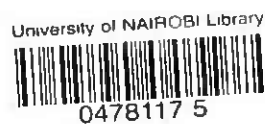


**PROTECTION OF CIVILIAN IN ARMED CONFLICTS:
A CASE STUDY OF SOMALIA
(1991-2008)**

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DECLARATION

THIS PROJECT PAPER IS MY ORIGINAL WORK AND HAS NOT BEEN PRESENTED AT ANY OTHER UNIVERSITY FOR THE AWARD OF AN ACADEMIC CERTIFICATE.

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ABBREVIATION USED IN THE STUDY

AMISOM	African Union Mission in Somalia
ARPCT	Alliance for the Restoration of Peace and Counter-Terrorism
ARS	Alliance for the Re-Liberation of Somalia
BIO	British Islamic Orgnaisation
CCW	Certain Conventional Weapons)
HRL	Human Rights Law
I.C.U	Islamic Courts Union
I.I.O	International Immigration Orgnaisation
ICC	The International Criminal Court
IHL	International Humanitarian Law
NDC	National Defence College
NGO	Non Governmental Orgnization
SDM	Somali Democratic Movement
SNA	Somali National Alliance
SPM	The Somali Patriotic Movement
TFG	The Transitional Federal Government
UN	United Nations
UNDP	United Nation Development Programme
UNHCR	United Nations High Commission for Refugees
UNITAF	Unified Task Force
UNOSOM I	United Nations Operation in Somalia I
WFP	World Food Programme

ABSTRACT

The overall objective of the research is to identify the challenges facing international humanitarian law to be respected by the warring parties. There are two sub-objectives, to examine whether and how the existing rules of the International Humanitarian Law should or could be adapted to (more) adequately cover national armed groups, arrive at a recommendation to help states, NGOs and the International Community as well as the competent authorities to provide humanitarian aid and monitor the implementation of international humanitarian law, not to inflict any casualties on civilians, and intervene to solve Somalia's armed conflict. The research is a case study of Somalia 1991-2008. The research is based on three hypotheses, those are, the ignorance of the law by Somalia's combatants significantly impedes efforts to increase respect for international humanitarian law in Somalia's armed conflict, lack of respect for international humanitarian law during armed conflicts affects negatively on the lives of Somalia's civilians, finally, state collapse in Somalia led to the suffering of civilians in armed conflict. The main findings are, international humanitarian law lays down rules that are applicable to both state and non-state actors, the structure of Somalia's conflict impacts negatively on civilian protection and the diversity of conflicts and parties in Somalia makes it very difficult to formulate standard approaches or plans of action for increasing respect for humanitarian law. The main recommendations are, any benefits, or perceived benefits, for specific groups versus other groups of such infusion need to be considered, There are needs to a premium development activities that can contribute to breaking down clan division and clannism, it is important to distinguish between Islam, its

institutions, and the way it is practiced by the majority of the population, and extreme and divisive tendencies pursued by a tiny minority in the name of Islam.

TABLE OF CONTENT

DICLARATIONi
ACKNOWLEDGEMET.....	...ii
LIST OF ABBREVIATION.....	...iii
ABSTRACT.....	...iv
TABLE OF CONTENT.....	...vi
CAHPTR ONE	
BACKGROUND OF THE STUDY.....	1
Introduction.....	1
Statement of the Research Problem.....	5
Objectives of the Study.....	6
Literature Review.....	7
Justification of the Study.....	14
Theoretical Framework.....	15
Hypothesis.....	17
Methodology.....	18
Chapters Outline.....	18
CHAPTER TWO	
THE INTERPLAY BETWEEN INTERNATIONALHUMANITARIAN LAW AND INTERNATIONALHUMAN RIGHTS LAW IN SITUATIONS OF ARMED CONFLICT	
Introduction.....	20
The Overlap of International Human Rights Law and International Humanitarian	

Law in Situations of Armed Conflict.....	21
Extraterritorial Application of Human Rights.....	29
Complementarity and Lex Specialis.....	31
Complementarity: Mutual Reinforcement.....	33
Solving Conflicts of Norms.....	36
Conduct of Hostilities.....	38
Complementarity and Its Limits Regarding Procedural Aspects.....	39
The Legal Framework of Civilian's Protection.....	41
Specific Challenges.....	48
CHAPTER THREE	
THE CASE STUDY: HUMANITARIAN LAW VIOLATION IN SOMALIA CONFLICT	
Introduction.....	54
State-building and collapse.....	55
Civil war in Mogadishu.....	59
Humanitarian Law and Human rights violation.....	63
CHAPTER FOUR	
CONCLUSION AND RECOMMENDATIONS	
Chapters Summary.....	80
General Conclusion.....	85
Recommendations.....	89
SELECTED BIBLIOGRAPHY.....	93
ANNEX-QUESTIONS FOR INTERVIEWS.....	101

CHAPTER ONE

BACKGROUND TO THE STUDY

1.0. INTRODUCTION

The most widely prevalent type of armed conflict today is intrastate in nature and often become internationalized. It involves hostilities between government armed forces and organized non-State armed groups or is carried on among members of such groups themselves. A defining feature of intrastate armed conflict is that it is usually waged by persons familiar with each other's political and economic history, social organization, culture and customs. Unfortunately, it is characterized also by the extreme brutality that so often accompanies fighting among those with a common or shared background.¹

Armed conflict may dramatically increase the number of armed forces and weapons in an area populated by civilians, heightening tension and bringing the conflict close to civilians. The civilian population needs to be protected against dangers arising from the conduct of hostilities and in particular to live free from acts which aim to spread terror, such as indiscriminate attacks. Certain weapons can also have a serious impact on the environment which in turn threatens the means of survival of the civilian population. The preservation of the environment

¹ M. Kidron *The New State of War and Peace*, New York, Simon and Schuster, 1997, p13.

and of public and private property necessary for the health and survival of the population is a necessity.²

The civilian population must be free from threats or acts of violence committed against them by parties to an armed conflict, be it the military, armed groups or police. They also need protection from such acts committed by members of peacekeeping forces or by private individuals, such as members of political parties.

International humanitarian law (IHL) provides the normative framework against which the behaviour of parties to intrastate armed conflicts must be assessed. As far back as 1949, States agreed, in Article 3 common to the four Geneva Conventions, to abide by certain minimum standards in such wars. The provisions of common Article 3 bind all parties to intrastate armed conflicts, including organized non-state armed groups. Common Article 3, which is said to reflect elementary considerations of humanity, has since been supplemented by a number of other treaty provisions, and by customary humanitarian law governing the conduct of parties to non-international armed conflicts.³

Drafting laws is just the first step in ensuring protection for those who do not take part in hostilities, such as civilians, or those who no longer do so, such as wounded or sick members of the armed forces and armed groups. The real challenge has

² J. Fawcett, *Law and Power in International Relations*, London, Faber and Faber, 1982, p57.

³ ICRC, Geneva, Ref No 0923/002, 2008, p36.

always been to make the rules known to the opposing sides and to ensure that they are applied.⁴

One should have no illusions that there are any legal tools or policy arguments that can avail in those instances when the law is being systematically flouted, if the political will to abide by it is lacking. The many different causes of non-international armed conflicts, and the diversity of the participants, also means that those hoping to assist the parties involved in respecting the law must bring to their task patience, wisdom and knowledge it strengthened protection beyond the minimum standards contained in common Article 3.

A number of other treaties of humanitarian law also apply to situations of non-international armed conflict. Among them are the following: the Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices, Protocol II on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW) the Convention for the Protection of Cultural Property in the Event of Armed Conflict, and the Second Protocol to the Hague Convention of 1954.⁵

The rules of customary international humanitarian law, however, fill some important gaps in the regulation of non-international armed conflicts. First, many of the provisions of Additional Protocol II are now considered to be part of

⁴ H. Rosalyn, *Problems and Process: International Law and How We Use It*, London, Oxford University Press, 1994, p21.

⁵ *Ibid*, p28.

customary international law and, thus, binding on all parties to non-international armed conflicts.⁶ These rules include the prohibition of attacks on civilians, the obligation to respect and protect medical and religious personnel, medical units and transports, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, the obligation to respect the fundamental guarantees of persons who are not taking a direct part, or who have ceased to take a direct part, in hostilities, the obligation to search for and respect and protect the wounded, sick and shipwrecked, the obligation to search for and collect the dead, the obligation to protect persons deprived of their liberty, the prohibition of the forced movement of civilians, and specific protection for women and children. The civil war disrupted agriculture and food distribution in southern Somalia. The basis of most of the conflicts was clan allegiances and competition for resources between the warring clans.

Conflict broke out in Somalia by the early 2006 between an alliance of Mogadishu warlords known as the Alliance for the Restoration of Peace and Counter-Terrorism (ARPCT) and a militia loyal to the Islamic Courts Union (I.C.U), seeking to institute Sharia law in Somalia.⁷

Several hundred people, mostly civilians caught in the crossfire, died during this conflict. Mogadishu residents described it as the worst fighting in more than a decade. The Islamic Courts Union accused the U.S. of funding the warlords through the Central Intelligence Agency and supplying them with arms in an effort

⁶ A. S. Abuhyf, *The Public International Law*, Dar Almarifa, Cairo, 1998, p241

⁷ J. Fearon and David Laitin, Ethnicity, Insurgency, and Civil War, *American Political Science Review*, vol. 97, no. 1 February 2003, p11.

to prevent the Islamic Courts Union from gaining power. This study examines the challenges which is facing respectful of International Humanitarian Law and the International Human rights to insure protection of the civilian in armed conflicts, focusing on Somalia conflict as a case study.

1.1. Statement of the research problem

The intrastate armed conflict take place within the borders of States and are waged between a State and organized non-state armed groups or among such groups themselves. The daily life of many civilians caught up in these situations is ruled by fear or the threat of destruction and extreme suffering. The deliberate targeting of civilians, the destruction of civilian property and looting, the forced displacement of populations, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world. The challenges presented by these conflicts are, to a certain extent, related to a lack of applicable rules, but more importantly, to a lack of respect for IHL. Since the overthrow of dictator Mohammed Siad Barre in 1991, Somalia has experienced a nearly uninterrupted state of armed conflict between militias loyal to a rival local warlords. After fourteen failed attempts at establishing a unified, sovereign national government, Somalia's reputation as a "failed state."⁸ International humanitarian law (IHL) is a body of law that provides essential protection for those directly affected by an armed conflict, if it is respected by the

⁸ Interview with a Worker in British Islamic Orgnaisation (BIO) on 17th September in Nairobi

parties to that conflict. Where IHL is not respected, human suffering increases and the consequences of the conflict become more difficult to repair . This study investigates what can be done to bridge this gap between good intentions as embodied by the law and the reality of suffering? What can be done to influence the behaviour of warring parties? What are the challenges? What strategies or approaches have proven successful? What lessons can be learnt from practice?

1.2. Objectives of the study

The overall objective of the research is to identify the challenges facing international humanitarian law to be respected by the warring parties. The sub-objectives are:

- i. It examines whether and how the existing rules of the International Humanitarian Law should or could be adapted to (more) adequately cover national armed groups. In this context, few concrete proposals suggesting which rules should be adapted, and in what sense, were found
- ii. Arrive at recommendation to help states and armed groups involved in armed conflicts, as well as the competent authorities to provide humanitarian aid and monitor the implementation of international humanitarian law, not to inflict any casualties on civilians.

1.3. Literature review

The purpose of this section to analyze the implementation of the Humanitarian Law. There will be diverse literature on Somalia conflict.

a. Literature on Humanitarian Law

According to Mwagiru, conflict is the consequence of the incompatibility of goals of different parties about a particular thing. Conflict transcend time and space. Therefore, it is inevitable in all social systems. Conflicts have both destructive and constructive consequences.⁹ One should have no illusions that there are any legal tools or policy argument that can prevail in those instances when the law is being systematically flouted, if the political will to abide it is lacking.

According to Tocci, the many different causes of intrastate armed conflicts, and the diversity of the participants, also means that those hopping to assist the parties involved in respecting the law must bring to their task patience, wisdom and knowledge it strengthened protection beyond the minimum standards contained in common Article 3.¹⁰

A number of the other treaties of humanitarian law also apply to situations of intrastate armed conflict. Among them are the following: the protocol on prohibitions or Restrictions on the Use of mines, Booby-Traps and other Devices, Protocol II on Prohibitions or Restrictions on the Use of Certain Conventional Weapons (CCW) the Convention for the protection of cultural property in the

⁹ M. Mwagiru, *Conflicts: Theory; Processes and Institutions of Management*, Nairobi. Watermark, 2000, p3.

¹⁰ N. Tocci, *The EU and Conflict Resolution: Promoting Peace in the Backyard*, London and New York, Routledge, 2007, p 137.

Event of armed Conflict, and the Second protocol to the Hague Convention of 1954.¹¹

The rules of customary international humanitarian law, however, fill some important gaps in the regulation of intrastate armed conflicts. First, many of the provisions of Additional protocol II are now considered to be part of customary international law and, thus, binding on all parties to intrastate armed conflicts.

Gasser notes that rules include the prohibition of attacks on civilians, the obligation to respect and protect medical and religious personnel, medical units and transports, the prohibition of starvation, the prohibition of attacks on objects indispensable to the survival of the civilian population, the obligation to respect the fundamental guarantees of persons who are not taking a direct part, or who have ceased to take a direct part, in hostilities, the obligation to search for and respect and protect the wounded, sick and shipwrecked, the obligation to search for and collect the dead, the obligation to protect persons deprived of their liberty, the prohibition of the forced movement of civilians, and specific protection for women and children.¹²

The four conventions, the cornerstone of international humanitarian law, were adopted during the 60th anniversary of the Geneva Conventions on August 12 1949. The Conventions and their Additional protocols embody the most important rules limiting the barbarity of war.

¹¹ H.P. Gasser, *International Humanitarian Law: an Introduction*, in: *Humanity for All*, the International Red Cross and Red Crescent Movement, Berne, Haupt Publishers, 1993, p. 510.

¹² Ibid, p514.

Sixty years on, these treaties continues to provide the best available framework for protecting civilians and those no longer participating in combat. Clarifying the notion of direct participation in hostilities. International humanitarian law hinges on the principle of the distinction between combatants and civilians. The latter are entitles to full protection from attack unless they “directly participate in hostilities.”¹³

According to Schondorf, human rights today nobody questions that IHL and human rights law apply during armed conflict, or that they complement and influence each other. While IHL remains that special law applicable during armed conflict, conflicting norms or standards sometimes require interpretation to determine whether a rule of IHL or human rights law prevails in a concrete setting. The Convention on Cluster Munitions – frequently asked questions whether states have adopted a new treaty that prohibits cluster munitions and requires specific action to address their humanitarian consequences.¹⁴

The emblems which use in the service of conflict and disaster victims are, the red cross, red crescent and red crystal emblems are visible symbols of the protection afforded to war victims under the Geneva Conventions and their additional protocols. They also stand for the neutrality of those who bear them and indicate membership of the movement. International humanitarian law, refugee law and

¹³ J. Marie Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, Cambridge, Cambridge University Press, 2005, p 6.

