CHAPTER ONE

INTRODUCTION

1.1 Background to the Study

In most conflicts that we have witnessed across the globe today, governments and armed groups routinely attack civilians, commit war crimes and terrible human rights abuses especially amongst vulnerable groups, particularly women.[1] There is no doubt that armed conflicts affect women differently as women are amongst the most vulnerable persons and prone to be hit the hardest.[2]Trying to protect women in such situation is a formidable task. In recent years, the attention paid to violations against women in armed conflicts has reached unprecedented levels. Hardly a week goes by without a story in the news media or a report of a non-governmental organization documenting these problems. The subject has also pervaded all areas of the United Nations, from the works of the Security Council to the Special Representatives of the Secretary General and from the World Health Organization to Adhoc International Criminal Tribunals.[3]

Legal efforts to protect women in wartime or during period of armed conflicts have been under way since the beginning of the century. In recent decades, government and institutions have produced declarations, conventions and other legal texts in order to ensure the primacy of women's right in even the worst of circumstances. The law of armed conflict for instance grants women general protection as civilians and requires that women members of the armed forces shall in all cases benefit from treatment as favorable as that granted to men.[4] Besides this basic protection, women are similarly granted specific protection including, protection against outrages

[1] Amnesty International, "'Death Everywhere' War Crimes and Human Rights Abuses in Aleppo, Syria" (2015) https://www.amnestyusa.org/files/embargoed_5_may_aleppo_report_death_everywhere.pdf Accessed 4 June 2018.
[2] T Madzima-Bosha,"The effects of conflict are felt hardest by women and children" (2016) https://www.peaceinsight.org/blog/2013/05/effects-conflict-women-children/ Accessed 4 June 2018.
[3] N Reilly, "Seeking Gender Justice in Post-Conflict Transitions: Towards a Transformative Women's Human Rights Approach" (2007) *International Journal of Law in Context* Vol 3(2).
[4] F Krill, "The protection of women in International Humanitarian Law", (1985) *International Review of the Red Cross*, No. 249.

upon personal dignity and in particular against rape, enforced prostitution and any form of indecent assault, the protection against expectant mothers, maternity cases and mother of infants, and the rule that women deprived of liberty i.e. civilian internees or prisoners of war, must be confined in separate quarters from male internees and must be under the immediate suppression of women.[5]

Women usually do not start wars, but they do suffer heavily from the consequences. Conflict spurs much higher rates of sexual violence. It renders women acutely vulnerable to poverty, the loss of jobs and the destruction of assets such as homes. Essential health services crumble, underlined by a maternal mortality rate that is 2.5 times higher on average, in conflict and post-conflict countries.[6]

Throughout history we see examples of terrible abuses against women and children. From the 1.1 million children killed during the Holocaust, to the many women and children raped or killed during the Rwandan Genocide.[7]Women who survive these atrocities often have to live with the intense and frightening images of rape, war and death for the rest of their lives. Women also suffer from sexually transmitted diseases, stigmatization and sometimes unwanted pregnancies.[8] They are faced with the overwhelming task of keeping families together after displacement, providing food, clothing and shelter in what is in most instances, destroyed infrastructure, for their children and their families.[9]Often the only option is to flee within countries or across borders. According to the United Nations Refugee Agency, women comprise

[5] I Abdullahi, "Observance of the Legal Protections for women in Armed Conflicts: A terrible Beauty?" (2014) *International Journal of Peace and Conflict Studies* (IJPCS), Vol. 2, No. 2. p.42.
[6] Women and Armed Conflict, UN WOMEN, United Nations entity for Gender Equality and the Empowerment of Women. http://beijing20.unwomen.org/en/in-focus/armed-conflict. Accessed 15 March 2017.
[7] J Banyanga, "Trauma inflicted by genocide: Experiences of the Rwandan Diaspora in Finland" (2017) *Cogent Psychology*, Vol 4(1) p. 2. https://www.tandfonline.com/doi/full/10.1080/23311908.2017.1333244Accessed 21 March 2019.
[8] *Ibid.*
[9] *Ibid.*

49 per cent of the refugees worldwide mostly as a result of conflict, and are often put at greater hardship than men in these situations based upon their gender.[10]

In 2000, the UN Security Council adopted the groundbreaking resolution 1325 (2000) on women, peace and security. It recognizes that war, impacts women differently, and reaffirms the need to increase women's role in decision-making related to conflict prevention and resolution. Since the adoption of the resolution, progress is being made; the Council has adopted a number of follow-up resolutions that have become increasingly concrete andwith more than half of all peace agreements signed included references to women, peace and security.[11] However, the pace of change is too slow. From 1992 to 2011, women comprised fewer than four per cent of signatories to peace agreements and less than ten per cent of negotiators at peace tables.[12]

The Beijing Declaration and Platform for Action, adopted in 1995 by 189 UN Member States, made women and armed conflict one of 12 critical areas of concern. It stated unequivocally that peace is inextricably linked to equality between men and women and to development.[13]

The Beijing Platform for Action[14] spelt out a series of essential measures to advance both peace and equality through reducing military expenditures and controlling the availability of armaments. It stated that women must participate in decision-making around conflict resolution, and recognized that women have been powerful drivers of peace movements. It stressed that

[10] I Abdullahi, *art cit.*
[11] L Olsson and Theodora-IsmeneGizelis. *An introduction to Resolution 1325: Measuring Progress and Impact.* (2013). *p. 1* https://fba.se/contentassets/692e74c7fc95456db35af18f9c9e38ea/9781138800021_intro.pdf Accessed 15 March 2017.
[12] UN Women, *art cit. p.1*.
[13] Beijing Declaration and Platform for Action. (1995).http://www.un.org/womenwatch/daw/beijing/pdf/BDPfA%20E.pdf Accessed on 15 March 2017.
[14] UN Women: The Beijing Platform for Action: inspiration then and now (2015) http://beijing20.unwomen.org/en/about Accessed on 15 March 2017.

those who have fled conflict are entitled to fully participate in all aspects of programmes to help them recover and rebuild their lives.[15]

Since then, fierce fighting has engulfed some areas of the world, dragging back development and women's gains by decades.[16] The Beijing commitments remain mostly unfulfilled, even as their urgency has never been more apparent.[17]There is no doubt that war affects women and men differently; aswomen and children are often the most vulnerable and prone to being hit the hardest.There are multiple examples of the sufferingof women and children in armed conflicts in the African continent. The eastern Democratic Republic of Congo (DRC), where conflict has raged for decades, has for example been labeled as "the most dangerous place on earth to be a woman".[18] According to certain reports at the peak of the conflict 1000 women had been raped daily. A 2010 research by the Journal of the American Medical Association found out that 39.7% of women in the eastern DRC including the North Kivu, South Kivu, and Province Orientale were victims of sexual violence during their lifetime, rape being the most frequent. Another study conducted in 2010 concluded that two in five women living in the eastern DRC were exposed to sexual violence. [19]

The civil war in South Sudan is another illustration. A February 2015 report by the United Nations (UN) states that 12 000 children were used as child soldiers across South Sudan in 2014. The report adds that thousands of these children were kidnapped and forced to become

[15] *Ibid.*
[16] UN Women: Women and Armed Conflict (2015) http://beijing20.unwomen.org/en/in-focus/armed-conflict Accessed on 15 March 2017.
[17] *Ibid.*
[18] Peace and Security Council (PSC) Report on Protecting Women and Children in the line of fire (2015) Available at https://issafrica.org/pscreport/on-the-agenda/psc-looks-at-protecting-women-and-children-in-the-line-of-fire Accessed on 15 March 2017.
[19] NGO Working Group on Women, Peace and Security (2011) From Local to Global: Making Peace Work for Women. www.womenpeacesecurity.org/media/pdf-fiveyearson.pdf Accessed on 15 March 2017.

child soldiers. UNICEF reported 89 child abductions in South Sudan in the same month. Human Rights Watch also accuses the Juba government and the rebels of using child soldiers.[20]

In addition, the notorious Nigerian Islamist group Boko Haram continues to hold more than 200 girls, kidnapped in Chibok in April 2014 as hostages.[21]There have also been reports of subsequent kidnappings of more school girl's in northeast Nigeria by BokoHaram.[22]Consequently, Armed Conflict has affected millions of people in Nigeria; according to the facts and figures by the International Committee of the Red Cross, it has displaced more than 2 million people.[23] The kidnapping grabbed the headlines, but the atrocities committed by the group in the region, especially against women and children continue. Lately, the group has also started using teenage girls as suicide bombers.[24]

The past five years has seen an increased interest and commitment from the Peace and Security Council to mainstream gender and child protection in conflict analysis and response, as various measures have been taken to promote the overall protection of vulnerable groups affected by conflict-related violence in Africa.[25] The Peace and Security Council has held numerous open sessions on this issue since 2010. The sessions served as a platform for the Council to engage with civil society organizations, advocacy groups for the rights of women and children and the media.

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[20] Special Report on the review of the mandate of the UN mission in South Sudan (2015).http://www.un.org/en/ga/search/view_doc.asp?symbol=S/2015/899. Accessed on 15 March 2017.

[21]Chibok abductions in Nigeria: 'More than 230 seized' BBC News: 21 April, 2014http://www.bbc.com/news/world-africa-27101714 Accessed 15 March 2017 .

[22]A Haruna, "How Boko Haram attack, kidnap of Dapchi schoolgirls occurred – Residents, School staff" https://www.premiumtimesng.com/news/headlines/259646-boko-haram-attack-kidnap-dapchi-schoolgirls-occurred-residents-school-staff.html Premium Times Newspaper February 23 2018. Accessed 4 June 2018.

[23] ICRC Facts and Figures, 2016 *Humanitarian Needs and ICRC response* at p.1.

[24]R Kriel, "Boko Haram favors women, children as suicide bombers, study reveals" CNN Report 11 August 2017. https://edition.cnn.com/2017/08/10/africa/boko-haram-women-children-suicide-bombers/index.html Accessed 15 December 2017.

[25] PSC Report, *art cit. p.2.*

The past years has also seen progress led by the Women, Gender and Development Directorate of the African Union, including the designation and deployment of gender focal points in the Departments of Peace and Security and Political Affairs, and the African Union liaison offices.[26]

In ensuring the protection of women in armed conflicts in Africa, the African Union has developed various sets of instruments and documents with an objective of preventing the negative impact of violent conflict on women and children before, during, and after conflict.[27] These include the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Solemn Declaration on Gender Equality in Africa (2005) and the African Charter on the Protection and Welfare of the Child (1999), as well as the African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009). The African Union also adopted the UN Security Council resolutions 1325 (2000) and 1820(2008) on Women, Peace and Security.[28]

To give motivation to the implementation of the African Union's Gender Architecture, the 12th Ordinary Session of the Assembly of the Union, held in Addis Ababa from 1 - 3 February 2009, declared 2010-2020 the decade of African women.[29] Subsequently, the AU created mechanisms and groups including the Committee of 30 for the African Women's Decade (AWD), the steering committee for the fund for African Women, the meeting of AU experts and the ministerial committee of 10 to implement the objectives of the decade.[30]The African Charter on the Rights and Welfare of the Child (1990), (the first African document to establish 18 as a

[26]*Ibid.*
[27] E McCandless and T Karbo (eds), *Peace, Conflict, And Development In Africa: A Reader*(Switzerland: University for Peace, 2011) p. 44.
[28]*Ibid.*
[29]AU:Annual Report on the Activities of the African Union and Its Organs, 2018 https://au.int/sites/default/files/documents/33782-doc-ex_cl_1061_xxxii_e.pdf Accessed 4 June 2018.
[30] African Women's Decade 2010-2020: Mid-Term Review (2016) http://www.un.org/en/africa/osaa/pdf/events/2018/20180315/AfricanWomenDecade.pdf Accessed 17 June 2017.

minimum age for military recruitment and participation in hostilities) is another one of these instruments. The African Committee of Experts on the Rights and Welfare of the Child was also established subsequent to the Charter, to review the progress made by close to 50 signatories in the implementation of the treaty.

Despite the increased commitment and attention, as well as measures to institutionalize, legalise and mainstream efforts towards the protection of women and children affected by armed conflict, grave violations of women and children's rights in conflict areas remain a major threat to human security in Africa. The signing, adoption, ratification and implementation of the relevant instruments and commitments remain a challenge across the continent.[31] The changing nature of conflicts and the rise of non-state actors, as well as the increased threat of terrorism and organized crime pose new threats for the protection of women and children. The situations in the DRC, South Sudan, Central African Republic and Nigeria demonstrate the seriousness of the challenge.

Consequently,there is need to examine and investigate cases of crimes committed against women and children, to launch preventive campaigns aiming at the armed forces and the police, fight impunity by bringing perpetrators to justice and more importantly ensure that the vulnerables are protected.

1.2 Statement of Problem

In the past decades, African societies have been undergoing difficult times with regards to ethnic conflicts and wars. Violence against women and girls is one of the most egregious and persistent human rights violations that affects women and girls of all ages from every society, all classes,

[31]A M Mangu, "The African Union and the promotion of democracy and good political governance under the African Peer-Review Mechanism: 10 years on" (2013) *Africa Review* Vol. 6 Iss. 1.p. 6 https://www.tandfonline.com/doi/full/10.1080/09744053.2014.883757Accessed 21 March 2019.

races, ethnicities, religions, immigrant statuses and sexualities in the world.[32] The magnitude and scope of violence against women is only now receiving global attention.[33] However, as the UN Economic Commission for Africa points out, 'the scourge of violence against women in Africa particularly is still largely hidden' due to assumptions that it is a private matter and an acceptable cultural norm, given women's subordination to men and the lack of appropriate institutional responses and government support for victims and gender equality.[34] As such, violence against women and girls remains prevalent and its impacts on African economies ignored or understated. [35]

Violence against women and girls, its causes and its consequences, remain poorly understood by many scholars, advocates and policymakers.[36] Psychology, public health and criminal justice studies tend to focus on individual-level analysis and risk factors for perpetrators and victims.[37] The broader political economic order, however, is frequently neglected in social science analyses of violence against women although social surveys of key demographic and social characteristics of victims and perpetrators strongly highlight gender inequalities.[38] Political economy analysis directs our attention away from interpersonal relations and religious and cultural dynamics toward global and regional material structures as causes of violence and conflict such as gender-biased macroeconomic policies, supply-chains, labor markets and

[32] J Ward & W Marsh, "Sexual Violence against Women and Girls in War and Its Aftermath: Realities, Responses and Required Resources. Brussels: UNFPA. (2006) Accessed 17 March 2017. www.unfpa.org/emergencies/docs/finalbrusselsbriefingpaper.pdf
[33] *Ibid.*
[34] UN Economic Commission for Africa African Centre for Gender and Social Development: Violence against Women in Africa: A Situational Analysis http://www1.uneca.org/Portals/awro/Publications/21VAW%20in%20Africa-A%20situational%20analysis.pdf Accessed 17 March 2017.
[35] B Agarwal, "Gender and Command over Property". (1994) *World Development*,Vol 22(10), pp. 1455-80.
[36] S Namy, C Carlson, *et al, "*Towards a feminist understanding of intersecting violence against women and children in the family" (2017) *Social Science & Medicine* Vol. 184. p. 40
[37] *Ibid.*
[38] J True, "The Political Economy of Women's Human Rights. Special Rapporteur on Violence against Women, its Causes and Consequences." (2009)Annual Report to United Nations Human Rights Council, Geneva, Switzerland. May 26/A/HRC/11/6/Add.6.

political norms.[39] These structures are modifiable and, where they can be shown to directly and indirectly cause violence, policy changes could be devised to significantly reduce the incidence of violence against women.[40] The World Health Organization 2010 states that we 'need more research to identify modifiable factors to influence violence against women at community/society levels' and that 'policies to stop violence against women are based on little evidence-based information/knowledge.'[41]

Conflict and war often impoverish a country as it makes the trade-off between military spending and spending for social and economic development, which may create conditions for severe violence against women. They also normalize violence and spread it throughout the societies involved. For instance, state and group-sanctioned violence frequently celebrate masculine aggression and perpetuate impunity with regard to men's violence against women. [42]It is by now well documented that sexual and physical violence against women increases as a direct result of armed conflict.[43] The large-scale rape of women, for example, has been a military tactic in countless historical and recent conflicts. The causes of armed conflict are often linked with attempts to control economic resources such as oil, metals, diamonds, drugs or contested territorial boundaries. Violence against women may be one way to achieve this control and extraction of resources.[44]

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[39] B Young &CScherrer (eds.), *Gender Knowledge and Knowledge Networks in International Political Economy* (Baden-Baden: NomosVerlagsgesellschaft, 2010). p. 55.
[40]*Ibid.*
[41] UN Economic Commission for Africa Violence against women in Africa: A Situational Analysis. African Centre for Gender and Social Development, (Addis Ababa: UNECA, 2009). http://www1.uneca.org/Portals/awro/Publications/21VAW%20in%20Africa-A%20situational%20analysis.pdf Accessed 30 November 2017.
[42] C Moser & F Clark, *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence*. (London: Zed Books 2001). p. 98.
[43]*Ibid.*
[44]*Ibid.*

Women and girls displaced by conflict have been subject to rape and sexual abuse, early and forced marriage and trafficking. What is less well known is the long-term impact of this violence on the welfare of women and girls in the post-conflict phase. The stigmatization and sometimes even forced displacement of women who have been raped, for instance, often results in their impoverishment and in further violence against them. For example, in the Darfur region of Western Sudan, thousands of women were raped and tortured and lost their husbands and livelihoods as a result of the conflict.[45] These women and their families have become internally displaced persons vulnerable to on-going violence in camps and resettlement zones. Internally displaced women are especially vulnerable to violence as a result of their economic resources being stripped from them during the displacement and their consequent lack of access to social and economic resources. Once the conflict has ended, women who are repatriated often no longer have houses or land to return to due to their destruction, forced relocation to a different part of the country, discriminatory inheritance laws, lack of property titles and secondary occupants. Female internally displaced persons remain economically disadvantaged decades after the displacement.[46]

In conflict and post-conflict affected societies, men may feel themselves disempowered and unable to fulfill their duty to protect their families. Dolan[47] argues that insufficient economic opportunities for men to provide for their families and live up to expectations of successful masculinity may encourage initial conflict and further violence. As in the case of unemployment, this can arouse men's resentment and erupt in violence against women family members,

[45] Human Rights Watch, "Five Years On, No Justice for Sexual Violence in Darfur"(New York: Human Rights Watch, 2008).
[46]UNFPA, The State of the World Population: Culture, Gender, and Human Rights. (New York: UN Population Fund, 2008) also available at http://www.unfpa.org/sites/default/files/pub-pdf/swp08_eng.pdf Accessed 16 March 2017.
[47] C Dolan, "Collapsing Masculinities and Weak States"(In Cleaver F (ed.) *Masculinities Matter* (New York: Zed Books, 2002).p.98.

especially if women are the economic providers.[48] Indeed, women often become heads of households during and after conflict as men may be out fighting, killed or elect to leave the affected area in order to look for work elsewhere. Women who are left behind thus become primarily responsible for their family's survival.[49] Even when a political settlement has been achieved, however, organized crime may perpetuate political and gender-based violence.

Some research suggests women can be empowered in post crisis situations and experience transformations in traditional gender roles as, for example, in Rwanda with its high proportion of women representatives in the National Parliament.[50]

In post-conflict and transitional societies, soldiers who are no longer able to wield arms in public may use them as an expression of their power in the private realm in acts of violence against intimate partners or other family members.[51] The public reintegration of soldiers into peacetime civilian life often does not help with their adjustment to private family relationships destabilized by war. For example, during the war in Southern Sudan, daughters became economic bargaining chips, increasing forced and early marriage as well as rape within marriage and domestic violence.[52] Childbearing was also considered a patriotic obligation for women in the struggle for self-determination. These gendered experiences and the pervasive gender-based violence have resulted in many men having a sense of entitlement to sexual services both inside and outside marriage after the end of conflict.

Failure to address women's social and economic needs and opportunities in post-conflict situations contributes to their poverty, material insecurity and vulnerability to violence, resulting

[48] UNFPA, *op. cit*
[49] *Ibid.*
[50] M Hughes, 'Armed Conflict, International Linkages, and Women's Parliamentary Representation'. (2009) *Social Problems*, 56(1), pp 174-204.
[51] V Farr, H Myrttinen& A Schnabel (eds.) *Sexed Pistols: The Gendered Impacts of Small Arms and Light Weapons* (New York: University Press, 2009) p. 292.
[52] UNDF, The Price of Peace. (New York: United Nations Development Fund, 2010).

in begging, as well as resorting to prostitutionas a means of redressing poverty,thus creating further vulnerability to violence and trafficking.[53]Ephgrave[54] criticizes the one-dimensional treatment of gender-based violence experienced by women during conflict at the South African Truth and Reconciliation Commission (TRC) and Rwandan *Gacaca*Court hearings. Women's experiences of violence in both forums were reduced to the physical injury or the sexual violence inflicted upon them. They did not recognize the structural inequalities and various other human rights' violations that women and girls suffered. Moreover, narrow representations of women's victimhood obscured women's agency during conflict (including roles as perpetrators).[55] The invisibility and the continuum of domestic violence, sexual violence and other forms of gender-based violence exacerbate inequalities and marginalize women in reconstruction and state-building processes. This is despite the UN Security Council's Women, Peace and Security Agenda (consisting of seven Security Council resolutions) in which member states recognize the right of women to participate in peace building.[56]

Patterns of violence against women from the home to the transnational realm are structurally linked to patterns of global transformation instigated by economic, political and military forces.[57] In Africa, we can see that destabilizing global processes such as economic competition, neoliberal policies, armed conflict and post-conflict reconciliation efforts often reinforce existing gender inequalities and create new forms of marginalization and vulnerability to violence.

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[53]J True, *art cit.*

[54] N Ephgrave, "Women's testimony and collective memory: Lessons from South Africa's Truth and Reconciliation Commission and Rwanda's Gacaca courts". (2014) *European Journal of Women's Studies*, http://journals.sagepub.com/doi/abs/10.1177/1350506814547057 Accessed 17 March 2017.

[55]*Ibid.*

[56] UN Peacekeeping (n.d.) Women, peace and security. http://www.un.org/en/peacekeeping/issues/women/wps.shtml. Accessed 17 March 2017.

[57]T Virkki, "At the Interface of National and Transnational: The Development of Finnish Policies against Domestic Violence in Terms of Gender Equality) (2017) *Social Sciences*, Vol. 69(1) p. 31.

Women's experiences of physical violence and abuse are inextricable from their experiences of poverty, labor exploitation in liberalized sectors from limitations on their sexual and reproductive rights and from on-going control of their mobility by ideological actors in the family and the polity. Advocates and policymakers seeking to eliminate violence against women must address the structural gender inequalities that are the root causes of this problem, that is, if it is hoped to save more than one woman or girl at a time.

Without doubt, the effects and impacts of armed conflicts on women in Africa have been enormous, while attempts have been made by various stakeholders to eliminate the menace, it still subsists. This study attempts to provide answers to some pertinent question as follows –

1. How has war and armed conflicts impacted the lives of women in Africa?
2. What are the existing legal frameworks available to aid in the protection of women during and post war and armed conflicts in Africa?
3. Are the peacekeeping mechanisms and post-conflict reconstruction programmes available and gender sensitive?
4. Who are the key players in ensuring the safety and protection of women during and post war and armed conflicts in Africa?
5. To what extent do women participate in the process?
6. To what extent have international humanitarian law and international human rights law aided in the protection of women during and post armed conflicts in Africa?
7. What are the challenges with regard to implementation of the existing laws?

1.3 Purpose of Study

This research takes a general look at the effects and impacts of war and armed conflicts on women in Africa, as well as the laws available for the protection of these victims with a view to

identifying the implementation challenges with regard to international humanitarian law and international human rights law.

The specific objectives are as follows:

1. Determinationof the legal and moral justification for the demand to protect women during and post armed conflicts in Africa;
2. Examination of the impact of war and armed conflicts on African women;
3. Identification and examination of the role played by various institutions in addressing the plethora of problems created by armed conflicts in the lives of women in Africa;
4. To draw lessons from peacekeeping missions in conflict areas, such as Liberia, Democratic Republic of Congo *etcetera*. This is to inform strategies towards peace keeping and reconstruction of the lives of womenaffected by armed conflicts in Africa;
5. To identify the nature of reparative justice available to women who are victims of all sorts of violence and violations, as a result of war and armed conflicts in Africa;
6. To examine the role of International Humanitarian Law and International Human Rights Law in the protection of women in armed conflicts in Africa, and to determine whether these laws are sufficient in the protection of women in Armed Conflict.

The main objective of this research is to get a detailed understanding of the nature of the protection of women during and post war and armed conflicts in Africa, the role of international humanitarian law and international human rights law in ensuring their protection, to determine to what extent these laws have been applied as well as its successes and failures and to proffer solutions or recommendations as regards the best way forward in the fight to mitigate the sufferings of women during and post war and armed conflicts in Africa.

1.4 Scope of Study

The topic of this research is International Human Rights and International Humanitarian Law protection of women in Armed Conflict in Africa: issues and challenges. As a result, protection of women in war and armed conflict in Africa is the focus of the research.

The research is limited to protection of women during and post war and in armed conflicts as well as reparative justice available for female victims.

1.5 Significance of the Study

Should women be entitled to protection during and post war and in armed conflicts? The answer is yes. The answer is simple, as a result of the negative effect on the lives of victims of war and armed conflict, as well as the society in general.

It is estimated that close to 90 per cent of current war casualties are civilians, the majority of whom are women and children, compared to a century ago when 90 per cent of those who lost their lives were military personnel.[58] Although entire communities suffer the consequences of armed conflict, women and girls are particularly affected because of their status in society and their sex. Parties in conflict situations often rape women, sometimes using systematic rape as a tactic of war. Other forms of violence against women committed in armed conflict include murder, sexual slavery, forced pregnancy and forced sterilization.[59]

The research unravels the international legal dimensions of the crusade to protect women during and post war and armed conflicts in Africa. This discourse is of particular importance because gender is increasingly becoming an integral consideration in peace processes, as called

[58] A Roberts, "Lives and Statistics: Are 90% of War victims civilians?*"* (2010) *Survival*, Vol. 52, no.3, pp115-136 at p.115.

[59] L R Jefferson, "In War as in Peace: Sexual Violence and Women's Status" https://www.hrw.org/legacy/wr2k4/download/15.pdf Accessed 17 March 2017.

for in the United Nations Security Council Resolution (UNSCR) 1325, adopted in 2000 as the first ever formal women, peace and security resolution passed by the United Nations.

Other UN documents that recognize the importance of gender mainstreaming in peace support operations include the report of the UN High-Level Independent Panel on Peace Operations, and the 2015 Review of the UN Peace building Architecture.[60] Both processes reflect the UN's focus on encouraging substantive inclusivity on the basis of gender.[61] Additionally, Women's inclusion in peacekeeping at community level has evolved, as their increased engagement is now known to be key to the successful implementation of mission mandates, as women in conflict and post-conflict nations have as great an understanding of the peace and security challenges that form part of their lived realities as their male counterparts.[62]

This research advances recommendations to benefit the UN Department of Peacekeeping Operations, other UN agencies working in peacekeeping environments, as well as member states with regard to international humanitarian law and international human rights law. These recommendations aim to share ideas on how best to address implementation challenges around UNSCR 1325 at community level, and in ultimately responding to the needs of vulnerable groups, particularly women and girls, in the context of peacekeeping operations by involving them in responding to highlighted challenges.

1.6 Methodology

A very important feature of any research work is its method of analysis, which is based on primary and secondary approaches to data collection.

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[60]E Stamnes and K M Osland, "Synthesis Report: Reviewing UN Peace Operations, the UN Peace-building Architecture and the Implementation of UNSCR 1325" (2016) Norwegian Institute of International Affairs Report. https://www.un.org/pga/70/wp-content/uploads/sites/10/2016/01/NUPI_Report_2_16_Stamnes_Osland.pdf Accessed 17 March 2017.
[61]*Ibid.*
[62]*Ibid.*

In this research, the doctrinal methodology was adopted. Data materials includedprimary sources such as textbooks, newspapers, magazines and journals. Data was collated from libraries, research institutions, and personal contact with expert scholars in the field and the internet.

Additionally, this research referred extensively to International and Regional Conventions, Statutes, Treaties, Articles, Resolutions and Declarations on Human Rights and International Humanitarian Law, as well as reports of committees and conference papers from various national and international organizations with particular reference to the field of study.

Finally, interviews were conducted, opinions of researchers and scholars were analyzed; and these, with other variables,summed up the materials with which this research was based.

1.7 Literature Review

The first essential step in the conduct of academic research is to carry out an extensive research on the topic of discourse, as this affords the researcher the opportunity to have a holistic understanding of the subject matter, while identifying the loopholes or lacuna that may exist in the subject matter of the research. Consequently, a review of relevant literatures on the subject is of utmost importance.

Nwachukwu[63] discusses the essence, fulcrum and goal of International Humanitarian Law. It exists to limit, for humanitarian reasons, the effect of armed conflict; seeks to do so by means of rules that protect persons who do not or are no longer participating in the hostilities, that restrict the means and methods of conducting hostilities and that prevent the escalation of the conflict. Its main objective is to limit the suffering caused by war or armed conflict, prevent bloodshed and ultimately strengthen world security by protecting the victims of and participants in hostilities. It focuses in the protection of human right and respect for humanity during armed

[63] O C Nwachukwu, 'Armed Conflict under International Humanitarian Law' (2014)*Nnamdi Azikiwe University Journal of International Law and Jurisprudence,* Vol 5.

hostilities. One great obstacle confronting international institutions in their bid to develop international humanitarian law is their perceived inability to enforce its will. Other obstacles include lack of state co-operation, lack of adequate resources and insufficient funding for International Institutions. Nwachukwufocuses on armed conflicts under international humanitarian law which is deeply rooted in the political, economic, social and ideological relations of the modern world, and provides an in-depth analysis of the historical sources of international humanitarian law, scope of application of international humanitarian law, international and non-international armed conflict, mixed international and non-international armed conflict.

In conclusion, the article demonstrates that international humanitarian law does not seek to end war or armed conflicts but rather is targeted to cushioning the devastating effects of war on humanity. Thus, international humanitarian law as an offshoot of international law has rules and principles that regulate the means, methods and conduct of armed conflicts and strives to uphold the human dignity even under a war situation. Humanity in war, compassion for the victims, and impartiality, meaning no adverse distinction based on race, ethnic origin, religion, social class or any other factor. These are the core values of International Humanitarian Law which must be upheld in both peacetimes and wartimes.This work however just generally addressed the concept of armed conflict; it did not delve into the impact of armed conflict on victims of wartime violations, especially women which this research addressed.

The success of the application of the principles of IHL however, depends largely on the principle of distinction as entrenched in Article 48 of the Additional Protocol I of the Geneva Convention. It is in the distinction of the nature of the conflict, that appropriate rules can be applied. It is in the ability to distinguish combatants from non-combatants that soldiers in

conflict are able to apply proportionality, humanity, precaution and determine the necessity to attack or not. Oji[64] opines that distinction of combatants from non-combatants may be achieved through self-discipline of the armed forces and of states. States must ensure that their combatants who violate the principle of distinction, by blurring the distinctions are prosecuted; Accountability for breach of IHL will curb its breach. Stating further that accountability should be extended to states, making them responsible for breaches of IHL through the blurring of targets. However, before applying the sledge hammer of accountability through prosecution, States must ensure that their armed forces are properly trainedin the norms of international humanitarian law, as well as limit the roles of civilians in armed conflict. Oji deals primarily with principle of Distinction underIHL, as well as the responsibility for the breaches of IHL, however, the studydid not address the specific nature of women as non-combatants, and as objects to be distinguished. Consequently, this research takes into consideration the specific nature of women as victims of armed conflicts in Africa and analyses the laws available for their protection in wartime.

The plethora of armed conflicts prevalent in Africa usually occurs within the borders of the states. The rules of international humanitarian law equally apply in non-international armed conflict becausemilitary interventions leading to civilian casualties infringe on the rules of IHL. Ikpeze[65]reemphasizes the protection available to civilian populations in the context of non-international armed conflicts viewed through the lens of recent Nigerian experience, and makes a case for stringent adherence to IHL obligations by the Armed Forces. Although, the author made reference to the Nigerian situation, it does not take away from the fact that internal armed

[64] E A Oji, 'The Problem with International Humanitarian Law: Distinguishing targets in Armed Conflict' (2013) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol 4.
[65] N Ikpeze, 'Civilians in non-international Armed Conflicts: The Contemporary Nigerian Experience' (2015) *Nnamdi Azikiwe University Journal of International Law and Jurisprudence*, Vol 6.

conflicts are the norm in Africa and they are riddled with human rights and IHL violations, as such it is imperative that African states ratify the necessary IHL Conventions (where they have not) and train its armed forces on IHL rules and practices.Ikpeze limits her research to protection of civilians in non-international armed conflicts and the need for proper compliance with the provisions of IHL and IHRL, the research did not address international armed conflict nor the protection of its victims. Even though conflicts in Africa are majorly internal, it is imperative to understand and analyze the protection of civilians in both international and non-international armed conflicts, as neither the cause nor the nature of wars are predictable; thus it can rear its ugly head between states or internally at any given time and whatever reason. As a result, this research addresses both typologies of armed conflict under IHL and the protection of civilians especially women, as well as the fundamental rights accruing to them in armed conflict.

African countries currently get the worst reputation when it comes to violence and armed conflict. Virtually every story coming out of the continent seems to showcase one atrocity or another. As a result, various scholars have conducted research on the subject matter, with regard to war and armed conflicts in Africa, its adverse effects on the civilian population, especially women, as well as the role of international human rights law and international humanitarian law in the protection of women during and post war or armed conflict.

Aremu[66]opines that the continent of Africa has been highly susceptible to intra and inter-state wars and conflicts and this has prompted the insinuation that Africa is the home of wars and instability, he further states that the most pathetic about these conflagrations is that they have defied any meaningful solution and their negative impacts have retarded growth and development in Africa while an end to them seems obscure. He poses questions as to the reason

[66] J O Aremu, 'Conflicts in Africa: Meaning, Causes, Impact and Solution' (2010) *International Multi-Disciplinary Journal, Ethiopia* Vol. 4 (4), Serial No. 17.

for the causes of these unending wars in Africa, How far have they weakened cohesion, unity and the potential development of the African continent,And what canbe done to overcome this monster. He answers these pertinent questions by stating foremost that Conflicts in Africa are caused by a multiplicity of factors, for instance, the creation of arbitrary borders by the colonial powers, heterogeneous ethnic composition of African states, inept political leadership, corruption, negative effect of external debt burden and poverty.

The unending political tensions, wars and conflicts in the continent have had lasting negative impact on the socio- economic development of Africa because socio- economic development cannot be sustained in an environment riddled with violence, instability and insecurity.Some of these include death and loss of lives, surge of refugees' and internally displaced persons and poverty. In addition, he posits that as a way out of the predicament of wars and conflicts that have bedeviled Africa, it is apt to offer some valuable suggestions based on a thorough analysis of the causes of the problem. As such, two major broad solutions may be experimented with to bail Africa out of recurrent conflicts and wars. These are committed and sincere leadership and eradication of poverty, which may be divided into; even distribution of resources, Promotion of rule of law, Protection of Fundamental Human rights, Equal access to qualitative education, Provision of gainful employment for the youths and Adequate remuneration of civil servants.

In conclusion, Aremu writes that since independence in the late 20th century, African countries have been battling with the problem of civil wars and inter- state conflicts and this has taken its toll on Africa's development in a number of ways; as suchthuggery, looting and arson have become part and parcel of Africa's political culture. He states that all hands must therefore he on deck to halt this negative development and chart a new course for peace in Africa, as this

will not only enhance adequate security of life and property in Africa, it will also attract foreign investors to Africa for the adequate exploration of her numerous natural resources for growth and development.

While Aremu has asked important questions and proffered answers to them, he has not dealt extensively with the impact of war and armed conflict on the civilian population, especially women; it is my opinion that women suffer the brunt of war and armed conflict extensively, and one cannot discuss the impact of war on the African continent without delving into its adverse effects on women. Again, the solutions proffered though significant, are not all encompassing, it deals majorly with measures to aid in the prevention of Armed Conflict, it does not offer insight on the measures to protect the victims of war and armed conflict, and as have been established historically, wars and armed conflict are inevitable, as such it is imperative to devise methods to protect and preserve the lives and dignity of the civilian population.

Kudakwashe and Bukaliya[67]discussthe causes of armed conflicts and their effects on women. The study is a content analysis of forty cases that dwelt on armed conflicts the world over; and the causes of armed conflicts were identified and analyzed under the following headings namely, ethnic differences, inequitable distribution of resources, limited access to land, religious differences and undemocratic governance. Further research analysis of the regions show that the majority of armed conflicts wherever they may occur are caused by inequitable distribution of resources, limited access to land by citizens and undemocratic governance. The most prevailing effects of the armed conflicts were found to betraumatization and stigmatization of the raped women, displacement of women and women being thrown into widowhood.

[67] M A Kudakwashe, B Richard, 'Causes of Armed Conflicts and Their Effects on Women*'* (2015) *International Journal of Research in Humanities and Social Studies* Volume 2, Issue 4.

In addition to sexual violence against women in Armed Conflicts in Africa, the authors discussed other forms of abuse to the extent that women do not go off to fight and largely remain unarmed and unprotected at a time when traditional forms of moral, community and institutional safeguard have disintegrated, and weapons have proliferated, leading to women being particularly vulnerable during wartime. Food scarcity and inequalities in food distribution are exacerbated during periods of armed conflict, rendering women and girls more susceptible to malnutrition.

Further, Armed conflict exacerbates existing inequalities between women and men and puts women and girls at heightened risk of physical and emotional abuse from male family members. The increased availability of and access to weapons increases the risk of severe injury or death during assault.

In addition, the paper recommends that serious efforts are required to be made by international communities to curb wars at all costs and avert conflicts which may bring untold suffering to women.

The authors engaged in an analysis of war and conflict torn region in a bid to determine the causes of Armed Conflicts and their effects on women. It was established that a number of wars have been fought nearly the world over and as already alluded to above; the main victims of such armed conflicts have been women. A lot is known about the armed conflicts the world over but the effects of such conflicts have not been disseminated enough, as such women still suffer in alarming ways, especially in Africa.This research aligns with the authors as it posits women suffer the brunt of armed conflicts despite the plethora of laws put in place for their protection.

Following the development of the international life during the last decades, major changes occurred within the structure of the armed conflict itself. Nowadays we do not speak out

about international armed conflicts only, but non-international armed conflicts or asymmetric ones, as well. However, there is a constant within this combination of changes and that is, the status of women, especially the status of a woman as one of the most affected categories of civilians during an armed conflict.[68]According to Ivanciu, in Bosnia, Rwanda, Sierra Leone or Congo rape, sexual slavery, constrained prostitution, constrained insemination, as well as many other forms of sexual violence were literally used as methods of war. Therefore there is nothing unexpected in the efforts of the international community to ameliorate and to reduce the number of victims within this category of population. He aimed at highlighting the norms of protection women should be granted during an armed conflict, as part of the civilian population while taking into account their special needs.

In time of armed conflict, women will have to face the same tides, representing infringements of international humanitarian law as civilian population in its whole: torture, summary executions and abusive arrests, forced transfers, taking hostages, threats and intimidations, as such they together with their children, they represent the biggest percentage of refugees or transferred population.

In conclusion, the author acknowledges that the focus, granted by the international community to women protection in case of armed conflict, has enhanced extensively. However, there are manyobstacles in achieving the objectives, as in many other fields of internationalhumanitarian law. Despite some major changes regarding the attitude of internationalhumanitarian law towards women, they remain one of the most vulnerable categories ofcivilian population that suffer the most for reasons related to the armed conflict.

[68] C Ivanciu, 'The Protection of Women during Armed Conflicts' (2016) *Scientific Research and Education in the Air Force-Afases.* *http://www.afahc.ro/ro/afases/2016/SOCIO/IVANCIU.pdf*Accessed on 26 April 2017.

On one hand, checking up the existing juridical framework, international humanitarian law possesses the theoretical necessary tools designed toprotect women from any acts of violence, related to the armed conflict. On the other hand,when applied in the field, these tools face multiple challenges. For an example, how will the employees of the UNor ICRC be able to provide support for the population in regions affected by war and armed conflicts if a specific country does not grant them access on its territory or if they areasked to leave its territory before accomplishing their mandate?

This author deduces that while, international humanitarian law has provided instruments for the protection of women in armed conflicts, implementation of these instruments poses a major problem as such the menace still persists. This dissertation aligns with the deduction of the author in this regard and proffersrecommendationsto aid the UN in delivering its mandate as echoed in UN Resolution 1325.

Expert opinion on the quality of international humanitarian law'sprovisions for the protection of women diverges. The official position of the International Committee of the Red Cross, recognized in the GenevaConventions as the guardian of international humanitarian law,is that sufficient rules exist in IHL to prevent violence against women in armed conflict. In the organization's view, the real problem is the failure to implement this law. According to the ICRC, if women have to bear so many of the tragic effects of conflict, it is not because of any shortcomings in the rules protecting them, but because those rules are not observed.[69]

This view would seem to underscore the importance of the role of international criminal law, which is precisely about implementing IHL's prohibitions. It hints that the pressing task is not looking backward to "fix" humanitarian law, but rather looking forward toward its aggressive

[69] K Bennoune, 'Do We Need New International Law to Protect Women in ArmedConflict' (2007) *Cape Western Reserve Journal of International Law,* Vol 38 (2).

implementation and development through, inter alia, the practice of international criminal law. Additionally, a number of contemporary feminist/critics have suggested that some aspects of the IHL rules regarding women are archaic and reflect the very stereotypical ideas about women that perpetuate discrimination. They argue that that implementation of extant IHL through International Criminal Courts alone, though an important step, may not entirely remedy the problem. Instead, perhaps something must be done to modernize International Law itself, in light of advances in understanding violence against women in conflict, especially those advances made in international human rights standards.

Bennoune[70]explores these dichotomous views to assess how adequately IHL addresses women's experiences of conflict, and what,if anything should or could be done to remedy any of the gender-relatedshortcomings identified in IHL.

In conclusion, Arguments were made for and against the reform of the existing laws; to the extent that one may be told that law reform, particularly in the IHL area, should not be a high priority in combating international crimes against women, yet, in thinking about the role of law in stoppingviolence against women in armed conflict, it is instructive to note that accordingto the Beijing Platform for Action, violence against women is exacerbatedby: "the lack of laws that effectively prohibit violence against women and failure to reform existing laws.

Additionally, any such updating or reform made, should most likely take the form of a supplementto theexisting Laws, as this would avoid undermining the overall legitimacyof the Laws or needlessly calling into question importantissues that have been satisfactorily resolved therein.

The author further posits that what the law designed to protect women says about women and the nature of the risks they face will shape the ways in which military forces aretrained, the

[70]*Ibid.*

ways in which crimes against women are understood, andwhether or not those crimes are prevented and prosecuted. That law shouldreflect advanced understandings of violence against women.

Ultimately, every possible method must be utilized to bring the advances made in the area of women's human rights to bear on the mainstream understandingof IHL. As such, while acknowledging the views of the ICRCarticulated above, any such efforts undertaken whether to reform the existing Laws or not, must be balanced with a significant emphasis on full and universalimplementation of existing technical rules of IHL and despite the perceived deficiencies inthe overall framework, this would go a long way toward greater protectionfor women in conflict.

Accordingly, this research while agreeing with the author that every possible method must be utilized to ensure that women are duly protected and that women are involved in the peace making process, it posits that the underlying problem remains with the implementation of the existing rules of IHL and IHRL, as such this research proffers some recommendations in that regard.

Bastos[71] questions whether the existing humanitarian rules are enough to protect women during armed conflicts, and posits that the need to broaden the scope of humanitarian protection stems directly from the changing nature of war. The contemporary characteristics of new or aggravated violence poseenormous challenges in terms of protection of civilians and application of International Humanitarian Law. It seems that armed conflicts have become more complex, for examplebecause of the instrumentalisation of ethnic differences and the emergence of new actors capable of engaging in violence, particularly due to the precedents created by the ICTY

[71] E R Bastos, 'Are existing Humanitarian rules enough to protect women during armed conflict?' http://gedi.objectis.net/eventos-1/ilsabrasil2008/artigos/dheh/ramosbastos.pdf Accessed on 26 April 2017.

and the ICTR, it has been recognized that rape can be a war crime, a crime against humanity, and an instrument of genocide. *Akayesu* was certainly marked innovative in acknowledging that rape can constitute genocide, and that it is punishable under international criminal law. In addition, other decisions of international courts have helped to strengthen women protection, for example by broadening the definition of torture to include acts involving the insertion of objects and use of bodily orifices.In conclusion, the author reiterated while there has been progress, much remains to be done to ensure that those responsible for all forms of violence in armed conflict against women are systematically prosecuted.

This author takes into consideration, the plight of women in armed conflicts and theorizes that humanitarian protection needs to be broadened to match the changing nature of war. While this research agrees with the author, it disagrees in part to the extent that this research maintains that implementation of the existing rules is the key to ultimate protection. While the nature of war as the author states is changing, fundamental rights and protection that should be ensured for victims of armed conflicts do not change. These rights are consequent upon that fact that a person is human; as such he or she does not change.

Additionally, Ghazanfari and Ahmadi[72] in determining the position of women and children in the international humanitarian law system echoed that the recent attention paid by the global community to the position and support of women and children in armed conflicts has considerably increased. However, similar to other fields of humanitarian law and human rights, there are obstacles in the way of realization of this objective. In spite of significant changes made to the attitude of the international humanitarian law toward women and children, women and children are still the target of most damages. Women and children are those who are hurt and

[72]H Ghazanfari, T Ahmadi, 'The Position of Women and Children in the International Humanitarian Law System' (2013) *International Journal of Research in Social SciencesNov. 2013.* Vol. 3, No.3.

victimized in wars while they have no say in the start or finish of the wars. Considering the security of support for women's rights in conflicts, it should be said that fortunately the statue of the International Criminal Court has introduced sexual harassment (which is the most prevalent form of violence practiced against women in conflicts) as a human crime; referring specifically to rape, sexual slavery, forced prostitution, forced pregnancy, forced sterilization, or any other form of sexual violence. In other words, all of the contents of humanitarian law documents are applied to all of the persons involved in armed conflicts including women and children.

This research agrees with the authors to the extent that while there has been an international clamor to deal with the menace of violence against women in armed conflicts, especially in Africa, the problem still persists, as such while acknowledging the progress that has been made on various levels, recommendations are proffered to aid in the implementation process, because while wars may never stop, its impact especially amongst women who fall among the most vulnerable groups should be brought down to its barest minimum.

Having established that massive human rights violations in armed conflict constitute a threat to peace, and that women are the most severely affected by the scourge of war, the Security Council has since 1999 adopted a number of resolutions intended specifically for this group. These instruments contribute to the development of humanitarian law applicable to women and acknowledge the value of active participation by women in peace efforts. Tachou-Sipowo[73] analyses the foundations on which the Council has been able to assume responsibility for protecting women in situations of armed conflict, and then considers the actual protection it provides, and posits that the Council has had varying success in this role, pointing out that the thematic and declaratory resolutions on which it is largely based are not binding and therefore,

[73] A G Tachou-Sipowo, 'The Security Council on women in war: between peacebuilding and humanitarian protection' (2010) *International Review of the Red Cross.* Vol 92, No 877.

they are relatively effective only as regards their provisions committing United Nations bodies. Tachou-Sipowo proposes that the Council's role could be better accomplished through situational resolutions rather than through resolutions declaratory of international law. This research disagrees with the author on the issue of situational resolutions; this implies that conflict must occur to warrant intervention. While the jurisdiction of IHL arises during armed conflict, it does not now mean that the rules should be established when conflict begins. To ensure respect for the law, proper implementation and protection of civilians, particularly women, this research posits that certain measures must be taken in peacetime.

There is no doubt about the importance of the protection of women in armed conflicts, as women's human rights are mostly disrespected, specifically in Africa. Armed conflicts, aggression, foreign occupation, ethnic and other types of conflicts are ongoing reality affecting women's human rights in Africa. Mwamba[74] focuses on the provisions of the UN Security Council Resolution 1325 of 2000 on Women, Peace and Security, which calls for the presence of women in conflict prevention and peace building activities in order to reverse their marginalization and abuse of human rights.

Resolution 1325 urged member states to ensure increased representation of women in decision making in national, regional and international institutions and mechanisms for the prevention, management, and resolution of conflicts. It calledupon parties to armed conflict to take special measures to protect women and girls from violence in war, and to provide them to participate in the peace process as a way of achieving long-term solutions. The resolution urged the UN Secretary General to appoint more women as special representatives and envoys to pursue good offices on his behalf, and in his regard, called on member states to provides

[74] N P Mwamba, 'Protection of Women during Armed Conflict Situation in Africa' https://www.academia.edu/25491532/Protection_of_Women_during_an_Armed_Conflict_Situation_in_Africa accessed 26/4/2017.

candidates to the Secretary –General, for inclusion in a regularly updated roaster. The resolution further called on all actors involved, when negotiating and implementing peace agreements, to adopt a gender perspective, including the special needs of women and girls during repatriation, resettlement, rehabilitation, reintegration and post-conflict reconstruction.

While agreeing with the author, this research posits that women can play an important role in war times other than beingthevictimsof the war waiting to be rescued or helped. Women can participate in peace negotiation processes in accordance with the UNSC resolution 1325, they can play roles of UN special representatives and can also have a special role during repatriation processes, reintegration and rehabilitation; more importantly aid in the implementation process of the existing laws, especially in Africa where victims are vulnerable and fear persecution, consequently, recommendations are made in this regard.

Abdullahi[75]postulatesthat modern armed conflicts are employed in a wide array of operations that range from peacetime riot control to outright international armed conflicts. Women fall among the vulnerable group in the society especially during period of armed conflicts. He focuses on attention on women and ex-rays the observance of the legal protection for women in armed conflicts, steps taken towards undertaking the protection, measures of the protection in terms of both international and non-international armed conflicts, its observance as well as the consequences of lack of observance. He assesses the state of knowledge andviolations and notes that although there have been many developments in the legal parlance, the issue is not always moving in the right direction in terms of observance and thence a terrible beauty.

The author further opines that International Humanitarian law remains as a whole, a suitable framework for regulating the conduct of parties to armed conflicts – international and

[75] I Abdullahi, 'Observance of the Legal Protections for Women in Armed Conflicts: A terrible Beauty? (2014) *International Journal of Peace and Conflict Studies (IJPCS),* Vol. 2(2).

non-international treaty and customary law have developedover the years, gaps have been filled and ambiguities clarified. Recent experiences however havedemonstrated the enduring relevance and inadequacy of humanitarian laws in preserving womenlives and dignity during armed conflicts. Abuse of women's right by combatants seems to rise inhigher proportion to the number of international laws adopted to ensure women's safety.

In conclusion, while recognizing that women have never before been so poorly protected in practical terms during periods of armed conflicts, he states that until an antidote is found for the murderous violence of internal, regional and international conflicts, women survival will depend largely on the capacity of humanitarian institutions to come to their aid at the right time and with the appropriate means.Consequently, this dependence on humanitarian institutions comes down to effective and efficient implementation of International Humanitarian Laws and Human Rights.

This research agrees with the author that the issue of women protection in armed conflict is still lingering, as well as that the survival of women in conflict situations is largely dependent on the capacity of humanitarian institutions to come to their aid at the right time and with the appropriate means, andalso posits that women can do more than wait around to be reached by humanitarian organizations. On that note, recommendations are made to increase women's participation in peace making processes.

It is imperative to discuss women's rights under the scope of International Humanitarian Law. According to Gardam,[76]It would be misleading to represent the existing body of human rights law as a satisfactory regime from the perspective of women. Commentators have convincingly demonstrated the limitations of this law, which does not adequately take into

[76] J Gardam, 'Women, human rights and international Humanitarian Law',(1998) *International Review of the Red Cross,* No. 324.

account the reality of women's experience of the world. However, it is in the context of human rights law rather than humanitarian law that more progress has been made in recognizing and attempting to meet the as yet unaddressed needs of women.This attention to women's human rights has had substantial implications for international humanitarian law.

Indeed, the fact that violence against women and strategies to contain it have been the focus of much of the work of human rights agencies concerned, it has led to a consideration of the issue in connection with armed conflicts, where so much of the violence against women occurs.

