these inequalities continue after the cessation of hostilities. Women and children are often excluded from the reconstruction processes that takes place after armed conflict as well as from peace building initiatives.

Charlotte Lindsay⁸⁹ points out that women bear the consequences of wars disproportionately and suffer violations of human rights in situations of armed conflict, including terrorism, torture, disappearance, rape, ethnic cleansing, family separation and displacement. Moreover, they endure lifelong social and psychological traumas. Along with children, women constitute 80% of the World's refugees and displaced persons. Due to the traditional role structure of the family, the popular perception is that men are soldiers or aggressors and that woman are wives, mothers, nurses and social workers. The reality of war is that while it is primarily men who are conscripted and killed in battle, women make up the majority of civilian casualties and suffer in their role as care givers owing to a breakdown in social structures.

According to **Davies**⁹⁰ women and children suffer emotionally, psychologically and economically. The concept of men going to war and of women staying safely at home with children and the elderly does not reflect the reality of war. In recent years, much attention has been devoted by international organizations, non-governmental organizations (NGOs), academics and certain governments to the plight, needs and rights of women affected by armed conflict. For example, the International Committee of the Red Cross (ICRC) published *Women Facing War* (2001), a study on the impact of armed conflict on women; the United Nations Security Council adopted Security Council Resolution 1325 on Women, Peace and Security (2000) which resulted in the production of a number of studies on this theme, by the Division for the Advancement of Women (2002) and UNIFEM (2002).⁹¹ on the impact of armed conflict on women; the United Nations Security Council adopted Security Council Resolution 1325 on Women,

⁸⁸ El-Bushra, J. (2012), 'Gender and Forced Migration: Editorial', *Forced Migration Review*, No 9 220

⁸⁹ El-Bushra, J. El-Karib, A. and Hadjipateras, A., (2002), *Gender-Sensitive Programme Design and Planning in Conflict Situations: Research Report*, London: ACORD.

⁹⁰ Davies, S., 2011. *Adaptable Livelihoods: Coping with Food Insecurity in the Malian Sahel*. Macmillan: London.

⁹¹ CSOPNU 2004. *Nowhere to Hide: Humanitarian Protection Threats in Northern Uganda. Summary of Findings*. Kampala :CSOPNU.

Peace and Security (2000) which resulted in the production of a number of studies on this theme, by the Division for the Advancement of Women (2002) and UNIFEM (2002).⁹²

Corrin⁹³ show that women's experience of armed conflict is multifaceted: it means separation, loss of relatives, physical and economic insecurity, an increased risk of sexual violence, wounding, detention, deprivation and even death. In all conflicts, women suffer in ways specific to men. Yet they should not be seen as a homogenous group; different women will have different needs, vulnerabilities and coping mechanisms. Women and children in armed conflict are not passive and not necessarily victims.⁹⁴ Around the world, women become members of the regular armed forces, armed groups or their support services. Moreover, women and children are engaged as politicians, leaders of NGOs and active campaigners for peace. In times of conflict, women and children and in some cases men, experience gender violence which exacerbates the general, common impact conflict has on people in general: death, injury, bereavement, displacement, loss of property and loss of livelihood. Combatants on either side use sexual violence as a part of their battle plan. In any case, militarized societies experience and absorb higher levels of violence. As women and men have different, culturally-determined social roles, they experience conflict in different ways. It is imperative to recognize these diverse factors of vulnerability and their consequences in order to adapt responses accordingly. At the same time, it must be appreciated that war precipitates changes in traditional roles, which are fluid rather than frozen in time. For example, in wartime, women daily demonstrate their resilience and coping mechanisms such as the capacity to engage in enterprise in the public sphere to sustain families. This shows that while everyone is responsible for improving the plight of women in wartime, there are significant benefits in ensuring that women themselves are involved in all measures taken on their behalf.

According to **Alexandra**⁹⁵ the very notion of vulnerability depends on an appreciation of what makes people vulnerable. This differs according to whether one is male or female, adult or child, rich or poor, deprived of freedom, displaced or a member of the civilian population generally. As women and men have different, culturally determined social roles, they experience conflict in different ways. It is imperative to recognize these diverse factors of vulnerability and their consequences in order to adapt

⁹² *ibid*

⁹³ Corrin, C. 2010. *Gender Audit of Reconstruction Programmes in South Eastern Europe*, Fairfax and New York: Urgent Action Fund and the Women's Commission for Refugee Women and Children.

⁹⁴ Bahl, V. 1997. *Cultural Imperialism and Women's Movements: Thinking Global*. *Gender and History*, April 1 14.

⁹⁵ Alexandra Stiglmayer, ed., *Mass Rape: The War against Women in Bosnia-Herzegovina*, Lincoln, University of Nebraska Press, 2012

responses accordingly. At the same time, it must be appreciated that war precipitates changes in traditional roles, which are fluid rather than frozen in time. For example, in wartime, women daily demonstrate their resilience and coping mechanisms such as the capacity to engage in enterprise in the public sphere to sustain families.⁹⁶ This shows that while everyone is responsible for improving the plight of women in wartime, there are significant benefits in ensuring that women and children themselves are involved in all measures taken on their behalf.

According to **Vickers**⁹⁷ conflict in a sense, creates opportunity and impunity together an opportunity impunity window. The psychological and social impacts of armed conflict are inter-twined. Changes in social interactions may create psychological distress. Studies have shown the grave consequences of gender-based social repression on the psychological well-being of women. The proliferation of armed conflicts and the high levels of military and civilian casualties in those conflicts have meant that there are large numbers of widows in many countries.⁹⁸ This has a major impact not only on women but on society in general. Widowhood often changes the social and economic roles of women in the household and community and the structure of the family. The impact of widowhood differs between cultures and religions. However, it can affect the physical safety, identity and mobility of women. Widowhood can also affect their access to basic goods and services necessary for survival and their rights to inheritance, land and property, in addition to the wider impact it has on the community.

1.20 Chapter synopsis.

The study is divided into five chapters. Chapter One the Research Proposal, which Sets out the background of the study, the focus and objectives of the study, the significance of the study especially to Uganda, the hypothesis, the methodology of the research and the literature review.

Chapter two will discuss the conventional and customary international humanitarian law (law of armed conflicts).the chapter will give a legal definition of armed conflicts, it will also discuss the types of armed conflicts as defined by the laws of armed conflicts and will provide the different laws that

⁹⁶ Shobha Guatam, Amrita Banskota and Rita Manchanda, "Where there are No Men: Women in the Maoist Insurgency in Nepal," *Women, War and Peace in South Asia*, Sage Press: New Delhi, 2001, pp. 215-248.

⁹⁷ Vickers, J. 2013. *Women and War*. London & New Jersey: Zed Books. *Violent Conflicts*. Montreal, Center for Developing areas. Montreal McGill University.

⁹⁸ Waligo, J.M. 2005. *Constitution-making and the Politics of Democratization in Uganda*. In *From Chaos to Order. The Politics of Constitution-Making in Uganda*, Hasen, & Twaddle, Kampala. Fountain Publishers

regulate armed conflicts for example the four Geneva convention and the two additional protocols and others.

Chapter three will discuss the effects of armed conflicts on humanity. It should be noted that the women and children are the categories of people mostly affected by armed conflicts. Therefore this chapter will discuss ways in which the children, women and other protected persons are continuing to be affected by armed conflicts.

Chapter four will discuss the mechanisms put in place by the international community to minimize effects of armed conflicts on women, children and other protected persons under international humanitarian law, the chapter will discuss the principles set forth by the international humanitarian law to protect civilian objects and others who have ceased to take part in armed conflicts like the wounded, the sick and the prisoners of war (POW).

Chapter five will discuss what the researcher provides as reforms and recommendations on the protection of humanity against the impacts of armed conflicts.

CHAPTER TWO

LEGAL FRAMEWORK OF ARMED CONFLICTS AND HOW IT PROTECTS HUMANITY FROM SUFFERING.

2.0 Introduction

Although international humanitarian law has as its aim the limitation of the effects of armed conflict, it does not include a full definition of those situations that fall within its material field of application. While it is true that the relevant conventions refer to various types of armed conflict and therefore afford a glimpse of the legal outlines of this multifaceted concept, these instruments do not propose criteria that are precise enough to determine the content of those categories unequivocally. A certain amount of clarity is nonetheless needed. In fact, depending on how the situations are legally defined, the rules that apply vary from one case to the next. The legal regimes that need to be taken into account are thus not always the same and depend on whether the situations constitute, for example, an international or a non-international armed conflict. Similarly, some forms of violence, referred to as 'internal tensions' or 'internal disturbances', do not reach the threshold of applicability of international humanitarian law and therefore fall within the scope of other normative frameworks. This chapter will look at the different international humanitarian laws regulating armed conflicts and typology of armed conflicts protected by the law of armed conflicts.

2.1 The 1949 Geneva Conventions

By virtue of common Article 2(1), the 1949 Geneva Conventions apply to 'all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them'.⁹⁹ The situations referred to here are conflicts between States. The 'High Contracting Parties' mentioned in this text are sovereign entities. Depending on the case in question, these situations may take the form of a direct conflict between States or of intervention in a previously existing internal conflict. In the latter hypothesis, the conflict is 'internationalized'. That is the case if a foreign Power sends troops into a territory to support a movement opposing the local government. Intervention may also take place by proxy when that Power merely supports and guides the uprising from a distance.¹⁰⁰ In that case, it is then vital to determine the

⁹⁹ The same field of application was also retained for other instruments of international humanitarian law, in particular Additional Protocol I (see Art. 1(3)).