¹⁴ R. Schondorf, “Extra-State Armed Conflicts: Is there a Need for a New Legal Regime?” *New York University Journal of Law and Politics*, Vol. 37, No. 1, Oct. 2005, p. 62.

human rights law are complementary bodies of law that share a common goals, the protection of the lives health and dignity of persons.¹⁵

Doswald notes that, they form a complex network of complementary protections and it is essential that we understand how they interact. But it is important to distinguish the interplay between international humanitarian law and international human rights law in situations of armed conflict. International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practices have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice.¹⁶

According to the Red Cross as guardian of international humanitarian law, a complex role that is closely connected with its own foundation and was later formally entrusted to it by the international community. The article presents various aspects of this role and examines its scope in the contemporary context.

b. Literature on Somalia conflict

According to Abdullahi Somalia is a highly traditional country, due to a series of civil wars (the most recent of which began in 1991 and is ongoing), the country has operated without a central government for almost ten years As a consequence,

¹⁵ Ibid, p 66.

¹⁶ L. Doswald, International Humanitarian Law and Human Rights Law, 293 INT'L REV. RED CROSS 94-119, 1993.p 43.

customary practices have increasingly taken the place of a non-existent legal system. Justice is perceived and applied differently depending on the region, and is based on a combination of systems that includes tribal rules, Islamic Sharia law, and the Penal Code that existed before 1991.¹⁷

According to Samatar, Somalia's history of conflict reveals an intriguing paradox—namely, many of the factors that drive armed conflict have also played a role in managing, ending, or preventing war. For instance, clannism and clan cleavages are a source of conflict—used to divide Somalis, fuel endemic clashes over resources and power, used to mobilize militia, and make broad-based reconciliation very difficult to achieve. Most of Somalia's armed clashes since 1991 have been fought in the name of clan, often as a result of political leaders manipulating clannism for their own purposes. Yet traditional clan elders are a primary source of conflict mediation, clan-based customary law serves as the basis for negotiated settlements, and clan-based blood-payment groups serve as a deterrent to armed violence.¹⁸

According to Paolo, by the end of 1978 the moral authority of the Somali government had collapsed. Many Somalia had become disillusioned with life under military dictatorship and the regime was weakened further in the 1980s as the Cold War drew to a close and Somalia's strategic importance was diminished. The government became increasingly totalitarian, and resistance movements,

¹⁷ M. Abdullahi, *Culture and customs of Somalia*, Westport, Greenwood Press, 2001, p.22.

¹⁸ A. Samatar, *Socialist Somalia: Rhetoric and Reality*, London: Zed Press, 1998, p.137

encouraged by Ethiopia, Sprang up across the country, eventually leading to the Somali Civil War.¹⁹

Assafa notes that, by the end of the Cold War 1990 Somalia saw great changes. President Barre was ousted by combined northern and southern clan-based forces all of whom were backed and armed by Ethiopia. And following a meeting of the Somali National Movement and northern clans' elders, the northern former British portion of the country declared its independence as Somaliland in May 1991; although de facto independent and relatively stable compared to the tumultuous south, it has not been recognised by any foreign government.²⁰

In January 1991, President Ali Mahdi Muhammad was selected by the manifesto group as an interim state president until a conference between all stake holders to be held in Djibouti the following month to select a national leader. However, United Somali Congress military leader General Mohamed Farrah, Aidid, the Somali National Movement leader and the Somali Patriotic Movement leader refused to recognize Mahdi as president. This caused a split between the SNM, USC and SPM and the armed groups Manifesto, Somali Democratic Movement (SDM) and Somali National Alliance (SNA) on the one hand and within the USC forces. This led efforts to remove Barre who still claimed to be the legitimate president of Somalia. He and his armed supporters remained in the south of the country until mid 1992, causing further escalation in violence. The armed conflict

¹⁹ T. Paolo. *The Colonial Legacy in Somalia*. New York: St. Martin's press, 1999, p23.

²⁰ H. Assafa, "Ethnic Conflict in the Horn of Africa: Myth and reality", inhtml file/G/2/Ethnic/12/4/ 2008 p11.

within the USC devastated the Mogadishu area.²¹ The Civil war disrupted agriculture and food distribution in southern Somalia. The basis of most of the conflicts was clan allegiances and competition for resources between the warring clans.

According to Godfrey, the resulting famine caused the United Nations Security Council in 1992 to authorise the limited peacekeeping operation United Nations Operation in Somalia I (UNOSOM I). UNOSOM's use of force was limited to self-defence and it was soon disregarded by the warring factions. In reaction to the continued violence and the humanitarian disaster, the United States organised a military coalition with the purpose of creating a secure environment in southern Somalia for the conduct of humanitarian operations.²² This coalition, (Unified Task Force or UNITAF) entered Somalia in December 1992 on Operation Restore Hope and was successful in restoring order and alleviating the famine.²³

Little notes that, following the civil war the Harti and Tanade clans declared a self-governing state in the northeast, which took the name Puntland, but maintained that it would participate in any Somali reconciliation to form a new central government. Then in 2002, Southwestern Somalia, comprising Bay, Bakool, Jubbada Dhexe (Middle Juba), Gedo, Shabeellaha Hoose (Lower Shabele) and Jubbada Hoose (Lower Juba) regions of Somalia declared itself autonomous,²⁴

²¹ Ibid

²² M. Godfrey, *The Modern African State: Quest for Transformation, Somalia: A Stateless State - What Next?*, New York, Nova Science Publishers, 2001, p132.

²³ Ibid, p141.

²⁴ D. Little Peter, *Life Goes On, Somalia: Economy without State*, Oxford, International African Institute, 2003, p. 138.

although initially the instigators of this, the Rahanweyn Resistance Army, which had been established in 1995, was only in full control of Bay, Bakool and parts of Gedo and Jubbada Dhexe, they quickly established the de facto autonomy of Southwestern Somalia.²⁵

1.4. Justification and Significance

- i. **Academic.** Since the subject matter under study is relative new in terms of time, little has been written on protection of civilians in Somalia armed conflict specially on its challenges. This study contributes in adding to the literature on the subject matter. Future researchers can use this study to develop further studies on protection of civilians in armed conflicts analysis. The study should be able to open other areas in order to develop a better strategy to enhance the protection of civilians in armed conflicts and respectful to International Humanitarian Law and Human Rights Law by the parties in any armed conflict.
- ii. **Policy.** The significance of this research stems from the fact that it discusses a problem that threatens the national security of all African Horn countries and even their existence and enteritis. The problem is ensuring from lack of respect for international humanitarian law in the armed conflict. The reality of millions of civilians caught up in armed conflict is desperate, and civilians are now the main casualties of war worldwide often specifically targeted by warring parties rather than

²⁵ Ibid, p 147.

merely caught up in the fighting. As the researcher belongs to an Africans Horn country and that he works in the military field, the issue of the region's stability in general and the countries of the region in particular, including the researcher's concern with this issue is one that is associated with his work, country and nation, besides being a general concern.

1.5. Theoretical Framework

The study is based on a solidarism international society theory. Fotion's argument of the theory is that states have both a legal right and a moral obligation to intervene forcibly in exceptional circumstances that offend minimum standards against humanity. In addition, the theory argues that domestic and international orders derive their legitimacy and stability from their ability to protect individuals and groups from arbitrary coercion and violence which violates their human dignity.²⁶

Jackson argues that, if the traditional norms of sovereignty and non-intervention are not reviewed by the international community, when government violates human rights values, neither justice for the greater number nor long term domestic and international order will be secured, as suppressed groups and individuals will inevitably revolt against their rulers and internal conflict will spill over into international conflict.²⁷ Contrary to the Idealists' hopes, the nature of international

²⁶ N. Fotion, *War and Ethics*, London, Continuum, 2007, p 36.

²⁷ R. H. Jackson, *The political theory of international society*, Oxford, Oxford University Press, 2001, p68.

relations on what seems to be the war and not harmony and peace, statistics have shown that there are 13 years of war for every year of peace.

Walzer notes ,at the start of the traditional rules of international law is emerging in the seventeenth century (1648), there were no restrictions on the methods of fighting between the warring countries, only those constraints that are spelled out some of the combatants, a choice of their actions, so as to stop the looting in the towns and the granting of women and children, a kind of protection, or what holds the hearts of the «Knights» medieval warriors from the emotions of human grown under special rules Consolingly the wounded and the sick and care for them and should not be finishing them, and not to be subjected to non-combatants, and for the safety of the population of the State of the enemy²⁸

As the principles of Islamic law have moved to some Christians, the scholars advocates compassion and cruelty, such as avoidance of Victoria and Suarez a result, advocates of scholars need to adhere to certain rules of humanitarian in the fight to reduce the brutality of what has been done in the war.

Steinhoff notes, as a result, to mitigate the barbaric customs that were practiced in the wars of that era, including the order of the writings of those saints and men of the church from a clemency and compassion and brought religious systems such as «the Peace of God», and «a truce of God», and was called by the men of the religious meetings and conferences as a result of the cancellation of a number of

²⁸ M. Walzer, *Just and Unjust Wars: A Moral Argument with Historical Illustrations*, 4th ed., New York: Basic Books, 1977, p54.

the customs of war atrocities²⁹ Grotius, however we come to one of the co-traditional international law, where he wrote his book, known as «the law of war and peace» 1623 - 1624, in the light of the terrible experience of the thirty-year religious war, which then swept through Europe.³⁰

It was the view of Grotius, and should be taken into account some of the rules governing the conduct of belligerents, which must be taken into account humanitarian considerations and religious considerations of security and safety Grotius also decided that it would not be defeated and killed only in exceptional cases, dangerous. According to Walzer, It may be destruction of property not only for military reasons are necessary, and such restrictions are the most important part of the writings of Grotius in the law of war, it is represents an important contribution in the rules of international law governing the state of war.³¹Theory of solidarity is relevant because Somalia as a state has failed to have central authority since 1991. The collapse of the state structure has had a serious ramification in terms of health, education, development and security putting a serious threat of the existence of Somali as a society. Therefore international community must emphasize and intervene to restore normalcy.

1.6. HYPOTHESES

1. The ignorance of the law by Somalia combatants significantly impedes efforts to increase respect for international humanitarian law in Somalia armed conflict.

²⁹ Ibid

³⁰ U. Steinhoff, *On the Ethics of War and Terrorism*, Oxford, Oxford University Press, 2007, p 56.

³¹ M. Walzer, *Arguing about War*, London, Yale University Press, 2004, p33.

2. Lack of respect for international humanitarian law during armed conflicts affect negatively on the lives of Somalia civilians.

3. State collapse in Somalia led to the suffering of civilians in armed conflict .

1.7. METHODOLOGY

The study will utilize both primary and secondary data. Primary data will be collected from the field by interviews. Interviews will utilize open ended questions. There will be probing where necessary. The study samples includes personnel from the International Committee of the Red Cross. Secondary data will be obtained by intensive reading and analyzing relevant works that have been published in books, Journals papers print and electronic media, news papers. This method of Data collection is relevant in this study that it examine what scholars have done, and build on their scholarly work instead of repeating what has already been done. This Method critically evaluates works that have been published on the subject matter to show the strengths and weakness with a view of contributing to knowledge. It also critically analysis works that have been published and extract their contribution to the area under study. Hence the research shall adhere to get its literature increase through the given articles over internet that is arriving during research process. The additional literature will immediately come out through the lectures given by lecturers in NDC Auditorium.

1.8. Chapters outline

a. Chapter one. Background to the study.

- b. Chapter two.** The Interplay between International Humanitarian Law and International Human rights in situation of armed conflict.

- c. Chapter three.** The case study: Humanitarian Law violation in Somalia conflict.

- e. Chapter four.** Conclusion .

CHAPTER TWO

THE INTERPLAY BETWEEN INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW IN SITUATIONS OF ARMED CONFLICT

2.0 Introduction

The previous chapter deals with the background of this study. This chapter makes an overview of the interplay between International humanitarian law (IHL) and Human Rights Law (HRL). This chapter offers the fundamental features that distinguish the two bodies of law.

International human rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. Yet, developments in international and national jurisprudence and practice have led to the recognition that these two bodies of law not only share a common humanist ideal of dignity and integrity but overlap substantially in practice. The most frequent examples are situations of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law. Triggering events, opportunities and ideas are key factors in the development of international law. This fact accounts for the fragmentation of international law into a great number of issue related treaty regimes established on particular occasions, addressing specific problems created by certain events. But as

everything depends on everything, these regimes overlap.¹ Then, it turns out that the rules are not necessarily consistent with each other, but that they can also reinforce each other. Thus, the question arises whether there is conflict and tension or synergy between various regimes. The chapter will discuss the overlap of International Human Rights Law and International Humanitarian Law in situations of armed conflict, developments in international jurisprudence, extraterritorial application of human rights, complementarity and its limits regarding procedural aspects and the legal framework of civilian's protection.

2.1 The Overlap of International Human Rights Law and International Humanitarian Law in Situations of Armed Conflict

a. Converging Development of Human Rights Law and Humanitarian Law

Beyond their common humanist ideal, international human rights law and international humanitarian law had little in common at their origin. However, the theoretical foundations and motivations of the two bodies of law differ.

Modern human rights can be traced back to the visionaries of the Enlightenment who sought a more just relationship between the state and its citizens. Human rights were, in their beginning, a matter of constitutional law, an internal affair between the government and its citizens. International regulation would have been perceived as interference in the *domaine réservé* of the state. It remained, with the

¹ H. Raap, *Crisis Management And Humanitarian Protection*, Berlin, Berliner Wissenschafts-Verlag, 2004, p. 37.

exception of minority protection following the First World War, a subject of national law until after the Second World War. With the conclusion of the Second World War human rights became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948.

Humanitarian law, for its part, was primarily based on the reciprocal expectations of two parties at war and notions of chivalrous and civilized behavior,² It did not emanate from a struggle of rights-claimants, but from a principle of charity. The primary motivation was a principle of humanity, not a principle of rights, and its legal development was made possible by the idea of reciprocity between states in the treatment of the other states' troops. Considerations of military strategy and reciprocity have historically been central to its development.³ And while human rights were an internal affair of states, humanitarian law, by its very nature, took its roots in the relation between states, in international law.

After the Second World War, the protection of civilians in the Fourth Geneva Convention, albeit for a large part only those of the adverse or third parties, added a dimension to humanitarian law that drew it much closer to the idea of human rights law, especially with regard to civilians in detention. Also, the revolutionary codification of Common Article 3 to the Geneva Conventions for situations of non international armed conflict brought humanitarian law closer to human rights law, because it concerned the treatment of a state's own nationals. The drafting

² L. Doswald-Beck & S. Vité, *International Humanitarian Law and Human Rights Law*, 293 INT'L REV. RED CROSS, 1993, p.p 94-119.

