

**THE ELDERLY PERSON IN WARTIME: HOW IHL
RESPONDS TO THE PLIGHT OF ELDELRY PERSONS.**

**DISSERTATION SUBMITTED IN PARTIAL
FULFILLMENT OF THE REQUIREMENTS FOR THE
LL.B DEGREE, UNIVERSITY OF NAIROBI**

**BY
MEROKA MBECHÉ A.K.**


SUPERVISED BY MR. A. MOMANYI

SEPTEMBER 2005

UNIVERSITY OF NAIROBI LIBRARY
P. O. BOX 30197
NAIROBI

DECLARATION

This project is my original work and has not been presented for a degree in any other university.

Signed: 
Meroka Mbeche A.K

Date: 22/09/05

This project was submitted for examination with my approval as the university supervisor.

Signed: 
Mr. A. Momanyi

Date: 22/09/05

ACKNOWLEDGEMENTS

I wish to thank my father Prof. Mbeche for his guidance and instruction, not only while writing this project, but also throughout the course of my studies at the University of Nairobi.

Secondly, I would like to thank my supervisor Mr. A. Momanyi for his effort and for patiently guiding me throughout the course of writing this project. Without his invaluable instructions, this project would not be what it is.

My sincere gratitude also goes out the University of Nairobi, Faculty of Law Library, the Jomo Kenyatta Memorial Library, Dr. A.O Adede and L'etwal International, the Kenya Red Cross Society and the International Committee for the Red Cross, Nairobi, for giving me access to the resource material I needed for this project.

I would also like to express my gratitude to the staff of the University of Nairobi, Faculty of Law and Faculty of Business and Commerce Computer Laboratories, where I conducted a great deal of research over the internet and typed this project.

I am also grateful to my mother Mary Meroka, my sister Lucy and my brother George for supporting me throughout the course of my studies at the University and more so while writing this project. My gratitude goes out to all my friends as well.

My gratitude goes out to Dennis Mutua as well, for his constant support and love.

Most importantly, I would like to thank God who has made all things possible.

DEDICATION

I dedicate this project to my niece, Bijou Meroka. Through your innocence, you taught me many vital lessons in life. Now I know how beautiful life is when looked at through the eyes of a child.

**TABLE OF INTERNATIONAL LEGAL INSTRUMENTS AND
CONVENTIONS**

1. The Statute of the International Court of Justice, 3 Bevan 1153, U.N Yearbook, 1945
2. The London Charter of the International Military Tribunal issued on 8th August, 1945, 82 1945 U.N.T.S 284
3. The Fourth Geneva Convention of 12th August 1949 relative to the Protection of Civilian Persons in Wartime, 75 1949 U.N.T.S 287
4. The Vienna Convention of 1969, 1155 1969 U.N.T.S 331
5. The Convention on the Prohibition of Military and Hostile Use of Environmental Modification Techniques, of 10th December 1976, UN A/RES/31/72, 1976
6. The 1977 Protocols Additional to the 1949 Geneva Conventions, Protocol I Relative to International Armed Conflicts, 1977 1125 U.N.T.S 3 and Protocol II Relative to Non-International Armed Conflict, 1977, 1125 U.N.T.S 609
7. The United Nations Convention on Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects of 1980 and its Four Annexed Protocols, 2 1980 U.N.T.S, 1342
8. The Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction of September 1997, 36 I.L.M 1507 (1997)
9. The Statute of the International Criminal Court, adopted in 1998, U.N Doc. A/CONF.183/9

LIST OF CASES

1. Trial of the Major War Criminals Before the International Military Tribunal (Wikipedia Free Encyclopedia, May 2005)
2. United States of America v. Karl Brandt, et al. (Wikipedia Free Encyclopedia, May 2005)

LIST OF ACRONYMS

1. ICC- International Criminal Court
2. ICJ- International Court of Justice
3. ICRC- International Committee for the Red Cross
4. ICT- International Criminal Tribunal
5. ICTR- International Criminal Tribunal for Rwanda
6. ICTY- International Criminal Tribunal for former Yugoslavia
7. IHL- International Humanitarian Law
8. IMT- International Military Tribunal
9. NGO- Non- Governmental Organization
10. NMT- Nuremberg Military Tribunal
11. UEFA- Union of European Football Association
12. U.N- United Nations
13. UNHCR- United Nations High Commission for Refugees
14. UNICEF- United Nations Children's Education Fund
15. UNGA- United Nations General Assembly

TABLE OF CONTENTS

	PAGE
Acknowledgments.....	ii
Dedication.....	iii
Table of International Legal Instruments and Convention.....	iv
List of Cases.....	v
List of Acronyms.....	vi
 <i>CHAPTER ONE: THE ELDERLY PERSON IN WARTIME- AN INTRODUCTION</i>	
1.0 Introduction.....	1
1.1 Statement of the research problem.....	3
1.2 Research justification.....	3
1.3 Theoretical framework.....	4
1.4 Hypotheses, assumptions and limitations.....	6
1.5 Type of research and method of study.....	7
1.6 Data needs and data source.....	8
1.7 Literature review.....	9
 <i>CHAPTER TWO: DEVELOPMENT, SOURCES AND ROLE OF IHL</i>	
2.0 Introduction.....	14
2.1 Definition of terms:	
i) Armed conflict.....	14
ii) Distinction between international and internal armed conflict.....	15
iii) International Humanitarian Law.....	15
iv) War victim.....	15

v) Humanitarian aid and humanitarian organizations.....	16
vi) Vulnerability.....	16
vii) Civilian.....	16
viii) Protection under International Humanitarian Law.....	17
2.2 Historical development of International Humanitarian Law.....	18
2.3 Post 1977 and modern day development of International Humanitarian Law..	20
2.4 Sources of International Humanitarian Law.....	24
2.5 The Role of IHL in Armed Conflict.....	29
2.6 Conclusion.....	31
 <i>CHAPTER THREE: EFFECTS OF WAR ON THE ELDERLY</i>	
3.0 Introduction.....	32
3.1 Threatened loss of life.....	33
3.2 The Problem of Health-Care.....	35
3.3 Threatened loss of financial investments.....	36
3.4 Trauma and stress related disorders that affect the elderly.....	38
3.5 Isolation.....	39
3.6 Conclusion.....	40
 <i>CHAPTER FOUR: IHL RESPONSES TO THE ELDERLY IN WARTIME</i>	
4.0 Introduction.....	42
4.1 The Provisions of the Geneva Conventions of 1949.....	43
4.2 The Work of Humanitarian Organizations In Relation To The Elderly...	47
4.3 Deficiencies in IHL in Relation to the Elderly.....	51
4.4 Conclusion.....	53

CHAPTER FIVE: IHL RESPONSES TO WOMEN AND CHILDREN IN WARTIME AS COMPARED WITH IHL RESPONSES TO THE ELDERLY IN WARTIME

5.0 Introduction..... 54

5.1 IHL’s Response to Women in War as compared to the Elderly in War.. 54

5.2 IHL’s response to Children in War as compared to the Elderly in War.. 63

5.3 Conclusion..... 71

CHAPTER SIX: CONCLUSIONS AND RECOMMENDATIONS

6.0 Introduction..... 72

6.1 Statement Regarding Proving or Disproving of Hypotheses..... 72

6.2 Conclusions..... 74

6.3 Recommendations..... 75

SELECTED BIBLIOGRAPHY..... 78

CHAPTER ONE

THE ELDERLY PERSON IN WARTIME- AN INTRODUCTION

1.0 Introduction

It has been said that war is not a recent phenomenon. It is, in fact, as old as the human race. Indeed, throughout history we read of various wars. There were different reasons why these wars were fought, but the repercussions were the same: people died, others were left desolate without food and shelter, property was destroyed, what took years to build was destroyed in the space of a few months, weeks and even days. The question was whether all this destruction was necessary and the emphatic answer was “no”. International Humanitarian Law is the law that developed as a result of these wars. It developed over a long time and is now the body of International Law that deals with armed conflicts, of both international and internal nature.

IHL is the body of law that seeks to protect those who are victims of war. It is that body of international rules, which seeks to limit the effects of war on people and objects. The focus of this body of law is war, and the victims of war. It does not seek to protect those who are culprits and offenders during war. However, even the victims of war fall under various categories. Modern IHL instruments have very broad categorizations, distinguishing only between combatants and non-combatants. This notwithstanding, there are categories of persons who require special consideration during war. This is attributed to the fact that these persons are exposed to special dangers during war, which in turn makes them vulnerable and at risk of suffering greater evil than other persons suffer. Children, women and the aged form these

categories of persons. The Fourth Geneva Convention of 1949,¹ which is concerned with the protection of civilian persons in time of war, is the most relevant insofar as the protection of these categories of persons is concerned. The Additional Protocols of 1977² are also important.

This study is however concerned with the aged and not the other two categories of persons. The aged form a special category of persons in need of protection, not only in times of war but also during peacetime. While IHL is concerned with their protection in time of war, municipal law will be concerned with their protection in peacetime. The aged need to be protected from exploitation. They have special needs that ought to be provided for; for example, they need proper medical attention for the old age diseases that afflict them. This is a category of persons that needs special consideration at all times, but the focus of this study is the consideration that the aged need during war.

While it is true that not much has been said about the afflictions of the aged during war, these afflictions are real and in need of being addressed. Thus, unlike the other two categories of women and children, the issues of the aged have not been the subject of great attention. Again, this is not only at the international level, but at the local level as well. This study is aimed at remedying this situation.

¹ The Fourth 1949 Geneva Convention Relative to the Protection of Civilian Persons in Wartime, 1949 75 U.N.T.S 287

² The 1977 Protocols Additional to the 1949 Geneva Conventions, Protocol I Relative to International Armed Conflicts, 1977 1125 U.N.T.S 3 and Protocol II Relative to Non-International Armed Conflict, 1977, 1125 U.N.T.S 609

1.1 Statement Of The Research Problem

The aim of this study is to find out how IHL responds to aged persons during war.

There are several research questions that have to be answered in order to understand how IHL treats the aged during war.

- What dangers and afflictions do the aged face during war that they do not face during peacetime?
- What mechanisms has IHL put in place to protect the aged during war?
- Are these mechanisms sufficient?
- What more can be done under International Humanitarian law to ensure the protection of the aged during war?

1.2 Research Justification

The aged are part of our society. They rely on the able bodied generation to protect them and ensure that their needs are met. The purpose of this study is to find out whether IHL offers any protection to the aged during war and whether such protection is sufficient. IHL already recognizes that the elderly are a vulnerable category of persons during war, which means that the elderly are a category of persons who have special needs during war, thus falling under the umbrella of vulnerable persons. The purpose of this study is to find out what afflictions and dangers the elderly face during war and how IHL responds to their plight.

The first question is very important, because over the past, not much has been said about the aged and the problems they face during war. It may thus have been taken for granted that the aged suffer no affliction during war. The answers to this question

will highlight exactly what the aged face during war, how war affects them and the risks that it poses to them. It will thus give rise to an examination of the needs of the aged during war.

The second question will simply examine the manner in which IHL responds to the needs of the aged during war. The third question will give answers as to whether this response by IHL is sufficient. It will seek to find any loopholes that may exist in the law insofar as protection of the aged is concerned. The fourth question will come up with possible way of bettering the protection offered to the aged under IHL and sealing any loopholes that may exist.

1.3 The Theoretical Framework

Under IHL, civilian persons and objects are to be protected during war. The rationale here is that the aim of war is to conquer or subdue the enemy. In line with this thinking, Jean Jacques Rousseau came up with a very interesting theory in his book “Le Contrat Sociale”. He said that war is not a relation between men, but a relation between states. He further said that individuals are enemies only as soldiers, not as members of their countries, but as their defenders. Thus since the aim of war is to subdue the enemy, a combatant has the right to kill its defenders while they are armed. He also has a right to attack military objects. A combatant has no right to kill or harm civilian persons, or destroy civilian objects. This theory of law belongs to the *Natural School of thought*. Under this school of thought, law is derived from the

natural order of things. As propounded by Rousseau, the natural order of things in war is that war is an enterprise between States, not between men.

It therefore follows that civilian persons and objects are protected under IHL. The aged fall under this category, if they are not taking part in war. No one should inflict harm on them if they are non-combatants, and whoever does so will be going against the rules of warfare. Those who are victims of war rely on IHL for protection. This body of law is charged with the responsibility of sheltering non-combatants from harm during war.