¹⁰⁰ International Criminal Tribunal for the former Yugoslavia (ICTY), Prosecutor v. Tadic, Case No. IT-94- 1-A, Judgment (Appeals Chamber), 15 July 1999, para 84.

level of control that makes it possible to classify the armed conflict as international. Not every form of influence necessarily leads to the conflict becoming internationalized. On that point, the International Criminal Tribunal for the former Yugoslavia (ICTY) pointed out that 'control by a State over subordinate armed forces or militias or paramilitary units may be of an overall character (and must comprise more than the mere provision of financial assistance or military equipment or training). This requirement, however, does not go so far as to include the issuing of specific orders by the State, or its direction of each individual operation'.¹⁰¹ The criterion of 'overall control' is achieved when the foreign State 'has a role in organising, co-ordinating or planning the military actions of the military group, in addition to financing, training and equipping or providing operational support to that group' (emphasis added).¹⁰² Involvement must therefore go beyond mere logistical support, but that involvement does not imply that everything done by the group concerned is directed by the State taking part from a distance.

The situations referred to in Article 2(1) common to the 1949 Geneva Conventions are viewed from the twin viewpoints of formalism and effectiveness. First, there are declared wars, implying that the state of war is recognized officially by the parties concerned. Second, there are other forms of inter-State armed conflict, whose existence does not depend on how the parties define them. While the concept of war already exists in the oldest treaties of international humanitarian law,¹⁰³ the 1949 Conventions introduced the concept of armed conflict into this legal regime for the first time. Through this semantic contribution, those who drafted those instruments wanted to show that the applicability of international humanitarian law was henceforth to be unrelated to the will of governments. It was no longer based solely on the subjectivity inherent in the recognition of the state of war, but was to depend on verifiable facts in accordance with objective criteria. Thanks to that contribution in 1949, international armed conflict thus became established as a concept governed by the principle of effectiveness. The relevant rules apply when certain specific factual conditions are met.¹⁰⁴

¹⁰¹ Ibid., para 137. On this point, see also International Court of Justice (ICJ), Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment, ICJ Reports 2007, 26 February 2007, para 404.

¹⁰² ICTY, Prosecutor v. Naletilic, Case No. IT-98-34-T, Judgment (Trial Chamber), 31 March 2003, para 198.

¹⁰³ See, for example, Arts. 4, 5 and 6 of the Convention for the Amelioration of the Condition of the Wounded in Armies in the Field of 22 August 1864.

¹⁰⁴ See J. Pictet, (eds), *Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*: Commentary, Geneva, ICRC, 1952, p. 32; R. Kolb, *Ius in bello*, Le droit international des conflits armés, Basel/Brussels, Helbing and Lichtenhahn/Bruylant, 2003, pp. 72 ff.

Article 3 common to the 1949 Geneva Conventions applies in the case of 'armed conflict not of an international character occurring in the territory of one of the High Contracting Parties'.¹⁰⁵ This provision begins with a negative expression, dealing with armed conflict 'not of an international character'. It thus refers back implicitly to common Article 2, which, as stated above, deals with conflicts between States. Armed conflicts that are not of an international character are those in which at least one of the parties involved is not governmental. Depending on the case in question, hostilities take place either between one (or more) armed group(s) and government forces or solely between armed groups.¹⁰⁶

Common Article 3 also assumes that an 'armed conflict' exists, i.e. that the situation reaches a level that distinguishes it from other forms of violence to which international humanitarian law does not apply, namely 'situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature'.¹⁰⁷ The threshold of intensity required in that case is higher than for an international armed conflict. Actual practice, in particular that of the ICTY, reveals that this threshold is reached every time that the situation can be defined as 'protracted armed violence'.¹⁰⁸ This condition needs to be assessed against the yardstick of two fundamental criteria: (a) the intensity of the violence and (b) the organization of the parties.¹⁰⁹ These two components of the concept of non-international armed conflict cannot be described in abstract terms and must be evaluated on a case-by-case basis by weighing up a host of indicative data.¹¹⁰ With regard to the criterion of intensity, these data can be, for example, the collective nature of the fighting or the fact that the State is obliged to resort to its army as its police forces are no longer able to deal with the situation on their own. The duration of the conflict, the frequency of the acts of violence and military operations, the nature of the weapons used, displacement of civilians, territorial control by opposition forces, the number of victims (dead, wounded, displaced persons, etc.) are also pieces of information that may be taken into account.¹¹¹ However, these are¹¹² assessment factors that make it possible to state whether the threshold of intensity has been reached in each case; they are not conditions that need to exist concurrently.

¹⁰⁵ Common Article 3(1).

¹⁰⁶ ICTY, Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 70.

¹⁰⁷ ICRC, *How is the term 'Armed Conflict' defined in international humanitarian law?*, Opinion Paper, March 2008, p. 3.

¹⁰⁸ ICTY, Prosecutor v. Tadić, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, para 70.

¹⁰⁹ International Criminal Tribunal for Rwanda (ICTR), ICTR, Prosecutor v. Rutaganda, Case No. ICTR-96-3, Judgment (Trial Chamber I), 6 December 1999, para 93;

¹¹⁰ ICTY, Prosecutor v. Haradinaj, Case No. IT-04-84-T, Judgment (Trial Chamber), 3 April 2008, para 49.

¹¹¹ R. Pinto (rapporteur), *Report of the Commission of experts for the study of the question of aid to the victims of internal conflicts*, International Review of the Red Cross, February 1963, especially pp. 82–83;

¹¹² Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, paras 66–118;

As for the second criterion, those involved in the armed violence must have a minimum level of organization. With regard to government forces, it is presumed that they meet that requirement without it being necessary to carry out an evaluation in each case.¹¹³ As for non-governmental armed groups, the indicative elements that need to be taken into account include, for example, the existence of an organizational chart indicating a command structure, the authority to launch operations bringing together different units, the ability to recruit and train new combatants or the existence of internal rules.¹¹⁴

When one or other of these two conditions is not met, a situation of violence may well be defined as internal disturbances or internal tensions. These two concepts, which designate types of social instability that do not pertain to armed conflict, have never been defined in law, despite the fact that they are referred to explicitly in Additional Protocol II.¹¹⁵ In its background documents in preparation for the drafting of that instrument, the ICRC considered that internal disturbances are situations in which 'there is no non-international armed conflict as such, but there exists a confrontation within the country, which is characterized by a certain seriousness or duration and which involves acts of violence.

These latter can assume various forms, all the way from the spontaneous generation of acts of revolt to the struggle between more or less organized groups and the authorities in power. In these situations, which do not necessarily degenerate into open struggle, the authorities in power call upon extensive police forces, or even armed forces, to restore internal order'.¹¹⁶ As for internal tensions, they cover less violent circumstances involving, for example, mass arrests, a large number of 'political' detainees, torture or other kinds of ill treatment, forced disappearance and/or the suspension of fundamental judicial guarantees.¹¹⁷

Common Article 3 applies to armed conflicts 'occurring in the territory of one of the High Contracting Parties'. The meaning of this element may be controversial. Is it to be understood as a condition excluding non-international armed conflicts taking place in two or even more State territories, or rather as a simple reminder of the field of application of common Article 3? According to the latter hypothesis, it is argued that this specific point was included in order to make it clear that common Article 3 may only be applied in relation to the territory of States that have ratified the 1949 Geneva Conventions.

¹¹³ ICTY, *Prosecutor v. Haradinaj*, para 60.

¹¹⁴ ICTY, *Prosecutor v. Boskoski*, Case No. IT-04-82, Judgment (Trial Chamber), 10 July 2008, paras 199-203.

¹¹⁵ Additional Protocol II, Art. 1(2).

¹¹⁶ ICRC, *Protection of Victims of Non-International Armed Conflicts, Document presented at the Conference of government experts on the reaffirmation and development of international humanitarian law applicable in armed conflicts*, Vol. V, Geneva, 24 May–12 June 1971, p. 79.

¹¹⁷ A. Eide, 'Internal Disturbances and Tensions', *International Dimensions of Humanitarian Law*, UNESCO, Paris, 1988, pp. 279–295.

Common Article 3 prohibits warring parties from engaging in acts of violence against persons taking no active part in hostilities including members of the armed forces who do not bear arms without any distinction whether the armed conflict is of international or non-international character. This provision reads as follows:

*In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict should be bound to apply, as a minimum the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above – mentioned persons: (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (b) Taking hostage (c) Outrages upon personal dignity, in particular humiliating and degrading treatment; (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples. (2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.*¹¹⁸

The duty to protect the life, dignity, health and safety of civilians and other non-combatants constitutes a cornerstone of international humanitarian law and is fundamental to protecting civilians from atrocity crimes.¹¹⁹

2.2 Additional Protocol I of 1977

Since the adoption of Additional Protocol I of 1977, the field of application of the law of international armed conflict has ceased to be limited to inter-State conflicts *stricto sensu* and also encompasses conflicts between government forces and some non-governmental groups, i.e. peoples fighting in the

¹¹⁸ Common Article 3 to the Geneva Conventions of 1949

¹¹⁹ Prosecutor v. Furundzija, Case No. IT-95-17/1-T para. 183.

exercise of their right of self-determination. The Protocol stipulates that the situations targeted by Article 2 common to the 1949 Geneva Conventions include 'armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the 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'.¹²⁰

The scope of this provision raises a number of questions of interpretation, beginning with the precise definition of the 'peoples' concerned and the criteria which make it possible to distinguish those situations of armed conflict from that covered by Article 3 common to the 1949 Geneva Conventions and their Additional Protocol II.¹²¹ The two instruments referred to in Article 1(4) of Additional Protocol I are actually couched in terms that are too general to allow fully satisfactory answers to be derived from them. Moreover, it is difficult to find additional clarification in actual practice because the scenario referred to in that Article has never been officially recognized, particularly as the States that might be concerned did not ratify Additional Protocol I. The interested reader can make useful reference to the commentaries already devoted to that particular type of armed conflict¹²²

2.3 Additional Protocol II

Additional Protocol II applies to non-international armed conflicts 'which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol'. However, this instrument does not apply to wars of national liberation, which are equated with international armed conflicts by virtue of Article 1(4) of Additional Protocol I.