The 1993 Vienna Declaration and Programme of Action, adopted by the United Nations World Conference on Human Rights, confirmed that "violations of the human rights of women in situations of armed conflict are violations of the fundamental principles of human rights and humanitarian law and that they require a "particularly effective response. The Programme of Action also stressed that the equal status of women and the human rights of women should be integrated into the mainstream of United Nations system-wide activity and form an integral part of United Nations human rights activities. The author opines that there is no doubt that the work of human rights organizations has had a considerable impact on the approach taken to the protection of women in times of armed conflict; as such a change of emphasis over recent years can be discerned in the work of the ICRC in this context. The protection of women victims of conflict has always been part of the ICRC's mandate. Traditionally, however, women have been subsumed under the general category of civilians or under the separate category of "women and children". This has occurred despite the fact that the needs of these various categories of victims are not identical.

The author applauds the efforts of international community, while noting that after years on the fringe of human rights law, the topic of women and human rights is nowadays gaining increasing respect as a separate area of concern within the mainstream of international law. And, although women's human rights are very much in the developmental stage as regards both framework and substance, each passing year sees the further elaboration of their guiding principles.

From the text above, the author made several references to Human Rights Law and humanitarian law, as such it is vital with respect to protection of women in armed conflicts in Africa to understand their interactions, fragmentation, conflict, parallelism or convergence. Therefore this research analyses in detail the interplay between IHL and IHRL with regard to the protection of African women in armed conflicts within the provisions of various human rights instruments and the rules of IHL.

Orakhelashvili[77] states that the principal question in terms of assessing the interaction between human rights applicable both in peacetime and war and humanitarian law applicable only to armed conflicts is whether the protection accorded to individuals under the latter is lower than that under the former. The clarification of this question requires the accurate assessment of the available evidence, and not the preconceived approach that tends to conceive one of these two fields as*Lex Specialis* that excludes or curtails the protection under the other field. The author examines the various aspects of this problem, such as the general interaction between humanrights law and humanitarian law, and the relevance of particular human rights in the context of armed conflicts, and posits that the evidence dealt with in the course of the analysis

[77]AOrakhelashvili, 'The interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, Parallelism or Convergence? *The European Journal of International Law* Vol. 19, no. 1.

exposes the fallacyof the argument that the humanitarian law protection may be lower than that under human rights law.

Orakhelashvilidemonstrated that the approach of some researchers that humanitarianlaw can, as *LexSpecialis*, displace human rights law is not supported by sufficient evidence.If humanitarian law is *LexSpecialis*, it is so for limited purposes and in a way complements – not curtails – the level of protection under human rights law. The relationship between the norms from the two fields must be verified by reference to the interaction between individual norms. When humanitarian law safeguards are applied as their content requires, human rights and humanitarian law norms reveala similar content. In these cases the protection under humanitarian norms does not prove to be less than under human rights law. On the other hand, the built-in limitations of human rights treaty norms provide for accommodating the requirements ofmilitary necessity, proportionality, and humanity as applicable in humanitarian law.

This research supports the author's approach, and echoes that humanitarian law cannot displace human rights law. While they are distinct branches of law, they both exist for the sole purpose of preserving the dignity and humanity of all persons. Human rights do not suddenly stop exiting just because there is an armed conflict, as such they continue to apply at all times.

Gender-specific effects of armed conflict on women in Africa cannot be over emphasized. Among the most traumatic of theseeffects is sexual exploitation and gender-based violence, each having profoundpsychosocial consequences. Other gendered effects occur when girls are recruited aschild soldiers, girls and women become internally and externally displaced refugees,and public health services, such as reproductive health care, are inadequate or unavailable.McKay[78]analyses the effects of armed conflict on girls and women using the

[78] S Mckay, 'The effects of Armed Conflicts on Girls and Women' (1998) *Peace and Conflict: Journal of Peace Psychology*, Vol 4(4).

GracaMachel report as a reference point. The GracaMachel report "Impact of armed conflict on children (1996)"[79], asked the international community to come together to address the plight of children affected by war.For two years, Machel travelled to conflict zones and met children, families, humanitarian workers and Government officials to better understand what boys and girls were going through. The report presented to the General Assembly described conflicts in which nothing was spared, held sacred or protected – not children, families or communities.

The report added that "the struggles that claim more civilians than soldiers have been marked by horrific levels of violence and brutality. Any and all tactics are employed, from systematic rape, to scorched-earth tactics that destroy crops and poison wells, to ethnic cleansing and genocide. With all standards abandoned, human rights violations against children and women occur in unprecedented numbers. Increasingly, children have become the targets and even the perpetrators of violence and atrocities."[80] As a result of the report, the General Assembly recommended the appointment of a Special Representative on children and armed conflict, who would report back to the General Assembly and the Human Rights Council (then called the Commission on Human Rights) annually.

The action generated by the General Assembly, and the tools developed by the UN Security Council to address the sufferings of children affected by war, have enabled consistent progress in the past 20 years, even though important challenges remain to protect them.

McKay points out how the Machel report has aided in highlighting the sufferings of victims of war (women and children) and credits the report as having made a pilot contribution by including gender in the analysis. McKay elaborates on this contribution by discussing the

[79] UN Office of the Special Representative of the Secretary General for Children and Armed Conflicts, (2016), *Impact of Armed Conflict on Children – Twenty Years of Action Following the Publication of GraçaMachel Report to the General Assembly. https://childrenandarmedconflict.un.org/graca-machel-report-20th/ Accessed 27 April 2017.*

[80] *Ibid*

major themes and their implications, that is, gender-specific sexual violence, girl soldiers, public health and the survival of women and children, displacementof girls and women in refugee camps, and increasing women's capacities in peacebuilding during and after armed conflict.

Therefore this research agrees with the author and reiterates that in protecting women in armed conflicts in Africa, one must take into account their participation in these conflicts, as such this research also takes into consideration, the specific role of women and the impact of armed conflicts on their lives in determining whether the available laws for their protection are sufficient, adequate or otherwise.

Lahai[81]posits that the level of women's participation in armed violence in Africa is determined by the nature and typology of conflict. He examines the nature ofwomen's participation in armed conflicts in 15 countries in Africa; data collated show variations, and similarities in the contextual conditions under whichwomen become war participants, the article presents three kinds of wars, and the conditions thatdistinguish them from one another. The findings show that in resources or opportunistic driven wars, women's participation is higher and more complex when compared to ethno-religious and secessionist/autonomy driven wars. In addition, it finds that women's participation can be active and passive as well as coerced and voluntary.Lahai points out that the end of conflicts, or the signing of peace accords, does not represent the end of violence against women. Countries in the data analyzed, share this feature of increasing levelsof post-war gender-based violence. In Sierra Leone, for example, after the war the dashing down of the optimism offormer male combatants to reclaim their lost status in society has resulted in more cases of domestic violence. InSouthern Sudan, he points out that the violence that existed in pre-war years-such as arranged marriages,battering of women, and wife

[81] J ALahai, 'Gendered Battlefields: A contextual and comparative Analysis of Women's Participation in Armed Conflicts in Africa' (2010) *Peace & Conflict Review* Vol 4(2).

inheritance—is closely related to the prevailing culture of violence that escalated duringthe war, with multiple cases of rape of women. He argues that traditionally men largely account for direct combat-related deaths and other violations such as amputation and forced recruitment.However, the expansion of battle sites fromthe fields into the homes and safe zones means that the casualties among non-combatants, especially women, havecome to represent a larger percentage of those killed in Africa's armed conflicts.Women are victims of systematic sexual-gender-based-violence in all conflicts in Africa. In the Ivorian Conflict, it was reported that many women were victims of sexualized violence. In Darfur, Human Rights Watch (2008) reported that since the war started thousands ofwomen were raped, murdered, and uprooted from their communities. Lahai further states emphatically that these statistics are an underestimation of the victims of Systematic Gender Based Violence because women prefer not to report outof fear and stigma.

In conclusion, Lahaistates that despite the variations in the data for each typology of conflict, the findings reveal that women are not merely victims, but are important actors in deciding the outcome of wars. Against this backdrop, any analysis of gender and conflictshould move away from the traditionally 'male-centric' level of analysis to a gender-centric one. Most tellingly, todepict women as the only victims of male barbarity robs women of their agency, and entrenches masculineexpectations that politicizes violence against women to wage wars of revenge leading to any unending circle of violence that are reinforced by states keen to manipulate those expectations for political gain.

From the text above, Gender Based Violence is prevalent in Armed Conflict, and this raises the question as to the initiatives available to reduce the risk and incidence of sexual violence in Armed Conflict and other humanitarian crisis which this work addresses.

Spangaro*et al*.[82]conducted a systematic review on the existence of evidence for initiatives to reduce risk as well as the incidence of sexual violence in Armed Conflict. The review reinforces the importance of multifaceted interventions, highlighting the importance of strengthening such multilayeredinterventions and evaluating them carefully. In addition, funded programs should incorporate robust outcome evaluation at the highest standard possible prioritizing inclusion of community member perspectives, including those of survivors. The findings support the need for interventions that strengthen local capacity, seeking to build on pre-existing systems and traditions within communities where possible.

Systems forholding offenders accountable that require survivor participation, through reporting and giving evidence, need to be designed to privilege survivors needs for protection and avoidance of re-traumatization. Similarly, opportunitiesshould be explored for peace building strategies specific topreventing sexual violence such as inclusion of women innegotiating cease-fire arrangements and making sexual violencea topic of negotiations.

Aboveall, Spangaro*et al*emphasizes the need for thorough implementation ofinterventions.This research goes a step further by making recommendations on the interventions that can be made.

Protection of women in Armed Conflicts also entails ensuring that perpetrators of these crimes are brought to justice. In this regard, it is imperative to analyze the contribution of the international court of Justice to International Humanitarian Law.The contribution of the International Courtof Justice has been significant to International Law and International Humanitarian Law. Ibezim[83] highlights and appraises the contribution of the ICJ to IHL through

[82] J Spangaro, C Adogu, *et al.* 'What Evidence Exists for Initiatives to Reduce Risk and Incidence of Sexual Violence in Armed Conflict and Other Humanitarian Crises? A Systematic Review.' (2013)*PLOS ONE* Vol 8 (5).
[83] E C Ibezim, 'The contribution of International Court of Justice to International Humanitarian Law, (2013*) ABSU-PCLJ* Vol 1, No 1.

selected cases. The appraisal yielded results to the extent that the ICJ affirmed the existence of certain rules of law as part of customary international Law and established new principles of Law to benefit IHL. For instance, in *Democratic Republic of Congo v Uganda*[84], among others, the court found that the Ugandan Armed forces committed violations of humanitarian law against civilians, such as torture, rape and killings and generally failed to take measures to ensure respect for human rights and humanitarian law in the occupied territory; responding to Uganda's contention that those members of their armed forces who perpetrated those crimes, acted contrary to their official instructions, the court stressed that, that was irrelevant since parties to an armed conflict are responsible for all persons forming part of their armed forces in accordance to Article 3 of the 1907 Hague Conventions IV and Article 91of the 1977Additional Protocol to the 1949 Geneva Conventions.

Thepast twenty years have witnessed explosive developments in recognizing and prosecuting gender crimes in international law. Long ignored, trivialized, and misunderstood, rape and other forms of sexual violence committed in the context of war or mass atrocity have received unprecedented attention in recent years.The primary impetus for the new developments in redressing these crimes was the establishment of the International Criminal Tribunalfor the former Yugoslavia (ICTY or Yugoslav Tribunal) in The Haguein 1993. The Yugoslav Tribunal explicitlyauthorized the prosecution of, among other crimes, rape as a crimeagainst humanity.

Askin[85] traces the development of the prosecution of gender based crimes in international Law, from its inception at the ICTY to its recognition at the ICTR, where in the *Akayesu Case*, and perhaps the most groundbreaking decision advancing gender jurisprudence worldwide, the Trial Chamber of the Rwanda Tribunal recognized for the first time in history that rape was

[84] [2005] ICJ Rep 168.
[85] K D Askin, 'A Decade of the Development of Gender Crimes in International Courts and Tribunals: 1993 to 2003 (2004) *Human Rights Brief* Vol. 11, no. 3.

explicitly recognized as an instrument of genocide and a crime against humanity. Further, the article traces the development to the signing of the Statute of the International Criminal Court. The ICC became the permanent court with jurisdictionover war crimes, crimes against humanity, genocide, and eventually, aggression.

For the first time in history, a statute for an International Criminal Court explicitly authorized the prosecution, as war crimes and crimesagainst humanity, of rape, sexual slavery, forced prostitution, forced sterilization,forced pregnancy, "and any other form of sexual violence of comparable gravity. In addition, rape has now been explicitly recognized as an instrument of genocide, a crime against humanity, and a war crime(as grave breaches, violations of the laws or customs of war, violationsof Common Article 3 to the Geneva Conventions, violations of theFourth Geneva Convention, violations of the 1977 AdditionalProtocol I to the Geneva Conventions, and violations of the 1977Additional Protocol II to the Geneva Conventions). Notably, Sex crimes arejusticiable as war crimes regardless of whether they are committed inan international or internal armed conflict.

Askin states that trials at the ICTR demonstrates that female judges, investigators, prosecutors,and translators, particularly those with expertise in gendercrimes, are extremely useful in the prosecution of gender crimes. Thus stressing the importance of the role of women in the process.

The explosive development of gender-related crimes in international lawwithin the last ten years reflects the international community's denouncement ofthe crimes and the commitment to redress them. The inclusion and enumerationof several forms of sexual violence in the ICC Statute acknowledges that theseare crimes of the gravest concern to the international community as a whole, and their inclusion in the ICTY and ICTR Statutes situates them amongst the crimes

regardedas constituting a threat to international peace and security. Further, thelarge and ever increasing number of human rights treaties, declarations or reports,conference or committee documents, U.N. resolutions and decisions byhuman rights bodies promulgated since the 1990s that condemn, protect against,prohibit, or outright criminalize gender-related violence reflects the commitmentof the international community to afford accountability for these crimes, irrespectiveof the presence of an armed conflict.Askin[86] posits such attributions provide increased means of protecting women and girls, bolsters efforts in enforcing violations ofthe laws, and challenges traditional stereotypes of gender crimes being lessgrave or important.

Phelps[87] analyses the effectiveness of International Criminal Prosecution of gender based crimes; Phelps posits that the ICC's potential is great, as it offers the advantage of permanence.More than any other element, its permanence will promotethe incidence and effectiveness of criminal liability for gender-basedwar crimes. The ICTY and ICTR have made significant progress insetting precedents in the international prosecution of gender-basedwar crimes, including convictions for rape and recognition of gender basedwar crimes as part of overall genocide schemes. *Ad hoc*international criminal tribunals have been successful in specificdeterrence, while peoples' tribunals have demonstrated their ability to provide victim vindication.

The International Criminal Court can build uponthose successes and attain the additional goals of general deterrenceand retribution, putting the world on notice that war crimes,including gender-based war crimes, will be prosecuted and punishedwhenever and wherever they occur. Notably, armed conflict may never cease, as such gender based violence may never cease as well

[86] K D Askin, 'Prosecuting Wartime Rape and Other Gender-Related Crimes under International Law: Extraordinary Advances, Enduring Obstacles', (2003) *Berkeley J. Int'l Law.* Vol 21 (288).
[87]A R Phelps, 'Gender-Based War Crimes: Incidence and Effectiveness of International Criminal Prosecution' (2006) *William and Mary Journal of Women and the Law,* Vol 12 (2).

regardless of what international criminal prosecution mechanisms are in place, and many war criminals will not be deterred simply because their actions are illegal.

However,it is hoped that the ultimate goal of decreasing the occurrence of these atrocities will be achieved.

1.8 Organisational Layout

This dissertation is divided into seven chapters. Chapter one is the introduction;introducing the need for the protection of women in armed conflicts in Africa, it also contains the background to the study, statement of the problem, purpose, scope and significance of the study, methodology and Literature review.

Chapter two is the overview of International Human Rights Law and International Humanitarian Law, clarification of relevant concepts, such as, nature of Human Rights and International Humanitarian Law, the relationship betweenInternational Human rights Law and International Humanitarian Law, Women's rights as Human Rights and women as victims under International Humanitarian Law.

Chapter three discusses the Rights of African Womento protection as provided by regional and international instruments.

Chapter four discusses sexual violence against women in armed conflict in Africa, as a war crime in international law, as a weapon of war, as a crime against humanity, genocide and as a violation of human rights and international humanitarian law. It also explores the difference between Sexual violence and gender-based violence.

Chapter five discusses the responsibility for the protection of women in armed conflicts, exploring the concept of the responsibility to protect and the role of the UN in protecting women.

Chapter six discusses reparations and transitional justice for women as victims of human rights violations during armed conflicts in Africa, the victim's right to reparation, reparation under International Humanitarian Law andmechanisms for gender focused transitional justice in Africa.

Chapter seven is the recommendations and conclusion.

CHAPTER TWO

OVERVIEW OF INTERNATIONAL HUMAN RIGHTS LAW AND INTERNATIONAL HUMANITARIAN LAW

2.1 Nature of International Humanitarian Law

International humanitarian law can be defined as the principles and rules which regulate hostilities in order to attenuate their hardships: they aim at safeguarding military personnel placed 'hors de combat' and persons not taking part in hostilities; they also determine the rights and duties of belligerents in the conduct of operations and limit the choice of means of doing harm.[88] The current understanding of which is *"jus in bello"*.[89]

The International Committee of the Red Cross, which is considered to have a special relationship with international humanitarian law as its guardian and promoter, describes it as part of the body of international law that governs relations between states. It aims to protect persons who are not or are no longer taking part in hostilities, the sick and wounded, prisoners and civilians, and to define the rights and obligations of the parties to a conflict in the conduct of hostilities.[90]

Prior to the evolution of International Humanitarian law, once there was conflict between states, the ensuing scenario was often one where the ordinary laws of peace existing between the warring states were promptly superseded by a state of chaos, brutality and inhumane treatment between the parties to the conflict.[91] To regulate such conduct and reduce the dehumanization of individuals, it was inevitable that a body of law aimed at regulating activities during the theatre

[88] J Meurant, "Inter Arma Caritas: Evolution and Nature of International Humanitarian Law", (1987) Journal of Peace Research, Vol. 24, No. 3 p.89.
[89] *Ibid.*
[90] International Committee of the Red Cross (ICRC), *War and International Humanitarian Law* (2010) https://www.icrc.org/eng/war-and-law/overview-war-and-law.htm Accessed 2 May 2017.
[91] R Guelf, *Documents on the Laws of War*, (3rd edn. Oxford: Oxford University Press, 2000) p. 35.

of war would be developed. It was the need for such a body of law that led to the evolution of international humanitarian law as it is known today.[92]

It is also referred to as the laws of war, the laws and customs or the law of armed conflict. It comprises of all those rules of international law which are designed to regulate the treatment of the individual (civilian or military, wounded or alive) in international armed conflicts.[93] It is a branch of international law dealing with such matters as the use of weapons and other means of warfare, the treatment of war victims by the enemy and generally the direct impact of war on human life and liberty.[94]

As earlier stated, the current understanding of international humanitarian law is *"jus inbello"*, that is, it does not matter which party instigated it or who was blameworthy. Humanitarian law will come to the fore in such situation and all parties to the conflict are bound to observe its rules. As a preliminary deduction, international humanitarian law comes into full operation when there is an outbreak of war or conflict between one or two nations.

Consequently, international humanitarian law is a set of rules that seek to limit the effects of armed conflict on people, including civilians, persons who are not or no longer participating in the conflict and even those who still are, such as combatants.[95]To achieve this objective, international humanitarian law covers two areas: the protection of persons; and restrictions on the means and the methods of warfare.

2.1.1 Contemporary Evolution of International Humanitarian Law

The modern International Humanitarian Law is made up of two historical streams namely; The Law of TheHague or the Law of War and the Law of Geneva or Humanitarian law. The two

[92] C CWigwe, *International Humanitarian Law* (Accra: Readwide Publishers, 2010) p.1.
[93] D Fleck (ed), *The Handbook of International Law* (3rdedn, Oxford: Oxford University Press, 2013) p.4.
[94] Article 2(4), 2(7), 51 UN Charter 1945.
[95] C CWigwe, *op. cit.*

streams tooktheir names from a number of international conferences which drew up treaties relating to warand conflict, in particular the Hague Conventions of 1899 and 1907 and Geneva Conventions, thefirst which was drawn up in 1863.[96]

The Hague Convention concentrates on the limitation of the effect of hostilities and regulatingthe combatants' behavior and the conduct of military operations.[97] While the Geneva Conventionsaims at developing and extending the protection of victims of armed conflicts. Both lawsfollowed a parallel route marked by successes, failures and gaps before fusing together and beingpractically integrated in 1977 with the adaptation of the Protocols Additional to the Geneva Conventions.[98]

The weight of events and codification of International Humanitarian Law began in the secondhalf of the 19th century that more systematic way approach was initiated. In the United States aGerman immigrant, Frances Lieder, drew up a Code of Conduct in 1863, which came to becalled the Lieder Code in his honor, for the Northern army. The Lieder Code included thehumane treatment of civilian populations in areas of conflict, and also forbade the execution of

prisoners of war.[99]

Henry Dunant, a Swiss businessman who had worked with wounded soldiers at the Battle ofSolferino, led a more systematic effort to try and prevent the suffering of war victims. Dunantwrote a book he titled 'A memory of Solferino', and in which he described the horrors he hadwitnessed. His report were so alarming that they led to the founding of the

[96] V Michael, 'International Humanitarian Law and Spirituality'(2002)http://www.scribd.com/doc/61414965/International-Humanitarian-Law-and-Spiritually accessed 2 May 2017.
[97] ICRC: The Law of Armed Conflict: Basic Knowledge (2002) https://www.icrc.org/eng/assets/files/other/law1_final.pdf Accessed 2 May 2017.
[98] *Ibid.*
[99] J Meurant, *art. cit.*

InternationalCommittee of the Red Cross (ICRC) in 1863 and the Convention of Conference in Geneva in1864 which drew up the Geneva Convention for the Amelioration of the Condition of theWoundedin Armies in the Field.[100]

The Geneva Conventions are the result of a process that developed in a number of stagesbetween 1864 and 1949. As a result of the Second World War, all the Four Conventions were part of the 1907 Hague Convention and re-adopted by the international community in 1947.[101]

Later conferences have added provisions prohibiting certain methods of warfare and addressingissues of civil wars.[102]

Thus International humanitarian law finds its sources in a series of conventions and protocols. The following form the core of modern international humanitarian law:[103]

i. The Hague Regulations respecting the Laws and Customs of War on Land;
ii. The Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (1949);
iii. The Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (1949);
iv. The Geneva Convention (III) relative to the Treatment of Prisoners of War (1949);
v. The Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War (1949);
vi. The ProtocolAdditional to the Geneva Conventions and relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977); and

[100] The battle of Solferino (24 June 1859) https://www.icrc.org/eng/resources/documents/misc/57jnvr.htm Accessed 3 May 2017.
[101] J Meurant, *art. cit.*
[102] *Ibid.*
[103] *Ibid.*

vii. The Protocol Additional to the Geneva Conventions and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) (1977).

viii. Protocol III (2005): Protocol Additional to the Geneva Conventions of 12 August 1949, and relating the adoption of an additional distinctive emblem.

The Hague Regulations are generally considered as corresponding to customary international law, binding on all States independently of their acceptance of them. The Geneva Conventions have attained universal ratification. Many of the provisions contained in the Geneva Conventions and their Protocols are considered to be part of customary international law and applicable in any armed conflict.[104]

The International Committee of the Red Cross (ICRC) as has been established has a special role under international humanitarian law.[105] The Geneva Conventions stipulate that it will visit prisoners, organize relief operations, contribute to family reunification and conduct a range of humanitarian activities during international armed conflicts. They also allow it to offer these servicesin non-international armed conflicts. The International Committee of the Red Cross has a recognized role in the interpretation of international humanitarian law and is charged with working towards its faithful application in armed conflicts, taking cognizance of breaches of that law and contributing to the understanding, dissemination and development of the law.[106]

To properly understand the nature of international humanitarian law, it is imperative to itemize its basic principles. They include-

1. Persons who do not or can no longer take part in hostilities are entitled to respect for their lives and for their physical and mental integrity. Such persons must in all

[104] S Watts, "Reciprocity and the Law of War" (2009) *Harvard International Law Journal*, Vol 50(2), p.365.
[105] Y Sandoz, "The International Committee of the Red Cross as guardian of international humanitarian law" (1998) https://www.icrc.org/eng/resources/documents/misc/about-the-icrc-311298.htm Accessed 3 May 2017.
[106] Statutes of the International Red Cross and Red Crescent Movements, Art. 5.2 (c) and (g).

circumstances be protected and treated with humanity without any unfavorable distinction.

2. It is forbidden to kill or wound an adversary who surrenders or who can no longer take part in fighting.
3. The wounded and sick must be collected and cared for by the party to the conflict who has them in custody. Medical personnel, establishments, transports and equipment must be spared. The Red Cross on a white background is the sign protecting such persons and objects and must be respected.
4. Combatants and civilians captured by the adverse party are entitled to respect for their lives, dignity, personal rights, political and religious convictions. They must be protected from all acts of violence or reprisal.
5. Everyone must enjoy basic judicial guarantees and no one may be held responsible for an act he has not committed. No one may be subjected to physical or mental torture, any act of violence, or to cruel or degrading treatment.
6. Neither parties to the conflict nor members of their armed force have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause excessive suffering.
7. The parties to the conflict must at all times distinguish between the civilian population and combatants in order to preserve the civilian population.[107]

These itemized rules do not attempt to supersede the sources of international humanitarian law but are aimed at ensuring ease of understanding of the basic rules.[108]

2.1.2 Application of International Humanitarian Law

[107]Wigwe, *op cit*, p.11.
[108]*Ibid.*

International Humanitarian Law applies only to Armed Conflict; it does not come into operation in the instances of internal tensions or disturbances, such as isolated acts of violence.[109]It makes the state responsible for the actions of its armed forces. The law applies to paramilitary groups attached to the armed forces of a state, rebels or other non-state parties who initiate conflicts against their own states.[110]

2.1.3 Armed Conflict

International Humanitarian Law came into existence to cushion the effect of war and armed conflict, as such it is important to understand the concept of armed conflict, its types and the role of international humanitarian law.

One of the most authoritative definition of armed conflict is contained in the International Criminal Tribunal for Yugoslavia (ICTY) Appeal Chambers decision on jurisdiction in the *Tadic case*[111] to the effect that:

> …an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between government authorities and organized armed groups or between such groups within the state. International humanitarian law applies from the initiation of such armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached, or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the territory of the warring states or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.[112]

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[109] E. A. OJI, *Responsibility for Crimes under International Law* (Lagos: Odade Publishers, 2013) p. 76.
[110]*Ibid.*
[111]*Prosecutor vDuskoTadic*, ICTY Appeals Chambers decision of 2nd October 1995. http://www.icty.org/x/cases/tadic/acdec/en/51002.htm Accessed 20 March 2017.
[112]*Ibid.*

This definition as stated above hinges on the application of International Humanitarian Law during armed conflict, as such it is imperative to determine the meaning of "Armed Conflict" under international humanitarian law.

The States parties to the 1949 Geneva Conventions have entrusted the International Committee of the Red Cross (ICRC), through the Statutes of the International Red Cross and Red Crescent Movement, "to work for the understanding and dissemination of knowledge of international humanitarian law applicable in armed conflicts and to prepare any development thereof".[113] It is on this basis that the ICRC has presented the prevailing legal opinion on the definition of "international armed conflict" and "non-international armed conflict" under International Humanitarian Law, the branch of international law which governs armed conflict.[114]

International humanitarian law distinguishes two types of armed conflicts, namely international armed conflicts, between two or more States and non-international armed conflicts, between governmental forces and non-governmental armed groups, or between such groups only.[115] International Humanitarian Law treaties also establishes a distinction between non-international armed conflicts in the meaning of common Article 3 of the Geneva Conventions of 1949 and non-international armed conflicts falling within the definition provided in Art. 1 of Additional Protocol II.[116]

Legally speaking, no other type of armed conflict exists. It is nevertheless important to underline that a situation can evolve from one type of armed conflict to another, depending on the facts prevailing at a certain moment.

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[113] Statutes of the International Red Cross and Red Crescent Movement, art. 5, para. 2(g).
[114] *Ibid.*
[115] ICRC Opinion Paper: "How is the tem Armed Conflict defined in International Humanitarian Law" (2008) https://www.icrc.org/eng/assets/files/other/opinion-paper-armed-conflict.pdf Accessed 20 March 2017.
[116] *Ibid.*

i. International Armed Conflict (IAC)

Common Article 2 to the Geneva Conventions of 1949 states that:

> In addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the said occupation meets with no armed resistance.

According to this provision, International Armed Conflicts are those which oppose "High Contracting Parties", meaning States. An International Armed Conflict occurs when one or more States have recourse to armed force against another State, regardless of the reasons or the intensity of this confrontation.[117] Relevant rules of IHL may be applicable even in the absence of open hostilities. Moreover, no formal declaration of war or recognition of the situation is required.[118]

The existence of an International Armed Conflict, and as a consequence, the possibility to apply International Humanitarian Law to this situation, depends on what actually happens on the ground. It is based on factual conditions. For example, there may be an International Armed Conflict, even though one of the belligerents does not recognize the government of the adverse party.[119] The ICRC Commentary of the Geneva Conventions of 1949 confirms that any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2, even if one of the parties denies the existence of a state

[117] ICRC Opinion Paper: "How is the term Armed Conflict defined in International Humanitarian Law" *art. cit.*
[118] *Ibid.*
[119] D Fleck, *Op. cit,* p. 45.

of war.[120] It makes no difference how long the conflict lasts, or how much slaughter takes place.[121] Apart from regular, inter-state armed conflicts, Additional Protocol I extends the definition of International Armed Conflict to include armed conflicts in which peoples are fighting against colonial domination, alien occupation or racist regimes in the exercise of their right to self-determination i.e. wars of national liberation.[122]

According to Schindler, the existence of an armed conflict within the meaning of Article 2 common to the Geneva Conventions can always be assumed when parts of the armed forces of two States clash with each other… Any kind of use of arms between two States brings the Conventions into effect.[123]Gasser explains that any use of armed force by one State against the territory of another, triggers the applicability of the Geneva Conventions between the two States… It is also of no concern whether or not the party attacked resists…As soon as the armed forces of one State find themselves with wounded or surrendering members of the armed forces or civilians of another State on their hands, as soon as they detain prisoners or have actual control over a part of the territory of the enemy State, then they must comply with the relevant Convention.[124]

ii. Non-International Armed Conflict (NIAC)

Two main legal sources must be examined in order to determine what a Non-International Armed Conflict under international humanitarian law is -

a) Non-International Armed Conflicts within the Meaning of Common Article 3 of the Geneva Conventions of 1949

[120] J Pictet, Commentary on the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (Geneva: ICRC 1952) p. 32.
[121]*Ibid.*
[122] ICRC Opinion Paper: "How is the tem Armed Conflict defined in International Humanitarian Law" *art. cit.*
[123] D Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI,* Vol. 163, 1979-II, p. 131.
[124] H P Gasser, *International Humanitarian Law: an Introduction, in: Humanity for All: the International Red Cross and Red Crescent Movement, H. Haug (ed.),* (Berne: Paul Haupt Publishers, 1993)*pp. 510- 511.*

Common Article 3 applies to armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties. These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. As the four Geneva Conventions have universally been ratified now, the requirement that the armed conflict must occur "in the territory of one of the High Contracting Parties" has lost its importance in practice. Indeed, any armed conflict between governmental armed forces and armed groups or between such groups cannot but take place on the territory of one of the Parties to the Convention.[125]

In order to distinguish an armed conflict, in the meaning of common Article 3, from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. It has been generally accepted that the lower threshold found in Article 1(2) of Additional Protocol II, which excludes internal disturbances and tensions from the definition of Non-International Armed Conflict, also applies to common Article 3. Two criteria are usually used in this regard.[126]

First, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents, instead of mere police forces.[127]Secondly, non-governmental groups involved in the conflict must be considered as "parties to the conflict", meaning that they possess organized armed forces. This means for example that these forces

[125] ICRC Opinion Paper: "How is the tem Armed Conflict defined in International Humanitarian Law" *art. cit.*
[126]*The Prosecutor v. FatmirLimaj*, Judgment, IT-03-66-T, 30 November 2005, para. 84.
[127]*Ibid* at paragraph 135-170.

have to be under a certain command structure and have the capacity to sustain military operations.[128]

b) Non-International Armed Conflicts within the Meaning of Art. 1 of Additional Protocol II

A more restrictive definition of Non-International Armed Conflict was adopted for the specific purpose of Additional Protocol II. This instrument applies to armed conflicts "which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".[129]

This definition is narrower than the notion of Non-International Armed Conflict under common Article 3 in two aspects. Firstly, it introduces a requirement of territorial control, by providing that non-governmental parties must exercise such territorial control as to enable them to carry out sustained and concerted military operations and to implement this Protocol. Secondly, Additional Protocol II expressly applies only to armed conflicts between State armed forces and dissident armed forces or other organized armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-State armed groups. In this context, it must be reminded that Additional Protocol II develops and supplements common Article 3 without modifying its existing conditions of application1.[130] This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of Non-International Armed Conflict in general.

[128] D Schindler, "The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols", *RCADI*, Vol. 163, 1979-II, p. 147.
[129] Additional Protocol II, art. 1, para. 1.
[130] *Ibid.*

In addition, Case law has brought important elements for the definition of an armed conflict, in particular regarding the non-international armed conflicts in the meaning of common Article 3 which is not expressly defined in the Conventions concerned.[131] Judgments and decisions of the International Criminal Tribunal for the former Yugoslavia (ICTY) threw some light on the definition of Non-International Armed Conflict.

The International Criminal Tribunal for the former Yugoslavia determined the existence of a Non-International Armed Conflict as "whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State".[132] The ICTY thus confirmed that the definition of Non-International Armed Conflict in the sense of common Article 3 encompasses situations where "several factions confront each other without involvement of the government's armed forces"[133] Since that first ruling, each judgment of the ICTY has taken this definition as a starting point.[134]

Further, several recognized authors also commented very clearly on what should be considered as a non-international armed conflict. Their comments are relevant in first place to the conflicts which do not fulfill the strict criteria foreseen in Additional Protocol II and provide useful elements to ensure the application of the guarantees provided in common article 3 to the Geneva Conventions of 1949.

According to Gasser, it is generally admitted that "non-international armed conflicts are armed confrontations that take place within the territory of a State between the government on the one hand and armed insurgent groups on the other hand… Another case is the crumbling of

[131] R Bartels, "Timelines, Borderlines and Conflicts: The Historical Evolution of the Legal Divide between International and Non-international Armed Conflicts."(2009) *International Review of the Red Cross* Vol. 91(873), p.35.
[132]*The Prosecutor v. DuskoTadic*, ICTY Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, IT-94-1-A, 2 October 1995, para.70.
[133] Y Sandoz, C.Swinarski, B Zimmermann, *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, (Geneva: ICRC, 1987) para. 4461.
[134]*Ibid.*

all government authority in the country, as a result of which various groups fight each other in the struggle for power"[135]

Schindler also proposes a detailed definition:

> The hostilities have to be conducted by force of arms and exhibit such intensity that, as a rule, the government is compelled to employ its armed forces against the insurgents instead of mere police forces. Secondly, as to the insurgents, the hostilities are meant to be of a collective character, i.e. they have to be carried out not only by single groups. In addition, the insurgents have to exhibit a minimum amount of organization. Their armed forces should be under a responsible command and be capable of meeting minimal humanitarian requirements.[136]

Sassoli[137]writes that "common Article 3 refers to conflicts 'occurring in the territory of one of the High Contracting Parties,' whereas Article 1 of Protocol II refers to those 'which take place in the territory of a High Contracting Party.' According to the aim and purpose of International Humanitarian Law, this must be understood as simply recalling that treaties apply only to their state parties. If such wording meant that conflicts opposing states and organized armed groups and spreading over the territory of several states were not non-international armed conflicts, there would be a gap in protection, which could not be explained by states' concerns about their sovereignty.[138] Those concerns made the law of non-international armed conflicts more rudimentary.[139] Yet concerns about state sovereignty could not explain why victims of conflicts spilling over the territory of several states should benefit from less protection than those affected by conflicts limited to the territory of only one state. Additionally, Articles 1 and 7 of

[135] Gasser, *art.cit,* p.555.
[136] D Schindler, *art. cit,* p. 147.
[137] M Sassoli, Transnational Armed Groups and International Humanitarian Law, Program on Humanitarian Policy and Conflict Research, *Harvard University, Occasional Paper Series*, Winter 2006, Number 6, pp. 8-9.
[138]*Ibid.*
[139]*Ibid.*

the Statute of the International Criminal Tribunal for Rwanda extend the jurisdiction of that tribunal called to enforce, inter alia, the law of non-international armed conflicts, to the neighboring countries.[140] This confirms that even a conflict spreading across borders remains a non-international armed conflict.

In conclusion, 'internal conflicts are distinguished from international armed conflicts by the parties involved rather than by the territorial scope of the conflict.[141]

2.2 Nature of International Human Rights Law

Rights are difficult to define and there are lots of different definitions and interpretations of what a right is. One way to understand rights is as things to which individuals or groups have a justified entitlement; that is, they cannot be asserted out of thin air they must have a justification and they are not valid simply because they have been written down by an authority.

The word right is derived from the Latin word "*rectus*" which means, that to which a person has a just and valid claim whether it be land, a thing, or the privilege of doing or saying something.[142] A legal right is a right protected by law; thus it is a capacity residing in one man or group of men controlling with the assent and the assistance of the state, the actions of others.[143]

A human right is a right that is believed to belong to everyone simply by being human. When we think about human rights and law we look first to the UN Conventions and Declarations about human rights that evolved in the 20th century. However, all societies and civilizations have principles that guide the claims about rights, duties and responsibilities that characterize all human relations. What constitutes a justified demand, who can make demands,

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[140] *Ibid.*

[141] L Zegveld, *Accountability of Armed Opposition Groups in International Law*, (Cambridge: Cambridge University Press, 2002) p. 136.

[142] O N Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction,* (Enugu: CIDJAP Press, 1999) p. 1.

[143] C Oputa, *Human Rights in the Political and Legal Culture of Nigeria, 2nd Idigbe Memorial Lectures* (Lagos: Nigerian Law Publications Ltd, 1998). Cited in O N Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction,* (Enugu: CIDJAP Press, 1999) p. 1.

and who owes it to respond to demands are all matters that have varied significantly over time and across different cultures and civilizations.

Contemporary human rights emerged in the aftermath of the Second World War and are arranged around the Universal Declaration of Human Rights.[144] This contemporary form of rights includes civil liberties which are freedoms from violations imposed by the state and its institutions as well as rights to have vital economic needs met such as health, education, food and housing.[145] It is important to note that these rights are based on the fundamental assumption that each and every person is a moral and rational being who deserves to be treated with dignity simply because they are alive.[146] This is different from earlier charters that allocated rights only to certain categories of people or 'citizens' who were usually male landowners, and not, for example, slaves, women, disabled people or peasants.[147]

The term Human Rights appeared in public domain for the first time in the years 1942 to 1944 in the course of internal policy discussions in the United States on the subject of the principles on which the post war organization would be based.[148]The expression came into regular parlance after World War II and the founding of the United Nations in 1945; subsequently leading to adoption of the Universal Declaration of Human Rights by the General Assembly in 1948. Though the Universal Declaration of Human Rights did not at the time it was adopted, impose any legal obligation on states, it was symbolic and represented aspirations to which member states strive to attain. As aptly put by Pathak:

> Through centuries the individual has struggled against the

[144] S Moyn, "The Universal Declaration of Human Rights of 1948 in the History of Cosmopolitanism" (2014) *The University of Chicago Journals*Vol 40(4) p.560.
[145]*Ibid.*
[146] C CAni, 'The Rudiments of Human Rights*' (*2010) *Journal of International Law and Jurisprudence*, also available at*https://www.ajol.info/index.php/naujilj/article/viewFile/138182/127750*accessed on 2 May 2017.
[147]*Ibid.*
[148]Ogbu, *opcit*, p.12.

> overwhelming power of the state. Today he stands assured in the conviction that his basic rights so fundamental to him, so fundamental to the essential quality of his life, constitute an integral part of the universal structure of law.[149]

The core system of human rights promotion and protection under the United Nations has a dual basis: the UN Charter adopted in 1945, and a network of treaties subsequently adopted by UN members. The Charter-based system applies to all 192 UN Member States, while only those States that have ratified or acceded to particular treaties are bound to observe that part of the treaty-based (or conventional) system to which they have explicitly agreed.[150]

2.2.1 The Charter- Based System

This system evolved under the UN Economic and Social Council, which set up the Commission on Human Rights, as mandated by Article 68 of the UN Charter.[151] The Commission did not consist of independent experts, but was made up of 54 governmental representatives elected by the Council, irrespective of the human rights record of the States concerned. As a consequence, States earmarked as some of the worst human rights violators served as members of the Commission.[152] The main accomplishment of the Commission was the elaboration and near-universal acceptance of the three major international human rights instruments: the Universal Declaration of Human Rights, adopted in 1948, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR), the latter two adopted in 1966.[153] As the adoption of those two separate documents

[149] R S Pathak, 'The Protection of Human Rights' (1978) 18 L.J.I.L. Cited in O N Ogbu, *Human Rights Law and Practice in Nigeria: An Introduction,* (Enugu: CIDJAP Press, 1999) p. 13.
[150] S Moyn, *art cit.*
[151] D Albahary, "International Human Rights and Global Governance: The End of National Sovereignty and the Emergence of a Suzerain World Polity?"(2010) *Michigan State Journal of International Law* Vol. 18:3, p.512.
[152]*Ibid.*
[153] F Viljoen, 'International Human Rights Law: A Short History' (2009) *UN Chronicle Vol. XLVI No. 1 & 2*https://unchronicle.un.org/article/international-human-rights-law-short-historyAccessed 3 May 2017.

indicates, the initial idea of transforming the Universal Declaration into a single binding instrument was not accomplished, mainly due to a lack of agreement about the justiciability of socio-economic rights. As a result, individual complaints could be lodged, alleging violations by certain States of ICCPR, but not so with ICESCR.[154]

The normative basis of the UN Charter system is the Universal Declaration of Human Rights, adopted on 10 December 1948, which has given authoritative content to the vague reference to human rights in the UN Charter. Although it was adopted as a mere declaration, without a binding force, it has subsequently come to be recognized as a universal yardstick of State conduct. Many of its provisions have acquired the status of customary international law.

2.2.2 The Treaty- Based System

The treaty-based system developed even more rapidly than the Charter-based system.[155] The first treaty, adopted in 1948, was the Convention on the Prevention and Punishment of the Crime of Genocide, which addressed the most immediate past experience of the Nazi Holocaust. Since then, a huge number of treaties have been adopted, covering a wide array of subjects, eight of them on human rights -- each comprising a treaty monitoring body under the auspices of the United Nations.[156]

The first, adopted in 1965, is the International Convention on the Elimination of All Forms of Racial Discrimination (CERD), followed by ICCPR and ICESCR in 1966. The international human rights regime then started to move away from a generic focus, shifting its attention instead to particularly marginalized and oppressed groups or themes: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979; the

[154] *Ibid.*
[155] D Albahary, *art cit.*
[156] C McHale, 'The impact pf U.N Human Rights Commission Reform on the ground: Investigating extrajudicial executions of Honduran children' (2005) *Fordham International Law Journal* Vol 29 (4), p.165.

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984); the Convention on the Rights of the Child (1989); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990); and the Convention on the Rights of Persons with Disabilities (2006).[157] The latest treaty is the International Convention for the Protection of All Persons from Enforced Disappearances (ICED), also adopted in 2006 but yet to enter into force. With the adoption of an Optional Protocol to ICESCR in 2008, allowing for individual complaints regarding alleged violations of socio-economic rights, the UN treaty system now also embodies the principle that all rights are justiciable.[158]

Twenty years after the adoption of the Universal Declaration, the first International Conference on Human Rights was held in 1968 in Teheran. As the world was at that stage caught in the grip of the cold war, little consensus emerged and not much was achieved. The scene was very different when the second world conference took place in Vienna in 1993. The cold war had come to an end, but the genocide in Bosnia and Herzegovina was unfolding. Against this background, 171 Heads of State and Government met and adopted the Vienna Declaration and Programme of Action. It reaffirmed that all rights are universal, indivisible and interdependent.[159]

Several resolutions adopted there were subsequently implemented, including the adoption of an Optional Protocol to CEDAW and the establishment of the Office of the United Nations High Commissioner for Human Rights.[160]

[157] *Ibid.*
[158] *Ibid.*
[159] *Ibid.*
[160] *Ibid.*

Other conferences have also highlighted important issues, such as racism and xenophobia, which were discussed at the 2001 World Conference against Racism, held in Durban, South Africa. This culminated in the adoption of the Durban Declaration and Programme of Action. A review conference to assess progress in the implementation of the Declaration took place in April 2009.[161]

2.2.3 The Regional System

Since the Second World War, three regional human rights regimes/norms and institutions that are accepted as binding by States have been established. Each of these systems operates under the auspices of an intergovernmental organization or an international political body. In the case of the European system, it is the Council of Europe, which was founded in 1949 by 10 Western European States to promote human rights and the rule of law in post-Second World War Europe, avoided a regression into totalitarianism and served as a bulwark against Communism. The Organization of American States (OAS) was founded in 1948 to promote regional peace, security and development. In Africa, a human rights system was adopted under the auspices of the Organization for African Unity (OAU), which was formed in 1963 and transformed in 2002 into the African Union (AU).[162]

In each of the three systems, the substantive norms are set out in one principal treaty. The Council of Europe adopted its primary human rights treaty in 1950: the European Convention of Human Rights and Fundamental Freedoms. Incorporating the protocols adopted thereto, it includes mainly "civil and political" rights, but also provides for the right to property. All 47 Council of Europe members have become party to the European Convention. OAS adopted the

[161] *Ibid.*
[162] UN Doc. A/RES/60/251 (para 13), 3 April 2006, recommending to the Economic and Social Council to "abolish" the Commission on Human Rights on 16 June 2006. http://www2.ohchr.org/english/bodies/hrcouncil/docs/A.RES.60.251_En.pdf Accessed 3 May 2017.

American Convention on Human Rights in 1969, which has been ratified by 24 States. The American Convention contains rights similar to those in the European Convention but goes further by providing for a minimum of "socio-economic" rights. In contrast to these two treaties, the African Charter, adopted by OAU in 1981, contains justiciable "socio-economic" rights and elaborates on the duties of individuals and the rights of peoples. All AU members are parties to the African Charter.[163]

2.2.4 Application of International Human Rights Law

Advances in human rights are not dependent only on States. Non-governmental organizations have been very influential in advancing awareness on important issues and have prepared the ground for declarations and treaties subsequently adopted by the United Nations.[164]

The role of civil society is of particular importance when the contentiousness of an issue inhibits State action. The Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity is a case in point. Although it was adopted in November 2006 by 29 experts from only 25 countries, the 29 principles contained in the document related to State obligations in respect of sexual orientation and gender identity are becoming an internationally accepted point of reference and are likely to steer future discussions.[165]

The international human rights law landscape today looks radically different from 60 years ago when the Universal Declaration was adopted. Significant advances have been made since the Second World War in expanding the normative reach of international human rights law,

[163] *Ibid.*
[164] Report by the Global Citizenship Commission on "The Universal Declaration Of Human Rights in the 21st Century a Living Document in a Changing World" (2016) http://www.equalrightstrust.org/ertdocumentbank/Brown-Universal-Declaration-Human-Rights-21C.pdf Accessed 3 May 2017.
[165] *Ibid.*

leading to the proliferation of human rights law at the international level.[166] Over the last few decades, however, attention has shifted to the implementation and enforcement of human rights norms, to the development of more secure safety nets and to a critical appraisal of the impact of the norms. Greater concern for human rights has also been accompanied with greater emphasis on the individual liability of those responsible for gross human rights violations in the form of genocide, crimes against humanity and war crimes.[167]

The creation of international criminal tribunals, including the International Criminal Court in 1998, constitutes a trend towards the humanization of international law. The further juridification of international human rights law is exemplified by the establishment of more courts, the extension of judicial mandates to include human rights, and the unequivocal acceptance that all rights are justiciable.[168] With the adoption of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, there is much clearer acceptance of the principle of indivisibility under international human rights law. However, the constant evolution of the international human rights regime depends greatly on non-State actors, as is exemplified by their role in advocating for and preparing the normative ground for the recognition of the rights of "sexual minorities". There is no doubt that the landscape is to undergo dramatic changes in the next 60 years.[169]

The core international human rights sources may be listed as follows-[170]

i. The International Covenant on Economic, Social and Cultural Rights and its Optional Protocol (1996);

[166] *Ibid.*
[167] *Ibid.*
[168] F Viljoen, art cit.
[169] *Ibid.*
[170] *Ibid.*

ii. The International Covenant on Civil and Political Rights and its two Optional Protocols (1972);

iii. The International Convention on the Elimination of All Forms of Racial Discrimination;

iv. The Convention on the Elimination of All Forms of Discrimination against Women and its Optional Protocol (1979);

v. The Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and its Optional Protocol (1985);

vi. The Convention on the Rights of the Child and its two Optional Protocols (1989);

vii. The International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families;

viii. The International Convention for the Protection of All Persons from Enforced Disappearance; and

ix. The Convention on the Rights of Persons with Disabilities and its Optional Protocol.

There is a growing body of subject-specific treaties and protocols as well as various regional treaties on the protection of human rights and fundamental freedoms.[171] Moreover, resolutions adopted by the General Assembly, the Security Council and the Human Rights Council, case law by treaty bodies and reports of human rights special procedures, declarations, guiding principles and other soft law instruments contribute to clarifying, crystallizing and providing principled guidance on human rights norms and standards, even if they do not contain

[171] Report by the Global Citizenship Commission on "The Universal Declaration Of Human Rights in the 21st Century a Living Document in a Changing World" *art cit.*

legally binding obligations per se, except those that constitute rules of international custom.[172] International human rights law is not limited to the rights enumerated in treaties, but also comprises rights and freedoms that have become part of customary international law, binding on all States, including those that are not party to a particular treaty. Many of the rights set out in the Universal Declaration of Human Rights are widely seen as having this character.

Furthermore, some rights are recognized as having a special status as peremptory norms of customary international law (*iuscogens*), which means that no derogation is admissible under any circumstance and that they prevail, in particular, over other international obligations. The prohibitions of torture, slavery, genocide, racial discrimination and crimes against humanity, and the right to self-determination are widely recognized as peremptory norms, as reflected in the International Law Commission's draft articles on State responsibility.[173]

Similarly, the Human Rights Committee has indicated that provisions in the International Covenant on Civil and Political Rights that represent customary international law (and a fortiori when they have the character of peremptory norms) may not be the subject of reservations.[174] The Committee added that "a State may not reserve the right to engage in slavery, to torture, to subject persons to cruel, inhuman or degrading treatment or punishment, to arbitrarily deprive persons of their lives, to arbitrarily arrest and detain persons, to deny freedom of thought, conscience and religion, to presume a person guilty unless he proves his innocence, to execute pregnant women or children, to permit the advocacy of national, racial or religious hatred, to deny to persons of marriageable age the right to marry, or to deny to minorities the right to enjoy

[172]UNHR (2011) International Legal Protection of Human Rights in Armed conflict. http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf Accessed 20 March 2017.
[173] Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted by the International Law Commission at its fifty-third session in 2001. http://legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf Accessed 20 March 2017
[174]UNHR (2011) art. cit. at p. 10

their own culture, profess their own religion, or use their own language.[175] And while reservations to particular clauses of article 14 may be acceptable, a general reservation to the right to a fair trial would not be." The Committee, in line with article 4 of the Covenant, has also reiterated that certain rights contained in the Covenant cannot be subject to derogation, including article 6 (right to life).[176]

The jurisprudence of the International Court of Justice, which the Court's Statute recognizes as a subsidiary means for the determination of rules of law, is increasingly referring to States' human rights obligations in situations of armed conflict.[177] These decisions have provided further clarification on issues such as the continuous application of international human rights law in situations of armed conflict.