³Ibid, p 123.

histories, appear to show that the process of elaboration of the Universal Declaration of Human Rights and the Geneva Conventions were not mutually inspired. While general political statements referred to the common ideal of both bodies of law, there was no understanding that they would have overlapping areas of application. It was probably not assumed, at the time, that human rights would apply in situations of armed conflict, at least not in situations of international armed conflict.⁴ Yet, there is a clear reminiscence of war in the debates on the Universal Declaration. Still, the Universal Declaration was meant for times of peace, since peace was what the United Nations sought to achieve.

After the invasion of Hungary by Soviet troops in 1956, the Security Council called upon the Soviet Union and the authorities of Hungary to respect the Hungarian people's enjoyment of fundamental human rights and freedoms.⁵ The situation in the Middle-East, especially, triggered the will to discuss human rights in situations of armed conflict. The Tehran International Conference on Human Rights marked the definite step by which the United Nations accepted the application of human rights in armed conflict. The first resolution of the International Conference, entitled Respect and Enforcement of Human Rights in the Occupied Territories, called on Israel to apply both the Universal Declaration of Human Rights and the Geneva Conventions in the occupied Palestinian

⁴ Th. Meron, *The Humanization of Humanitarian Law*, 94 AM. J. INT'L L. 2000 , p.p 239, 243.

⁵ R. Kolb, *The Relationship between International Humanitarian Law and Human Rights Law: A Brief History of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Convention*, 324 INT'L REV. RED CROSS, 1998, p p, 409-419.

territories.⁶ Then followed the Resolution entitled *Respect for Human Rights in Armed Conflict* which affirmed that even during the periods of armed conflicts, humanitarian principles must prevail. It was reaffirmed by General Assembly Resolution 2444 of 19 December 1968 with the same title. That resolution requested the Secretary General draft a report on measures to be adopted for the protection of all individuals in times of armed conflict. The two reports of the Secretary-General conclude that human rights instruments, particularly the International Covenant on Civil and Political Rights (which had not even entered into force at that time) afforded a more comprehensive protection to persons in times of armed conflict than the Geneva Conventions only.⁷ The Secretary-General even mentioned the state reporting system under the Covenant which he thought may prove of value in regard to periods of armed conflict, already anticipating the later practice of the Human Rights Committee.

The United Nations has also conducted investigations into violations of human rights, for example, in connection with the conflicts in Liberia, Sierra Leone, Israel's military occupation of the Palestinian territories, and Iraq's military occupation of Kuwait. More recently, the Security Council has condemned human rights violations by militias and foreign armed groups in the Great Lakes region, implying human rights violations by troops abroad.⁸ Resolutions of the United Nations General Assembly and the UN Commission on Human Rights have also

⁶ J. Morsink, *World War Two and the Universal Declaration*, 15 HUMAN RIGHTS QUARTERLY, 1993, pp 357, 358

⁷ *Ibid*, p362.

⁸ Commission on Human Rights Resolution, UN Doc. E/CN.4/S5/1 , Oct. 19, 2000, p7.

sometimes referred to human rights with regard to international armed conflict and situations of occupation.⁹

Some newer international treaties and instruments incorporate or draw from both human rights and international humanitarian law provisions. This is the case for: the Convention on the Rights of the Child of 1989 , the Rome Statute of the International Criminal Court the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict 2000, the Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law and most recently the draft Convention on the Rights of Persons with Disabilities.

b. Derogations from Human Rights in Armed Conflict and their Limits

The Universal Declaration of Human Rights is silent in regard to armed conflict. The question of the application of human rights in armed conflict only later arose with the drafting of human rights treaties.

As is well-known, most human rights can be derogated from in time of public emergency, which includes situations of armed conflict. It is a common misconception, however, to dismiss the application of human rights in time of armed conflict, because derogability is understood as entirely suspending the right. This is not what international law says; derogation clauses all limit the possibility

⁹ Commission on Human Right Resolution, UN Doc. E/CN.4/1991/67 , Mar. 6, 1991, p11.

for derogation. Derogations are only permissible to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with states' other obligations under international law and do not involve discrimination solely on the ground of race, color, sex, language, religion, or social origin.¹⁰

There are two formal requirements for the lawfulness of derogations: they must be officially proclaimed and other states party to the treaty must be notified of them. A question that remains open until now is whether the procedural requirements apply to armed conflicts and if so, whether a state that does not comply with them will be held to the full range of human rights.¹¹ State practice does not confirm this understanding with respect to international armed conflict. In such situations, states have not derogated from the European Convention For example former Yugoslavia, Kosovo, Afghanistan, and Iraq. With respect to non-international armed conflict, the practice is mixed, but even when a state has derogated, it is necessary to verify whether it was done so on the grounds that there was a non-international armed conflict. Quite frequently, states deny the existence of conflicts on their territory.

The majority of international human rights treaties contain no derogation clauses at all, this does not mean that none of their provisions are derogable, nor that all of

¹⁰International Covenant on Civil and Political Rights, art. 4, 99 U.N.T.S., March 23, 1976, p 171.

¹¹ Official Records of the Economic and Social Council, Eleventh Session, Supplement No. 5, UN Doc. E/1681, Annex I, Article 2.

their provisions are derogable. Indeed, it would be inconsistent, for instance, if freedom of expression, which is a derogable right in the ICCPR would be non-derogable with regard to children in the Convention on the Rights of the Child.¹²

Derogations clauses, where they exist, not only permit the suspension of rights, but also limit this suspension and prohibit the suspension of other rights. They ensure that in times of armed conflict, human rights continue to apply and be respected, albeit in a modified manner.

c. Developments in International Jurisprudence

A further important development leading to the recognition that human rights law applies to situations of armed conflict is the vast body of jurisprudence by universal and regional human rights bodies.

The UN Human Rights Committee has applied the ICCPR in non-international armed conflict as well as international armed conflict, including situations of occupation, both in its concluding observations on country reports as well as in its opinions on individual cases.¹³ The same is true for the concluding observations of the UN Committee on Economic and Social Rights, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women and the Committee on the Rights of the Child. The European Court of Human Rights has recognized the application of the European Convention both in situations of non-international armed conflict and in situations

¹² Ibid, Annex I, Article 2.

¹³ Concluding Observations on Sri Lanka, UN Doc. CRC/C/15/, July 2, 2003.p.207.

of occupation in international armed conflict. The Inter-American Commission and Court have done the same with regard to the American Declaration on the Rights and Duties of Man and the American Convention on Human Rights. While most of these bodies have refused to apply international humanitarian law directly, because their mandate only encompassed the respective applicable human rights treaties, the Inter-American Court has applied humanitarian by interpreting the American Convention on Human Rights in the light of the Geneva Conventions because of their overlapping content. The Inter-American Commission is the only body that has expressly assigned itself the competence to apply humanitarian law.¹⁴ The International Court of Justice has re-affirmed the jurisprudence of human rights bodies. Its first statement on the application of human rights in situations of armed conflict can be found in the Advisory Opinion on the Legality of the Threat of Use of Nuclear Weapons of 1996.

By and large, states have not objected to the interpretation of international bodies, with the exception of some states who contest the application of human rights in times of armed conflict. These latter states could be persistent objectors to the application of human rights law to armed conflict in terms of customary law. This would, require a consistent practice of objection. Moreover, it is questionable whether there could be persistent objection to the application of certain rights that are non-derogable or even jus cogens rights, such as the prohibition of torture or the right to life. Also, if seen as a reservation to the application of a given treaty to situations of armed conflict, it would be doubtful whether such an objection would

¹⁴ Concluding Observations on Colombia , UN Doc. CRC/C/COL/CO/3, June 8, 2006.p16.

be compatible with the object and purpose of human rights treaties, especially if the objection is not formulated as a formal reservation.¹⁵

The argument that human rights are entirely ill-suited for the context of armed conflicts is misleading. It would be too simple to say that while humanitarian law has an underlying realistic philosophy based on military necessity, human rights law is idealistic and inappropriate for situations of strife. We will see below how the interaction between the two bodies of law can work and when humanitarian law is the more appropriate body of law. But the application of human rights in principle to situations of armed conflict is compatible with the drafting and wording of human rights treaties and of the two Additional Protocols to the Geneva Conventions. It also flows from the very nature of human rights: if they are inherent to the human being, they cannot be dependent on a situation.¹⁶

2.2 Extraterritorial Application of Human Rights

Jurisprudence and state practice have recognized the application of human rights not only in non-international armed conflict, but also in international armed conflict including situations of occupation. This means that human rights have been applied outside of the territory of the parties to the respective treaties.¹⁷ Many

¹⁵ M. Dennis, *Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation*, J. INT'L L. 119, 2005, p122.

¹⁶ Y. Sandoz, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Geneva, ICRC, 1987, p 61.

¹⁷ L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press, 2002, p. 136.

of the treaties have specific application clauses which form the basis for the discussion on their reach while others have no application clauses at all. Nonetheless, one can find in the jurisprudence of the Human Rights Committee, the European Court of Human Rights and the American Commission of Human Rights agreement on the basic requirement for extraterritorial application. This requirement is effective control, either over a territory or over a person.

a. Effective Control over a Territory

Effective control for the purposes of human rights, appears to be broader and more flexible than for the purpose of occupation in humanitarian law. On the one hand, the threshold can be lower for human rights. Indeed, human rights obligations are flexible: with varying degrees of control, the state has varying obligations, going from the duty to respect to the duties to protect and fulfill human rights.¹⁸ The obligation to protect persons from harm resulting from third parties, for instance, requires a higher threshold of control over the environment of the person than the duty to respect the prohibition of ill-treatment. This is different in the law of occupation, which is premised on a degree of control sufficient to impose quite precise and absolute obligations on the state, including obligations of protection and welfare.¹⁹

¹⁸ Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War, arts. 40, 55, & 56, Aug. 12, 1949, 75 U.N.T.S. p 287.

¹⁹ Ibid, art.57.

b. Power over a Person

International human rights bodies agree that where a state has effective control over a territory or over a person, their respective human rights treaties apply. Typical cases would be abduction, detention, or ill-treatment. What is open, is whether the European Court of Human Rights or the Human Rights Committee would also hold states responsible for extraterritorial killings. Such killings do not presuppose power over a person in the same narrow meaning as detention. These cases fall neither into the category of effective control over a territory nor into the category of power over an individual.²⁰ The nature of human rights is universal, and their object and purpose is the protection of the individual from abuse by states. As recognized in jurisprudence, potential abuse by states cannot only occur on the state's own territory, but also outside. On the other hand, it limits the application of international human rights law to situations where the state authorities have either effective control over a territory or power over the person. This is a reasonable limitation, since otherwise states would be held accountable for violations over which they have no command, or there could be clashes of jurisdiction between several states.

2.3 Complementarity and Lex Specialis

The concurrent application of both bodies of law has the potential to offer greater protection to the individual but it can also raise many problems. With the

²⁰ N. White, *The UN, Human Rights and Post-Conflict Situations*, London, Manchester University Press, 2005, p114.

increasing specialization of different branches of international law, different regimes overlap, complement, or contradict each other. Human rights and humanitarian law are but one example of this phenomenon.²¹

The International Court of Justice has found three situations relevant to the relationship between humanitarian and human rights law: “some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law.”²² Indeed, rights that are exclusively matters of humanitarian law, for instance, are those of prisoners of war. Rights which are typically a matter of human rights law are such rights as freedom of expression or the right to assembly. Rights that are matters of both bodies of law are such rights as freedom from torture and other cruel, inhuman, or degrading treatment or punishment, the right to life, a number of economic and social rights, and rights of persons deprived of liberty.

Some fundamental features that distinguish the two bodies of law should be recalled. Firstly, humanitarian law only applies in times of armed conflict, whereas human rights law applies at all times. Secondly, human rights law and humanitarian law traditionally bind different entities. While it is clear that humanitarian law binds parties to the conflict, i.e., both state authorities and non-state actors, this question is far more controversial in human rights law. Traditionally, international human rights law has been understood to bind only states and it will have to be seen how the law evolves in this regard. Thirdly, while

²¹ Ibid, p121.

²² D. Kretzmer, Targeted Killing of Suspected Terrorists: Extra-Judicial Executions or Legitimate Means of Defence?, 16 EUR. J. INT’L L. 171, 2005, p185.

most international human rights are derogable with few exceptions, humanitarian law is nonderogable (with the only exception of Article 5 of the Fourth Geneva Convention). Lastly, there are considerable differences in procedural and secondary rights such as the right to an individual remedy, as will be further discussed below.²³

Considering these differences, the tendency in jurisprudence and practice, however, calls for a more dynamic approach. In this vein, it is often said that human rights and humanitarian law are not mutually exclusive, but complementary and mutually reinforcing. This approach is meant to affirm the possibility of simultaneous application of both bodies of law. The concept of complementarity is a policy rather than a legal nature. To form a legal framework in which the interplay between human rights and humanitarian law can be applied, legal methods of interpretation can provide some helpful tools. This leads to two main concepts: the concept of complementarity in its legal understanding in conformity with the Vienna Convention on the Law of Treaties and the concept of *lex specialis*.

2.4. Complementarity: Mutual Reinforcement

Lubell notes that, both human rights law and international humanitarian law are relevant to a situation and there is scope for mutual reinforcement. There are several ways in which this might occur. In general terms, human rights law

²³ Ibid, p188.

enshrines the more general rules, but is broader in its scope of application. It can often benefit from the more narrowly applicable, but often more precise rules of humanitarian law. On the other hand, human rights law has become increasingly specific and refined through a vast body of jurisprudence and the details of interpretation can influence the interpretation of humanitarian law, which has less interpretative jurisprudence at its disposal.²⁴

In general terms, human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour by those in whose power they are state authorities in the case of human rights law, a party to the conflict in the case of humanitarian law. Thus, the protection of persons in the power of the authorities constitutes an area of considerable overlap between human rights and humanitarian law, judicial guarantees, treatment of persons, economic and social rights. In these situations, there is considerable scope for mutual reinforcement.

a. Mutual Influence in Interpretation

An often cited example of the influence of human rights law on humanitarian law is Article 75(4) of Additional Protocol I, which was drafted on the basis of Article 14 of the ICCPR, and whose interpretation can therefore draw on the right to fair trial in human rights law. Conversely, humanitarian law has provided a threshold for minimum rights below which no derogation of human rights can reach.

²⁴ N. Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, 860 INT'L REV. RED CROSS, 2005, p237.

Derogations must be consistent with states' other obligations under international law,²⁵ which includes humanitarian law. Thus, humanitarian law can provide minimum obligations. The right to a fair trial, for instance, is derogable under human rights law, but its core has been considered to be non-derogable, based on Article 75 of Additional Protocol I.

b. Mutual Influence in the Development of the Law

Another possibility of mutual influence relates to the development of international law. As mentioned, Article 75 of Additional Protocol I was drafted on the basis of the right to a fair trial in Article 14 ICCPR and many of the basic protections in Additional Protocol II were influenced—but further refined—by the non-derogable rights of the Covenants. A more recent example is the influence of humanitarian law on the Convention for the Protection of All Persons from Enforced Disappearance. The right to know, enshrined in Article 32 of Additional Protocol I, has influenced jurisprudence of human rights bodies with regard to enforced disappearances and been included in this new Convention (Article 24 (2)). Similarly, communication and information rights of families enshrined in the fourth Geneva Convention have influenced similar rights in the Convention (Article 18).²⁶

²⁵ Y. Sandoz, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, op.cit, p74.