As in the case of common Article 3, a non-international armed conflict within the meaning of Additional Protocol II can only exist if the situation attains a degree of violence that sets it apart from cases of internal tensions or disturbances.¹²³

¹²⁰ Additional Protocol I, Art. 1(4).

¹²¹ M. Bothe, K.J. Partsch, W.A. Solf, *New Rules for Victims of Armed Conflicts*, Martinus Nijhoff, The Hague, 1982, pp. 45-52.

¹²² Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, paras 66-118.

¹²³ Additional Protocol II, Art. 1(2).

That instrument nonetheless defines a more limited field of application than that of common Article 3. It requires non-governmental forces to have a particularly high level of organization, in the sense that they must be placed 'under responsible command' and exercise territorial control, allowing them 'to carry out sustained and concerted military operations and to implement this Protocol'.¹²⁴ Although common Article 3 also presumes that armed groups are able to demonstrate a degree of organization, it does not stipulate that these groups should be able to control part of a territory. In practice, a conflict may therefore fall within the material field of application of common Article 3 without fulfilling the conditions determined by Additional Protocol II. Conversely, all the armed conflicts covered by Additional Protocol II are also covered by common Article 3.

In practice, it is often difficult to identify situations that meet the criteria of application established by Additional Protocol II. The required degree of territorial control, in particular, may be perceived differently from one case to another.

If a broad interpretation is adopted, the concept of non-international armed conflict within the meaning of that instrument comes close to that of common Article 3. Even temporary control that is geographically limited would suffice in that case to justify the application of Additional Protocol II.¹²⁵ Conversely, if Article 1(1) is interpreted strictly, the situations covered are restricted to those in which the nongovernmental party exercises similar control to that of a State and the nature of the conflict is similar to that of an international armed conflict.¹²⁶ In its Commentary on the Additional Protocols, the ICRC seems to adopt an intermediate position on this issue, accepting that territorial control can sometimes be 'relative, for example, when urban centres remain in government hands while rural areas escape their authority'.¹²⁷ It nonetheless adds that the very nature of the obligations presented in Protocol II implies that there is 'some degree of stability in the control of even a modest area of land'.¹²⁸

Additional Protocol II also restricts its field of application to armed conflict between governmental forces and dissident armed forces or other organized armed groups. That means that – contrary to

¹²⁴ Additional Protocol II, Art. 1(1). On this point, see M. Bothe, K.J. Partsch, W.A. Solf, above note 13, pp. 626 ff.

¹²⁵ D. Momtaz, 'Le droit international humanitaire applicable aux conflits armés non internationaux', The Hague Academy Collected Courses, No. 292, 2002, p. 50, ICRC translation)

¹²⁶ L. Moir, *The Law of Internal Armed Conflict*, Cambridge University Press, Cambridge, 2002, p. 106.

¹²⁷ Y. Sandoz et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, ICRC/Martinus Nijhoff, Geneva/The Hague, 1987, para 4467

¹²⁸ *ibid*

common Article 3, which does not provide for that restriction – it does not extend to conflicts solely between nongovernmental groups.¹²⁹

Additional Protocol II repeats the *ratione loci* criterion already formulated in common Article 3, i.e. that it only covers non-international armed conflicts ‘occurring in the territory of one of the High Contracting Parties’. The previous comments on this subject also apply here. The Protocol also stipulates that the conflicts concerned are those taking place on the territory of a High Contracting Party between ‘its’ armed forces and opposition movements. A narrow reading of this passage would make this instrument inapplicable to the troops of a government intervening abroad in support of the local authorities. The forces involved in that case are not those of the State in which the conflict is taking place.

An interpretation in keeping with the spirit of humanitarian law indicates, however, that the expression ‘its armed forces’ should in this case cover not only the troops of the territorial State, but also those of any other State intervening on behalf of the government.

As for the scope of the new points introduced in Additional Protocol II, it should be recalled that that instrument expands and supplements common Article 3 but that it does not change its conditions of application.¹³⁰ The additional restrictions provided for in Article 1(1) therefore only define the field of application of the Protocol and do not extend to the entire law of non-international armed conflict. Common Article 3 thus preserves its autonomy and covers a larger number of situations.¹³¹

Article 4 of the Additional Protocol II also sets out a list of fundamentals guarantees and several acts which are prohibited. This Article reads:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors. 2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph I are and shall remain prohibited at any time and in any place whatsoever: (a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as

¹²⁹ Ibid., para 4461

¹³⁰ Additional Protocol II, Art. 1(1).

¹³¹ Y. Sandoz (eds), *ibid*, para 4454

torture, mutilation or any form of corporal punishment; (b) collective punishments; (c) taking of hostages; (d) acts of terrorism; (e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; (f) slavery and the slave trade in all their forms; (g) pillage; (h) threats to commit any of the foregoing acts. 3. Children shall be provided with the care and aid they require, and in particular: (a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care; (b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated; (c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities; (d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured; (e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.¹³²

2.4 The UN Charter and protection of civilians from mass atrocities

Maintaining peace and security and promoting respect for human rights is one of the fundamental purposes of the United Nations.¹³³ Despite the fact that a declaration of human rights was not incorporated in the UN Charter, in its preamble, the Charter lays out the aims of the Organization which include saving succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of law can be maintained and to promote better standards of life.¹³⁴ Thus, important references to human rights were included in the Charter which in Articles 1(2), 1(3), 13(1), 55 and 56 lay down the UN commitment to protect human rights. In order to meet these challenges, since its creation in 1945, the United Nations has been developing the means and standards for human rights protection. Thus, different mechanisms were established by the United Nations to make sure that states

¹³² Article 4 of the Additional protocol II

¹³³ United Nations Charter signed on 26 June 1945 and entered into force on 24 October 1945. UN Charter, Article 1 (3).

¹³⁴ The UN Charter, Preamble

fulfil their duty to protect individuals from mass violations of human rights.¹³⁵ Thus, the concretization of human rights and their protection was the Universal Declaration of Human Rights adopted by the General assembly on 10 December 1948. Although the 1948 Universal Declaration of Human Rights was not recognized as creating legal obligations when it was adopted, it nonetheless constitutes a milestone of international human rights protection. Its adoption was a benchmark for the creation of a legal framework for international human rights which apply in both times of war and peace.

Article 2(4) of the UN Charter prohibits the use of force and this provision states:

*All Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.*¹³⁶

This principle was described by Bruno Simma as 'the corner stone of peace in the Charter, the heart of the United Nations Charter or the basic rule of contemporary public international law'.¹³⁷ Nonetheless, there is an exception to this rule. The Charter allows recourse to armed force in inter-state relations only in two situations; the first is the inherent right of individual and collective self-defense under Article 51¹³⁸ and the second is when the Security Council authorizes the use of force to maintain or restore international peace and security under Chapter VII of the Charter. Any other threat or use of force beyond the two exceptions must be regarded as a violation of the Charter of the United Nations.

One of the major problems raised is whether a military intervention in a sovereign state to stop human suffering is compatible with the principle of non-intervention. The central question is whether international law permits states to intervene militarily to prevent or to stop gross violations of human rights. Legal views expressed on this point differ considerably.¹³⁹ One part of the doctrine consider that the UN Charter allows the use of force to prevent or to halt the most serious international crimes, such as

¹³⁵ The United Nations has establish different mechanisms which aim to monitor and to publish reports on human rights situations in specific countries such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights.

¹³⁶ Article 2(4) of the UN Charter.

¹³⁷ Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford: Oxford University Press, 2002, pp. 114-115.

¹³⁸ Article 51 of the Charter states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security'.

¹³⁹ Christine Gray, *International law and the use of Force*, 49 2nd. ed., 2004;

genocide, since Article 2(4) prohibits the use of force only against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the UN.¹⁴⁰

Teson for example disagrees with the idea that humanitarian intervention is prohibited by article 2(4) of the Charter. As he states:

Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).¹⁴¹

This approach assumes that in case of widespread violations of human rights, military intervention may be the only way to prevent the continuing slaughter of innocents, arguing that the prohibition of crime of genocide and crimes against humanity is a peremptory norm from which no derogation is permitted.¹⁴²

As to the Tanzania invasion of Uganda, intervention followed the slaughter of hundreds of thousands of innocent Ugandans under the Idi Amin regime. In fact, the tyrannical regime was marked by serious violations of human rights; the intervention halted the systematic killing of people from certain tribal and ethnic groups and led to the overthrow of Idi Amin Dada. However, Tanzania's ostensible justification of its invasion was self-defense in response to the occupation and annexation of the Kagera salient.¹⁴³

2.5 Conclusion

The Fourth Geneva Convention and the additional protocols to the Geneva Conventions not only require the warring parties including states and non-state armed groups to refrain from perpetrating atrocities against civilians, but they are also required to take adequate measures to protect civilians from the effects of hostilities.¹⁴⁴ However, this duty lies first and foremost with states. Therefore, states have both positive and negative obligations to implement the rules of IHL within their territory, including adopting

¹⁴⁰ Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, Berkeley, University of California Press, 1958, p.95.

¹⁴¹ Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*. 2nd ed., Irvington-On-Hudson, N.Y. : Transnational Transnational Publisher Inc., 1997, p.151.