The law should thus respond to the needs of war victims adequately. Under the *Sociological School of thought*, law develops in tandem with the needs of the society. It may be difficult for the International Humanitarian Law to respond adequately to the need of war victims, because, unlike municipal law, which has well grounded methods of ensuring that it is adhered to, International Law lacks proper means of ensuring that it is adhered to. The possibility of persons breaching International Law without ever being brought to justice is very high. The lack of well-grounded enforcement mechanisms has loomed over International Law like a dark cloud for a long time now. However, this does not mean that International Law is completely irrelevant. On the contrary, International Law has achieved much over the years, despite the lack of strong enforcement mechanisms. Taking the example of International Humanitarian Law, in the very early days, wars were fought without any boundaries. Men killed for the sake of killing, and they killed even those who could

not defend themselves. Currently, the conduct of war is different from what it was back then. Only combatants can be killed or harmed, and although there are those who harm unarmed men, the cases of such occurrences have reduced significantly. In the same way, IHL can be fashioned to meet the needs of war victims adequately. This theory under the Sociological School of thought propounds that law is capable of developing to meet the needs of society. Society is dynamic; it keeps on evolving and changing. Law is the instrument that regulates society; therefore law must also be dynamic and keep in tune with the changes in society. Under this theory, IHL can develop to adequately meet the needs of victims of war.

Thus, this study is guided by these two legal theories: one that war is an enterprise between states, in the case of international armed conflicts. It is an enterprise between a government and the enemies of a government in the case of internal armed conflicts. Thus, those who are not taking part in the war are protected by IHL. The second theory that guides this study is the theory of law that holds that International Law is important despite its lack of strong enforcement mechanisms. This theory steers this study to look at the achievements that International Law has made despite this problem of enforcement. There is therefore room for improvement of IHL for ensuring the adequacy of protection of war victims.

1.4 Hypotheses, Assumptions And Limitations

This study seeks to prove or disprove several assumptions that have been made. IHL does recognize that the aged are a vulnerable category of war victims. However, the

protective mechanisms put in place by this body of law for the benefit of the aged are inadequate. This is drawn from the fact that not much has been said about the aged under IHL. Secondly, IHL's response to women and children in wartime is better than its response to the elderly.

The aged face many risks during war. They are exploited for their money and other assets. They also face great emotional turmoil, because they lose their children and grandchildren during war. It is the able bodied generation that actively takes part in armed conflict; these are the children and grandchildren of the aged. It is the aged who suffer emotional turmoil due to the loss of these generations.

The scope of this study is limited to looking at the situation of the elderly person in wartime. Thus, this study will not be concerned with the post-war effects that elderly persons face. The situation of elderly refugees and those who are internally displaced due to war is therefore not within the scope of this study. The focus of this study is the elderly person within the context of armed conflicts, whether international or internal.

1.5 Type Of Research And The Method Of Study

The type of research that will be carried out is explanatory research, where the aim of the study is to find the cause and effects of war insofar as the aged are concerned.

This type of research will enable making of explanations concerning the things that affect the aged during war. Secondly, positivist research will also be adopted. This

UNIVERSITY OF DAR ES SALAAM LIBRARY
P. O. BOX 35091
DAR ES SALAAM

means that the community will not participate in the research project, as the purpose of this study is not to find out what the problems of the society are. The aim of this project is to study a particular phenomenon and then explain the issues that surround it. *Therefore, this research project is concerned with war and its effects on the aged. It* seeks to explain the relationship between war and the aged, and further highlight the role of IHL in the protection of the aged during war.

The method of study that will be adopted is the qualitative study. Here, there will be an in depth study of the effects of war on the aged, while looking at the manner in which IHL responds to the aged during war. The relationship between war and the aged will be carefully analyzed.

1.6 Data Needs And Data Sources

The data needs depend wholly on the research problem. Thus, data that gives answers to the research questions is required. Data on how war affects the aged and how IHL responds to the aged is very important. The source of this data will be books, journals and cyber space. Another possible data source is interviews with aged persons who may have experienced the effects of war. The reports of various organizations that deal with war victims will also form part of the data sources to be used.

Data on how IHL responds to children and women during war is also required. This data will enable the comparative study to be carried out. The possible data sources

include books, journals and cyber space. The reports of various organizations that deal with war and war victims will also form an important source of data.

1.7 Literature Review

This sub-chapter looks at the various publications that have been released and which are related to this study. The purpose is to distinguish this study from previous studies.

Elaine Cumming and William Henry¹

In their book, *Growing Old* have analyzed the process of aging as a phenomenon. They have looked at the various stages an individual passes through when aging and they have gone further to look at the impact aging has on an individual, not only physically and mentally, but socially as well. They analyze the social factors that affect the aged and how the aged respond to these factors. They also look at the aged in relation to other members of the society.

Anne-Marie Guillemard²

The book *Old Age and The Welfare State* looks at how various social activities affect the aged. This book also looks at the various social policies that have been employed by various states for the benefit of the aged. The provisions made by welfare states for the benefit of the aged have been critically analyzed in this book, and their *advantaged and disadvantages highlighted.*

¹ Elaine Cumming and William E. Henry, *Growing Old; The Process of Disintegration* (Basic Book Publishing Company 1961)

² Anne-Marie Guillemard, *Old Age and the Welfare State* (Sage Studies International Sociology 1984)

Yukio Noguchi and David Wise³

The book Aging In The United States and Japan is also a text worth considering. It is a book concerned with the aged in the United States and Japan. It looks at how various social activities affect them and how the state provides for them. It is thus a case study of the aging process specifically in the United States and Japan.

The foregoing studies are concerned with the situation of the aged during peacetime. They look at the various social phenomena that affect the aged and how society at large addresses those phenomena. The proposed study is entirely different from these other studies because it is concerned with the elderly person during war. It is not concerned with social issues that affect the aged during peacetime. The focus of the proposed study is placing the elderly person within the context of war.

1977 Additional Protocol I to the 1949 Geneva Conventions Relating to the Protection of Victims of International Armed Conflict

Chapter II of this Protocol provides measures in favour of women and children. It expressly provides for the protection of women and children during international armed conflict. It says in Articles 76 and 77 that women and children respectively shall be the object of special respect. This Protocol gives the view that women and children are vulnerable in times of war, and are susceptible to certain types of atrocities, for example it protects women against rape and children against indecent assault. This Protocol however does not provide for the aged as a category of vulnerable persons. IHL recognizes three classes of vulnerable persons during war,

³ Yukio Noguchi and David A. Wise, Aging in the United States and Japan (University of Chicago Press 1994)

and those are women, children and the elderly. However, this Protocol makes provisions for only two of those categories of vulnerable persons recognized under IHL. This will affirm the position taken by Jeremy Seabrook in his article, *The Fullness of life* (ICRC 2000), that until recently, the preoccupation of International Agencies was children, and now that is shifting toward the elderly persons.

United Nations High Commission for Refugees⁴

An important study to note is the United Nations High Commission for Refugees (UNHCR) study carried out in 1997. This study concerns the situation of elderly refugees. It looks at the post-war trauma that the elderly suffer. It is an important study because it concerns the aftermath of war and how elderly refugees and those who are internally displaced cope during this period. This study is differentiated from the proposed study, in that the proposed study will focus on the elderly person within the context of war. It will address issues which elderly persons who face war go through.

This report highlights the fact that the elderly suffer greatly during war. The fact that the elderly have special needs during the post war period, strengthens the argument that they have special needs during wartime.

Dr. Hartman Storm and Linda Wood⁵

The effects of World War II on women were critically examined in their study. World

⁴ United Nations High Commission for Refugees, UNHCR Assistance to Older Refugees (UNHCR 1997)

⁵ Dr. Sharon H. Hartman and Linda P. Wood, Women and World War II (Brown Education Projects)

War II was devastating and left many with scars that could not be forgotten. This study focuses on the plight of women during this war. They suffered greatly, losing their sons and husbands and suffering emotional, physical and mental abuse in the hands of the enemy. After the war, women had to rebuild their lives and somehow learn to cope with the horrors that they had seen during the war.

This is one of the many studies that have been carried out on the plight of women during war. It examines the special needs which women have during wartime and how IHL has responded to these needs.

Heather Feeney and Cynthia Picolo ⁶

They studied the effects of war on the girl child. They focused specifically on girls below the majority age of 18 and what they suffer during war. This study doubles up looking at issues of gender and minority in wartime. According to this study, the girl child is at great risk of sexual abuse. The girl child is also likely to assume the role of a homemaker should she become orphaned due to war. This means that she would have to fend for any siblings that she may have, particularly younger ones and will have to give up her education.

The International Committee of the Red Cross⁷

The ICRC has published articles on the plight of women and children during war,

⁶ Heather A. Feeney and Cynthia M. Picolo, Girls at War (Background Papers International Conference on War-Affected Children 2000)

⁷ Raoul Wellenbertg Institute of Human Rights and Humanitarian Law, Children of War- a Report from the Conference of Children of War (ICRC Stockholm 1991)

highlighting the horrors that they face during this time. The articles emphasize that women and children are particularly vulnerable during war, having to face issues of sexual abuse, for women and girl children. Children are also forced to give up their innocence in cases where they are forced to take part in the war, witnessing the killing of people and even taking part in it. This leaves them with scars that may never heal. The ICRC was looking at these issues and also making recommendations for the mitigation of suffering imposed on women and children during war.

The ICRC has also published articles on the plight of the elderly during war, and has highlighted what it has done as a humanitarian organization to mitigate their suffering. In its publication, the ICRC has stated that the needs of the elderly during wartime have not been disregarded and that IHL has put in place mechanisms to protect them. However, the constant violation of the provisions of IHL has led to the compromise of this protection offered to the elderly.⁸

It is envisioned that this study will add to the area of vulnerable victims of war by highlighting the plight of the elderly person faced with war. The goal is to inform society what the elderly face during war.

⁸ Françoise Krill, The Elderly in Situations of War (ICRC September 1999)

CHAPTER TWO

DEVELOPMENT, SOURCES AND ROLE OF INTERNATIONAL HUMANITARIAN LAW

2.0 Introduction

IHL began to develop in the 19th century.¹ It has not remained static ever since it was first developed, and its scope has widened since then.

This chapter is concerned with the development of IHL. It is also concerned with where International Humanitarian Law is to be found that is the sources of this body of law. Finally, this chapter will analyze the role of IHL.

2.1 Definition of Key Terms

i) Armed Conflict

This has been defined to mean confrontations between two or more States for example international armed conflict, a State and another body other than a State for example wars of national liberation, a State and a dissident faction within a State or Ethnic Group wars, which are both examples of internal armed conflict.²

¹ The battle of Solferino of 1864, which Henry Dunant witnessed and was inspired to establish the ICRC. This event marked the beginning of IHL's development. *See also* Kalshoven Frits and Zegveld Liesbeth; Constraints on the Waging of War, an Introduction to International Humanitarian Law (ICRC Geneva 2001) p. 15

² International Committee of the Red Cross, Dictionary on the International Law of Armed Conflict (ICRC March 2001) pp 34-35

ii) Distinction between international and internal armed conflict

As indicated above, international armed conflict refers to confrontations between states *per se*, while internal armed conflict refers to confrontations within a State. An internal armed conflict could be between government and rebel groups, or between two or more ethnic groups belonging to the same state. Additional Protocol I of 1977 is relative to international armed conflicts while Additional Protocol II is relative to internal armed conflicts.

iii) IHL³

This is the body of Law that seeks to protect the victims of war and the personnel responsible for taking care of them. It is contained within the 1949 Geneva Conventions. It is sometimes referred to as the Law of Geneva. It is important to distinguish the Law of Geneva from the Law of The Hague. The Law of The Hague is the law that governs the way in which hostilities are to be carried out. It regulates the activities of parties to an armed conflict. This is distinguished from the Law of Geneva, which seeks to protect the victims of war and the personnel who take care of them.⁴

iv) War victim

This refers to persons who suffer or who may suffer injury due to war.⁵ They

³ Also referred to as the Law of War- Kalshoven Frits and Zegveld Liesbeth; Constraints on the Waging of War, an Introduction to International Humanitarian Law (ICRC) pp 11

⁴ *Ibid.*, Humanizing of War by IHL, pp 12-15

⁵ International Committee of the Red Cross, Dictionary of the International Law of Armed Conflict (ICRC March 2001)

are protected under IHL, which dictates that such persons shall not be the targets of activities of parties to the conflict. IHL is aimed at mitigating their suffering.

v) ***Humanitarian aid and Humanitarian Organizations***

Humanitarian aid refers to the assistance given to victims of war in order to prevent injury to them or to mitigate the suffering caused by such injury.⁶ The organizations that seek to give this kind of assistance to victims of war are referred to as humanitarian organizations.⁷

vi) ***Vulnerability***

This has been defined to mean the susceptibility of a person, group or community, property, infrastructural base or the environment to a hazardous event. It involves a combination of factors that determine the degree to which a people or community's life and livelihood are put at risk by discrete and identifiable events in nature or in society.⁸

vii) ***Civilian Population***

This is a population made up of civilian persons and it enjoys general protection against the dangers of military operations.⁹ Civilian persons are those not

⁶ *Ibid*

⁷ Article 9 Common to the Four 1949 Geneva Conventions mandates the International Committee of the Red Cross or any other impartial humanitarian organization to carry out humanitarian activities.