2.3 The Relationship between International Human Rights Law and International Humanitarian 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.[178] The most frequent examples are situations of occupation or non-international armed conflicts where human rights law complements the protection provided by humanitarian law.[179]

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[175] K D A Carpenter, "The International Covenant on Civil and Political Rights: A Toothless Tiger" (2000) *North Carolina Journal of International Law and Commercial Regulation* Vol 26(1).
[176] *Ibid.*
[177] *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda),* Judgment, I.C.J. Reports 2005. http://www.icj-cij.org/docket/files/116/10455.pdf Accessed 20 March 2017.
[178] G Nystuen, "The relationship between international humanitarian law (IHL) and international human rights law (HR) http://www.uio.no/studier/emner/jus/humanrights/HUMR4100/h06/undervisningsmateriale/Lecture%206%20-%20Nystuen.pdf Accessed 20 March 2017.
[179] *Ibid.*

International human rights law and international humanitarian law share the goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and, more recently, the Human Rights Council has considered that, in armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by the conflict. [180]Although different in scope, international human rights law and international humanitarian law offer a series of protections to persons in armed conflict, whether civilians, persons who are no longer participating directly in hostilities or active participants in the conflict. Indeed, as has been recognized, inter alia, by international and regional courts, as well as by United Nations organs, treaty bodies and human rights special procedures, both bodies of law apply to situations of armed conflict and provide complementary and mutually reinforcing protection.[181]

It is imperative to distinguish between the two, as such, International human rights law is a system of international norms designed to protect and promote the human rights of all persons. These rights, which are inherent in all human beings, whatever their nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status, are interrelated, interdependent and indivisible.[182] They are often expressed and guaranteed by law, in the form of treaties, customary international law, general principles and soft law. Human rights entail both rights and obligations. International human rights law lays down the obligations

[180] 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 Conventions (1998) *International Review of the Red Cross*, No. 324.
[181] L Doswald-Beck & S Vité, "International Humanitarian Law and Human Rights Law" (1993) *International Review of the Red Cross,* No. 293.
[182]*Ibid.*

of States to act in certain ways or to refrain from certain acts, in order to promote and protect the human rights and fundamental freedoms of individuals or groups.[183]

International humanitarian law is a set of rules which seek, for humanitarian reasons, to limit the effects of armed conflict. It protects persons who are not or are no longer participating in the hostilities, and restricts the means and methods of warfare. Its scope is, therefore, limited *rationemateriae* to situations of armed conflict. International humanitarian law is part of *jus in bello*(the law on how force may be used), which has to be distinguished and separated from *jus ad bellum* (the law on the legitimacy of the use of force). The use of force is prohibited under the Charter of the United Nations.[184] Nevertheless, international humanitarian law has to be applied equally by all sides to every armed conflict, regardless of whether their cause is justified. This equality between the belligerents also crucially distinguishes an armed conflict, to which international humanitarian law applies, from a crime, to which only criminal law and the rules of human rights law on law enforcement apply.[185]

For years, it was held that the difference between international human rights law and international humanitarian law was that the former applied in times of peace and the latter in situations of armed conflict.[186] Modern international law, however, recognizes that this distinction is inaccurate. Indeed, it is widely recognized nowadays by the international community that since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of

[183] G I A Draper, "The relationship between the human rights regime and the law of armed conflict"(1971), *Israel Yearbook on Human Rights* , Vol.1 p.72.
[184] R Quentin-Baxter, "Human rights and humanitarian law—confluence or conflict?" (1985) *Australian Yearbook of International Law*, Vol. 9, p.113.
[185] *Ibid.*
[186] UNHR (2011) International Legal Protection of Human Rights in Armed conflict. http://www.ohchr.org/Documents/Publications/HR_in_armed_conflict.pdf Accessed 20 March 2017.

war, international human rights lawcontinues to apply in situations of armed conflict.[187]In *Cyprus v. Turkey*[188] the European Court of Human Rights in Strasburg held amongst other things, that there had been 14 violations of human rights even though there was armed conflict at that time.

Moreover, nothing in human rights treaties indicates that they would not be applicable in times of armed conflict. As a result, the two bodies of law—international human rights law and international humanitarian law—are considered to be complementary sources of obligations in situations of armed conflict. For example, the Human Rights Committee, in its general comments Nos. 29 (2001) and 31 (2004), recalled that the International Covenant on Civil and Political Rights applied also in situations of armed conflict to which the rules of international humanitarian law were applicable.[189] The Human Rights Council, in its resolution 9/9, further acknowledged that human rights law and international humanitarian law were complementary and mutually reinforcing.[190] The Council considered that all human rights required protection equally and that the protection provided by human rights law continued in armed conflict, taking into account when international humanitarian law applied as a law governing a specific subject matter.[191] The Council also reiterated that effective measures to guarantee and monitor the implementation of human rights should be taken in respect of civilian populations in situations of armed conflict, including people under foreign occupation, and that effective protection against violations of their human rights should be provided, in accordance with international human rights law and applicable international humanitarian law.[192]

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[187] R Kolb, *art cit.*
[188] 120 ILR 10.
[189]UNHR (2011), *Loc. cit.*
[190] A William, "A Human Rights Law of Internal Armed Conflict: The European Court of Human Rights in Chechnya", *European Journal of International Law* (2005) Vol. 16, Issue 4, p.741.
[191]*Ibid.*
[192]*Ibid*

Over the past few years, the application of the rules of international human rights law and international humanitarian law to situations of armed conflict has raised a series of questions concerning the implementation of the specific protections guaranteed by both bodies of law.[193] Their concurrent application has created confusion about the obligations of the parties to a conflict, the extent of these obligations, the standards to be applied and the beneficiaries of these protections.[194] Thus, in order to correctly understand the relationship between international human rights law and international humanitarian law when applied in practice to situations of armed conflict, it is thus important to put this relationship in its legal and doctrinal context.

2.3.1 The Scope of Application of International Humanitarian Law and International Human Rights Law

While international human rights law and international humanitarian law have different historical and doctrinal roots, both share the aim of protecting all persons and are grounded in the principles of respect for the life, well-being and human dignity of the person.[195] From a legal perspective, both international human rights law and international humanitarian law find their source in a series of international treaties, which have been reinforced and complemented by customary international law. Taking into account that international human rights law applies at all times (whetherin peace or in war) and that international humanitarian law applies only in the context of armed conflicts.

Moreover, certain violations of international human rights and humanitarian law constitute crimes under international criminal law, so other bodies of law, such as the Rome

[193] H J Heintze, "On the relationship between human rights law protection and international humanitarian law, (2009) *International Review of the Red Cross,* No 856.
[194] *Ibid.*
[195] In *Prosecutor v. AntoFurundžija,* the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia emphasized that the general principle of respect for human dignity was the "basic underpinning" of both human rights law and international humanitarian law. Case No. IT-95-17/1-T, Judgment of 10 December 1998, para. 183.

Statute of the International Criminal Court, could, therefore, also be applicable.[196] International criminal law and criminal justice on war crimes implement international humanitarian law, but they also clarify and develop its rules. Similarly, other bodies of law, such as international refugee law and domestic law, will often also be applicable and may influence the type of human rights protections available.[197]

The common background is that while humanitarian law applies only to armed conflicts, as stipulated, for instance, in Common Article 2 of the 1949 Geneva Conventions, human rights law applies in both peace and war. According to the European Union Guidelines on promoting compliance with international humanitarian law, 'International Humanitarian Law is applicable in time of armed conflict and occupation.[198] Conversely, human rights law is applicable to everyone within the jurisdiction of the State concerned in time of peace as well as in time of armed conflict.[199] Thus while distinct, the two sets of rules may both be applicable to a particular situation.[200]The UN Report on the situationconcerning the detainees in Guantánamo Bay also emphasizes the applicability of the two bodies of law, especially in terms of human rights in wartime.[201]

The interdependence between these two fields is confirmed in the jurisprudence of the International Court of Justice. As the Court emphasized in the cases of the *Legal Consequences*

[196] H J Heintze, *art cit.*
[197] N Lubell. "Challenges in applying Human Rights Law to Armed Conflict (2005) *International Review of the Red Cross* Vol 87 No. 860, p.738.
[198]*Ibid.*
[199]*Ibid.*
[200] European Union Guidelines on promoting compliance with international humanitarian law [2005] OJ C327/04, at para. 12. http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52005XG1223(02) Accessed 20 March 2017.
[201]AOrakhelashvili, "The interaction between Human Rights and Humanitarian Law: Fragmentation, Conflict, parallelism or convergence?" *(*2008). *The European Journal of International Law.* Vol. 19, no, 1 also available at http://www.ejil.org/pdfs/19/1/178.pdf Accessed 20 March 2017.

of the Construction of the Wall in the Occupied Palestinian Territory[202] *and Democratic Republic of Congo v. Uganda*[203], human rights treaties continue to apply in wartime. They apply together with humanitarian law.

The parallel applicability of the two fields of law is witnessed in particular in the legal regime of belligerent occupation. As Article 42 of 1907 Hague Regulations determines, the territory is under occupation if effectively taken under control. The acts of the occupying power which violate the applicable humanitarian law and human rights law provisions are null and void.[204]In the *Palestine Wall case*, the startingpoint for the applicability of humanitarian law to the construction of the Wall lay with the fact that Palestinian territory is under belligerent occupation.[205] In this context, the Court observed that the construction of the Wall led to the destruction or requisition of properties in violation of Articles 46 and 52 of the 1907 Hague Regulations and Article 53 of the IV Geneva Convention. The Court pointed out that these destructions were not justified by military necessity.[206] The Court observed that the construction of the Wall and its associated regime 'impede the exercise by the persons concerned of the right to work, to health, to education and to an adequate standard of living' under the International Covenant on Economic Social and Cultural Rights.[207] As for the violations of civil and political rights, the Court observed that the construction of the Wall had deprived a significant number of Palestinians of their freedom to choose the place of their residence, thus impeding the freedom of movement under Article 12(1) of the International Covenant on Civil and Political Right.[208]

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[202] (2004) ICJ Rep 136.
[203] ICGJ 31 (ICJ 2005).
[204] Y Dinstein, 'Belligerent Occupation and Human Rights', *8 Israel Yearbook of Human Rights* (1978) p. 142.
[205] Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, General List No. 131.para. 89. http://www.icj-cij.org/files/case-related/131/131-20040709-ADV-01-00-EN.pdf Accessed 20 March 2017.
[206]*Ibid*, at paras 132 – 135.
[207]*Ibid.*
[208]*Ibid*, at paras 133 – 134.

The similar approach of parallelism was displayed in the *Congo-Uganda* case, where the Congo claimed that serious and widespread human rights and humanitarian law violations were committed by the Ugandan forces in the occupied parts of the Congo, against the lives and property of the Congolese population.[209] The Court observed that Uganda was responsible for violations of human rights law and humanitarian law. This confirms that the two bodies of law not only apply in the same situations, but can also outlaw the same conduct. The Court's findings constitute a warning that even if the protection in one of the fields is found to be less than that of the other field, the applicability of the latter will thus not be prevented.[210]

Additionally, the International Criminal Tribunal for the Former Yugoslavia (ICTY) decided that human rights law and humanitarian law are mutually complementary and their use for ascertaining each other's content and scope is both appropriate and inevitable. Because of the resemblance of the two bodies of law, 'in terms of goals, values and terminology', the recourse to human rights law 'is generally a welcome and needed assistance to determine the content of customary international law in the field of humanitarian law.[211] As such, international humanitarian law can be said to have fused with human rights law. At the same time, the Tribunal specified that 'notions developed in the field of human rights can be transposed in international humanitarian law only if they take into consideration the specificities of the latter body of law.[212]

In terms of the applicability of humanitarian law, the ICTY noted that once the existence of an armed conflict has been established, international humanitarian law continues to apply

[209]*Democratic Republic of the Congo v. Uganda*, Judgment of 19 Dec. 2005, General List No. 116.
[210]AOrakhelashvili, *op cit* at p. 164.
[211]*Ibid,* p.165.
[212]*Ibid.*

beyond the cessation of hostilities.[213]However, it is imperative to note that this continuous applicability of humanitarian law relates to only those provisions that are by their nature suitable for being applied after the cessation of hostilities; the principle of continued applicability would not cover the provisions relating to combat actions and ensuing military necessity.[214]

The general conclusion therefore is that each of the two bodies of law can apply to the relevant armed conflict, and do so individually. Each of these bodies of law can provide standards for the assessment of the relevant conduct of the state. The subjects governed by one body of law are frequently also governed by the other body of law, and whatever the formal and procedural constraints on the powers of national and international decision-making bodies, in the exercise of their mandate they are expected, at least by implication, to consider the impact of both human rights law and humanitarian law, to reach the outcomes permissible at the level of international law. This demonstrates that in the final analysis the protection under humanitarian law is not substantially lower than that under human rights law.

2.4 Women's Rights as Human Rights.

2.4.1 Historical Perspectives to Women's Rights Movement.

Modernisationhas altered the status of women to such an extent that perhaps only modern ideologies of women's liberation can provide the intellectualorganization necessary in the struggle for equality of women."[215]

The history of women's rights movement is a parallel part of the history and development of modern human rights. There is a rareness of historical account that predates the formation of the UN. Here a distinction has to be made from the national women's movement, which was

[213]*Ibid.*
[214] N Lubell, *art cit.*
[215] Rhoda Howard, 'Group versus Individual Identity in this African Debate on Human Rights' in An-naim A and Deng F M (eds.) *Human Rights in Africa: Cross Cultural Perspectives.* (Washington DC: The Brooking Institution, 1990) p.159.

precursor to the global women's movement. Whereas, the latter can be traced from the formation of the UN, women's struggle at country level dates back to the 17th century.[216]

By the 19th century it manifested mainly in the struggle for enfranchisement of right to vote for women and recognition of women's legal personality as femme sole. Thus, the English Married Women's Property Act (1881) came about as a result of the women's movement. At the time of colonial rule in most African states, women's struggle had crystallized in the West and in some circumstances resulting in national legislations recognizing legal capacity for women to enter into contract or be treated not as minors.[217] Not surprisingly, the colonists came and ruled Africans with anti-feminists attitudes already existing in the West. The inclusion of the principle of equality and non-discrimination provisions in the international instruments would not have happened without the awareness created by the early feminists' activists.[218]

The women's movement is deeply rooted in women's organizations in different parts of theworld for gender justice. The role played by women in the history of humanity, especially in thestruggle for national liberation, the strengthening of international peace, and the elimination ofimperialism, colonialism, neo- colonialism, foreign occupation, Zionism, alien domination,racism and apartheid is formidable but often less documented.[219]

The most chronological account is English Feminism 1780 to 1980written by Barbara Caine[220] whichgave a good historical account of feminism and the woman question, early feminist campaigns andstrategies. The anthology illustrates that women's movement and feminists struggle existed long before the end of the eighteen century. The best known early

[216] M Mooney, "Equal Rights? The Women's Movement from Suffrage to Schlafly" (2006) http://historyproject.uci.edu/files/2017/01/Equal_Rights_Grade11.pdfAccessed 20 March 2017.
[217] *Ibid.*
[218] *Ibid.*
[219] E C Dubois, "Woman Suffrage and the Left: An International Socialist-Feminist Perspective" (1991) https://www.researchgate.net/publication/272791098_Woman_Suffrage_and_the_Left Accessed 3 June 2018.
[220] C MacKinnion, *Toward a Feminist Theory of the State* (Cambridge: Harvard University Press, 1989) pp. 161-162.

writings on the subject were those of MaryWollstonecraft, *A Vindication of the Rights of Woman.*[221]

Modern feminism is hinged on the demand for women's rights and the recognition of equal worth ofwomen based on their humanity. In the 18th and 19th century feminism was always linked to demands ofsexual freedom, for the freedom to negotiate sexual relationships without the bonds of marriage, and toexplore new ways of living which did not conform to middle- class norms.[222]

The 20th century moving slightly away from the sexualized discourse of preceding centuries was markedby militant campaigns on the suffrage movement championed by the Women's Liberation Movement.[223]

The women's suffrage struggle is seen as the first wave of feminism and to spark it off was John Stuart Mill who petitioned the English Parliament in 1866 for women's suffrage and argue thus: "Under whatever conditions, and within whatever limits, men are admitted to suffrage, there is not a shadow ofjustification for not admitting women under the same. The majority of women of any class are not likelyto differ in political opinion from the majority of men in the same class."[224] As has been noted, Mill's ideasand approach were very influential for some feminists and certainly played a notable part in establishingthe dominance of the suffrage campaign in the late 1860s and early 1870s.[225] Of course, women were atthe forefront of the suffrage campaign establishing Women's Suffrage Journal and Suffrage CampaignCommitteesacross Great Britain and Ireland in the late 1860s and it became an avenue

[221] S Tomaselli (ed.) *A Vindication of the Rights of Men and A Vindication of the Rights of Woman* (Cambridge: University Press, 1995) p.89.
[222] E C Dubois, art cit.
[223] S Tomaselli, *op cit.*
[224] *Ibid.*
[225] Barbara Caine, '*English Feminism 1780 – 1980'* (Oxford/New York: Oxford University Press, 1997) p. 75.

for continuousagitations for property and legal rights of married women, until the Married Women's Property Act of1882 was enacted.[226] The London National Society for Women's Suffrage, Women's Freedom League andNational Union of Societies for Equal Citizenship amongst others continued the struggle until limitedsuffrage was achieved in 1917and later in 1928 the Equal Franchise Act gave women the right to vote onthe same terms as men.[227]Other legislative development gradually followed suit to shatter otherinstitutional barriers, for example, the removal of the Sex Discrimination Act in 1929.[228]

This resulted inthe admission of women to the legal profession and to earn degrees in universities amongst severallegislative developments in that era which later women were to enjoy and take for granted in many of theBritish Colonies of Africa and beyond.[229]

2.4.2The Role of the UN in the Promotion and Protection of Women's Rights

The women's movement has a staunch ally in the United Nations. Starting from the assertion in theCharter, calling for full equality of men and women, the United Nations has worked with the women'smovement to realize this goal of our founders.[230] The Commission on the Status of Women was one of thefirst bodies established by the United Nations after its foundation. Over the pastyears, WorldConferences on Women, held in Mexico City, Copenhagen, Nairobi, etc. have contributed to theprogressive strengthening of the legal, economic, social and political dimensions of the role of women. In1979, the General Assembly adopted the landmark

[226] *Ibid.*
[227] *Ibid.*
[228] E C Dubois, *art cit.*
[229] *Ibid.*
[230] S Goonesekere& R De Silva-De Alwis, "Women's and Children's rights in a human rights based approach to development" (2005) UNICEF Working Paper, https://www.unicef.org/gender/files/WomensAndChildrensRightsInAHumanRightsBasedApproach.pdf Accessed 3 June 2018

Convention for the Elimination of all Forms ofDiscrimination against Women. “The movement for gender equality the world over has been one of thedefining developments of our time”.[231]

The systemic discrimination and situation of women worldwide has attracted global concern and action aimed at resolving the inequities. The United Nations being the forum for discourses of human rightscan be regarded as the center of the global movement for women’s rights; interest in and commitment tothe promotion and protection of human rights and the principle of gender equality and non-discriminationare at the core of United Nations initiatives.[232]

For decades the United Nations has been dealing with the persistent question of gender equalityand standards it has developed in this area have given added impetus to women’s demand nationally, regionally and internationally for gender equality and women’s rights. Starting fromthe UN Charter (1945), where in its preamble, it reaffirmed faith in fundamental human rights, inthe dignity and worth of the human person, in the equal rights of men and women and nations large and small. This feeling of all-inclusiveness was perfected and given legal backing in Article1 of the Charter that sets the function of UN to include “promoting and encouraging respect forhuman rights and for fundamental freedoms for all without distinction as to race, sex, language,or religion”.[233]

A major step taken by the UN to concretize its recognition and promotion of women’s human rights was the establishment of the Commission on the Status of Women (CSW). It wasthrough this Commission’s work that the UN in a systematic manner dealt with questions of

[231] The Statement of the then Secretary General of the United Nations, Boutros Boutros-Ghali during the conclusion of the Beijing Conference on Women, September 15, 1995. UN, Platform for Action and the Beijing Declaration (New York: UN Department of Public Information, 1995). http://www.un.org/esa/gopher-data/conf/fwcw/off/a-20a1.en Assessed on 4 May 2017.
[232] Women and the League of Nations. https://unngls.org/images/multilateralism/gender_part_3_main.pdf accessed 4 May 2017.
[233] Articles 1(3), 13 (b), 55 (c), 56, 62 and 68 of the UN Charter.

women and equality such as the social status of women, political rights and citizenships in its early days. Standard setting work of this commission led to adoption by the United Nationsmember states of the following international instruments on women's right: Convention on Nationality of Married Women (1957); Convention on the Political Rights of Women (1952); Conventionon Consent to Marriage, Minimum age of Marriage and Registration of marriages (1962); Declarationon Elimination of All Forms of Discrimination (1967); Declaration on Elimination of Violence Against Women (DEVAW) (1993); Declaration on Protection of Women in Emergency and ArmedConflict (1974).[234]

The Convention on Elimination of All Forms of Discrimination against Women (CEDAW) isa culmination of the standard setting work of the CSW and burgeoning forwards of the women'sright movement. The CEDAW provisions are meant to respect, protect, prevent and promote women's rights. The Convention unequivocally prohibits discrimination against women on thebasis of their sex and enjoins State Parties to take all appropriate measures, including legislation,to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women.[235]

In addition, The United Nations Convention on the Rights of the Child (CRC) adopted by the General Assembly in 1989 expanded these rights as far as the human rights of the girl- child are concerned. Since, the right of the girl- child is a pointer torights of women, the CRC, has become an important instrument as well in the struggle for therights of women and girl –child.[236]

Justice will not be done to the significant role the United Nations played if the numerousinternational conferences that contributed in no small measure to put women's issues on theglobal agenda were not mentioned. International conference is another mechanism within

[234] S Goonesekere& R De Silva-De Alwis, *art cit.*
[235]*Ibid.*
[236]*Ibid.*

theinternational system that has been used to advance human rights. These conferences provide anoccasion for the governments to discuss and perhaps ultimately agree on common strategies ofaction to resolve issues of global concern.[237] The UN has held several of these conferences to booster the rights of women as we know them today. These conferences include:World Conference tocelebrate 1975 as International Women's year (IWY), the second world conference on women was held in Copenhagen in 1980,where the redefined Plan of action for the second half of the Women's Decade was adopted with three sub-themes "Employment, Health and Education" added to the original theme of the decade: "Equality, Development and Peace".[238] The Copenhagen Conference was also intended to reaffirm the importance of the Convention on the Elimination of All Forms of Discrimination against Women as well as to review the progress in implementing the goals of the Mexico City Conference at the midpoint of the United Nations Decade for Women.[239]

In 1985, the third World Conference was held in Nairobi to review and appraise achievementsover the decade as a whole; and to adopt forward looking strategies of Implementation for theadvancement of women for the period up to the year 2000.[240] The United Nations Decade forWomen (1976- 1985) was a worldwide effort to examine the status and rights of women and tobring women into decision-making at all levels.[241]

The Fourth conference held in Beijing in 1995, was another forum to address women's human rights and map out plan of action for advancing the Forward LookingStrategies and the Implementation of the Convention on Elimination of All Forms ofDiscrimination againstWomen

[237] *Ibid.*
[238] *Ibid.*
[239] The United Nations and The Advancement of Women 1945-1995, *United Nations, Blue Book Series*, Volume VI, Rev. Ed (New York, 1996) p. 43.
[240] H Pietilä& J Vickers, *Making Women Matter: The Role of the United Nations* (London: Zed Books Ltd, 1994) p. 54
[241] UN Department of Public Information United Nations, *The Platform for Action and the Beijing Declaration*. http://www.un.org/esa/gopher-data/conf/fwcw/off/a--20.en Assessed on 4 May 2017.

up to and beyond the year 2000.The Beijing Conference represented a significant milestone in the articulation and publication of women's right. The Conference achieved two main objectives which were to adopt a platform for Action that UN member states will implement; and to highlight women's vision and strategy forthe world in the 21st century.[242]

There are other conferences which have aided in the advancement of women's rights, for instance the Conference on Human Rights held in Vienna in 1993, where it was reinforced that Women's Rights are Human Rights. It was stated thus:

> The human rights of women and of the girl-child are an inalienable, integral andindivisible part of universal human rights. The full and equal participation ofwomen in political, civil, economic, social and cultural life, at the national,regional and international levels, and the eradication of all forms ofdiscrimination on ground of sex are priority objectives of the internationalcommunity.
>
> Gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking, are incompatible with the dignity and worth of the human person, and must be eliminated…The human rights of women should form an integral part of the United Nations human rights activities, including the promotion of all human rights instruments relating to women.[243]

2.5 Women as Victims under International Humanitarian Law.

Wars today are no longer fought at isolated battle fronts – the battlefield is often in the midst of the civilian population.[244] Civilians, not combatants, make up the largest number of casualties,

[242] S Goonesekere& R De Silva-De Alwis, art cit.
[243] Paragraph 18 of the Vienna Declaration and Programme of Action (1993). http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx Assessed on 4 May 2017.
[244] R Copelon, "Surfacing Gender - Re-Engraving Crimes against Women in Humanitarian Law" (1994) 5 *Hastings Women' L.J*. 243.

and among civilians, women are particularly vulnerable and victimized and they outnumber men in casualties in most conflicts.[245]

Both during and post conflict women have to face new living conditions, those married without their spouses, perhaps in a refugee camp where food, water and health care is scarce, and where threats of sexual violence are present.[246] However, women do not always take on the role of a victim, but also join armed forces or other armed groups as combatants. As such, they sometimes become the perpetrators of serious violations of international humanitarian law

In terms of IHL women enjoy the general protection under international humanitarian law, afforded to men and women, as well as specific protection in their capacity as women civilians or women combatants.[247]The general protections provided by international humanitarian law apply equally to women and men. All four Geneva Conventions and their Additional Protocols contain, confirmed by customary international law, provisions stating that persons or categories protected shall be treated humanely without adverse distinction founded on sex.

Women who do not take part in hostilities are part of the civilian population, and consequently benefit from the general protection of civilians afforded by IHL. Likewise, the general protection for combatants, and prisoners of war, apply equally to both women and men.

2.5.1Why Protect Women?

The daily lives of many women today are caught up in situations ruled by fear or the threat of destruction and extreme sufferings.[248] The deliberate targeting of women, the destruction of their properties, looting, forced displacement, use of women as human shields, rape and other forms of sexual violence, indiscriminate attacks and other acts of violence against women unfortunately

[245]*Ibid at p.249.*
[246] J Gardam, H Charlesworth, *art cit.*
[247] B Byrne, "Towards a Gendered Understanding of Conflict" Gender and Peace Support Operations (2002) http://www.genderandpeacekeeping.org/resources/3 Accessed 3 June 2018.
[248]*Ibid.*

all are too common in most armed conflicts in the world today.[249] Women today are also actively supporting their men folks in military operations, not by taking up arms but by providing them with the support needed to wage war. Furthermore, there are women endangered because of their presence amongst the armed forces but who are there completely against their will i.e. abducted for sexual purposes or perform menial tasks such as cleaning, washing and cooking in the camps.[250]

In addition, during the period of their abduction, and often after, these women and girls can be in considerable danger from attacks by the opposing forces as well as their abductors. Despite these examples of voluntary and involuntary participation of women in armed conflicts as combatants and in supportive roles, some countries and cultures refuse the participation of women in combat roles in the armed forces.[251] The majority of women experience the effects of armed conflicts as part of the civilian population. As members of the civilian population, women suffer direct or indirect effects of fighting which amongst others include lack of food and other essentials needed for healthy survival.[252]

Women invariably have to bear greater responsibility for their children and their elderly relatives and often the wider society especially when the men in the family have left to fight, interned or detained and even in worst situations, missing or dead or internally displaced or even in exile. Ironically, many women often do not flee the fighting or the threat of hostilities, because they and their families believe that the very fact that they are women (often with children) will afford them a greater measure of protection from the warring parties.[253] They believe their

[249] N, Buchowska, *art. cit.*
[250] *Ibid.*
[251] C Márquez Carrasco, L Iñigo Alvarez, et al, Human rights violations in conflict settings (2014) http://www.fp7-frame.eu/wp-content/uploads/2016/08/08-Deliverable-10.1.pdf Accessed 1 December 2017.
[252] *Ibid.*
[253] N, Buchowska, *art. cit.*

gender and their social constructed role will protect them. Some women have been found to harbor and feed soldiers thus being exposed to the risk of reprisals by their opposing forces and placed in difficult and inappropriate situations. Because of the proximity of women to fighting and for the presence of the armed forces, women invariably have to restrict their movements, thus severely limiting their access to supplies of water, food and medical attention, to exchange news and information and to seek community or family support.[254]

Generally, women are not recruited to fight, they remain largely unarmed and unprotected at a time when traditional forms of moral, community and institutional safeguards have disintegrated and weapons abound. Women working in forests or fields are among the victims of anti-personnel mines and unexploded ordnance.[255] Additionally, women who are wives, mothers, sisters or daughters of combatants, although civilians themselves, may be specifically targeted to put pressure on one party, or as a form of retaliation.[256] Women who are forced to feed and shelter arms bearers are subjected to the risk of not only violence resulting from the presence of arms bearers in their homes, but also from reprisals by those in opposition, who may incorrectly perceive them to be combatants themselves or collaborators.[257]

Furthermore, feeding and housing arms bearers may stretch scant resources to the limit. This may pose acute problems for women, who generally have a lower social and economic status than men.[258] The problem of scarce resources is exacerbated by the fact that threats to personal safety often hamper women's access to those able to provide them with assistance. Women cannot realistically access services unless they know they will be safe. For example,

[254] C Lindsey, Women facing war: ICRC study on the impact of armed conflict on women(Geneva: ICRC, 2001), also available at https://www.icrc.org/eng/assets/files/other/icrc_002_0798_women_facing_war.pdf Accessed 1 December 2017. p. 24
[255] *Ibid.*
[256] *Ibid.*
[257] *Ibid.*
[258] *Ibid.*

women may fear reprisals by their own community for transgressing cultural limitations on mobility (such as going unaccompanied to distribution points); they may be reluctant to leave children unattended in a war-torn region to visit distribution points; or they may hesitate to report any acts or threats of violence committed against them.[259]

This reluctance to report violations often stems from the fact that women may be unused to or ashamed of speaking about such acts. They may feel more comfortable or deem it more appropriate to be interviewed by a woman, through a female interpreter where necessary.[260] It is imperative that these women are given sufficient time, privacy and opportunity to report violations, and subsequently aided to ensure their protection.

2.5.2 Women and Armed Conflicts in Africa

The end of the Cold War in 1989 did not, as had been expected, bring about a reduction in armed conflicts. More than two thirds of the poorest countries in the world are in conflict regions.[261] The nature of armed conflict has changed.[262] In the past, wars used to be waged almost solely between two sovereign states, but so-called modern wars are fought in quite different ways. The international community faces a completely new situation, an immensely complex nexus of diverse causes and warring parties.[263]

Today, warfare is increasingly taking on intra-national forms (domestic or cross-border armed conflicts among disintegrating states, civil wars or rebellions), now exceeding

[259] *Ibid.*
[260] Human Rights Watch, (2010) "As if we weren't Human" https://www.hrw.org/report/2010/08/26/if-we-werent-human/discrimination-and-violence-against-women-disabilities-northern Accessed 1 December 2017
[261] J E Ugarriza, "Ideologies and conflict in the post-Cold War" (2009) *International Journal of Conflict Management*, Vol. 20(1), p. 83.
[262] *Ibid.*
[263] *Ibid.*

international conflicts in terms of absolute numbers but also of intensity.[264] The former demarcated fronts between two well-trained national military forces are being superseded by new actors, such as warlords, rebels, mercenaries and child soldiers.[265] Nor is warfare a purely male domain anymore; we can no longer ignore the role of women in hostilities. Besides voluntary female combatants, thousands of girl soldiers are forced to fight.[266]

Women and girls are abducted and coerced into marrying warlords or held as slaves or prostitutes.[267] Rape is deployed as a strategic weapon and method of torture.[268] These very brutal, prolonged and disorderly conflicts afflict many civilians. This is also why there has been a huge rise in the number of refugees and internally displaced persons. Uprooted population groups, particularly women and children, live for years in camps, dependent on humanitarian aid and with limited access to vital resources.[269] Discrimination against women in the distribution of food, the lack of recognition of their particular needs, attacks and acts of violence or extortion in the camps perpetuate their insecurity.[270]

Whilst wars and armed conflict are not only confined to Africa, the continent has been plagued with armed conflicts since 1978. According to the United Nations Peacemaker database between September 1978 (following the eruption of conflict in Namibia) and February 2009 (with the signing of the 'Agreement on Good Will and Confidence Building for the Settlement of

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[264] D Smith, "Trends and Causes of Armed Conflict"(2004) *Berghof Research Center for Constructive Conflict Management*http://edoc.vifapol.de/opus/volltexte/2011/2576/pdf/smith_handbook.pdf Accessed 2 June 2018.
[265] *Ibid.*
[266] E Rehn & E J Sirleaf, "Focus: Women, Gender and Armed Conflict"(2009) https://www.oecd.org/dac/gender-development/44896284.pdfAccessed 2 June 2018.
[267] "Nigeria Chibok abductions: What we Know", BBC World News 8 May 2017. http://www.bbc.com/news/world-africa-32299943 Accessed 2 June 2018.
[268] N Ewigman, "Rape as a weapon of war in modern conflicts" (2010) https://www.bmj.com/content/340/bmj.c3270 Accessed 2 June 2018.
[269] *Ibid.*
[270] E Rehn & E J Sirleaf, *art cit.*

the Problem in Darfur')Africa has witnessed more than 146 intra-state conflicts.[271]However, the trends of war in Africa show three types of conflicts, namely Resource/Opportunistic driven; Ethno-religious/Nationalistic' driven; and Secessionist/autonomy driven conflicts.[272] Women participate in these wars either voluntarily or under coercion especially when survival is the overriding rule for women (and men) in times of conflict. Once involved, the character of their participation is little different from that of the male combatants. Brutality is hyped in armed conflicts, as every participating combatant feels some sense of privilege and empowerment when armed with an assault rifle.[273]

Contextually, there are variations on the levels and patterns of participation. Findings have shown that in resource/opportunistic driven wars, women's participation is higher when compared to ethno-religious and secessionist driven wars.[274] In the opportunistic wars of Sierra Leone and Liberia, for example, apart from the behavioral similarities of female and male combatants, they were ideologically less motivated, whereas in secessionist wars there are clear ideological reasons for women's involvement and they are empowered and motivated by the sense of liberation. However, the result shows some exceptions. In the opportunistic wars in Somalia and Algeria, for example, women are absent in the war as active participants due to the religious factors, yet, active (whether coerced or voluntarily) in the non-combative arena of being sex slaves or 'Desert Wives' for the male soldiers/rebels.[275]

[271] J I Lahai, *Gendered Battlefields: A Contextual and Comparative Analysis of Women's Participation in Armed Conflicts in Africa* (2010) http://www.review.upeace.org/index.cfm?opcion=0&ejemplar=19&entrada=98 Accessed on 20 March 2017.
[272]*Ibid.*
[273]*Ibid.*
[274]*Ibid.*
[275]*Ibid.*

All these types of war share some similar features: first, they are intense and cannot end without external military and diplomatic intervention, culminating mostly in fragile power sharing governments; second, these wars result in the distortion of conventional and gender-specific roles and responsibilities defined in terms of 'what men and women are trained to do' in their gender relations.[276] Finally, violence is targeted at women majorly because of their sexuality.[277]

In addition, the effects of the war on women do not differ, irrespective of the type of war it is, for instance, socio economic effects- as members of the civilian population, women experience distinctive economic problems in armed conflict.[278] In many cases women are separated from the men who traditionally may be their source of income. Lack of education and training, their role in caring for others, and general community attitudes make it extremely difficult for women to support themselves financially.[279] In many cultures, moreover, it is women who have the most to gain from economic development, and are thus particularly disadvantaged when these resources are diverted during armed conflict.[280]

2.5.3Effects of Armed Conflicts on Women

The impact of armed conflict onchildren, especially infants and young children cannot be considered in isolation from women.[281] Because women are the primary child caregivers, when they are affected by war, so are children. In many cultures, mothers, older sisters, aunts, and grandmothers share responsibility for children's physical and psychosocial development. As men

[276]D Smith, *art. cit.*
[277]*Ibid.*
[278] C Nordstrom, "Women, economy, war"(2010) *International Review of the Red Cross*, Vol 92(877), p.161.
[279] C Elliott, *Global Empowerment of Women: Responses to Globalization and Politicized Religions* (New York: Routledge, 2008) p. 45.
[280]*Ibid*.
[281] T Plumper & E Neumayer, "The Unequal Burden of War: The effect of Armed Conflict on the Gender Gap in Life Expectancy" (2006) *International Organization*, Vol 60, p.723.

leave to fight, women are increasingly responsible for maintaining the social fabric of their communities.[282] During and after wars, women are instrumental in providing a sense of family and community continuity that supports children's healing from war-related trauma. Women's physical and psychosocial health and survival are therefore critical to the well-being of children, both during and after armed conflict.[283] The impact of armed conflicts on women may be articulated as follows-

1. Trauma - these women suffer from trauma, as they are forcibly displaced, injured and killed, and have difficulties in making a living during and after conflict. Additionally, women have become prime targets of armed conflict and suffered its impact disproportionately; particularly as gender-based and sexual violence have become weapons of warfare and among the defining characteristics of contemporary armed conflict. Women and children also constitute the majority of the world's refugees and internally displaced persons.[284]
2. Violence - women are vulnerable to all forms of violence, but particularly sexual violence and exploitation, including torture, rape, mass rape, forced pregnancy, sexual slavery, enforced prostitution, and trafficking. Easy access to weapons increases interpersonal violence, including domestic violence, which often continues and may even increase in the aftermath of conflict. [285]

[282] *Ibid.*
[283] S McKay, 'The effect of armed conflict on Girls and Women'(1998) *Peace and Conflict: Journal of Peace* Psychology, 4(4), 381-392. p. 381 http://www.tandfonline.com/doi/pdf/10.1207/s15327949pac0404_6 Accessed on 16 March 2017.
[284] UN Security Council Report (S/2002/1154), 'Impact of Armed Conflict on Women and Girls, (2010) http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%202010%20Sidebar2.pdf . Accessed on 16 March 2017.
[285] *Ibid.*

3. Inequality - Armed conflict exacerbates inequalities between women and men, and discrimination against women and girls. If women do not participate in decision making, they are unlikely to become involved in decisions about the conflict or the peace process.
4. Lack of Quality Health Care - The health consequences for women and girls during conflict are enormous. Women and girls are highly vulnerable due to their sexual and reproductive roles. Gender discrimination can lead to inequitable distribution of food to women and girls, causing malnutrition and other health problems. Experiencing or witnessing death, separation, rape, torture, destruction, loss of livelihood and material deprivation can cause severe mental and social stress.[286]
5. Women's daily tasks as providers and caregivers become increasingly difficult and dangerous, especially as public services and household goods become less and less available. Armed conflict forces women to take on more responsibilities for family security and livelihoods. But lack of land and property rights constrains their efforts. Women and girls take on new or non-traditional occupations. Forced out of the formal sector, and with increasing competition in the informal sector, they may be pushed into dangerous illegal activities.[287]
6. Armed conflict also changes social structures and relations. Women as well as men are victims of detention and 'disappearance'. The 'disappearance' of male relatives particularly affects women in societies where their status is directly linked to their relationships with men. Women are often traumatized and cannot come to terms withthe disappearance as long as they still hope for the return of their relatives.[288]

[286] *Ibid.*
[287] *Ibid.*
[288] *Ibid.*

7. Girls face particular difficulties. They may be forced into early marriages as a coping strategy in economically desperate households. Girls' enrolment in schools often drops in times of war. When forced to become heads of households, girls are particularly marginalized, suffer social stigma, and are at an increased risk of abuse and sexual violence. [289]
8. Women are not only victims in armed conflict: they are also active agents. They may choose to participate in the conflict or to provide non-military support; or they may be manipulated or forced into various roles. Women may be forced into sexual slavery or coerced to work as domestic servants for fighting groups. Many women organize for conflict resolution, peacemaking and disarmament. They are involved in rebuilding the social, cultural, economic and political fabric of their societies. But even where women have been involved in informal peace processes, they are normally pushed into the background when formal peace negotiations begin.[290]

Crimes are regularly committed against women in armed conflicts. These crimes are motivated by a myriad of factors. For example, a commonly held view throughout history has been that women are part of the spoils of war to which soldiers are entitled. Deeply entrenched in this notion is the idea that women are property or chattel available to victorious warriors.[291]

Further, whilerape, enforced prostitution and any form of indecent assault are expressly prohibited by the Fourth Geneva Convention and implicitly prohibited by the prohibitions on torture, cruel, inhuman and degrading treatment and outrages against personal dignity, sexual

[289] *Ibid.*
[290] UN Security Council Report (S/2002/1154), loc. cit.
[291] B Inder, "The impact of armed conflict on women: (2012) *Women's Initiatives for Gender Justice*, https://www.nato.int/issues/women_nato/meeting-records/2012/pdf/NATO-Gender-Committee2012-presentation-Brigid-Inder.pdf Accessed 2 June 2018.

violence also falls within the scope of "willfully causing great suffering or serious injury to body or health", which is a grave breach of the Fourth Geneva Convention. Slavery, in any form, is also proscribed.[292]And although this may not be expressly stated in each instrument, sexual violence obviously falls within the prohibitions on torture and cruel, inhuman and degrading treatment in the other human rights instruments. [293]

Another major effect of armed conflicts on women in Africa is Displacement.[294]A displaced womanin Unity State, South Sudan stated-

> During war nothing is easy; there is no good direction to go. If you are going to be killed it might as well be on the islands. If you go to Bentiu you can be killed, if you try to move along the river they will also attack you. You don't know what side they are from. They will attack you and you fear they will rape or kill you.[295]

Threats of killing, torture and rape engender an atmosphere of terror, which often impels the civilian population to flee their homes. Civilians may leave their land and possessions because they fear an attack, as a result of a campaign of ethnic cleansing, because their houses and habitual means of subsistence have been destroyed by fighting, or sometimes even due to a strategy of employing human shields to protect advancing or retreating armies.[296] During their flight, women are especially vulnerable. They are an all-too-easy target for harassment, and those who are identifiable as belonging to a particular ethnic or religious group may be particularly at

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[292] C Lindsey-Curtet, F T Holst-Roness and L Anderson, *Addressing the Needs of Women affected by armed conflict* (2004) https://www.icrc.org/eng/assets/files/other/icrc_002_0840_women_guidance.pdf Accessed 20 March 2017.
[293]*Ibid.*
[294] D Mazurana, "Gender and the Causes and Consequences of Armed Conflict," in D Mazurana, A Raven-Roberts, and J Parpart (eds.), *Gender, Conflict, and Peacekeeping*, (Oxford: Rowman& Littlefield, 2005), p. 98.
[295] Concern Worldwide Unity State Contextual Analysis, South Sudan. (2016) Name removed for anonymity. http://www.reachresourcecentre.info/system/files/resource-documents/reach_ssd_situation_overview_unity_state_october_2016.pdf Accessed on 20 March 2017.
[296]*Ibid.*

risk. There are many reported cases of abuse of women while fleeing conflict zones. Not only arms bearers, but also local residents can be responsible for harassing or committing violations against such women.[297]

Forced displacement may also be used to remove inhabitants from an area in order to cut off the logistical support or means of subsistence they give, or are perceived to be giving, to combatants. Women comprise a significant component of internally displaced and refugee populations, and often head households as a result of being separated from male family members. Separation from one's family, community, home and land can have life-threatening implications.[298] To take one particular example, women and girls who have been abducted from their communities and used by armed groups in support roles can find themselves in a situation amounting to displacement at the end of the conflict. Although women and girls who have been abducted under such circumstances are often not regarded as "displaced persons", they face many of the same problems during the demobilization process and their plight should not be overlooked.[299]

By the end of 2015, there were over 65 million people displaced as a result of conflict, violence and persecution.[300] Reversing the broader global trend towards peace since the Second World War, the intensity of armed conflict has increased exponentially in the last five years, an increase that has led to a remarkably high level of forced displacement and suffering.[301]

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[297] *Ibid*
[298] D Mazurana, *op. cit.*
[299] *Ibid.*
[300] UNHCR (2016) Global Trends in Forced Migration,https://www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.htmlAccessed on 22 March 2019, p. 2.
[301] International Institute for Strategic Studies (2016) Armed Conflict Survey 2016 Press Statement. www.iiss.org/en/ about%20us/press%20room/press%20releases/press%20 releases/archive/2016-3b31/may-2fc6/armed-conflict-survey- 2016-press-statement-9243 Accessed on 20 March 2017.

As the world's population grows and cities expand, conflict is increasingly played out in densely populated urban areas, leading to the destruction of hospitals and other essential services, siege and starvation of populations, and the deliberate targeting of noncombatants.[302] Recent years have seen repeated violations of International Humanitarian Law and the proliferation of indiscriminate attacks on civilians. Between 2010 and 2014, the number of deaths from armed conflict more than trebled, with civilians making up 78% of casualties.[303] Syria accounts for the largest proportion of these deaths, however ongoing conflicts in Afghanistan, Iraq, the Central African Republic, Somalia, Yemen, South Sudan, North East Nigeria/Lake Chad Region and elsewhere are all contributing heavily to the rising human cost of war across the globe.[304] The amplified scale and intensity of armed conflict in recent years has resulted in a breath-taking increase in forced displacement, with a surge of almost 23 million people between 2011 and 2015.[305]

According to the report by the UNHCR "Global Trends in forced displacement" 2016 and UNICEF "Uprooted - The Growing Crisis for Refugee and Migrant Children" Report 2016, 65.3 million people are reported as forcibly displaced globally. Women and girls represent 50% of this population.[306]

[302] International Committee for the Red Cross (2016) Interview with Kathleen Lawland, head of ICRC Arms Unit. Transcript,http://blogs.icrc.org/law-and-policy/2016/05/24/explosiveweapons-populated-areas-interview-icrc-head-arms/ Accessed on 20 March 2017.
[303] Women, War and Displacement: A review of the impact of conflict and displacement on gender-based violence. A report by the Irish Consortium on Gender-Based Violence. (2016) p.9 http://www.gbv.ie/wp-content/uploads/2016/11/GBV-Report_FINAL_LOW.pdf Accessed on 20 March 2017.
[304] M Specia, "Death toll in Syria: numbers blurred in fog of war, The Irish Times 14 April 2018, https://www.irishtimes.com/news/world/middle-east/death-toll-in-syria-numbers-blurred-in-fog-of-war-1.3461102 Accessed 2 June 2018.
[305] UNHCR (2016) , art, cit at p. 5.
[306] UNHCR "Global Trends in forced displacement" 2016, http://www.unhcr.org/statistics/unhcrstats/5943e8a34/global-trends-forced-displacement-2016.html; UNICEF "Uprooted - The Growing Crisis for Refugee and Migrant Children" Report 2016 https://www.unicef.org/publications/index_92710.html16 March 2017.

The fact, that generally, women do not go off to fight and largely remain unarmed and unprotected at a time when traditional forms of moral, community and institutional safeguard have disintegrated, and weapons have proliferated, leads to women being particularly vulnerable during wartime.[307] Food scarcity and inequalities in food distribution are exacerbated during periods of armed conflict, rendering women and girls more susceptible to malnutrition. Collection of firewood or water often puts young girls and women at risk of dangers, which include kidnapping, sexual abuse and exposure to landmines.[308]

Social attitudes also affect the vulnerability of women and girls. For example, families have often wrongly assumed that an elderly woman or a woman with children will be safe from harm and have left them to safeguard property while the rest of the family flees. Armed conflict exacerbates existing inequalities between women and men and puts women and girls at heightened risk of physical and emotional abuse from male family members.[309] The increased availability of and access to weapons increases the risk of severe injury or death during assault. Women-run SOS hotlines for abused women and children reported high levels of abuse during and following the wars in the former Yugoslavia, as weapons that men used during the war were turned on women and children when they returned home.[310] Given the gender-based division of labor, women and men have different risks of exposure to landmines.[311] For example, women are at risk since they are responsible for' gathering fuel or fetching water while men may be in

[307]M AKudakwashe and B Richard, "Causes of Armed Conflicts and their effects on women" (2015) *International Journal of Research in Humanities and Social Studies*, Vol. 2. Issue 4 pp. 77-85 http://www.ijrhss.org/pdf/v2-i4/11.pdf Accessed on 16 March 2017.
[308]*Ibid.*
[309]*Ibid.*
[310]*Ibid.*
[311] E Laws, "The impact of mines and explosive remnants of war on gender groups" (2017) http://www.gsdrc.org/wp-content/uploads/2017/07/149-The-impact-of-mines-and-explosive-remnants-of-war-on-gender-groups.pdfAccessed on 16 March 2017.

greater danger on public roads.[312] Abuse and torture of female members of a man's family in front of him is used to convey the message that he has failed in his role as protector.[313] These forms of humiliation and violence take on powerful political and symbolic meanings.[314]

The specific impact of conflict on women calls for specific responses from the international community. Gender-based differences and inequalities need to be addressed in policies, planning and implementation in all peace operations, humanitarian activities and reconstruction efforts.

2.5.4 Rationale for the Protection of Women against Gender-based Violations in Armed Conflicts

It is not a new phenomenon thatin times of armed conflict, women will have to face the same tides, representing infringements of international humanitarian law as civilian population in its whole: torture, summary executions and abusive arrests, forced transfers, taking hostages, threats and intimidations.[315] Beside those women will have to face gender infringements, such as rape, forced prostitution, sexual slavery, forced inseminations. Together with their children women represent the biggest percentage of refugees or transferred population.[316] It is estimated that, since 1990, at global scale, from all deaths related to the armed conflicts, 90% are civilians and 80% of this percentage is represented by women and children.[317]

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[312] G D'Odorico& N Holvoet, "Combating Violence against Women (VAW) in South Kivu: A Critical Analysis", (2009) *Journal of International Women's Studies*, Vol. 11(2), p. 87.
[313] *Ibid.*
[314] *Ibid.*
[315] I Zhianpour, AArashpour& M Shekarchizadeh, "Humanitarian Protection of Women in Armed Conflicts" (2015) *Mediterranean Journal of Social Sciences*, Vol 6 No 3 S2 p. 40.
[316] C Ivanciu, "The protection of women during armed conflict" *(2016)* Scientific *Research and Education in the Air Force-Afases*. p. 575, also available at http://www.afahc.ro/ro/afases/2016/SOCIO/IVANCIU.pdf Accessed on 17 March 2017.
[317] O AOtunu: *Special comment on children and security, Forum du desarmement*, no. 3, (Geneva: United Nations Institute for Disarmament Research, 2002) pp. 3-4.

In all armed conflicts, women have suffered from the grave breaches of human rights law and international humanitarian law. They were victims of all forms of sexual violence, in a sporadic and incontrollable manner because of the carelessness of commanders or chiefs of armed groups. However these acts of barbarism occur, also, in a continual and methodic manner. In certain situations women become real targets for those seeking to humiliate and to destroy entire communities by using these atrocities. [318]

Women are victims of sexual aggression becausethe assaulters aim to destroy their mental and physical integrity. Usually, women are aggressed in public in an inhuman attempt to exhibit the incapacity of the male part of a group to protect them. Women are, also, victims because they represent the future of the human resource of the group they belong to. That's why acts like mutilation of the genital organs or forced inseminations are widespread, the attackers pursuing partial or total destruction of a nation, ethnic or religious group. Perpetrated during an armed conflict or in time of peace these acts represent a crime of genocide.[319]

In the post-conflict period women continue to suffer because of sexual aggressions they endured, but, in some cultures, the assaults are coming from the members of the group they are belonging to. In time of armed conflict or shortly after its ending, with husbands involved in conflict or killed in action, the status of women is dramatically altered and they, usually, become the only support for their families or, on the contrary, they are cast out because of the sexual aggression they need to confront.[320] Being the victim of a sexual aggression is equivalent to extreme consequences for the victim, consequences like ruling out from community public life,

[318] I Zhianpour, AArashpour& M Shekarchizadeh, *art. cit*.
[319] C Ivanciu, *op.cit*. p. 576.
[320] Claire de Than, E Shorts, *International criminal law and human rights* (London: Thomson Sweet & Maxwell, 2003,) p. 347.

oppressions or losing the marital status judging, in some cultures, that the victims dishonored the family and the group they reside in.[321]

The importance of drawing attention to the protection of women in situations of armed conflict is not without reason. Women experience war in a multitude of ways from taking an active part as combatants to being targeted as members of the civilian population or just because they are women.

Throughout the history, wars were accompanied by atrocities, enormous cruelty and violence, which from the contemporary legal perspective ought to be seen as mass violations of human rights.[322] Although every armed conflict imprints cruel toll on all members of the society, regardless of their gender, age, skin color, nationality or ethnic origin, women were and still are particularly vulnerable to all forms of such violations, in particular - becoming victims of various forms of violence.[323] Women were treated as spoils of war for the victorious armies, and rape was seen as a cruel, but also an unavoidable consequence of war, a kind of a collateral damage.[324]

International Humanitarian Law tries to protect the wounded, sick, prisoners of war and civilians in the hands of enemies. Though International Humanitarian Law instruments seem to be comprehensive, they do not cover the full range of human suffering caused by war. War is not just a man's business. In today's conflicts, the impact of war on women can be severe. Irrespective of their capacity as civilians or combatants, women face systematic disadvantages that are the product of gender inequality, which generally intensify during armed conflict.[325]

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[321] *Ibid.*
[322] B Azizi, "The freed body of women in battleground"(2014)http://bidarzani.com. Accessed 16 March 2017.
[323] *Ibid.*
[324] M Seyler, "Rape in conflict: Battling the impunity that stifles its recognition as a *jus cogens* human right*". J. Int'l L*, 1 (2011-2012), pp. 66–86.
[325] J Momtaz&A H Ranjbaran, *International humanitarian law: The law of internal armed conflict* (Tehran: Mizan Publication, 2008).