¹⁴² Ian Brownlie, *Principles of Public International Law*, 515 5th ed., 1998,

¹⁴³ Clark Arend and Robert Beck, *International Law and the Use of Force: Beyond the UN Paradigm*, Routledge, op. cit, pp. 122-125

¹⁴⁴ Common Article 3 to the Geneva Conventions, Article 14 Geneva GC IV; and Art.s 48, 51(2) and 52(2), Additional Protocol I of 1977

lawful measures to induce the transgressors to comply with the conventions.¹⁴⁵ Consequently, serious violations of the provisions of IHL constitute war crimes and any person accused of grave breaches can be held criminally responsible. Although discriminate attacks against civilian population and civilian objects are prohibited,¹⁴⁶ the reality of contemporary armed conflicts shows that those rules are violated daily, either by state forces or by non-state armed groups.¹⁴⁷ Yet violence against civilians is continuing and even worsening in some conflicts.

¹⁴⁵ Carlo Focarelli, 'Common Article I of the 1949 Geneva Conventions: A Soap Bubble?', *European Journal of International Law*, vol. 21, no. 1, 2010, pp. 125-171.

¹⁴⁶ This rule is codified in Articles 48, 51(2) and 52(2) of Additional Protocol I (in international armed conflicts) and Article 13(2) of Additional Protocol II (in non-international armed conflicts).

¹⁴⁷ Human Rights Council Resolution 9/9.

CHAPTER THREE

EFFECTS OF ARMED CONFLICTS ON HUMANITY.

3.0 Introduction

This chapter presents the effects of armed conflicts on humanity and these include deaths, rape school dropout and others as will be discussed in this chapter.

3.1 Civilian Deaths

There is no question that despite the best efforts to limit civilian casualties during conflict, it is inevitable that civilians will be injured, killed, and at the very least, be stripped of the basic necessities needed to sustain themselves. Iraqi civilians, being caught between the warring might of a dozen adversaries have likewise suffered unspeakable horrors. One of a dozen sobering facts that have come out of the recent wars is that death has no shortage of opportunity there; one can be killed by bombs or missiles from above; foreign soldiers might go on a rampage, in a bid to even some score, might turn upon their own countrymen; death might be at the next checkpoint; or even at a wedding where a suicide bomber might strike. All these scenarios are not just flowing from this author's imagination; they have been broadcasted to us from afar. There's not agreement as to the correct number of Iraqi civilian homicides, due to war, since 2003, but one source sets the number at close to 115,000.¹⁴⁸ Although people might try to find some solace at arguing the number of deaths should be lower, they need to be reminded that every single life is precious to someone, and in such a case, one death can be significant. Since the wounded always greatly outnumber the dead, we can expect the number of wounded to be much higher.

One consequence of these wars, is that hundreds of thousands of men serving have either been killed or severely disabled. This tragic number hides another unsettling outcome: hundreds of thousands of women have been widowed by war. In a society where women don't have the same access to education, and therefore, employment as men, widowhood has unimaginable consequences; these may include such phenomena as impoverishment, which produces other evils, such as human trafficking and prostitution; and mental illness; the next section discusses several of the most common problems plaguing women today.

¹⁴⁸ Iraqi Body Count (IBC); www.iraqibodycount.org;

3.2 Sexual abuse

The effects of sexual abuse are the exploitation of power. Young people are especially at risk and this can have lasting consequences for their sexual and productive health. The costs can include unwanted pregnancies, sexually transmitted infections (STI), physical injury and trauma. Bitangora¹⁴⁹ reported that in Uganda as in many parts of the world, a lot of stigma is attached to a woman who has been raped. The effects of female Genital cutting are many. According to the report of women vision in Uganda (1998) the surgeons, who performed the cutting are old women. These women according to the report claim that they have ancestral powers. Female genital cutting can be seen as an impediment to a girl's sexual enjoyment. The girls according to the report of women vision (1998) are known to experience intense pain, bleeding, painful abdominal menstruation, infection or trauma.

As a result of armed conflicts systematic rape and other forms of sexual abuse of women and girls have been reported in many war zones around the world. In Bosnia Herzegovina, Burundi, Sierra Leone, and Northern Uganda, systematic rape, forced marriages and other forms of sexual abuse are often used as a tool of war. Past studies have indicated that female adolescents are up to six times more likely than male adolescents to develop PTSD symptomatology. Yet, male adolescents tend to report more exposure to violence than their female counterparts, often due to the sexual nature of the violence.

Since 1986, Uganda was engulfed in an extreme and violent conflict between government forces and rebels, resulting into large scale internal displacement, abductions of over 26,000 children, death, destruction of homes, basic infrastructure and services like education and health. In this conflict, adolescent girls have lost their parents and family members. Many were abducted, used as child soldiers, and physically and sexually abused while in rebel captivity.¹⁵⁰

Among the peculiar problems in the phase of resettlement is that the reintegration of a considerable number of formerly abducted children, both girls and boys in the society remains a challenge. The abducted girls were attached to rebel leaders as "wives." They were sexually abused and had children of these soldiers. Some of the abductees who either escaped or where rescued by the national army were granted amnesty in the same manner like that of any other adult person who had voluntarily joined the

¹⁴⁹ Bitangora, B. (1999). "Rape, the Silent Cancer among Female Refugees". In: Conveying Concerns; Women Report on Gender-based Violence. Washington: Population Reference Bureau, (2000MEASURE communication

¹⁵⁰ Michau, L. (2007). 'Approaching old problems in new ways: community mobilisation as a primary prevention strategy to combat violence against women', Gender & Development Vol. 15, No. 1, Oxfam GB., pp 95 – 109

rebel group. The soldiers from the rebel group who surrendered or relinquished therebel groups have since been absorbed into the national army and some of them have received rewards for denouncing rebel activities. The formerly abducted girls however, received no recognition of their victimization.¹⁵¹ On the contrary, they continue to be considered and treated as pariahs in the society. Some of them who returned with children have received psychosocial and resettlement support from NGOs but nothing from the Ugandan government. They continue to face the burden of dealing with the trauma resulting from their experiences in abduction and the challenge of having to maintain themselves and their children without any economic support.

According to Machel¹⁵² in 2007 the government of Uganda developed a framework for responding to the situation in Northern Uganda called the Peace, Recovery and Development Plan (PRDP) for Northern Uganda (2007 – 2010). The strategic objective of the PRDP aims at rebuilding and empowering communities by promoting improvement in the conditions and quality of life of displaced persons in camps, completing the return and reintegration of displaced populations, initiating rehabilitation and development activities among other resident communities and ensuring that the vulnerable are protected and served. The most vulnerable in Northern Uganda are currently women and girls who have borne the brunt of war and have several odds against them as already noted above. Strategic objective focuses on peace building and reconciliation to ensure continuous prevalence of peace in Northern region through increased access to information by the population, enhancing counselling services, establishment of mechanisms for intra/inter communal and national conflict resolution, strengthening local governance and informal leadership structures and reinforcing the socioeconomic reintegration of ex-combatants. To meet these objectives, women and girls deserve the greatest attention and justice for the violations of their bodies. They equally deserve compensatory interventions that would place them in a position of economic independence and therefore empowerment.¹⁵³

¹⁵¹ Lederach, J. P. (2005). *The Moral Imagination: the Art and Soul of Building Peace*. Oxford: Oxford University Press.

¹⁵² Machel, G. (2001). *Impact of War on Children*. London: Hurst and Company.

¹⁵³ Gow, M. & Wanduragala, R. (2000). *The Right to Peace: Children and Armed Conflict* (Vol. 2). Geneva, Switzerland: World Vision International.

3.3 Armed Conflicts and Exclusion from education

According to Dorsey and Opeitum¹⁵⁴ there is stigmatization of victims or persons who have experienced SGBV in the community, which results into the person's loss of confidence and, leads to isolation from the community. This has led to victims of war especially young boys and girls dropping out of school due to the stigmatization. As a result of war, formal education has been negatively impacted. Schools have been destroyed, teachers and students have been abducted and killed, and the accessibility of education has become limited. Even when individuals are able to find a school, instability and a lack of resources results in overcrowded conditions and difficulty in attaining one's education. The consequences include not only higher rates of illiteracy, ensuing poverty, and further economic despair; these effects extend to increased gender inequality and the loss of a safety zone, an environment that allows children to hope for an improved future and maintain a "normal" childhood. While the limited number and distant locations of schools continue to threaten education, one of the most pronounced threats in Uganda is insecurity. Schools in the rural environments of Northern Uganda are often far and few, particularly as a result of war. However, the constant threat of the LRA and other militant groups legitimizes the concern for abduction on the migration to and from school. Additionally, schools are often easy targets during times of conflict. The Sacred Heart Girls Boarding School was victim to at least three attacks, many killings, and the abduction of more than 50 students. St. Mary's College, another school in Northern Uganda, was attacked by the LRA resulting in 139 student abductions in one single night. In addition to the threat of insecurity, the school buildings were destroyed, resources were damaged, and in some circumstances students, teachers, and administration members were killed. Lock¹⁵⁵ identify that there is an inverse relationship between warfare and education and development in Uganda. They also acknowledge a decline in the success rates of students, particularly in primary and secondary schools, and lower levels of attaining higher education for children is further affected by a child's inability to focus in school or prioritize school over other aspects of daily life.¹⁵⁶ Some cannot afford the costs associated with school, although Uganda's Universal Primary Education bill, in practice, was designed to alleviate the burden of up to four children in each household. Others, often females, are not permitted to attend school or feel they cannot attend due to the necessity to help their family raise income to survive. Those who even continue to attend face extreme fatigue, possibly a result of sleeping

¹⁵⁴ Dorsey, J. & Opeitum, S. (2002). The Net Economic Cost of the Conflict in Acholiland Sub Region of Uganda Kampala: Civil Society Organisations for Peace in Northern Uganda (CSOPNU).

¹⁵⁵ Lock, R. (2008). A Reporter's Notebook: Lost Culture in Uganda [Radio], World Vision Report. Uganda: World Vision.