⁸ ICRC, Dictionary on the International Law of Armed Conflict (ICRC March 2001). *See also* The Kenya National Policy on Disaster Preparedness and Response.

⁹ *Ibid*.

belonging to any of these categories:¹⁰

- a) Members of the regular armed forces, even if the armed forces belong to a government or authority not recognized by the adverse power
- b) Members of volunteer corps or resistance movements
- c) Persons forming part of *levee en masse*
- d) Combatants in general

viii) *Protection under IHL*

This term is used in the law of armed conflict in relation to the term respect and applies whenever the intention is to shield persons or property from effects of hostilities.¹¹ A protected person is one protected by IHL.¹² There are four categories of persons protected under IHL:¹³

- a) Sick and wounded members of the armed forces in the field. These members are no longer able to take part in hostilities due to sickness and injury. As such, they are protected from hostilities that may be directed at them while sick and wounded. They are protected under the First Geneva Convention of 1949.
- b) Sick, wounded and shipwrecked members of the armed forces at sea. They are protected under the Second Geneva Convention of 1949.

¹⁰ The Fourth Geneva Convention of 1949 Relative to the Protection of Civilian Population in Time of War

¹¹ International Committee of the Red Cross, Dictionary of the International Law of Armed Conflict (ICRC March 2001)

¹² When the term “protected” is used in relation to war, it means protection under IHL.

¹³ The Four 1949 Geneva Conventions each protect a specified class of persons

- c) Prisoners of war. They are protected under the Third Geneva Convention of 1949.
- d) Civilian persons who because of armed conflict or occupation are in the power of a Party whose nationality they do not possess. The Fourth 1949 Geneva Convention protects them from the dangers of military operations.

2.2 The Historical Development of IHL¹⁴

In June 1859, Henry Dunant witnessed the horrors of the battle of Solferino. He mobilized the women of the area to care for the sick and wounded without regard to their nationalities. He then started a quest that sought to protect persons who were victims of armed conflicts and the personnel responsible for their care. His plan was to create, in time of peace, private relief societies in every country, which would be able to help the wounded in time of war. Four citizens of Geneva joined him to carry out this plan. These four were General Dufour, Gustave Moynier, Dr. Appia and Dr. Maunoir. In 1863, the five formed the International Committee for the Relief of the Wounded, commonly known as the Committee of Five. This Committee later became the International Committee for the Red Cross (ICRC).

In October 1863, the ICRC appealed to representatives to meet in Geneva. The purpose of this meeting was to establish relief societies which were to assist the wounded and the associations of “voluntary relief workers”, which were later to be called the National Red Cross Societies. The International Committee recognized the

¹⁴ Hans Peter Gesser, International Humanitarian Law: An Introduction (Geneva/ Paul Haupt Publishers, 1993)

need to obtain neutral status for the wounded victims of hostilities who were no longer engaged in combat, and the personnel taking care of them to allow them to perform their humanitarian task. To put this into practical effect, the co-operation of various governments was required. Accordingly, the founders of the Red Cross persuaded the Swiss government to convene a Diplomatic Conference to draft the text of an international treaty guided by this idea.

The Diplomatic Conference met in August 1864 in Geneva, where the representatives of twelve states signed a brief international treaty containing ten articles, which was entitled "Geneva Convention of August 22, 1864, for the Amelioration of the Condition of the Wounded in Armies in the Field". The signing of this treaty marked the inception of IHL, destined to protect victims of armed conflict and the personnel responsible for their care. This branch of law has continued to develop ever since.

The initial idea that inspired it gave rise to a series of conventions convened in light of additional experience of wars and the need to provide better protection for victims facing such changes and technological advances. The 1864 Geneva Convention for the Wounded and Sick of the Armed Forces was improved by two conventions, the first in 1906, the other in 1929. It was also adapted to maritime warfare by a Convention signed at The Hague in 1899, which was replaced by another convention on the same issue in 1907. These Conventions were adopted in the course of Peace Conferences, which aspired to provide a universal settlement for all problems related to war.

The experience of World War I soon after focused attention on the need to improve the treatment of prisoners of war. A Convention was concluded to this effect in Geneva in 1929. It expounded on the provisions which had been adopted in 1899 and 1907 Peace Conferences. Then after World War II and the mass atrocities inflicted upon civilian population, a fourth Geneva Convention was signed in 1949 to protect civilians in enemy or occupied territory.

The preceding Conventions were reviewed at the 1949 Diplomatic Conference, with the result that the four Geneva Conventions now in force all date from 12th August 1949, and are generally referred to as the Geneva Conventions. These four Conventions are as follows:

- a) The First Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field;
- b) The Second Geneva Convention for the Amelioration of the Condition of the Wounded and sick in the Armed Forces at Sea;
- c) The Third Geneva Convention Relative to the Protection of Prisoners of War;
- d) The Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War;

2.3 Post 1977 and modern day development in IHL

As already noted, law is dynamic and never remains static. This being the case, there have been developments in IHL since 1977 when the two Protocols Additional to the 1949 Geneva Conventions were adopted. In 1980, the United Nations Convention on

Prohibition or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects¹⁵. As the title implies, this Convention does not cover nuclear or bacteriological weapons. It does cover the category of weapons often indicated as “dubious weapons”.¹⁶ This Convention is normally referred to as the Weapons Convention.

The Weapons Convention has four Annexed Protocols. The first Protocol consists of a single provision, which is the prohibition of the use of any weapon, the primary effect of which is to injure by fragments which in the human body escape detection by X-rays. It applies the principle in Article 35(2) of Additional Protocol I of 1977, which is the prohibition of the use of weapons of a nature to cause superfluous injury or unnecessary suffering.

The second Protocol is the Protocol on Mines, Booby-traps and other devices. The Protocol has detailed rules on mine-like munitions, and attempts to a great extent to protect civilian population as much as possible. This Protocol was amended and now has provisions on the scope of its application, transfers, implementation and enforcement and international co-operation and consultation. This Protocol II of 1980 was extended by adoption in Geneva on May 3rd, 1996. In addition to this Protocol, the Ottawa Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction¹⁷ was adopted in Oslo in

¹⁵ 1980, 1342 U.N.T.S 2, The 1980 Weapons Convention and its 4 Annexed Protocols, A/CONF/95/15

¹⁶ The term “dubious weapons” is used because the weapons themselves or the manner in which they are used are deemed to be at variance with the principles of IHL

¹⁷ 36 I.L.M 1507 (1997)

September 1997; it was then opened for signature in Ottawa in December of the same year. 121 States signed it. This Convention is essentially an inter-state disarmament instrument.

The third Protocol contains rules on incendiary weapons. It is the Protocol on the Prohibition or Restriction on the Use of Incendiary Weapons. It defines what incendiary weapons are for the purposes of the Protocol,¹⁸ and what munitions are not included in the scope of the Protocol. The second and only other provision of the Protocol is rules on the protection of civilians and civilian objects.

The fourth Protocol makes provisions on the use of blinding laser weapons.¹⁹ It was adopted in October 1995. It is notable that the regulation of the weapons used in warfare under these four Protocols had in mind the protection of civilians and civilian objects.

On the issue of the environment, IHL makes provisions for its protection under Article 55 of Additional Protocol I of 1977 and under the Convention on the Prohibition of Military and Hostile Use of Environmental Modification Techniques, of 10th December 1976²⁰. The 1991 Gulf War proved the lack of widespread knowledge of IHL rules in relation to the environment. Therefore in 1994, encouraged by the UNGA and with the help of experts in the matter, the ICRC

¹⁸ An incendiary weapon is defined in Article 1 of the Protocol as one which is primarily designed to set fire to objects or to cause burn injury to persons through the action of flame, heat, or a combination thereof, produced by a chemical reaction of a substance delivered on the target.

¹⁹ The use of weapons whose function is to cause permanent blindness is prohibited under this Protocol

²⁰ UN A/RES/31/72, 10th October 1976

drafted guidelines for military manuals and instructions on the protection the environment in times of armed conflict.

A further development is in relation to the use of nuclear weapons. Although the four Geneva Conventions and their Additional Protocols do not expressly prohibit their use, the principles and rules of IHL apply in such cases. Among other things, these rules prohibit the use of weapons likely to cause unnecessary suffering.²¹ The ICJ in The Hague reaffirmed the application of those principles to nuclear weapons in 1996.²²

On 17th July 1998, the Statue of the ICC²³ was adopted. This is an important step toward reducing impunity and ensuring greater respect for IHL. This new court has jurisdiction over war crimes committed in either internal or international armed conflicts. The four Geneva Conventions of 1949 lay down a duty to prosecute war criminals and the ICC adds to the tools available.

The latest development concerns the means of combat. In 2001, the 1980 United Nations Convention on the Prohibition or Restriction of the Use of Certain Conventional Weapons was extended. Previously, this Convention only covered

²¹ These rules are to be found in the Hague Conventions, which make provisions on the use of weapons during wartime.

²² The fall of the Berlin wall in 1989 and the dissolution of the Soviet Union in 1991 impacted significantly upon the potential use of nuclear weapons. Germany and the Soviet Union began to dismantle huge numbers of their nuclear warheads but still kept formidable destructive capacities. At the same time, other states either had already developed or were beginning to develop their nuclear capacities. In light of all these, the UN-GA chose to submit the issue of legality or illegality of potential use of nuclear weapons to the International Court of Justice for an Advisory Opinion in December 1994.

²³ *UN Dept of Public Information, DPI/511, October 1997*

International Armed Conflict, but the Second Review Conference amended Article 1 to cover internal armed conflict²⁴.

These developments have been aimed at protecting both civilians and combatants in time of war. While providing protection for war victims generally, no special provisions have been made specifically for the aged as vulnerable victims of war. The developments in IHL have been in response to the new dimensions taken by war. As already stated, there are new types of wars to contend with, for example terrorism. Weapons used during armed conflicts are more sophisticated and advanced. This increases the vulnerability of the elderly during wartime. Rules protecting them during wartime in the wake of these advancements in the conduct and manner of war are important. But these types of rules have not yet been implemented.

2.4 Sources of IHL

There are various sources of International Law. IHL being a branch of international SSlaw, it will also be found in these sources.²⁵

a) Treaties

They are defined as agreements between two or more parties, in writing, governed by International law and can be contained in one or more documents. These are the most important source of international law. The Geneva Conventions of August 12th 1949 and their 1977 Additional Protocols thus form the most important source of

²⁴ International Review of the Red Cross, Official statement by Dr. Jakob Kellenberger (ICRC 2001)

²⁵ Shaw, Malcolm N. International Law (4th Edition, Cambridge University Press, 1997) pp 55

International Humanitarian Law. These Conventions have been signed and ratified by 192 States²⁶ and are binding to those States. In relation to the new developments in IHL, the treaties negotiated in relation to those issues also form sources of IHL, though they have not been signed and ratified by many States.²⁷ The Vienna Convention of 1969 governs the Law of Treaties. It is this Convention that deals with procedural matters and issues of legality in relation to treaties.

b) Custom

This is usage which has obtained the force of law. It is the practice of States, which though was never formally laid down as law, has been accepted by the international community as law. Thus, when a habit of doing certain things has grown under the conviction that doing those things is obligatory or right according to International Law that is custom.²⁸ A rule of custom that has been emerging is in relation to humanitarian intervention. All States are sovereign in International Law. Where one State is violating the human rights of its citizens, the question has arisen as to whether another State may intervene to protect those citizens. Under the principle of Sovereignty, a State cannot interfere in another State's affairs, unless those affairs interfere with the rights of that State. However, a practice has been developing under IHL where a State can intervene to protect the lives of the nationals of another State where such other State is either guilty of causing injury to its nationals or where it has failed to protect its nationals from such injury. This is a rule of custom and is a source

²⁶ www.icrc.org (States Parties to the Main Treaties, 25-05-2005)

²⁷ Shaw, Malcolm N. International Law (4th Edition, Cambridge University Press, 1997) pp 73

²⁸ A D'Amato, The Concept of Custom in International Law (Cornell, 1917)

of IHL.²⁹

*c) Judicial Decisions*³⁰

These are the decisions of International Courts, State Courts, International Criminal Tribunals and Special Courts. In IHL, the decisions of the International Criminal Tribunals (ICTs) are of great importance. The first ICT to be established was the Nuremberg Tribunal.³¹ At the meetings in Tehran(1943), Yalta (1945) and Potsdam (1945), the three major wartime powers USA, USSR and Britain agreed on the format to punish those responsible for war-crimes during World War II. France was also awarded a place on the tribunal. The legal basis for the trial was established by the London Charter of the International Military Tribunal, issued on August 8, 1945, which restricted the trial to "trial and punishment of the major war criminals of the European Axis countries".