Wars are no longer fought in secluded combat zones; the battlefield is in the midst of the civilian population. Civilians, not combatants, make up the largest number of casualties, and among civilians, women are particularly exposed and victimized. War disrupts food supplies, production, health facilities, transport, water and fuel. Parties to a conflict are required under International Human Law to protect the health, economic and physical security of the civilian population. When they fail, it is often women who have to deal with the consequences.[326]

Although ferocity and coercion were bound with wars for centuries, significantly for the contemporary armed conflicts, the methods and scale of perpetration of violence changed considerably. Violence against women, especially sexual violence, is no longer a side effect of hostilities or their inseparable consequence.[327] The major change that has occurred during past decades, after the end of the WWII in terms of the use of sexual violence in the armed conflicts is that at present, it is used deliberately: as weapon of war, as a war tactic or also as a means of political repression[328] The way the sexual violence is used in most contemporary conflicts involves deliberate, conscious and intended effort to humiliate and intimidate not women only, but all members of the community or ethnic group in order to dominate it and in extreme cases, to achieve ethnic cleansing and to exterminate.[329] It is used to enforce hostile occupations, as a method of conquering or seeking revenge against the enemy, and a means of payment for mercenary soldiers. For instance Democratic Republic of Congo's civil war, which tolled over 5 million casualties since 1998, may serve as a horrendous example of an armed conflict, in which rape is used systematically, as a weapon of war, entailing enormous number of several hundreds

[326] *Ibid.*
[327] *Ibid.*
[328] Human Rights Watch, *Rape as a Weapon of War and a Tool of Political Repression*, The Human Rights Watch *GlobalReport On Women's Human Rights* (New York - Washington - Los Angeles - London – Brussels, 1995)p.98.
[329] T Meron, 'Rape as a crime under international humanitarian law' (1993) *American Journal of International Law* Vol 87 (3), p. 424.

of thousands of victims. Sexual assaults in that conflict included gang rape, which represents the majority of all cases, rape in public or in presence of family members, rape with instruments, genital mutilation, perpetrated on a daily basis.[330]

Similarly, during Sierra Leone civil war (1991–2000) thousands of women were brutally rapedand forced to become wives of rebel commanders and combatants, some of which did not consider it wrong to rape women and turn them into sex slaves.[331] Cruelty and scale of outrages against women in that conflict were almost indescribable and sexual violence was followed by or accompanied by other human rights abuses like: beating, bodily injury, amputation, torture, killing, forced labor, sexual assault without rape, abduction, burned dwelling, looting.[332]

2.5.5Special Protection of Women under International Humanitarian Law

International humanitarian law protects women, in time of armed conflict, with the same protection men are entitled to, disregarding if they are civilians or combatants. Establishment of Geneva Conventions has been seen as great step forward for protection of women in the armed conflict.[333] The Geneva Conventions constituted a major shift in the legal position of women in warfare, but still protection of their rights provided therein, is mostly based on the notions and ideals of „respect for women", "honor" and "family rights", and women are seen in those treaties primarily as mothers and caregivers.[334] It is indicated by researchers, that acts of coercion against

[330] International Trade Union Federation Report (2011). November), Violence against women in Eastern Democratic Republic of Congo: Whose responsibility? Whose complicity? https://www.ituc-csi.org/IMG/pdf/ituc_violence_rdc_eng_lr.pdf.pdf Accessed on 21 March 2017.
[331] K Kelsall, *Culture under cross-examination, Int'l justice and the special court for Sierra Leone, (*Cambridge University Press, Cambridge, 2009) p.136.
[332] N Buchowska, "Violated or protected. Women's rights in armed conflicts after the Second World War" (2016) *International Comparative Jurisprudence*, Vol 2 (2) p.72.
[333] E Gekker, "Rape, sexual Slavery, and forced marriage at the international criminal Court: How Katanga Utilizes a ten-year-old rule but overlooks new Jurisprudence" (2014) *Hastings Women Law Journal*, Vol. 25(1) p.105.
[334]A Barrow, "UN Security Council Resolutions 1325 and 1820: Constructing gender in armed conflict and international humanitarian law" *IRRC,* 92 (877) (2010), pp. 221–234.

women and rape in particular, are considered by those treaties as harm to women's "honor" in its social meaning, rather than women's dignity in the sense of essential feature of a human being.[335]

The principle of indiscrimination is statutory in the texts of the Geneva Conventions (1949) and the Additional Protocols to the Geneva Conventions (1977). For that purpose, article 27 of the fourth Geneva Convention stipulates that "protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity"[336]. On the same line any differentiation based on sex, colour, language, religion, race, political opinion, national or social origins, level of wealth or any other similar criteria is strictly forbidden.[337] At the same time, taking into account the physical and psychological particularities of women, the authors of the Geneva Conventions and their Additional Protocols have entitled women with a special protection condition. Rules that specify and impose respect for women special needs can be found in all four Geneva Conventions and their Additional Protocols as follows –

1. Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field and the Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, in their

[335]H Moodrick-Even Khen and A Hagay-Frey, Fall, "Silence at the Nuremberg Trials: The International military tribunal at Nuremberg and sexual crimes against women in the Holocaust", *35 Women's Rts. L. Rep* (2013), pp. 43–66.
[336]Convention (IV) relative to the Protection of Civilians Persons in Time of War, Geneva, 12 August 1949. http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.33_GC-IV-EN.pdf Accessed on 17 March 2017.
[337]*Ibid.*

article 12, paragraph 4 (similar in both Conventions) states that "women shall be treated with all consideration due to their sex."[338]

2. Geneva Convention III stipulates in article 14, paragraph 2 that "women shall be treated with all the regard due to their sex and shall in all cases benefit by treatment as favorable as that granted to men."[339]
3. Geneva Convention IV in its article 27, paragraph 2 entitles women with special protection "against any attack on their honour, in particular against rape, enforced prostitution, or any form of indecent assault."[340]
4. Additional Protocol I to the Geneva Conventions relating to the protection of the victims of international armed conflicts also bears special provisions with a view to protect women in article 76, paragraph 1: "women shall be the object of special respect and shall beprotected in particular against rape, forced prostitution and any other form of indecent assault)."[341]

Additional Protocol II to the Geneva Conventions does not encompass a particular rule that requires respect for women special needs, but requires, as a general rule for everybody, the abstention from violent behavior against life, physical and mental wellbeing.

The majority of juridical specific norms approach the status of women from two points of view: as component of civilian population, respectively the status of women while imprisoned, especially flashing out security (mainly incriminating the acts of sexual violence) and livelihood

[338]Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949. http://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.31_GC-II-EN.pdf Accessed on 17 March 2017.
[339]Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949. https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument Accessed on 17 March 2017.
[340]*Ibid.*
[341] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.
https://www.icrc.org/eng/assets/files/other/icrc_002_0321.pdf Accessed on 16 March 2017.

aspects (ensuring a minimum of decency for women's life – shelter, food, clothes, etc.), as well as provisions regarding the mental and physical health, juridical protection, etc.

Therefore, article 12, paragraph 4, common to Geneva Conventions I and II, designates the fundamental principle in accordance with, in time of armed conflict, women shall receive and be treated with all considerations due to their sex. From personal security point of view, articles 14 and 15 of the fourth Geneva Conventions specify that the parties to an armed conflict may create hospital and security areas and localities, designed to shelter civilian population from the effects of the armed conflict, especially pregnant women and mothers with children under age of seven years old. Some provisions sight out the protection of minimum life conditions for the civilian population, especially for the most vulnerable categories in time of armed conflict.

Consequently, article 70 of the Additional Protocol I targets the situation when civilian population is ill provided, stage when humanitarian and impartial assistance actions are required. When allocating these humanitarian aids, pregnant women and nursing mothers will receive them with priority. Also, both parties to an armed conflict shall grant right of way to any transport of essential nourishment, clothing and tonics for children under the age of fifteen, pregnant women and maternity cases.[342]

From the health protection point of view, many provisions from Geneva Convention IV and Additional Protocol I entitle women with a privileged state of protection because of their physical vulnerability, in certain situation; pregnant women, beside wounded and invalid personnel are the subjects of a special protection, in accordance with Article 16 of the fourth Geneva Convention. The next Article of the same Convention asks the belligerents to work together in order to reach an agreement facilitating the evacuation of wounded persons, invalids, elders, children and nursing mothers from an encircled and besieged area. Another special

[342] Convention (IV) art. 23, para. 1.

measure asks the occupying power not to limit in any way any actions related to nourishing, medical care and protection against all effects of armed conflict, actions that are deployed in favor of children under the age of seven, pregnant women or nursing mothers.[343] Aiming to highlight the special needs of pregnant women and mothers of new-born babies, these categories of population have been, intentionally, included in the category of wounded and sick personnel.[344]

From the entirety of these provisions, not mentioning the specific rules that protect women, we can conclude that the Geneva Conventions and their Additional Protocols protect the situation of maternity and the familial unity.

There are, also, specific rules concerning the norms of protections for imprisoned women, women in a state of detention or inmates for reasons related to the armed conflict. Thus, all forms of discriminationare forbidden. Women prisoners of war are to be treated with all consideration due to their sex and having granted in all cases, the same treatment "as favourable as that granted to men."[345] From quarter and ensuring the livelihood point of view, women prisoners of war shall be lodged in places that are separate from the men and they will be monitored by women guards.[346]

In the field of health, medical care and hygiene, specific provisions can be found within the texts of the third and the fourth Geneva Conventions. Inside of prisoners of war camps the detaining power is bounded to ensure sanitary installations (women will be provided with separate installations from men) and to take any necessary measures in order to prevent

[343] Convention (IV) art. 50, para. 5.
[344] Convention (IV) art. 8, para. 1.
[345] Convention (III) art. 14, para. 2.
[346] Protocol I art. 75, para. 5.

epidemics.[347] In order to ensure an optimal state of health for pregnant women, nursing mothers and children under the age of fifteen will be provided with additional food.[348]

We take into account in these cases about an entirety of norms aiming to ensure, on one hand a minimum standard demanded by a civilized livelihood considering the exceptional circumstances related to the armed conflict and, on the other hand the provision that some vulnerable categories of women will survive the effects of hostilities. [349]

A special regime is applied from the point of view of juridical protection of women. Therefore, a woman prisoner of war cannot be convicted to a more severe punishment than any other man or woman belonging to the armed forces of the detainee power, punished for a similar crime.[350] Also, aiming to protect the familial unity, death penalty shall be avoided against expectant mothers or those with dependent children.[351]

It is also significant, that application of Geneva Convention IV is somehow limited by the notion of "protected persons", who are persons who find themselves "in the hands of a Party to the conflict or the Occupying Power of which they are not nationals."[352] It means that nationals of a state who is not a party to the Convention and a state's own nationals, neither nationals of a neutral State, nor those of a co-belligerent state receive protection from the Convention.

Moreover the Geneva Conventions do not explicitly provide prosecution of crimes against women.They do however stipulate that state parties to the Conventions should provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave

[347] Convention (III) art. 29, para. 1-2.
[348]Convention (IV) art. 89, para. 5.
[349] Humanitarian Access in Situations of Armed Conflict, (2014) Handbook on the International Normative Framework https://www.eda.admin.ch/dam/eda/en/documents/aussenpolitik/voelkerrecht/Human-access-in-sit-of-armed-conflict-handbook_EN.pdf Accessed 17 March 2017.
[350] Convention (III) art. 88, para. 2-3.
[351] Protocol I art. 10, para.3.
[352] Geneva Convention IV, 1949, art 4

breaches of the Convention.[353]However all forms of sexual violence have been considered as meeting the hallmarks of grave breach of the Convention.[354]It has been signposted that the question of prosecution of acts of violence against women should explicitly be provided within the treaty and should not be the matter of its interpretation.[355]

Additionally, the Nurembergand Tokyo Tribunalscreated in order to conduct "the just and prompt trial and punishment of the major war criminals" of the European Axis and in the Far East[356]respectively, constituted a shift in challenging the international responsibility for the war crimes. Nevertheless during the Nuremberg Trial, no express reference to women or to the types of crimes that are likely to specifically affect women had been made.[357] To the contrary, at Tokyo Trial, some defendants were accused with charges including rape, e.g. during the occupation of Nanking.[358]

The first major change in the prosecution of crimes committed against women during armed conflict was brought with the creation of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) as they were advised by the United Nations General Assembly to pay particular attention to crimes of sexual violence. The Statute of ICTY empowering the Tribunal to prosecute persons for committing crimes against humanity directly indicates to rape, "when committed in armed

[353] Geneva Convention I, Article 49; Geneva Convention II, art. 50; Geneva Convention III, art. 129; Geneva Convention IV, Article 146).
[354] Final Report of the Commission of Experts established pursuant to Security Council Resolution 780 (1992) http://www.refworld.org/docid/582060704.html Accessed 1 December 2017.
[355] J Gardam, "Women and the law of armed conflicts: Why the silence?"(1997), *International & Comparative Law Quarterly*, 46 pp. 55–80 https://www.cambridge.org/core/journals/international-and-comparative-law-quarterly/article/women-and-the-law-of-armed-conflict-why-the-silence/DEB775AB7D00D6246DEAD2BEBB828374 Accessed 21/3/2017.
[356]The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis 1945 (The Nuremberg Charter) Article 1; The International Military Tribunal for the Far East Charter 1946 (The Tokyo Charter) Article 1.
[357]J Gardam and M Jarvis, *Women, armed conflict and international law, (*The Hague: Kluwer Law International, 2001) p. 105.
[358]*Ibid.*

conflict, whether international or internal in character, and directed against any civilian population."[359] Correspondingly, the ICTR Statute while vesting the Tribunal with power to prosecute crimes against humanity also refers to rape.

However, in order to accuse any person of those charges, the actions must constitute "widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds."[360] Both Tribunals have prosecuted defendants with rape charges,[361] and significantly in 48% of cases before the ICTY, the accused have been charged with the systematic use of various forms of sexual violence against women.[362]The ICTY in the case of *Prosecutor v. DragoljubKunarac, RadomirKovac and Zoran Vukovic*[363]had its first conviction for the crime of rape as a form of torture and sexual enslavement as crimes against humanity.[364]Similarly, the ICTR in the case of *The Prosecutor v. Jean-Paul Akayesu*[365]had its first conviction of sexual violence and rape as a form of genocide.

Thorough analysis of the jurisprudence of both Tribunals would go beyond the limits of this research; nevertheless it is worth mentioning, that though the ultimate impact and effectives of those Tribunals may be disputable (this especially refers to ICTR), they are acknowledged for delivering adequate definitions of rape, violence and sexual violence and their jurisprudence is likely to become very important for international humanitarian law.[366]

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[359] Statute of International Criminal Tribunal for the former Yugoslavia, Article 5 (g).
[360] Statute of International Criminal Tribunal for Rwanda, Article 3.
[361]*The Prosecutor v. Laurent Semanza*ICTR-97-20-T, *Prosecutor v. AntoFurundzija ICTY* IT-95-17/1-T.
[362] United Nations Department of Peacekeeping Operations (2010). Review of The Sexual Violence Elements of The Judgments of The International Criminal Tribunal For The Former Yugoslavia, The International Criminal Tribunal For Rwanda, And The Special Court For Sierra Leone In The Light of Security Council Resolution 1820.
[363] IT-96-23-T & IT-96-23/1-T.
[364] LSE Centre for Women Peace and Security, "Tackling Violence against Women" (2016) http://blogs.lse.ac.uk/vaw/landmark-cases/a-z-of-cases/kunarac-kovac-and-vukovic-case/ Accessed 1 December 2017.
[365] ICTR-96-4-T.
[366]N Buchaowska, Violated or Protected? Women's rights in armed conflicts after the Second World War. (2016)http://www.sciencedirect.com/science/article/pii/S2351667416300324 Accessed 21 March 2017.

The foremost shift in the challenging issue of prosecution of crimes against women has been made with the establishment of the International Criminal Court. The Rome Statute has been described as the first adequate response to the decades of insufficient prosecution of crimes against women committed during the armed conflict.[367] The Rome Statue provides the ICC with jurisdiction with respect to *inter alia* "crimes against humanity."[368] According to Article 7 of the Rome Statute, crimes against humanity include "rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack".

Consequently, rape charges were brought up in cases against accused persons from the Democratic Republic of Congo, Darfur, Uganda and Central African Republic.[369] Nevertheless in its first judgments, for example in the case of *The Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui*,[370] despite the evidence of a widespread practice of rape and sexual slavery, the Court did not find the evidence to be sufficient to determine whether the suspect knew that rape and sexual slavery has been committed by his subordinates.[371]

In that context, the judgment of 21 March 2016 in *Jean-Pierre Bemba Gombo'scase*[372]is very much worth noting. Bemba Gombo has been found guilty of two counts of crimes against humanity and three counts of war crimes in Central African Republic, all of them including rape.[373] The ICC determined that Bemba Gombo bears the command responsibility for the acts

[367]*Ibid.*
[368]The Rome Statute of the International Criminal Court 1998, Article 5.
[369] S SaCouto and K Cleary, 'The importance of effective investigation of sexual violence and Gender-based crimes at the International criminal Court' *17 Am. U. J. Gender & Soc. Pol'y& L*, 337 (2009), pp. 339–358 http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1027&context=jgspl Accessed 21/3/2017.
[370]*ICC-01/04-01/07*
[371]*Ibid.*
[372]*The Prosecutor v. Jean-Pierre Bemba Gombo, ICC-01/05-01/08*
[373]The International Criminal Court (2016) https://www.icc-cpi.int/car/bemba Accessed 1 December 2017.

committed by his subordinates, because he had not prevented those crimes and had not punished those guilty of committing them.[374]That is definitely a groundbreaking judgment, because it is the first one in which the ICC has convicted a defendant for committing rapes as a crime against humanity and war crimes.

Furthermore, since the late 1960s, the UN has drawn its attention specifically to the situation of women in armed conflict in its declarations, resolutions and action plans. In 1968, the International Conference on Human Rights in Teheran initialised the discussion on the protection of women and children in emergency and armed conflict.[375]The Commission on the Status of Women followed that with its own discussion during sessions held in 1970, 1972, and 1974.[376] The result of those actions was the UN General Assembly Declaration on the Protection of Women and Children in Emergency and Armed Conflict, adopted in 1974. Also the final document of the United Nations Fourth World Conference on Women held in Beijing in November 1995, i.e. Platform for Action (1995) referred to the issue of women in armed conflicts as one of the twelve crucial points of interest of the UN member states.[377]

However, the most important UN achievements in the field of developing the legal framework for the protection of women's rights in the armed conflict, is the Resolution 1325 (2000).[378] This resolution aims to entitle women with more decisional power in conflict prevention, conflict mediation or during the peace building process, all these being an add-on to

[374]N Buchowska, art. cit.
[375]A Biehler, 'protection of Women in International Humanitarian Law and Human Rights Law' *in* R Arnold and N Quenivet (Eds.), "International humanitarian law and human rights law: towards a new merger in International Law *(*Leiden – Boston: Brill, 2008), p. 355–381.
[376]*Ibid.*
[377]*Ibid.*
[378]United Nations Security Council Resolution 1325 (2000) on Women, Peace and Security.http://www.un.org/womenwatch/osagi/cdrom/documents/Background_Paper_Africa.pdf Accessed 21 March 2017.

the efforts of reducing the sex-based violence.[379] This resolution has resulted in the increasing number of women involved in military operations abroad, boosting the number of women involved in the decision making process and developing cooperation between ministries, non-governmental organizations and civil society representatives.[380]

The groundbreaking Resolution 1325 has strongly underlined the need to reduce the use of gender-based violence in armed conflicts, explicitly requiring Member States to take all necessary action in this regard and urging them to stop impunity and to prosecute those who are responsible.[381] Resolution 1325 has also obliged Secretary General to start the reporting procedure to the Security Council on the agenda, which has resulted in 22 reports, with last report of 17 September 2015.[382]

Eight years after the adoption of Resolution 1325, the Security Council adopted another pivotal document Resolution 1820 (2008)[383], in which sexual violence in armed conflict has been identified as kind of military tactics and action deliberately targeting civilians, thereby significantly affecting the intensification of armed conflict and blocking the subsequent restoration of peace and security. Unfortunately in the same document, the Security Council has declared that rape and other forms of sexual violence "can constitute" a war crime or a crime against humanity. This approach has been criticised and has been seen as step backward, as the Council has used conditional mood ("can") instead of affirmative one.[384] Furthermore, under Resolutions 1888 and 1889 (2009) Special Representative of the Secretary-General on Sexual

[379] *Ibid.*
[380] V C Sagar, "Women, Peace and Security: Impact of UNSCR 1325 On Indo-Pacific" (2015) https://www.rsis.edu.sg/wp-content/uploads/2015/12/CO15281.pdf Accessed 21 March 2017.
[381] *Ibid.*
[382] *Ibid.*
[383] United Nations Security Council Resolution 1820 (2008). http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/CAC%20S%20RES%201820.pdf Accessed 21 March 2017.
[384] A Barrow, UN Security Council Resolutions 1325 and 1820: Constructing gender in armed conflict and international humanitarian law IRRC, 92 (877) (2010), pp. 221–234.

Violence in Conflict has been appointed and UN Action against Sexual Violence in Conflict – "Stop Rape Now" has been launched. The assessment of those two resolutions was variable. Some expressed the general positive reception.[385] Others however, pointed out to their shortcomings, as not having enough impact on the improvement of real position of women in the armed conflict.[386]

One of the most important of the resolutions in the UN Security Council agenda "Women, Peace, Security" is the Resolution 1960 (2010)[387], which has introduced the "naming and shaming" procedure. The Security Council was obliged to include detailed information on parties to armed conflict that are credibly suspected of committing or being responsible for acts of rape or other forms of sexual violence.[388] It is argued that "naming and shaming" procedure allows strengthening the international pressure by pointing out those responsible for committing violence in armed conflicts and has to be seen as positive example in generally limited range of the UN legal instruments.

Finally, the UN Security Council Resolution 2242 (2015)[389] has to be welcomed. Security Council has drawn its attention to the "changing global context of peace and security, in particular relating to rising violent extremism."[390]It is very important that the Security Council has directly expressed the view that "acts of sexual and gender-based violence are known to be part of the strategic objectives and ideology of certain terrorist groups, used as a tactic of terrorism, and an instrument to increase their power through supporting financing, recruitment,

[385] P K Deshmukh, "Introductory note to the United Nations Security Council Resolution 1888 and 1889: Women, Peace, security" *ILM*, 49 (2010), pp. 71–82.
[386]M Seyler, art, cit.
[387]United Nations Security Council 1960 (2010)http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/WPS%20SRES%201960.pdf Accessed 21 March 2017.
[388]*Ibid.*
[389]United Nations Security Council 2242 (2015)http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/s_res_2242.pdf Accessed 21 March 2017.
[390]*Ibid.*

and the destruction of communities."[391]Obviously the impact of that resolution to actual situation of women is very limited. However, it indicates the growing attentiveness of international community towards the dangers of atrocities committed by extremist terrorist groups.

Although the focus of this sub-section is the protection of women under international humanitarian law, reference is also made to other bodies of international law applicable in situations of armed conflict, principally human rights and refugee law, where they offer important complementary protection. In principle, human rights law is applicable at all times, i.e. both in peacetime and in situations of armed conflict. However, certain human rights instruments permit States to derogate from certain rights in times of public emergency.[392] That being said, it is not possible to derogate at any time from the right to life or from the prohibitions on torture or cruelty, inhuman or degrading treatment, slavery and servitude, and retroactive criminal laws.

Another important difference between international humanitarian law and human rights law is who is bound by the law. While international humanitarian law binds all parties to an armed conflict; both government and armed opposition groups, human rights law lays down rules which bind governments in their relations with individuals.[393] The traditional view is that non-state actors are not bound by human rights norms - a view which is increasingly the subject of debate.[394]

Human rights law today is enshrined in a number of universal and regional instruments covering wide-ranging issues, such as civil and political rights, or focusing on specific rights, e.g. the prohibition on torture, or specific beneficiaries, e.g. women or children. In addition to its

[391]*Ibid.*
[392] C Lindsey, "Women Facing War: ICRC study on the impact of armed conflict on women". http://www.refworld.org/pdfid/46e943750.pdf. Accessed 16 March 2017.
[393] D B Hollis, "Why State consent still matters- Non State Actors, treaties and the changing sources of International Law" (2005) *Berkeley Journal of International Law*, Vol 23, Iss 1 p.137.
[394]*Ibid.*

complementarity with international humanitarian law, human rights law provides important additional protection through the highly developed mechanisms for its enforcement.

Many of the instruments establish judicial or quasi-judicial bodies which oversee the implementation of the treaties and which are directly accessible to individuals claiming to have suffered violations of their rights.[395] Such bodies can issue binding decisions requiring the respondent States to terminate the violation and, where appropriate, to make reparations.[396] In regard to refugees, international refugee law lays down general and basic principles for their identification and protection including definitions, and the basic rights to be granted to refugees.[i] Additional rules, as well as the interpretation and practical implementation of these principles, are left to national law.

[i] *Ibid.*

[395] C Lindsey, art. cit.
[396] *Ibid.*

CHAPTER THREE

INTERNATIONAL RIGHTS OF AFRICAN WOMEN TO PROTECTION

3.1African Charter on Human and People's Rights and Human Rights

The role of the African human rights protection system in the promotion of human security can be examined in terms of its contribution of human rights guarantees and enforcement mechanisms established to protect individuals and communities against those conditions that threaten their well-being.

The African Human Rights system derives its norms from various sources. Its founding instrument is the African Charter on Human and Peoples' Rights (the African Charter), but it also relies on instruments such as the OAU Convention Governing Specific Aspects of Refugee Problems in Africa of 1969. This Convention was adopted in 1969 and came into force in 1974.[i] The protections envisaged in this Convention are of paramount importance as various conflicts in Africa have forced many people to flee their countries and seek refuge in neighboring states.[i]

The rights of women in Africa are recognized by the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.[i] The Protocol provides guarantees for women's rights with a combination of protection and empowerment. Article 4(1) provides that "every woman shall be entitled to respect for her life and the integrity and security of her person. All forms of exploitation, cruel, inhuman or degrading punishment and treatment shall be prohibited."Article 4(2) among others obliges states to adopt all the legislative, institutional, budgetary, social and economic measures necessary for the prevention, prohibition and punishment of all forms of violence against women and the rehabilitation and reparation of women victims. It defines violence against women as;

> all acts perpetrated against women which cause or could cause them physical, sexual, psychological, and economic harm, including the threat to take such acts; or to undertake the imposition of arbitrary restrictions on or deprivation of fundamental freedoms in private or public life in peace time and during armed conflicts or of war.[i]

In this way, the Protocol seeks to protect women from acts of violence that threaten their well-being. It also recognizes the right of women to peace. This right guarantees women's rights to peaceful existence and protection from the consequences of violent conflict and requires that states take measures that enable women to contribute to the maintenance of peace and security. Accordingly, it provides for women's participation in educational programmes for peace; structures and processes for conflict prevention and management; national, regional and international decision-making processes; and post-conflict reconstruction and peace-building processes.[i]

3.1.1 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa.

The entry into force of the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa on 25 November, 2005(African Women's Protocol or Maputo Protocol) marked the culmination of years of lobbying for a document which would promote and protect the human rights of the continent's women by African women's rights advocates.[i]

The Protocolto the African Charter on Human and Peoples' Rights on the Rights of Women in Africa is a legally binding multilateral supplement to the African Charter on Human and Peoples' Rights (African Charter)[i], by the African Union Assembly of Heads of State and Government. Also referred to as the "Maputo Protocol," alluding to the place of its adoption, the Protocol entered into force on November 25, 2005.As of October 2015, it has been ratified by 37 of the 53 members of the African Union (AU), all of which are also States Parties to the African

Charter.[i]The adoption of the Protocol should be understood against the broader contemporaneous political, legal, and social background.[i] The substance of the Protocol did not come to be adopted in isolation from these factors-it does not exist in a vacuum-and its implementation will take place in a specific, yet changing, context. Its adoption testifies to the greater visibility and mobilizing strength of women's organizations in Africa and is the culmination of a dual drafting process: one initiated by the women's movement and one steered by the "Inter-African Committee on Harmful Traditional Practices Affecting Women's and Children's Health.[i]

According to its Preamble, the Protocol was adopted to address theconcern that "despite the ratification of the African Charter on Human andPeoples' Rights and other international human rights instruments by the majority of State Parties, women in Africa still continue to be victims ofdiscrimination and harmful practices.[i] Therefore, the Protocol should notbe viewed primarily as correcting normative deficiencies in internationalhuman rights law dealing with women's rights, but rather as a response tothe lack of implementation of these norms.[i]

At the time of the drafting and adoption of the Women's Protocol, thetwo main instruments of particular relevance to the rights of women inAfrica (the African Charter and the UN Convention on the Elimination ofall forms of Discrimination against Women (CEDAW), enjoyeduniversal and near-universal ratification in Africa, respectively. TheAfrican Charter on the Rights and Welfare of the Child (African Children'sCharter), which deals with the rights of children under the age of 18including the girl-child, enjoyed less state support.[i]

Subsequent to theadoption of the African Women's Protocol, two further instruments oflimited relevance to women in Africa have been adopted. The AU SolemnDeclaration on Gender Equality in Africa" was adopted, but is a nonbindingdeclaration and is limited in its legal effect even though it isextensive in its reach to all AU members. The other instrument, the

Southern African Development Community (SADC) Gender Protocol, [i]is potentially binding on AU members, but only on thosewithin the SADC region that have ratified it. It is imperative to review the African Women's Protocol with the instruments as mentioned above to shed light on the most prominent overlapping and distinguishing features of these instruments.

i. African Women's Protocol and the African Charter

From the 1990s, women's rights started to receive more attention inthe African Commission. Institutionally, this focus culminated in the establishment of the position of the Special Rapporteur on the Rights of Women in Africa, in 1998.[i]At that stage, a process of elaborating an African instrument on women's rights was already under way. Spearheaded byan increasingly vocal and visible African women's rights movement, debate about the need for an additional instrument to extend the scope and content of women's rights in the African Charter increased, and the notion of a substantive supplement to the Charter gathered momentum.[i]

Not all participants in the discussion supported the adoption of an additional instrument. Under the Charter, it was argued, *everyone* is a rights-bearer, not *every man*.[i]Article 2 of the Charter reinforces that the rights in the Charter (including the right to dignity, bodily security, and education, to name but a few of them that may resonate in women's lives), are to be enjoyed without any discrimination on the basis of sex, among other grounds. In Article 18(3), the Charter specifically mentions the duty of States Parties to "ensure the elimination of every discrimination against women". Against this background, it was argued that the real problem lay in the lack of the utilization of the available system bywomen or on theirbehalf, and that the potential of the Charter should be unlocked bycampaigning for the adoption of resolutions on rights of relevance to women.[i]This argument found support in the generally progressive and expansive interpretive approach of theCommission, which suggested that such an approach

would be likely to succeed if fully explored.[i]However, the argument for a new substantive shield for women in Africa won the day.

Eventually adopted in 2003, the Protocol "brings into the open theCharter's shrouded premise that women are included in its protectivescope.[i] As a supplement to the African Charter, the Protocol attempts tounderline the rights for women enumerated in the Charter and to elaborateupon their relevance.

ii. African Women's Protocol, the African Charter and CEDAW

Although the African Women's Protocol has been drafted as an addition to the African Charter and not as a response to CEDAW, the Protocol invites comparison with CEDAW, being the main UN treaty on women's rights.[i] Compared to CEDAW, the Protocol speaks in a clearer voice about issues of particular concern to African women, locates CEDAW in African reality, and returns into its fold some casualties of quests for global consensus, resulting from the adoption of CEDAW.[i]

More specifically, the Protocol expands the scope of protected rights beyond those provided for under CEDAW and it deals with rights already covered in CEDAW with greater specificity. Importantly, it emphasizes the private sphere as an important domain in which rights are to be realized and it underlines the need for "positive action.[i]The Protocol expands the protective scope of women's rights by addressing numerous issues of particular concern to African women that were not included in CEDAW.

Compared to CEDAW, the Protocol provides in greater detail for the "protection of women in armed conflict. Article 11 provides thus:

1. States Parties undertake to respect and ensure respect for the rules of international humanitarian law applicable in armed conflict situations which affect the population, particularly women.
2. State**s** Parties shall, in accordance with the obligations incumbent upon them under the international humanitarian law, protect civilians including women, irrespective of the population to which they belong, in the event of armed conflict.
3. State**s** Parties undertake to protect asylum seeking women, refugees, returnees and internally displaced persons, against all forms of violence, rape and other forms of sexual exploitation, and to ensure that such acts are considered war crimes, genocide and/or crimes against humanity and that their perpetrators are brought to justice before a competent criminal jurisdiction.
4. State**s** Parties shall take all necessary measures to ensure that no child, especially girls under 18 years of age, take a direct part in hostilities and that no child is recruited as a soldier.[i]

The Protocol provides specificity where vagueness prevailed, for example when it clarifies that "positive African cultural values are those "based on the principles of equality, peace, freedom, dignity, justice, solidarity and democracy.[i]

iii. African Women's Protocol and the African Children's Charter

The obvious overlap between the Protocol and the African Charter onthe Rights and Welfare of the Child (African Children's Charter)[i] arisesfrom the scope of the two instruments: The Protocol

covers all "persons offemale gender, including girls,[i] without setting any age limitation and theAfrican Children's Charter deals with "every human being below the age of18 years. [i] From the point of view of the "girl-child," both treaties aretherefore potentially relevant.

In so far as they both explicitly deal with the girl-child, the twoinstruments are largely similar. The African Children's Charter stipulateseighteen as the minimum age of marriage,[i] a threshold that wassubsequently introduced into the Protocol.The Protocolechoes the obligation of States party to the African Children's Charterto take "all necessary measures to ensure that no child take a directpart in hostilities, adding the phrase: "Especially girls under 18 years ofage.[i]

When it was adopted, the African Children's Charter presented asignificant advance on existing international human rights law, both incomparison to the African Charter and the UN Convention on the Rights ofthe Child. By restating these provisions, the African Women's Protocolessentially solidifies and reinforces this progress.[i]

3.1.2 Effectiveness of the African Women's Protocol

The overriding rationale for the adoption of the African Women'sProtocol was the concern that, despite the ratification of internationalhuman rights instruments, women in Africa continue to be victims ofdiscrimination and harmful practices.[i] The question about the "addedvalue" of the Protocol, therefore, ultimately has to find its answer inimprovements in the actual enjoyment of the relevant rights by women.

The effect of the Protocol on women's lives depends, at the national level,on its effective domestication and available domestic remedies, and, at theregional level, on effective implementation by the African Commission, owing to the fact that even if the Protocol is an international treaty, its effect has to be felt at the national level if it is to meet the basic rationale for its adoption, which isthe full realization of the rights provided for under the Protocol.[i]

Consequently, it may be argued that the key to a better future for women is the effective and efficient implementation of the available instruments.

Nevertheless, the African Women'sProtocol is part of a rapidly changing landscape in which the rights and protection of women are given much more serious consideration than in the recent past.[i]As a regional instrument, the African Women's Protocol speaks to theconcerns of women in Africa with greater precision and less ambiguity thanCEDAW, but in a less precise and targeted way than the SADC GenderProtocol. From the vantage point of women in Africa, these instruments aremutually reinforcing and provide a menu from which the most relevant andappropriate tactical and strategic choices can be made.[i]

The potential effect of the Protocol depends largely on the knowledgeand awareness of its content and the possibilities of its use in advocacy,legal reform, and litigation. Proper domestication and internalizationshould ultimately lead to greater correspondence between internationalhuman rights standards and the lived realities of women.

3.2The African Women's Protocol and other Regional Women's Human Rights Treaties

i) The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic violence.

The European Convention on Human Rights and Fundamental freedoms like the African Charter, provides generic fundamental rights and freedoms for all persons, e.g. right to life, prohibition of torture, prohibition of slavery and forced labour, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to an effective remedy, prohibition of discrimination, it also undertakes State parties to secure these rights and freedoms to everyone within their jurisdiction.[i]

In particular, the rights of women were specifically recognized and codified by the European Convention on violence against women. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic violence, known as the Istanbul Convention[i], became the first legally binding instrument in Europe that specifically targets violence against women and domestic violence. The Convention requires States to take steps to prevent and eliminate all forms of violence and discrimination against women and to implement policies, practices, and supportive measures that assist survivors and relevant agencies, while recognizing that sexual harassment, rape, forced marriage, honour crimes, genital mutilation, and other forms of violence constitute serious human rights violations and "a major obstacle to the achievement of equality between women and men."[i]

As was evident in the development process of the African Women's Protocol, the issues of gender violence and violence against women as a violation of human rights were slow to appear on the agenda of the European Union.[i] However, as a result of the international pressure from transnational women's groups, violence against women was connected to human rights issues in other arenas, especially through the United Nations Declaration on the Elimination of Violence Against Women (CEDAW), the European Union increased its own efforts by first recognizing violence against women as an important European Union issue through several new resolutions from 2000 to 2006.[i] Consequently, and in addition to other events recognizing the need to protect the rights of women, and culminated by the war crimes committed against women in the wars in the former Yugoslavia and Rwanda, as well as a renewed international effort by the UN (which resulted in the adoption of Resolution 1820), the Istanbul Convention was then adopted.

Similar to the African Women's Protocol, the Istanbul Convention builds on the CEDAW. CEDAW makes no mention of violence against women; instead it focuses on discrimination against women as a human rights violation.[i] It, however, asserts that gender-based violence is a form of discrimination that inhibits women's ability to enjoy their rights and freedoms on an equal basis with men. The African Women's Protocol goes into greater detail about comprehensive policies and rights attributed to women, protection of women in armed conflicts,prevention of violence and the protection and support for women in distress.[i] The Istanbul Convention on the other hand also provides for thorough and broad policies on violence against women, data collection, prevention, protection, and support for victims of violence, recommended substantive law concerning violence against women and domestic violence, and investigative and punitive measures.[i]

While, the Istanbul Convention does not make specific provisions for the protection of women in armed conflicts, it may be argued that its provisions apply even during armed conflict; as has been established in this work,[i] International Human Rights law, deals with the protection of persons from abusive powers, as well as the preservation of the dignity and humanity of all; accordingly it has also been widely recognized by the international community that since human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, international human rights law continues to apply in situations of armed conflict.

Additionally, similar to the Istanbul Convention which has been described as most advanced treaty in the world on violence against women and girls, the African Women's Protocol, includes economic harm as a form of violence against women.

It acknowledges the importance of human rights protectionin the private sphere of life, as well as in peace time and during situations of armed conflicts or war.[i]

From the foregoing, it is deduced that the African Women's Protocol and the Istanbul share a plethora of similarities, with minor dissimilarities. Despite being adopted for different regions, they provide specifically for the protection of the rights of women in the midst of the growing awareness by the international community on the need to protect women against violence as well as the need to involve women in humanitarian and peace keeping processes and operations.

ii) The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women.

In the American context, the specific plight of women was not taken much account of for many years.[i] In the 1990's, following the general trend of gender-mainstreaming, the situation improved and the Inter-American Commission on Human Rights started to include issue of abuses against women in its agenda.[i] The Commission began using its mandate to examine human rights situations to protect the rights of women. Thus leading to the adoption of the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women(Convention of Belém do Pará). The Convention reaffirms every woman's "right to be free from violence in both the public and private spheres"[i]

The Convention of Belém do Parádefines violence against women as "any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere."[i]The Convention provides specifically among others for the right of women to be protected from torture, violence and all forms of discrimination.

Notably, the Convention of Belém do Pará does not make specific mention of the protection of women in armed conflicts as provided by the African Women's Protocol, however the argument as has been established in this work that human rights obligations derive from the recognition of inherent rights of all human beings and that these rights could be affected both in times of peace and in times of war, rings true in this regard.[i] Thus the rights of women to protection enshrined in the Convention of Belém do Pará remains applicable in armed conflict.[i]

Further, the Convention of Belém do Pará, was adopted to address the concern that despite the existence of a plethora of human rights instruments, women still continue to be victims of various forms of violence, discrimination and harmful practices in both public and private sphere;[i] thus the African Women's protocol largely mirrors the Convention of Belém do Pará in this regard. Additionally, the coming into force of the Convention of Belém do Parálike the African Women's Protocol, marked an important moment in the continued efforts to affirm and protect women's human rights and to denounce violence against women as a human rights violation.

Undoubtedly, other initiatives to prevent, punish, and eradicate violence against women had preceded the adoption of the Convention of Belém do Pará and the African Women's Protocol; however, the provisions of the Convention and the Protocol are unique to the extent that theyspecifically delineate states' obligation to protect women's rights to a life without violence.

3.3International Covenant on Economic, Social and Cultural Rights and Women's Protection

Economic, Social and Cultural Rights have a particular significance for women because they go to the heart of issues related to poverty and inequality.[i] From women's lived daily experiences

and social and cultural roles, they know the central nature of ensuring adequate and nutritious food is available for the family, the importance of being able to easily access clean water, of having a safe and secure dwelling and access to a health Centre and medicine.[i] Women know that due to their work life being more often interrupted because of care-giving and child-rearing obligations, or because their work is not formalized, or because they have always been paid less than their male colleagues, their access to adequate social security benefits when they are older may be limited. Women know that school fees, lack of adequate sanitation and privacy,sexual harassment by male teachers and policies excluding young mothers all create significant barriers for girl's educational opportunities.[i] Women know that gender stereotypes impact their ability to achieve equality and success in work, education, and politics and at home.[i]

Women know the daily impact that poverty and inequality have in their daily lives. As a group, women have less social, economic and political power and are disproportionately poor. In the context of the global financial crisis and deepening economic inequality, women are affected disproportionately by the presence or absence of social programs and policies that ensure health care, education, child care, housing, food and water because women are the principal unpaid providers for these needs when the State fails to do so.[i]

The international human rights framework and mechanismsprovide individuals with the ability to claim food, housing, employment, education and healthcare as basic rights. When needs are transformed into rights, it allows individuals to claim that these rights be respected, protected and fulfilled; and to hold governments accountable if they fail to do so.[i] The international human rights framework also allows us to connect to the broader international community which is struggling for these rights around the world and to use a common language which can promote solidarity and movement-building, thereby increasing the impact of our

work.[i] Within the international human rights system, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the International Covenant on Economic, Social and Cultural Rights (ICESCR)[i] are particularly relevant for claims involving women's economic, social and cultural rights given these Committees' expertise on women's equality and substantive ESC rights, respectively.

Human rights are inherent and inalienable rights all people have because they are human and they are therefore universal. These basic principles were first established in the UDHR and later by the International Covenant on Economic, Social and Cultural Rights and International Covenant on Civil and Political Rights (ICCPR).[i]

States have obligations arising from the fundamental and inherent nature of human rights as well as under international human rights law and are legally accountable for violations of these duties.[i] All human rights are "indivisible, interdependent, inter-related, and of equal importance for human dignity."[i] This principle recognizes that all human rights economic, social, civil, political and cultural are equally necessary to human dignity and equality. These categories fail to capture the inherent connectedness of all human rights and the necessity of their realization in ensuring women's equality.

The position that economic, social and cultural rights are not in fact rights, or cannot be adjudicated, is outdated and has been proven incorrect by domestic, regional and international courts around the world.[i] The adoption of the Optional Protocol to the ICESCR itself signals an important shift in the international recognition of justiciability of Economic, Social and Cultural rights. Furthermore, the traditional dichotomy between so-called "positive" and "negative" rights is also being scrutinized, given clear evidence that all human rights include both negative and

positive obligations on States. That is, for most rights, States will be required to refrain from action and to take positive steps and invest resources to realize human rights.[i]

The ICESCR states that men and women have equal right to the enjoyment of all the rights it sets out, i.e. the right to work, including the opportunity to gain a living by work which is freely chosen (Article 6); the right to just and favorable conditions of work, including fair and equal remuneration (Article 7); the right to form and join trade unions (Article 8); the right to social security (Article 9); the right to an adequate standard of living, including adequate food, clothing and housing (Article 11); the right to the highest attainable standard of physical and mental health (Article 12); the right to education and the right to take part in cultural life (Article 13). Special mention is made of the family, which should be accorded "the widest possible protection and assistance", while "marriage must be entered into with the free consent of intending spouses" (Article 10 (1)).

The ICESCR, like the ICCPR, is considered to impose three types of different obligations on states that are party to it; the obligations to respect, protect and fulfill the rights enumerated in it.[i] As of July 2003, 147 states had ratified this treaty, with the United States of America being one of the few that had not.[i] The obligations on States Parties are qualified in article 2 (1) of the ICESCR, which says: "Each State party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant." Article 2(2) sets out the principles of equality and non-discrimination in relation to the provision of covenant rights.

Ensuring a comprehensive application of the obligations in these Articles "requires an understanding that focuses upon the subordination, stereotyping, and structural disadvantage that women experience."[i] States have the immediate duty to ensure that women are not being directly or indirectly discriminated against in access to, or fulfillment of, a substantive right.[i] Both CEDAW and the Committee on Economic, Social and Cultural Rights (CESCR) have interpreted this obligation as not only requiring the State to prevent discrimination but to take positive steps to remedy past and structural discrimination that goes beyond enactment of laws beyond legal or formal equality to substantive or de facto equality.[i] Specifically, General Recommendations 28 of CEDAW and General Comment 16 and 20 from CESCR provide details to this obligation.

The obligation to respect requires States to refrain from actions that directly or indirectly discriminate against women and infringe on their enjoyment of ESC rights. States Parties must not adopt or repeal laws, policies, or programs (including those which appear neutral on their face) which adversely impact women's equal enjoyment of ESC rights.[i] The obligation to protect requires States to take steps directed at eliminating of prejudices and gender-based stereotypes; to adopt constitutional and legislative provisions on equality and non-discrimination between men and women; to ensure administrative programs and institutions to protect against discrimination against women; and ensure effective remedies and redress.[i]

According to feminists' theories, the ICESCR does not touch upon the economic, social and cultural contexts in which most women live, since the crucial economic and social power relationship for many women is not one directly with the state but with individual men, whose authority is supported by patriarchal state structures.[i] Williams[i] points to other shortcomings, arguing that although the Covenant does refer to the equal rights of both men and

women to enjoy all economic and social rights, supports equal wages for work of equal value without discrimination of any kind, and also recognizes the right of women to paid maternity leave, these rights are only applicable to women who are already integrated into the paid economy as independent earners. The ICESCR fails to recognize the needs of the many women who do not participate in the paid economy, or participate as unpaid family labour in family businesses and who are thus not covered by the rights that are conferred on workers who earn wages in the paid economy.[i]

Despite the perceived shortcomings of the ICESCR, 49 African States have ratified the ICESCR since its adoption in 1966; therefore, its influence on the development of human rights regime in Africa cannot be denied. It must be noted that the ICESCR influenced the drafting, legal protection and development of Economic, Social and Cultural rights in the African Charter. [i]

Accordingly, in Articles 15–19 of the African Charter, the following rights are explicitly recognized, which are protected in the ICESCR- the right of self-determination; the right to work under equitable and satisfactory conditions; the right to enjoy the best attainable state of physical and mental health; the right to education; the protection of the family, and cultural rights. Although the formulation of the rights in the Charter is narrower than in the ICESCR, the Charter protects some individual or collective rights not protected in the Covenant. Such rights include the right of all peoples to 'economic, social and cultural development'[i] and 'the right to a general satisfactory environment favorable to their development'.[i]

It is important to stress that the African Commission is empowered to draw inspiration from international law on human and peoples' rights,[i] particularly from the UN

instruments when interpreting the Charter. This provided a legal basis to rely on the ICESCR to develop the jurisprudence of the African Commission on Economic, Social and Cultural rights.

Moreover, the African Commission has defined the right to development as 'an inalienable, individual or collective right, to participate in all forms of development, through the full realization of all fundamental rights, and to enjoy them without unjustifiable restrictions'.[i] It follows that the right to development imposes obligations on States to respect, protect and fulfill 'all fundamental rights' including civil and political rights as well as all Economic, Social and Cultural rights.Additionally, the African Court on Human and Peoples' Rights confirmed in the *African Commission on Human and Peoples' Rights v. Republic of Kenya* that by virtue of Articles 60 and 61 of the African Charter, it will draw inspiration from other human rights instruments to interpret rights protected by the Charter.[i]

Further, the content of some treaty provisions protecting Economic, Social and Cultural rights in other African Union regional human rights treaties protecting specific vulnerable groups, such as children, women, the youth, internally displaced persons, older persons and persons with disabilities have also been heavily influenced, at least in part, by the ICESCR. Such treaties include but not limited to the African Charter on the Rights and Welfare of the Child, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa and the Convention for the Protection and assistance of Internally Displaced Persons.[i] In particular, the African Women's Protocol provides for Economic and Social Welfare Rights, cultural rights, right to a healthy and sustainable environment and right to sustainable development.[i]

On a national level, State parties to the ICESCR are obliged to take steps to the maximum of available resources, with a view to achieving progressively the full realisation of

the rights recognized in the Covenant.[i]This must be done by all appropriate means, including particularly the adoption of legislative measures; for instance in certain states, treaties must be translated in National Legislation in order for it to have a force of Law.[i]Some states in their Constitution affirm commitment to human rights enshrined in all duly ratified international Conventions without a detailed explicit Bill of Rights.[i]

Form the foregoing; the relevance of the ICESCR to the protection of women's rights especially in post conflict situations cannot be disputed. Owing to the ratification and domestication of the ICESCR by most African states, its provisionis irrefutably applicable to ensure protection of women's economic, social and cultural rights, sustainable development, gender balance in participation throughout all processes for decision-making, policy-making and operationalizing measures for post-conflict peace-building; and gender mainstreaming in the formulation of all peace-building policies and practices. In addition, the importance of other international human rights treaties, such as UDHR, CEDAW and the ICCPR in the development of the human rights regimes for the protection of persons in Africa, particularly women cannot be overemphasized, as their ratification and domestication by nearly all African stateshave directly or indirectly paved the way for both generic and gender specific policies and instruments to be adopted.

3.4United Nations Declaration on the Protection of Women and Children in Emergency and Armed Conflicts

War atrocities are seen as mass violations of human rights. They affect all members of the society, regardless of their gender, age, skin color, nationality or ethnic origin. Women however, were and still are particularly vulnerable to all forms of such violations, in particular becoming victims of various forms of violence.[i]

Throughout history, wars have been accompanied by atrocities, enormous cruelty and violence, which from the contemporary legal perspective seen as mass violations of human rights.Although every armed conflict imprints cruel toll on all members of the society, women are often vulnerable and are subjected to all forms of inhumane treatment and violence.[i]

In this context, the UN General Assembly, while considering the recommendation of the Economic and Social Council contained in its resolution 1861 (LVI) of 16 May 1974, expressed concern over the sufferings of women and children belonging to the civilian population who in periods of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence are too often the victims of inhuman acts and consequently suffer serious harm.[i]

The Declaration further acknowledged the suffering of women and children in many areas of the world, especially in those areas subject to suppression, aggression, colonialism, racism, alien domination and foreign subjugation, who despite general and unequivocal condemnation, colonialism, racism and alien and foreign domination are still subjected to incalculable sufferings, especially women and children.[i]

Conscious of its responsibility for the destiny of the rising generation and for the destiny of mothers, who play an important role in society, in the family and particularly in the upbringing of children, and bearing in mind the need to provide special protection of women and children belonging to the civilian population, the General Assembly of the United Nations Organization made the following Declaration on the Protection of Women and Children in Emergency and Armed Conflicts and calls for the strict observance of the Declaration by all Member States as follows -[i]

1. Attacks and bombings on the civilian population, inflicting incalculable suffering, especially on women and children, who are the most vulnerable members of the population, shall be prohibited, and such acts shall be condemned.
2. The use of chemical and bacteriological weapons in the course of military operations constitutes one of the most flagrant violations of the Geneva Protocol of 1925, the Geneva Conventions of 1949 and the principles of international humanitarian law and inflicts heavy losses on civilian populations, including defenseless women and children, and shall be severely condemned.
3. All States shall abide fully by their obligations under the Geneva Protocol of 1925 and the Geneva Conventions of 1949, as well as other instruments of international law relative to respect for human rights in armed conflicts, which offer important guarantees for the protection of women and children.
4. All efforts shall be made by States involved in armed conflicts, military operations in foreign territories or military operations in territories still under colonial domination to spare women and children from the ravages of war. All the necessary steps shall be taken to ensure the prohibition of measures such as persecution, torture, punitive measures, degrading treatment and violence, particularly against that part of the civilian population that consists of women and children.
5. All forms of repression and cruel and inhuman treatment of women and children, including imprisonment, torture, shooting, mass arrests, collective punishment, destruction of dwellings and forcible eviction, committed by belligerents in the course of military operations or in occupied territories shall be considered criminal.