¹⁵⁶ *ibid*

in hiding and commuting long distances; as many as 40,000 children in Northern Uganda are night commuters, sleeping in communal settings away from their families for safety and migrating to school each day. Lack of focus from hunger, improperly treated illness, and constant fear continue to destroy a healthy and productive learning environment.¹⁵⁷

3.4 Armed Conflicts and Gender-based Violence Trauma

Although there is heated debate regarding the cross-cultural applicability of assessing war affected persons for signs of Post-traumatic Stress Disorder (PTSD), theoretical discordances run the risk of missing the broader point: trauma is trauma. When trauma starts, critical thinking stops; normal functioning of the frontal cortex the seat of reasoning and judgment ceases and all cognitive processing enters fight-or-flight mode, which is very present tense and externally focused. This makes it difficult to visualize a future for oneself or focus on anything apart from meeting basic needs and people do what they must to cope people need the material staples of clean air, water, nutrients and soils for growing roots. As even the most fertile grounds cannot protect a plant from the swing of a sickle or the turnover of a plow people are not invulnerable to threat or destruction. Of course, people are not plants. Plants, for all their persistence to live, are unconscious of their mortality; the lone flower that survives the slash and burning of its field is unaware of its solitude. They can be transplanted into healthier soils or more suitable climates and thrive. It is not so easy with people. People have an emotional complex. People feel terror, anger, grief, panic, empowerment, excitement, loneliness and/or pain in the face of adversity, and the connections between sexual and gender-based violence, trauma, and/or posttraumatic stress disorder (PTSD) are well documented.¹⁵⁸ Human bodies record physical trauma and our minds record the memories of events, both of which can have enduring impacts on physical and psychosocial health.

The level of social disturbance and trauma is disconcerting because, if unaddressed, it has the potential to jeopardize the mental health of the next generation. The contemporary scourge of SGBV is acritical case in point because many acts of sexual and gender-based violence are founded in people's experiences with trauma and violence.

War and displacement marked a "situation of profound social and moral distress. Many children rebels were forced to kill family members. A study conducted on the effects of trauma on youth in the IDP camps revealed that "80% had been exposed to gunfire and over half witnessed someone being killed. A

¹⁵⁷Tom, P. (2006). *The Acholi Traditional Approach to Justice and the War in Northern Uganda*.

¹⁵⁸Gow, M. & Wanduragala, R. (2000). *The Right to Peace: Children and Armed Conflict* (Vol. 2). Geneva, Switzerland: World Vision International.

large percentage has had a friend or family member abducted (67%) or killed (56%) and of the abducted, a small but tragic percentage (8%) reported being forced to torture or kill a friend or family member. Further to this, alarmingly high rates of SGBV in the IDP camps prompted the formation of the 2004 Gulu district sub-committee on sexual and gender-based violence. Lederach¹⁵⁹ research revealed a high incidence rate of rape and marital rape. Child defilement, incest, sexual abuse, “survival sex” (prostitution of women and young girls) and wife battery were closely tied to male alcohol abuse and culturally ingrained ideas of male dominance and women’s submissiveness. Outside of these “protection” camps, female abductees were used and abused as sex slaves and coerced into being co-wives of soldiers and military commanders. The preponderance of male perpetrated SGBV and high-risk sexual behaviour resulted in social support services that predominantly assisted women, thus contributing to another source of psychosocial distress. For example, aggressively condemning SGBV introduces more shame and guilt into an already stressed environment and this has the potential to provoke more anger and violence.

According to a report by Michau¹⁶⁰ gender and development is a hot topic in international development discourses and it has spurred a lively debate on issue pertaining to the under or over-emphasis on either men or women issues in Uganda.

Motions to address gender inequality prompted the subfield known as Women in Development (WID) to hone in on eliminating violence and discrimination against women. Men, however, have often felt marginalized by these development projects especially those, who have also suffered tremendously from a conflict. It is no accident that the more recent discussions about men in development yielded the acronym MAD. In the case of Uganda, displaced women and children were identified as the most vulnerable group in the population and they received the bulk of the food aid, displacing men’s primary gender role as breadwinners and as head of the household. This bred resentment and a demoralizing loss of utility, resulting in an “identity crisis that manifested most destructively in the high level of

¹⁵⁹ Lederach, J. P. (2005). *The Moral Imagination: the Art and Soul of Building Peace*. Oxford: Oxford University Press.

¹⁶⁰ Michau, L. (2007). ‘Approaching old problems in new ways: community mobilisation as a primary prevention strategy to combat violence against women’, *Gender & Development* Vol. 15, No. 1, Oxfam GB., pp 95 – 109

alcoholism in the camps. Men felt ostracized and abandoned by an aid community that seemed to disproportionately prioritize women's issues.¹⁶¹

3.5 Armed Conflicts and Socio-Cultural Insecurity

Gender based violence in northern Uganda today has two key components, one is rooted in the North's history of conflict, and the second is rooted in the contemporary, strident sanctioning of traditional gender and patriarchal power-dynamics in an a postwar society that is less community oriented than it was before the war. Two decades of war, displacement, and differentially motivated humanitarian emergency relief aid deeply upset traditional Acholi family values, cultural frameworks for monitoring social behaviour, gender roles and power relationships, claims to land and individuals' agency in pursuing economically viable livelihoods. Further to this, the population became conditioned, if not somewhat desensitized to rape, a common characteristic of sexual violence perpetrated during all of the internal conflicts that have taken place throughout the Great Lake region of Africa.¹⁶² Women's bodies, via rape or defilement by the Lord's Resistance Army and Uganda People's Defence Force alike, were reduced to objectified weapons of war. An environment characterized by such uncertainty, hardship, abduction, displacement and normalized violence saw the gradual supplanting of community-focused motives and decisions with individually oriented ones. After the war, this individualism serves to further alienate people from their community-oriented culture, and it sharpens the inequalities inherent in patriarchal systems that dictate people's access to resources. Although women were subjected to culturally constructed inequalities before the war, the war made these inequalities more pronounced by eroding the positive community structures that formerly protected women from being altogether excluded from secure livelihoods.¹⁶³

Many traditional reconciliation ceremonies, as well as socio-cultural norms that protected women and children (even if they were disempowered in other ways such as the lack of control over property ownership) lost their foothold in society during the internal conflict. Weakened ties to traditional socio-cultural institutions frustrated people's ability to cope with social problems that lack correlates to the

¹⁶¹ Rabwoni, O. (2002). Reflections on youth and militarism in Contemporary Africa. In A. de Wall & N. Argenti (Eds.), *Young Africa: Realising the Rights of Children and Youth* (pp. 155-169). Trenton, NJ: Africa World Press, Inc.

¹⁶² Annan, J., Blattman, C., Carlson, K., & Mazurana, D. (2008). *The state of female youth in northern Uganda: findings from the survey of war-affected youth (SWAY) phase II*.

¹⁶³ Rutazaa, A. (2005). *'Tanzanian Women and Access to Law: The Case of Kilimanjaro'*, Durham, North Carolina, Terry Sanford Institute of Public Policy, Duke University

pre-war environment. One common source of mass anxiety was the displacement of adults' and elders' roles as revered and empowered members of the community.

Displacement robbed adults of the ability to provide secure and stable environments for their children and children, raised in an environment of dangerous uncertainty, grew up without adult role models.¹⁶⁴ Today, youth are a source of high social anxiety owing to their lack of respect for their elders. Other sources of anxiety include, but are not limited to the challenges of negotiating dual identities and the inversion of traditional gender roles, specifically, the emergence of female-headed households and its impacts on men's "collapsing masculinities". As a result, the Acholi engaged alternative ways of coping in a landscape rife with anxiety, trauma and abuse. If the coping mechanism(s) that enabled people to "live with bad surroundings" were in and of themselves bad and unhealthy (i.e. exerting excessive control over household interactions, asserting masculinity via sexual harassment or abuse, becoming alcohol dependent or engaging in transactional, or, "survival sex") a new set of social problems is likely to emerge in the post conflict environment when these adaptive strategies are no longer needed or beneficial and this is exactly what happened. The trauma of government-induced displacement was complemented by the equally traumatic lack of government-assistance in post-conflict resettlement.¹⁶⁵

3.6 Conclusion

International Humanitarian Law has come in to minimize the effects of armed conflicts by coming up with different principals that are intended to protect humanity from suffering the effects of armed conflicts. Despite this effort as manifested in different laws, the enforcement by states and people involved in armed conflicts is still lacking and this has led to continued suffering of humans in countries faced with armed conflicts of which ever nature.

¹⁶⁴ Lock, R. (2008). A Reporter's Notebook: Lost Culture in Uganda [Radio], World Vision Report. Uganda: World Vision.

¹⁶⁵ Gonzalez-Brenes, M. (2004). 'Domestic Violence and Household Decision-making: Evidence from East Africa', Ph.D. Dissertation, Department of Economics, University of California Berkeley

CHAPTER FOUR

MECHANISMS PUT IN PLACE BY THE INTERNATIONAL COMMUNITY TO MINIMIZE EFFECTS OF ARMED CONFLICTS ON WOMEN, CHILDREN AND OTHER PROTECTED PERSONS UNDER INTERNATIONAL HUMANITARIAN LAW

4.0 Introduction

Over the last two hundred years, there has been an evolution and emergence of a strong and expansive body of law designed to govern situations of armed conflict when, for all intents and purposes, all other order has broken down. Several key themes, or overarching principles, dominate this body of law, which is referred to as international humanitarian law (IHL). Three important threads running through IHL are: the limitation of the means of warfare; the prevention of unnecessary suffering; and the restriction of damage to military targets. All three of these threads are interrelated and have overlapping areas of concern: this serves to emphasize both their mutual and independent importance.