²⁶ Additional Protocol (I) Article 75 .

There are many instances in which human rights law and humanitarian law do not contradict each other, but rather regulate different aspects of a situation or regulate a situation in more or less detail, and can therefore mutually reinforce each other. This is frequently the case where both bodies of law seek to limit the exercise of abusive power over the individual or where they are concerned with the welfare of the population.²⁷ In other words, for the protection of persons in the power of a party to the conflict, human rights law can reinforce the applicable provisions of humanitarian law, especially where there is detailed soft law or jurisprudence to flesh out the obligations. Conversely, humanitarian law can reinforce human rights law through the absolute nature of its obligations and its greater detail.

2.5. Solving Conflicts of Norms

There are some few instances where human rights and humanitarian law are incompatible. In such situations, Chesney notes that, the object and purpose of both bodies of law give guidance on which body would provide the prevailing rule, the *lex specialis*. Indeed, humanitarian law was especially conceived for the conduct of hostilities and for the protection of persons in the power of the enemy.²⁸

Human rights law was conceived to protect persons in the power of the state from abuse and does not rest, in principle, on the idea of conduct of hostilities, but on law enforcement. Thus, it is fair to say that for the conduct of hostilities, humanitarian is the more refined body of law whereas for law enforcement human rights law is the more refined version. For persons in the power of an authority,

²⁷ L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, op.cit, p163.

²⁸ R. Chesney, *Leaving Guantánamo: The Law of International Detainee Transfers*, 40 U. RICH. L. REV. 657, 2006, p 127.

there will be far more overlap. Thus, the closer a situation is to the battlefield, the more humanitarian law will prevail over human rights law, whereas for law enforcement, human rights law prevails.²⁹

A case in point is the right to life. International humanitarian law accepts the use of lethal force and tolerates the incidental killing and wounding of civilians not directly participating in hostilities, subject to proportionality requirements. In human rights law, on the contrary, lethal force can only be resorted to if there is an imminent danger of serious violence that can only be averted by such use of force.³⁰ Schindler notes that, the danger cannot be merely hypothetical, it must be imminent. This extremely narrow use of lethal force to protect the right to life is illustrated by the Principles on the Use of Force and Firearms by Law Enforcement Officials, which state that intentional lethal use of firearms may only be made when strictly unavoidable in order to protect life, and requires clear warning before the use of firearms with sufficient time for the warning to be observed.³¹ But this standard is very different from a planned operation in an armed conflict. Also, the principle of proportionality in humanitarian law is different from proportionality in human rights law. Human rights law requires that the use of force be proportionate to the aim to protect life. Humanitarian law requires that the incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof caused by an armed attack must not be excessive in relation to the concrete

²⁹ Ibid, p 132.

³⁰ N. Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, op.cit, p241.

³¹ D. Schindler, *Human Rights and Humanitarian Law: Interrelationship of the Laws*, AM. UNIVERSITY L. REV. 1982, pp 935-941.

and direct military advantage anticipated. The two principles can lead to different results.

One therefore has to decide whether in a situation of armed conflict, humanitarian law or human rights law applies, because certain killings that are justified under humanitarian law are not justified under human rights law. In practice one has to differentiate between different situations of occupation: there are in reality situations of occupation where the territory is not entirely under control.³² While and where hostilities are ongoing or where hostilities break out anew, humanitarian law on the conduct of hostilities must prevail over the application of human rights, which presuppose control for their respect and enforcement. The question is, of course, when hostilities can factually be said to have broken out again. Not all criminal activity, even if extremely violent, can be treated like an armed attack.

2.6. Conduct of Hostilities

The *lex specialis* principle does play a role when there is a conflict between human rights and humanitarian law, as it does in other conflicts of norms in international law.³³ As a general rule, humanitarian law is the law most appropriate for the conduct of hostilities, because its norms on the use of force are based on the assumption that military operations are ongoing and that the armed forces have no definite control over the situation. Conversely, where the situation is remote from

³² Ibid, p952.

³³ D. Louise, "The right to life in armed conflict: does international humanitarian law provide all the answers?", 864 *International Review of the Red Cross*, 2006, p48.

the battlefield and the state authorities have enough control over a situation to be able to carry out law enforcement operations, human rights law provides the most appropriate framework. It follows from the above that the principle of *lex specialis* in a narrow sense as well as the principle of complementarity both inform the relationship between human rights law and humanitarian law.

2.7. Complementarity and Its Limits Regarding Procedural Aspects

Human rights law and humanitarian law differ fundamentally in a number of procedural aspects which all have to do with the right to a remedy and to individual standing in human rights law. While humanitarian law does not know such individual standing at international level, all major human rights treaties have a form of individual complaint mechanism which has led to case-law on the right to a remedy, the right to an investigation and the right to reparation. Such case-law has already started to influence the understanding of humanitarian law and could continue to do so in the future.³⁴

a. Remedies Level

Human rights are the result of a struggle for individual rights. The acceptance of human rights was the result of a struggle of oppressed classes, first the bourgeois classes in the Eighteenth, later the working classes in the Nineteenth Century.³⁵

This history has influenced the formulation and development of human rights law

³⁴ Ibid, p 52.

³⁵ H. Joachim Heintze, "On the relationship between human rights law protection and international humanitarian law", 856 *International Review of the Red Cross*, 2004, p. 78.

and procedures. While humanitarian law focuses on the parties to a conflict, human rights are entirely built around the individual and are formulated as individual entitlements. This does not imply that there are no rights in humanitarian law.

As far as individual remedies at international level are concerned, we have seen that courts do not hesitate to pronounce themselves on the lawfulness of acts committed in armed conflict, whether in purely human rights terms or in humanitarian law terms depends on the jurisdiction.

b. Investigations in Armed Conflict Situations

Human rights bodies have not hesitated to apply these requirements to investigations in situations of armed conflict. Recently, the UN Special Rapporteur on extrajudicial, summary, or arbitrary executions has lamented the fact that investigations are less frequent and often more lenient in armed conflict situations than in times of peace.³⁶ Following this practice, there is scope for influence of human rights and humanitarian law in this respect, especially with regard to the use of force.³⁷ It is important to distinguish between the substantive law justifying the use of force and killing, which differs between human rights and humanitarian law, and the question of investigation, which constitutes in the first place a gathering of facts.

³⁶ Ibid, p 95.

³⁷ M. Sassoli, and L. Olson, "The legal relationship between international humanitarian law and human rights law where it matters in non-international armed conflict", 871 *International Review of the Red Cross* 90, 2008, p. 59.

c. The Right of Reparations

While for all violations of civil and political rights the individual has a right to an effective procedural remedy before an independent body, no such individual right exists in international humanitarian law. Similarly, while every violation of a human right entails a right to reparation, the equivalent norms on reparation in the law of international armed conflict award this right, or at least the possibility to claim it, to the state. The law on non-international armed conflict is silent on reparation. Nothing in international humanitarian law, precludes the right to a remedy and to reparation. Many serious violations of humanitarian law constitute serious violations of human rights at the same time.³⁸ For the same act a person can have a right to full reparation because it constitutes a human rights violation but no right to reparation under humanitarian law. This contradiction is well known and there is an increasing tendency to recognize that states should afford full reparation for violations of humanitarian law as well.

2.8. The Legal Framework of Civilian's Protection

The instruments of international law which provide a legal framework for the protection of civilian populations in armed conflicts notably include the following:

- a. International Humanitarian Law, and in particular the Fourth Geneva Convention of 1949 and the two Additional Protocols of 1977 which establish basic rules of conduct during hostilities and the need for making a fundamental distinction between the civilian population and combatants. IHL

³⁸ Ibid, p61.

offers protection to those not participating in the hostilities and to non combatants.

b. The Convention Relating to the Status of Refugees of 1951 which provides those who flee to another country to escape conflict at home and the associated persecution with a legal status and a legal framework of protection .

c. Certain fundamental rights such as the right to life and the prohibition of torture apply in situations of conflict.

d. Specific plans of political action and legal norms developed to protect particularly vulnerable groups and notably women, children and internally displaced persons.

e. The International Criminal Court governed by the Rome Statute (1998) by means of which the international community is able to combat impunity, as the ICC has the power to initiate criminal proceedings against perpetrators of the most serious crimes, in particular war crimes and crimes against humanity

2.9. The 1949 Geneva Conventions

The Geneva Conventions and their Additional Protocols are international treaties that contain the most important rules limiting the barbarity of war. They are at the core of international humanitarian law, the body of international law that regulates the conduct of armed conflict and seeks to limit its effects.³⁹ They specifically protect people who are not taking part in the hostilities (civilians, health worker

³⁹ J. Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", *European Journal of International Law*, 14:2, 2003, p. 24.

and aid workers) and those who are no longer participating in the hostilities, such as wounded, sick and shipwrecked soldiers and prisoners of war.

a. The First Geneva Convention

This Convention represents the fourth version of the Geneva Convention on the wounded and sick after those adopted in 1864, 1906 and 1929. The fundamental principles as well as the division into chapters remained the same as in the preceding version with the exception of the new introductory chapter on general provisions. Changes were made especially in Chapter IV (personnel). Hitherto, medical personnel and chaplains falling into enemy hands had to be immediately repatriated. The 1949 Convention, taking account of changed conditions of warfare, provides that they may in certain circumstances be retained to care for prisoners of war. The provisions on medical equipment were correspondingly altered. In the chapter on medical transports it was provided that medical aircraft may in certain circumstances fly over neutral territory. The convention entered into force in 21th October 1950.⁴⁰

b. The Second Geneva Convention

This Convention replaced Hague Convention of 1907 for the Adaptation to Maritime Warfare of the Principles of the Geneva Convention. It closely follows the provisions of the first Geneva Convention in structure and content. It has 63

⁴⁰ First Geneva Convention of 1864 on the treatment of battlefield casualties.

articles specifically applicable to war at sea. For example, it protects hospital ships.⁴¹

c. The Third Geneva Convention

This Convention replaced the Prisoners of War Convention of 1929. It contains 143 articles whereas the 1929 Convention had only 97. The categories of persons entitled to prisoner of war status were broadened in accordance with Conventions I and II. The conditions and places of captivity were more precisely defined, particularly with regard to the labour of prisoners of war, their financial resources, the relief they receive, and the judicial proceedings instituted against them. The Convention establishes the principle that prisoners of war shall be released and repatriated without delay after the cessation of active hostilities.⁴²

d. The Fourth Geneva Convention

The Geneva Conventions, which were adopted before 1949, were concerned with combatants only, not with civilians. The events of World War II showed the disastrous consequences of the absence of a convention for the protection of civilians in wartime. The Convention adopted in 1949 takes account of the experiences of World War II. It is composed of 159 articles.⁴³ It contains a short section concerning the general protection of populations against certain

⁴¹ Second Geneva Convention of 1906 extending the first convention to war at sea.

⁴² Third Geneva Convention of 1949 on the treatment of prisoners of war.

⁴³ Fourth Geneva Convention "relative to the Protection of Civilian Persons in Time of War" (first adopted in 1949, based on parts of the 1907 Hague Convention IV)

consequences of war, without addressing the conduct of hostilities, as such, which was later examined in the Additional Protocols of 1977. The bulk of the Convention deals with the status and treatment of protected persons, distinguishing between the situation of foreigners on the territory of one of the parties to the conflict and that of civilians in occupied territory.⁴⁴ It spells out the obligations of the Occupying Power vis-à-vis the civilian population and contains detailed provisions on humanitarian relief for populations in occupied territory. It also contains a specific regime for the treatment of civilian internees. It has three annexes containing a model agreement on hospital and safety zones, model regulations on humanitarian relief and model cards.

e. The Additional Protocols to the Geneva Conventions

In the two decades that followed the adoption of the Geneva Conventions, the world witnessed an increase in the number of non-international armed conflicts and wars of national liberation. In response, two Protocols Additional to the four 1949 Geneva Conventions were adopted in 1977. They strengthen the protection of victims of international (Protocol I) and non-international (Protocol II) armed conflicts and place limits on the way wars are fought. Protocol II was the first-ever international treaty devoted exclusively to situations of non-international armed conflicts⁴⁵.

⁴⁴ The Fourth Geneva Convention.

⁴⁵ J. Fitzpatrick, "Speaking Law to Power: The War Against Terrorism and Human Rights", *op.cit.*, p. 32.

1. Protocol (I) 8 June 1977

The present Protocol brings mainly the following innovations:

Article 1(4) provides that armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes are to be considered international conflicts. Part II (Articles 8-34) develops the rules of the First and the Second Geneva Conventions on wounded, sick and shipwrecked. It extends the protection of the Conventions to civilian medical personnel, equipment and supplies and to civilian units and transports and contains detailed provisions on medical transportation.⁴⁶

Part III and several chapters of Part IV (Articles 35-60) deal with the conduct of hostilities, i.e. questions which hitherto were regulated by the Hague Conventions of 1899 and 1907 and by customary international law. Their reaffirmation and development is important in view of the age of the Hague Conventions and of the new States which had no part in their elaboration. Article 43 and 44 give a new definition of armed forces and combatants. Among the most important Articles are those on the protection of the civilian population against the effects of hostilities.⁴⁷ They contain a definition of military objectives and prohibitions of attack on civilian persons and objects. Further Articles (61-79) deal with the protection of civil defence organizations, relief actions and the treatment of persons in the power of a party to a conflict. Part V (Articles 80-91) brings some new elements to the problem of the execution of the Conventions and the Protocol.⁴⁸

⁴⁶ Protocol (I) 8 June 1977, Article 1(4).

⁴⁷ Ibid, Part III, Article 35-60.

⁴⁸ Ibid, . Part V, Articles 80-91.

2. Protocol (II), 8 June 1977.

The only provision applicable to non-international armed conflicts before the adoption of the present Protocol was Article 3 common to all four Geneva Conventions of 1949. This Article proved to be inadequate in view of the fact that about 80% of the victims of armed conflicts since 1945 have been victims of non-international conflicts and that non-international conflicts are often fought with more cruelty than international conflicts. The aim of the present Protocol is to extend the essential rules of the law of armed conflicts to internal wars.⁴⁹ The fear that the Protocol might affect State sovereignty, prevent governments from effectively maintaining law and order within their borders and that it might be invoked to justify outside intervention led to the decision of the Diplomatic Conference at its fourth session to shorten and simplify the Protocol. Instead of the 47 Articles proposed by the ICRC the Conference adopted only 28. The essential substance of the draft was, however, maintained. The part on methods and means of combat was deleted, but its basic principles are to be found in Article 4 (fundamental guarantees). The provisions on the activity of impartial humanitarian organizations were adopted in a less binding form than originally foreseen. The restrictive definition of the material field of application in Article 1 will have the effect that Protocol II will be applicable to a smaller range of internal conflicts than Article 3 common to the Conventions of 1949.⁵⁰

⁴⁹ M. Sassòli, and L. Olson, "The legal relationship between international humanitarian law and human rights law where it matters in non-international armed conflict", *op.cit.*, p. 62.