6. Women and children belonging to the civilian population and finding themselves in circumstances of emergency and armed conflict in the struggle for peace, self-determination, national liberation and independence, or who live in occupied territories, shall not be deprived of shelter, food, medical aid or other inalienable rights, in accordance with the provisions of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, the Declaration of the Rights of the Child or other instruments of international law.[i]

3.4.1 The Interplay between Human Rights Instruments and Protection of Women in Africa.

After the adoption of the Universal Declaration of Human Rights in 1948, the Commission on Human Rights drafted two human rights treaties, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Together with the Universal Declaration, these make up the International Bill of Human Rights.[i] The provisions of the two Covenants, as well as other human rights treaties, are legally binding on the States that ratify them.Both Covenants prohibit discrimination based on sex as well as to ensure the equal right of men and women to the enjoyment of all rights contained in them.[i]

In 1967, United Nations Member States adopted the Declaration on the Elimination of Discrimination against Women, which states that discrimination against women is an offence against human dignity and calls on States to "abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women".[i] Subsequently, the CEDAW was adopted by the General

Assembly in 1979. Its preamble explains that, despite the existence of other instruments, women still do not enjoy equal rights with men.The Convention articulates the nature and meaning of sex-based discrimination, and lays out State obligations to eliminate discrimination and achieve substantive equality.As with all human rights treaties, only States incur obligations through ratification.[i]

In addition to international human rights standards, regional human rights treaties include crucial provisions aimed at promoting and protecting women's human rights in Africa.Article 2 of the African Charter prohibits discrimination on any grounds, including sex, in the enjoyment of the rights guaranteed by the Charter. Article 18 of the Charter specifically mentions the obligation of African States to "ensure the elimination of every discrimination against women and also ensure the protection of the rights of the woman and the child as stipulated in international declarations and conventions". The African Charter is further complemented by the African Women's Protocol,which unequivocally reinforces women's rights in totality, while expounding on specific and unique experiences of African women regarding inheritance, widowhood and harmful practices.In particular, the African Women's Protocol sets the standards for women's human rights in Africa. The definition of violence against women recognizes both physical and emotional violence as well as threats of violence.[i] It recognizes the role of women in political and public life while encouraging state parties to invest more in legislation and other measures to secure equal representation of women and men in decision-making.[i] More importantly, the Protocol takes into the consideration the protection of women's rights in armed conflicts.[i]

The protection of women against violence and harmful practices and eliminating all forms of discrimination against them are fundamental human rights, as such all these instruments

exist for the sole purpose of ensuring that these rights are duly protected. Consequently, they all culminate to provide protection for women at all times, both in peace time and in the times of armed conflict. However, to enjoy these rights, a universal ratification and domestication of the instruments that contain them must be achieved by African states.

CHAPTER FOUR
SEXUAL VIOLENCE AGAINST WOMEN IN ARMED CONFLICTS: A VIOLATION OF INTERNATIONAL HUMANITARIAN LAW AND INTERNATIONAL HUMAN RIGHTS LAW

4.1 Sexual Violence against Women in Armed Conflicts

Sexual violence is prevalent in contemporary armed conflicts.[i] International humanitarian law and human rights law absolutely prohibit all forms of sexual violence at all times and against anyone; international criminal law moreover provides for the individual criminal responsibility of sexual crimes' perpetrators.[i] These three bodies of law importantly reinforce each other in this field.

Sexual violence has occurred during armed conflicts at all times, on all continents. It is still prevalent in a number of contemporary armed conflicts, such as in the Central African Republic, Colombia, Democratic Republic of the Congo (DRC), Mali, South Sudan and Syria.[i]In the July 2016 conflict in South Sudan, women and girls suffered physical assaults and sexual violence including rape, gang-rape and sexual assaults.[i]The United Nations Mission in South Sudan (UNMISS)documented 217 victims of sexual violence that included rape and gang-rape that were committed in various areas across Juba between 8 and 25 July, at Sudan People's Liberation Army (SPLA) checkpoints. In most of these cases, victims and witnesses reported that the alleged perpetratorswere SPLA soldiers and police officers.[i]

According to the United Nations, over 200,000 women have suffered sexual violence in the DRC since the armed conflict began; between 250,000 and 500,000 women were raped during the 1994 genocide in Rwanda; and between 20,000 and 50,000 during the armed conflict in Bosnia in the early 1990s;[i] but this data may show only the tip of the iceberg. One of the specific issues related to sexual violence is that it remains an "invisible" crime because feelings of guilt or shame, fear of retaliation or taboos may prevent victims from coming forward and

talking about it.[i] Material barriers such as security risks, physical distance and transportation costs may also prevent victims from seeking help.[i] For humanitarian organizations that want to prevent sexual violence and respond to the needs of victims, this is a challenge.[i] In its operational work, the International Committee of the Red Cross (ICRC) has therefore recently adopted a new approach. It presumes that sexual violence occurs in armed conflicts and endeavors to provide an appropriate humanitarian response to the victims of sexual violence even in the absence of allegations.[i]

Sexual violence, including when conflict-related, often has no relation to sexual desire, but is instead linked to power, dominance and abuse of authority.[i]Often, sexual violence is not perpetrated in isolation but accompanied by other violations, suchas unlawful killings, child recruitment, and destruction of property or looting.[i] Its causes (direct and indirect) can be numerous, including the climate of impunity which is rampant in armed conflicts, the absence of clear orders and instructions prohibiting sexual violence, the proliferation of small arms and light weapons used to threaten victims, the increased vulnerabilities of victims of armed conflicts (internally displaced persons, migrants, widows, etc.), and the destruction of community ties and individual coping mechanisms.[i]

Sexual violence can also be used in a strategic or tactical way by parties to armed conflicts. In all cases, it has devastating consequences, primarily for the victims themselves, of course, because of its negative physical, psychological, social and economic effects, but also for the victims' relatives, who face possible trauma, feelings of indignity and guilt at having been unable to protect their next-of-kin. It may also have consequences for entire communities when it creates fear and destroys the social fabric.[i]

Despite its prevalence, sexual violence is not an unavoidable consequence of warfare and violence.[i] Like any other violation, it can be prevented. A precondition for this, is a strong legal framework and the existence of solid institutions to implement the prohibition of sexual violence. It will be demonstrated that sexual violence is absolutely and adequately prohibited under international law, and more precisely under international humanitarian law and human rights law. Moreover, during the last twenty years, international criminal law has considerably evolved and has criminalized the most serious forms of sexual violence at the international level. These three bodies of international law strongly complement and positively influence each other in this field. This is not to say that sexual violence does not give rise to legal controversies, but rather that international law, howeverimperfect has recognized the impact of sexual violence in armed conflict and has providedlaws in an attempt to end the menace. The implementation of these rules at the national and international levels, however, needs to be strengthened to effectively eliminate or at least reduce the occurrence of sexual violence.

4.1.1 Defining Sexual Violence

In*Akayesu's case,* the International Criminal Tribunal for Rwanda (ICTR) Trial Chamber held that sexual violence is "any act of a sexual nature which is committedon a person under circumstances which are coercive".[i] The term "act of a sexual nature" is very broad. It may range from penetration to comments having a sexual connotation. "Coercion" moreover must be understood broadly as including not only a show of physical force but also "threats, intimidation, extortion and other forms of duress which prey on fear or desperation."[i] The Trial Chamber further held that "sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact."[i] From this definition, it is clear that sexual violence encompasses and is broader than rape. But is there a

minimum threshold of gravity to consider an act as "sexual violence" when committed under coercive circumstances?

There is no clear-cut answer to this question. The Statute of the International Criminal Court (ICC) criminalizes "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity."[i] This is a non-exhaustive list of the most serious forms of sexual violence falling under the jurisdiction of the ICC, which does not help to define the minimum gravity threshold for an act to be considered "sexual violence." Case law and legal writings nevertheless provide a number of additional concrete examples of sexual violence: for instance, trafficking for sexual exploitation,[i] mutilation of sexual organs,[i] sexual exploitation (such as obtaining sexual services in return for food or protection),[i] forced abortions,[i] enforced contraception,[i] sexual assault,[i] forced marriage,[i] sexual harassment(such as forced stripping),[i] forced inspections for virginity[i] and forced public nudity have been qualified as sexual violence.[i]

According to the World Health Organization (WHO), sexual violence can be defined as "any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work."[i]If one accepts such a definition, then, it seems that the threshold of gravity is very low and that the term "violence" encompasses not only physical but also verbal or psychological violence.[i] It should also be noted that if the ICC prosecutes only sexual violence of certain gravity, this does not mean that forms of sexual violence which may not reach that gravity cannot be considered an international crime under other treaties or national legislations. This is evidenced by the fact that, for instance, the Statute of the Special Court for Sierra Leone

criminalizes under crimes against humanity offences such as "rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence".[i]

4.1.2 Defining Rape

The severity of the offence of rape cannot be over emphasized. Little wonder why a lot of pundits have advocated strict punishments for the offence.In the case of *Popoola v. State,*[i]Muntaka-Coomasie J.S.C stated on rape that "the offence appeared to be heinous and heartless. The sentence meted out by the trial court amounts to abdicating its role as a judicial officer. I condemn such type of sentence. The sentence is unnecessarily lenient and loose".In the samelight, Ngwuta J.S.C stated that"I join my learned brother in expressing disappointment that the appellant was given a lenient term of five years in prison. I think that the severity of punishment for rape, with particular reference to statutory variety, should rank next to capital punishment"

Under the Nigerian Criminal Code Act, Rape is described as having unlawful carnal knowledge of a woman or girl, without her consent, or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind, or by fear of harm, or by means of false act, or, in the case of a married woman, byimpersonating her husband.[i]This offence is punishable by imprisonment for life, with or without caning.[i]The Nigerian courts have applied the law on rape as contained in the statutes and have held that rape is the act of sexual intercourse committed by a man with a woman who is not his wife and without the woman's consent.[i] By the provision of the Criminal Code Act, the prosecution must prove carnal knowledge, this position was upheld by the Supreme Court in *Posu v The State,*[i]where the court enumerated the ingredients of the offence of rape when it held that in a charge of rape or

unlawful carnal knowledge of a woman without her consent, it is the duty of the prosecution to prove the following ingredients beyond reasonable doubt, that-

(a) the accused had sexual intercourse with the prosecutrix;

(b) the act of sexual intercourse was done without her consent or that the consent was obtained by fraud, force, threat, intimidation, deceit or impersonation;

(c) the prosecutrix was not the wife of the accused;

(d) the accused had the *mens rea*, the intention to have sexual intercourse with the prosecutrix without her consent or that the accused acted recklessly not caring whether the prosecutrix consented or not, and

(e) there was penetration.

Further, section 6 of the Criminal Code provides that "When the term "carnal knowledge" or the term "carnal connection" is used in defining an offence, it is implied that the offence so far as regards that element of it, is complete upon penetration." The slightest penetration of the vagina by the penis is sufficient. It is not necessary that the hymen was ruptured or that there was ejaculation. The Supreme Court held in *Ogunbayo v. The State*,[i] that

> The essential ingredients of the offence of rape are penetration and lack of consent. Sexual intercourse is deemed complete upon proof of penetration of the penis into the vagina. Emission is not a necessary requirement. Any or even the slightest penetration will be sufficient to constitute the act of sexual intercourse. Thus, where penetration is proved but not of such a depth as to injure the hymen, it will be sufficient to constitute the crime of rape.

The Criminal Code does not recognise that penetration of a woman or girl's anus or mouth could be equally as traumatic as that of the vagina and that it should be considered as one

of the elements, which may constitute rape.[i] Only a woman or girl may be raped as far as the wordings of the Code suggest. Even though in this day and age, there have been cases of men claiming to be raped,[i] the Criminal Code Act does not take cognisance of this fact.[i]

According to section 30 of the Criminal Code Act, a male person under the age of 12 years is presumed to be incapable of having carnal knowledge. This is an irrebuttable presumption, which means that he cannot be guilty of the offence of rape or attempted rape, even if it is shown that he has reached puberty despite his age.[i] He may, however, be convicted of indecent assault. Since it is required that there must be genital penetration which a woman is incapable of doing, a woman would not be physically capable of committing the offence, but may be guilty of counselling or abetting rape. Interestingly, as put forward by Ijalaiye,[i] although a woman may not be physically capable of committing rape against a man or another woman, she may, however, be charged and found guilty of the offence of rape. This opinion he arrives at through the implications deduced under section 7 of the Criminal Code, which defines who a principal offender is. Section 7 provides that when an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence and may be charged with actually committing it-

(a) every person who actually does the act or makes the omission which constitutes the offence;

(b) every person who does or omits to do an act for the purpose of enabling or aiding another person to commit the offence;

(c) every person who aids another person committing the offence; and

(d) every person who counsels or procures any other person to commit the offence.

Thus, whether one considers a woman in such a situation as either a principal in the first or second degree, or accessory before the fact, if her act is caught under any of the provisions in section 7, she would be considered as a principal offender of the crime of rape.[i]

The legal principle that a woman gives an irrevocable consent to sexual enjoyment on marriage to her husband still exists; since section 6 of the Criminal Code Act also defines unlawful carnal knowledge as "carnal connection which takes place otherwise than between a husband and wife;" this implies that a husband cannot be guilty of raping his wife.[i] This exception is an old fashioned one, and is generally attributed to the fact that wives were viewed (and still are) as the husband's chattel, having been bought by them.[i] The wife is taken to have given her irrevocable consent to sexual enjoyment to the husband on marrying him.[i] However, where a husband uses force or violence against her, to exercise his right, he may be guilty of assault or wounding. The legal principle that a husband cannot rape his wife, would not apply in two situations. These are where the marriage has been dissolved or if a competent court has made a separation order which contains a clause that the wife is no longer bound to cohabit with her husband.[i]

As with English law, absence of consent from the victim is essential on a charge of rape. The prosecution must prove that the accused had carnal knowledge of the woman or girl he was accused of raping, without her consent. The issue as to what is not considered as consent as given by the Criminal Code Act is restricted to certain acts.[i] Consent, which was obtained by force or by means of threats or intimidation of any kind or by fear of harm or by means of false and fraudulent representations, is no consent. It is also rape to have carnal knowledge of a woman by impersonating her husband. Unfortunately, the principle in the decision in *D.P.P v*

Morgan[i] is still good law, under the Criminal Code Act. In that case, it was held by the English House of Lords that "an honest belief by a man that a woman with whom he was engaged with sexual intercourse was consenting was a defence to rape, irrespective of whether that belief was based on reasonable grounds."[i]

Accordingly, an accused person that pleads that he believed the woman was consenting does not bear the burden of establishing honest and reasonable mistake of fact under section 25 of the Criminal Code Act. Thus, the prosecution not only has the burden of proving the*actusreus*and the *mens rea*, but it must also prove as part of its case that the accused intended to have sexual intercourse without the woman's consent. In practice, the few cases which have come before the courts show how difficult it is to prove rape, even though it is obvious that the accused committed the crime.[i]

From the foregoing, it is obvious that there is a need to redefine the meaning of rape under the Nigerian law; as the seriousness of the offence of rape cannot be overstated.The features of rape under that the Nigerian legal regime which distinguishes it from the modern day conception, for example the fact that rape can only be committed upon penetration of the vagina and not any other part of the female physiology or the fact that a man cannot commit rape upon his lawful wife.[i] The current global trend on what constitutes the offence of rape demonstrates a complete and total departure from the traditional common law concept; rape has been defined to include a plethora of ingredients, including but not limited to marital rape, gender-neural definitions, penetration through the anus or mouth of the victim with the sex organ or any other body part of the perpetrator or with an object provided the victim who did not consent to the sexual act.[i]

Under the Penal Code applicable in northern Nigeria,a man is said to commit rape where he has sexual intercourse with a woman in any of the following circumstances:- (a) against her will; (b) without her consent; (c) with her consent, when her consent has been obtained by putting her in fear of death or of hurt; (d) with her consent, when the man knows that he is not her husband and that her consent is given because she believes that he is the man to whom she is or believes herself to be lawfully married; and (e) with or without her consent when she is under fourteen years of age or of unsound mind.[i]

Mere penetration under the Penal Code Act is sufficient to constitute the sexual intercourse necessary to the offence of rape. Cases under the Penal Code Act shows the importance the courts attach in providing evidence of penetration to a charge of rape.[i]However, the definition of rape under the Penal Code Act is narrower than that under the Criminal Code Act in the sense that where the latter uses the term "carnal knowledge" implying that penetration of the vagina could be done by penetration of a foreign object, the term "sexual intercourse" under the Penal Code Act implies that only a penis can penetrate a vagina.[i]The Penal Code Act does not define what consent is but describes what consent is not. Even then, it goes without saying that absence of consent from the victim is an essentialingredient to a charge of rape.[i]The consent must not be obtained by force, fraud or misrepresentation.[i]Apart from the various instances which the sections list as to what would not constitute consent; it is interesting to note that rape is still committed even where a girl who is under 14 years of age or of unsound mind consents."[i]

Whereas a male person under 12 years old is presumed incapable of having carnal knowledge under the Criminal Code Act, no such provision is made under the Penal Code Act. There is, therefore, nothing to stop the prosecution from charging a child over 7 years of age, for

example, for rape if it can be shown that he has attained a sufficient maturity of understanding to judge the nature and consequence of his act.[i]

In addition, the principle in the decision of *D.P.P. v Morgan*[i] is also applicable under the Penal Code Act. However, although a husband cannot commit rape on his wife,[i] he will be liable under section 83 of the Penal Code Act as an abettor, if the situation in *D.P.P. v Morgan*[i] were to occur, as the section provides that "where several persons are engaged or concerned in the commission of a criminal act each person may be guilty of a different offence or offences by means of that act." Also, in the *D.P.P. v Morgan*[i] type of case, if during the rape, the husband were to be around, he will be punished as a principal offender by virtue of section 90 of the Penal Code Act. Thus, actual presence when the act of rape is being committed and prior abetment by virtue of this section will be taken as having participated in the offence of rape. In *Peter v The State,*[i] it was held before the Federal Court of Appeal when applying section 90 of the Penal Code that once an abettor is found to be present at the commission of an offence he abetted, he automatically becomes a principal offender. The trial court must then convict such a person for the main offence and not for abetment.

It is clear that the provisions of the Criminal Code Act and the Penal Code Act applicable in Nigeria with regards to rape are not sufficient to tackle the ever-evolving phenomenon of the offence of rape; therefore it is imperative that these laws are amended in line with modern realties, to ensure justice for the citizenry.

As a result of the lacuna in the existing laws,human rights and women groups in Nigeria pushed for the passing of comprehensive legislation against gender-based violence; this resulted in the enactment of the Violence against Persons Prohibition Act, (VAPP Act) 2015,[i] which

proposed wide-ranging provisions of many aspects of violence, including violence against women, with the aim to transform the landscape of violence against women in Nigeria.[i]The Act provides for a range of offences which constitute violence; including but not limited to rape, physical injury, spousal battery, harmful traditional practices, intimidation and coercion. Amongst its innovative and progressive features is the definition of rape is now inclusive and gender-neutral. It provides that an offence of rape is committed if a person intentionally penetrates the vagina, anus or mouth of another person with any other part of his or her body or anything else; if the other person does not consent to the penetration or if the consent is obtained by force or means of threat or intimidation of any kind or by fear of harm.[i]It also provides for compensation for rape as well as for criminal sanctions.[i]

It is clear that the VAPP Act is innovative and a step in the right direction in the protection of women and other victims of violence; as it makes elaborate provisions for various forms of gender-based violence.[i] Rape is one of the most pervasive acts of gender-based violence. While it also affects men, anecdotal evidence suggests that Nigerian women and girls are disproportionately affected.[i] Before the enactment of VAPP Act, the offence of rape was principally governed by the Criminal Code, Penal Code and Criminal Procedure Code; and has been established; these laws are outdated and lacking in a plethora of ways and often requiring the prosecution to prove thatthere is carnal knowledge, penetration of the vagina, that such penetration was unlawful, there was no consent; and that testimony is independently corroborated[i]

The VAPP Act 2015 addresses these problems, and it supersedes all previous legislation on the same subject matter.[i]The definition does away with the language “carnal

knowledge."Thus, under the Act, the definition of rape, adopting clearer, simpler language, becomes more in tune with modern realities, more inclusive, and explanatory of consent.[i] The offence of rape has become inclusive against all genders. Victims of rape are no longer restricted to women and girls. Perpetrators can also be male or female. Moreover, penetration remains an important ingredient, however this now includes penetration of orifices other than the vagina, The offence is no longer limited to penile penetration - the use of "anything else" to penetrate constitutes the offence of rape.[i] Spousal or marital rape is now recognised under the Act. In this regard, it can be reasonably assumed that in the absence of an expressexclusion, any husband or wife, who acts in contravention of the above section, is guilty of the offence of rape and punishable accordingly. "The use of "any person" clearly includes either husband or wife. With these modifications, the Act has brought the definition of rape in line with modern day realities and increased the scope of legal protection for victims.[i] It is imperative to point out that section 1 which deals with rape, clearly recognises the requirement of compensation. It states that, the Court shall also award appropriate compensation to the victim as it may deem fit in the circumstance."[i] This is an innovative and progressive provision in the Nigerian context.

Notably, Section 45 of the Act provides that any offence committed or proceedings instituted before the commencement of the Act under the principal criminal legislation, that is, the Criminal Code, the Penal Code and the Criminal Procedure Code and any other law or regulation, which is applicable to violence, shall continue to be enforced under the Act.It thus removes the application of other legislation on offences, which it articulates. It also provides in the same section that the Act shall supersede any other provisions in the principal criminal legislation that deal with similar offences under the VAPP Act.

However, despite the progressive nature of the VAPP Act, its geographic scope is narrow.The Act provides that only the High Court of the Federal Capital Territory empowered by an Act of the National Assembly shall have jurisdiction to hear and grant any application brought under the Act.[i]This is attributed to the fact thatNigeria is a democratic state with a federal system of government. Legislative responsibilities are outlined in the Constitution, and in order to determine who bears the legislative responsibility on any particular issue in Nigeria, one must resort to the Constitution of the Federal Republic of Nigeria, 1999. In order to understand legislative prerogatives in regard to violence therefore, one must understand the constitutional provisions regarding violence.Violence clearly falls into the realm of criminal law. It is important to note that criminal law is, largely, a residual matter over which the states have power to make legislation exclusively.[i]

The VAPP Act legislates on clearly criminal matters, providing criminal penalties for offences that border on violence; as such it currently applies only to the Federal Capital Territory. It can therefore only be implemented, as things currently stand, in federal institutions throughout the country and in the Federal Capital Territory. From the foregoing, it would appear that the VAPP Act is of very limited relevance for the nationwide fight against violence against women in Nigeria. One could begin to wonder why women and civil society groups fought so hard for over a decade to see the Act passed into law if it would only apply to limited area and institutions in the country.[i] However, the VAPP Act has the potential to apply widely if and when it is adopted by States. Should it be adopted by States, it will override any existing laws on violence, including extant criminal law, as provided by the consequential amendment of sections of the Act.[i]

For the full effect of the Act to be felt in Nigeria, a new frontier for advocacy must be exploited, i.e. adoption by States. If adopted by states as is hoped, the VAPP Act's provisions have the potential to extend overarching protection against violence throughout the country; sadly only three states have adopted the Act.[i]

At the international level, rape has been essentially defined by the international criminal tribunals for Rwanda and the former Yugoslavia through three main cases. The first is the case of *Prosecutor v Akayesu* before the ICTR, in which the Trial Chamber (and then the Appeals Chamber) adopted a very broad and generic definition of rape.[i] The ICTR simply held that rape is "a physical invasion of a sexual nature, committed on a person under circumstances which are coercive."[i] While the International Criminal Tribunal for the former Yugoslavia (ICTY) seemed initially to follow the approach taken by the ICTR, it shifted to a more precise definition of rape in the *Furundžija case*.[i] Others would say that the ICTY did not radically depart from the ICTR definition but rather provided additional details on the constituent elements of acts considered to be rape.[i] After having noted that it was not possible to draw the elements of rape frominternational treaty law or customary law, the ICTY Trial Chamber conducted a comparative law analysis in order to deduce the "common denominators" of rape in the criminal law of major legal systems. It concluded that the objective elements (*actusreus*) of rape are:

i. the sexual penetration, however slight: a) of the vagina or anus by the penis of the perpetrator or any other object used by the perpetrator, or b) of the mouth of the victim by the penis of the perpetrator;
ii. by coercion or force or threat of force against the victim or third person.[i]

Under International Humanitarian Law, the Leiber Code was the first modern code of warand it expressly prohibited rape during armed conflict. It deemed rape a crime punishable by

death and gave a superior the right to kill on the spot a perpetrator of such acts of violence contrary to a given order.[i]Article 44 of the named code provided-

> All wanton violence committed against persons in the invaded country...all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier or an officer in public or in private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.[i]

In addition to the above, the Code recognized rape as one of the crimes punishable by all penal codes and for which a soldier could face death or severe punishment for committing.[i] Prohibition of rape was therefore one of the basic rules of war with severe penalties in as early as 1863.

Prohibition of rape under international humanitarian law is also recognized by the Common Article 3 of the Geneva Conventions which though does not expressly mention rape or other forms of sexual violence, it prohibits "violence to life and person" including cruel treatment and torture and "outrages upon personal dignity."[i]Further, Article 27 of the fourth Geneva Convention provides that "women shall be especially protected against any attack on their honour in particular rape, enforced prostitution or any form of indecent assault."[i] Article 76(1) of the Additional Protocol 1 of 1977 provides that "women shall be the object of special respect and shall be protected against rape, force prostitution and any other form of indecent assault."[i] Article 4(2)(e) of the Additional Protocol II of 1977 prohibits "outrages upon personal dignity in particular humiliating and degrading treatment, rape, enforcement prostitution and any form of indecent assault."[i]

In addition, rape, sexual slavery, enforced prostitution, force pregnancy, enforced sterilization or any other form of sexual violence of comparable gravity constitutes crime under the statute of the International Criminal Court as well as under the Statutes of the International Criminal Tribunal of the Former Yugoslavia and Rwanda.[i] Rape is also prohibited as a norm of customary international law applicable in both international and non-international armed conflict.[i]

It is imperative to note that the Rome statute adopted in 2002 outlined the various categories of crimes[i]but did not delve into the elements of the crimes. Consequently, a review of the statute[i] was done on at a conference in Kampala in June 2010 and resulted in the adoption of the Elements of Crimes which would assist the court in interpretation of the Rome Statute.[i] At the time the elements were adopted, the committee responsible had an opportunity to review and consider the ICTY and ICTR cases.Under the Elements of Crimes of the ICC, the basic elements of rape are the same, regardless of whether rape is prosecuted as a war crime or as a crime against humanity.[i] The elements of rape as a crime against humanity are outlined as follows-[i]

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.
2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
4. The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.[i]

On the other hand, the elements of rape as a war crime according to the ICC's Elements of Crimes are enumerated as follows[i]-

1. The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

2. The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

3. The conduct took place in the context of and was associated with an international armed conflict.

4. The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[i]

These elements were derived from parts of the ICTY and ICTR Procedural Rule 96[i] and *Akayesu, Furundzija*and *Kunarac*judgements but were broadened to be gender-neutral and cover situations not contemplated by the ICTY and ICTR. For instance, it allowed for prosecution of

varied forms of sexual violence by reference to sexual penetration by any part of the body or object.[i] In addition, the elements encompass the use of force or coercion as a fundamental element unlike the former chambers which required lack of consent.[i]

The ICC further gives broad latitude to the terms 'coercion' and 'force' in order to anticipate the wide range of circumstances arising in wartime.[i] Threats to a third party other than the victim will sufficiently suffice as evidence that the element of coercion have been proved. Inaddition, the ICC's definition recognizes that certain persons, due to age, mental or physical condition, or infirmity, are incapable of providing consent to sexual activity.[i]

The Elements of crime of the ICC do not include the *mens rea* but rather dwell on the *actusreus* which can be simply explained as that the perpetrator invaded the body of the victim sexually and that the invasion was committed by force. However, Article 30 of the Rome Statute of the ICC requires that "material elements are committed with intent and knowledge."[i] Therefore, to have the required *mens rea,* the perpetrator must (1) intend to invade the body of a person resulting in penetration, and (2) know that the invasion was committed through the use of force, threats, coercion, or by taking advantage of a coercive environment, or a person incapable of voluntarily consenting.[i] The ICC definition thus eliminates any inquiry into situations whereby due to incapacity genuine consent is impossible.[i] It does not explicitly require 'knowledge of lack of consent' it does provide a two-part *mens rea* requirement that allows for a mistake of fact defence.[i]

As a crime against humanity, the other thresholds that need to be met before rape can be prosecuted are that the attack was widespread and systematic and directed towards a civilian population. The *mens rea* of this element is that the perpetrator had knowledge of the attack. The Rome Statute[i] defines an attack directed against a civilian population as a course ofconduct

involving the multiple commission of acts contemplated against any civilian population pursuant to or in furtherance of a state or organizational policy.[i]

A civilian population on the other hand has been interpreted to mean groups identifiable by nationality, ethnicity or other distinguishing features.[i] Finally, a widespread attack implies that the attack took place over a large area while systematic implies that it was organized in nature of the violence and the improbability of its random occurrence.[i] These are circumstances that are often experienced in conflict setting, both national and international.

As a war crime, the other requisite elements are that the conduct was in context of an international armed conflict and the perpetrator was aware of the existence of the conflict.[i] This means that perpetrators can only be charged with war crimes where the conflicts are of an international character whereas crimes against humanity apply to both types of conflict. The *mens rea* of a war crime is simply the knowledge that an armed conflict exists at the time the act is conducted.[i]

Further, rape as an act of genocide is particular and its particularity matters.[i] This is ethnic rape as an official policy of war in a genocidal campaign for political control.[i] That means not only a policy of the pleasure of male power unleashed, not only a policy to defile, torture, humiliate, degrade, and demoralize the other side, which happens all the time in war; and not only a policy of men posturing to gain advantage and ground over other men.[i] It is specifically rape under orders. This is not rape out of control. It is rape under control. It is also rape unto death, rape as massacre, rape to kill and to make the victims wish they were dead.[i] It is rape asan instrument of forced exile, rape to make you leave your home and never want to go back.[i] It is rape to be seen and heard and watched and told to others; rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people.[i]

In the *Prosecutor V Akayesu*[i]for the first time in international law, an international court construed and applied the crimes of rape and sexual violence in an international context, finding that rape and sexual violence can constitute acts of genocide. Therefore, when committed with specific intent to destroy a group in whole or in part, rape and sexual violence constitute genocide.[i]The initial indictment against *Akayesu* had not charged rape and sexual violence, but during the early stages of the trial many witnesses recounted acts of rape and sexual violence.[i] The judges permitted an amendment to the indictment to add a count of a crime against humanity (rape). The amendment alleged that Tutsi women who had sought refuge at the *Bureau Communal* were repeatedly subjected to sexual violence and that *Akayesu* knew and encouraged these acts of sexual violence. Evidence adduced in support of these allegationswas overwhelming.[i]The Rwanda Tribunal found that there was a widespread and systematic rape of the Tutsi women with intention to destroy them.[i]The mass rape of Tutsi women resulted not only in the physical and psychological destruction of the woman, but, according to the court, their families and communities as well. The sexual violence was "an integral part of the process of destruction" The tribunal made it clear for the first time that genocide could be accomplished throughrape.[i]

4.1.3 Statistics of Sexual Atrocities on Women in Armed Conflicts in Africa and other Jurisdictions

Sexual violence has accompanied warfare in virtually every known historical era.[i] Rapes were routinely committed during the First World War.[i] In World War II, wide-spread and systematic occurrence of war rape by soldiers and civilians of women has been documented. The Judge Advocate General's Office reports that there were 971 convictions for rape in the U.S Military from January 1942 to June 1947.[i] The term "Comfort Women" is an euphemism for the

estimated 200,000 mostly Korean, Chinese, Taiwanese and Filipino women who were forced to work as prostitutes in Japanese military brothels during World War II.[i]

At the end of World War II, Red Army Soldiers are estimated to have raped around 2,000,000 German women and girls.[i] The magnitude of rape in Bosnian and Herzegovina has been described as "especially alarming."[i] It has been estimated that during the Bosnian war about 20,000 to 50,000 women were gang raped by soldiers in numerous "rape camps."[i] According to the Women's Group *Tresnjevka*, more than 35,000 women and children were held and raped in the Serb-run "rape camps."[i]

In the African context, during Rwandan genocide in 1994, hundreds of thousands of women and children (mostly Tutsi) were raped and or became victims of other forms of sexual violence.[i] Hence, the ICTR in its "landmark judgment in *Prosecutor v Akayesu*[i] held that rape constitutes genocide. For at least four years prior to the well-publicized massacre, Hutu militia began raping hundreds of thousands of Tutsi women. During the 100 days of genocide, both Tutsi and moderate Hutu women were attacked, but most prevalent victims were Tutsi. While the Rwandan government officially reported a total of 15,700 rape victims, UN Special High Commission on Human Rights reported in 1996 that at least 250,000 and 500,000 women and girls were violated, including children as young as two years old and elders in their seventies.[i] Researchers found that "Rape was the rule. Almost all Tutsi women were raped."[i] This was a country saturated with sexual assault.Hutu militia intentionally infected many of the Tutsi women with the HIV virus, AIDS, and other STDs.[i] In fact; the *genocidaire* organizers assembled AIDS-infected Hutu extremists, releasing them from hospitals specifically to form "rape squads."[i] Their mission was to cause a "slow and inexorable death" to enemy women and wipe out the Tutsi line of progeny.[i] The exact percentage of rape survivors is unknown, as the

stigma of rape runs deep within Rwandan society and many women waited for years, if ever, to report. However, of known rape survivors, 67 percent are HIV positive, and subsequently many of their children have been infected.[i]Further, rape impacted not only the women ravaged, but also their children and other family members who were forced to witness the acts themselves and, in many cases, the mutilation done afterward using machetes, boiling water and penetration with sticks.[i] These attacks were meant to further injure and shame the women and harm their loved ones. Children were also conceived through the rapes, many of whom were abandoned. One woman reportedly turned over her baby to the Ministry of Family and Promotion of Women, saying, "This is a child of the State."[i] Currently, 75 percent of Rwandans are under the age of 30, including those young adults who witnessed the atrocities and those conceived by rape.[i]

In Sierra-Leone, although the civil war ended in 2002, women in the country are still facing incidences of sexual and gender based violence.[i] Sexual and gender-based violence has also continued unflinchingly into the post-war years and is now morphing into the society's culture that it is understood and even accepted.[i] The influence of the civil war is apparent. The statistics are horrifying. Accordingly, in 2009, there were 927 reported cases of sexual abuse.[i]

Throughout the armed conflict in Sierra Leone from 1991 to 2001, thousands of women and girls of all ages, ethnic groups, and socioeconomic classes were subjected to widespread and systematic sexual violence, including individual and gang rape, and rape with objects such as weapons, firewood, umbrellas, and pestles.[i] Rape was perpetrated by both sides, but mostly by the rebel forces.[i] These crimes of sexual violence were generally characterized by extraordinary brutality and frequently preceded or followed by other egregious human rights abuses against the victim, her family, and her community.[i] Although the rebels raped indiscriminately irrespective

of age, they targeted young women and girls whom they thought were virgins[i]. Many of these younger victims did not survive these crimes of sexual violence.[i] Adult women were also raped so violently that they sometimes bled to death or suffered from tearing in the genital area, causing long-term incontinence and severe infections.[i] Many victims who were pregnant at the time of rape miscarried as a result of the sexual violence they were subjected to, and numerous women had their babies torn out of their uterus as rebels placed bets on the sex of the unborn child.[i]

Thousands of women and girls were abducted by the rebels and subjected to sexual slavery, forced to become the sex slaves of their rebel "husbands."[i] Abducted women and girls who were assigned "husbands" remained vulnerable to sexual violence by other rebels. Many survivors were kept with the rebel forces for long periods and gave birth to children fathered by rebels.[i] Some abducted women and girls were forcibly conscripted into the fighting forces and given military training, but even within the rebel forces, women still held much lower status and both conscripted and volunteer female combatants were assigned "husbands."[i]

The main perpetrators of sexual violence, including sexual slavery, were the rebel forces of the Revolutionary United Front (RUF), the Armed Forces Revolutionary Council (AFRC) and the West Side Boys, a splinter group of the AFRC. Human Rights Watch has documented over three hundred cases of sexual violence by the rebels; countless more have never been documented.[i] From the launch of their rebellion from Liberia in March 1991, which triggered the war, the RUF perpetrated widespread and systematic sexual violence.[i]

The UN Agencies estimated that more than 60,000 women were raped during the civil war in Sierra-Leone during 1991-2002; more than40,000 in Liberia from 1989-2003; and up to

60,000 in the former Yugoslavia 1992-2003; and at least 200,000 in the Democratic Republic of Congo (DRC) since 1998.[i]

In April 2010, the UN Special Representative for Sexual Violence in Conflict, Margot Wallström, described the Democratic Republic of the Congo (DRC) as "the rape capital of the world".[i]The conflict in the East of the DRChas been described as one of the most deadly conflicts that there has been since the Second World War.[i] According to the UNOffice for the Coordination of Humanitarian Affairs,rape and sexual violence are recurrent atrocities.[i]For example, in the conflict torn Kasai region, not only have hundreds of women been raped, but many rape survivors are then rejected by their husbands and families due to a belief that they carry stigma and bring misfortune.[i]

The rejection is doubly tragic for women who sacrificed themselves to undergo horrific assault to save the lives of their husbands and children from armed raiders, only to be later abandoned.[i] Some men have simply deserted their wives. Left without a choice after relations worsen post-rape, other women have been forced to abandon their matrimonial homes.[i]

The Sudanese wielded rape as a weapon of war. The Janjaweed militia aligned with Sudanese government and regularly violated women as the Darfur conflict spread to Chad.[i] Till date, rape as a weapon of war continues in Darfur with impunity.[i]A victim *Kajtouma Ahmed* cried softly as she fled Darfur, that armed men in uniforms attacked her village, shooting her 13 year-old son dead, burning her home and stripping and raping her.[i]

The prevalence of sexual violence within the Boko Haram crisis has been widely reported in humanitarian assessments, human rights reports and media coverage from the early days of the insurgency.[i]Boko Haram's abuses against women and girls, including abduction, forced conversion to Islam, physical and psychological abuse, forced labour, forced participation in

insurgency operations and forced marriage, rape, and other sexual abuse have inspired fear among local communities in north-east Nigeria and contributed to the group's notoriety, both within the region and globally.[i] However, while Boko Haram's violence against women and girls has been at the centre of public attention to the crisis, delivering protection and support for women and girls has been an on-going challenge in the humanitarian response.[i]

In January 2016, three UN Special Rapporteurs visited Maiduguri in Borno State on behalf of the Office of the High Commissioner for Human Rights (OHCHR), and reported widespread sexual abuse and other major protection concerns affecting internally displaced women and girls.[i]The prevalence of sexual abuse and exploitation of women and girls by civilian militias, members of the military and the national and state governments' emergency management cadres was also reported.[i]In October 2016, a Human Rights Watch report, highlighted sexual exploitation and abuse among IDP women and girls by camp officials.[i] A 17-year-old girl said that just over a year after she fled the frequent Boko Haram attacks in Dikwa, a town 56 miles west of Maiduguri, a policeman approached her for "friendship" in the camp, and then he raped her.[i]"One day he demanded to have sex with me," she said. "I refused but he forced me. It happened just that one time, but soon I realized I was pregnant. When I informed him about my condition, he threatened to shoot and kill me if I told anyone else. So I was too afraid to report him."[i]Another victim, a 16-year-old girl who fled a brutal Boko Haram attack on Baga, near the shores of Lake Chad, northern Borno in January 2015, said she was drugged and raped in May 2015 by a vigilante group member in charge of distributing aid in the camp.[i]

The Boko Haram conflict has led to more than 10,000 civilian deaths since 2009; the abductions of at least 2,000 people, mostly women and children and large groups of students,

including from Chibok and Damasak; the forced recruitment of hundreds of men; and the displacement of about 2.5 million people in northeast Nigeria.[i]

Further, other conflicts torn areas have recorded a plethora of sexual atrocities meted out to women, e.g. violence in the Niger Delta has been particularly intense in Ogoniland. The Ogoni people have been subjected to serious human rights violations, with members of the security forces being primarily responsible for the gender-based violence, including rape, sexual slavery and forced pregnancy, committed in Ogoniland between 1990 and 1998.[i]The harrowing accounts by victims demonstrate the profound and very long term physical, psychological and social consequences of rape: serious physical injuries, unwanted pregnancies, psychological trauma and rejection by families, including husbands, and communities.[i]For instance, Girls under 18 years were among those raped by the security forces in Ogoniland. Fatima, 10 years old at the time, described how she had been repeatedly raped and held in sexual slavery for five days in April 1994.[i] Their Suffering is compounded by the denial of any form of justice or reparations.[i]

In Odi, Bayelsa State, Women's Aid Collective (WACOL)recorded over 50 allegations of rape by the security forces in Odi in 1999.[i]In February 2006 Amnesty International interviewed some of the women who had been raped, abducted and forced into sexual slavery; many continue to struggle with the physical and psychological consequences.[i] For instance Joy, a 35-year-old farmer, described how her husband had left her after she was held in conditions amounting to sexual slavery-

> Before I come back home my older daughter was crying about the coming of Federal troops to destroy Odi. My second daughter was killed and they took the third one. My mother was crying with fear. So the army people captured me and bring me to where they were staying. Three of them used me. They kept me for a week. After the government intervention [they] let me go. When I came back everything was burnt down. My daughter died. In my place when you are used by another man your husband leaves you. He left me since 1999. I went to see a doctor at the hospital one month after. I had health problems: my stomach was swelling. He gave me drugs. I did not do an examination for rape. The government did nothing. I told the chief of the community, and he did not do anything.[i]

Additionally, there are reports that eventswhich took place in Odioma, Bayelsa State in February 2015 recorded a plethora of sexual atrocities and violations by security forces.[i]A 23-year old woman told Amnesty International in February 2006 how the security forces had terrorized the community during the raid in February 2005[i]-

> We were all at home. Then we run to the bush. I slept there with my baby. The militaries slept with young ladies and married ones. They came at night in the bush; they were looking for men but they could not find them. They beat us [women and children] they raped some women. They tied us under the rain, we did not eat for about five days then they went back to the community. They turned [the women's] clothes, beat them, and sleep with them. They tried with me but I was with a baby that saved me. If the husband was there they do it in front of him. They came back every night.[i]

4.1.4 Aftermath of Sexual Violenceon Women in Armed Conflicts

Sexual violence, whether committed by a state actor or a non-state actor – constitutes a violation of women's rights and fundamental freedoms.[i] It violates the rights of women and girls to be free from torture, to mental and physical integrity, to liberty and security of the person, and prevents

enjoyment of rights such as the right to health, employment and freedom of expression and, in some cases; it denies them the right to life.[i]

Women who have been raped suffer from a wide spectrum of debilitating effects in addition to Post Traumatic Stress Disorder (PTSD) and depression which may often go unnoticed.[i] Effects of rape can include both physical trauma as well as deep psychological trauma.[i] Although rape victims commonly report injuries and issues with their reproductive health after the sexual assault, the most common and lasting effects of rape involve mental health concerns and diminished social confidence, which may lead to self-blame, anxiety and stress, depression, flash-backs (memories of rape as if it is taking place again), borderline personality disorder, sleep disorders, eating disorders, dissociative identity disorder, guilt, distrust of others-uneasy in everyday social situations, anger, feelings of personal powerlessness and in worst cases, suicide.[i]It is apparently clear from the discourse in this study that the effect of sexual violence can really be very devastating both from the individual and from the society perspectives. Sexual violence is therefore about the cruelest cancer attacking mankind today.

4.2 Sexual Violence versus Gender-Based Violence

In contradistinction with rape and sexual violence, there is no internationally agreed-upon definition of "gender-based violence."[i] As a consequence, many different definitions of this term can be found.

The Committee on the Elimination of Discrimination Against Women (CEDAW Committee) defined gender-based violence in its General Recommendation No. 19 in 1992 as "violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty."[i] While this definition is broad in

terms of acts covered, it seems limitative regarding the persons covered. Gender based violence is described as a form of discrimination against women exclusively.[i]

This restriction may be due to the mandate of the CEDAW Committee, or perhaps to the fact that, in practice, women and girls are (or at least are perceived as) the persons most affected by gender-based violence because of the subordinate status of women and girls *vis-à-vis* men and boys in a number of societies.[i]

Nowadays, the term "gender-based violence" is usually understood as covering not only women and girls but also men and boys. According to the Inter-Agency Standing Committee (IASC),[i] although the term "gender-based violence" is often used interchangeably with the term "violence against women", men and boys may also be victims of gender-based violence especially sexual violence[i] based on socially determined roles, expectations andbehaviours linked to ideas about masculinity. Thus, the IASC provides for a broad and often-used definition of gender-based violence as "an umbrella term for any harmful act that is perpetrated against a person's will, and that is based on socially ascribed (gender) differences between males and females."[i] Similarly, the ICRC defines gender-based violence as an "overall term, including sexual violence and other types of gender-specific (violence that are) not necessarily sexually-based."[i] In turn, the ICRC defines gender as

> culturally expected behavior of men and women based on roles, attitudes and values ascribed to them on the basis of their sex, whereas the term "sex" refers to biological and physical characteristics of a person. Gender roles vary widely within and between cultures, and depend on the particular social, economic and political context.[i]

From these definitions and examples, one can deduce first that gender based violence is generally broader than sexual violence. Indeed, gender-based violence includes not only acts of sexual violence, such as rape, sexual mutilation (e.g. breast mutilations) and other forms of sexual abuse, but also acts of a non-sexual nature such as certain forms of domestic violence (e.g. battery) or honour killings (e.g. dowry deaths). Second, what distinguishes "gender-based violence" from any other form of violence is not the act in itself (e.g. killing, rape, battery, mutilation) but that it is "gender-specific."

In other words, the violent act is committed "based on socially ascribed differences between males and females or because of the gender of the victim. For instance, if a person has been murdered because he or she was transgender or homosexual, this is a gender-based crime. In this sense, sexual violence can be seen as sometimes broader than gender-based violence.[i] A detainee may be raped in detention as a method of torture independently of his or her gender or socially ascribed role in society. The argument has sometimes been made, however, that sexual violence is always a form of gender-based violence because the links between sex and gender are too intricate to be distinguished.[i]

4.3 The Prohibition of Sexual Violence under International Humanitarian Law

International Humanitarian Law treaties have sometimes been criticized because they allegedly do not take appropriately into account the needs of women in armed conflicts and because they do not prohibit and criminalize sexual violence in a sufficiently robust way.[i] It is submitted that this criticism is excessively harsh. While the Geneva Conventions of 1949 and their Additional Protocols of 1977 may not be perfect in their approach to sexual violence, they provide the necessary protections from and prohibitions against rape and other forms of sexual violence. This is done in different ways: first, rape is expressly prohibited; and second, the prohibition of rape

and other forms of sexual violence is encompassed in less explicit provisions such as the prohibitions against cruel treatment and torture, outrages upon personal dignity, indecent assault and enforced prostitution, and those intended to ensure respect for persons and honour.[i]

Rape was already expressly prohibited in theLieber Code of 1863. Its Article 44 provided that:

> All wanton violence committed against persons in the invaded country … all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense. A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.[i]

The 1929 Geneva Convention on prisoners of war provides that prisoners of war are entitled to respect for "their persons and honour" and that "women (prisoners of war) shall be treated with all consideration due to their sex."[i]From an early stage, IHL treaties showed an awareness of sexual violence during armed conflict and aimed at preventing it, even though, as products of their time, they did not address it in express terms.

In contemporary IHL treaties, rape and other forms of sexual violence are prohibited in both international and non-international armed conflicts. In international armed conflicts, the Third Geneva Convention of 1949 continues to provide that prisoners of war are "in all circumstances entitled to respect for their persons and honor" and that "women shall be treated with all regard due to their sex."[i] The Fourth Geneva Convention is more explicit and provides that civilian "women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault."[i] While the Fourth Geneva Convention expressly addresses rape and other forms of sexual violence, this phrasing has been

criticised because rape and sexual violence seem to be characterized as an intrusion on the victim's honour and thus as not reflecting the seriousness of the offence, i.e. an attack against the physical and psychological well-being of the victim.[i] This wording indeed seems euphemistic and old-fashioned today, but the notion of "honour" had a completely different connotation at the time. While they seem weak and symbolic today, notions of honour (as evidenced by the principle of chivalry, for instance) were considered highly important constraints in war and were at the core of IHL rules in 1949 and before.[i] In any case, and because of these fundamental changes of values and societal norms, the connection between sexual violence and honour is less present in more recent IHL treaties.[i]

Additional Protocol I to the Geneva Conventions (AP I), of 1977, provides that "outrages upon personal dignity, in particular humiliating and degrading treatment, enforced prostitution and any form of indecent assault", are "prohibited at any time and in any place whatsoever, whether committed by civilian or by military agents."[i] Two additional provisions protect specifically women "against rape, enforced prostitution and any other form of indecent assault" and children "against any form of indecent assault."[i]

In non-international armed conflicts, Article 3 common to the four Geneva Conventions which has been described by the International Court of Justice (ICJ) as reflecting "elementary considerations of humanity" applicable in all types of armed conflicts[i]implicitly also prohibits sexual violence when it outlaws "violence to life and person, in particular … mutilation, cruel treatment andtorture" as well as "outrages upon personal dignity, in particular humiliating and degrading treatment." It is complemented by Additional Protocol II (AP II) of 1977, which, where and when applicable, prohibits, in the provision on fundamental guarantees, "outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced

prostitution and any form of indecent assault" for "all persons who do not take a direct part or who have ceased to take part in hostilities" (i.e. civilians and persons hors de combat).[i]As such, rape and other forms of sexual violence are implicitly or explicitly prohibited in common Article 3, as well as in AP II.