The **Nuremberg Trials** is the general name for two sets of trials of Nazis involved in World War II and the Holocaust. The trials were held in the German city of Nuremberg from 1945 to 1949 at the Nuremberg Palace of Justice. The first and most famous of these trials was the **Trial of the Major War Criminals Before the International Military Tribunal** or IMT, which tried twenty-four of the most important captured (or still believed to be alive) leaders of Nazi Germany. It was held from November 20, 1945 to October 1, 1946. The second set of trials of lesser war

²⁹ Lillich, R. B. (ed) Humanitarian Intervention and the United Nations (Charlottesville, 1973)

³⁰ Article 38 of the Statute of the International Court of Justice provides that judicial decisions and writings of qualified publicists are sources of International Law, subject to the provisions of Article 59 of the same Statute.

³¹ Wikipedia, The Free Encyclopedia, Nuremberg Trials (23rd May 2005)

criminals was conducted under Control Council Law No. 10 at the U.S. Nuremberg Military Tribunals (NMT), including the famous Doctors' Trial (*United States of America v. Karl Brandt, et al.*) was the first of 12 trials for war crimes that the United States authorities held in their occupation zone in Germany in Nuremberg after the end of World War II.

The United Nations established special International Criminal Tribunals in Rwanda and Yugoslavia to prosecute those responsible for atrocities during times of war and genocide. Successful convictions of these political and military leaders are meant to bring justice to victims and to deter others from committing such crimes in the future. These special tribunals gave impetus to the formation of the International Criminal Court (ICC), finally established in 2003. Unlike the ICC, the special tribunals have limited jurisdictions and do not threaten the possible prosecution of leaders or nationals of powerful countries like the United States.³² Below are brief overviews of the work carried out by various ICTs and Special Courts.³³

The UN's first special international court, the ICTY hears cases of genocide, crimes against humanity, and war crimes from the conflicts that ravaged the former Yugoslavia during the 1990s. It has garnered special attention for prosecuting former Yugoslav president Slobodan Milosevic.

In 1994, ethnic militias massacred 800,000 Rwandans while the world looked on. The ICTR attempts to establish a record of the genocide and bring those responsible to justice. During Sierra Leone's brutal civil war rebels terrorized civilians with mass

³² Global Policy Forum, International Criminal Tribunals and Special Courts

³³ Ibid.

amputation and rape. The SC-SL is a "hybrid" national and international court designed to bring the perpetrators of these crimes to justice. The Khmer Rouge killed more than 1 million people during the 1970s. Thirty years later, the UN and the Cambodian government have agreed to establish a joint national and international court to hold those responsible accountable. Backed by the Indonesian military, pro-Indonesia militias murdered thousands of Timorese during the territory's struggle for independence. UN efforts to hold the perpetrators accountable have been stymied by the Indonesia government.

The capture of Saddam Hussein on December 13, 2003 prompted a worldwide debate as to how to try him and other top Baath Party leaders. While the US government and the Iraqi Governing Council push for a trial at a war crimes tribunal in Iraq, human rights activists and legal experts call for an internationally organized tribunal.

d) Writings of qualified publicists

These are the writings of persons considered knowledgeable in International Law.

Various books and articles published by the ICRC would fall under this category. The writings of scholars such as Rousseau and Antonio Grotius³⁴ have the force of law under this category of sources of IHL.

e) Resolutions adopted by International Bodies

These form a soft source of law, as opposed to the other four categories that form

³⁴ Of relevance are the books Le Contrat Sociale by Rousseau and De Jure Belli AC Pacis by Grotius

hard law. Soft law only has persuasive force, while hard law has to be applied as it exists in relevant situations. Resolutions taken, for example, by the UNGA form a soft source of law. An example of a UN Resolutions which forms soft law is the Resolution 731 of 1992 on “Acts of International Terrorism the Constitute a Threat to International Peace and Security”.³⁵

2.5 The Role of IHL in Armed Conflict

As previously mentioned, IHL is the body of law that was developed in order to protect the victims of war and the personnel that care for them.³⁶ Protection was defined to mean respect, when used in the context of armed conflict. This body of law is thus charged with ensuring the respect of war victims. It is charged with the task of ensuring that the human rights accorded to individuals at peacetime are not violated during war. This flows from the fact that there is threat of ignoring human rights and violating human dignity at wartime.

During the battle of Solferino, Dunant witnessed men killing other men who were unarmed and defenseless. During World War II, mass atrocities were committed against persons who were not taking part in the hostilities.³⁷ In both wars, there was total disregard of fundamental human rights. IHL came in to ensure that individuals were respected in the course of armed conflict. Atrocities against those not taking part in hostilities were outlawed. The Geneva Conventions of 1949 provide for this. The

³⁵ Martinus Nijhoff, Year Book of the UN; 1992 (Part 1 on Political and Security Questions)

³⁶ Hans Peter Gesser, International Humanitarian Law: An Introduction (Henry Dunant Institute, Geneva/Paul Haupt Publishers 1998) *See* IHL and the Protection of War Victims

³⁷ Historical development of IHL is premised on the recognition of the need to protect victims of war and the personnel caring for them.

First Geneva Convention of 1949 in Article 12 provides that sick and wounded members of armed forces shall be protected and respected at all times. Article 12 of the Second 1949 Geneva Convention provides for the protection of wounded, sick and shipwrecked members of the armed forces at sea. Article 4 of the Third 1949 Geneva Convention provides for protection and respect of prisoners of war. Article 13 of the Fourth 1949 Geneva Convention provides for respect and protection of civilian persons.

The role of IHL is thus to protect victims of war and personnel that care for them from the dangers of military activities. Under Article 51 of the 1977 Additional Protocol I it is provided that military activities shall not be directed at civilian populations. IHL governs the conduct of those taking part in armed hostilities. It imposes duties and obligations on them, in order to safeguard the lives and dignity of those who are not taking part in the hostilities. Therefore, once a man picks up arms and begins to engage in armed conflict, he is not protected under IHL. But once he lays down those arms and is no longer taking part in the conflict, IHL then protects him. In the same light persons not taking part in war are protected under IHL. IHL is also charged with the task of mitigating the suffering caused by armed conflict to those not taking part in the hostilities. The humanitarian workers are charged with providing food, clean water and adequate sanitation for those affected by war and lacking these basic necessities.³⁸ Under the Geneva Conventions of 1949,

³⁸ The Sphere Project- Humanitarian Charter and Minimum Standards in Disaster Response which was launched in 1997 by a group of NGOs and the Red Cross Red Crescent Movement and which is aimed at alleviating human suffering caused by disaster and calamity makes provisions to be observed in delivery of humanitarian aid.

humanitarian workers should not be the subjects of military activities and neither should they be barred from conducting their humanitarian mission (Chapter IV common to the four 1949 Geneva Conventions).

The role of IHL is thus to protect the victims of war from hostilities being directed at them. In so doing, IHL enforces human rights during wartime and ensures human dignity for the victims of war and the personnel who take care of them.

2.6 Conclusion

IHL is a dynamic body of law that has been developing since the second half of the 19th century. There have been new types of wars and other challenges within the society, which have forced this body of law to develop and adapt itself to the society. IHL has also widened its scope,³⁹ now applying to the issues that emerged after its inception. It is therefore possible for IHL to respond adequately to the issue of protection of war victims and make adequate provisions in that area.

The next chapter is concerned with the effects the war has on the elderly.

³⁹ The new developments in IHL have led to the application of IHL to matters previously not within its scope, for instance, IHL now makes provisions relating to environmental protection (see the 1976 Convention on the Prohibition of Military and Hostile Use of Environment Modification Techniques)

CHAPTER THREE

EFFECTS OF WAR ON THE ELDERLY

3.0 Introduction

It is important to understand that IHL is not based on categories of individuals. It protects all persons who are not taking part in war or those who are no longer taking part in hostilities; this means civilians, wounded, sick or shipwrecked combatants and prisoners. However, IHL does take into account the particular vulnerability of certain categories of the population and their specific needs. IHL recognizes three categories of vulnerable persons and they are women, children and the elderly.¹

The question to be addressed here is how war affects the elderly. Being a vulnerable class of persons, the elderly would suffer special injury due to war. The role of IHL as discussed in the previous chapter is to protect war victims and humanitarian workers who offer aid and relief to those victims. However, war impacts differently on various groups of persons. It will be noted that IHL makes special provisions in relation to women and children, over and above those made in relation to the civilian population as a whole. The underlying reason for this type of differential treatment is the fact that war brings different consequences for different classes of persons.

It is therefore important to note that IHL classifies war victims into different categories. One such category is the vulnerable victims of war. Persons who fall under this category are those who are prone to suffer greater injury during war, because of circumstances surrounding them, which make war a greater ordeal for

¹ Francoise Krill, The Elderly in Situations of War (ICRC September 1999)

them. Such circumstances may include gender and age. The elderly are therefore considered vulnerable victims of war because of their age.

3.1 Threatened loss of life

During emergencies - war or natural disasters - the elderly suffer disproportionately. The less mobile cannot even become refugees. Left behind in war zones, they face bombardment and, as occurred in Kosovo, vengeful harassment. Images from Chechnya of elderly women, emerging from cold basements to pick their way through rubble in search of basic provisions, remain an enduring symbol of the sufferings of the old.² All those who fall victim to war are threatened with the loss of their lives, and they seek ways and means to save their lives. The elderly however face a greater threat, because their age makes it difficult, and in some cases impossible to flee. This is because there are no means of transport to safe locations. Often, those fleeing do so on foot. They have to trek long distances, and for long duration, sometimes without food and water in order to get to safety. Secondly, the environmental conditions are also harsh, making the journey to safety even more arduous; for instance, the scorching sun without any places to shelter causes many to die of heat stroke.

This being the case, the elderly are often trapped in areas ridden with armed conflict, because of their inability to walk long distances to safe locations. Some who undertake the journey die on the way due to starvation, harsh weather conditions and even fatigue. Those who are left behind do not fare any better, because they face

² Jeremy Seabrook, *The Fullness of Life* (ICRC 2000)

dying in the heat of armed hostilities. With the advent of better and more powerful weapons, injury can easily be inflicted far and wide, and even upon those who do not take part in the conflict. These indiscriminate attacks pose real and actual danger to civilians not engaged in the conflict.

Whereas IHL makes stringent provisions on combatants to distinguish between combatants and non-combatants, and further to restrict their activities to combatants, these provisions are often ignored, the result being that hostilities will be directed to the civilian population. This is the issue of enforcement of IHL.³ Many elderly people are unable to flee from these hostilities, thus decreasing their chances of survival.

Evacuation procedures carried out by International Agencies are especially useful to the elderly in such circumstances. If the ICRC does everything within its power to protect civilians in the places where they are living but still cannot guarantee their security, it may have no choice but to evacuate them, in accordance with international humanitarian law, in order to preserve their lives. The groups at risk often include elderly persons.⁴

The problem faced by the elderly during war is therefore acute. They face greater threat to their lives and are less likely to survive war than other categories of the civilian population.