⁵⁰ Protocol II, 1977 Geneva Convention amendment about the protection of victims in non-international armed conflicts.

f. The Convention Relating to the Status of Refugees of 1951

The United Nations Convention Relating to the Status of Refugees is an international convention that defines who is a refugee, and sets out the rights of individuals who are granted asylum and the responsibilities of nations that grant asylum. The convention also sets out which people do not qualify as refugees, such as war criminals. The Convention also provides for some visa-free travel for holders of travel documents issued under the convention.⁵¹ The convention was approved at a special United Nations conference on 28 July 1951. It was initially limited to protecting European refugees after World War II but a 1967 Protocol removed the geographical and time limits, expanding the Convention's scope. Because the convention was approved in Geneva, it is often referred to as "the Geneva Convention," though it is not one of the Geneva Conventions specifically dealing with allowable behavior in time of war.

2.10. SPECIFIC CHALLENGES

Actors who seek to engage with the parties to non-international armed conflicts, to improve their compliance with IHL, may face a number of specific challenges.

a. Diversity of conflicts and parties

Non-international armed conflicts differ enormously. They range from those that resemble conventional warfare, similar to international armed conflicts, to others that are essentially unstructured. This diversity, in conflicts and in those party to

⁵¹ UNHCR, *The Geneva Convention Relating to the Status of Refugees 1951, General Provisions.*

them, makes it very difficult to formulate standard approaches or plans of action for increasing respect for humanitarian law.

According to Fleck, the parties, whether States or organized armed groups, also vary widely in character. Depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy: these and other factors will affect the prospects for engaging with a party to increase its respect for the law. Willingness to discuss the law and the conflict, or to allow third parties (e.g. the ICRC, other humanitarian actors, United Nations (UN) bodies, neutral third States) to get involved, will also differ in degree.⁵²

Organized armed groups, in particular, are extremely diverse. They range from those that are highly centralized with a strong hierarchy, effective chain of command, and communication capabilities, to those that are decentralized with semi-autonomous or splinter factions operating under an ill-defined leadership structure. Groups may also differ in the extent of their territorial control, their capacity to train members, and the disciplinary or punitive measures that are taken against members who violate humanitarian law.⁵³

b. Denial of applicability of humanitarian law

Not infrequently, a party to a non-international armed conflict, either a State or an armed group, will deny the applicability of humanitarian law, making it difficult to engage in a discussion on respect for the law. Governmental authorities, for

⁵² D. Fleck, *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford University Press, Oxford, 1995, p. 45.

⁵³ *Ibid.* p 52.

example, might disagree that a particular situation qualifies as an armed conflict. They might claim instead that it is a situation of “tension” or mere banditry and does not amount to non-international armed conflict. On this basis, a State might attempt to hinder or block contact with an armed group or access to the geographical area under its control. A State might also be reluctant to permit any negotiations or engagement that, in its view, would grant legitimacy to the armed group.⁵⁴

Non-State groups might also deny the applicability of humanitarian law by refusing to recognize a body of law created by States, or by claiming that they cannot be bound by obligations ratified by the government against whom they are fighting. In such cases, the law will seldom be a relevant frame of reference, especially for groups whose actions are shaped by a strong ideology.

c. Lack of political will to implement humanitarian law

According to Moir, any actor attempting to increase respect for the law might face another significant challenge: a party may not have enough political will, or none at all, to comply with the provisions of humanitarian law. The strength of political will in a particular situation is likely to be difficult to ascertain, but a thorough understanding of the context, as well as good contacts and dialogue with appropriate figures in the leadership of the party, will help.⁵⁵

Even within one party, the attitudes of different factions might differ. For example, the military wing of a party might recognize the importance of respecting the law,

⁵⁴ Ibid, p53.

⁵⁵ L. Moir, *The Law of Internal Armed Conflict*, Cambridge: Cambridge University Press, 2002, p 52.

while its political representatives neither concede the applicability of humanitarian law nor support the implementation of its provisions.⁵⁶ The reverse is also possible. Where the objective of a party to a non-international armed conflict is itself contrary to the principles, rules and spirit of humanitarian law there will be no political will to implement the law. Consider, for example, parties who perform certain acts as part of a widespread or systematic attack against a specific civilian population, or parties who are interested only in seizing control of economic resources or wealth. In such cases, violations of IHL are the means by which objectives are pursued.⁵⁷

d. Security and access

Security threats in non-international armed conflicts are common, especially in conflicts that are unstructured or where the parties to the conflict are unable to provide effective security guarantees.⁵⁸ Threats to security or lack of security guarantees can prevent access to certain areas or to the parties to the conflict. This will present a general obstacle to dialogue on any subject, including humanitarian law.

e. Ignorance of the law

In many non-international armed conflicts, bearers of arms with little or no training in IHL are directly involved in the fighting. This ignorance of the law

⁵⁶ Ibid, p56.

⁵⁷ J.M. Henckaerts, L. Doswald-Beck, *Customary International Humanitarian Law*, op. cit. p53.

⁵⁸ Ibid, p 61.

significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts. Indeed, there is little likelihood that a body of law will be observed unless those whose duty it is to respect and apply it are instructed and trained to respect its obligations.⁵⁹

To overviewing the chapter, it would be impossible today to completely compartmentalize humanitarian law on the one side and human rights law on the other side. While their origins and developments were quite distinct, recent international instruments have increasingly taken both into account. In times of armed conflict both bodies apply concurrently. Their interplay, however, is only slowly being tested in practice, mainly in national and international courts and only the accumulation of decisions and reports will give an overview of the situations that might create tension or synergy. A framework for their interplay is the complementarity approach, limited where necessary by the *lex specialis* principle. Mostly, human rights law and humanitarian law complement each other mutually as more specific expressions of general legal rules. Sometimes, one body of law will be the *lex specialis* to the other. In general humanitarian law will be the *lex specialis* in situations of conduct of hostilities. The protection of persons in the power of a party to the conflict, on the other hand, will show far more synergy between the two bodies of law, humanitarian law provisions frequently providing more detailed and higher protection but human rights law sometimes being more protective because of its further development in case-law and practice. Lastly, it

⁵⁹ H. McCoubrey and N. D. White, *International Law and Armed Conflict*, Aldershot, Vermont: Dartmouth Publishing, 1992, p. 318.

should be noted that human rights law has more advanced procedural safeguards for the protection of individual rights than humanitarian law, particularly in respect of the right to an individual remedy, to an independent and impartial investigation and to individual reparation. While not entirely transferable due to the nature of each body of law, this could in the future have an influence on humanitarian law.

CHAPTER THREE

THE CASE STUDY: HUMANITARIAN LAW VIOLATION IN SOMALIA CONFLICT

4.0. Introduction

The previous chapter deals with the interplay between International humanitarian law (IHL) and Human Rights Law (HRL). This chapter focusing on the structure of Somalia conflict which is led to Humanitarian Law violation by the various combatants towards vulnerable groups.

The Republic of Somalia has effectively split into three main parts. In the north west Somali regions, the Republic of Somaliland was established in 1991. It has remained largely peaceful since 1997, with large-scale refugee repatriation. The northeastern regional state of Puntland, established in 1998, is relatively stable and has seen some post-conflict reconstruction, limited return migration, and the arrival of displaced people from south-central Somalia and the Somali region of Ethiopia.¹ In the war torn south-central regions, the ousting of the Islamic Courts Union (ICU) by Ethiopian and Transitional Federal Government forces has not brought peace, with remnants of the ICU mounting a vigorous insurgency campaign. Fighting in Mogadishu displaced over 870,000 people in since January 2007 (some two thirds of the city's population), and 1.1 million people are

¹ J. Drysdale, *Stoics without pillows. A way forward for the Somalilands*, London, Haan Associates, 2000, p16.

internally displaced with in south-central Somalia.²The chapter will discuss state building and collapse of Somalia, clan ideology, civil war in Mogadishu, displacement, losing socio-political protection, rape and other sexual violence, attacks on schools and hospitals and denial of humanitarian access.

4.1. State-building and collapse

Traditionally stateless, Somalis are an ethnic group, defined in terms of shared language, religion and socio-political organization through clanship, but have never formed a single polity. Somali people are concentrated in an area in the Horn of Africa that stretches from the far north east corner into modern day Djibouti, the Ogaden region of Ethiopia and northern Kenya, and have a strong and enduring tradition of nomadic pastoral migration. Arab and Somali regional migration brought Islam and linkages into wider trading networks.³ In the 1800s and early 1990s, Britain, Italy, Ethiopian and France brought various parts of the Somali regions under colonial rule, complicating later attempts at state-building. The Republic of Somalia was created in 1960 from the union of the Italian-administrated UN Trusteeship to the south and the newly independent British Somaliland to the north. During the first decade the civilian government remained heavily reliant on budgetary support from other countries, with growing public discontent at visible corruption and the overcentralisation of power on the southern

² M. Brons, *Society, Security, Sovereignty and the State in Somalia: From Statelessness to Statelessness?* Utrecht: International Books/University of Groningen, 2001, P22.

³Ibid , P38.

capital, Mogadishu. ⁴Like many post-colonial capitals, there were high levels of urbanisation in the early post independence period.

Civil war broke out in 1988, with the government responding to cross-border SNM attacks with savage reprisals against Isaq civilians in the north west, destroying Hargeisa and Burao by aerial bombardment, killing more than 50,000 people. In 1989, the United Somali Congress (Hawiye based) and the Somali Patriotic Movement (Ogaden based) were established and in January 1991, the USC ousted Barre from Mogadishu and appointed an interim government.⁵ The insurgent groups failed to agree on the formation of a new government, leading to devastating violence and political fragmentation.

a. Clan Ideology

Somalia is normally described as a “clan society” and the classic anthropological texts have ascribed an almost fatalistic clan identification to Somalis. The Somali clans (Darood, Dir, Hawiye and Isaak) are seen as the “pure” or “ideal” Somalis, the Sab (Rahanweyn and Digil) along with the Cushitic peoples (Shebele and Gabwing) are a deviation. This is nothing more than the ideological construct of a ruling group, supported by colonial social engineering, and reinforced by successive post-colonial governments. Historical research reveals a much more complex picture, in which the Somali are in fact one branch of a common Cushitic

⁴ T. Saadia., *Somali Nationalism*, Cambridge: Harcard University Press 1963, p16.

⁵ M. Bryden, Quick Fixes: Coming to Terms with Terrorism, Islam, and Statelessness in Somalia. *The Journal of Conflict Studies*, Vol. XXIII, No. 2 Fall 2003, pp 24-56.

tree, that came through historical circumstance to exercise military domination over the others.⁶

Because of the clan-based system of patronage and reward established by Siad Barre, clan identity had certain class characteristics in the late 1980's and early 90s. The Somali Patriotic Movement (SPM) sprang from Ogaden clan members of the officer class in the armed forces. However, the large clan-based coalitions that existed in 1991 were inherently unstable. They existed primarily to try to seize state power.⁷ They fought each other in the months after the collapse of the Siad Barre government. When this failed, the locus of conflict shifted to major strategic resources such as cities and ports. With the shift in locus of conflict came a fragmentation of the clan alliances. Thus the major battles of late 1991 and early 1992 were intra-USC and intra-SPM.⁸ As these conflicts too remained unresolved, further fragmentation set in. Alongside the fragmentation came realignment, with fractions of each clan alliance allying with fractions of the other, and two main parallel inter-clan forces emerging.

b. The rise of the Islamic courts

The Transitional Federal Government (TFG) was formed in Kenya in 2004, the most recent of fourteen attempts to re-establish a government since 1991. Formed in exile, and intended to be a government of national unity, the TFG finally convened in Baidoa in early 2006. However, relocation to the capital was

⁶J. Hirsch, & B. Oakley, *Somalia and Operation Restore Hope: Reflections on Peacemaking and Peacekeeping*. Washington D.C, United States Institute of Peace Press, 1995. p73.

⁷ Ibid Interview with a Worker in British Islamic Organisation (BIO) on 17th September in Nairobi

⁸ J. Drysdale, *Stoics without pillows. A way forward for the Somalilands*, op.cit, p23.

prevented by disagreement between the TFG and the 'Mogadishu group' a powerful alliance of businessmen, faction leaders, clan elders from the locally strong Hawiye/Habar Gedir sub-clans.⁹ The TFG was hampered by serious internal dissent and defections of Mogadishu-based parliamentarians and ministers and its territorial control was limited to two provincial towns.

Over the course of a decade or so, configurations of power in Mogadishu had shifted considerably, challenging the power of the Hawiye warlords. Popular support for factional leaders was weakened by their failure to provide basic services and rule of law, and the rise of a powerful business elite able to buy off militia as private security forces. Meanwhile, the long-standing network of sharia courts, grew in strength, fuelled by funding from Mogadishu's business community to resolve disputes and deal with chronic lawlessness, providing the basis for a broad based Islamist movement known as the Islamic Courts Union, with its own militia.¹⁰

Amid growing tensions and violence between the Islamists and the warlords in 2006, the US government, which had long been trying unsuccessfully to get hold of suspected terrorists believed to be hiding with hard-line Islamists, took the opportunity to back prominent factional leaders in an 'Alliance for the Restoration of Peace and Counter-Terrorism'. The Islamists won a decisive victory in June 2006, after serious fighting, for the first time since the state had collapsed, the capital was ruled by a unified administration, which rapidly expanded its control to the border with Puntland in the north and with Kenya in the south. Major changes

⁹ A. De Waal, *Islamism and its Enemies in the Horn of Africa*, Addis Abeba, Shama Books, 2004, p22.

¹⁰ Ibid, p32.

ensued in Mogadishu. Clan militias were disarmed or brought under the Courts' control, dramatically increasing civilian security, Mogadishu's air and seaports were re-opened for the first time since 1995, and the Courts initiated a popular urban clean-up programme.¹¹

The main surprise about political Islam in Somalia is not that it has emerged as a force, but that it took so long to do so, and has been hostage to other political formations specifically the interests of certain urban groups and, after the formation of the TFG, the Hawiye clans. Despite the concerted efforts of local, diaspora and foreign Islamists, no significant Islamist constituency has developed in the country.

4.2. Civil war in Mogadishu

In the early 1990s, in Mogadishu and elsewhere, opposing militia looted homes and businesses, robbed, kidnapped, raped and killed people associated by clan with opposing factions and minority groups. The population was further decimated by famine in 1991-92 and was the scene of flailing humanitarian efforts and a catastrophic UN intervention in 1993 by US and other forces. Borders proliferated within the Somali Republic after the collapse of the state, constraining travel by land through the territories governed by competing factions.¹²

The southern and central areas were controlled for much of the 1990s and first half of the 2000s by multiple non-state actors, warlord and factional rule drawing on

¹¹ International Crisis Group. Somalia's Islamists. Africa Report No.100. Brüssel/Nairobi, International Crisis Group, 2005, p28.