To the extent that rape and other forms of sexual violence amount to a serious violation of these provisions, there is no doubt that they also amount to war crimes when committed in non-international armed conflicts.[i] In the ICTY Statute, rape and other forms of sexual violence are not mentioned among the crimes that can be prosecuted when committed in a non-international armed conflict, i.e. in Article 3 on violations of the laws or customs of war.[i]This did not impede the ICTY, however, from considering rape and other forms of sexual violence as constituting war crimes in non-international armed conflicts. As is well known, Article 3 of the ICTY Statute has been interpreted as a residual clause covering any serious violation of IHL not covered by other articles of the Statute.[i]

The conditions for determining which violations fall within Article 3 of the ICTY were elaborated in the *Tadić case* (i.e. the famous four "Tadić conditions").[i] On this basis, in the *Kunarac case,* for instance, the three accused were charged with and found guilty notably of violations of the laws and customs of war in the form of rape and torture and outrages upon personal dignity (for other forms of sexual violence) in the context of thenon-international armed conflict in Bosnia and Herzegovina between 1992 and 1993.[i]This list implies that a certain threshold of gravity must be reached, but it is open-ended, thus leaving some room for jurisprudential interpretations.[i]

It is clear that rape and other forms of sexual violence do amountto grave breaches of IHL if committed against protected persons in the context of andassociated with an international

armed conflict, when these acts fall into thecategories of “torture or inhuman treatment” or “willfully causing great sufferingor serious injury to body or health”. In the ICRC Customary IHL Study, theCommentary to Rule 156 (“Definition of War Crimes”) explains that:

> Although rape was prohibited by the Geneva Conventions, it was not explicitly listed as a grave breach either in the Conventions or in Additional Protocol I butwould have to be considered a grave breach on the basis that it amounts toinhuman treatment or willfully causing great suffering or serious injury tobody or health.[i]

Additionally, the participants in the International Conference for the Protection of War Victims,held in Geneva from 30 August to 1 September 1993, went as far as declaring that“acts of sexual violence directed notably against women and children … constitutegrave breaches of international humanitarian law.”[i]

4.3.1Conflict-Related Sexual Violence as a Violation of International Humanitarian Law

Sexual violencecan be committed in peacetime, or during armed conflicts or other situations of violence. It can be committed by a variety of actors for a variety of purposes. Even when committed in times of armed conflict, sexual violence is not necessarily “conflict-related.”[i]

The term “conflict-related sexual violence” is not used in IHL treaties. It is however increasingly used and sometimes understood as a synonym of sexual violence that amounts to an IHL violation.[i] Various actors define “conflict-related sexual violence” differently. The UN, for instance, describes “conflict-related sexual violence” as

> sexual violence, that … occurs in conflict or post-conflict settings or othersituations of concern (e.g. political strife) and that … has a direct or indirect nexus with the conflict or political strife itself, that is, a temporal, geographicaland/or causal link. In addition to the international character of the suspected crimes (which can, depending on the circumstances, constitute war crimes, crimes against humanity, acts of genocide or other gross violations of human rights), the link with conflict may be evident in the profile and motivations of the perpetrator(s), the profile of the victim(s), the climate of impunity or Statecollapse, cross-border dimensions and/or the fact that they violate the terms of a ceasefire agreement.[i]

If one accepts such a wide definition of "conflict-related sexual violence"which is understandable from a humanitarian and operational perspective, it is clear that not all conflict-related sexual violence amounts to a violation of IHL and a war crime.[i]IHL applies only in armed conflict situations and to acts that have a direct, or at least sufficient, link or nexus to an armed conflict.[i]

Conflict situations and act with nexus with the armed conflict is not always so easy to determine. It is not because IHL is applicable at a given place and time that all acts occurring in this context are governed by IHL.[i] The ICTY in *Kunarac's case*clarifies that:

> What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime, but the existence of an armed conflict must, at a minimum, have played a substantial part in the perpetrator's ability to commit it, his decision to commit it, the manner in which it was committed or the purpose for which it was committed. Hence, if it can beestablished, as in the present case that the perpetrator acted in furtherance of or under the guise of the armed conflict it would be sufficient to conclude that his acts were closely related to the armed conflict.[i]

The formula "under the guise of the armed conflict" has sometimes been criticized as overly broad. The ICTR has however usefully explained that "the expression 'under the guise of the armed conflict' does not mean simply 'at the same time as an armed conflict' or 'in any circumstances created in part by the armed conflict.[i] The court gave the example of a non-combatant taking advantage of the lessened effectiveness of the police in conditions of disorder created by an armed conflict to murder a neighbour he had hated for years, and affirmed that this would not, without more, constitute a war crime. Contrariwise, the killings of civilian Tutsis by military officials and civilians alike were considered as having a nexus with the armed conflict taking place at the time between Rwandan government forces and the Rwandan Patriotic Front (RFP, an organized non-State armed group consisting of Tutsis), and thus as amounting to war crimes. The fact that the Tutsi ethnic minority was identified with the RFP, the participation of military officials in the killing and the fact that the identification of infiltrators from the RFP served as an alleged motive for the killings of Tutsis were considered as indicia for the nexus.[i]

Similarly, the ICC Elements of Crimes provide that for a war crime to exist, it must be committed "in the context of and associated with" an armed conflict.[i]Conflict-related sexual violence must thus be committed by a person (whether combatant or civilian) in the context of and associated with an armed conflict in order to amount to a war crime under the Rome Statute. The Rome Statute formulation does not offer more precision compared to the case law of the international criminal tribunals for the former Yugoslavia and Rwanda.[i] It is difficult, however, to define in abstract the precise criteria to determine the existence of a nexus that would offer an adequate response to all possible scenarios. Such a determination needs to be made on a case-by-case basis.

4.3.2 Sexual Violence as a Weapon or Method of Warfare

For centuries, wartime rape of women was considered an inevitable consequence of war, necessary to boost soldier's morale, and was lumped together with property crimes. Later, rape was considered a crime against family honour. Not until the last half century was rape understood to be an offence against the woman, against her dignity, instead of against her family's or her husband's honour.[i]

Sexual violence in armed conflict, is sometimes qualified as a "weapon of war"or as a "method of war".[i] Under IHL, a generally accepted definition of "weapon" does not exist, even though some attempts have been made to circumscribe the notion.[i] A brief analysis of different definitions adopted at the national and international levels reveals the existence of two common elements in the understanding of the notion: "weapon" refers toan object, material, instrument, mechanism, deviceor substance that is used to kill, injure, damage, threaten or destroy.[i] If such a definition is accepted, it is clear that the characterization of rape or other forms of sexual

violence as a weapon of war is inaccurate from a strict IHL perspective. Instead, sexual violence is an unlawful and criminal behaviour.[i]

In contrast, a "method of warfare" is generally understood as the way in which a weapon is used,[i] or as any specific tactical or strategic way of conducting hostilities that is intended to overwhelm and weaken the adversary.[i] Sometimes, sexual violence is resorted to as a tactical or strategic way of overwhelming and weakening the adversary, either directly, or indirectly by hurting the civilian population perceived as supporting the enemy.[i] This is particularly the case when it is carried out in a systematic manner and covered by the chain of command. It is in this sense that sexual violence may sometimes have been referred to as a "method of warfare."

In practice, sexual violence can only be committed against persons who are under the control of the perpetrator. Any type of violence, such as sexual violence committed against persons in the hands or power of the enemy is absolutely prohibited by IHL rules on the treatment of persons.[i]The characterizations of rape as a "weapon of war" or a "method of warfare" are nowadays very common, but these terms are usually resorted to in a non-technical way to attach a particular stigma to the crime of rape and to indicate that rape is not just a by-product of war, that it is not just committed opportunistically or randomly, but may be part of a strategy.[i] For instance, in the Democratic Republic of Congo, rape was employed as a weapon of war, used deliberately with the intention of destroying communities at the roots and not entirely for the sexual and perverse pleasure of the soldiers.[i]

4.4 The Prohibition of Sexual Violence under Human Rights Law

Human rights law applies at all times.It is thus necessary to briefly analyze humanrights rules in the context of sexual violence and how it complements IHLin times of armed conflict.

Surprisingly, most human rights treaties, universal and regional, do not containexplicit or specific prohibitions of sexual violence.[i] Even the Convention on theElimination of Discrimination Against Women (CEDAW) of 1979 does not contain any provision to that effect. Only "traffic in women and exploitation of prostitutionof women" is explicitly prohibited.[i]IHL treatiesappear to be more explicit, specific and precise than humanrights treaties in general as regards the prohibition of sexual violence.

However, there are rare exceptions. For instance, at the universal level, the Convention on the Rights of the Child of 1989 provides that States Parties must protect children from all forms of sexual exploitation and sexual abuse, including through the adoption of appropriate legislative, administrative, social and educational measures.[i] States Parties must also prevent particularly:

a) The inducement or coercion of a child to engage in any unlawful sexual activity;
b) The exploitative use of children in prostitution or other unlawful sexual practices;
c) The exploitative use of children in pornographic performances and materials.[i]

The State thus has an obligation to prevent and protect children from being sexually abused not only by State actors, but also by private actors.

At the regional level, the Inter-American Convention on the Prevention,Punishment and Eradication of Violence against Women of 1994 prohibits"violence against women", which includes not only physical and psychologicalbut also sexual violence, whether it is committed in the public or private sphere.[i]This Convention drew its inspiration from the non-binding United NationsDeclaration on the Elimination of Violence against Women of 1993, whichcontains

similar provisions. The Protocol to the African Charter on Human andPeoples' Rights of Women in Africa (Maputo Protocol) of 2003 prohibitsviolence against women in a similar way and contains a number of provisionsaimed at protecting women from sexual violence.[i] One provision dealsspecifically with armed conflicts and provides that:

> States Parties undertake to protect asylum seeking women, refugees, returneesand internally displaced persons, against all forms of violence, rape and otherforms of sexual exploitation, and to ensure that such acts are considered warcrimes, genocide and/or crimes against humanity and that their perpetratorsare brought to justice before a competent criminal jurisdiction.[i]

In the European system, there is no particular treaty on sexual violence or on the protection of women. In 2002, however, the Council of Europe adopted a recommendation on violence against women which defines violence against women as including rape and other forms of sexual violence and which notablyrecommends that Member States "penalize rape, sexual slavery, forced pregnancy, enforced sterilization or any other form of sexual violence of comparable gravityas an intolerable violation of human rights, as crimes against humanity and,when committed in the context of an armed conflict, as war crimes".[i]

Although not treaties, there are a number of other non-bindinghuman rights documents that refer to the issue of sexual violence. TheBeijing Declaration and Platform for Action, adopted at the Fourth WorldConference on Women, deserves a special mention as it identified already in1995 the themes of "violence against women" and "women and armed conflict"as critical areas of concern requiring urgent action, and highlighted that "acts ofviolence against women include violation of the human rights of women insituations of armed conflict, in particular … systematic rape, sexual slavery andforced pregnancy."[i]

4.4.1 Sexual Violence as Torture or Cruel, Inhuman or Degrading Treatment or Punishment

The fact that most human rights treaties do not contain a specific prohibition against sexual violence does not mean that they do not prohibit rape and other forms of sexual violence. The non-derogable prohibition of torture or cruel, inhuman or degrading treatment or punishment contained in all general human rights treaties provides a strong basis to prohibit virtually all forms of sexual violence at all times.[i]

Torture is defined in the UN Convention Against Torture (CAT) as

> any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.[i]

Rape can be presumed as always causing "severe pain or suffering."[i]It is moreoveralways "intentionally inflicted". It may have a specific purpose such as obtaininginformation and probably always has the purpose of coercing the victim. Thislatter coercive element can be seen as inherent in armed conflict situations.[i]Lastly, the CAT requires that torture be committed with the more or less directinvolvement of a public official. This is not to say, however, that torture by aprivate individual does not raise human rights questions. States have a duty toprotect individuals from torture by private individuals.[i]

The Special Rapporteur against Torture had already noted in 1986 thatsexual abuse is one of the various methods of physical torture.[i] The case law ofhuman rights bodies provides a number of concrete examples where sexualviolence has been considered as amounting to torture or cruel, inhuman ordegrading treatment or punishment. In particular, rape has often been consideredas torture. The Inter-American Commission on Human Rights (IACHR) considered that the rape by aPeruvian soldier of a woman who was suspected of belonging to a subversivegroup and whose husband had been abducted by the Peruvian army amounted totorture in the sense of the Inter-American Convention to Prevent and PunishTorture because it was committed intentionally by a State official with thepurpose of punishing her personally and intimidating her.[i]Additionally, the IACHR relied inter alia on IHL to support its argument thatcurrent international law establishes that sexual abuse committed by members of security forces, whether as a result of a deliberate practice promoted by theState or as a result of failure by the State to prevent the occurrence of thiscrime, constitutes a violation of the victims' human rights, especially theright to physical and mental integrity.[i]The case law of the international criminal tribunals for the former Yugoslavia andRwanda confirms that rape amounts to torture.[i]

Additionally, not only rape but also other forms of sexual abuse can amount to torture or cruel, inhuman or degrading treatment or punishment. For instance, the IACHRconsidered that forcing someone to witness the rape of close relatives constitutes"a form of humiliation and degradation that is a violation of the right to humanetreatment."[i]The Committee against Torture held that imposing involuntary sterilization is a cruel treatment.[i]

Further, the United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment explicitlyimposes a duty to proceed to a prompt and

impartial investigation wherever there are reasonable grounds to believe that an act of torture has been committed.[i]

4.4.2The Interpretive Value of Human Rights Treaties for International Humanitarian Law as regards Sexual Violence

The definition of torture, cruel, inhuman or degrading treatment or punishment under human rights law, and the numerous examples of human rights case law dealing with rape and other forms of sexual violence as a form of torture and other ill-treatments, are useful not only when interpreting these concepts under human rights law, but also when doing so under IHL and international criminal law.[i] In the *Kunarac's case*, for instance, the Trial Chamber of the ICTY highlighted that IHL does not contain any definition of torture.[i] It thus referred to human rights law to define "torture" under both Articles 3 (violation of the laws and customs of war) and 5 (crime against humanity) of the ICTY Statute. Importantly, the Trial Chamber highlighted that:

> Because of the paucity of precedent in the field of international humanitarianlaw, the Tribunal has, on many occasions, had recourse to instruments andpractices developed in the field of human rights law. Because of theirresemblance, in terms of goals, values and terminology, such recourse isgenerally a welcome and needed assistance to determine the content ofcustomary international law in the field of humanitarian law.[i]

In brief, even if the definition of torture and of rape as torture or otherinhuman or degrading treatment is not exactly the same under human rights law, IHL and international criminal law, it is clear that the definitions providedunder human rights law are of highly important interpretive value.[i]

4.5 Sexual Violence as a Crime against Humanity and an Act of Genocide

In armed conflict situations, not only war crimes can be committed but also crimes against humanity and acts of genocide.[i] It is therefore necessary to analyze whether rape and other forms of sexual violence can give rise to crimes against humanity and acts of genocide. If the answer is positive, this means that even acts of sexual violence that are not directly linked to the armed conflict can constitute international crimes.

The post-Second World War Control Council Law No. 10 was the firstinternational legal instrument that expressly included rape in the list of crimes against humanity.[i] It was followed by the ICTR Statute[i], the ICTY Statute[i] and the ICC Statute.[i]The latter added to the list as sexual acts constituting crimes against humanity: "sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity."

To amount to a crime against humanity, sexual crimes must however be committed as "part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack."[i] In other words, there must be a policy or a practice of committing crimes that are tolerated or condoned by a government or *de facto* authority. An isolated rape will be difficult to portray as a crime against humanity. The *Kunarac case* can be cited as a case in point in which rape and other forms of sexual violence amounted to a crime against humanity.[i] The accused members of either the Bosnian Serb Army or of Serb forces were convicted for crimes against humanity in the form of rape, torture and enslavement because they took Muslim women and girls on a regular basis, rapedthem and kept them in servitude in the context and furtherance of the ethnic cleansing of the Focaarea.[i]

Sexual violence can even amount to an act of genocide when committedwith intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such.[i] Rape and other forms of sexual violence can fall into different categories of acts of genocide, in particular "causing serious bodily or mental harm to members of the group", "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part" or "imposing measures intended to prevent births within the group."[i]

The most famous case in which sexual crimes were considered as acts of genocide is the *Akayesu case*.[i] Jean-Paul Akayesu, bourgmestre of Taba commune in Rwanda from April 1993 to June 1994, was convicted for crimes against humanity and for acts of genocide, notably because he knew that members of the Interahamwe had systematically committed rapes and other forms of sexual violence against Tutsi girls and women, he took no measures to prevent or to punish the perpetrators, and he ordered, instigated and aided and abetted sexual violence.[i] The Trial Chamber highlighted:With regard, particularly, to…rape and sexual violence, the Chamber wishes to underscore the fact that in its opinion, they constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such. Indeed, rape and sexual violence certainly constitute infliction of serious bodily and mental harm on the victims and are even, according to the Chamber, one of the worst ways of inflicting harm on the victim as he or she suffers both bodily and mental harm. In light of all the evidence before it, the Chamber is satisfied that the acts of rape and sexual violence described above, were committed solely against Tutsi women, many of whom were subjected to theworst public humiliation, mutilated, and raped several times, often in public, in the Bureau Communal premises or in other public places, and often by more than one assailant. These rapes resulted in physical and psychological destruction of Tutsi women, their families and their communities. Sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole. The rape of Tutsi women was systematic and was perpetrated against all Tutsi

Accordingly, rape and other forms of sexual violence can also amount to genocide.

4.6 The Discrepancy Between the Law and the Facts

Rape and other forms of sexual violence are not only violations of human rights law and IHL entailing State responsibility, they can also amount to international crimes and, as such, entail individual criminal responsibility.

The prohibition of rape and other forms of sexual violence is one of the areas where IHL, human rights law and international criminal law go in the same direction, complementing and reinforcing each other. It is fascinating to see how frequently human rights bodies and the international criminal tribunals cite each other in order to reinforce their analysis in the field of sexual violence. For instance, in the *Delalić case*, the ICTY cited the ECtHR and the IACHR among other human rights bodies in order to conclude that rape amounts to torture.[i] In the *Pérez v. Mexico case*, the IACHR notably cited the ICTY and the ECtHR for the same purpose.[i] The latter, for instance, referred to the ICTY findings in the context of the *M.C. v. Bulgaria* case dealing with the alleged rape of a 14- year-old girl by two men, to reject force as a necessary element of rape and to conclude that any sexual penetration without the victim's consent constitutes rape.[i] This phenomenon of exchange between the various branches of international law has been called "cross-fertilization" by certain authors.[i]

On this basis, and as demonstrated in the previous sections, it can safely be said that the prohibition and criminalization of rape and other forms of sexual violence at the international level is strong and fairly adequate. This is not to say that international law is perfect in this regard, as some legal uncertainties always remain; for instance, is there a lower threshold for an act to amount to sexual violence? When does sexual violence committed during an armed conflict amount to a war crime? What is the lower threshold of gravity for sexual violence to

constitute a serious violation of IHL? Should the notion of rape as torture be interpreted in the same way under human rights law, IHL and international criminal law?[i] These grey areas have a rather limited impact in practice.[i]

One may think that even though State practice and international case law have clarified a number of issues, it would still be useful to have a new binding treaty assembling these evolutions or integrating IHL, human rights and internationalcrimes pertaining to sexual violence.

Given the already existing strong international legal framework, the lack of appetite among States for new treaties nowadays and the inherent risk that every treaty-making exercise entails (i.e. opening for negotiation points which were solved through case law and other practice, thus jeopardizing the existing legal framework), it is unlikely that such an enterprise would bring more benefits than costs.[i]

That being said, there is a shocking discrepancy between the prohibition and criminalization under international law of rape and other forms of sexual violence and the prevalence on the ground of such crimes in situations of armed conflict.[i] It is submitted, however, that this discrepancy cannot be explained by the existence of a gap or lack of clarity in international law. What is urgently needed are not more international law rules but rather a better implementation of existing rules at the domestic level and effective prosecutions of perpetrators of sexual crimes at the domestic and international levels.

The importance of the implementation of existing laws cannot be overemphasized, as these laws however adequate and robust are dead if they are not properly implemented on all levels.Eliminating sexual violence in armed conflicts is an ambitious order; some may even call

it a utopian project. States and humanitarian actors must not capitulate however, as sexual violence is neither an inevitable nor an inherent component of armed conflicts.

4.7 Sexual Exploitation and Abuse in Peacekeeping Missions

The UN defines sexual exploitation as "any actual or attempted abuse of a position of vulnerability, differential power, or trust, for sexual purposes, including but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another", and sexual abuse as "the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions"[i]Based on this definition, the UN considers sexual exploitation as actions that include peacekeeperinvolvement in transactional sex and in sexual violence.[i]

The sexual exploitation (SEA) and abuse of women and children in various war-torn countries is unfortunately not unheard of in our society, and goes back hundreds, if not thousands of years.[i] However when it is done by the hands of the very people that supposedly came to help, in this case the UN peacekeeping personnel, it is a rather new but persistent criminal phenomenon during peacekeeping missions. Exposure to gruesome acts of sexual violence makes women and children in conflict-affected areas some of the most vulnerable groups of people in the world and in dire need of protection. It is all the more unconscionable then, when the abuse is perpetrated by UN peacekeepers deployed in missions whose mandate is to protect them.[i]

Although reports of sexual abuse or misconduct by U.N. peacekeepers or civilian personnel first surfaced more than a decade ago,[i] the international media paid scant attention to such allegations. However, theshocking acts of abuse of the U.N. peacekeepers in Sierra Leone, Guinea, and Liberia were widely reported in the press.[i] This negative publicity, coupled with

intensive press coverage of other areas, such as the oil-for food scandal, has caused the UN and many of its Member States to urge reform and increased accountability of U.N. military and civilian personnel implicated in violations of human rights.[i]

The first publicly documented cases of SEA trace back to the 1990s to UN peacekeeping missions in Bosnia and Herzegovina, Kosovo, Cambodia and Timor Leste.[i]Abuses included sexual exploitation of children, pornography, and sexual assaults, "but it was not until the widespread allegations of abuse emerged in the DRC in mid-2004 that numerous high-level UN officials responded to the charges."[i]Secretary-General Annan acknowledged that acts of gross misconduct had clearly taken place stating-

> This is a shameful thing for the United Nations to have to say, and I am absolutely outraged by it…I have long made it clear that my attitude to sexual exploitation and abuse is one of zero tolerance, without exception, and I am determined to implement this policy in the most transparent manner.[i]

Ever since then, cases of alleged abuse have occurred quite frequently in various missions and countries around the world, and despite the UN's zero tolerance policy and explicit messaging against SEA, sexual exploitation and abuseby peacekeepers is a major problem for peacekeepingmissions.[i]

The recurrent occurrence of sexual exploitation in peacekeeping operations is a major problem for many reasons. Engaging in such practice is a gross human rights violation on the part of peacekeepers thatleaves individual survivors traumatized. In addition tothe obvious physical and psychological trauma inflictedon the survivors, it undermines the credibility and effectiveness of the peacekeeping missions and creates distrust among the local people and the peacekeeping personnel, severely harming the country's development towards a functioning civil

society.[i] It contributes to the spreading of sexually transmitted diseases in the area, and to the significantrise in prostitution during and after the missions stay and hinders the promotion of gender equality.[i] Third, it creates new problems in the area, for example "peacekeeper babies" as the UN calls them, meaning babies that are born from sexual encounters with local girls and women, who are then left to taking care of them alone, with no support from the fathers, not even acknowledgement of paternity.[i]

If peacekeepers are supposed to promote genderequality, as a part of enhanced mandates that invoke UNSecurity Council Resolution (UNSCR) 1325, then SEAsignificantly hampers these efforts. In many multidimensionalmissions, a large component of the peacebuildingactivities involves promoting gender equality through theUNSCR 1325 mandate[i] which means that if peacekeepingpersonnel are involved in activities that violategender equality, locals may not take these programs seriously.[i]

Moreover, such behavior and activity only serve toperpetuate patriarchal structures within the host country.For example, there is anecdotal evidence that this behaviorby peacekeepers may foster the growth of an illicitsex industry and its associated problems.[i] In order for thepromotion of gender equality to have any effect, peacekeepersmust therefore lead the way by example.

The UN's record on SEA is inconsistent.[i]As has been stated, allegations aboutpeacekeepers' involvement in widespread sexual misconductinitially emerged in the UN mission in Cambodia(1993) and were followed by reports from Bosnia andHerzegovina, Haiti, the Democratic Republic of Congo(DRC), East Timor, Liberia, and Sierra Leone. Despitethe fact that many allegations emerged before 2000, itwas not until 2003 that the UN Secretary-Generalannounced a zero-tolerance policy that forbade peacekeepersfrom exchanging money,

food, help, or anythingof value for sex.[i] And, it was not until 2005 that theDepartment of Peacekeeping Operations (DPKO)established the Conduct and Discipline Team to trainpeacekeepers about the new policy, to enforce it, andto conduct investigations of violations of it.[i] In 2007 thepolicy was extended to all UN personnel (not just peacekeepers)and the Conduct and Discipline TeamwithinDPKO became the Conduct and Discipline Unitwithin the UN's Department of Field Support.Thismeans that the UN did not start collecting data on SEA allegations until 2006, over a decade after indications ofan endemic problem arose.And despite the UN's measures, the UN notes that SEA allegations are still a major problem for peacekeeping operations.[i]For example, there exists a highlevel of transactional sex between peacekeepers and localwomen.

The OIOS report cites a representative study by Bebe*r et al.* [i]who found that overone-fourth of women aged 18 to 30 in greater Monrovia,Liberia have engaged in transactional sex with a peacekeeperand about half of the sexual transactions that occurin Monrovia are with UN personnel.[i] While transactionalsex is only a form of SEA,[i] there are clear power dynamics associatedwith peacekeepers and local women. Moreover, whenmen engage in transactional sex, they may be more prone to commit sexual abuse or rape.[i]

4.7.1 Comparative Analysis of Peacekeeping Missions in Africa and Other Jurisdictions

There have been reports of sexual exploitation in nearly all UN peacekeeping missions.[i] This has remained so despitethe fact that theUN says it has a "zero tolerance, no excuses and nosecond chances approach to sexual exploitation and abuse."[i] Even in the peacekeeping mission currently in South Sudan (UNMISS); continued instances of sexual exploitation by peacekeeping personnel have been reported after allegations surfaced in February 2018 of a Ghanaian

peacekeeping unit in South Sudan having "transactional sex" with local women living in a protection of civilian site.[i]This is a clear breach of the UN's code of conduct, which prohibits sexual relationships with vulnerable people, and this has no doubt caused challenges in UNMISS credibility and also creates an atmosphere of mistrust.

The most SEA allegations have come from three specific missions during UN history; the United Nations Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) in 2010, its predecessor being the United Nations Organization Mission in the Democratic Republic of the Congo (MONUC) established in 1999, the United Nations Stabilization Mission in Haiti (MINUSTAH) established in 2004, and the United Nations Mission in Liberia (UNMIL) established in 2003.[i] The history of these countries leading up to the establishment of UN peacekeeping forces in the country will be briefly examined, in an attempt to find common factors explaining the high number of SEA cases during each mission.

i. The United Nations Organization Mission to the Democratic Republic of the Congo (MONUC)

The 1994 Rwandan genocide set the stage for many unstable and violent years in the history of Central Africa. Rebellions and violent conflicts followed the nation as the Congolese Civil Wars brought more destruction, and the losses of millions of people.[i]In 1997 rebel forces overthrew the legitimate government and established the Democratic Republic of the Congo. However, violence persisted as new rebellions sparked, spreading destruction to neighboring areas. Eventually the conflict-ridden period was brought to an end, as the Lusaka Ceasefire Agreement was established between parties in 1999.[i]MONUC was established the same year to sustain the ceasefire and promote the peaceful liaison between the parties involved.

In November of 1999, the UN Security Council established MONUC with the adoption of Resolution 1279 and authorized the mission, allowing personnel to take "the necessary action," including lethal force, to fulfill their mission, protect themselves, other personnel, civilians, UN equipment and the effectiveness of their operations.[i] MONUC established its headquarters in Kinshasa and liaison offices in Pretoria, South Africa and Kigali, Rwanda. By April 2010, the mission had a fairly established presence in the eastern portion of the country, a vast and volatile region that experienced the most fighting and sexualviolence, with bases and headquarters in various cities throughout the country.[i]Alan Doss, the Secretary-General's Special Representative to the DRC, explained in 2010 that MONUC concentrated more than 95% of its force, roughly 23,275 military troops, in the eastern regions of the country.[i]MONUC was renamed MONUSCO in 2010 in accordance with UNSC1925.

In 2004 the international media reported that more than one hundred local women throughout the DRC complained that MONUC personnel had committed a variety of sexual crimes. Multiple media outlets reported the scandal; and depicted the horrendous exploitation, which included sexual relations with girls as young as 10 and in exchange for milk, eggs or peanut butter.[i]Investigations conducted by the UN Office of Internal Oversight Services (OIOS) revealed disturbing details from the mission where, "numerous reports by victims of peacekeepers engaging in detailed and disturbing acts, such as videotaping themselves torturing, raping, and abusing naked women and girls.[i]The OIOS investigated 72 allegations, all of which originated in Bunia, and were only able to substantiate seven claims.[i] Despite the OIOS investigation in 2005, peacekeepers continued to commit sexual violence and in 2006 local women filed an additional 217 allegations.[i] This mission singlehandedly is responsible for nearly

half of the documented SEA cases during past years.[i] One may therefore argue that peacekeepers did not improve the situation of sexual violence DRC.

ii. The United Nations Stabilization Mission in Haiti (MINUSTAH)

The first UN mission in Haiti (UNMIH) was set up after the violent political coup of 1991 and the overthrowing of the legitimate president.[i]The UN peacekeeping forces officially deployed in 1994, to aid in the return of the legitimate authorities of the country, as well as in the promotion of a stable and peaceful environment.[i] The operation was deemed successful and as great strides were made the UN forces left the country in 1996.[i] However, the mission was reestablished not long after, in 2004, after another violent rebellion compromised the peace and security already once established in the country.[i]MINUSTAH was created to reestablish the once secure and stable government, and to maintain the rule of law and public order in Haiti.[i]Unfortunately in the beginning of 2010 the country was struck with a 7.0 magnitude earthquake and the rebuilding process was severely set back as the country suffered the devastating losses of over 300,000 people. Only 10 months later an outbreak of cholera, deemed the worst in recent history, hit Haiti, killing almost 10, 000 and hospitalizing thousands more.[i]Regardless of the obvious hardships of the mission MINUSTAH succeeded to support the country through its presidential and legislative elections.[i]

Sexual exploitation and abuse scandals have made their way to the public eye throughout the mission's tenure, but the true levels of UN SEA and the number of victims remain largely hidden from view.[i]When the OIOS conducted SEA interviews in Haiti, 231 individuals came forward and admitted to having sex with peacekeepers in return for different goods;some to secure their position inthe society,or to gain luxuries like cellphones, clothes or other desired valuables.However there were also those who cited hunger, lack of shelter, baby care items,

andmedications as the reason for agreeing to sex.[i]As transactional sex is commonly defined as sexual intercourse driven by material exchanges,[i]it is clearly against the rules of UN's Zero Tolerance Policy,prohibiting sexual relations in exchange for assistance, goods, money etc. This also reveals the indifferent attitude or lack of knowledge of peacekeeping personnel with regard to UN regulations.

Arguments have been canvassed that The UN's inability to determine and enact lasting solutions to prevent UN SEA has eroded its credibility, as sexual exploitation and abuse perpetrated by UN personnel continue to prevent MINUSTAH from promoting rule of law, ensuring a secure and stable environment and protecting human rights in order to ensure individual accountability for abusers and redress for victims.[i]

iii. The United Nations Mission in Liberia (UNMIL)

In 1989 Liberia ended up in the middle of its first civil war, lasting until 1996.[i] The war started when the National Patriotic Front of Liberia (NPFL) led by former government official Charles Taylor sought to overthrow the repressive government of Samuel Doe.[i]The violent conflict deemed the lives of over 200,000 Liberians and forced almost a million others out of their home and as refugees in neighboring countries.[i]In 1993 the Economic Community of West African States (ECOWAS) succeeded in negotiating a peace agreement between the parties and UNOMIL,the predecessor of UNMIL was established to observe and help in the realization of the peace.[i]However, the peaceful times in Liberia did not last long as new rebellions sparked almost instantly after the election of the new president, Charles Taylor, restarting the already once stopped civil war.[i]The violence and conflict continued to devastate the country up until 2003, when Taylor stepped down and UN forces were again deployed in the country.UNMIL

helped the country to rise from the devastation of its violent past and achieved the securing of the peace and rebuilding of the society, longed for over a decade by the Liberian people. [i]

In February 2002 a report published by the United Nations High Commissioner for Refugees (UNHCR) and Save the Children detailed numerous complaints indicating that UN peacekeeping personnel and humanitarian aid workers in Liberia had demanded sex for food, shelter, education and medicine.[i]

UNMIL reached its fair share of negative attention with multiple allegations claiming that UN peacekeepers routinely engaged in sexual relations with Liberian girls, sometimes aged as young as 12.[i]An internal U.N letter confirmed the violations, "…girls as young as 12 years of age are engaged in prostitution, forced into sex acts and sometimes photographed by U.N. peacekeepers in exchange for $10 or food or other commodities."[i] A report by the UN Office of Internal Oversight Services said peacekeepers in Liberia bought sex with money, jewelry, cell phones, televisions and other items in countries where they are deployed.[i]The OIOS report, also said a survey of 489 women between the ages 18 and 30 in the Liberian capital, Monrovia found that a quarter of them said they had sex with UN peacekeepers, usually for money.[i] In addition, it has also been reported that during Liberia's 14-year civil war, it was estimated that thousands of children born to Liberian women were fathered by Nigerian and Ghanaian soldiers who were part of the Economic Community of West African States Monitoring Group (ECOMOG) peace keeping force.[i] These children were left behind in poverty and eventually became a liability to not just the mothers, but to society as a whole.[i]

Further, findings suggest that over the course of nine years, approximately 58,000 Liberian women and adolescents in Liberia's capital city, Monrovia; have engaged in

transactional sex with U.N peacekeepers.[i]These numbers are clear indication of radical underreporting concerning SEA and its effects on women.

4.7.2 Lessons Learnt from the Analysis of Sexual Exploitation occurring in UN Peacekeeping Missions

Every UN peacekeeping mission has started in order to bring or maintain a more stable environment in the society, after events that have deeply disturbed the country, often for multiple years, or even decades.[i]By looking at the background of the aforementioned countries it is highly evident that a higher risk in SEA is correlated with a violent and conflict-ridden history of the country, which frequently translates to a violent present.

According to Róisin,[i] both during and in the aftermath of armed conflict, the vulnerability of the civilian population may well be increased, in particular that of women and children.[i] Poverty, institutional collapse, gender inequality, erosion of the rule of Law, insufficient control of international borders, lack of economic opportunity, and widespread IHRL and IHL violations, all contribute to environments where rape, trafficking, prostitution (forced or otherwise) and other forms of SEA are more likely to be prevalent.[i]

Inevitably the display of decades of aggression, violence and oppression leaves its traces in the people. Along with the deepening violence women experience during war, the long-term effects of conflict and militarization create a culture of violence that renders women especially vulnerable after war.[i] After women have experienced years of aggressive and abusive behavior, the threshold to prostitution and further exploitation can significantly decrease.[i] This also increases the risk of locals engaging in sexual relations with UN peacekeepers deployed in the country.

While some of these Peacekeeping missions have somewhat succeeded in keeping the peace in mission environments, they have also contributed to the continued violation of women in conflict torn areas; this fact cannot be ignored.

The issue of sexual exploitation and abuse by UN peacekeeping personnel has garnered the attention of governments, intergovernmental organizations, non-governmental agencies, and other public interest groups. However, more than a decade after reports of sexual abuse surfaced and several years after the Secretary-General announced theUN's zero-tolerance policy;[i]the Under-Secretary for Peacekeeping Operations acknowledged that not all troop contingents were fully supportive of the zero-tolerance policy, particularly when it came to prostitution.[i]Prince Zeid stressed that Member States must not view the issue as one of ephemeral or passing importance, but rather, it should be viewed as the serious topic that it is.[i]

Allegations of sexual abuse have already tarnished both the reputation of the United Nations and the work of UN peacekeepers. While the issue of sexual abuse has been addressed in numerous Security Council resolutions, UN reports, and press accounts, allegations of sexual abuse and official inaction continue to escalate. It is crucial that abuse be eliminated, that perpetrators be punished, and that victims be compensated. Now that some light has been cast on the issue, it is hoped that serious reform will be implemented.

4.7.3 Women's Contributions in UN Peacekeeping Missions and the way Forward

As has been discussed,UN peacekeeping mission is a collective action that helps to resolve conflict in the world.The UN has highlighted gender balanced and timely process peacekeeping mission with different initiatives.[i]The conceptual roots of the United Nations Security Council Resolution (UNSCR) 1325 came from the 1995 Beijing Platform for Actions that endorsed women in armed conflict. After 5 years, UNSCR 1325 (2000) and adopted

"Women, Peace and Security."[i]It was a revolutionary achievement in establishing the agenda of peace and security including gender mainstreaming in peacekeeping operations.[i]The Resolution called on all member states to encourage female participation in UN peacekeeping missions focusing on participation, protection, relief and recovery.[i]The resolution also encouraged female participation at all levels of the state, including in the appointing at higher levels of police, political leadership, recruitment of military or police officers, and foot soldiers.[i] The resolution also called for the increase of female participation for the goal of "gender equality and representativeness" with regard to peacekeeping missions.[i]

Before the UNSCR 2000 declaration, the Windhoek Declaration and the Namibia Plan of Action were acknowledged in 1999, which focused on gender balance and equality in all peacekeeping missions.[i] The United Nations has argued that women have been deployed in different areas for a long time including as police, military, and civilian roles that are helpful not only in peacekeeping, but also in ensuring women's rights.[i] In addition, the UN claimed that women peacekeepers have performed in the same role of their male counterparts even in difficult conditions.[i]Since the adoption of Resolution 1325, globally, female awareness on conflict has risen which has helped recognize their role in "resolving conflicts and building peace".

Since the adoption of the UNSCR 1325,women participation in peacekeeping missions has been slowly increasing.[i]The UN has encouraged its member states to recruit females into the police service and UN police operations as gender priorities. Some countries have enthusiastically contributed women peacekeepers in missions. Female police and troops in 2009 included Pakistan (10,989), Bangladesh (9,424), India (8,640), Nigeria (6,001), Nepal (3,924), Rwanda (3,635), and Ghana (3,283).[i]For the first time in UN history, the first all-female police unit (FFPU) was sent to Liberia in UN peacekeeping in January 2007.[i] They played a significant

role in security in Liberia, and their presence encouraged Liberian women to join in the United Nations Mission in Liberia (UNMIL) and the national police force.[i] In another example, Jordanian women have participated in peacekeeping missions since 2007 in Libya, Sudan, Afghanistan, Liberia, and Ivory Coast in the army and civil defence. They have played significant roles in conflict-affected areas including abuse against women and children.[i]

The debate as to the contribution of women in Peacekeeping operations, has garnered a plethora of opinions. Some have argued that women could play a crucial role in society not only helping women and children but also establishing peace and security if they have the chance.[i] The UN maintains that inclusive participation in peacekeeping mission is a better strategy to achieve sustainable peace.[i]Others have argued that the security sector is for men not for women because they are physically stronger and more competent to such tasks.[i]Academic literature on peace and security has much on women peacekeepers, especially in protecting women and children. They have "a greater awareness of and sensitivity to their particular needs and challenges, because women peacekeepers are less provocative than men."[i]In many cultures and societies, women are not willing to share their personal needs and challenges to men, but they can easily talk to other women about their personal problems. In addition, women peacekeepers are less likely to commit abuse, and are generally less corrupt and abusive.[i]Further,the presence of women in peacekeeping missions is especially beneficial for diverse cultures where women are prohibited from speaking to men and forbid public physical contact between opposite sexes. Within those communities, women peacekeepers are the better option.

However, gender stereotypes can have negative and positive connotations regarding women, peace, and security. Negative influence has blocked women serving in military services throughout the world,[i]but women have proven to better perform in the post-conflict settings

where female peacekeepers can quickly "establish better relationships with local women" to help normalize things.[i] They "help to de-escalate tensions that had arisen between their male colleagues and locals."[i]As noted above in the case of Indian FPU in Liberia, the UN mission aided local women and empowered them to defend themselves against sexual assault and violence.[i]Women have played a significant role in West Africa in peacekeeping by providing a bridge between conflicts affected and ethnically divided societies. In Sierra Leone, Liberia, Ivory Coast and Guinea Bissau, sustainable peace was made with an inclusive female participation.[i]

The Indian FPU became one example of a successful story of UN peacekeeping.[i] After the deployment of the Unit in Liberia, the local people started to feel safe and secure. The unit was able to lower the crime rates in comparison to other places. Armed robbery was reduced by 65%, and reported cases of sexual assaults increased as a result of the rise of confidence in women they didn't have to hide.[i]In addition, the most significant achievement was that Liberian women were motivated to join the LNP and UN mission; some of them became police officers. Female recruitment in LNP remained high and increased every year to 10% of the LNP by mid-2008 and 13% by mid-2009.[i]The Unit was able to maintain law and order, and reform the strong police force.[i]They began training of self-defence techniques, first aid and a hygiene policy, which become a crucial initiative.[i]

It is obvious from the foregoing that women have already played a significant role in establishing peace and security, reducing sexual violence, and successfully completing given mandates within specific time frames.It is necessary to reduce sexual exploitation and abuse in conflict affected societies during conflict and post-conflict settings. To overcome these, it should be mandatory to constantly engage in continuous, targeted and sustained training of peacekeeping personnel on gender issues,ensure implementation of a UN code of conduct within

the peacekeepers including a zero tolerance policy, and ensure a gender-balanced peacekeeping force.

CHAPTER FIVE

RESPONSIBILITY FOR THE PROTECTION OF WOMEN IN ARMED CONFLICTS

5.1 Development, Concept and Elements of the Responsibility to Protect

Systematic human rights atrocities perpetrated against individuals based on their ethnicity, gender, and race have laced contemporary political discourses. With the international community's inability to collectively respond to prevent mass atrocities and other severe humanitarian emergencies, former United Nations (UN) Secretary-General Kofi Annan spearheaded the challenge to create a norm permitting states to intervene in another sovereign state in the event of gross and systematic violations of human rights that affect every precept of our common humanity.[i] Spurred on by failures of the international community to prevent genocides in Rwanda 1994 and Srebrenica 1995,the International Commission on Intervention and State Sovereignty (ICISS)was established in September 2000 to address how and when the international community should act to prevent genocide, war crimes, ethnic cleansing and crimes against humanity.[i]

In 2001, the ICISS a panel of international experts founded by the Canadian Government released its final report titled the Responsibility to Protect (R2P).[i] In its report, ICISS re-conceptualized the concept of state sovereignty by putting the primary responsibility to protect its people on the state itself.[i] Only if the state is "unwilling or unable to halt oravert it, the principle of non-intervention yields to the international responsibility to protect".[i]

ICISS has elaborated three elements of responsibility to protect: the responsibility toprevent, theresponsibility to react, and the responsibility to rebuild.[i] The responsibility to react includes apart from non-forcible coercive measures the possibility of military interventions.[i]

However, ICISS has imposed six cumulative criteria on military interventions: just cause, right intention, last resort, proportional means, reasonableprospects, and right authority.[i] As right authority ICISS identified primarily the Security Council.[i] Since ICISS was aware of the problems regarding the Security Council´s accountability in the event of humanitarian catastrophes, it recommended a code of conduct for the five permanent members of the Security Council (P5): they should not use their veto power to prevent an otherwise majority resolution if their own state interests are not at stake.[i]

Three years after the release of the report, the UN Secretary General and his High Level Panel on Threats, Challenges and Change recommended the adoption of Responsibility to protect to the World Leaders´ Summit in 2005. Due to tough negotiations, the 2005 World Summit Outcome endorsed only a compromise, enshrined in Paragraphs 138 and 139 of the Outcome document.[i]

The crimes which trigger the responsibility to protect were limited to genocide, war crimes, ethnic cleansing, and crimes against humanity.[i] The criteria established by ICISS to legitimize military interventions were abolished. The Security Council should rather decide on a case-by-case basis if a military intervention is deemed necessary.[i] All participating states agreed that a Security Council authorization is mandatory for any collective action.[i]

The World Summit Outcome was reaffirmed by Security Council Resolution 1674 in 2006 and in 2009 during a UN General Assembly debate.[i] A prominent matter on which states could agree during the debate was again the need of Security Council authorization for any use of force under Responsibility to Protect.[i]

5.1.1 Legal Foundation for Establishing a Responsibility to Protect

While the Security Council's role in implementing international law is unquestioned giventhe weight of the authority conferred on it by the UN Charter, its human rightsrole is a major innovation.[i] Since the end of the Cold War and the fall of the BerlinWall, the focus in international security has shifted towards the resolution of internaland transnational conflicts, in which violence against civilians predominates.[i]

The Gulf War, as an example of an inter-state conflict, did give rise to the UnitedNations Compensation Fund, but the fact that claims must be submitted throughgovernments diminished its potential utility for victims of armed conflicts. Sincethe Security Council has been freed from the 'veto straitjacket'[i] (in that permanentmembers have less recourse to it), and above all has been marked by the failures inthe former Yugoslavia and Rwanda, it has included human suffering on its agenda.[i]

The continuous expansion of its powers clearly poses a problem in terms of ademocratic deficit,[i] but this is now rectified by the near complete consensus onits responsibility to protect. After much evasion about the controversial principle of humanitarian intervention and the relationship between peacekeepingand strengthening democracy, the rule of law and fundamental freedoms,a consensus was eventually reached during the 2005 World Summit. In a finaldeclaration, seemingly admitting failure of the project to reform the UN system,Member State governments adopted a historic position, appointing the SecurityCouncil as the last resort for victims of armed conflict. They announced thatthey were:

> prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis and in co-operation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity'.[i]

Hence when all diplomatic means have been exhausted and the traditionalsystem for protecting the individuals based on state responsibility and international co-operation has failed, the responsibility to protect rests with theSecurity Council. This implies that in many cases the only possible means of endingthe atrocities will be to resort to force. However, as we have seen in practice, theCouncil has complete freedom to choose its means of action. Chapter VII of the UN Charter hasindeed been used to justify intervention in conflicts where international crimeswere being committed,[i](as was seen in was the case in Sierra Leone, Liberia, and the Democratic Republic of the Congo), but the Council also likes to see itself as a legislator andadvocate of human rights in war. In this sense, it has always been mindful of thesuffering of women.

5.1.2 The Factual Foundations of the Role of the Security Council in the Responsibility to Protect Women in Armed Conflicts

One of the purposes of international human rights law is to protect women in peacetime.This does not mean that some of its principles cease to apply in times of war. Onthe contrary, they may well complement international humanitarian law. TheGeneva branch of humanitarian law affords protection to civilians and to armedforces personnel no longer participating in the hostilities.[i] Rather than attributingthe shortcomings of international humanitarian law to a change

in the nature ofconflicts, there would be more reason to think that it was developed without takingthe complexity of war into full account.[i]

The suffering women endure today isnothing new. The phenomenon of ‘comfort women’ predates the adoption ofthe 1949 Conventions.[i] The weakness of humanitarian law in addressing women’sdifficulties may be regarded as the result of deliberate oversight, or perhaps of purely fortuitousignorance.[i]The reform efforts of 1977 were not, however, wholly satisfactory. Theywere praiseworthy in that they clearly defined the obligations of parties to aninternational conflict (Protocol I) and fleshed out Article 3 common to all fourGeneva Conventions (Protocol II), but they once again stopped short at theproblems of women in war. Yet it is well known that the intensification of violenceagainst civilians, as a typical method of warfare, is more marked among womenand girls owing to their vulnerability.[i] While men and boys are often forced intocombat or killed in ethnic cleansing campaigns, the suffering of women is compoundedby manifold abuses, facilitated by their gender and ranging from forcedrecruitment or conscription to rape or slavery in military camps and even murder.[i]

Sexual violence has been by far the most frequently deplored abuseoccurring during armed conflict.[i] It is generally perpetrated by all warring factions,for it is a crime that achieves a number of objectives.The harm to the honour and dignity of the victim, though considered the mainconsequence of sexual violence, is certainly not the only one. Often systematic rapeleads to or is accompanied by forced marriage and pregnancy, with the intent ofchanging the ethnic make-up of the population.[i] It is in this context that sexualviolence against women is now considered a weapon of war. It becomes a method of warfare when used systematically to torture, injure, extract information,degrade, threaten, intimidate or punish in relation to an armed conflict.[i]

In other circumstances, for instance in the event known as the 'Rape ofNanking' and the case of the 'comfort women' during World War II, the systematicviolations of women's rights were not directly linked to the war objectives. Thosewomen were used solely to gratify Japanese/ fringe benefits of soldiers and kept in secret campsunknown to the enemy and to the public. They nonetheless served military aims,for they were used to motivate and reward combatants. In that sense, they involuntarilyplayed a significant part in the war effort.[i]

A brief review of armed conflicts reveals that such systematic violenceagainst women cannot be traced back only to the wars of the early 1990s. Almost200,000 women and girls were abducted and forced into sexual slavery by theImperial Japanese Army during World War II.[i] More recent conflicts have seena steady increase in violence against women. It is estimated that at least 5000Kuwaiti women were raped by Iraqi soldiers during the 1990 invasion of Kuwait,[i]while a special UN report published that the Rwandan genocide showedthat during the fighting, sexual violence against women from the age of 13 to65 was the rule and its absence the exception.[i] The Rwandan government reported15,700 rapes, and 2000 to 5000 resultant pregnancies, whereas the Special Rapporteur taking into account a margin of error and the possible unreliabilityof statistics, as well as unreported cases put the figure closer to between 250,000and 500,000 rapes.[i] This is an astounding figure in comparison with the genocide'stotal estimated death toll of 800,000. In the war that raged in the DemocraticRepublic of the Congo, around 100,000women were victims of sexual violence between 1998 and 2003.[i] There are reportsof suffering on a similar scale in the conflicts in Liberia, Timor-Leste, Indonesia,the former Yugoslavia, Sudan and Afghanistan.[i] In the conflict in northernUganda, 20 to 30% of the child soldiers recruited and abducted are girls.[i]

According to Human Rights Watch, 100% of those who eventually escape the gripof the Lord's Resistance Army have a sexually transmitted disease.[i]Debates on the effectiveness of humanitarian law have resulted in newapproaches towards the treatment of women, and the ICRC has conducted anumber of studies to stress that women feel the impact of war in many differentways.[i] By intervening in the human rights field, however, the Security Councilcan offer more comprehensive protection for women in war, since it can repressviolations affecting them and promote their rights during peacekeeping operations, hence the establishment of a responsibility to protect.

5.2 The Security Council's Intervention on the Protection of Women in Armed Conflicts

The Security Council's intervention with regard to women's rights during armed conflict helps to strengthen international humanitarian law and to promote women as stakeholders in the peace process. The method of intervention by the Security Council may be viewed in two ways, namely, Reinforcing humanitarian law and Promotion of women's rights.

5.2.1Reinforcing Humanitarian Law

The inadequacy of provisions to suppress violence against women has long beenthe main weakness of international law for their protection. The Committee on theElimination of Discrimination Against Women (CEDAW) has nevertheless helpedto move the debate forward within its mandate to promote implementation ofthe 1979 Convention. As the Convention had failed to address violence againstwomen,[i] the Committee adopted a general recommendation on that subject in1992,[i] which inspired the Declaration on the Elimination of Violence againstWomen made by the UN General Assembly in the following year. According tothe Committee's recommendation, gender-based violence constitutes a form ofdiscrimination when directed against a person specifically because of his or hergender.[i] By turning its attention to the

situation of women in war, the Committeeis helping to reinforce humanitarian law. The steadily growing violence againstwomen in this context calls for specific protective and punitive measures.[i] Thesewould comprise access to health care, rehabilitation and counselling services for all victims, and appropriate legal measures, including civil remedies and penalsanctions, against violators of women's rights.[i]

The recommendation does not fully compensate for the gaps in theGeneva Conventions, but it does acknowledge that sexual crimes against womenare sufficiently serious to warrant penal sanctions. The 1999 Optional Protocol tothe 1979 Convention also reflects this standpoint.[i] It officially entered into forcein 2001, introducing two major changes. The first enables female victims of discriminationto make a formal complaint to the Committee. The second, moreimportantly, gives the Committee the competence to conduct investigations inthe territory of State Parties in the event of grave and systematic violations ofwomen's rights.

Action by the Committee on the Elimination of Discrimination AgainstWomen is nonetheless limited, for although its mandate has been considerablyextended, the authority of its decisions is undermined by the inherent weakness ofinternational law, in particular the lack of enforceability.[i] Similarly, as responsibilityfor compliance with human rights obligations is assigned to each individual state,penal sanctions are bound to fail in the absence of judicial mechanisms powerfulenough to impose them.[i] Moreover, state structures very often break down duringarmed conflict. Ad hoc interventions on the part of the Security Council became an option when it established international criminal tribunals.[i]

In the terms of their founding resolutions, the International CriminalTribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) are subsidiarybodies of the Security Council. Their creation confirmed its ability to exercise executiveand legislative as well as judicial

functions.[i] The importance of its role in theadvancement and protection of women's rights can no longer be ignored, for thetwo *ad hoc* Tribunals have established a jurisprudence that reinforces humanitarianlaw and also shows that the suffering inflicted on women is primarily of a sexualnature.[i] They thus achieve two goals in that respect: sexual violence against womennow constitutes a crime, and that crime is defined in international law.[i]

By criminalizing such conduct, the jurisprudence of the *ad hoc* Tribunalshas given a broader meaning in international law to the concept of violenceagainst women in armed conflict.[i] The qualification of sexual violence as a gravebreach of international humanitarian law amounts to a revision of the GenevaConventions. The Tribunals have the power to prosecute persons committinggrave breaches of the Geneva Conventions,[i]and also violations of the laws orcustoms of war,[i] genocide[i] and crimes against humanity.[i] As the seriousnessof violence against women is not acknowledged by the 1949 Geneva Conventions,which do not include it in their list of grave breaches, such acts are mostly prosecutedas war crimes, acts of genocide or crimes against humanity.[i] However,the notion of 'laws and customs of war' is generally considered to be 'a catch-allprovision'[i] whose vague terms allow for the inclusion of a number of humanitariancommitments.[i] The ICTY has thus interpreted it as banning sexual violence,including rape, against civilian populations.[i]The Trial Chamber stated that rape,torture and outrages upon personal dignity, no doubt constitutes serious violations of common Article 3, as such entails criminal responsibility under customary international law.