³ Various measures have been taken to ensure the implementation and enforcement of IHL. See, ICRC, IHL; Answers to Your Questions (ICRC October 2002). See also Kalshoven, Frits and Zegveld Liesbeth, Constraints on the Waging of War; An Introduction to International Humanitarian Law (ICRC Geneva, 2001) pp 185-200

⁴ Francoise Krill, The Elderly in Situations of Armed Conflict (ICRC September 1999)

3.2 The Problem of Health-Care⁵

The elderly suffer from various old-age diseases and ailments. They need to take medication for these ailments. During war, the access to these drugs is greatly reduced. Health-care systems are greatly hampered in wartime. There are increased medical needs, arising from injuries inflicted by the hostilities. The focus of health-care providers during war is to provide care to the wounded and the sick. Thus, diseases arising as a result of the war are given primary attention. These would include malnutrition ailments caused by food shortages. Diseases such as arthritis, diabetes, heart disease and Alzheimer's, which mainly affect the elderly, are hardly catered for in wartime.

The ordinary channels of transport and communication are also interfered with during war. For this reason, it is difficult for the aged to access the drugs they need. As noted earlier, it is difficult for the aged to travel long distances. Medical camps are usually set up in areas where hostilities are not intense, both for the safety of the victims seeking aid there and for that of the relief workers. The elderly are disadvantaged because if the medical camps are located far from where the former are, they will have great difficulty in accessing medical care.

There is also the issue of security, which affects the capacity of the aged to access medical care. During war, it is insecure for one to leave the confines of his or her home. This reduces the accessibility of the population as a whole to health-care.

⁵ Dr. Pierre Perrin, Handbook on War and Public Health, ICRC Health Division (ICRC Geneva 1996)

This reduced access to medical care by the aged further reduces their chances of survival, because over and above the diseases that occur as a direct result of war, they also suffer from old-age diseases and ailments, which if go untreated for long periods of time are life-threatening.

A health issue that calls for special consideration is HIV/AIDS⁶. This mainly affects the elderly women. Women are prone more to HIV because of the sexual violence directed toward them in wartime. This is primarily a women's issue, but it warrants special mention. The spread of HIV/AIDS increases during wartime due to rape. Many women end up pregnant and still others contract HIV. Sexual abuse is targeted at women and girls of all ages. For the elderly women, their reduced capacity to flee hostilities renders them even more vulnerable to sexual abuse, as was stated by Francoise Krill⁷ one of the dangers posed to the elderly is rape.

3.3 Threatened Loss of Financial Investments

Investments are an important aspect of life. As a person advances in age, they make more and more investments. Consequently, the elderly will usually have more investments than younger persons will. War leads to destruction of property and infrastructure. It also has negative impacts on a nation's economy. This means that those who invested in a nation, which is rocked by war, run the risk of losing that investment. This influences negatively on one's personal financial position.

⁶ For more information on HIV/AIDS and war, see Judy Benjamin, Women, War and HIV/AIDS (Population Reference Bureau 2005)

⁷ The Elderly In Situations of Armed Conflict (ICRC September 1999)

For the elderly, they risk losing many years of financial investments. The implication is that at the end of the war, an elderly person will be left in a rocky financial situation. Whereas a young person would be capable of starting the process of financial realization from scratch, an elderly person would have problems starting that process all over again. The elderly do not have the physical strength needed. Secondly, as society evolves and changes, the skills that were useful in amassing wealth in the past may no longer be useful. It would also take years to rebuild the economy of a previously war-torn nation.

The payment of pension may also collapse during war.⁸ A report by the ICRC Deputy Director of Operations, Helsinki, (ICRC 1999) stated as follows:

“Since the fall of the Berlin Wall, the former USSR and its allies have undergone considerable upheavals. Owing to the collapse of the economy, retirement pensions have dwindled or even stopped altogether, as have social welfare payments of all kinds, leaving the elderly in a state of utter destitution”.

This affects the purchasing power of the aged. They need more than food; they also need medication for old-age diseases. Without the money to purchase these necessities, their lives are at risk. In Northern Caucasus old people are in an extremely difficult situation owing to the collapse of social services and the non-payment of pensions in almost all cases. Their purchasing power being very limited, elderly persons living in urban areas cannot afford to buy agricultural produce.

⁸ Pension provides an important source of income for many elderly people. In social welfare States, State aid is equally as important. When war breaks out, both the pension and social welfare services collapse, leaving the elderly with no means of income, and incapable of providing for themselves. See Dr. Pierre Perrin, Handbook on War and Public Health, ICRC Health Division (ICRC Geneva 1996). The situation in Northern Caucasus is illustrative on the issue of pension and social services, because in that region, old people are in extremely difficult situations due to the collapse of social services and non-payment of pensions

It is devastating to lose one's financial investments, with little or no hope of recovery. This is a major cause of stress related disorders, which greatly affect the aged. It also aggravates the suffering caused by the old-age diseases; for instance, those suffering from heart disease would have the condition worsened by the stress and worry caused by the loss of financial investments. The willful destruction of civilian housing is also a leading cause for the loss of financial investments.

3.4 Trauma and Stress Related Disorders That Affect The Elderly⁹

Civilian populations living in zones of armed conflict are subjected to constant stress. Many victims of armed conflict suffer from lifelong scars inflicted by the experience of war. The atrocities committed in wartime impact greatly on those who witness them. The loss of loved ones and property in wartime breeds fear and anger in those affected. These are experiences common to all those affected by war. However, the response of the aged to these situations is unique to them.

The elderly do not cope well under stress, because of old-age ailments, which are worsened by stressful situations. Stress caused by traumatic events occurring during war leads to depression in many elderly persons. This type of stress is referred to as severe stress. Even in peacetime, the elderly suffer more from stress than other age groups. In wartime, the stress is worsened and aggravated. It often leads to depression and worsens already existing diseases and ailments.

This is a life-threatening situation for the elderly. It becomes even more so because it

⁹ ICRC, Humanitarian Action and Armed Conflict; Coping With Stress (ICRC). Stress is categorized as either protective stress or severe stress. The former enables a person to cope with difficult and trying conditions whereas the latter is harmful, leading to exhaustion, impairment and even depression.

is difficult to detect. It is normal for persons affected by war to suffer from stress, however, for the elderly, if not treated it leads to development of life threatening diseases or worsens already existing ones. The difficulty of accessing medical care has serious repercussions for the elderly.

It has been advised that talking to family and friends about traumatic occurrences is one way of releasing stress and is also very effective in helping victims of war to cope during the war. Being aware of one's emotional reactions is also very important. This is because there are different types of stress, and not all stress is harmful, there is helpful stress, which is encouraged. Where medical care is inaccessible, these activities go a long way in helping to save lives.

3.5 Isolation¹⁰

The bonds of family, so precious in old age, are gradually being eroded by economic development, globalization and, in some cases, conflict.¹¹ Therefore many elderly people, especially in the West live alone. The ICRC considers elderly people in Abkhazia as particularly vulnerable because a large number of them belong to ethnic minorities (Russians, Armenians, Georgians) and are living in isolation. In the developing countries, this is not a serious problem because extended mainly families live together or close to each other. However, in the West, old people find themselves

¹⁰ ICRC considers elderly people in Abkhazia as particularly vulnerable because a large number of them belong to ethnic minorities and are living in isolation. ICRC delegates regularly visit representatives of these groups in order to gather allegations of violations of IHL committed against them and to pass these results to Abkhaz authorities. In Kosovo, the ICRC considers old people, often living alone as being as vulnerable as unaccompanied children. In the context of the recent Kosovo crisis, special effort was made to help old people fend for themselves in camps in Macedonia and Albania.

¹¹ Jeremy Seabrook, The Fullness of Life (ICRC 2000)

alone, either by losing touch with their relatives or by choice because they do not wish to move from the places where they were born. In peacetime, there are social workers who take care of old persons with no family, but in wartime, this service collapses. Thus, old persons in such a state are unable to fend for themselves, lacking the physical strength to do so, and in worse cases, they lack even the financial resources needed to purchase their necessities.

In Kosovo, in the area of protection, the ICRC considers old people, who are often living alone, as being very vulnerable and requiring just as much attention as unaccompanied children. In the context of the recent Kosovo crisis, a special effort was made to help elderly people left to fend for themselves in the camps in Macedonia and Albania. The ICRC organized 859 family reunifications, almost half of which involved old people.

One of the most notorious actions that leads to isolation of the elderly is the forceful displacement of civilian populations by occupation troops, as well as destruction of civilian housing. This problem was noted in the *XXVth International Conference of the Red Cross*.

3.7 Conclusion

The elderly are disadvantaged during peacetime. In wartime, their suffering is worsened. Suffering unique to the aged is occasioned by war, and this then leaves the aged with special needs. The factors that lead to their vulnerability are occasioned by

their physical condition and health status. Age is therefore one of the considerations that ought to be taken in addressing the question of protection of victims of war.

IHL has responded to the needs of the aged, and the first step was the recognition of the aged as a vulnerable category of persons in wartime. It should be noted that violations and atrocities are committed against the aged, but not for want of legal provisions.¹² The difficulty of enforcement of these legal provisions and their abuse are the main reasons why the protection accorded to the elderly is impaired. To this end, it is arguable that sound and concrete means of enforcing IHL rules will provide better protection to the victims of armed conflict.

The next chapter will analyze the manner in which IHL has responded to the elderly in wartime.

¹² Françoise Krill reiterated this position, in the report on the Elderly in Situations of Armed Conflict (ICRC September 1999)

CHAPTER FOUR

IHL RESPONSES TO THE ELDERLY IN WARTIME

4.0 Introduction

IHL distinguishes between combatants and non-combatants. This does not mean, however, that humanitarian law does not take into account the particular vulnerability of certain categories of the population and their specific needs. Indeed, along with the rules providing special protection for women and children, it contains some provisions relating to the elderly. There are several provisions which have been made addressing the needs of the elderly under this body of law, not only in form of International conventions, but also in terms of the work done by International Agencies, as well as the resolutions adopted by these agencies. Until recently, the focus of International Agencies has been children, affected by poverty, armed conflict and forced labour. However, now the focus of these Agencies is shifting to old people¹.

During peacetime, the aged are still classified as a disadvantaged group of persons, in need of support from their government as well as their families. In wartime, their situation is worsened and aggravated². Old people were greatly affected during the Second World War, as were women and children. The elderly like women and children are protected under the Fourth Geneva Convention of 1949, Relative to the Protection of Civilians. Thus, it is primarily as civilians that the elderly are protected during wartime. The effects that war has on civilian populations are therefore

¹ Jeremy Seabrook, *The Fullness of Life* (ICRC 2000)

² Francoise Krill, *The Elderly In Situations Of Armed Conflict* (ICRC September 1999)

important. One of the critical issues that affect the civilian population during war is the use of new methods and means of warfare, which have indiscriminate effects. The toll of civilian casualties has in the recent past risen to 90% in some cases³.

Moreover, new types of conflicts have emerged, pitting regular armies against guerrilla groups. In this type of situation civilians are inevitably caught up in the fighting, are accused by both sides of supporting the adversary and are consequently subjected to reprisals.

As mentioned above, the response of IHL to the elderly during war has been at various levels. There are conventions, which provide protection for the elderly, and the International Agencies, which offer humanitarian aid, have also done their bit in this regard.

4.1 The Provisions of the Fourth 1949 Geneva Convention Relative to the Protection of Civilians and the 1977 Additional Protocols to the 1949 Geneva Conventions.

It is primarily as civilians that the elderly are protected by this body of law; it is therefore the Fourth Geneva Convention that provides that protection in general terms.

On the issue of the age at which one is considered to fall under the bracket of the elderly, IHL says nothing about the age at which an individual is considered to be

³ Francoise Krill, The Elderly in Situations of Armed Conflict (ICRC September 1999)

elderly. The ICRC Commentary on the Fourth Convention⁴ does, however, give an indication:

"No limit was fixed for 'aged persons'. Should this expression be taken to mean those over 65, as stipulated in the Stockholm Draft? The Conference refrained from naming a definite age, preferring to leave the point to the discretion of Governments. 65 seems, however, to be a reasonable age limit. It is often the age of retirement, and it is also the age at which civilian internees have usually been released from internment by belligerent Powers".

As far as the ICRC is concerned, this is the threshold adopted for its activities in aid of the elderly. A certain degree of flexibility is however important and it is possible that assistance may be given to persons below the age of 65⁵.