¹² International Crisis Group, Can the Somali Crisis be contained? Africa Report No. 116. Brüssel/Nairobi, International Crisis Group, 2006. p17.

clan based military support, and later on councils of elders, municipal administrations and Islamist groups also came to control parts of the territory. Localised systems of governance have, in some places and at some points in time, provided a surprising degree of stability, despite the absence of the state.¹³

a. An Ethiopian-backed Transitional Federal Government

Western governments generally did not want to see a strong Islamist state in Somalia; the US government's frustration about what it saw as the ICU's noncooperation over terrorist suspects mounted. In December 2006, at the invitation of the Transitional Federal Government, and with US diplomatic support, Ethiopian troops mounted an offensive against the Islamic Courts which succeeded in dislodging their forces from Mogadishu. Many of its leaders and fighters fled south or abroad. The TFG, with help from the UN, particularly UNDP, began attempts to establish government offices and institutions.¹⁴

But it did not take long for opposition to rally. The opposition that emerged was not one organisation, but a range of fragmented groups coalescing around Hawiye clan militia, ICU militia, and the hardline jihadist Al-Shabaab group. Opposition factions carried out numerous and damaging attacks on TFG and Ethiopian installations in Mogadishu and elsewhere and the civilian neighbourhoods surrounding them; murdered and threatened aid workers, civil society leaders, and ordinary people they claim were acting in ways complicit with the TFG, including

¹³M. Fishpool, *Somalia Profile*, Cambridge, Walden Publishing, 2001, P156.

¹⁴ K. Menkhaus, "The Somali Crisis: Tragedy in Five Acts", *African Affairs*, Summer 2007, p22.

by trying to prevent opposition groups from launching attacks from their neighbourhood that would incite reprisals against civilians; and organised a series of suicide bombings in Puntland and Somaliland in October 2008. They recruited through a mixture of persuasion, cash offerings and intimidation.

Numerous sources now document that the TFG and its Ethiopian allies responded to opposition attacks in ways that have caused severe suffering to civilians, deeply alienating many residents of Mogadishu. By the end of 2007 government sources said that 80 per cent of the country was still outside government control. At the end of 2008, all the major towns in south-central Somalia were controlled by various fragments of the insurgency, except Mogadishu and Baidoa¹⁵.

b. Political, military and humanitarian situation in Somalia

The security situation in Somalia is of serious concern. Mogadishu has been a scene of continued conflict between the Transitional Federal Government forces, supported by Ethiopian troops, and various anti-Government armed groups, including remnants of the Union of Islamic Courts (UIC); Al-Shabaab insurgents, many of them linked to UIC; and the Hawiye clan militias. Although UIC had been defeated by the Transitional Federal Government and Ethiopian forces in December 2006, its supporters and other armed groups are continuing to resist the Transitional Federal Government presence in and around Mogadishu.¹⁶ The security situation elsewhere in central and southern Somalia is characterized by

¹⁵ Ibid, 35.

¹⁶ Report of the Secretary-General on children and armed conflict in Somalia, S/2008/352, Distr, General 30 May 2008, p7.

clashes between pro and anti-Transitional Federal Government groups or between factions over the control of land, grazing rights or other resources. Armed groups, some affiliated with UIC, appear to be gaining ground. For example, the radical group Al-Shabaab has grown stronger and obtained increased numbers of weapons, and of a more sophisticated nature. It has set up training camps at Bargal, in Puntland, and there is reason to believe that it intends to expand into areas such as Baidoa. Since February 2008, Al-Shabaab forces have captured several towns, including Wajid and Jowhar, and several villages in the Bay and Hiran regions.

In February 2007, the African Union deployed the African Union Mission in Somalia (AMISOM), a peace support operation in Mogadishu, whose mandate was endorsed by the United Nations Security Council in its resolution 1744 (2007). While AMISOM is authorized to have 8,000 African Union troops, there are at present only 1,760 Ugandan forces and 854 peacekeepers from Burundi. One more battalion from Burundi is expected in Somalia by May 2008, which would bring the total African Union troop presence to more than 3,000.¹⁷

The conflict in Mogadishu between the Transitional Federal Government and Ethiopian armies and anti-Government forces has led to near-daily mortar attacks, explosions of roadside bombs and improvised explosive device attacks. While the capital experiences the most violence, including targeted assassinations, anti-Government attacks have been reported in several regions outside of Mogadishu, such as Kismayo in Lower Juba, Baidoa in the Bay region and Beletweyne in the

¹⁷ Ibid, p9.

Hiran region, particularly where there are Ethiopian soldiers or Transitional Federal Government officials and institutions.¹⁸

In many places outside Mogadishu, clan leaders act as political heads, and clan militias are regaining power. In 2007, all 10 regions in central and southern Somalia experienced clan conflicts. While many of those clan conflicts revolved around competition over local power or land, some were influenced by national political agendas and all have contributed to the overall insecurity of civilians, particularly children.¹⁹

Somaliland and Puntland have been engaged in a sometimes violent border dispute over two regions, Sanag and Sool. Somaliland, which has declared independence from Somalia, claims legal authority in the two regions under British colonial-era boundaries, but Puntland has effectively controlled parts of Sanag and Sool for years as a result of clan affiliation.²⁰

4.3. Humanitarian Law and Human rights violation

Civilians, notably, vulnerable groups, continue to be the majority of casualties, primarily as a result of crossfire and explosions. Since February 2007, 340,000 people have fled fighting in Mogadishu. In the past year, the humanitarian and nutrition situation in central and southern Somalia, more specifically in the Shabelle regions, has deteriorated. About 1.9 million Somalis (roughly 20 per cent of the population), more than half of whom are internally displaced, are in need of

¹⁸ UN, Humanitarian Situation in Somalia, Monthly Analysis, August 2007, p6.

¹⁹ *Ibid*, p7.

²⁰ C. Horst, Vital links in social security: Somali refugees in the Dadaab camps, Kenya. *Refugee Survey Quarterly*, 20004, 21(1 & 2), p109.

humanitarian assistance.²¹ Food supplies have been disrupted, access to clean water and medical assistance has been hindered, and the hospitals that are able to stay open are stretched to capacity.

a. The Dismembering of Daily Life

It seems that a key element is the unpredictability of violence, which makes it hard to adapt to or negotiate, and contrasts with earlier years when patterns of violence had settled into some regularity. For much of this period, when conflict broke out, people knew which areas to avoid, they knew it would be temporary, and they knew where they fitted in the power configurations in Mogadishu. In story told by a man (Life in Somalia was unbearable, there was death on daily basis and we couldn't survive there anymore where there are rockets going over your head, rape, kidnapping and killings. It's a ruthless situation that makes even the stones weep... Ethiopians set fire to everything they come across or thought that the insurgents could hide in - houses, farms, offices, shops and even food stores and the animals that belong to the poor nomads.)²²

This situation remains unresolved. Exiled ICU leaders established an umbrella group with non-Islamist Somalis known as the Alliance for the Re-Liberation of Somalia (ARS). Led by moderates Sheikh Sharif Sheikh Ahmed (former ICU) and Sharif Hassan (former TFG), the ARS negotiated the Djibouti Agreement with the

²¹ UN, Humanitarian Situation in Somalia, Monthly Analysis, August 2007, op.cit, p12.

²² Interview with (NGO worker in his 40s), In: Anna Lindley, *Leaving Mogadishu: The War on Terror and Displacement Dynamics in the Somali Regions, A Micro Level Analysis of Violent Conflict*, Institute of Development Studies at the University of Sussex, Brighton BN1 9RE, 2009, p11.

TFG in July 2008, calling for a cessation of hostilities, deployment of a UN peacekeeping force, and withdrawal of Ethiopian troops. However, the Djibouti process has stalled due to the refusal by Al-Shabaab and hardliner Eritrea-based ARS members (led by Hassan Dahir Aweys) to participate, and the limited control of the more moderate ARS wing of the numerous opposition groups in Somalia.²³ There have been important structural upheavals in Mogadishu and shifting landscapes of violence in the last couple of decades, with particularly dramatic changes within the last five years. This provides the backdrop to migration, shaping underlying predispositions to migrate.

b. Displacement

Since 1991, Somalia has witnessed diverse migration patterns. Nomads have continued their cycles of pastoral migration, adapting to changing ecological and political circumstances. People have moved short distances within and between cities and rural homelands, or from more troubled to quieter regions, to escape violence²⁴. People have also fled to neighbouring countries, forming a large regional diaspora, both encamped and self-settled in urban areas, and some formed sizeable refugee communities in Western Europe and North America. Some have returned to the more stable self-declared Republic of Somaliland and to a lesser extent to the autonomous regions of Puntland.²⁵ Meanwhile, emigration from

²³ Ibid, p 35.

²⁴ Interview with a Worker in The International Immigration Organisation (I.I.O) on 18th September in Nairobi.

²⁵ A.J. Ahmed. *Daybreak Is Near: Literature, Clans, and the Nation-State in Somalia*, Asmara, Red Sea Press, 2000, p81.

across the Somali regions continues in response to insecurity, chronic political uncertainty, and limited economic opportunities. The first mass displacement was to Ethiopia and Djibouti as a result of the war in the north-west in 1988-1991. There was a second massive population movement in the wake of escalating violence in the southern areas and the collapse of the state in 1991, with hundreds of thousands of people fleeing to Kenya and Ethiopia.²⁶

c. Human capabilities

Human capabilities were defined by early livelihood theorists as what people can do or be, and the ability to find and make use of livelihood opportunities and cope with stress and shocks.²⁷ Later models use the term 'human capital' or 'human assets' to capture a similar idea, and emphasise the people at a household's disposal as labour resources, as well as their skills, knowledge, ability to work, or health. Deaths, departures and incapacity of various kinds disrupted the human capabilities of the families affected, irredeemably changing the nature of family life.²⁸ Such changes can have a huge emotional, economic and security impact on those left behind. For some the death of family members was a proximate cause that set the scene for eventual migration, for others it immediately precipitated migration. Beyond human capabilities, there are also more concrete resources that are used to secure a means of living, both physical (structures, infrastructure and

²⁶ Ibid, p89.

²⁷ R. Anker, *Poverty Monitoring: An International Concern*, New York, St. Martin's Press, 1994, p14.

²⁸ V. Luling, Come back Somalia? Questioning a collapsed state. *Third World Quarterly*, 1997, 18(2), p119.

equipment used for production, and housing, and domestic tools and stocks) and financial. The way that the conflict impinged on these was another major factor driving migration²⁹.

The widespread looting of businesses and other institutions by freelance militia, as well as the warring parties, also had a more general effect on market activity. As the militia fled, and businesses and institutions like schools and universities closed for periods, or definitively, many employees lost income. While Bakara Market, the biggest Somali market and the heart of Hawiye economic power, has continued to operate, it is in a dangerous area and was frequently been the epicentre of battles between the opposition and the TFG. It seems likely, that the disruption to trade routes and changing patterns of demand caused by the civil insecurity was a further factor in the decisions of some businesspeople to leave Mogadishu.

d. Losing socio-political protection

Another theme that emerge is how civilians came to decide to leave was the loss of socio-political protection. Socio-political assets – which can sometimes turn into liabilities, especially in conflict settings - include membership of particular groups, access to community decision-making processes, ability to appeal to authorities for justice and security, et cetera, that can be used to further one's livelihood strategies. As patterns of power in Mogadishu were contested and reconfigured, people who had managed to negotiate the risks of life in Mogadishu before and during the Islamic Courts found themselves in new situations which required

²⁹ Ibid, p 122.

reconfigurations of their livelihood systems in many ways, including by adopting migration as a livelihood strategy.³⁰

Those witnessing the growing frequency of death and disaster among their neighbours, extended family and clan networks, began to fear that the same could happen to them if they stayed. This was the case even among those from prosperous families that had hitherto led relatively comfortable lives in Mogadishu. For women, exposure to increased risk of rape and assault against the background of generally increased urban insecurity, often contributed to the decision to depart. For some women, membership of particular groups had previously provided a degree of protection from rape.

Some livelihoods became specifically politically dangerous. Opposition groups began to target anyone working for the TFG, even if only as a cleaner, and anyone suspected of assisting the government in any way. NGO workers were particularly politically exposed, international aid organisations and their Somali civil society partners were targeted by some opposition groups for complicity with Western backing of the TFG and counter-terrorism.³¹ But it is often unclear where the threats are coming from, often clearly from insurgents, but other times people fear that the TFG is trying to silence them, or others are using the opportunity to settle old scores.

³⁰ A. Lindley, *Leaving Mogadishu: The War on Terror and Displacement Dynamics in the Somali Regions, A Micro Level Analysis of Violent Conflict*, op.cit, p 42.

³¹ M. Bryden, *Somalia: Seizing the Opportunity*, Paper present in Conference on the Current Peace and Security Challenges in the Horn of Africa, Adis Ababa, March 12-13, 2007, p14.

e. Grave violations of Human's rights

Children continue to be a highly vulnerable group, particularly children in settlements of internally displaced persons. An estimated 600,000 children and their families are in need of emergency humanitarian aid, particularly in Mogadishu. As a direct result of the conflict, Somali children are suffering not only from malnourishment and higher risk of disease, but also exhaustion and emotional trauma.³² The general lack of basic services has worsened over the reporting period.

The availability of large numbers of small arms inside Somalia has led to widespread violence by military and militia personnel, as well as civilians, in a climate of impunity, exacerbating grave violations of children's rights. Violations against children have occurred in the context of the conflict, but individuals are also taking advantage of the lack of rule of law and the availability of arms to commit violent crimes against children and other vulnerable members of the population.³³

In addition to the challenges of systematic monitoring and reporting of grave violations against children because of poor security and access limitations, there have been no reliable birth records in nearly 20 years to verify the age of victims as a basis for access to services. Moreover, cultural norms establish 15 years as the threshold of adulthood in Somalia, leading to less reporting of abuse of children.

³² UN, Humanitarian Situation in Somalia, Monthly Analysis, op.cit, p12.

³³ Ibid, p13.

f. Recruitment and use of children in armed forces and groups

The recruitment and use of children in armed forces and groups continues to be a critical concern and challenge, exacerbated by broad cultural acceptance. The Transitional Federal Government and remnants of UIC were cited a report on children and armed conflict for recruiting and using children. In addition to those groups, during the period covered by the report there was further evidence of the recruitment and use of children by the Al-Shabaab forces.³⁴

The widespread use of children in almost all fighting forces in the country was noted, particularly in Mogadishu. The recruitment of children has been increasing as a result of the conflict between anti-Government groups and the Transitional Federal Government and Ethiopian troops. Although during the last year there were 64 reports of child recruitment, down from 100 reports over the previous 12-month period, this apparent decrease is not indicative of the high level of child recruitment. The decline is attributable in part to the fact that UIC no longer controls Mogadishu. During its control in 2006 it engaged in mass recruitment of children in schools which was simpler to monitor. Moreover, the exact number of children recruited or involved in the hostilities cannot easily be verified, as there is a lack of access to children who are actively engaged in the conflict. In addition, there is no birth registration in Somalia, making it difficult to determine the age of an adolescent or young person involved with an armed group.³⁵

³⁴ UN, Promotion and protection of the rights of children, A/62/609-S/2007/757, December 2007, p3.