It is consequently established thatviolence against women is likewise prohibited by the law of armed conflict as a grave breach warranting prosecution by an international tribunal. It is questionablewhether states can in such cases actually exercise universal jurisdictionwithout a relevant treaty-based provision. Sexual violence can, however, be prosecutedunder universal

jurisdiction as a crime of genocide when it is deemedto cause serious bodily or mental harm to members of the group with intent todestroy, in whole or in part, a national, ethnical, racial or religious group.[i] Thedefinition of crimes against humanity already contained a provision explicitlyprohibiting rape directed against a civilian population,[i] but the problem ofapplying it remained. This task was to be assumed, for the first time, by a body withinternational jurisdiction.

The concept of violence against women in the jurisdiction of the *ad hoc*Tribunals is at times restrictive (penalizing only rape) and at other times broad(penalizing sexual violence in general). It is not easy to broaden the concept, forsexual violence comes in many forms that tend to overlap and it is difficult to makea clear legal distinction between them.[i] For example, rape and sexual slavery canbe perpetrated separately, concurrently or consecutively.[i]

In *Kunarac et al.,* the ICTY punished rape as a crime against humanity,in accordance with its Statute. As a war crime, the act has been sanctioned onthe charge of torture, inhuman treatment, and willfully causing great suffering orserious injury to body or health.[i] The ICTY understands torture and outragesupon personal dignity as being violations of the laws or customs of war, includingcrimes of sexual violence committed against detainees.[i] The Trial Chambers havetherefore concluded on several occasions that rape and other forms of sexualviolence, including forced public nudity, cause severe physical or mental pain andamount to outragesupon personal dignity,[i] and also that rape or sexual violencecan be equivalent to torture for others besides the victim, particularly if the actsare committed in their presence.[i]

This definition of rape nonetheless provoked controversy, which the*Kunarac case* seems now to have settled. The first definition appeared in the*Akayesu case,* in which the ICTR classified rape as ‘physical invasion of a sexualnature, committed on a person under

circumstances which are coercive'.[i] In the*Furundžija case* the ICTY confirmed this definition, dividing it into two parts:

1. the sexual penetration, however slight:
    a) of the vagina or anus of the victim by the penis of the perpetrator or anyother object used by the perpetrator; or
    b) of the mouth of the victim by the penis of the perpetrator;
2. by coercion or force or threat of force against the victim or a third person.[i]

Criticised for insisting that the proof of rape lies in the use of force,the formulation in the *Akayesu*and *Furundžija cases* was amended by *Kunarac*,defining rape as a violation of the sexual autonomy of the victim and qualifying anysexual act as rape if:

1. the sexual activity is accompanied by force or threat of force to the victim or athird party;
2. the sexual activity is accompanied by force or a variety of other specified circumstances which made the victim particularly vulnerable or negated herability to make an informed refusal; or
3. the sexual activity occurs without the consent of the victim.[i]

Subsequent debates were centered on the notion of consent. In the*Gacumbitsi case*,[i] the ICTR Appeals Chamber was called upon to determinewhether the burden of proof falls on the Prosecution, namely to prove absence of consent, or on the Defence to prove the contrary. In spite of the provisionsdesigned to protect rape victims concerning evidence of the crime, as provided in Rule 96 of the Rules of Procedure and Evidence of the ICTR ,that when submitting evidence in cases of sexual assault:

i) …no corroboration of the victim's testimony shall be required;

ii) (ii) consent shall notbe allowed as a defence if the victim:

   a. has been subjected to or threatened with or has had reason tofear violence, duress, detention or psychological oppression; or

   b. reasonably believed that if the victimdid not submit, another might be so subjected, threatened or put in fear.

iii) before evidence of the victim's consent is admitted, the accused shall satisfy the Trial Chamber in camera that the evidence is relevant and credible.

iv) prior sexual conduct of the victim shall not be admitted in evidence or as defence.

The Chamberaccepted that the absence of consent remained an element of crime that must beproved by the Prosecution. However, this requirement is significantly eased bythe Chamber's acknowledgement that absence of consent can be inferred from thecircumstances surrounding the crime, i.e. the context of genocide or the victim' captivity.[i] The same applies if the Prosecution can establish that the accused wasaware that the coercive circumstances in which the rape took place underminedthe possibility of genuine consent on the part of the victim.[i]

The ICTRStatute, provides for the prosecution of both rape and sexualviolence as a violation of Article 3 common to all four Geneva Conventions and ofProtocol II on the protection of civilians in non-international conflict.[i] It istherefore only natural that the ICTR was the first to formulate a definition of sexualviolence, stating that it was 'any act of a sexual nature which is committed on aperson under circumstances which are coercive'.[i] In light of the Statute

of theInternational Criminal Court, the ICTY regards sexual violence as a concept thatextends beyond rape to encompass sexual slavery and any other assault of a sexualnature.[i]

5.2.2Promotion of Women's Rights

The questioning of the Security Council's capacity to assume a normativefunction is reflected in the promotion of women's rights. *Serges Sur* states 'theCouncil … has always preferred acting and making decisions on a case-by-casebasis, rather than formulating declaratory norms'.[i] The Council has now begunissuing international regulations in support of this preference which eitherreinforce existing regulations or place new obligations on states and in so doingis clearly going beyond the bounds of the specific situation defined in Article 39 ofthe Charter.[i] This approach, meanwhile consolidated by persuasive practice, runscounter to the exceptional nature of the authority granted to it by Chapter VII of the Charter, which provides for action with respect to threats to the peace, breaches of the peace and acts of aggression.[i]

The human rights implications of armed conflict have been by far the Council's foremost concern. To date, the following issues have been examined: children in situations of conflict; the protection of civilians during hostilities; HIV/AIDS and international peacekeeping operations; and the protection of UN staff, associates and humanitarian workers, journalists, war correspondents and the media in wartime. The Council has also issued two thematic resolutions on women, peace and security.[i]

Before the first resolution on women, peace and war, of 31 October 2000, the Council adopted a resolution on 17 September 1999 more generally addressing the protection of civilians in war.[i] In this resolution, the Council was already evidencing a grave preoccupation with the status of women in war and formulating various recommendations; it expressed its concern at the fact that the vast majority of victims in conflicts are civilians, particularly women, children and

other vulnerable groups, and acknowledged the direct impact of conflict on women. The solutions proposed are no less than declarations of international law.

The Council, for instance, points out the importance of widely disseminating international law on the protection of civilians, and of relevant training for civilian police, armed forces, and members of the judicial and legal professions, civil society and personnel of international and regional organizations.[i] It consequently encourages an acknowledgement of the need for gender-specific humanitarian aid and recognition of the violence women suffer. The Council also favours incorporating special protection provisions for vulnerable groups, including women and children, into peacekeeping mandates.[i] United Nations personnel involved in peacemaking, peacekeeping and peace building activities should therefore have appropriate training.[i] The Council calls upon States to ratify instruments of international humanitarian, human rights and refugee law.[i] Additionally, all parties to conflict are bound to comply with their obligations under those bodies of law[i] and states are bound to prosecute in the case of noncompliance.[i] In Resolution 1265 (1999) the Council provides, for the first time, for the possibility of intervening in situations of armed conflict where civilians arebeing targeted or humanitarian assistance to civilians is being deliberately obstructed.[i]

In Resolution 1325 (2000), the Security Council highlights that the threat to women in war is distinct from that facing the civilian population as a whole, as it had previously done in the case of children.[i] This resolution expands on the provisions relating to women contained within Resolution 1265 (1999). It points out that women are being increasingly targeted during armed conflict and stresses the importance of full respect for international law relative to protecting women from gender-based violence, particularly rape and other forms of sexual abuse and all other forms of violence in situations of armed conflict, and calls upon states to take

special measures to protect women.[i] The resolution stipulates that those crimes cannot be included in any amnesty provision, and that states have a responsibility to prosecute any perpetrators of such acts.[i]

In the same resolution, the Council also urges that the gender-specificity of needs be taken into account in mine clearance and mine awareness programmes,[i] disarmament, demobilization and reintegration; it calls for men and women to be equally represented among peacekeeping operations personnel, and for all to receive training on gender issues. Similarly, it states that a gender perspective should be adopted when negotiating peace agreements.[i] The resolution breaks new ground not only in the area of protection, but also in promoting women both as the solution to their own suffering and as active and valuable participants in the restoration of peace and security. The measures set forth by the Council to this end are the following:

1. increased representation of women at all decision-making levels in national,regional and international institutions and mechanisms for the prevention,management, and resolution of conflict;
2. increased participation of women at decision-making levels in conflict resolutionand peace processes;
3. the appointment of more women as special representatives and envoys topursue good offices on behalf of the UN Secretary-General, and the creationof a roster of female candidates for this role;
4. expansion of the role and contribution of women in United Nations field basedoperations, and especially among military observers, civilian police,human rights and humanitarian personnel;

5. incorporation of a gender perspective and gender component into peacekeepingoperations;
6. training by and guidelines for Member States on the rights and particular needs of women, as well as on the importance of involving women in all peacekeeping and peace building measures.[i]

The implementation of these recommendations relating to the promotion of women as agents of peace has been the subject of a comprehensive assessment by the Security Council. Resolution 1889 (2009) reports a mixed result. It welcomes some achievements such as the efforts of States to implement Resolution 1325 (2000) at the national level through action plans,[i] the efforts of the Secretary General to boost more women to senior United Nations positions, and the establishment of a United Nations Steering Committee on Resolution 1325 (2000).[i] However, the Council remained concerned about the under-representation of women at all stages of peace processes, and the persistence of obstacles to their participation, such as violence and intimidation, insecurity and lack of rule of law, cultural discrimination and stigmatization, lack of access to education, marginalization and lack of funds for efforts to rehabilitate women.[i]

Resolution 1820 (2008) on women, peace and security, although expressing concern about the general situation of women in war and the obstacles to their participation in the promotion of peace, puts the main emphasis on rape and other acts of sexual violence against them during conflict. The resolution thus acknowledges that since 2000 violence against women has intensified in the majority of conflicts worldwide. This phenomenon is especially prevalent in Africa, in the bloody conflicts of the DRC, Uganda, the Central African Republic, Sierra Leone, Liberia and Sudan/Darfur. The Council recognizes that women and girls are particularly targeted by sexual violence ‘including as a tactic of war to humiliate, dominate, instill fear in,

disperse and/or forcibly relocate civilian members of a community or ethnic group'.[i] It furthermore stresses that sexual violence against women can exacerbate armed conflicts and may impede the restoration of peace, and reaffirms its readiness to adopt appropriate measures to address widespread or systematic sexual violence on a case-by-case basis.[i] Resolution 1820 (2008) recommends both short- and long-term action to be taken.

In the short term, the Council can condemn all forms of sexual violence committed in armed conflict,[i] demand their immediate cessation,[i] and take targeted measures against parties to conflicts who commit these crimes.[i] Longer term measures include promoting activities to prevent and address rape and sexualviolence, protective action by states in accordance with their obligations, and punishment of the perpetrators of sexual crimes.

The responsibility for promoting a response to rape and sexual violence rests largely with the UN Secretariat and those agencies intervening in conflict zones, whose personnel must be trained in preventing, recognizing and responding to sexual violence. This applies particularly to peacekeeping operations personnel,[i] given the zero-tolerance policy established by the UN Secretariat *vis-a`-vis* the sexual exploitation and abuse of civilians during such operations.[i]With regard to promotion, the Secretary-General is requested to develop guidelines and strategies to enhance the ability of peacekeeping operations to protect women and girls from all forms of sexual violence.[i]

The protective measures formulated by the Council are intended to be more concrete. It places a number of specific obligations on parties to conflict, such as enforcing appropriate military disciplinary measures and upholding the principle of command responsibility, training troops on the prohibition of all forms of sexual violence against civilians, debunking myths that fuel sexual violence, vetting military personnel during recruitment to take into account past

actions of rape and other forms of sexual violence, evacuating women and children under imminent threat of sexual violence to safety,[i] and protecting women and girls in and around refugee camps.[i] The Council also urges Member States to provide medical care and follow-up to victims of outrages upon their personal dignity.[i]

Regarding the suppression of sexual violence against women, the Council's proposals reaffirm the exclusion of such acts from amnesty provisions, in recognition of the gravity of such acts and their inclusion as crimes in the statutes of the *ad hoc* Tribunals and the International Criminal Court. Member States must ensure that all victims of sexual violence have equal protection under the law and equal access to a justice system that takes account of their suffering.[i] According to the Council, it is important to react to these crimes not only for the sake of justice, but also for sustainable peace, truth and national reconciliation.[i]

Resolution 1888, adopted on 30 September 2009, aimed at strengthening efforts to end sexual violence against women and children in armed conflict and established the mandate of the Special Representative on Sexual Violence in Conflict. It further developed language regarding expanding Security Council sanctions regimes to include sexual violence as a designation criterion and called for all relevant UN missions and bodies to share information with sanctions committees through expert groups. This resolution included a range of measures to develop capacity to implement resolution 1820, including:

1. a request for the Secretary-General to appoint a Special Representative;
2. a request to deploy rapidly a team of experts to situations of particular concern with respect to sexual violence in armed conflict; and
3. a decision to include specific provisions in peacekeeping mandates, as appropriate, for women's protection advisers.[i]

The Council adopted resolution 1889[i], addressing the need to take into account women's protection and empowerment in post-conflict situations. This resolution reinforced resolution 1325, and (as resolution 1888 had in relation to resolution 1820) focused on how to implement key elements of resolution 1325. In terms of practical application, it called upon the SecretaryGeneral to submit to the Security Council a set of indicators for use at the global level to track implementation of resolution 1325.[i]

Resolution 1960,[i] requested the Secretary-General to establish monitoring, analysis and reporting arrangements on conflict-related sexualviolence. The resolution also called upon parties to armed conflict to make time-bound commitments to prohibit and punish perpetrators of sexual violence. The SecretaryGeneral was asked to include in his annual reports on conflict-related sexual violence an annex listing parties credibly suspected of bearing responsibility for patterns of rape and other forms of sexual violence, "as a basis for more focused United Nations engagement with those parties, including, as appropriate, measures in accordance with the procedures of the relevant sanctions committees".[i] The Council reiterated its intention, when adopting or renewing targeted sanctions in situations of armed conflict, to consider including rape and other forms of sexual violence as designation criteria. The resolution also called for the Special Representative on Sexual Violence in Conflict to share with relevant Security Council sanctions committees, including through relevant expert groups, all pertinent information about sexual violence.

Resolution 2106[i] addressed impunity and effective justice for crimes of sexual violence in conflict. It highlighted that states bear the primary responsibility to protect civilians but also drew attention to the range of sexual violence offences in the Rome Statute of the International Criminal Court and the statutes of the ad hoc international criminal tribunals. The resolution

linked national responsibility to address sexual violence and women's political and economic empowerment as central to long-term prevention strategies. It also explicitly called for addressing sexual violence concerns in disarmament, demobilization and reintegration processes; in security sector reform processes; and in justice sector reform initiatives.

Resolution 2122[i] was adopted on 18 October 2013 to address the persistent gaps in the implementation of the women, peace and security agenda. This was the first resolution since resolution 1325 (2000) that substantially addressed the participation aspects of the women, peace and security agenda, as the five resolutions adopted on this thematic issue since 2000 largely focused on sexual violence in conflict and other protection aspects of the agenda.

This resolution recognized that the Security Council needed to receive better information on implementation of this aspect of the agenda to improve its own work. The resolution requested:

1. more regular briefings by the Executive Director of UN Women;
2. that UN officials, in particular Special Envoys, Special Representatives and Department of Political Affairs (DPA) and Department of Peace Keeping Operations (DPKO), include information on women, peace and security in their briefings and reports to the Council;
3. that Commissions of inquiry report on gender-specific elements of conflict; and
4. that the Secretary-General undertake a global study ahead of the 2015 High-Level Review to assess progress at the global, regional and national levels in implementing resolution 1325.[i]

Resolution 2242[i] includes practical actions to improve the implementation of the women, peace and security agenda in several areas such as:

1. greater integration between the UN agendas on countering violent extremism, countering terrorism and women, peace and security; and
2. improving the Council's own working methods in relation to women, peace and security implementation by:
    i. forming an Informal Experts Group on this thematic agenda;
    ii. considering greater integration of gender into the work of sanctions regimes, including by ensuring relevant expert groups have gender expertise; and
    iii. inviting women's civil society representatives to brief on country-specific issues.

It also incorporated gender recommendations from the 1325 Global Study and the High-Level Independent Panel on Peace Operations report, such as the need to:

1. improve the gender-responsiveness of peace operations through greater cooperation between DPA, DPKO, the Special Representative on Sexual Violence in Conflict and UN Women;
2. integrate gender expertise within mission staffing structures;
3. specify gender-related performance indicators in the compacts between the Secretary-General and heads of missions; and
4. achieve better gender balance in UN military and police contingents.[i]

It is imperative to note that October 2015 marked the fifteen year anniversary of the ground-breaking UN Security Council resolution 1325 and this milestone was set by the Security Council as the benchmark for a high-level review of UNSCR 1325 to assess progress in its implementation at global, regional and national levels.In preparation for the high-level review, the UN Secretary General launched a global study on the implementation of UNSCR 1325 (the

Global Study), with the aim of assessing the progress made and challenges encountered over the last fifteen years on furthering the objectives of the Women Peace and Security Agenda.[i] The study proposed structural reforms and dozens of recommendations. It also emphasized that the Women, Peace and Security agenda is grounded in human rights. The recommendations are shaped by the following principles:

1. Prevention of conflict must be a priority;
2. Resolution 1325 is a human rights mandate to promote the rights of women in conflict situations, and any attempt to "securitize" issues and use women as instruments in military strategy should be discouraged;
3. Women's participation is key to sustainable peace;
4. Perpetrators must be held accountable for their actions and justice must be transformative;
5. Localization of approaches and inclusive and participatory processes are crucial to the success of national and international peace efforts;
6. Supporting women peace-builders and respecting their autonomy is one important way to counter extremism;
7. All key actors (states, regional organizations, the media, civil society and youth) are vital to the successful implementation of the Women's Peace and Security Agenda.
8. A gender lens must be introduced into all aspects of the work of the Security Council;
9. The persistent failure to adequately finance the Women Peace and Security Agenda must be addressed; and,
10. Strong and supportive gender architecture at the United Nations is essential.[i]

The Global Study was followed by an open debate and the unanimous approval of Resolution 2242[i]by the Security Council.

While the passing of Resolution 2242 is welcome, this and other resolutions and treaties are not sufficient of themselves to promote the role of women in preventing armed conflict and contributing to peace building and conflict resolution. As highlighted by the Global Study, the obstacles to progress are the absence of political will at national level and the dominance of men in the management of peace building processes. By way of example, as the Global Study notes, despite the comprehensive normative framework in place to discourage sexual violence against women in conflict zones, there are very few prosecutions.[i] Poor implementation and enforcement undermines all efforts to improve the reality of life for women in conflict-affected settings.[i]

It was expected that, through Resolution 2242, the Security Council would seize the opportunity to bring to life the recommendations set out in the Global Study. Those expectations were not met. Resolution 2242 is filled with rhetoric rather than substance. Resolution 2242 was an opportunity to pressure member states to scale up the funding of the Women Peace and Security Agenda, set specific targets to increase the participation of women in peace processes; promote the adoption and, most importantly, the implementation of the National Action Plans; set up a monitoring and accountability framework to assess UN performance on UNSCR 1325 and its follow-up resolutions; and define responsibilities for progress.[i]The resolutions falls short in some ways, such as failure to address conflict prevention measures, making only passing reference to them, as opposed to the recommendations in the Global study that prioritizes the prevention of conflict, identifying it as the main factor in the promotion of women's peace and security.[i]

In addition, Resolution 2242 fails to consider some of the recommendations in the Global Study altogether. In respect of the promotion and protection of women and girls in humanitarian settings, among others, the Global Study specifically addresses the elimination of discriminatory laws and regulations, the promotion of monitoring mechanisms and safeguarding reproductive health. UNSCR 2242 is silent on these matters. In failing to do so, the Security Council has missed another opportunity to fully and faithfully implement the Women, Peace and Security Agenda.[i]

5.2.3 The Impact of the Security Council's Intervention on Women's Rights in Armed Conflicts

It isnecessary to analyze the impact of the Security Council's entry into matters concerning women's rights in armed conflicts, taking account of the fact that its resolutions as regards armed conflicts are addressed to parties to the conflict or to UN bodies.

i. Resolutions Addressed to Parties to Armed Conflict

An intervention can be *ad hoc* and confined to a particular context, as is generally the case when the Council responds to a threat to the peace, breach of the peace or act of aggression.[i] In the cases of the former Yugoslavia and Rwanda, where massive human rights violations, including systematic and widespread rape and sexual violence, were deemed to be affecting international peace and security, the Council set up prosecution mechanisms, i.e. the ICTY and ICTR.[i]

Since the Council acted under Chapter VII of the UN Charter, its decisions were binding and enforceable; as such this established the authority of the judgments handed down by its subsidiary bodies. For the first time ever, those bodies imposed international sanctions on perpetrators of sexual crimes against women during conflict.[i] These judgments have left a remarkable legacy, for the ICC, along with the international criminal courts created after the ICTR and the ICTY, reflect the advances accomplished: rape and other forms of sexual violence

are now punished as international crimes, and are excluded from all amnesty agreements. In this sense, the Council could quite rightly be considered as having aroused the law of armed conflict from the latent state it had been in since its codification.[i] The Council has done much to render its implementation more viable and the law itself better adapted to the atrocities of war, in which the use of rape and other forms of sexual violence as a method of warfare had previously been trivialized.[i]

On the other hand, when the Council goes beyond the bounds of Chapter VII and adopts resolutions declaratory of international law, the impact of its intervention is somewhat limited, for thematic resolutions do not impose the same binding obligations as those of decisions made in response to a threat to the peace or international security.[i] Yet their value should not be underestimated. The very position of the Security Council in the world order is in itself an inducement to give renewed meaning to the international obligations imposed by treaties and conventions on belligerents with regard to women's rights.[i] Nevertheless, it should be recognized that the Council's authority has not changed the behavior of the parties to conflicts regarding crimes of sexual violence.[i]

It may be argued that the review of its thematic resolutions which yields more resolutions (as can be inferred from the activities of the Security Council) is far from promising. The Council finds absence of progress regarding situations of violence against women in armed conflict, as well as the lack of success in implementationand proposes new resolutions to curb whatever seems to be lacking in the previous resolutions.[i] The question must then be asked, "Does the problem lie with the Resolutions or with the implementation Process?"

ii. Resolutions Addressed to UN Bodies

The effectiveness within the UN system of the 2000 and 2015 resolutions on women, peace and security cannot be denied. United Nations peacekeeping operations and subsidiary bodies are now gender-mainstreamed, which means there is increased participation of women in peacemaking and peace buildingprocesses.[i] The most significant being the Resolution 1325 (2000)on women, peace and security, which reaffirms the important role of women in the prevention and resolution of conflicts, peace negotiations, peace-building, peacekeeping, humanitarian response and in post-conflict reconstruction and stresses the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security.[i]

The resolution further urges all actors to increase the participation of women and incorporate gender perspectives in all United Nations peace and security efforts. It also calls on all parties to conflict to take special measures to protect women and girls from gender-based violence, particularly rape and other forms of sexual abuse, in situations of armed conflict, also providing a number of important operational mandates, with implications for Member States and the entities of the United Nations system.[i]

In addition, there is also a greater capacity for understanding the psychological effects suffered by victims of sexual violence during conflict, which is the function of the 'gender' sections of peacekeeping operations. For instance, the UN Mission in the Democratic Republic of the Congo (MONUC) was required to take exceptional measures in light of the sheer scale of the use of sexual violence. In the context of DRC peace initiatives, a separate UN task force was set up to address violence against women. Co-ordinated by the UN Development Fund for Women and composed of UN agencies, the Congolese Ministry of Gender, Family and Children

and 16 civil society organizations, the mandate of this task force is to combat sexual violence and impunity.[i]

5.3 The Responsibility to Protect and the Women, Peace and Security Agenda

The Women, Peace and Security (WPS) agenda gained popularity on the international peace and security platform following the adoption of UN Security Council Resolution 1325 in October 2000.[i] The WPS agenda is the most comprehensive articulation of women's rights and gender issues in international peace and security. It establishes a nexus between conflict prevention and women's rights, highlighting the relationship between gender inequality and conflict.[i]

Resulting from the Fourth World Conference on Women in 1995 in Beijing, and the pivotal Beijing Platform for Action which named 'Women and Armed Conflict' as one of twelve areas of critical concern, the NGO Working Group on Women, Peace and Security was formed to advocate a UNSC Resolution focused on women's unique contribution and experiences of conflict.[i] Through lobbying and advocacy, the NGO Working Group played a vital role in drafting the resolution and through UN Resolution 1325 successfully complicated the popular narratives that stereotyped women as either victims or inclusive peacebuilders.[i] UN Resolution 1325 directs policymakers to consider all of women's experiences in conflict and links women's rights to international peace and security.[i]

The adoption of an additional seven resolutions builds upon 1325 and makes up the WPS agenda. It rests upon a four-pillar mandate; prevention of violence and derogation of rights; protection from violence; participation in peace building and post-conflict reconstruction; and relief and recovery.[i] The WPS agenda specifically addresses sexual and gender-based violence (SGBV) in conflict, measures to ensure women's participation in decision-making processes and post-conflict programs, gender mainstreaming in UN activities and peacekeeping operations, and

gender-sensitive prevention frameworks. The WPS agenda provides basis for international engagement with gender issues. With R2P, the WPS shares a commitment to improve human security and revealing and preventing women's human rights abuses through international engagement.[i]

However, despite both frameworks emerging and sharing similar underpinnings, R2P and its community continue to fail to address gender issues encompassed within the WPS agenda, and have been characterized as "gender blind."[i] R2P did not embrace the central messages of Resolution 1325 nor were points of synergies explored where there was a lack of dialogue and acknowledgement towards gender issues.[i] From the inception, gender was excluded from the original formulation of R2P with only one of the 12 commissioners being a woman and only seven of 2000 sources consulted including gender.[i] Women within the original R2P document were framed in terms of vulnerable populations in need of protection. Women were mentioned three times only in reference to 'rape and sexual violence', which was mentioned seven times, where SGBV falls under crimes against humanity, war crimes and ethnic cleansing.[i] No reference was made of women being active participants and agents in conflict prevention, protection and post-conflict reconstruction.[i] This is despite the transformative possibilities of including aspects of the WPS agenda. R2P disregards WPS as a paradigm for conflict prevention and its centrality to peace and security. [i]

Despite this disconnect, there are areas of common engagement between R2P and the WPS agenda.

i. Prevention and Early Warning Systems

The inclusion of gender issues into existing early-warning frameworks and systems may illuminate potential or existing R2P situations. Studying macro and micro level changes to

women's lives in armed conflicts reveals the escalation of violence and derogation of individual rights in hyper-masculinized and militarized societies.[i] Gender-sensitive indicators include average levels of female education, liberty towards SGBV, increased kidnappings, sex work and domestic violence. UN Women have implemented several context-specific programs that have resulted in a comprehensive "how-to guide" that provide holistic early warning systems which are gender-sensitive indicators.[i]

Despite the benefits of including gender-sensitive indicators, gaps in women's participation in early-warning initiatives have not been overcome.[i] The UN Office of the Special Adviser on the Prevention of Genocide and the Responsibility to Protect have not addressed the role of gender inequality or gendered violence in early warning systems. A recent framework of analysis on the prevention of R2P crimes continues to situate women in the narrative of 'vulnerable population' with children and the elderly, and in regards to sexual violence and reproductive rights.[i] This is despite; systemic and structural gender inequality being seen as a potential early warning factor for preventing mass SGBV.[i]

Since gender inequality increases the likelihood of R2P crimes, any strategy of prevention must address gender norms that oppress and marginalize women.[i] Gender-sensitive indicators highlight structural, political, economic and social inequalities that maintain gender inequality in a given society that impacts post-conflict reconstruction and conflict protection.

ii. Gender-Sensitive Protection in Peacekeeping Operations

The protection pillar of WPS stresses the full involvement and participation of women in the maintenance and promotion of international peace and security.[i] This includes gender mainstreaming in all peacekeeping missions and the addition of gender units and advisers.[i] Providing an official female presence in conflict areas, refugee and Internally Displaced Persons

(IDPs) camps is essential to improve access and support for local women to communicate in an official capacity.[i] Women can approach each other more easily in female-only settings where women may be prohibited to talk to male strangers. Moreover, SGBV is more likely to be reported between women.

However, in 2016 it was reported that, only 3.34 per cent of military and 9 per cent of police were female.[i] Although there is at least one female in every peacekeeping force, the number varies from 1 woman out of 17 deployed in the UN mission in Afghanistan to 799 women out of 17,453 deployed in the UN-African Union Mission in Darfur.[i] Of 105,315 deployed peacekeepers, women only comprise 4.05 per cent.[i] Although numbers have improved since the adoption of UN Resolution 1325, increases have been marginal and reflect the low number of women included in UN peace building efforts.

WPS knowledge needs to be utilized in peacekeeping operations and wider UN peacebuilding efforts. For instance, the assumption that men are heads of households and therefore assistance being distributed to mainly men does not reflect post-conflict realities. Women are often widowed during and after conflict and adopt non-traditional roles such as heads of households.[i] Since post-conflict programs and assistance does not recognize this, women are forced to take drastic measures to support their family and may take part in exploitive aspects of peacekeeping economies, like the sex industry.[i] The misconception could be countered through gender units, gender-awareness trainings.

iii. Women's Participation in Post-Conflict Reconstruction

Women's involvement in peace processes is mentioned in every resolution of the WPS agenda. Evidence suggests that the inclusion of women at the peace table as witnesses, signatories, negotiators and mediators makes it 35 per cent more likely a peace agreement will last.[i]

Nevertheless, women's quality participation in official capacities remains insufficient.[i] Women and gender provisions have slowly started to be incorporated into peace agreements with a textual increase since the passing of Resolution 1325.[i]

However, by only categorizing women as mothers, caregivers and victims, women are excluded from peace negotiations where, ironically, the cessation of hostilities is reliant on those who took up arms.[i]This study is not arguing that women are better peacemakers, but that their participation is vital to ensure that their experiences of conflict are acknowledged. Around the world, women lobby for participation to ensure their needs and security concerns are addressed. For instance in Somalia, the Sixth Clan was formed in response to the five traditional Somali clans failure to include women in negotiating teams. The clan appointed a female representative and in peace talks in 2002, becoming the first female signatory to a peace agreement in 2004.[i] Peace processes must therefore include women as more than lip service to actual inclusivity.

Conflict transition provides a chance to create a more equal society by transforming the gendered relationships and identities that contributed to the production of violence.[i] Women's participation is indispensable to represent half the population during peace negotiations, to ensure explicit inclusion of women's rights and gender provisions, and could have major implications for women's social, political and economic status, and involvement in wider post-conflict initiatives.

Unfortunately, despite these areas of common engagement, R2P remains silent towards analysis and discourse surrounding the WPS platform.[i] Both frameworks emerged at similar times and share central doctrines of prevention, participation and protection; however women's involvement in R2P has been grossly deficient.

It has been briefly demonstrated above that there are areas of common engagement between R2P and the WPS agenda. R2P has much to gain from the WPS agenda and vice versa, where alliance with R2P and its community could aid the WPS agenda in addressing major gaps in its implementation; Alignment, both practical and normative, could provide an inclusive and holistic protection platform and encourage sustainable peace.

5.4IntegratingGender Issues in UN Peacekeeping Operations

There is no doubt that there is a growing awareness on the part of the international community with regard to the critical role of women in post conflict peace-building, reconstruction and reconciliation. Progress in this regard has been made especially over the past few years since the adoption of the landmark UN Security Council Resolution 1325 on women, peace and security.

Peacekeeping operations have changed drastically from relatively straightforward ones of building sustainable peace and restoring a safe environment to more complex intra-state and inter-ethnic conflicts over the past couple of years.[i]Thus, peacekeeping mission mandates have moved beyond exclusively military operations to multidimensional missions.[i] This implies the inclusion of new personnel with more comprehensive skills. Within this new multidimensional approach to peace development is the recognition that a gendered approach is essential to adequately respond to the needs of women, men, boys and girls who all have been affected differently by armed conflict.[i]

An aspect of the gender dimension of multi-dimensional peace operations is the effective integration of more women in peace-support operations.[i]The United Nations Department of Peacekeeping Operations (DPKO) has issued a number of policies emphasizing the important role that women have in achieving the mandates of multi-dimensional peacekeeping operations, including their potential advantage in accessing and working with vulnerable populations,

particularly with female victims of sexual and gender-based violence (SGBV).[i]Many women continue to suffer from the physical and mental harm caused by the armed violence, particularly by high levels of SGBV. Even when armed conflict is officially over, women and girls continue to face various forms of violence and exploitation, includingexploitation, including gang rape, sexual slavery, forced sex in exchange for food or survival, and forced or early marriage.[i]

As earlier stated, the UN has adopted various legal mechanisms promoting women's inclusion in processes affecting their peace and security, with the key mechanism being Resolution 1325 on women, peace and security. Resolution 1325 among other things highlights the positive role that women can play in conflict prevention, peace negotiations, peace building, and post-conflict recovery processes. Different methods are adopted by various countries to actualize the obligations of the Resolution, one of which is the development of a National Action Plan that outlines and coordinates different responsibilities, timelines, sources and outputs for all relevant actors and stakeholders.[i] This is a useful process for increasing the coherence, visibility and accountability of national efforts to implement women, peace and security policies.

The United Nations is yet to achieve a gender balance or to ensure the full participation of women in peacekeeping.[i]However, the importance of gender considerations for the success of peacekeeping operations and the urgency of tackling sexual exploitation and abuse (SEA) by peacekeepers has been gradually accepted by the international community during the past decade.[i] Eventually in 2000, the issues related to mainstreaming gender into all aspects of multidimensional peace operations were mapped out thoroughly in the Windhoek Declaration and Namibia Plan of Action.[i] Soon after, the Security Council adopted Resolution 1325 on women, peace and security, which calls for a mainstreaming of a gender perspective into all activities of UN peacekeeping missions, which includes providing gender training to all

peacekeeping personnel.[i]Gender mainstreaming also requiresintegration of gender analysis in all decision-making, planning and implementation, monitoring and evaluating, as well as increase the number of women leading and serving in peace operations; as suchto achieve the gender dimension of multi-dimensional peace keeping there is need for effective integration of more women in peace supportand peacekeeping operations.[i]

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The success of such integration is largely dependent on the political will of each country, the initiatives taken by high-level leadership of the country, and the organization of mission staffing.[i] This is because by the recruitment procedures for peacekeeping missions, United Nations Member States supply the Security Council with the armed forces and necessary facilities to assist in maintaining international peace and security.[i] The United Nations has no input in the selection of the personnel provided by troop-contributing countries or the pre-deployment training of these personnel.[i]

The African Union cites a multi-faceted approach as crucial to its gender architecture.[i] Though encompassing a broad strategy of gender mainstreaming across organizational and operational structures, this approach in recent years has focused more explicitly on the women, peace and security agenda.[i] The Solemn Declaration on Gender Equality in Africa (SDGEA) adopted by the AU Heads of State and Government in July 2004 stands as one of its most relevant contributions to this effort. By including provisions for greater female involvement in peace operations, it targets the historic lack of women participants in peace processes from

prevention through to reconstruction. Cognizant of the special risks that women and girls face in armed conflict, theDeclaration also explicitly prohibits the exploitation of women as sex slaves and demands a broader and more sensitive acknowledgment of SGBV.[i]

Building on this commitment, in 2009 the AU released its first ever African Union Gender Policy (AUGP) and Action Plan. Echoing the SDGEA, the AUGP reiterates the AU‘s commitment to promoting the effective participation of women in peace operations and security processes. The AUGP suggests that women‘s involvement in conflict management activities in peace operations, conflict resolution, and post-conflict reconstruction is central to the organization‘s success.[i]Cited by the AU as an effort to enhance the role of women in creating an enabling, stable and peaceful environment for the pursuit of Africa‘s development agenda, the AUGP‘s commitment to promote the effective participation of women in peace operations places several demands on the organs of the AU, the Regional Economic Communities (RECs), and member states. They include:

1. the use of UNSCRs 1325 and 1820 for gender mainstreaming in policy and practice when working in peace and conflict;
2. the development of coherent and effective strategies through the creation of regional consultative platforms for greater exchange and knowledge sharing;
3. the recruitment and deployment of women in mediation and post-conflict processes;
4. collaboration with UN bodies and AU organs to improve truth-telling transitional justice mechanisms for the benefit of women and girls in need of recognition and redress for violations incurred during a given conflict;
5. guaranteeing enhanced attention to the risks and challenges faced by women and children in peace operations; and

6. a call to support gender sensitization and education on gender-based violence in all training incurred by peacekeeping forces and humanitarian actors.[i]

Targets for uniformity in achieving these goals across the AU, member states, and RECs have been set for 2015 through to 2020.[i]

In addition, the AU Assembly declared the period 2010 to 2020 as Africa‘s Decade for Women. Launching in October 2010, the decade is conceived as a forum for the collaborative efforts of the AU Office of the Chairperson‘s Women, Gender and Development Directorate, the AU Peace and Security Department (PSD), the Peace and Security Council (PSC), and the Panel of the Wise to further the implementation of UNSCRson women peace and security, while specifically addressing issues such as violence against women, peace building and reconstruction.[i]

CHAPTER SIX

REPARATIONS AND TRANSITIONAL JUSTICE FOR WOMEN AS VICTIMS OF HUMAN RIGHTS VIOLATIONS IN ARMED CONFLICT

6.1 The Concept of Reparation under International Law

Armed conflict tears apart the social fabric of entire communities and devastates people's physical, mental, and emotional states, as well as their economic security and social status. A basic concept of justice, as recognized by both domestic and international law, is the right of victims to a remedy.[i] Domestic and international law also require perpetrators to repair the damage they have caused. Reparations are a critical avenue of providing remedies after armed conflict. As was stated by Bashorun MKO Abiola-

> The issue is quite simple, reparations or restitution is at the very core of every legal system known to man, for at the very least justice demands that the present atones for the past. Reparation is about fundamental human rights.[i]

The principle in international law affirming the obligation to provide reparation dates back many years. Already in 1927 and 1928, the Permanent Court of International Justice (PCIJ), the predecessor of the ICJ, had stated in the *Factory at Chorzow Case* that:

> It is a principle of international law and even a general conception of law thatany breach of an engagement involves an obligation to make reparation in anadequate form . . . reparation is the indispensable complement of a failure toapply a convention and there is no necessity for this to be stated in the conventionitself.[i]

Reparation must, as far as possible, wipe out all the consequences of theillegal act and re-establish the situation which would, in all probability, haveexisted if that act had not been

committed. Restitution in kind, or, if this is notpossible, payment of a sum corresponding to the value which a restitution wouldbear.[i]

Reparations can come in the form of a wide range of programs, processes and actions that seek restitution, rehabilitation, compensation, and satisfaction and guarantees of non-repetition.[i] It may take any of the following forms, e.g.medical and psychological care, legal and social services, monetary compensation, public acknowledgment of the facts and acceptance of responsibility, prosecution of the perpetrators, search for the disappeared and identification of remains, remembrance, commemoration, and education aimed at preventing future crimes, rebuilding, repairing critical infrastructure and environmental clean-up.[i] For instance, the United States official apology for the internment of Japanese Americans during World War II and monetary compensation to Americans of Japanese descent. This was the result of a successful campaign for reparations led by Japanese Americans throughout the 1980s that culminated in the signing of the Civil Liberties Act of 1988.[i]

Additionally, in August 2012 the International Criminal Court issued a historic decision on Reparations in the case of *Prosecutor v. Thomas Lubanga*[i]. In its decision, the Trial Chamber affirmed that victims of war crimes, crimes against humanity, and genocide have a fundamental right to receive reparations, and it outlined principles to guide the process of issuing reparations to victims in the Democratic Republic of Congo. The trial chamber furtherobserved that reparations go beyond the notion of punitive justice,towards a solution which is more inclusive, encourages participation and recognizes the need to provide effective remedies for victims.

The dictum established in the sentence of the PCIJ in the *Factory at Chorzow Case* has been widely cited and reaffirmed in a number ofjudgments of the ICJ, including the *Gabcˇikovo-*

Nagymaros Project Case[i],the more recent Case Concerning Armed Activities on the Territory of theCongo and in numerous international and regional human rightscase law.[i]

The*Factory at Chorzow Case* deals only with two forms of reparations: namely, restitution and compensation. These components historically constituted the basic foundations for the concept of reparations, which has in turn been furthered due to interpretations in human rights jurisprudence in particular.[i] In cases of serious violations of human rights, it clearly is impossible to achieve *restitutio in integrum*that is, re-establish the situation that existed before the wrongful acts.

Historically, international law viewed reparations as an inter-state measure.[i] However, the convergence of a number of developments in international law over the past decades has produced important shifts that have come to be recognized in international law.[i] A number of these include the affirmation of state responsibility in relation to certain fundamental human rights through the advancement of multiple treaty provisions in humanitarian law as well as human rights law. Several of these have acquired recognition as customary law, and, in some cases, even as peremptory norms that the world community has a common interest in protecting.[i]The International Law Commission(ILC) Articles on State responsibility adopted in 2001 support this affirmation. The Articles define reparation as consisting of the following components: guarantees of non-repetition (Article 30); restitution (Article 34); compensation (Article 36); and satisfaction (Article 37).The aim of restitution is to restore the situation that existed before the wrongful act was committed, i.e. the release of wrongly detained persons, the return of wrongly seized property and the revocation of an unlawful judicial measure; Compensation is a monetary payment for financially assessable damage arising from the violation.[i] It covers material and moral injury;Satisfaction covers non-material injury that

amounts to an affront to the injured State or person, i.e. an acknowledgement of the breach, an expression of regret or an official apology or assurances of non-repetition of the violation. Satisfaction can also include the undertaking of disciplinary or penal action against the persons whose acts caused the wrongful act.[i]

Although human rights are not specifically referred to in the ILC Articles, the official Commentaries to Article 33 assert that:

> When an obligation of reparation exists towards a State, reparation does not necessarily accrue to that State's benefit. For instance, a State's responsibility for the breach of an obligation under a treaty concerning the protection of human rights may exist towards all the other parties to the treaty, but the individuals concerned should be regarded as the ultimate beneficiaries and in that sense as the holders of the relevant rights.[i]

The ILC Articles were received with a generally positive reception by human rights scholars. However, the references to the rights of the individual in relation to human rights violations are minimal and appear only in the Commentaries as opposed to the actual Articles. This sparked criticism, in particular, when considering the practical challenges that persist in defining reparations during reconciliation efforts and the pressing need to define state responsibility in this area.[i]

Additional confirmation of the acceptance of the right of individuals to reparations under international law can be found in the International Court of Justice (ICJ) Advisory Opinion on *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* of 2004,[i] which affirmed the duty of Israel to provide restitution and compensate individuals and 'all natural and legal persons having suffered any form of material damage as a result of the wall's construction'. Disappointingly, the ICJ *Bosnia Genocide Case* of 2007 provided

significantly less clarity on state obligations to provide reparations and has been criticized for backpedaling and creating inconsistency in the jurisprudence of the court.[i]

With the recognition of human rights as *jus cogens,* individuals appear as rights bearers and subjects under international law. The logical significance of such recognition denotes that there is a clear need to translate consequences of breaches, such as reparations, in favor of individual victims. The provision of reparations remains primarily a state responsibility and closing the gap between international legal standards and their application represents a key challenge to the international legal order and to the human rights regime.[i]

Although international law has been slow in embracing individuals as direct beneficiaries of reparations, the concept of reparations has itself undergone changes and expanded to comprise a number of aspects.[i] It cannot be ignored that the move towards a comprehensive perception of reparations is due largely to human rights law codification and jurisprudence.[i] In addition, support has also come from reinterpretations and analysis of provisions in humanitarian and international criminal law.

6.2 Reparation under International Humanitarian Law

International humanitarian law focuses on the protection of persons against the dangers of war and armed conflicts by providing rules for fighting an armed conflict and the treatment of combatants and non-combatants.[i]Nevertheless it could also provide reparation when such protection fails.

The latter half of the twentieth century witnessed unprecedented development and codification of international legal standards for the protection of individuals.[i] These include numerous universal and regional human rights instruments, the 1949 Geneva Conventions and their Additional Protocols of 1977 and the various instruments of refugee law. Despite this

indispensable step forward in the protection of the individual, the reality today is that individuals continue to suffer in situations of armed conflict.[i] There is general agreement that the challenge today lies in ensuring respect for these rights and laws.[i] In response, a number of significant initiatives have been undertaken in recent years to improve compliance with human rights law and international humanitarian law.[i] In addition to the creation of various international human rights tribunals, we have seen the establishment of two *ad hoc* tribunals to try persons accused of serious violations of international humanitarian law in the former Yugoslavia and in Rwanda, as well as the permanent International Criminal Court.[i] Alongside these developments at the international level, there has been a marked increase of activity by national courts in prosecuting persons accused of serious violations of human rights and international humanitarian law.[i]

Against this background, a discourse of law and practice relating to reparation for violations of international humanitarian law is necessary, as this is consequent upon the fact that reparations become relevant once a violation of the law has occurred.

The general principles regarding reparations in international humanitarian law can be traced to Article 3 of the 1907 (IV) Hague Convention respecting the Law and Customs of War, which is somewhat reiterated in Article 91 of the Additional Protocol I to the Geneva Conventions.[i] It states that-

> A Party to the conflict which violates the provisions of the Conventions or of this Protocol shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces.

The official International Committee of the Red Cross (ICRC) Commentary to Article 91[i] gives some further guidance on the interpretation of the provisions. In line with international law,

the Article is construed on the presumption that it be exercised through an intra-state mechanism. The ICRC Commentary, however, gives little guidance as to how states should ensure that non-state parties to a conflict fulfill the obligation of paying compensation. Given the current extent of internal armed conflicts involving non-state entities, this illustrates a major lacuna in international humanitarian law.[i]

The Commentary affirms that state responsibility may also be incurred by omission when due diligence to prevent violations from taking place has not been demonstrated and, once they have occurred, repression of the acts has not been ensured.[i]Further, Article 91 makes specific reference to coverage of all provisions of the Geneva Conventions. A weak point is that no corresponding provision exists in the Additional Protocol II.

Additionally, the official Commentary provides no clear explanation as to why the term 'compensation'is used, as opposed to the more comprehensive term 'reparation', which would have been consistent with the jurisprudence of the International Court of Justice.[i] Nonetheless, the Commentary explains that the term compensation, generally perceived to be a reference to monetary redress, in this context comprises the obligation to ensure restitution to the extent possible in addition to financial compensation.[i]

While a conservative interpretation of Article 91 fails to recognize it as a source of rights in favour of individuals,[i] several scholars have made important contributions to broaden the interpretation of Article 91. They have based their arguments on the *travauxpreparatoires* of the 1907 Hague Convention IV, which indicate that the provision was not intended to be confined to claims between states, but was to be conceived as creating a direct right to compensation for individuals.[i]

Although the implications of reparation provisions in humanitarian law are still being explored and the implementation thereof largely remains lacking, some scholars have argued that provisions on reparations have attained customary law status and, consequently, states cannot absolve themselves or other states for liability with respect to grave breaches.[i]As such, it has been stated that 'the rule of responsibility, including the liability to pay compensation, has acquired a much broader scope.[i] Although formally written for the Conventions and the Protocol as treaties, it is not too daring to regard it as applicable to the whole of international humanitarian law, whether written or customary.

Additionally, the ICRC has specifically affirmed, in its 2005 in-depth study of customary international humanitarian law as regards reparation, that state responsibility for reparations has become established as a customary norm both in international and non-international armed conflicts.[i]

6.3 Reparation under International Human Rights Law

In contrast to humanitarian law, provisions on remedies and reparations are key features in all human rights instruments, which establish a multitude of legally binding and quasi-judicial enforcement mechanisms.[i] It has been argued that breaches of humanitarian lawcould be addressed through human rights mechanisms in view of the lack of enforcement mechanisms in humanitarian law.[i] Human rightsjurisprudence has played a vital part in defining various formsof reparations and has provided significant guidance on the developmentof non-monetary forms of remedies.[i]

The origin of reparations in human rights law may be traced to the adoption of the Universal Declaration of Human Rights in 1948; Article 8 states that: "Everyone has the right to

an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law".

The International Covenant on Civil and Political Rights (ICCPR) repeats the provision above as a legally binding norm in Article 2(3a) as follows 'any person whose rights or freedoms as herein recognized are violated shall have an effective remedy'. Additionally, Articles 9(5) and 14(6) provide a right to compensation for unlawful arrest, detention and conviction. The Human Rights Committee has given significant interpretation of the content of the concept 'effective remedy' in its decisions in cases of individual petitions, general comments on the interpretation of treaty provisions and also in its concluding observations of state party reports.[i]

In 2004, the Human Rights Committee adopted its General Comment No. 31 on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, largely inspired by the adoption of the ILC Draft Articles on State Responsibility in 2001 and the then draft Basic Principles on the Right to Reparation for Victims. The General Comment makes the link between the terms 'remedy' and 'reparation' explicit by stating that:

> Article 2, paragraph 3 requires that States Parties make reparation to individuals whose Covenant rights have been violated. Without reparation to individuals whose rights have been violated, the obligation to provide an effective remedy, which is central to the efficacy of Article 2, paragraph 3, is not discharged. The Committee notes that, where appropriate, reparation can involve restitution, rehabilitation and measures of satisfaction, such as public apologies, public memorials, guarantees of non-repetition and changes in relevant laws and practices, as well as bringing to justice the perpetrators of human rights violations.[i]

Other human rights treaty provisionsproviding for reparations and remedies in different forms include the following, Article 14 of the Convention Against Torture (CAT),[i] Article 6 of

the Convention on the Elimination of All Forms of Racial Discrimination (CERD)[i], Article 39 of the Convention of the Rights of the Child (CRC)[i] and Article 24(4) of the International Convention for the Protection of All Persons from Enforced Disappearance (CPPED).[i] The CPPED provides a pivotal contribution as its entry into force in 2010 provided a comprehensive definition of reparations in a legally binding instrument. Article 24(4) and (5) established the following:

> 4. Each State Party shall ensure in its legal system that the victims of enforced disappearance have the right to obtain reparation and prompt, fair and adequate compensation.
> 5. The right to obtain reparation referred to in paragraph 4 of this article covers material and moral damages and, where appropriate, other forms of reparation, such as: (a) restitution, (b) rehabilitation, (c) satisfaction, including restoration of dignity and reputation; (d) guarantees of non-repetition.[i]

6.3.1State Responsibility and the Obligation to make Reparation

Apart from other motivations like moral duty, public good or the concern to restore peace, the rule of law and human dignity in the country after an armed conflict, there is a long-standing legal principle in international law that responsibility for an internationally wrongful act leads to the duty to make reparation for the damages caused by such an act.[i]This has been acknowledged by Grotius as early as in 1646 in form of the legal maxim that 'every fault creates the obligation to make good the loss.'[i]

It is now codified in the ILC Draft Articles on the Responsibility of States for Internationally wrongful acts, representing the view of highly recognized publicists in international law.[i]As stated earlier, the PICJ states that the legal aim of reparation is `to wipe out the consequences of an illegal act and reestablish the situation that would, in all probability, have

existed if that act had not been committed´.[i] The ICJ approved this jurisprudence in the case of the *Democratic Republic of Congo v. Belgium* in 2002.[i]

In case of material damages, the State must provide restitution in kind. If restitution is not possible or only partial recovery of the material damages can be offered, the State must make compensation.[i] According to Article 36 (2) of the ILC's Draft Articles on State Responsibility the compensation shall cover any financially assessable damage including loss of profits insofar as it is established.