This chapter will explore each of these themes in turn. The first theme, the limitation on the means of warfare, emphasizes that the means of warfare are not unlimited. Rather, restrictions are placed on military actors as to the types of weapons they may and may not use in conflicts. The second theme, the prevention of unnecessary suffering, seeks to limit warfare so as to avoid the infliction of superfluous harm and suffering to both combatants and civilians. It limits military actors to the minimum means necessary to achieve victory and protects humanitarian considerations in the conduct of hostilities. Third, military actors are restricted to targeting and attacking combatants and military objectives. They must at all times distinguish civilians and civilian objects from combatants and military objectives. Next, the principles of precaution and proportionality will be examined. The former demands that all 'feasible precautions' are taken to avoid damage to civilian objects and civilian casualties. The latter demands a balancing assessment which weighs the military advantage, or military necessity, of an operation with the damage that will be inflicted, particularly in terms of incidental, or collateral, damage to civilians. Finally, the two key considerations of IHL – military necessity and humanity – are examined, along with the inherent tension between the two concepts.

4.1 Limitation on the Means of Warfare

Enshrined in Article 35(1) of Additional Protocol I 1977 is the rule that “[i]n any armed conflict, the right of the Parties to the conflict to choose methods or means of warfare is not unlimited.”¹⁶⁶

That the methods and means of warfare are not unlimited is also a widely embraced key tenet of customary IHL.¹⁶⁷ In its most simple form, the limitation on means of warfare is seen in the wide array of weapon ban conventions in existence: from a prohibition on expanding bullets in the Hague Convention 1899¹⁶⁸ to the prohibition of asphyxiating, poisonous and other gasses by Convention in 1925,¹⁶⁹ to a ban on blinding lasers in 1995,¹⁷⁰ the Landmine Ban of 1997,¹⁷¹ and the cluster munitions ban of 2008.¹⁷² These are but a few of the means of warfare subject to specific restriction or outright prohibition.¹⁷³

While the principle that the methods and means of warfare are not unlimited is established law, this does not mean that conventions restricting, limiting or banning weapons are always easily adopted. They are often the product of lengthy negotiations and not all achieve universal support. The case of landmines, and more recently cluster munitions, are prime examples. Both are currently the subject of separate agreements prohibiting their use, but many key States are not party to these agreements, such as the

¹⁶⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3.

¹⁶⁷ Christopher Greenwood, “The Law of War (International Humanitarian Law)” in Malcolm D Evans, ed, *International Law*, 2d, (Oxford: Oxford University Press, 2006) 783 at 795.

¹⁶⁸ Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899 reprinted in *The Laws of Armed Conflict: A Collection of Conventions, Resolutions, and Other Documents*, ed D Schindler and J Toman (Boston: Martinus Nijhoff Publishers, 2004) 69-93

¹⁶⁹ Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous, or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 UST 571, 94 LNTS 65.

¹⁷⁰ United Nations Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 13 October 1995, United Nations CCW/CONF.I/7.

¹⁷¹ Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction, 18 September 1997, reprinted in IRRC, No 320, September-October 1997, pp. 563-578.

¹⁷² Convention on Cluster Munitions, 30 May 2008, CCM/77, available at: <http://www.clusterconvention.org/files/2011/01/Convention-ENG.pdf>.

¹⁷³ Other examples include the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (Biological Weapons Convention), 10 April 1972, 1015 UNTS 163; 11 ILM 309 (1972); and, the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction (Chemical Weapons Convention), 3 September 1992, 1974 UNTS 45; 32 ILM 800 (1993).

United States, China, and Russia. These are major world powers and all stockpile, produce, and have used cluster munitions in conflict.¹⁷⁴

In the case of the Landmine Ban, the process to create the Convention was well publicized with the support of a great number of states and was an important moment for the rise of non-governmental organizations [NGOs], which were integral in championing the cause to a successful conclusion.¹⁷⁵ Unfortunately, not all States chose to become parties to the Convention. These non-party states include China, India, Pakistan, Russia, Ukraine, and the United States.¹⁷⁶ This is of concern because it is estimated that these states have more than 157 million stockpiled landmines amongst them.¹⁷⁷

Additionally, their resistance to accept the ban could provide a barrier to a customary prohibition developing. It is often the case, where States hesitate or refrain from participating in weapons bans, they do so on the grounds that the weapon in question has military utility that makes it an essential part of a military's arsenal.¹⁷⁸

This is an eloquent illustration of a key tension in IHL between claims of military necessity and the dictates of humanity. On the one hand, military actors want to use whatever means are available to them to achieve military victory. On the other hand, the dictates of humanity seek to protect those who do not participate in hostilities from the harms of military action, particularly where these military operations are, perhaps, excessive.

4.2 Prevention of Unnecessary Suffering

The limitation on means of warfare is closely linked to a second thread in IHL: the prevention or avoidance of unnecessary suffering. The International Court of Justice [ICJ] has referred to the

¹⁷⁴ Human Rights Watch, "Cluster Munitions Information Chart" (2010),

¹⁷⁵ Maxwell A Cameron, Brian W Tomlin, and Bob Lawson, eds, *To Walk Without Fear: The Global Movement to Ban Landmines* (Oxford: Oxford University Press, 1998).

¹⁷⁶ ICRC, "Landmine Stockpile Destruction", (December 2006), available at:

<http://www.icrc.org/eng/resources/documents/legal-fact-sheet/mines-destruction-factsheet-010906.htm>.

¹⁷⁷ ICRC, "Landmine Stockpile Destruction", *ibid*.

¹⁷⁸ For example, during the Kosovo conflict, the United Kingdom and United States defended the use of cluster munitions by emphasizing the military utility of the weapon, that they possess "exceptional effectiveness against specific types of targets". See Richard Moyes, "Cluster Munitions in Kosovo: Analysis of use, contamination and casualties" (2007) at 25, available at:

<http://www.landmineaction.org/resources/Cluster%20Munitions%20in%20Kosovo.pdf>

prohibition on causing unnecessary suffering to combatants as the second cardinal principle of humanitarian law.¹⁷⁹ The terms 'superfluous injury' or 'unnecessary suffering' appear extensively in instruments of IHL¹⁸⁰ and it is firmly established in customary IHL that the use of weapons causing superfluous injury or unnecessary suffering is expressly forbidden.¹⁸¹ This concept was first codified in Article 16 of the Lieber Code of 1863, written during the American Civil War, which states, Military necessity does not admit of cruelty -- that is, the infliction of suffering for the sake of suffering or for revenge, nor of maiming or wounding except in fight, nor of torture to extort confessions. It does not admit of the use of poison in any way, nor of the wanton devastation of a district.¹⁸²

This tenet was first codified in a treaty in the preamble to the 1868 St. Petersburg Declaration, which states that "the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable" goes beyond the legitimate means of warfare.¹⁸³

Now, nearly 150 years later, the concept is solidly established by convention and customary law as an inviolable rule of IHL.¹⁸⁴

It exemplifies efforts to protect principles of humanity in armed conflict by limiting the legitimate means of warfare to the minimal necessary to secure victory. Such victory should never be achieved by inflicting unnecessary cruelty and suffering which serves no purpose and provides no additional legitimate benefit to military efforts.

¹⁷⁹ Jean-Marie Henckaerts and Louise Doswald-Beck, "Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering" in Customary Humanitarian Law Vol I: Rules (Cambridge: ICRC and Cambridge University Press, 2009)

¹⁸⁰ Additional Protocol I Article 35(2); Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980,

¹⁸¹ Jean-Marie Henckaerts and Louise Doswald-Beck, "Practice Relating to Rule 70. Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering" in Customary Humanitarian Law Vol I: Rules (Cambridge: ICRC and Cambridge University Press, 2009)

¹⁸² US War Department, General Orders 100: Instructions for the Government of Armies of the United States in the Field (1863) [Lieber Code],

¹⁸³ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868 reprinted in The Laws of Armed Conflicts, eds, D Schindler and J Toman (Boston: Martinus Nijhoff Publisher, 1988) 102.

¹⁸⁴ For example, Article 35(2) of Additional Protocol I states "It is prohibited to employ weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering." While Article 13 of the fourth Geneva Convention states that the provisions of Part II are "intended to alleviate the sufferings caused by war."

4.3 Restriction to Military Targets

The most important thread running through IHL, and the cardinal principle of IHL according to the ICJ, is the protection of civilians and civilian objects, with the requirement of distinction between military and civilian, combatant and non-combatant targets.¹⁸⁵

The primacy of the principle of distinction represents the overarching and allen compassing need in IHL to preserve the principles of humanity from being completely subordinated to interests of military necessity. While war may be a chaotic state in which traditional law and order have broken down, under this principle, civilians and civilian objects are not legitimate targets for belligerents. It is for this reason that IHL bans indiscriminate attacks.¹⁸⁶

The principle of distinction is first articulated in the preamble to the 1868 St. Petersburg Declaration, which states that “the only legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy”.¹⁸⁷

It follows that, if the only legitimate target is opposing military forces, then one must be able to distinguish between opposing military forces and other individuals or objects which do not fall under that heading.

The principle of distinction therefore requires that belligerents, or combatants, and their military objects be distinguished from civilians and civilian objects. This basic rule is codified in Article 48 of Additional Protocol I 1977 and states as follows, In order to ensure respect for and protection of the civilian population and civilian objects, the Parties to the conflict shall at all times distinguish between the civilian population and combatants and between civilian objects and military objectives and accordingly shall direct their operations only against military objectives.¹⁸⁸

Civilian and civilian population are defined in Article 50 of the same Protocol, which states: Art 50. Definition of civilians and civilian population 1. A civilian is any person who does not belong to one of

¹⁸⁵ International Court of Justice, Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons, UN document A/51/218 at para 78. [hereinafter Nuclear Weapons case]

¹⁸⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3.