³⁵ Ibid, p9.

Children over the age of 15 are considered adults, and therefore it is culturally acceptable for boys to carry arms and for girls to work, usually in a domestic or logistics capacity, for armed groups. In addition, the nomadic and clan-based structure of traditional Somali life means that children have been expected to defend family or clan property. Displacement, abandonment, neglect, orphanhood and destitution have made children, especially those living on the streets, particularly vulnerable to recruitment.³⁶

Anti-Government forces, in particular groups describing themselves as Al-Shabaab, are also recruiting children into armed conflict and military operations. For example, children have been used to plant roadside bombs and other explosive devices, leading to a few deaths and several injuries among the children themselves.³⁷ It has been reported that street children are being used for the planting of these devices, frequently without their knowledge. It has also been reported that Al-Shabaab is training children as young as 8 years of age in special camps to plant bombs and carry out assassinations, offering a financial reward for those acts. This training is provided in many cities, including El Adde, Bu'ale and Balad, Al-Shabaab is also going into madrasas and Koranic schools to recruit children into armed conflict. For example, in September 2007, a child trained by Al-Shabaab killed a Transitional Federal Government officer near a school in Hamar Jahid. As a result of recruiting in schools, learning institutions are sometimes regarded as

³⁶ K.Fangen, Humiliation experienced by Somali refugees in Norway, *Journal of Refugee Studies*, 2006, 19(1), p89.

³⁷ Ibid, p93.

potential targets by the Transitional Federal Government and Ethiopian troops.

g. Killing and maiming

Civilians have been the victims of armed violence in many regions in Somalia, particularly those living in settlements of internally displaced persons that are close to military or government buildings. Violence between Transitional Federal Government and Ethiopian forces and anti-Government groups, including Al-Shabaab, remnants of UIC and Hawiya and other clan militias has led to high civilian casualties, particularly in Mogadishu.³⁸ Over 1,850 people, including 217 children, wounded by weapons, were examined by one hospital in Mogadishu alone. More than 125 children were recorded by protection monitors as having been killed, up from 82 reported from 16 March 2006 to 15 March 2007. The risks posed to children in Mogadishu by indiscriminate shelling, mortar attacks and gunfire increased during the first months of 2008. Thirty-three children, many under 10 years of age, have been reported seriously wounded in the crossfire in just two districts of Mogadishu between February and mid-May 2008 alone.³⁹

Child protection monitors have reported cases of children being injured or killed as a result of crossfire, mortar attacks, grenade launches or the rare targeted shooting, while in their homes, on the street, in the market, walking home from school or playing football.

There is a persistent danger to civilians from explosive remnants of war, landmines and other such devices. The numbers of unexploded ordnance accidents involving

³⁸ International Crisis Group Africa Report N°147, Somalia: To Move Beyond the Failed State, 23 Dec. 2008, p2

³⁹ Ibid, p 3.

civilians in and around Mogadishu increased following the bombardment of the capital by Transitional Federal Government and Ethiopian forces in April 2007. Between January and June 2007 there were more than 28 landmine accidents in southern Somalia, killing 8 children and wounding 10, and 33 incidents involving bombs or unexploded ordnance that killed 25 children and wounded.⁴⁰

h. Rape and other sexual violence

Reported cases of rape and other sexual assaults carried out against children increased from 115 last year to 128 during the period from 16 March 2007 to 15 March 2008.⁴¹ Of the rape cases of children reported by child protection monitors, only a minority are alleged to have been carried out by parties to the conflict. Nonetheless, the continued fighting has rendered women and children more vulnerable to sexual violence because of displacement, destitution, the breakdown of the rule of law and the re-emergence of armed groups and freelance militias, all a result of the ongoing conflict. There are reports of victims as young as 3 months old. Most at risk are women and girls living in open and unprotected settlements for internally displaced persons, particularly those who belong to a clan that is a minority in the area where they are living.

In the Raf and Raho and Tuur Jalle settlements for internally displaced persons in Bosaso there were 31 cases of rape against children reported in one month alone. In the Bulu Mingis settlement in Bosaso 25 rapes of children were reported in October 2007. In the first week of November 2007, three girls, aged 7, 12 and 18

⁴⁰ Ibid, p4.

⁴¹ UN, Special Report of the Indicators on Violence against Women and State response, A/HRC/7/6, 2008, p16.

years, were raped in the settlement. Forty children were raped and 12 children experienced attempted rape in five settlements for internally displaced persons in Somaliland during 2007, including Hargeisa and Sheikh-nur. ⁴²

Though most of the reported rapes have been carried out by civilians, there are several reports of rape by parties to the conflict, including militia members and Transitional Federal Government and Ethiopian troops. In particular, roadblocks set up and controlled by militias or gangs are locations where many incidents of sexual violence have reportedly occurred. In May 2007, militia members stopped a minibus at a checkpoint and raped eight women and five girls. On 15 April 2007, an 18-year-old girl was allegedly gang-raped by Ethiopian soldiers in the Hamar Bille neighbourhood of Mogadishu. On 28 April 2007, a 15-year-old displaced girl was en route to Beletweyne in a passenger car when militia members opened fire. She ran into nearby bushes to escape, but was followed by the militia members and repeatedly raped. ⁴³

There have been several cases of girls raped while fleeing Mogadishu, mostly along the road to Afgooye and Baidoa. In the first half of 2007, there were four such verified cases of girls raped by men dressed in Transitional Federal Government uniforms. In Heliwa district, Transitional Federal Government soldiers were accused of raping four internally displaced women and one teenage girl during what the soldiers claimed was a search for insurgents on 29 July 2007. On 13 October 2007, a 15-year-old girl was told by five armed men in Transitional Federal Government uniforms to fetch the family's valuables and that her brother

⁴² Ibid, p17.

⁴³ Ibid,p18.

must leave. When she returned without sufficient valuables, she was raped. On 1 November 2007, a 16-year-old girl was raped by two Transitional Federal Government policemen who were on security patrol.⁴⁴ In story told by a woman (We were rich with lands... My father died in 1991 at the start of the civil war, and we were four daughters and my mother. My mother had shops and we used to help there, we used to go to school and we were really doing well... The ICU understood why we should work outside our houses as women. We had no men to help us or bring food to our table. And you could travel carefree around the city... But after the arrival of the Ethiopians, we couldn't come out of our houses... The shops were taken over the TFG and we couldn't stay there any longer. My mum decided to leave for our sake as girls - we were hearing about rapes and how the Ethiopians make excuses to come into your house by saying that they are searching for the insurgents and that's how they get into houses of the civilians and they start doing their horrible things - raping, killings and slaughtering all that under the name of protecting us from the ICU! This a change - at least while we were only Somalis we never worried about that ever, everyone knows each other and we were respected among the community).⁴⁵

I. Attacks on schools and hospitals

Attacks on schools and hospitals have not been a prominent characteristic of the conflict in Somalia, though they appear to be on the rise. In mid-May, for example, a hand grenade exploded near a primary school close to the presidential palace in

⁴⁴ Interview with a Worker in The Arab League Somalia Office on 18th September in Nairobi.

⁴⁵ Interview with (A woman in her 28s), In: Anna Lindley, op. cit. p23.

Mogadishu. There were no casualties.⁴⁶ It was also reported that Ethiopian forces occupied the Mohamoud Ahmed Ali secondary school for military purposes between April and July 2007. In July and August 2007, there were reports of raids on schools by Transitional Federal Government forces in Mogadishu. Again, as a result of recruiting in schools by UIC and other anti-Government groups, such as Al-Shabaab, learning institutions are sometimes regarded as potential targets by the Transitional Federal Government and Ethiopian troops. On 26 July, Transitional Federal Government forces stormed an Islamic school and abducted 4 teachers and 20 students.⁴⁷

More recently, on 19 April 2008, during an attack on the Al-Hidayo mosque, Ethiopian forces raided an attached madrasa and detained 50 students under the age of 18 years. Thirty-two of those students were released a few days later.

Hospitals, particularly in Mogadishu, are stretched to capacity and are vulnerable to looting of their supplies. Several hospitals have also been forced to close. In April and May 2007, several hospitals, including the SOS, Al-Hayat and Al-Arafat hospitals, were attacked with mortar rockets. The Al-Arafat hospital is no longer functional following the attack. On 18 August, mortar shells from clashes between Ethiopian and Transitional

⁴⁶ UN Office for the Coordination of Humanitarian Affairs (UN OCHA), 2008, OCHA Fact-Sheet; Somaliland, May 2007 Internet : [http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/\\$file/Somaliland+fact+sheet+May+07\[1\].pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/$file/Somaliland+fact+sheet+May+07[1].pdf)

⁴⁷ AllAfrica.com, 13 July 2008, The Situation of Mogadishu's Daynile District 'Volatile' Internet : <http://allafrica.com/stories/200807140682.html> , accessed September 2009.

Federal Government forces and anti-Government forces once again hit the SOS hospital.⁴⁸

j. Denial of humanitarian access

Since the early 1990s, the capital, Mogadishu, has not been sufficiently secure to be used as a base for the United Nations country team; thus, the country team has been operating out of Nairobi, in neighbouring Kenya. The capital and much of the country have been inaccessible to international humanitarian personnel for many years. This has impaired monitoring and accountability of programmes, reduced delivery of aid even during acute humanitarian crises and rendered the local staff and international staff operating in Somalia more vulnerable to attacks.⁴⁹

Checkpoints and roadblocks are a major obstacle, particularly in central and southern Somalia. From January 2007 to February 2008, the number of roadblocks in Somalia has reportedly more than doubled to 396, according to United Nations sources. Of that total, 77 are in Hiran, on the central Somalia coast and in Galgudud. Seventeen of those 77 roadblocks are manned by local militias, and the remaining 60 are reportedly manned by Transitional Federal Government and local government forces. The United Nations is concerned that checkpoints and roadblocks pose an additional challenge to wounded or sick children and women trying to get access to medical assistance in Mogadishu. Further disruptions of

⁴⁸ Amnesty International (AI), 4 March 2009, Somalia: Civilians pay the price of intense fighting in Mogadishu
Internet : <http://www.amnesty.org/en/library/asset/AFR52/002/2009/en/df180328-b4d8-4908-827a-ce7c7ac8268c/afr520022009en.html> , accessed 7 September 2009.

⁴⁹ Ibid, Amnesty International (AI), 4 March 2009, Somalia, accessed 8 September 2009.

humanitarian aid have been periodic temporary bans on travel to parts of Somalia by international staff and even United Nations staff members who are Somali nationals. The United Nations further reports that pilots have refused to travel to Mogadishu because of security concerns. In Puntland, in particular, the threat of kidnapping has been quite elevated and has led to periodic travel restrictions. In addition, the Somali border with Kenya remained closed. Permission for the transport of humanitarian cargo to the border is being granted only on an ad hoc basis.⁵⁰

Somalia's National Security Service detained the World Food Programme (WFP) officer-in-charge of its Mogadishu office for five days in October 2007, forcing WFP to temporarily suspend food distributions to thousands of people. In February 2008, a German aid worker from German Agro Action was kidnapped on his way to Waqadiriya, in an area claimed by both Puntland and Somaliland. He was released 12 hours later. On 16 February 2008, a private convoy carrying WFP food was stopped and the convoy leader shot and killed by the militia manning the roadblock.⁵¹

Piracy off the coast of Somalia continued to be a problem for aid agencies attempting to deliver food and other supplies. Shipping is the principal and fastest route used by WFP to move large amounts of food aid to Somalia.

⁵⁰ Human Rights Watch, World Report 2009, Available in <http://www.docstoc.com/docs/8460751/World-Report-2009---Human-Rights-Watch>, accessed 8 September 2009.

⁵¹ Ibid, Human Rights Watch, World Report 2009, accessed 9 September 2009.

In an overview of the chapter it can be argued that, since the early 1990s there has been widespread and large-scale conflict and lack of effective government in South-central Somalia. Much of the public infrastructure was destroyed in the early 1990s, social services collapsed, livelihoods were disrupted, and large numbers of people were displaced. Despite numerous mediation attempts, and the deployment of United Nations Operation in Somalia (UNOSOM) troops, a low-intensity state of conflict with widespread intermittent violence has persisted until the present day. The lack of security is a significant hurdle and challenge to the establishment of a peaceful and prosperous Somalia. The institutional vacuum in much of South Central Somalia over the last 15 years has created an open field for carrying arms and staking claims and influence over territories and resources, feeding a culture of warlordism and militias. More than 01 million people fled war and famine in Somalia to seek refuge in neighboring countries, and many rural and urban poor became internally displaced after fleeing the violence.

While displacement has continued, resulting in multiple waves of security-seeking population movements, it is now less drastic than in the early 1990s. Nonetheless, approximately 400,000 IDPs and 250,000 refugees (around 8 percent of the Somali population) are now seeking protection and assistance in achieving durable solutions, including self-reliance, reintegration, or resettlement to a third country.⁵² Most health facilities were seriously damaged and looted during the civil war, and only a few have been completely rehabilitated. Overall, the public health care network is small, concentrated in the main towns and where security conditions allow.

⁵² Interview with a Worker in The Arab League Somalia Office on 18th September in Nairobi

CHAPTER FOUR

CONCLUSION AND RECOMMENDATIONS

Chapters Summary

Chapter one gives a background of the study, it dealt with what the study seek to achieve and how to go about to achieve it. The statement of the research problem we find that, The deliberate targeting of civilians, the destruction of civilian property and looting, the forced displacement of populations, the use of civilians as human shields, the destruction of infrastructure vital to civilian populations, rape and other forms of sexual violence, torture, indiscriminate attacks: these and other acts of violence are unfortunately all too common in non-international armed conflicts throughout the world. The challenges presented by these conflicts are, to a certain extent, related to a lack of applicable rules, but more importantly, to a lack of respect for IHL, Where IHL is not respected, human suffering increases and the consequences of the conflict become more difficult to repair. The study based on a solidarism international society theory. The central argument of the theory is that states have both a legal right and a moral obligation to intervene forcibly in exceptional circumstances that offend minimum standers against humanity¹.

Chapter two makes an overview of the interplay between International humanitarian law (IHL) and Human Rights Law (HRL). This chapter offers the fundamental features that distinguish the two bodies of law. International human

¹ See chapter one, Theoretical Framework, p 14.

rights law and international humanitarian law are traditionally two distinct branches of law, one dealing with the protection of persons from abusive power, the other with the conduct of parties to an armed conflict. With the conclusion of the Second World War human rights became part of international law, starting with the adoption of the Universal Declaration of Human Rights in 1948, the protection of civilians in the Fourth Geneva Convention, albeit for a large part only those of the adverse or third parties, added a dimension to humanitarian law that drew it much closer to the idea of human rights law, especially with regard to civilians in detention. The Universal Declaration of Human Rights is silent in regard to armed conflict. The question of the application of human rights in armed conflict only later arose with the drafting of human rights treaties. There are two formal requirements for the lawfulness of derogations: they must be officially proclaimed and other states party to the treaty must be notified of them. Jurisprudence and state practice have recognized the application of human rights not only in non-international armed conflict, but also in international armed conflict including situations of occupation. In general terms, human rights law and humanitarian law have in common that they seek to protect people from abusive behaviour by those in whose power they are state authorities in the case of human rights law, a party to the conflict in the case of humanitarian law.² The instruments of international law which provide a legal framework for the protection of civilian populations in armed conflicts notably include the International Humanitarian Law, and in particular the Fourth Geneva Convention of 1949 and the two

² See chapter two, *The Interplay between International Humanitarian Law and International Human Rights in situation of Armed Conflict*, p24.