The Fourth Geneva Convention contains two provisions affording special protection to the elderly. These are as follows.

Article 14, paragraph 1: *"In time of peace, the High Contracting Parties and, after the outbreak of hostilities, the Parties thereto, may establish in their own territory and, if the need arises, in occupied areas, hospital and safety zones and localities so organized as to protect from the effects of war, wounded, sick and **aged persons**, children under fifteen, expectant mothers and mothers of children under seven."* This is a clear provision meant to protect vulnerable victims of armed conflict, not only requiring that the parties to a conflict refrain from targeting these categories of persons, but also requiring these parties to set up areas where these vulnerable persons may go to for safety.

⁴ Commentary written by Uhler, Oscar and Coursier, Henry, et al (ICRC, Geneva, 1958) pp 660

⁵ Françoise Krill, *The elderly in Situations of Armed Conflict* (ICRC September 1999)

Article 17: *"The Parties to the conflict shall endeavour to conclude local agreements for the removal from besieged or encircled areas, of wounded, sick, infirm, and **aged persons**, children and maternity cases, and for the passage of ministers of all religions, medical personnel and medical equipment on their way to such areas."*

This provision on evacuation of vulnerable categories of persons during wartime seeks to remove these categories of persons from the heat of hostilities. It is an important protection mechanism, as it will ensure that vulnerable persons are never caught up in the midst of armed hostilities, thereby ensuring their safety.

As will be discussed later, these provisions will only achieve their goal if parties to armed hostilities respect their spirit as well as their letter. Where there is no respect for IHL rules and principles, these will be floated and constantly violated.

The Additional Protocols adopted in 1977 constitute a response to the situations of new and advanced means and methods of warfare. As indicated above, the use of these advanced weapons causes widespread and indiscriminate loss and damage, most of which is impacted upon the civilian populations. They supplement the 1949 Geneva Conventions, in particular by affording enhanced legal protection to civilians and hence to the elderly.

The Fourth 1949 Geneva Convention offers protection to civilians in international armed conflicts. For non-international armed conflicts, protection is offered by *Article 3*, common to all four 1949 Geneva Conventions. This Article is especially relevant

in Africa where the nature of armed hostilities is largely internal. The elderly are protected as persons not taking part in armed hostilities under IHL. On the one hand, they enjoy protection from abusive behaviour on the part of the party to the conflict in whose power they are, being persons protected by the Fourth Geneva Convention. As such, they benefit from all the provisions that set forth the fundamental principle of humane treatment.

On the other hand, as members of the civilian population they benefit from the rules of IHL relating to the conduct of hostilities. These rules, which uphold the principle of distinction between civilians and combatants and prohibit attacks directed against the civilian population, were given written expression in the Additional Protocols of 1977. It is important to understand that under the principle of distinction, those taking part in hostilities should distinguish between combatants and non-combatants. The hostilities should only be directed to combatants and no other sections of the population. These rules form an important basis for the civilian population and if respected and upheld, then the toll of war on the civilian populations should decrease. However, one still has to ask why the civilian population suffers great impact due to armed conflict, yet these rules exist. As was stated by Francoise Krill the ICRC Deputy Director of Operations, Helsinki, in his report on the *Situation Of The Elderly In Armed Conflict*, "So if the elderly do not always enjoy the protection to which they are entitled, are subjected to abuse and excesses and are left in need, it is not for lack of legal provisions".

4.2 The Work Of Humanitarian Organizations In Relation To The Elderly

For a very long time the International Red Cross and Red Crescent Movement has been concerned about the plight of the elderly. This concern gave rise to a number of resolutions adopted by various International Conferences of the Red Cross and Red Crescent since 1921 (Resolution IX of the 10th Conference in 1921, Resolution VIII of the 11th Conference in 1923, Resolution XII of the 12th Conference in 1925, Resolution XXIV of the 14th Conference in 1930, and Resolution IX of the 16th Conference in 1938). The ICRC seeks to protect and assist the elderly as it does in the case of all conflict victims, but it also tries to resolve the specific problems facing them and to meet their special needs, on the basis of humanitarian law which requests that their age be taken into account.

Since the fall of the Berlin Wall the situation of old people has become particularly precarious in the Balkans, in Eastern Europe and in Central Asia, and has been further aggravated by the armed conflicts that have broken out and are still raging in those regions. The elderly were therefore mentioned in the Plan of Action for the years 2000-2003 which was to be presented to the 27th International Conference that was to take place in Geneva from 31 October to 6 November 1999. The relevant section reads: *"In the conduct of hostilities, every effort is made to spare the life, protect and respect the civilian population, with particular protective measures for women and groups with special vulnerabilities such as children, **the elderly**, persons with disabilities and displaced persons"*.

The Red Cross Red Crescent Movement has responded to the elderly in various parts of the world, and has tried to adequately provide for their special needs. Below is an overview of the work the work this movement has undertaken in relation to the aged:

1. Abkhazia⁶

The ICRC considers elderly people in Abkhazia as particularly vulnerable because a large number of them belong to ethnic minorities (Russians, Armenians, Georgians) and are living in isolation. ICRC delegates regularly visit representatives of these groups in order to gather allegations of violations of humanitarian law committed against them and to pass these reports on to the Abkhaz authorities. The ICRC also keeps up its family message network to enable them, among others, to remain in contact with their relatives. A total of 13,213 family messages were distributed in 1998 and 5,085 were delivered in the first five months of 1999. In 1998, arrangements were made for eight elderly people to rejoin their families.

2. Bosnia-Herzegovina⁷

During the conflict in Bosnia-Herzegovina elderly people were regarded as particularly vulnerable, especially when atrocities were being committed against minority groups. The ICRC reached elderly and isolated members of minorities through its food-aid programmes. The combination of assistance and protection activities enabled delegates to visit these elderly people

⁶ Ibid.

⁷ Ibid.

regularly without drawing attention to them. During the visits the ICRC collected information about problems relating to the protection of the groups concerned so as to make the necessary representations to the relevant authorities. In the Dvar area, where a few elderly Serbs remained, an ICRC health delegate conducted a health care/protection programme for six months.

The ICRC also helped old people to rejoin their families. At present, the ICRC is still running several food-aid and medical assistance programmes in Bosnia-Herzegovina.

The ICRC provides the food component of the home care programme set up by the Red Cross organizations of the two entities to meet the needs of elderly people who are living alone and have no other means of subsistence. About a thousand volunteers are involved in this programme, which aims to reach 18,000 beneficiaries on a daily basis. The Federation covers running costs and provides hygiene items.

3. The Finnish experience⁸

The Red Cross in Finland developed its programmes for the elderly over a long period. After the Second World War, the National Society worked not only in reconstruction, but also with the elderly displaced from the area annexed by the Soviet Union. During the 1950s, a system of home visiting to the vulnerable elderly was established, using volunteers to befriend them and to

⁸ Jeremy Seabrook, The Fullness of Life (ICRC 2000)

help with shopping, cooking and hospital visiting. This programme expanded, and the Red Cross gave training and salaries to home helps. In the late 1960s, this professional service ceased, since as Finland became richer, the government extended the welfare state and considered NGOs should not be involved in delivering such services. Red Cross intervention was reduced to friendly visiting of the elderly.

4. Other Contexts⁹

In Azerbaijan, 30,000 elderly people living alone have received Red Cross Red Crescent support; in the Czech Republic, 7,000 home-care nurses have been trained; in Croatia, the Red Cross provided relief, medical and psychological support to 10,000 isolated elderly people left to fend for themselves as a result of conflict. Indeed, in many other parts of eastern Europe and in the former Soviet Union, the Federation, ICRC and individual National Societies have been running assistance programmes to help the elderly and destitute to survive the harsh winters, providing them with food, warm clothing, shoes, blankets, mattresses, candles and medicines. For many of the beneficiaries, who have no other means of support, these basic goods are often the difference between life and death.

⁹ Ibid.

4.3 Deficiencies in IHL in Relation to the Elderly

The problem of enforcement of IHL¹⁰

It has been argued that the lack of efficient enforcement mechanisms in International Law has led to it being ignored, violated and not being given the respect it deserves. Political, social as well as economic factors also contribute to the violation of International Law rules. The violation of humanitarian principles was especially witnessed during the last quarter of the 20th century. The biggest step in ensuring enforcement of IHL rules was taken in 1993 when the ad hoc Tribunal for Yugoslavia was set up and thereafter in 1994 when the Rwanda Tribunal was established. These Tribunals seek to bring to justice those responsible for atrocities committed during armed conflicts, and have therefore promoted the respect for IHL.

The *XXIV International Conference of the Red Cross* noted that “there was continued refusal of occupying powers to acknowledge the applicability and comply with the totality of their obligations under the Fourth Geneva Convention of 1949”. This conference made a solemn appeal that the rules of IHL and universally recognized humanitarian principles be safeguarded at all times and in all circumstances and that the ICRC be granted all the facilities necessary to discharge the humanitarian mandate confided to it by the International Community. This was under the *1981 Manila Resolution, VI*. This resolution recognized the fact that violation IHL rules compromised the protection offered to the civilian population under the Fourth 1949 Geneva Convention.

¹⁰ Kalshoven, Frits and Zegveld, Liesbeth, Constraints on the Waging of War; An Introduction to IHL (ICRC Geneva, 2001) pp 185-201

The *XXV International Conference of the Red Cross* observed that there was a need for the respect of IHL in armed conflicts. It was also observed that the violations of the provisions of the Geneva Conventions seriously impede the humanitarian work of the ICRC and thus worsen the plight of war victims.

The *XXVII International Conference of the Red Cross* made these observations:

Several delegations deplored the widespread violations of IHL being committed today and provided many examples, such as ethnic cleansing, the deliberate targeting or massacre of civilians, rape, forced displacements, hostage taking and the recruitment of children as combatants.

The universality of the Geneva Conventions and the importance of all IHL treaties were unanimously recognized. Some delegations stressed that there was no need for new rules or new commitments since most problems stemmed from lack of respect for and lack of implementation of existing rules. It was also observed that violations of IHL prolong and worsen conflicts and should not be tolerated. One delegation pointed out that continuous violations and lack of enforcement challenged the credibility of the law. Serious concerns about lack of respect for basic principles of humanitarian law were expressed by a considerable number of delegates, many of who stressed the need to ensure special protection for women and vulnerable groups such as children, the elderly, people with disabilities and displaced persons.

It is therefore arguable that concrete enforcement measures are important to ensure that IHL rules achieve their purpose. Steps have been taken by the International Community as well as International Agencies to deal with the question of enforcement.

4.4 Conclusion

IHL does make provisions for the protection of elderly persons in wartime, however, they still face many dangers and they are often the targets of many atrocities. The ICRC has done a lot to ensure that the elderly are protected in wartime, as well as during the post-war period. The fact that the rights of the elderly are often trampled upon during war does not mean that IHL has failed in its objective. This is a body of law that is still developing. The deficiencies within IHL are indeed curable; therefore the protection it offers to the elderly can be improved and enhanced.

The next chapter will compare the manner in which IHL responds to the elderly with the manner in which it responds to children on the one hand, and women on the other.

CHAPTER FIVE

IHL RESPONSES TO CHILDREN AND WOMEN IN WARTIME AS COMPARED WITH IHL RESPONSES TO THE ELDERLY IN WARTIME

5.0 Introduction

IHL recognizes three categories of vulnerable persons during wartime; these are women, children and the elderly. Each of these categories of persons have different needs, thus IHL's response to each category is logically different. However, this chapter is concerned with the better and more detailed response availed by IHL to women and children as compared with its response to the elderly.

The issue therefore is that while it is logical and necessary that IHL should respond differently to each of these three categories, there is no justification for there being better and more detailed rules as regard women and children than those on the elderly. It has to be understood that there are factors that lead to this variance. This chapter will analyze these factors as well. It will also analyze the similarities that exist in IHL's response to the three categories of vulnerable victims of war.