¹⁸⁷ Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight. Saint Petersburg, 29 November / 11 December 1868 reprinted in *The Laws of Armed Conflicts*, eds, D Schindler and J Toman (Boston: Martinus Nijhoff Publisher, 1988) 102.

¹⁸⁸ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 UNTS 3.

the categories of persons referred to in Article 4 (A) (1), (2), (3) and (6) of the Third Convention and in Article 43 of this Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.

2. The civilian population comprises all persons who are civilians.

3. The presence within the civilian population of individuals who do not come within the definition of civilians does not deprive the population of its civilian character.¹⁸⁹

It is important to note that, in Article 50(1), a presumption is created in favour of determining someone to be a civilian where there is doubt as to their status. This is important because it means that a soldier must be certain of the combatant status of an individual before that individual may become a legitimate target of attack.

The principle of distinction applies not only to distinguishing between combatants and non-combatants, or civilians, but also in terms of objects. Belligerents must distinguish between military objectives and civilian objects, with the latter barred from being the subject of attack. Military objectives are defined in Article 52(2) of Additional Protocol I, which states:

*Attacks shall be limited strictly to military objectives. In so far as objects are concerned, military objectives are limited to those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage.*¹⁹⁰

This definition is also a rule of customary IHL, according to Rule 8 of the ICRC Study on customary IHL.¹⁹¹

Rule 8 does not provide any elaboration on the content of the definition found in Article 52(2), though the commentary on Rule 8 does provide insight into how the definition is addressed in many military

¹⁸⁹ Ibid article 50

¹⁹⁰ Additional Protocol I, ibid at Article 52(2).

¹⁹¹ ICRC Study, supra note 49 at "Rule 8. Definition of Military Objectives".

manuals of states. For instance, many military manuals “state that the presence of civilians within or near military objectives does not render such objectives immune from attack.”¹⁹²

Also, “numerous military manuals and official statements consider that an area of land can constitute a military objective if it fulfils the conditions contained in the definition.”¹⁹³

However, it should be noted that there are differing interpretations of the definition of military objectives, centering primarily around the understanding of the phrases “effective contribution” and “military advantage”. For example, the United States interprets both phrases more broadly than other states and entities such as the International Committee of the Red Cross [ICRC].¹⁹⁴

Those states adopting a broad interpretation tend to consider the military advantage of an attack as a whole rather than on the basis of individual parts of the attack.¹⁹⁵ This means that the advantage of individual parts of the attack may in fact be uncertain, so long as there is a definite overall advantage to the larger operation as a whole. Furthermore, the ICRC study found that military manuals of states, including the United States, Australia and Canada, do not find the presence of civilians in or near an objective as rendering the objective immune from attack, such as in the case of civilians working in a munitions factory.¹⁹⁶

The definition of civilian object found in Article 52(1) of Additional Protocol I does add somewhat to our understanding of how to distinguish military from civilian objects. While Article 52(1), defined above, merely provides that civilian objects are all objects which are not military objectives and are prohibited from being the subject of attack or reprisal¹⁹⁷, article 52(3) provides an important addition:

¹⁹² ICRC Study, *ibid* at “Rule 8”. The list of state military manuals includes Australia, Canada, Colombia, Croatia, Ecuador, Germany, Hungary, Madagascar, Netherlands, New Zealand, Spain, Switzerland and the United States.

¹⁹³ ICRC Study, *ibid* “Rule 8”. The list of state military manuals includes Australia, Belgium, Benin, Ecuador, France, Italy, Madagascar, Netherlands, New Zealand, Spain, Sweden, Togo, United Kingdom and the United States. Official statements are noted from the following states Belgium, Canada, Federal Republic of Germany, France, Italy, Netherlands, New Zealand, Pakistan, Spain, United Kingdom and the United States.

¹⁹⁴ Virgil Wiebe, “Footprints of Death: Cluster Bombs as Indiscriminate Weapons Under International Humanitarian Law” (2000) 22 Mich J Int’l L 85 (HeinOnline) at 100-103.

¹⁹⁵ ICRC Study, *supra* at “Rule 8. Definition of Military Objectives”.

¹⁹⁶ ICRC Study, *ibid*.

¹⁹⁷ Additional Protocol I, *supra* at Article 52(1).

In case of doubt whether an object which is normally dedicated to civilian purposes, such as a place of worship, a house or other dwelling or a school, is being used to make an effective contribution to military action, it shall be presumed not to be so used.¹⁹⁸ This paragraph creates an important presumption in favour of determining an object to be civilian. Such objects therefore must be protected from attack where there is doubt as to whether they are being used to make an effective contribution to military action. If a civilian object is used for a military purpose, it can become a legitimate target for military attack, but careful assessment must be made and all feasible precautions taken to avoid attacking a civilian object. The ban on indiscriminate attacks is an established norm of customary IHL¹⁹⁹ and is also codified in Article 51(4) of Additional Protocol I 1977. Article 51(4) of Additional Protocol I defines indiscriminate attacks as follows: Indiscriminate attacks are:

- (a) those which are not directed at a specific military objective;
- (b) those which employ a method or means of combat which cannot be directed at a specific military objective; or
- (c) those which employ a method or means of combat the effects of which cannot be limited as required by this Protocol.²⁰⁰

This means that belligerents must not be indiscriminate either in their target selection or in their choice of weapon. In the ICRC Study on customary IHL indiscriminate attacks are covered under Rules 11 (prohibition of indiscriminate attacks) and 12 (definition of indiscriminate attacks).²⁰¹

One key difference between the definition in Article 51(4) of Additional Protocol I (above) and Rule 12 of the ICRC study is that under 51(4)(c) it states “cannot be limited as required by this Protocol” whereas under customary IHL, it is effects which cannot be limited as required under international humanitarian law. This is an important distinction that increases protections beyond the scope of Additional Protocol I to include all conventional and customary rules of IHL, thereby incorporating not only protections included in Additional Protocol I but also the entire body of protections contained in customary IHL. This is particularly important because customary international law binds every state in

¹⁹⁸ Additional Protocol I, *ibid* at Article 52(3).

¹⁹⁹ ICRC study, *supra* at “Rule 11. Indiscriminate Attacks”.

²⁰⁰ Additional Protocol I, *supra* note 4 at Article 51(4).

²⁰¹ ICRC Study, *supra* at “Rule 11. Indiscriminate Attacks” and “Rule 12. Definition of Indiscriminate Attacks”.

the world automatically, whether they are party to a treaty codifying this custom or not.²⁰² Rule 71 of the ICRC Study on customary IHL expressly prohibits weapons that are by their very nature indiscriminate.²⁰³

This is important because it means that militaries may not employ weapons that cannot distinguish between civilians and combatants or between civilian objects and military objectives, although, deciding whether a particular weapon is prohibited due to indiscriminacy where there is no additional ban on the weapon itself remains uncertain.²⁰⁴ This risks ambiguity in practice if some states believe a weapon may be prohibited on grounds of indiscriminacy, while others feel a weapon is legal until otherwise prohibited by a specific weapons ban.

4.4 Military Necessity and Humanity

Military necessity and humanity are the twin pillars of IHL. No military action can be taken in conflicts without performing the delicate, or not so delicate as the case may be, dance of evaluation back and forth between these two values. As noted above, this is often a difficult task, as the two values do not often partner easily.²⁰⁵ Military necessity justifies all military action in accordance with IHL, provided the principle of proportionality is respected, in order to defeat one's opponent in an economical and efficient manner.²⁰⁶ Meanwhile, humanity prevents all military action which is unnecessary to defeating one's opponent if the action is disproportionate to military gains.²⁰⁷ While it might seem straightforward to some, at least on paper, it is a very complicated determination involving numerous conflicting and seemingly unanswerable issues. "Force preservation is a crucial concern for the military" notes Amnesty International, "[b]ut can this consideration take precedent over legal obligations to protect civilians?"²⁰⁸ For Amnesty International it would seem the answer is a resounding, "No!",²⁰⁹ but it is not so simple as that. One must remember that IHL, by incorporating the principles of military necessity, humanity, and

²⁰² Antonio Cassese, *International Law*, 2d (Oxford, UK: Oxford University Press, 2005) at 157.

²⁰³ ICRC Study, *supra* at "Rule 71 Weapons That Are by Nature Indiscriminate"

²⁰⁴ ICRC Study, *ibid* "Rule 71".

²⁰⁵ Michael N Schmitt, "The Principle of Discrimination in 21st Century Warfare" (1999) 2 *Yale Hum Rts & Dev LJ* 143 (HeinOnline) at 150. [hereinafter Schmitt (1999)]

²⁰⁶ Waldemar A Solf, "Protection of Civilians Against the Effects of Hostilities under Customary International Law and Under Protocol I" (1986) 1 *Am UJ Int'l L & Pol'y* 117 (HeinOnline) at 128.

²⁰⁷ *ibid*

²⁰⁸ Amnesty International, 'Collateral Damage' or Unlawful Killings? Violations of the Laws of War by NATO During Operation Allied Force (2000),

²⁰⁹ Amnesty International criticizes what it sees as an unbalanced prioritization to avoid force casualties at the cost of civilian casualties and damages. See, Amnesty International. "Collateral Damage", *ibid* at 17.

proportionality, has necessarily introduced a certain amount of balancing, flexibility, and sometimes ambiguity, into armed conflict.