Additional Protocols of 1977 , the Convention Relating to the Status of Refugees of 1951 which provides those who flee to another country to escape conflict at home and the associated persecution with a legal status and a legal framework of protection, certain fundamental rights such as the right to life and the prohibition of torture apply in situations of conflict, Specific plans of political action and legal norms developed to protect particularly vulnerable groups and notably women, children and internally displaced persons, the International Criminal Court governed by the Rome Statute (1998) by means of which the international community is able to combat impunity.³

Chapter three examined the Humanitarian Law violation in Somalia conflict and how this impacted negatively on the civilians. The chapter also identified the structure of Somalia conflict which is led to that violation. Somali people are concentrated in an area in the Horn of Africa that stretches from the far north east corner into modern day Djibouti, the Ogaden region of Ethiopia and northern Kenya, and have a strong and enduring tradition of nomadic pastoral migration. Arab and Somali regional migration brought Islam and linkages into wider trading networks. Somalia is normally described as a “clan society” and the classic anthropological texts have ascribed an almost fatalistic clan identification to Somalis,⁴ because of the clan-based system of patronage and reward established by Siad Barre, clan identity had certain class characteristics in the late 1980’s and early 90s. The Somali Patriotic Movement (SPM) sprang from Ogaden clan members of the officer class in the armed forces. However, the large clan-based

³ See chapter two, *The Interplay between International Humanitarian Law and International Human Rights in situation of Armed Conflict* p 42.

⁴ See chapter three, *Humanitarian Law Violation in Somalia Conflict*, p57.

coalitions that existed in 1991 were inherently unstable.⁵ They existed primarily to try to seize state power. They fought each other in the months after the collapse of the Siad Barre government. When this failed, the locus of conflict shifted to major strategic resources such as cities and ports. With the shift in locus of conflict came a fragmentation of the clan alliances. Thus the major battles of late 1991 and early 1992 were intra-USC and intra-SPM. In the early 1990s, in Mogadishu and elsewhere, opposing militia looted homes and businesses, robbed, kidnapped, raped and killed people associated by clan with opposing factions and minority groups. The population was further decimated by famine in 1991-92 and was the scene of flailing humanitarian efforts and a catastrophic UN intervention in 1993 by US and other forces. Mogadishu has been a scene of continued conflict between the Transitional Federal Government forces, supported by Ethiopian troops, and various anti-Government armed groups, including remnants of the Union of Islamic Courts (UIC); Al-Shabaab insurgents, many of them linked to UIC; and the Hawiye clan militias. Although UIC had been defeated by the Transitional Federal Government and Ethiopian forces in December 2006, its supporters and other armed groups are continuing to resist the Transitional Federal Government presence in and around Mogadishu. Civilians, notably, vulnerable groups, continue to be the majority of casualties, primarily as a result of crossfire and explosions. Since February 2007, 340,000 people have fled fighting in Mogadishu. There have been important structural upheavals in Mogadishu and shifting landscapes of violence in the last couple of decades, with particularly dramatic changes within

⁵ See chapter three, *Humanitarian Law Violation in Somalia Conflict*, p55.

the last five years.⁶ This provides the backdrop to migration, shaping underlying predispositions to migrate. The first mass displacement was to Ethiopia and Djibouti as a result of the war in the north-west in 1988-1991. There was a second massive population movement in the wake of escalating violence in the southern areas and the collapse of the state in 1991, with hundreds of thousands of people fleeing to Kenya and Ethiopia. The widespread looting of businesses and other institutions by freelance militia, as well as the warring parties, had a more general effect on market activity. As the militia fled, and businesses and institutions like schools and universities closed for periods, or definitively, many employees lost income. An estimated 600,000 children and their families are in need of emergency humanitarian aid, particularly in Mogadishu. As a direct result of the conflict, Somali children are suffering not only from malnourishment and higher risk of disease, but also exhaustion and emotional trauma.⁷ The widespread use of children in almost all fighting forces in the country was noted, particularly in Mogadishu. Reported cases of rape and other sexual assaults carried out against children increased from 115 last year to 128 during the period from 16 March 2007 to 15 March 2008, though most of the reported rapes have been carried out by civilians, there are several reports of rape by parties to the conflict, including militia members, Transitional Federal Government and Ethiopian troops. Since the early 1990s, the capital, Mogadishu, has not been sufficiently secure to be used as a base for the United Nations country team; thus, the country team has been operating out of Nairobi, in neighbouring Kenya. Piracy off the coast of Somalia

⁶ See chapter three, Humanitarian Law Violation in Somalia Conflict, p56.

⁷ See chapter three, Humanitarian Law Violation in Somalia Conflict, p 61.

continued to be a problem for aid agencies attempting to deliver food and other supplies.

General Conclusion

One of the most important issues emerging from the study is that relation between IHL and IHR, IHL is a set of international rules, established by treaty or custom, which are specifically intended to solve humanitarian problems directly arising from international or non-international armed conflicts. It protects persons and property that are, or may be, affected by an armed conflict and limits the rights of the parties to a conflict to use methods and means of warfare of their choice.⁸ IHL is applicable in times of armed conflict, whether international or non-international. International conflicts are wars involving two or more states, and wars of liberation, regardless of whether a declaration of war has been made or whether the parties involved recognize that there is a state of war. IHL binds all actors to an armed conflict: in international conflicts it must be observed by the states involved, whereas in internal conflict it binds the government, as well as the groups fighting against it or among themselves. Thus, IHL lays down rules that are applicable to both state and non-state actors. International human rights law and international humanitarian law are traditionally two distinct bodies of law, there

⁸ Y. Sandoz, B. Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, op.cit, p77.

are an infinite number of points of contact between the two bodies of law, raising increasingly complicated and detailed questions.⁹

The study also brought out the structure of Somalia conflict and its impact on civilian protection, the most significant approach that The importance of clan lies primarily in the fact that clan identity is the locus for physical security and military mobilization. Based on long-standing realities of Somali social structure, this was sharpened by the political strategies adopted by Siad Barre and his opponents, and is an enduring reality. However, the clan system in contemporary Somalia should be seen primarily as a means of organizing political and economic life that is driven by other interests, rather than the determining factor for Somalia's political economy. During the 1990's, the strength of political Islam in the country lay in its ability to address the needs of certain groups that have been marginalized by both resource conflicts and clan militarism, and to deliver practical solutions to social needs. Political Islam also performed two important functions for the merchant class. First, it connected them to Gulf-based sources of finance and philanthropy. Second, it provided them with a ready-made basis for administrative and commercial law which could assist in enforcing contracts and stabilizing the political environment. When Islamists could latch onto a clan agenda, as they did during 2006 in Mogadishu, they demonstrated the potential to emerge as a powerful political force. Internal armed conflicts in Somalia often surface against the background of collapsed States and involve a number of non-State actors over which State institutions have little or no control. Opposition to the Ethiopian troop presence in Mogadishu and parts of central and southern Somalia has created a

⁹ N. Lubell, *Challenges in Applying Human Rights Law to Armed Conflict*, op.cit, p249.

volatile situation and exacerbated existing tensions. The ongoing conflict has seriously constrained humanitarian delivery and emergency operations in central and southern Somalia.

Civilians, including children, continue to be the majority of casualties, primarily as a result of crossfire and explosions. In many places outside Mogadishu, clan leaders act as political heads, and clan militias are regaining power.¹⁰ In all 10 regions in central and southern Somalia experienced clan conflicts. While many of those clan conflicts revolved around competition over local power or land, some were influenced by national political agendas and all have contributed to the overall insecurity of civilians, particularly vulnerable groups.

The main factor that emerge is the availability of large numbers of small arms inside Somalia has led to widespread violence by military and militia personnel, as well as civilians, in a climate of impunity, exacerbating grave violations of children's rights. Violations against children have occurred in the context of the conflict, but individuals are also taking advantage of the lack of rule of law and the availability of arms to commit violent crimes against children and other vulnerable members of the population. the continued fighting has rendered women and children more vulnerable to sexual violence because of displacement, destitution, the breakdown of the rule of law and the reemergence of armed groups and freelance militias, all a result of the ongoing conflict.

The study was based on one overall objective and two sub-objectives, which have been fulfilled. The overall objective is to identify the challenges facing

¹⁰ Interview with a Worker in The International Immigration Organisation (I.I.O) on 18th September in Nairobi.

international humanitarian law to be respected by the warring parties. The diversity of conflicts and parties in Somalia makes it very difficult to formulate standard approaches or plans of action for increasing respect for humanitarian law. The parties are vary widely in character, depth of knowledge of the law, motives for taking part in an armed conflict, interest in or need for international recognition or political legitimacy: these and other factors affected the prospects for engaging with a party to increase its respect for the law.

The efforts of humanitarian actors or organizations that seek to engage with the parties in Somalia conflict, to increase respect for the law, also affected by a number of other factors as well. These include the degree of access to Somalia territory in which the conflict taking place, the lack of reliable information concerning the conflict, as well as the level and quality of contact with the leadership of the parties.¹¹

The deny of the applicability of humanitarian law by the parties involved in Somalia conflict, made it difficult to engage in a discussion on respect for the law. Lack of political will to implement humanitarian law, parties in Somalia conflict have not enough political will, or none at all, to comply with the provisions of humanitarian law. The parties to the conflict are unable to provide effective security guarantees to access to certain areas in Somalia. The ignorance of the law significantly impedes efforts to increase respect for IHL and to regulate the behaviour of the parties to conflicts.¹²

¹¹ Interview with a Worker in The Arab League Somalia Office on 18th September in Nairobi.

¹² Interview with a Worker in British Islamic Organisation (BIO) on 17th September in Nairobi

The hypothesis of the study was duly demonstrated. The first hypothesis suggested that the ignorance of the law significantly impedes efforts to increase respect for international humanitarian law in the armed conflict. This hypothesis was demonstrated to be true as it was clearly manifested in chapters two and three. The second hypothesis suggested that Lack of respect for international humanitarian law during armed conflicts affect negatively on the lives of Somalia civilians, this one also had been proven to be true, indeed Somalia civilians had been affected negatively as the study shown. The last hypothesis holds that State collapse in Somalia led to the suffering of civilians in armed conflict. The study shown that this hypothesis is true, because the central government has no control throughout Somalia territory even within the capital Mogadishu.

Recommendations

Conflict prevention is one of the primary obligations of Member States set forth in the Charter of the United Nations, and United Nations efforts in conflict prevention must be in conformity with the purposes and principles of the Charter. Conflict prevention is also an activity best undertaken under Chapter VI of the Charter. The primary responsibility for conflict prevention rests with national Governments, with civil society playing an important role. The main role of the United Nations and the international community is to support national efforts for conflict prevention and assist in building national capacity in this field. In this section

specific recommendations on how the United Nation with the cooperation and active involvement of Member States, who ultimately have the primary responsibility for Somalia conflict prevention.

The process of state-building consistently is the main cause of exacerbating instability and armed conflict in Somalia. The revival of a state structure tends to be viewed as a zero-sum game, creating winners and losers over potentially high stakes. Control over a central government by specific groups would offer them opportunities to accrue economic resources at the expense of other groups, as well as to use the law and security forces to dominate politically. Whatever formula is used to establish the cabinet and other transitional institutions, one should expect a difficult and possibly extended bargaining process among the different office holders to clarify and demarcate roles, responsibilities and potential resources. While political institutions and public service institutions can be seen to represent opposing ends of such a specter, careful thought needs to be given to mechanisms that can provide nonpartisan oversight of institutions responsible for key functions such as judiciary, law enforcement, and internal and external security.¹³

All parts of Somalia need institutions that can provide functions such as maintenance of basic law and order, revenue collection, management of natural resources, and provision of essential public goods and services, even modest levels of law and order tend to reduce armed conflicts by minimizing retaliation and

¹³ Interview with a Worker in The International Immigration Organisation (I.I.O) on 18th September in Nairobi.

revenge killings. Fledgling and nascent public institutions in Somaliland and Puntland need to be strengthened, and in South-central carefully built when politically possible. Even if government functions do not contribute directly to preventing conflict escalation, they would benefit the population and provide a framework within which stability and social cohesion may develop if they were based on sound principles for governance in which strong and appropriate accountability measures feature.¹⁴

A common religious faith unites the Somali population across clan and other fault lines. The population is almost entirely Muslim, and the anarchy, plunder, and violence that followed the collapse of the state in 1991 were viewed by most Somalis to counter traditional Islamic values. Many worry that those values have eroded, and see revival of the traditional ethical and value system embedded in Islam as essential for the peace process. Sharia courts contribute to maintaining justice and stability, and local Islamic organizations play an important role in providing critical humanitarian and social services. Religious groups often transcend clan and regional lines, and thus are helping to strengthen crosscutting social capital. It is also important, to be aware of another and more recent trend, namely the existence of a few radical Islamic groups that tend to have divisive effects on society by promoting beliefs and values not shared by the majority. It is important to distinguish between Islam, its institutions, and the way it is practiced by the majority of the population, and extreme and divisive tendencies pursued by a tiny minority in the name of Islam.

¹⁴ Interview with a Worker in The Arab League Somalia Office on 18th September in Nairobi.

The clan system has been used as the basis for control of resources, which has led to division and conflict among lineage groups at different levels. The civil war that followed the state collapse in 1990–91 was fueled by the plunder of material resources, and relief aid during the 1991–92 crisis constituted an important part of the loot, justified by warlords as support for their lineage. Any infusion of financial or material resources into the economy, however small, would represent a potential object for competition and division among lineage-based groups. Any benefits, or perceived benefits, for specific groups versus other groups of such infusion need to be considered. There needs to be a premium on development activities that can contribute to breaking down clan division and clannism.

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ANNEX -A

QUESTIONS FOR INTERVIEWS

1. How has the absence of a centralized governance affected the rule of law and protection of the population?
2. How have the Somali different clans organized to enforce the rule of law and assist their population to seek justice?
3. How have the aid agencies and Non-governmental Organization operated in the absence of Law and Order and how has this affected the distribution of humanitarian assistance?
4. What has been the role of the International Community (UN, AU, Arab League, UNHCR) to ensure the protection of civilians?
5. What has been the effect of the extremists and fundamentalist on the rest of muslim population particularly their enforcement of the sharia Law and if it contradicts with the traditional Somali custom?
6. How have the intervention forces such as Ethiopia been able to follow the rule of law and if there were any violations how could the civilians seek remedy?
7. What did you find to be the most serious violations of human rights by the different parties operating in Somalia?
8. What would be your recommendations to the International Community in addressing the issues of humanitarian law as you have witnessed in Somalia?