In general, state responsibility arises out of violations of international law committed by individuals acting on behalf of the state, even if they exceed their authority or contravene instructions.[i] States are responsible for the *ultra vires* acts of officials committed within their apparent or general scope of authority and they are also responsible for the omission of its organs when they are under a duty to act. States are also responsible for all acts committed by their `armed forces´ regardless of whether such forces acted as State officials or private persons.[i]

Additionally, certain conduct of private individuals can also be attributed to a State. In respect to the modern ways of armed conflicts and new classes of combatants arriving on the stage, the law on state responsibility has started to adapt. As the ICJ in the *Nicaragua case* indicated, effective control over a paramilitary operation or unit can cause responsibility for violations of human rights and international humanitarian law.[i]

Today there is a growing number of practice of holding a state responsible for violations of international humanitarian law committed by private persons or groups which are not military organized, in cases where the State subsequently acknowledged or adopted the acts of these persons.[i] The ICTY confirmed in Tadić's case that in order to attribute the acts of a military or paramilitary group to another state, it must be proved that the statewields overall control over the

group.[i] The Court further set out that individuals or groups could be regarded as *de facto* State organs, if specific instructions concerning the commission of the particular acts had been issued by that State to the individual or group in question or the unlawful act had been publicly endorsed or approved *ex post facto* by the State at issue.[i]

The conduct of private individuals without any connection to the state cannot cause state responsibility.[i] Nevertheless all individuals acting on behalf of a state or not might be held criminally responsible, this in turn does not preclude the State's responsibility.[i] Article 25 (1) of the Rome Statute of the ICC specifies that no provision 'relating to individual criminal responsibility shall affect the responsibility of States under international law'.[i]

In respect to the origin or character of the obligation of the State, the Arbitration Tribunal in the *Rainbow Warrior case* held that 'any violation by a state of any obligation, of whatever origin, gives rise to state responsibility and consequently, to the duty of reparation'.[i] In *Gabčíkovo-Nagymaros Project case,* the ICJ found it well established that 'when a State has committed an internationally wrongful act, its international responsibility is likely to be involved whatever the nature of the obligation it has failed to respect'.[i]

6.3.2Provisions forReparationunder Regional Human Rights Instruments

The first provision establishing the competence to produce legally binding case decisions is the European Convention on Human Rights (ECHR), which entered into force in 1953.[i] Article 13 of theECHR affirms the right to an effective remedy, and Article 41 establishes that the court shall afford just satisfaction if internal law in the state party allows only partial reparation to be made. The jurisprudence of the European Court of Human Rights (ECtHR) has been conservative in its interpretation of an effective remedy and just satisfaction, and has largely limited its interpretation to monetary forms of reparations.[i]This is likely explained by the nature of the

claims, which during the first decades of the ECtHR did not involve serious human rights violations relating to armed conflict. However, the jurisprudence has undergone significant developments, particularly over the past decade.[i]

The American Convention on Human Rights (ACHR), which entered into force on 18 July 1978, provides another legally binding and enforceable complaint mechanism at the regional level. Article 25 of the ACHR affirms the right to a legal remedy, and Article 63 of the ACHR specifies the right to a remedy and fair compensation. From its inception, the Inter-American Court on Human Rights (IACtHR) took a creative approach to reparations and sought to interpret the concept as broadly as possible.[i]

Unlike the other international and regional human rights instruments referred to previously, the African Charter contains no clear provision on individual complaints and lacks a general reference to the right to a remedy for violations. This has limited the ability of the African Commission on Human and Peoples' Rights (ACHPR) to address reparations. However, this does not mean that victims' rights to reparations is not recognized. This will be further discussed in the section below.

6.4 Provision for Reparation under the African Human Rights Framework

The African Charter on Human and Peoples' Rights 1981 (African Charter) does not contain a specific article on the obligation of States to afford reparation in the event of a breach of the rights enshrined in the Charter. However, this does not mean that victims' right to reparation is not recognized in the Charter. Article 1 of the Charter obliges State parties to 'recognise the rights, duties and freedoms enshrined in the Charter and… to adopt legislative or other measures to give effect to them.' Article 7 (1) (a) provides that every individual shall have the right to have his cause heard, including 'a right to an appeal to competent national organs against acts

violating his fundamental rights as recognized and guaranteed by Conventions, Laws, Regulations and Customs in force.' The African Commission has interpreted Article 7 (1) to include victims' right to a remedy, noting that-

> The protection afforded by Article 7 is not limited to the protection of the rights of arrested and detained persons but encompasses the rights of every individual to access the relevant judicial bodies competent to have their causes heard and be granted adequate relief.[i]

Accordingly, even in the absence of an article within the Charter providing specifically for victims' right to reparation, such a right has been implied by the African Commission and other sub-regional mechanisms in their interpretation of the Charter.[i]

It is noteworthy that, the Protocol to the African Charter on Human and Peoples` Rights on the establishment of an African Court on Human and Peoples` Rights provides inits Article 27 that if the Court finds that there has been violation of a human or people's rights, it shall makeappropriate orders to remedy the violation, including the payment of fair compensation or reparation.[i] The future will demonstrate how the African Court will use its power.

6.4.1Gender Specific Reparation

The 'Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa' (African Women's Protocol or Maputo Protocol) of 2003 sets out a number of rights that victims can rely upon in communications before the Commission provided the relevant State has ratified the Maputo Protocol. Article 4(f) obliges State parties to the Maputo Protocol to 'establish mechanisms and accessible services for effective information, rehabilitation and reparation for victims of violence against women.'[i]

In November 2007, the African Commission adopted a Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence.[i] The resolution provides important guidance for States as well as the Commission itself to ensure that reparation afforded to victims of sexual violence is adequate and comprehensive, in particular in light of 'the extent of physical and psychological trauma that women and girls face as a result of sexual violence.[i] The Resolution calls on State parties to the African Charter to ensure accountability of perpetrators of sexual violence and to put in place efficient and accessible reparation programmes that ensure information, rehabilitation and compensation for victims of sexual violence.[i]

In complementing Article 4(f) of the Women's Protocol, the Resolution further provides that in setting up such reparation programmes and mechanisms, States must ensure that women participate in the elaboration, adoption and implementation of such programmes.[i]

Further, the African Commission also adopted the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa ('Fair Trial and Legal Assistance Principles and Guidelines') which comprehensively set out the obligations of States relating to provisions on fair trial in the Charter.[i] These include significant procedural obligations such as guaranteeing victims of crime access to justice and prompt redress through 'formal or informal procedures that are expeditious, fair, inexpensive and accessible.' States furthermore should 'inform victims of their rights in seeking redress through such mechanisms.'[i] These fair trial guidelines emphasize that States need to pay specific attention to the needs of rural communities and women as follows-

i) States must take special measures to ensure that rural communities and women have access to judicial services. States must ensure that law enforcement and judicial officials

are adequately trained to deal sensitively and professionally with the special needs and requirements of women.

ii) In countries where there exist groups, communities or regions whose needs for judicial services are not met, particularly where such groups have distinct cultures, traditions or languages or have been the victims of past discrimination, States shall take special measures to ensure that adequate judicial services are accessible to them.

iii) States shall ensure that access to judicial services is not impeded including the distance to the location of judicial institutions, the lack of information about the judicial system, the imposition of unaffordable or excessive court fees and the lack of assistance to understand the procedures and to complete formalities.[i]

Furthermore, fair and effective procedures and mechanisms must be established and be accessible to women who have been subjected to violence to enable them to file criminal complaints and to obtain other redress for the proper investigation of the violence suffered, to obtain restitution or reparation and to prevent further violence. Additionally, among others, States shall take steps to ensure that women who are complainants, victims or witnesses are not subjected to any cruel, inhumane or degrading treatment.[i]

Substantively, these fair trial principles do not provide for specific forms of reparation for women or communities. However, they do stipulate that, amongst other things, victims of crime and abuse of power, including victims of violations of international law committed by public officials, should 'receive restitution from the State whose officials or agents were responsible for the harm suffered.' States should provide financial compensation in cases where the perpetrator is indigent, including compensation to the victims who have suffered harm as a result of the

crime, as well as the family, 'in particular dependents.' States are 'encouraged to establish, strengthen and expand national funds for compensation to victims.'[i]

Increasingly transitional justice initiatives have sought to provide redress for victims, both monetary and symbolic, instead of focusing solely on the punishment of perpetrators. Through restitution, compensation and memorialization reparations fulfill a number of practical and symbolic purposes of acknowledging the harm inflicted upon victims. According to gender activists,[i] reparations have the potential to facilitate the rebuilding of women's lives; 'reparation must drive post-conflict transformation of socio-cultural injustices, and political and structural inequalities that shape the lives of women and girls; that reintegration and restitution by themselves are not sufficient goals of reparation, since the origins of violations of women's and girls' human rights predate the conflict situation' (Nairobi Declaration on the right of women and girls to a remedy and reparation 2007)[i]. In countries where truth commissions have provided some form of amnesty for perpetrators, reparations may be the only form of justice that victims receive.[i] Reparations can also be a mechanism to provide redress for women who may not want to become involved in prosecution or truth-seeking due to the stigma associated with gender-based violations of human rights.[i]

6.4.2 Challenges in Gender Specific Reparations in Africa

The need to take account of sexual violence against women, and its impacts, in post-conflict contexts has been a critical platform for the emergence of gender justice concerns.[i]There is, however, a growing concern over whether the emphasis on sexual violence in African contexts risks obscuring the need for a more broad-based approach to women's rights.[i]Another concern is that the existing women's organizations and movements are often sidelined when it comes to establishing transitional justice mechanisms.[i]Certainly there are grounds for noting that the wider

gender consequences of conflicts can be obscured by a limited focus on women as victims, which can contribute to failures to recognize the weighty matters of internal displacement, loss of livelihood, breakdown of social infrastructure and the huge increase in the number of woman-headed households.[i] Women are still largely excluded from formal peace negotiations and the ensuing reconstruction processes reflect this in their gender bias. Even where women are acknowledged as combatants rather than solely as victims, they are often further stigmatized rather than assisted, because as female combatants they have stepped out of traditional gender roles, and may have perpetrated violence.[i]

Many of the challenges to fully integrating gender into transitional justice mechanisms stem from the way that conflict and harms have been misinterpreted, leading to numerous examples where gender has been quite simply overlooked and the male experiences of human rights violations are seen as normative.[i] This manifests in the emphasis that transitional justice mechanisms give to economic and social reintegration, while neglecting the psychosocial or medical needs which are particularly stark for victims of sexual abuse. Rwanda, Sierra Leone and the Democratic Republic of the Congo (DRC) among other countries have shown the grave need for addressing issues of reproductive health linked to these crimes.Studies have revealed some 30 percent of women raped in the Eastern DRC to be infected by HIV.[i] The Panzi hospital in Bukavu, capital of South Kivu has been overwhelmed by women requiring surgical treatment and management of fistulas and othergynecological consequences of the mass sexual violence committed in the eastern region of the Democratic Republic of Congo.[i]

Following the United Nations General Assembly adoption of 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, a number of

women's organizations mobilized to examine how to better incorporate gender into reparations policies.[i] This led to the 2007 Nairobi Declaration which redefines reparations and guides policy-making for implementing this right specifically for victims of sexual violence.[i] The declaration notes that: 'Reparation must go above and beyond the immediate reasons and consequences of the crimes and violations; they must aim to address the political and structural inequalities that negatively shape women's and girls' lives'. While reparations are critical in the pursuit of gender justice they are often an under-funded afterthought in transitional justice processes. [i]

Further, reparations programmes to date have often failed to recognize and address structural issues which have given rise to gender-based violations of human rights.[i] Issues of implementation have also been of concern. These range from an absence of accessible information about these processes to the inability of women to have control over family finances.[i]

In the majority of cases, reparations policies emanate from recommendations made by Truth Commissions. Limitations arise from this since policies tend to mirror Commission's shortcomings, for example, by generalizing human rights violations across genders or failing to recognize the specific abuses suffered by women.[i]For example, in the case of South Africa, the definition of victim did include the 'relatives or dependents of victims' of whom the vast majority were women.[i] However, there was a hierarchy in this definition in the reparations process, which meant relatives and dependents were only entitled to grants if the 'primary' victim was deceased. While important to recognize the deceased, it failed the South African context where recognition was needed of the impact of detention on family members and the effect of post-traumatic stress disorder.[i] Another related challenge was that only those who were victims of crimes identified by the Truth Commission as human rights violations received

reparations. As socio-economic crimes have generally been beyond the reach of Commission's mandates this impedes the scope of reparations.[i]

A further problem stems from the fact that Truth Commission recommendations are not binding and are dependent on the will of the government for their implementation. Thus, if the government lacks the political will to implement reparations, or decides to pay a smaller amount than the Truth Commission recommended (as was the case in South Africa), there is little recourse for victims.[i] Further, often the available resources do not correspond to recommendations that have been made. For example, in April 2009, Sierra Leone had only twenty five percent of the funding needed to compensate victims and as such the government had to decide who will receive what. As a result, some war widows have been registered to receive reparations, but they will not receive benefits until at least 2010.[i]

Additionally, even when women can access reparations, further difficulties have been identified. Reparations programmes have also repeatedly overlooked the problem of children born of sexual violence or circumstances linked to conflict.[i] Due to the widespread sexual and gender-based crimes recorded by the Sierra Leone Truth Commission, creative measures were suggested for reparations to the victims of gender-based violence. These included service packages and symbolic measures, such as access to healthcare and rehabilitation services, counseling and psychological support.[i] Men and boys who had been victims of gender-based violence were also eligible for assistance. However, gender activists claim that while the provisions were far-reaching, many constituencies were overlooked, such as children born of rape. This was compounded by the lack of political will by government to enforce recommendations such as the call for a public apology by the president over the suffering of women and girls.[i]

A significant development with regard to reparations has been the delivery of reparations by military tribunals in the DRC. In April 2006, a military court in Mbdandaka found seven army officers guilty of mass rape of more than 119 women (according to the UN estimate, the number was over 200) at SongoMboyo in 2003 and sentenced them under the Rome Statute which the DRC ratified in 1998.[i] This was the first time rape was tried as a crime against humanity in DRC, and the first such sentence against military personnel for these crimes. The officers had rebelled against their commanders and attacked the villages of SongoMboyo and Bongandanga. For the destruction of the villages and the mass rape, they received sentences of life imprisonment and the verdict required each victim's family to receive reparations in the amount of US $10 000. Rape victims were to receive US $5 000.[i]

While the court's decision in the DRC is welcome, women still constitute the vast majority of the poor, and they are often the last to benefit from reparation programmes or development policies. Even when they do, they are frequently met with social challenges that prevent them from realizing their rights and entitlements. Thus future initiatives in transitional justice need to recognize these broader concerns and radically challenge the current configuration of processes to enable a more gender-aware and inclusive approach to post-conflict reconstruction.

6.4.3Reparation for Torture

In 2002, the African Commission adopted the Resolution on Guidelines and Measures for the Prohibition and Prevention of Torture and Cruel, Inhuman or Degrading Treatment or Punishment in Africa' (Robben Island Guidelines').[i] The Robben Island Guidelines outline under three main headings the State obligations to prohibit and prevent torture, and to provide reparation to victims of torture and ill-treatment.[i] The obligation to provide reparation exists

regardless of whether a successful criminal prosecution has been brought. The Robben Island Guidelines also urge States to ensure thatall victims of torture and their dependents are offered appropriate medical care, have access to appropriate social and medical rehabilitation, and are provided with appropriate levels of compensation and support.[i] These Guidelines specify that direct victims, as well as their family members and communities may also be considered victims for the purposes of reparation.[i]

The Robben Island Guideline provide helpful guidance to the interpretation of the obligation of State parties to the African Charter to provide, and the rights of victims to obtain, reparation for human rights violations.[i] This is particularly true for the Maputo Protocol, the Resolution on the Right to a Remedy and Reparation for Women and Girls Victims of Sexual Violence, and the Fair Trial Principles and Guidelines, which fill gaps of other international instruments in setting out the procedural obligations of States to provide a remedy to women and communities in particular.[i]

The Robben Island Guidelines have equally helped to foster awareness of the State obligation to provide reparation to victims of torture.[i] However, these Guidelines do not explain in any detail how in practice States are to implement the obligations spelt out in part III of the text.[i] The Committee for the Prevention of Torture in Africa (CPTA) mandated to promote the Robben Island Guidelines - is therefore considering developing a General Comment on part III, akin to General Comment No. 3 adopted by the UN Committee against Torture.[i] This would set out in detail the obligations of States to afford reparation to victims of torture and ill-treatment in Africa.[i]

6.5Basic Principles on the Right to Reparation for Victims

As outlined above, the international and regional human rights mechanisms have contributed to an expanded concept of reparations for victims of serious human rights violations.Their work has also benefited from a number of UN non-binding standards, which reinforce and assist in defining the notion of remedies and reparations.[i] The Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985) primarily focused on victims of ordinary crimes; it does, however, contain provisions on victims who have suffered harm 'through acts or omissions that do not yet constitute violations of national criminal laws but of internationally recognized norms relating to human rights'.[i] The Declaration provided scarce guidance on operative aspects, and also stated that national legislation should be enacted and enforced in order to allow victims access to remedies, including restitution, compensation and assistance.[i]

The Basic Principles on Reparation for Victims[i], which were developed during a fifteen-year period prior to their adoption in 2006, provide a crucial benchmark, as they synthesize and define the areas of reparations as consisting of restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[i] The Principles aim to reflect the connection between international humanitarian law and human rights law, and stress the importance of, and obligation to, implement domestic reparations for victims of armed conflict.[i] The Principles explicitly state in the preamble that they: 'identify mechanisms, modalities, procedures and methods for the implementation of existing legal obligations under international human rights and international humanitarian law, which are complementary though different as to their norms'. The Principles do not define what exactly gross human rights violations and serious humanitarian law violations are, leaving this definition open to interpretation and forthcoming legal developments. As previously noted, the Principles, even when still in draft, have been referred to in jurisprudence by numerous human rights bodies, they feature in several

recentlyadopted legal instruments.[i]A key provision in the Basic Principles is contained in paragraph 16, which affirms that: 'States should endeavor to establish national programmes for reparation and other assistance to victims in the event that the party liable for the harm suffered is unable or unwilling to meet their obligation'.[i]

Further, the Basic Principlesmake it clear that awards of reparation must be made without any discrimination; providing thatthe application and interpretation of these Basic Principles and Guidelines must be consistent with international human rights law and international humanitarian law and be without any discrimination of any kind or on any ground, without exception.[i]To further buttress this point, the International Criminal Court, in its first ever reparations decision, in the *Lubanga case*[i], has indicated that the needs of all victims must be taken into account, and particularly children, the elderly, those with disabilities and victims of sexual or gender violence. This in turn, requires that reparation should be granted and implemented without any discrimination, such as regards age, ethnicity, political belief or gender.

It is noteworthy that although the provisions of the basic principles are formally non-binding, the Principles make an important contribution by defining remedies for human rights violations. To a significant extent, the Basic Principles draw upon the Draft Articles on State Responsibility adopted by the ILC in 2001.[i]

6.6 Legal Mechanisms for Gender Focused Transitional Justice in Africa

The pervasive nature of gender-based violence in conflicts, especially sexual and reproductive violence has resulted in increased acknowledgment in international criminal law.[i] While sexual violence in conflicts has been recognized under international law since the Second World War, it remained largely invisible until the 1994 Rwandan genocide - during which as many as 500,000

women were raped.[i] This led to a more radical recognition of the need for a gender-based prosecution strategy to address sexual violence in conflicts as a war crime. Given the enormity of the challenges brought by the armed conflict in Rwanda, the Rwandans chose to employ different fora at different levels of the society to seek prosecutorial and restorative justice.[i] These mechanisms include the International Criminal Tribunal for Rwanda, domestic prosecutions and the adaptation of a local justice mechanism,the*Gacaca.*[i]

The Arusha-based International Criminal Tribunal for Rwanda (ICTR) was established by UN Security Council Resolution 955 in November 1994 to prosecute those responsible for serious violations of international criminal law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighboring states between 1 January 1994 and 31 December 1994.[i] The tribunal was set up on an *ad hoc* basis with the intention of trying those most responsible for crimes against humanity during Rwanda's 100-day genocide, including former Prime Minister Jean Kambanda.[i] In 1998, the ICTR found former mayor, Jean-Paul Akayesu, guilty of nine counts of genocide, crimes against humanity and war crimes that included his having incited and encouraged his troops to commit acts of rape. [i]This was particularly significant as it was the first time an international court had ever punished sexual violence in a civil war; and it was the first time that rape was found to be an act of genocide, aimed at the destruction of a group.[i] The Akayesu judgment has influenced other principles for the prosecution of sexual violence and served to influence the jurisprudence of a permanent International Criminal Court.[i]

In Sierra Leone, the nature and extent of atrocities committed during the civil war from 1991-2002 prompted the creation of the Special Court to try war criminals in 2000.[i] By this time, the innovation of the International Criminal Tribunal for Rwanda, coupled with developments at

the ICTY addressing events in the former Yugoslavia had created significant precedents for addressing war crimes in domestic conflicts.The subsequent creation of the International Criminal Court in 1998 made it difficult for the international community to overlook events in Sierra Leone.[i] While the 1999 Lomé Peace Agreement granted the Revolutionary United Front (RUF) rebel leadership "absolute and free pardon" from prosecution, this immunity did not extend to prosecution for war crimes.[i]

In 2000, in an effort to address the perceived failings of the ICTR, as well as other transitional justice initiatives, the government of Sierra Leone urged the UN Security Council to authorize the creation of a Special Court to address these crimes.[i] This move was supported by both the United States and Britain, resulting in the creation of a national institution which was subject to UN oversight.[i] This Special Court was to operate under both Sierra Leonean domestic law and international humanitarian law and, while beyond the control of the UN Security Council, was supported by its major funders, i.e. Britain and the USA.[i] The Sierra Leonean Special Court was established in 2003 and mandated to prosecute those who "bear the greatest responsibility" for war crimes, crimes against humanity and other serious violations of international humanitarian law.[i] The Court ensured that 20 per cent of its investigative team was focused on sexual offences, a marked improvement on the Rwandan International Tribunal.[i]

On an international level, the Hague-based International Criminal Court (ICC), which came into existence in 2002 as the first permanent international criminal tribunal, was set up as a court of last resort to prosecute offences where national courts failed or were unable to respond. The 1998 Rome Statute establishing the ICC expanded the definition of crimes against humanity and war crimes to recognise rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, trafficking or any other form of sexual violence after the intense lobbying

by women's groups globally.[i]As such the ICC can both prosecute these crimes and create an obligation that all investigations include gender-based crimes.[i]

In the case of the *Prosecutor v. Joseph Kony and Vincent Otti,*[i]Joseph Konythe alleged commander-in-chief of the Lord'sResistance Army (LRA) was accused among other crimes ofsexual enslavement (Article 7(1)(g)); rape (Article 7(1)(g)); inhumane acts of inflicting serious bodily injury and suffering (Article 7(1)(k) of the Rome Statute.In the case of Vincent Otti, the same charges were brought against him. Both accused persons were tried and found guilty as charged.

In *Prosecutor v Mathieu Ngudjolo Chui*,[i]Mathieu allegedly committed murder under Article 7 (1) of the Rome statute through other persons, within the meaning of Article 25(3) (a) of the statute as well as sexual slavery and rape under Article 9(1) (g) of the statute. However, in December 2012, the Trial Chamber II acquitted Mathieu of the charges and ordered his immediate release.

More recently, in the *Prosecutor v. Dominic Ongwen,*[i]Dominican alleged former brigade commander of the Sinia Brigade of the LRA was charged withcrimes against humanity including murder and attempted murder; torture; sexual slavery; rape; enslavement; forced marriage as an inhumane act; persecution; and other inhumane acts. In 2016, Pre-Trial Chamber II confirmed the charges brought by the Prosecutor against Dominic Ongwen and committed him to trial before a Trial Chamber, as such the trial opened in December 2016. Opening statements were then made by the Office of the Prosecutor and the Legal Representatives of victims. The trial resumed on 16 January 2017.

Unfortunately, while transitional justice mechanisms in Africa have brought greater attention to the impact of conflicts on women, they have not stemmed the widespread

occurrences of violence against women, as this remains shockingly high in post conflict settings. Domestic and sexual violence statistics emerging from post conflict countries such as South Africa, Liberia, DRC and Sierra Leone are elevated and structures for the redress of violations against women are clearly inadequate.[i]

6.6.1 Truth Commissions

Truth Commissions have also been pressured to report the often-overlooked range of abuses suffered by women during conflicts.[i]Adopting a gender sensitive approach to the work of a Commission in terms of its structure and ambit should assist in identifying the different experiences of men and women during particular conflicts.[i] Apart from helping to create a fuller historical record, it is hoped that a gender-aware process will enable the creation of gender-sensitive programmes for post conflict reconstruction and reconciliation.

The South African Truth and Reconciliation Commission (TRC) is the best known of Africa's modern TRCs. It was set up in 1995 as a far-reaching effort to address the human rights violations committed during the apartheid era, with the expressed intention of facilitating reparation and conflict resolution.[i]The TRC was tasked with compiling a detailed record of the nature, extent and causes of human rights violations that happened between 1960 and 1994, and to hear and document testimonies of those who had experienced violations.However, it wasalso perceived as failing to respond to calls for a more integrated understanding of the gendered nature of the apartheid state whose policies particularly afflicted African women and as a result, the experience of women was relegated to 'a chapter' in the TRC report.[i]

Drawing from the South African experience, the Sierra Leonean Truth and Reconciliation Commission, with the assistance of the United Nations Fundfor Women (UNIFEM), set out to pay special attention to the experiences of women and children during the conflict. The TRC was

an initiative agreed to by all parties during the 1999 Lomé Peace Agreement and was subsequently established through an Act of Parliament.[i]

According to the UN Special Rapporteur on the Elimination of ViolenceAgainst Women, an estimated 72 percent of SierraLeonean women and girls experienced human rights abuses during the war and over 50 percent were victims of sexual violence.[i] The publichearings by the TRC brought national attention to the plight of women during the war and the Commission also focused on the marginalisation and discrimination of women prior to the war.[i]The Commission's mandate, which in effect allowed investigation of the experience of Sierra Leonean women both pre and post-conflict, added a new dimension to the ability of TRCs to address the past. Consequently, the final report was able to highlight cases of gender violence as well as the multiple roles women played. The Commission's recommendations have been used by civil society groups such as the Mano River Women's Network (MARWOPNET) to advocate for legal reforms to advance gender justice.[i]

Nevertheless, despite these important achievements that indicate the real impact of TRCs in the advancement of gender justice, Truth Commissions have been criticised for advancing a narrow and partial truth rather than taking a more holistic approach which integrates gender fully.[i] The failure to look at the broader issues of the impact of conflict on women's lives holistically is still lacking.[i] These problems are amplified by certain factors which have made many women reluctant to engage fully in "truth telling", which have yet to be fully integrated into TRC's mandate.[i] These include social stigma or shame around discussing gender based violence, worry about security or retaliation from perpetrators and the prevailing tendency of women to focuson experiences of others rather than their own.[i]

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Conclusion

Over the past century, the nature of war has changed. Whereas wars were once fought by men on battlefields largely removed from civilian populations, today civil wars in populated areas, often divided along ethnic or religious lines, are increasingly prevalent. This means that even though the majority of soldiers and armed fighters are still male, women and girls have been increasingly impacted by violence in armed conflict.Women have often been targeted in wartime for violence, especially sexual violence.Parties in conflict situations often rape women, sometimes using systematic rape as a tactic of war. Other forms of violence against women committed in armed conflict include murder, sexual slavery, forced pregnancy and forced sterilization.The growing number of armed conflicts and the violations associated with them have resulted in an increase in forced internal displacement and refugee flows, with women refugees vulnerable to violence and exploitation while in flight, as well as in countries of asylum and during repatriation.

Protections afforded women in armed conflicts have been sparse[i]; however, since the gender-specific atrocities of the former Yugoslavia in the early 1990s, increasing attention has been focused on the needs of women both during and after armed conflict.[i] Greater awareness of

gender-based violations has been noted in the jurisprudence of the International Criminal Tribunal for the Former Yugoslavia, the International Criminal Tribunal for Rwanda, and through the development of the International Criminal Court.[i] Protection measures against sexual violence during armed conflict have been called for by the United Nations Security Council through various Resolutions, including Resolutions 1325, 1820, and 1888.Programs for the prevention of and response to wartime rape and other forms of Gender Based Violence have also been instituted by the United Nations and other humanitarian NGOs.[i] Ending impunity for perpetrators of violence against women during conflict and increasing the scope and availability of victim services are incredibly important first steps. However, if sexual and physical violence against women during wartime is a continuation of gender relations and inequality throughout societies and cultures during peacetime, prevention programs must address these deeper causes as well.

The groundbreaking UN Security Council resolution 1325 (2000) on women, peace and security recognizes that war, impacts women differently, and reaffirms the need to increase women's role in decision-making related to conflict prevention and resolution. However, as has been established in this study, women's role and participation still falls short, this has been attributed largely to the prevalence of social norms and biases that perpetuate gender inequality within the security sector.

Additionally,the Beijing Declaration and Platform for Action, adopted in 1995 by 189 UN Member States, made women and armed conflict one of 12 critical areas of concern. It stated unequivocally that peace is inextricably linked to equality between men and women and to development.The Beijing Platform for Action spelt out a series of essential measures to advance both peace and equality through reducing military expenditures and controlling the availability of

armaments. It stated that women must participate in decision-making around conflict resolution, and recognized that women have been powerful drivers of peace movements. It stressed that those who have fled conflict are entitled to fully participate in all aspects of programmes to help them recover and rebuild their lives. However, since then, fierce fighting has engulfed some areas of the world, dragging back development and women's gains by decades. The Beijing commitments remain mostly unfulfilled, even as their urgency has never been more apparent.[i]

This study examined the impact of war on the lives of women in the African society;it determined the legal and moral justification for the demand to protect women during and post armed conflicts in Africa; the rights and protection availed to these women in armed conflicts under International Humanitarian Law and International Human Rights Law. Itidentified and examined the key players and institutions in ensuring the safety and protection of women during and post armed conflicts in Africa.This workidentified the nature of reparative justice to women who are victims of all sorts of violence and violations in Armed Conflict in Africa; and it also analyzed past conflict situations in order toinform strategies towards peace keeping and reconstruction of the lives of women affected by armed conflicts in Africa.

This study posits that international human rights law and international humanitarian law share the goal of preserving the dignity and humanity of all. As such in the situations of armed conflicts, both branches of law are heavily relied upon to ensure that human rights of persons are not violated as well as to ensure that parties to armed conflicts conduct themselves within the ambit of the law. In this regard, theHigh Commissioner for Human Rights stated that,

> International human rights law and international humanitarian law share the common goal of preserving the dignity and humanity of all. Over the years, the General Assembly, the Commission on Human Rights and more recently the Human Rights Council, have considered that, in situations of armed conflict, parties to the conflict have legally binding obligations concerning the rights of persons affected by conflict.[i]

As indicated throughout this study, international human rights law and international humanitarian law are bodies of law in permanent evolution. Warfare is a phenomenon in constant change and, thus, international human rights law and international humanitarian law are required to adjust constantly to avoid gaps in the protection they provide. Changes in the law stem essentially from the practice of the different organs that supervise compliance with the system. Jurisprudence by judicial organs, and also by treaty bodies, is a significant source of interpretation and is fundamental for the development of the system. But applying the rules correctly and, most importantly, providing adequate protection to populations at risk require a thorough understanding of how these different norms interact and how they complete and complement each other to afford the highest standard of protection possible.The discussion on their interaction is certainly part of a broader legal debate on the fragmentation and unity of international law. As a result, recent legal debates have concentrated on developing mechanisms to ensure maximum protection for the individual.[i]

Additionally, as a result of efforts to ensure effective protection for the rights of all persons in situations of armed conflict, a number of United Nations agencies as well as international and regional courts, have in practice increasingly applied obligations of international human rights law and international humanitarian law in a complementary and mutually reinforcing manner.[i]In this respect, both international human rights law and

international humanitarian law provide extensive protections and guarantees for the rights of persons not actively or no longer participating in hostilities, including civilians. The application of both bodies of law should always be carried out in a complementary and mutually reinforcing manner; as doing so prevents gaps in protection and could facilitate a dialogue with the parties to the conflict concerning the extent of their legal obligations.[i] Moreover, the complementary application of both bodies of law will also provide the necessary elements for triggering national or international accountability mechanisms for violations committed in the conflict.[i]Additionally, both legal regimes also provide the necessary mechanisms to ensure that victims can exercise their right to a remedy and to reparation.

With specific regard to women, it is clear from the discussions in this study that a plethora of human rights instruments, as well as international humanitarian law treaties, exist at internationaland regional levels to promote the rights of women as well as to protectthem in armed conflict.This represents a remarkable progress in terms of attempting to address the impunity of war time violence against women. Additionally,the normative framework that human rights are women's rights has crystallized,however what remains is actual realization of these rights by women as bearers especially in the African context.Further,it may be argued that the implementation of the available legal mechanisms for the protection of women in armed conflict is the problem in the actualization of efficient protection of women in armed conflicts under international humanitarian law and international human rights law.

Moreover, despite the optimistic expectations, the codification of gender based offences in armed conflicts in various regional and international statutes and their determination as constituents of war crimes, crimes against humanity and genocide have not proved to be enough

deterrent to prevent such brutal crimes from occurring. On the contrary, sexually motivated violence against women in armed conflict is still prevalent.

One may argue that, measuring the progress of international law as regards the eradication of this scourge is speculative at best, because progress in this context has different meanings to different categories of persons. One may also argue that only the victims and survivors most affected by the outcome may be able to define the sufficiency or insufficiency of the laws or its implementation thereof.

7.2 Recommendations

Having determined the impact created on the lives of women by war and armed conflicts in Africa, the laws available to aid in their protection, as well as its perceived success and failures, this research proffers some recommendations in order to help strengthen the implementation process of these laws in a manner that is impactful on the lives of these women affected by armed conflicts. While these recommendations do not claim to be exhaustive, it attempts to capture the essential or key issues that must be addressed to create enabling environment- legal and otherwise for women's issues to thrive. It is pertinent to point out that these recommendations while they address mainly the United Nations and member states, it equally seeks to address other actors, for instance, the private sector, the civil society and NGOs whose focus is on gender issues and actualization of women's rights and protection.

1. **Strengthen the capacities of actors in mission environments through:**
    a) **Continuous, specialized and sustained training for peacekeeping personnel on gender issues to encourage changes in attitudes:** The United Nations (UN) should consider ensuring continuous training of peacekeeping personnel on issues of gender and women's rights. The UN should take the approach of integrating

practical training on changing attitudes towards women's rights. Peacekeepers originating from countries with better records of gender equality and equity may hold values that are more in line with treating women as equals, instead of being potential sources of exploitation. Due to the complex nature of current peace operations, it is increasingly important for military, police and civilian personnel to be equipped with practical skills and contextual knowledge on human rights. The training should cover prevention of sexual and gender based violence, and explicitly incorporates situational information on the impact of armed conflict on women, and on the critically important roles and contributions of women in preventing and ending armed conflict. Such training will prepare peacekeepers to more effectively collaborate and engage with local communities. The training should be sustainable and not just one-off events.

b) **Entering into constructive partnerships to generate and develop capacities of regional, national and community actors:** It is imperative that the UN strengthens its external partnership with think-tanks and social movements to address gender issues in peace operations environments in Central African Republic, Nigeria, the Democratic Republic of Congo and South Sudan. Such partnerships are already working in the Democratic Republic of Congo, and actors striving to ensure the protection of women in Central African Republic can benefit from lessons accruing from such partnerships. UN peace operations should also improve opportunities for collaboration with women's groups at the local and regional levels, to encourage and promote local women's participation in peace processes and state-building. Political processes supported by UN peace

operations should prioritize the development of dedicated dialogue platforms for the inclusion of women's issues into peace processes, as well as state-building approaches. The Framework of Cooperation between the International Conference on the Great Lakes Region (ICGLR) and the UN Office of the Special Representative of the Secretary-General on Sexual Violence in Conflict (SRSG-SVC), signed on 23 September 2014, is an example of such collaborative approaches. The framework highlights the UN's support in consolidating the Kampala-based ICGLR Regional Training Facility's capacity and strengthening its competencies, including through provision of experts, sharing of knowledge, experiences and information, to enhance joint efforts to build the capacities of actors in the region to address sexual violence.[i]

c) **Strengthening men's agency and capacity to prevent sexual violence and protect the rights of women:** Based on the realities of men and women in situations of conflict, it is clear that it is not possible to develop a truly gendered approach to understanding conflict and peace without analysing and considering men's perspectives and, in particular, without holding a view about men's relationships to violence. UNSCR 2242[i] on women, peace and security, adopted in October 2015, reiterates the importance of engaging men and boys as partners in promoting women's participation in the prevention and resolution of armed conflict, peace building and post-conflict situations. An increasingly popular approach to reducing violence, especially between men and women, is to focus on men as 'change agents', based on the idea that men susceptible to committing violence against women can change if they are helped to understand the causes

and consequences of their predatory and risk-seeking behavior. Men are central to gender (in) equality, yet men's agency is often absent from the gender discourse. Men's agency and power in perpetuating and addressing discrimination and exclusion needs to be acknowledged and included in the discourse. The UN should therefore intensify its effort in working with local men's groups, youth associations, and male traditional leaders; who are often gate keepers in the community, and without whose participation no real change can be achieved.

2. **Increase financial resources for gender considerations in peacekeeping operations through supporting funding for women's compensation and reparations:** Increased funding should be directed to local organizations that often have detailed knowledge – rooted in local lived realities – of the social and cultural barriers to gender equality and obstacles to the promotion and protection of women's rights. These institutions should be able to recognize and address the impacts of gender inequalities at local level, leveraging on the strengths of communities. The UN can contribute to breaking these barriers by ensuring that humanitarian aid and funding provides for the full range of medical, legal, psychosocial and livelihood services to victims of rape (often women) and other forms of sexual violence. A victims' assistance programme is operational in both United Nations Stabilization mission in the Democratic Republic of Congo (MONUSCO) and United Nations Multidimensional Integrated stabilization mission on Central African Republic (MINUSCA).[i] However, the UN should ensure that reparations awarded through judicial or administrative mechanisms are made available to survivors of sexual violence during times of conflict. Multi-sectoral approaches to the provision of reparations should be strengthened as part of post-conflict transition initiatives and reparations programmes

should receive consistent and sustainable funding. The presence of these mechanisms provide a platform for strengthening trust among victims and reinforcing their confidence in judicial processes. Emphasis should also be placed on trauma-healing for survivors. In the absence of healing, survivors of conflict and sexual violence continue feeding the cycle of conflict negatively – thus trauma-healing is key in preventing conflict.

3. **Increase women's participation in peace operations by:**
    a. **Supporting efforts to grow the number of qualified women available for peacekeeping missions:** Women continue to be underrepresented in peacekeeping forces. The dynamics of conflict call for both uniformed and civilian capabilities to meet the operational demands of effective peacekeeping. Due to the impact of sexual and gender based violence in mission environments, the UN should consider supporting the efforts of member states and other actors – such as the AU – to increase the number of qualified women in the security forces, as well as in civilian capacities. The UN can do this by supporting review processes in the defence and police forces, and by providing technical and financial support for implementing national gender quotas linked to peacekeeping. More attention should be paid to, on the one hand, the revision of national policies inhibiting women's participation in the security forces and, on the other, the development of policies supporting the deployment of women in peace operations. This will help to broaden opportunities for women police and military officers' deployment in peacekeeping missions. The UN should also support the efforts of member states to develop a gender policy on force generation to address the recruitment, force preparation, retention and advancement of female

uniformed personnel in missions. A strategic case for increasing the number of female personnel in peacekeeping environments is the fact that there have not been any cases reported of female peacekeepers being implicated in allegations of sexual violence, abuse and exploitation.[i] Further, the presence of women in peacekeeping missions in civil, military and police functions may encourage women from local communities to report acts of sexual violence.

b. **Strengthening the roles of gender experts at all levels and aspects of peace operations:** The UN should strengthen gender analysis during mission planning, mandate development, implementation and mission drawdown. In addition to a general call to include gender perspectives in the work of the UN and the deployment of gender experts and advisors, it is important to redefine the roles of these experts and advisors. For some missions, there is only one gender expert or advisor who is expected to support the entire mission. Increasingly, the UN is also adopting the use of gender focal points in missions. Some of the missions primarily depend on gender focal points, which limit the amount of work that these people, who already have core responsibilities (with gender mainstreaming as an add-on), can implement. The role of gender focal points should be strengthened and funded to ensure the adoption of effective gendered approaches in missions. During preparations for the mission, the UN should authorize and commission special fact-finding operations related to the security of women and their participation in peace efforts prior to the drafting of any resolutions and/or mandates pertaining to the establishment of peacekeeping missions.

4. Supporting a gender based development approach by:

a. **Establishing and strengthening gender based Projects:** The UN should encourage donors, and work with other actors, such as civil society groups and NGO's to fund income-generating projects and schemes, (such as financing small businesses for women) aimed at improving the economic conditions of local women in post-conflict countries where peace keeping missions are deployed. These projectsshould be gender sensitive and reflect the disproportionate strife suffered by women in conflict areas,by responding specifically to gender issues, including supporting the victim assistance programme infrastructure and funding projects such as gender desks in police stations and hospitals, with particular focus on rural areas where such infrastructures are not fully developed.

b. **Enhancing the link between gender in peacekeeping and the achievement of sustainable development goals:** Gender equality is a prerequisite not only for development and growth, but for sustainable peace and stability. Further, greater gender equality leads to faster economic growth, democratic inclusiveness and better human recovery. This is also reflected in the 2030 Agenda for Sustainable Development. The Sustainable Development Goals (SDGs) seek to realize the enjoyment of human rights by all, and to achieve gender equality and the empowerment of all women and girls. It envisions a world which invests in its children and in which every child grows up free from violence and exploitation. It also envisions a world in which every woman and girl enjoys full gender equality and where all legal, social and

economic barriers to their empowerment have been removed. The UN and other actors in states where there have been war and armed conflict should work together to establish and implement the various linkages between the implementation of United Nations Security Council Resolution 1325 and the realization of the Sustainable Development Goals, which were passed in 2015. Women's political and socio-economic development plays a central role in achieving these goals. The UN should work with other actors to create more opportunities for women to engage in economic empowerment activities. The linkage of these two main strategic objectives in a mission area provides for increases in financing and reduces the overlapping of efforts, noting that most member states make budgetary provisions and receive external funds for the SDGs. If this is linked to strengthening gender in peacekeeping, it forms a platform for responding to the vulnerabilities of women to sexual violence, exploitation and abuse.

c. **Recognizing Gender equality in all peace processes, agreements and transitional governance structures.** International, regional organizations and all participating parties involved in peace processes should advocate for gender parity, maintaining a minimum 30 per cent representation of women in peace negotiations, and ensure that women's needs are taken into consideration and specifically addressed in all such agreements; as well as to increase the number of women in senior positions in peace-related functions, as such priority should be given to achieving gender parity in the appointment of women as Special Representatives and Envoys.

5. **Strengthen protection of women in armed conflict by:**

   a. **Enhancing humanitarian support for female refugees and internally displaced persons (IDPs):** There has been an increase in the number of refugees crossing borders as a result of the conflicts going on in their various regions. Nigeria, the DRC and CAR both have IDPs who face the very real risk of starvation and other forms of violence and sexual exploitation. In June 2015, the total population of concern in DRC was 2,001 006 and 517 204 in CAR.[i]Additionally, the internal displacement monitoring centre estimates that there are almost 2,152,000 internally displaced persons in Nigeria as of December 2015.[i] Sadly these statistics are still on the increase. It is imperative to note that all categories of refugees and IDPs (women, children, men and the aged, among others) suffer extremely from lack of basic needs like water, healthcare, proper housing, community infrastructure, education, nutrition and protection, the UN system should devote more resources to the protection of women IDPs and refugees, who are disproportionately more exposed to sexual violence, exploitation and abuse. The UN should focus on strengthening the capacities of national authorities and local organizations to ensure the protection of civilian populations, with particular emphasis on women, including security from conflict-related sexual violence. Mainstreaming women's empowerment considerations into humanitarian activities is key to ensuring a rights-based and effective humanitarian system serving women, men, boys and girls affected by disasters and conflict. Cases of sexual violence, exploitation and abuse in both the DRC and CAR have reportedly

occurred in IDP camps, or near the camps, and should be systematically investigated and addressed.[i]

b. **Supporting community infrastructures for the protection of women:** In most conflict environments there are weak or no structures in place to facilitate the work that needs to be done to adequately protect women. Simple measures like providing escorts for women embarking on essential trips for water or wood can be helpful in deterring perpetrators of sexual violence against women. More particularly, in the aftermath of conflict, weak justice systems and socio-economic and cultural factors discourage women from reporting abuses and promote a culture of impunity. The UN can bridge this gap and strengthen mechanisms for accessing justice for women survivors by working with host countries to institutionalize judicial systems. While it is first and foremost the responsibility of governments, the UN should also emphasize its support to women in this regard. The demand on UN peacekeepers to provide security comes with a disclaimer that the UN cannot protect everyone, every time from everything. A key success inherent in peace and security issues is to utilize and engage community structures. For protection strategies to have a meaningful impact in a society in conflict, increased local engagement should be emphasized in peace operations environments. The UN should, therefore, support processes and coordination systems that ensure the inclusion of local authorities, among them indigenous and traditional leaders, in developing strategies for the protection of women in peacekeeping environments. This has the impact of increasing ownership and

enhancing inclusive participation. Involving families and communities to identify areas and situations where women are particularly vulnerable is important for strengthening preventive mechanisms. It is important to empower community leaders and members to employ and utilize protection mechanisms for their collective benefit.

c. **Enhancing accountability and combating impunity on violence against women:** Immunity does not translate to impunity. Weak judicial systems and structures provide loopholes for impunity for peacekeepers implicated in cases of sexual violence. All member states contributing peacekeeping forces are expected to take necessary measures to bring to justice their own nationals responsible for such crimes, as called for in UNSCR 1400 (2002) and in subsequent measures and resolutions, including UNSCR 2272. The UN should also ensure that the principle of no amnesty for perpetrators of grave human rights violations, including sexual violence crimes, is adhered to by member states. The body should further ensure that member states that do not take action on such misconduct are held accountable for the actions of their officers. Some of these accountability measures are reflected in the steps taken by the UN, like withholding reimbursements to troop-contributing countries whose peacekeepers have been implicated in allegations.[i]

6. **Enhance the sharing, dissemination and utilization of evidence-based information through:**

a. **Strengthening evidence-gathering on sexual violence in mission areas:** A sound strategy must be based on reliable data. Member states should close the

existing data and evidence gap by conducting or commissioning studies on gender and conflict-related sexual violence and facilitate improved data collection and analysis. The establishment of a Regional Research and Documentation Centre for Women, Gender and Peace building in the Great Lakes Region is one of the major activities of the United Nations Educational, Scientific and Cultural Organization's (UNESCO) gender equality programme. The center is part of UNESCO's programme promoting the human rights and status of women living in the Great Lakes region through the pursuit of policy-oriented research, consultations, networking and capacity-building for sustainable peace in the region.[i] Building on the Declaration of Commitment to End Sexual Violence in Conflict launched at the UN General Assembly in 2013, the 2014 Global Summit to End Sexual Violence in Conflict initiated the International Protocol on the Documentation and Investigation of Sexual Violence in Conflict, setting out international standards on how to collect the strongest possible information and evidence, whilst protecting witnesses, to increase Convictions and deter future perpetrators.[i]It guides practitioners on how to obtain evidence for sexual violence crimes. Stronger evidence lessens the burden on survivors to testify as the basis of prosecutions, as well as ensures that victims are not further stigmatized or traumatized by going through trials. The UN can contribute by working with local organizations to strengthen understanding of such instruments at the community level.

7. **Utilization of best practices and lessons learnt:** The UN should further ensure that peacekeeping missions build on successful efforts and lessons learnt from previous

missions to facilitate increased participation of local women in peace processes at all levels. This should be strengthened by studies and applied research on the key challenges and successes of the different interventions that seek to respond to gender dimensions in peacekeeping.

8. **Support policy processes for implementation of United Nations Security Council Resolution 1325 by:**

    a. **Strengthening political leadership on the full implementation of UNSCR 1325 and its subsequent resolutions**: High-level political leadership across the whole UN system should be visible and operational in responding to issues of women, peace and security. Greater efforts to ensure UN and other regional actors' accountability in implementing UNSCR 1325 must accompany enhanced leadership efforts by UN actors. The UN Department of Peace Keeping Operations and, by extension, the United Nations Security Council need to work to overcome the political and implementation hurdles they face in fully implementing the women, peace and security agenda, as well as the full complement of their obligations in terms of ensuring international peace and security. Briefings from senior UN officials, including special envoys and special representatives, must include analyses and recommendations on women's security, health and economic concerns and engagement in key political processes and decision-making forums, and women's access to services and protection. They must also reflect on information in key reports, and fill in gaps in information not provided in reports, particularly on women's participation. In this regard, briefers should report explicitly on the implementation of the women,

peace and security components of the mandate – including successes, challenges, failures and plans for further implementation, as well touching on ways of engaging with local organizations.

b. **Establishing a gender mainstreaming mentorship programme:** This programme will primarily target military, civilian and police peacekeepers with information on how to work with local women and communities at large in responding to gender issues. This could benefit from the experiences of the UN Police International Network of Female Peacekeepers, a setup which focuses on increasing professionalism through training and sharing expertise on international policing and issues affecting local women. The mentorship programme, hosted by the Department of Peace Keeping Operations, will also be a platform for sharing lessons learnt and best practices in terms of engaging with local communities on gender issues based on different mission experiences.

c. **Establishingan international Truth and Reconciliation Commission on violence against women in armed conflict as a step towards ending impunity**: This Commission, to be convened by civil society with support from the international community, will fill the historical gap that has left these crimes unrecorded and unaddressed.

d. **Strengthening of United Nations field operations for internally displaced women, and those bodies that support a field-based presence**: Protection officers from all relevant bodies, including the Office of the High Commissioner for Refugees (UNHCR), the Office of the High Commissioner for Human Rights (OHCHR), the Office for the Coordination of Humanitarian Affairs (OCHA), the

United Nations Children's Fund (UNICEF) and the International Committee of the Red Cross (ICRC), should be deployed immediately if a State cannot or will not protect displaced populations or is indeed responsible for their displacement.

e. **Psychosocial support and reproductive health services for women affected by conflict to be an integral part of emergency assistance and post-conflict reconstruction:** Special attention should be provided to those who have experienced physical trauma, torture and sexual violence. All agencies providing health support and social services should include psychosocial counseling and referrals. The United Nations Population Fund (UNFPA) should take the lead in providing these services, working in close cooperation with the World Health Organization (WHO), UNHCR, and UNICEF.

f. **Reviewing training programmes on and approaches to the gender dimensions of conflict resolution and peace-building for humanitarian, military and civilian personnel.** United Nations entities active in this area should lead this process with support provided by the Special Advisor on Gender Issues and Advancement of Women and the Task Force on Women, Peace and Security with a view to developing guidance on training policy and standards.

g. **Establishing a United Nations Trust Fund for Women's Peace-building:** This Trust Fund would leverage the political, financial and technical support needed for women's civil society organizations and women leaders to have an impact on peace efforts nationally, regionally and internationally. The Fund should be managed by the United Nations Development Fund for Women (UNIFEM), in consultation with other UN bodies, and women's civil society organizations.

h. **Encouraging UNIFEM to work closely with the Department of Political Affairs** (DPA) to ensure that gender issues are incorporated in peace-building and post-conflict reconstruction in order to integrate gender perspectives in peace-building and to support women's full and equal participation in decision-making, and for the UN Population Fund (UNFPA) to strengthen its work in emergency situations in order to build women's capacity in conflict situations. UNIFEM and UNFPA should be represented in all relevant inter-agency bodies.

i. Appointment of a panel of experts by the UN to assess the gaps in international and national laws and standards pertaining to the protection of women in conflict and post conflict situations and women's role in peace-building.

j. The systematic collection and analysis of information and data by all actors, using gender specific indicators to guide policy, programmes and service delivery for women in armed conflict. This information should be provided on a regular basis to the secretariat, member states, inter-governmental bodies, regional organizations, NGOs and other relevant bodies. A central knowledge base should be established and maintained by UNIFEM together with a network of all relevant bodies, in particular the Department of Political Affairs (DPA).

k. Ensuring that operational humanitarian, human rights and developmental bodies develop indicators to determine the extent to which gender is mainstreamed throughout their operations in conflict and post-conflict situations and ensure that 'gender mainstreaming' produces measurable results and is not lost in generalities and vague references to gender. Measures should be put in place to address the gaps and obstacles encountered in implementation.

l. Ensuring that the budget for humanitarian assistance and post-conflict reconstruction is gender sensitive, to ensure that women benefit directly from resources mobilized through multilateral and bilateral donors.

This study is unique because it brings to fore that while there are a plethora of international and regional treaties for the protection of women in armed conflicts in Africa; there are still violations of women rights in armed conflicts in Africa. This is attributed to the lack of or difficulty in the implementation of the provisions of the available laws.This study posits that to aid in the implementation process, careful planning and regularconsultation with relevant stake holders (specifically focused on implementation of IHL and IHRL provisions) is of utmost importance.In addition, since states have the responsibility of implementation of international humanitarian law rules as well as the protection of the fundamental human rights of its citizens,this study recommendsthat African states establish a committee of persons with expertise on the implementation of international humanitarian law and international human rightslaw with a gender-basedperspective.

This contribution will aid further research on the implementation of international humanitarian law and international human rights lawwithspecialfocus onthe protection of women in armed conflicts in Africa; it will further aid academic research, and be usefulto practitioners and the general public at large.

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