5.1 IHL's Response to Women in War as compared to the Elderly in War

It is important to look at the express legal provisions relating to women under various IHL treaties, the most important being the Fourth 1949 Geneva Convention and the 1977 Additional Protocols, as well as the work of humanitarian organizations in relation to women, and here the work of ICRC will be considered.

i) Provisions of the 1949 Geneva Conventions and their Additional Protocols of 1977 relating to women in wartime and how they differ from those relating to the elderly

Women are protected under the Geneva Conventions as civilians. Thus the general provisions relating to protection of civilians in wartime apply to women. The Conventions and Protocols go further to make provisions that specifically apply to women, offering them special protection. In all there are 43 provisions to be found in the Conventions and their additional Protocols, which are specific to women. These provisions have however received considerable criticism, and one issue that has been raised is the failure by these provisions to protect women as individuals. Instead, these provisions are couched in such a way that they apply to women in the context of their relations with other individuals, especially children. It has also been argued that these provisions are lax, their breach is not considered “grave”.¹

The comparison is thus made between how IHL treaties have responded to women and how they have responded to the elderly. The first distinction to note is that the Geneva Conventions and their Additional Protocols make express provisions that relate specifically to women. On the other hand, these Conventions and Protocols make no specific provisions for the elderly. The provisions that apply to the elderly apply across the board to civilians and persons not taking part in armed hostilities. Articles 14 and 17 of the Fourth Geneva Convention expressly mention aged people,

¹ Judith Gardam and Hilary Charlesworth, ‘Protection of Woman in Armed Conflict’, available at <www.genderandpeacekeeping.org/resources>

but the provisions in these Articles apply not only to the elderly, but to children, pregnant women and humanitarian workers as well.

It is therefore arguable that these Conventions make better provisions for women than they do the elderly.

Secondly, the criticism that the provisions relating to women have received is important. Just like in the case of the elderly, these provisions have been argued to be adequate, but their enforcement has presented a challenge.² Women often face all sorts of abuse during armed conflict. This has been attributed not to the insufficiency of IHL rules, but to the lack of efficient enforcement mechanisms of IHL. The ICRC report on Women and War stated that if women are suffering in situations of armed conflict it is not because of a lack of laws protecting them, but because these laws are not implemented and respected.

This has been the argument in relation to the provisions of IHL regarding the elderly. Indeed the breach of IHL rules, which seek to protect victims of war, is common to all victims of war, not only women and the elderly. The question then is why should the Geneva Conventions and their Additional Protocols make better provisions as regard the protection of women than those relating to the protection of the elderly. As already stated, these categories of persons have different needs under IHL and the dangers they face during wartime also differ. The provisions relating to each category is thus necessarily different.

² Ibid.

One of the reasons why IHL should offer better protection to women is because for a long time there has been agitation for the gender equality. Women's issues have been in the forefront in numerous international forums. It is logical that the IHL treaties would more pay attention to these issues than they would to issues regarding the elderly. Issues relating to the elderly have not caused a great stir within society as gender issues have. It is indeed arguable that issues relating to the elderly tend to take a backseat in many societies. Thus, the difference in IHL's response to the elderly from its response to women could be attributed to the society and how it responds to social matters. Take rape for instance. Society abhors it. This is sufficient to push those negotiating treaties to pay close attention to it and make detailed rules as regards it, which is what happened with the IHL treaties. On the other hand, issues such as failure to pay pensions may raise concern, even sympathy, but these are not sufficient to have the issue dealt with in great detail when negotiating treaties. This is the social pull, and it goes to the functions of law.

Law is a social tool, it operates within the context of society, therefore in many instances, and laws will reflect what a society considers to be important, its expectations and indeed its spirit. For this reason, those who negotiate treaties will take into consideration what society expects and hopes for.

ii) The Work of the ICRC in Relation to Women as Compared to the Elderly³

The ICRC is endeavouring to promote knowledge of the plight of women affected by

³ Extract from Document by ICRC, Women and War- The ICRC Response (2005)

armed conflict, to improve compliance with the obligations of IHL and to ensure humanitarian programmes and activities take the needs and perspectives of women into account. The ICRC stated this in a report on Women and War. The ICRC endeavours to protect women during armed conflict as well as to give them assistance. A summary of these activities is provided below:

Prevention and Protection

- **International humanitarian law training** – The ICRC conducts sessions with armed forces and armed opposition groups around the world in which messages about the needs of women and the prohibition of sexual violence are integrated. The sessions stress that sexual violence is a serious violation of IHL and a criminal act.
- **Detention** – As part of its mandate, the ICRC visits persons deprived of their freedom in relation to armed conflict. Delegates assess whether the conditions of detention of women adhere to IHL. For example, they seek to ensure that appropriate conditions exist for women and that the specific needs of mothers with children are met; that women are detained in separate quarters from male detainees; that female staff guards women and they are allowed family visits which are essential for their psychological well-being.
- **The missing** – In Bosnia alone, over 16,500 men went missing due to armed conflict. Consequently, women were left alone to bear the economic and emotional burden of missing relatives and endure a loss of social status.

Women whose husbands are missing have no legal entitlements or benefits which may exist for widows. The ICRC is working to provide support for those families and helping them to clarify the fate of missing relatives. The organization supports psychosocial workshops for families of the missing and provides them with material or administrative assistance.

- **Sexual violence** – A comprehensive response to the needs of women who have suffered sexual violence is critical to address their protection, medical and psycho- social needs. As one of the most frequent and traumatic violations that women suffer in wartime, it is also one of the most complex issues for humanitarian organizations to address. The ICRC conducts careful analysis of communities to develop strategies for providing medical and psychological care for victims of sexual violence, including those that are difficult to reach because of the taboo and shame associated with sexual violence. For example, the Algerian Red Crescent Society has traditionally run training workshops for destitute women and girls to teach them a variety of skills. A psychologist now takes part in these workshops and sets up discussion groups to create free, open and safe spaces for dialogue. Many of these women had experienced violence and in this safe environment they could recreate the social links necessary to their healing without fear of stigmatization.

Assistance

- **Economic security** – The ICRC seeks to provide support by devising appropriate programmes which will help women regain autonomy and dignity. Often the ICRC works with women's associations interested in participating in economic programmes. For example in Sierra Leone, the ICRC helped more than 100,000 women left alone after the armed conflict to restore their traditional economic activity and enhance their income generating capabilities by establishing an associative vegetable production programme.
- **Rehabilitation** – In some cultures women who have suffered injuries resulting from landmines are not able to receive care due to cultural restrictions on their freedom of movement, or due to a lack of resources. The ICRC aims to ensure that women have the same access as men to physical rehabilitation programmes. Often the ICRC will facilitate or cover the costs of transportation to rehabilitation centers as well as provide vocational training in line with their physical capabilities.

In addition to these, the ICRC has also published various articles relating to the plight of women in wartime. These publications are very important because in International Law, the writings of qualified publicists are considered a source of law. This is provided for under Article 38 of the Statute of the ICJ.

Reasons for the Differences

Comparing the ICRC response to women in armed conflict to its response to the elderly in the same situation, it is apparent that the difference is not great. In the previous chapter, the work of the ICRC in relation to the elderly was analyzed. The ICRC has implemented various projects aimed at assisting the elderly in wartime, just as it has done for women. It has taken into account the various needs of each of these categories, and tried to respond to these needs in the best way possible.

On the other hand, the publications that the ICRC has released in relation to the elderly are considerably fewer than those it has released in relation to women. While the plight of women in armed conflict has raised a lot of concern, this has not been the case with the elderly in the same situation. The ICRC publications have been geared at informing and educating society on the dangers women face during wartime, and the protection offered to them. Again, going back to the social pull theory, society requires and expects to be informed on matters that it considers important. In fact, society has a right to know. Drawing from this, those directly involved in law making and implementation are expected by society to give information on their activities. The ICRC responds to society by producing the information that society seeks. In so doing, the ICRC shapes and develops IHL, for as already stated, these publications are considered sources of International Law.

The ICRC thus contributes to the development of IHL in relation to women. The problem then is that the law relating to the elderly develops at a slower rate.

According to *Ehrlich*⁵ who is a scholar and wrote on the *sociological school of law*⁶, the law is derived from social facts and depends not on state authority but on social compulsion. He expounded on the social basis of law. Following his argument therefore, the differences in the way IHL relates to women on one hand and the elderly on the other hand can be linked to the society itself, as opposed to law-making authorities. As Ehrlich has argued it, the law is derived from social facts and the real source of law is not statutes or reported cases, but the society itself. Ehrlich further argued that law is distilled out of the interplay of social forces and activities.

According to *Roscoe Pound*⁷, another scholar in the sociological school of thought, in order for law as a form of social control, to be adequately employed in enabling just claims and desires to be satisfied must be developed in relation to existing social needs. Again, the argument here is that law has to develop in tandem with the society if at all it is to be effective. Of great import is the efficient functioning of the law as a form of social control, which efficiency, according to Pound, can only be achieved if the law develops in relation to existing social needs.

⁵ E.Ehrlich, *Fundamental Principles of Sociology of Law*, translated by W.L. Moll (1936). Ehrlich's writing were discussed by Lord Llyod of Hampstead in his book *Introduction to Jurisprudence*, 3rd ed. Stevens & Sons (1972) pp 340-342

⁶This school of thought propounds that the source of law is the society itself. These scholars link the law to society, arguing that the law does not function in a vacuum, but is a tool for social control. Thus, the law should be in tandem with the society.

⁷ Discussion of the writings of Roscoe Pound by Lord Llyod of Hampstead, *Introduction to Jurisprudence*, Stevens & Sons (1972) pp 342-348

5.2 IHL's response to Children in War as compared to the Elderly in War

i) Provisions of the 1949 Geneva Conventions and their Additional Protocols of 1979 Relevant to Children

The Fourth Geneva Convention protects children generally as persons not taking part in war, and goes further to make provisions that are specific to children. Of relevance are the following Articles: 14, 17, 23, 24, 38, 50, 51 and 68. The Additional Protocols also make detailed provisions on the protection of children. Articles 77 and 78 of Protocol I provide as follows:

ARTICLE 77- Protection of children

1. Children shall be the object of special respect and shall be protected against any form of indecent assault. The Parties to the conflict shall provide them with the care and aid they require, whether because of their age or for any other reason.

2. The Parties to the conflict shall take all feasible measures in order that children who have not attained the age of fifteen years do not take a direct part in hostilities and, in particular, they shall refrain from recruiting them into their armed forces. In recruiting among those persons who have attained the age of fifteen years but who have not attained the age of eighteen years, the Parties to the conflict shall endeavour to give priority to those who are oldest.

3. If, in exceptional cases, despite the provisions of paragraph 2,

children who have not attained the age of fifteen years take a direct part in hostilities and fall into the power of an adverse Party, they shall continue to benefit from the special protection accorded by this Article, whether or not they are prisoners of war.

4. If arrested, detained or interned for reasons related to the armed conflict, children shall be held in quarters separate from the quarters of adults, except where families are accommodated as family units as provided in Article 75, paragraph 5
5. The death penalty for an offence related to the armed conflict shall not be executed on persons who had not attained the age of eighteen years at the time the offence was committed

ARTICLE 78 -- Evacuation of children

1. No Party to the conflict shall arrange for the evacuation of children, other than its own nationals, to a foreign country except for a temporary evacuation where compelling reasons of the health or medical treatment of the children or, except in occupied territory, their safety, so require. Where the parents or legal guardians can be found, their written consent to such evacuation is required. If these persons cannot be found, the written consent to such evacuation of the persons who by law or custom are primarily responsible for the care of the children is required. Any such evacuation shall be supervised by the Protecting Power in agreement with

the Parties concerned, namely, the Party arranging for the evacuation, the Party receiving the children and any Parties whose nationals are being evacuated. In each case, all Parties to the conflict shall take all feasible precautions to avoid endangering the evacuation.

2. Whenever an evacuation occurs pursuant to paragraph 1, each child's education, including his religious and moral education as his parents desire, shall be provided while he is away with the greatest possible continuity.

3. With a view to facilitating the return to their families and country of children evacuated pursuant to this Article, the authorities of the Party arranging for the evacuation and, as appropriate, the authorities of the receiving country shall establish for each child a card with photographs, which they shall send to the Central Tracing Agency of the International Committee of the Red Cross. Each card shall bear, whenever possible, and whenever it involves no risk of harm to the child, the following information:

(a) surname(s) of the child;

(b) the child's first name(s);

(c) the child's sex;

(d) the place and date of birth (or, if that date is not known, the approximate age);

- (e) the father's full name;
- (f) the mother's full name and her maiden name;
- (g) the child's next-of-kin;
- (h) the child's nationality;
- (i) the child's native language, and any other languages he speaks;
- (j) the address of the child's family;
- (k) any identification number for the child;
- (l) the child's state of health;
- (m) the child's blood group;
- (n) any distinguishing features;
- (o) the date on which and the place where the child was found;
- (p) the date on which and the place from which the child left the country;
- (q) the child's religion, if any;
- (r) the child's present address in the receiving country;
- (s) should the child die before his return, the date, place and circumstances of death and place of interment.