Bolstering the pillar of humanity in IHL is what is known as the Martens Clause. This Clause originates in the 1899 Hague Convention and reads as follows, Until a more complete code of the laws of war is issued, the high contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.²¹⁰ It recognizes the difficulty in addressing all potential situations that might arise in armed conflict in the provisions of a treaty, thereby providing protections in context not necessarily expressly covered by treaty. Since its original articulation in 1899, the Clause has been rearticulated in the Geneva Conventions, its Additional Protocols and many other IHL treaties.²¹¹

The Martens Clause was recognized as a rule of customary international law by the ICJ in its Nuclear Weapons Advisory Opinion.²¹² Judge Shahabuddeen, in his dissenting opinion from that case, discussed the Martens clause and concluded that, in the context of armed conflicts, “the Martens Clause provides authority for looking beyond treaty law and custom to consider principles of humanity and the dictates of the public conscience.”²¹³

This position is supported by the International Law Commission [ILC], which has stated that the clause “provides that even in cases not covered by specific international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience.”²¹⁴ As important a rule as the Martens Clause is, Rupert Ticehurst notes that it is “subject to a variety of interpretations”.²¹⁵

²¹⁰ Gary D Solis, *The Law of Armed Conflict: International Humanitarian Law in War* (New York: Cambridge University Press, 2010) at 53

²¹¹ Solis, *ibid* at 53.

²¹² International Court of Justice, *Advisory Opinion, Legality of the Threat or Use of Nuclear Weapons*, UN document A/51/218 at para 78. [hereinafter *Nuclear Weapons case*]

²¹³ *Nuclear Weapons case*, *ibid* (Judge Shahabuddeen, dissent).

²¹⁴ UN Report of the International Law Commission on the Work of its Forty-sixth Session, 2 May -22 July 1994, GAOR A/49/10, p. 317.

²¹⁵ Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” (1997) *International Review of the Red Cross* No 317,

These interpretations range from more narrow interpretations which conceive of the Clause as a mere “reminder that customary international law continues to apply after the adoption of a treaty norm”, to the most expansive interpretations which see the Clause as mandating that “conduct in armed conflicts is not only judged according to treaties and custom but also to the principles of international law referred to by the Clause.”²¹⁶ Despite these varying interpretations, the existence of the Martens Clause provides strong support for the inclusion of the laws, or principles, of humanity in IHL.

4.5 Conclusion

Much as the international community has included the above protected principals in international laws and have been treated as ones preemptive norms of international law among states in the world, armed conflicts are still a threat to humanity as civilians, women, children and other protected persons continue to suffer the negative impacts of armed conflicts like rape, death, refugee and other effects. To minimize this the international laws should be adhered to by the member states.

²¹⁶ Rupert Ticehurst, “The Martens Clause and the Laws of Armed Conflict” (1997) *International Review of the Red Cross* No 317,

CHAPTER FIVE

REFORMS AND RECOMMENDATIONS

5.1 Recommendations

To state under consideration in this work, I am going to recommend following issues. These are,

- Those involved in committing crimes against humanity under international law should receive particular attention in transitional justice mechanisms.
- There should not be any amnesty mechanism for those involved in crime against humanity in time of conflict.
- Children and women who are accused of crimes allegedly committed while they were associated with rebels should be considered primarily as victims of offences, not only as perpetrators. These children and women must be treated accordance with international law in a framework of restorative justice and social rehabilitation, consistent with international law. Any judicial proceedings involving child and women soldiers must be within a framework of restorative justice that guarantees the physical, psychological and social rehabilitation of the child and the woman.
- In Uganda there is not any truth seeking mechanism, in this context there will need to establish truth-seeking and reconciliation mechanism. In addition, children's involvement should be promoted and support and their rights protect throughout the whole process.
- While doing disarmament, demobilization and reintegration (here after DDR) process, special provision should be made for children and women as the most affected human beings. These should include special measures to ensure children's protection from exploitation and re-recruitment and address the special needs of girls and children with disabilities.
- Child and women soldier must be protected from arbitrary detention, torture and other punitive measures, in accordance with the convention on the right of the child and international juvenile justice standards.
- Children who have been affected by conflict and children who have been associated with rebels are likely to have a variety of health-related needs. As soon as release process, all children should undergo assessment of their physical and psychological trauma.
- Education, vocational and skills training or opportunities should be granted to all conflict affected people.

- Educational activities should take into account the peoples lost educational opportunities. People with disabilities should be treated equally with others.
- For those responsible for unlawfully recruiting or using children in time of conflict should be brought in front of national court in accordance with international law. States should ensure that perpetrators of violence against children including sexual violence against girls are prosecuted.
- The international community through the United Nations should continue to work to follow up on the Military conflicts between countries. There should be observers to accompany the military forces when they occupy a certain country, to ensure that those forces comply with the rules of the Humanitarian Law completely, and to issue reports of non-humanitarian behaviors, if any are exercised by American forces in Iraq, Israeli forces in Palestine, or any occupying anywhere. The UN Security Council, and General Assembly should review those reports promptly, and take corrective actions.
- Non-government organizations, like the Red Cross and Red Crescent, Human Rights Watch, and Amnesty International, should be permitted to enter the occupied territories, and the prisons, and get reports about the conditions.
- The international community should compensate all persecuted, tortured, and raped women, and all women who have lost their husbands and children, and to aid women, the international community should establish a monetary fund that would be funded by the wealthy countries.
- The basic system for the International Criminal Court year 1998, should be modified to give it the authority to interfere in international and internal conflicts in order to observe events as they transpire, and protect citizens from military operations.
- Ugandan government should create conditions conducive to the return in safety and with dignity of the persons including children displaced from their home. In addition, government should make particular efforts to facilitate the enrolment of displaced children in school.
- The Security Council should put a strong emphasis on implementing Responsibility to Protect as an international norm that in future would legally compel states to meet their 'responsibility to protect' obligations. Around the world, there are many ongoing conflicts in which civilians are facing mass atrocity crimes and governments have shown unwillingness or inability to protect their population or are themselves the perpetrator and the Responsibility to Protect do not apply while they fit within its scope. As can be seen from the case of the EasternDRC conflict, civilians continue to suffer persistent violence by armed groups characterized by mass atrocities

such as sexual violence and gender-based violence as well as mass killing and abduction and recruitment of children into armed forces when the application of Responsibility to Protect could have helped to adequately respond to this situation. The role of Responsibility to Protect within the Protection of Civilians (PoC) concept needs to be clarified. The ambiguities surrounding the two concepts in face of mass atrocity crimes must be elucidated.

- The way to deal with governments who are not perpetrators but who failed to protect their population should be reviewed. The Security Council should avoid using ambiguous and opaque language when it is urging concerned states to fulfill their primary obligation to protect civilians under Responsibility to Protect framework. As to the case of the DRC, the Security Council should be more severe with the Congolese government as to its obligation to put an end to the continual cycle of violence in eastern provinces, particularly to reform its armed forces which are also involved in commission of mass atrocity crimes against the civilian population.
- A more expansive interpretation of victim reparations under Article 75 of the Rome Statute of International Criminal Court should be taken into account in order to allow victims of mass atrocity crimes for which the prosecutor has failed to prove to be provided assistance to receive reparation and compensation. For example, when there exists sufficient evidence that a person is a victim or a survivor of mass atrocity crimes of which the perpetrator is accused before the court, reparation should be awarded regardless of whether the accused has been convicted or not. This would allow victims of mass atrocity crimes to rebuild their lives and dignity.
- As many victims of atrocity crimes are not considered in the Rome Statute framework, states should be encouraged to set up mechanisms to ensure that the harm that victims of mass atrocity crimes have suffered will be recognized and that they will be granted reparations to rebuild their lives. In this context, states should be compelled to fulfill their responsibility to rebuild when they have failed to protect their population from mass atrocities.
- Human rights and humanitarian principles should be promoted in states affected by armed conflicts. Both state and non-state armed forces should be aware of their obligations to protect civilians and be trained using basic language in the legal regime applicable to armed conflict. As in the case of the DRC, where many combatants have never been to school, it would be difficult even impossible for them to adequately understand the complexities of the legal regime applicable to armed conflict. Even some high-ranking commanders have only a rudimentary knowledge of the laws of armed conflict.

- The current legal framework in relation to the protection of civilians from atrocity crimes is insufficient and inadequate to modern conflicts. Consequently, thousands of civilians continue to be the primary victims of mass atrocity crimes committed by both state and non-state armed groups. In situations of armed conflict, belligerents do not take all feasible measures to protect civilians both in military operations and against the effects of hostilities as required by international humanitarian law. As previously mentioned, the lack of adequate infrastructures to implement humanitarian principles and political will are the main cause of serious suffering of civilians affected by armed conflict. As the ICRC observes:

*The adequacy of International Humanitarian law has on occasion been challenged not only in terms of its ability to encompass new realities of organized armed violence within existing classifications, but also in terms of the existence of a sufficient body of substantive norms and its applicability in a given situation.*²¹⁷

While states have a duty to implement international humanitarian law and to ensure that its principles are respected, there is a lack of awareness of the law of armed conflict on behalf of armed and fighting forces. As Pfanner comments:

*The implementing measures required in peacetime to back up the obligation to spread knowledge of the Geneva Conventions and the Protocols thereto 'as widely as possible' are the training of qualified staff, the deployment of legal advisers in armed forces, emphasis on the duty of commanders and special instruction for the military and authorities who may be called upon to assume relevant responsibilities.*²¹⁸

Therefore, new strategies should be developed to ensure that people affected by armed conflict are protected by the laws. It is clear that the current legal framework on protection of civilians in armed conflict has proven itself to be inadequate. As mentioned above, without concrete measures for implementation of the International Humanitarian Law and International Human Rights Law, fighting forces cannot be expected to fully comply with the rules protecting people affected by armed conflict.

²¹⁷International humanitarian law and the challenges of contemporary armed conflicts', Document prepared by the international Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007,

²¹⁸Tony Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', International Review of the Red Cross, vol. 91, no. 874, June 2009, p. 283.

5.2 Conclusion

It is clear that the Responsibility to Protect has reinforced the current legal framework with regard to the protection of civilians from mass atrocities and that the new norm has become an integral part of the global security agenda, there must be a move from traditional mechanisms to practicable and workable strategies to address any humanitarian crisis.

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