Protocol II also makes provisions that are specific to children. Part II of this Protocol provides for humane treatment of all persons during armed conflict, this is under Article 4. Paragraph 3 of this Article provides as follows:

Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in

keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of sub-paragraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.

As in the case of women, the Geneva Conventions and their Additional Protocols make detailed provisions relating to children. This is not the case with the elderly, as has already been discussed. Again, the reason for this variance can be traced back to the society, as explained in 5.1 above.

As with women and the elderly, children are greatly affected by war and face

grave abuse. Again, the question of enforcement and implementation of IHL is raised.

ii) The Work of the ICRC in Relation to Children as compared to the Elderly

The ICRC tries to ensure children in war have adequate access to medical care, food and water, and, when possible, reunites them with their families. It also campaigns against the recruitment of child soldiers and reminds all parties to conflict of their obligations towards children. To this end, the ICRC has made various publications and implemented various projects aimed at protecting children in wartime. For instance, the ICRC has teamed up with UEFA to campaign for the protection of children in war. This is an effort linked to the Euro 2004 championships that were held in Portugal.⁸

ICRC work in relation to children is extensive, perhaps even more so than what it has done in relation to women, but definitely more extensive than its work in relation to the elderly. This is indeed logical, because children face the greatest forms of abuse during war. They are often recruited in the army, which is a most cruel form of forced labour, this has led to the application of the rules of the First, second and Third Geneva Convention to children. They are persons who take part in armed hostilities, hence the necessity to apply the

⁸ The ICRC and UEFA have launched their joint effort campaign, Protect Children In War, which is linked to the 2004 UEFA Championships (Info Resources/ Photos, 28th April, 2004)

rules in these Conventions to them. In responding to the plight of children, the ICRC has put in a lot of effort to alleviate their suffering. This has led to the co-operation of the ICRC with other organizations, such as UEFA in order to improve as far as possible the lives of children affected by war.

It is arguable that children face greater dangers during wartime than the other two categories of vulnerable victims of war. Children in armed conflict also routinely experience emotionally and psychologically painful events such as the violent death of a parent or close relative; separation from family; witnessing loved ones being killed or tortured; displacement from home and community; exposure to combat, shelling and other life-threatening situations; acts of abuse such as being abducted, arrested, held in detention, raped, tortured; disruption of school routines and community life; destitution and an uncertain future. Some even participate in violent acts. Children of all ages are also strongly affected by the stress levels and situation of their adult caregivers.⁹ For this reason, greater emphasis has been put on their protection, not only by the ICRC, but by other organizations which are specifically concerned with children.

The work that UNICEF has done to aid children in war is of great importance. To the extent that UNICEF intervenes to assist children in wartime, it can be classified as a humanitarian organization, although the assistance it offers is

⁹ UNICEF/HQ99-0014/Brant

specific to children.¹⁰

Reasons for the Differences

Again, these can be traced back to the society. The values of any given society come into play here. As has been discussed, society takes a keen interest in matters involving children. The effects of war on children raise a lot of concern within society. This is not the case with matters concerning the elderly. The arguments of *Ehlich* and *Pound* are also valid in the case valid in this case as they were in the case of women. Indeed, the social pull theory explains why IHL respond in a better way to children than it does to the elderly.

From the discussion above, the society is greatly concerned with the rights of children. Take for example the ICRC working together with UEFA to help war-afflicted children. There is also the fact that there is more than one organization, which seek to aid children in wartime. We have UNICEF, which seeks to aid children in wartime, thus supplementing the work of the ICRC in relation to children. The response to war affected children indeed overwhelming. The same cannot be said of the response to the elderly. The reason for this could be found within the values of society. What society considers of great importance will have more effort placed into it. While the plight of the elderly affected by war raises sympathy, it does not raise the kind

¹⁰ Ibid

of concern that the plight of children raises. The social theories of law propounded by *Ehrlich* and *Pound* as explained in the case of women above are therefore valid in this instance as well.

5.3 Conclusion

The needs of war victims are different and are to large extent determined by the age and gender of the victims. IHL seeks to respond to these needs. It is logical that IHL will respond differently to victims whose needs differ. The challenge comes where the response to a category of victims is better than the response to another category. IHL responds to children and women a better way than it does the elderly. The reasons for this are found within society itself. However, the law is dynamic and can indeed be fashioned to give adequate protection to all victims of war.

CHAPTER SIX

CONCLUSION AND RECOMMENDATIONS

6.0 Introduction

This chapter will discuss the conclusions drawn from this research project. It will also analyze whether the hypotheses made at the beginning of the study have been proved or not. Finally, recommendations will also be made in this chapter.

6.1 Statement regarding proving or disproving of hypotheses

The first hypothesis that was made is that IHL provisions relating to elderly persons in wartime are inadequate. This hypothesis has been proved. In chapter three, the effects of war on the elderly were analyzed. It was apparent that the elderly are often the victims of abuse during wartime, that they suffer the loss of their property and nonpayment of pensions. IHL does not address these issues, although they are a direct consequence of war on the elderly. In chapter four, the response of IHL to the elderly was analyzed. The Geneva Conventions, specifically the fourth one under which the elderly are protected, have no provisions which are specific to the elderly. These provisions are also not detailed. For this reasons, there is a deficiency in the protection offered by IHL to the elderly.

It has been argued that the provisions of IHL in relation to the elderly are adequate. The fact that the elderly suffer abuse during wartime is not as result of IHL not making provisions for their protection. It has been argued that the elderly suffer abuse due to lack of proper enforcement mechanisms, which has led to the violation of IHL. Lack of respect for IHL is the reason why the elderly continue to suffer abuse during wartime.

Indeed, enforcement of IHL is a problematic area, and it is true that because it is not respected and is constantly being violated, the protection it offers to victims of war is compromised. But, this is not the only reason why the elderly continue to suffer abuse during wartime. IHL provisions in relation to the elderly are not adequate, as it has been argued. The provisions relating to their protection are not detailed and they do not address certain pertinent issues which the elderly face during wartime, as has been discussed above.

The second hypothesis that was made is that IHL provisions relating to women and those relating to children are better than those relating to the elderly. Here, the first issue that was considered is the fact that these three categories of war victims have different needs. For this reason, IHL has to respond to them differently. However does not only respond to these categories of victims differently, but its response to women as well as its

response to children is better than its response to the elderly, as was seen in chapter five. The rules relating to women and those relating to children are specific to these categories of victims, and they are also detailed. In stark contrast, there isn't a single provision in the Geneva Convention and their Additional Protocols of 1977, which relate to the elderly, without making reference to women and children. Secondly, the rules relating to women and children cover pertinent issues that affect these categories of victims during war. For instance, there are detailed rules relating to rape during wartime, addressing the question of sexual violence against women during war. For children, the issue of child soldiers is addressed in great detail.

6.2 Conclusions

There is room for the improvement of IHL. This is a relatively new body of law that only started to develop in the 19th century, and is still in the process of developing. For this reason, there is room for IHL provisions to be improved so that it can adequately cater for all victims of war. There are deficiencies in IHL, which have greatly impeded its function, which is the protection of victims of war. It has been argued that the most problematic area in IHL is the question of its enforcement. Lack of respect for IHL has led to its constant breach. Emphasis has been placed on the need by parties to armed hostilities to respect IHL. Whether this will be achieved is not certain.

However, should this question of enforcement be resolved, war victims will be guaranteed adequate protection. This stems from the fact that 197 States are parties to the Geneva Conventions.

6.3 Recommendations

This study has highlighted several problems with IHL. The following recommendations have been made with the aim of solving these problems.

- The IHL provisions relating to the elderly should be reviewed. The provisions relating to protection of the elderly are inadequate. They should be detailed in order to cover the issues that they do not address. The effects of war on the elderly as discussed in chapter three of this study should be given due consideration and IHL should make specific rules relating to this issue.

- The question of enforcement of IHL is a problematic issue. Lack of respect for IHL has led to its violation, and this in turn has compromised the protection offered by IHL to victims of war. In order to create respect for this body of law, States should educate their members on IHL, its function and its importance. Indeed, it is important for States to educate their citizens on the law of war. In

many African countries, this would be a big challenge, because many nationals of African States do not even understand their own constitutions. But this should not bar States from endeavoring to educate their citizens on the law of war. This is one way of fostering respect for IHL and thus enhancing the protection it offers to war victims. The Geneva Conventions provide that the High Contracting Parties shall undertake, in time of peace as in time of war, to disseminate the text of the Conventions as widely as possible in their respective countries, and in particular to include the study of the Conventions in their programmes of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population, in particular the armed forces, the medical personnel and the chaplains. This provision is embodied in Articles 47, 48, 127 and 144 of the Four 1949 Geneva Conventions respectively. This is an important provision, but the Conventions do not provide for the implementation of this provision. The financial requirements for the implementation of this provision are also not laid out. This is a general provision. Specific provisions on how the dissemination of the Conventions can be achieved are necessary. Ensuring the implementation of this single provision will go a long way in fostering respect for IHL.

- This study only focused on the plight of the elderly during wartime. It is therefore recommended that a further study be carried out to find out the post-war effects on the elderly.

SELECTED BIBLIOGRAPHY

Books

Caversio, Sylvie Giossi, Strengthening Protection In War- A Search for Professional Standards (International Committee of the Red Cross, May 2001)

Cumming, Elaine and Henry, William E., Growing Old; The Process of Disintegration (Basic Book Publishing Company 1961)

Gardan, Judith Gail, Non-Combatant Immunity as a Norm of International Humanitarian Law (Law School, University of Adelaide; Martinus Nijhoff Publishers, 1993)

Guillemard, Anne-Marie, Old Age and The Welfare State (Sage Studies in International Sociology 1980-1984)

Haug, Hans with Gasser, Peter-Hans, Perret Françoise and Robert-Tissot, Jean Pierre, Humanity for all- The International Red Cross and Red Crescent Movement (Paul Haupt Publishers, Berne, Stuttgart, Vienna; The Henry Dunant Institute, 1993)

International Red Cross Committee, Care in the Field for Victims of Weapons of War (ICRC Health and Relief Division Geneva, 2001)

International Committee of the Red Cross, Dictionary of the International Law of Armed Conflict (International Committee of the Red Cross Geneva, 1992)

Kalshoven, Frits and Zegveld, Liesbeth, Constraints on the Waging of War- An Introduction to International Humanitarian Law (International Committee of the Red Cross Geneva, March 2001)

Mulinen De, Frederic, Handbook on the Law of War for Armed Forces (International Committee of the Red Cross, 1987)

Noguchi, Yukio and Wise, David A., Aging in the United States and Japan (University of Chicago Press 1994)

Perrin, Pierre, Dr., War and Public Health- Handbook on War and Public Health

(International Committee of the Red Cross Health Division)

Shaw, Malcolm N., International Law 4th ed. (The Press Syndicate of the University of Cambridge 1997)

Articles

Feeney, Heather A. and Picolo, Cynthia M., Girls at War (Background Papers International Conference on War-Affected Children 2000)

International Committee of the Red Cross, Forum on War, Money and Survival (ICRC 2000)

International Committee of the Red Cross, Woman and War (International Committee of the Red Cross, August 1995)

International Committee of the Red Cross, People on War- Campaign on International Humanitarian Law (ICRC, October 1998)

International Committee of the Red Cross, Victims of War (ICRC, July 1993)

International Conference of Red Cross and Red Crescent, Civilians in War (International Conference of Red Cross and Red Crescent Geneva, 1995)

Storm, Sharon H. Hartman, Dr. and Wood, Linda P., Women and World War II (Brown Education Projects)

United Nations High Commission for Refugees, UNHCR Assistance to Older Refugees (UNHCR 1997)

Reports

International Committee of the Red Cross, Arms Availability and the Situation of Civilians in Armed Conflict (International Committee of the Red Cross Geneva, June 1999)

International Committee of the Red Cross, Guide for National Red Cross and Red Crescent Societies to Activities in the Event of Conflict (International Committee of the Red Cross, 1990)

Raoul Wellenberg Institute of Human Right and Humanitarian Law, A Report from the Children of War Conference, Stockholm, 31st May- 2nd June 1991.