

LAW, SOCIAL JUSTICE AND DEVELOPMENT A FESTSCHRIFT FOR PROFESSOR UBA NNABUE

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ISBN: 978-045-648-8

PUBLISHED BY:

IMO STATE UNIVERSITY PRESS
OWERRI

COMPUTER TYPE SETTING:

Amadi Chika
No. 9/11/ Madumere Street
Owerri, Imo State

PRINTED IN NIGERIA BY

Applause^B Multi Sectors Ltd.
#23 Madumere/Ihugba Street
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CHAPTER 2

ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW AGAINST VIOLATION WITHIN THE CONTEXT OF INTRA-

STATE CONFLICTS IN AFRICA*

ABSTRACT

The case of intra-state conflicts and their enforcement against violation of International Humanitarian Law is a complementarily process and mutual influence whereby the principles of International Humanitarian Law are enforced by the mechanism of the operation of municipal legal rules during internal armed conflict within the jurisdiction of a state.

INTRODUCTION

International Humanitarian Law and its enforcement against violation within the context of intra-state conflict raises a lot of issues be it in Africa or elsewhere. This topic under review brings to the fore the question of the sphere of existence and enforcement of International Humanitarian Law. It raises the question of violations of Human Rights Law, Criminal Law and International Humanitarian Law.¹ In other words, how can International Humanitarian Law be recognized for enforcement in the internal jurisdiction of a state. How can violations of international humanitarian law be established and confronted for resolution. This paper is designed to address such issues such as the nature and causes of intra-state conflicts in Africa, the applicability of international humanitarian law to intra-state conflicts, violations of international humanitarian law during intra-state conflicts in Africa and the mechanism for enforcement of international humanitarian law against violation; during intra-state conflicts.

NATURE AND CAUSES OF INTRA-STATE CONFLICTS IN AFRICA

The African conflict topology can be categorized into four broad planks: civil national strife, boundary conflicts, self-determination and intra-State conflict.

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¹ Elizabeth Baumgartner (2008), "Aspects of Victim Participation in the Proceedings of International Criminal Court" in *International Review of the Red Cross* Vol. 90 Number 870, pp. 409-410.

Each of these has profound implications for the general scheme of conflicts resolution in Africa.²

The incidence of civil strife has been rampant on the continent. Some of the strife's have been running for decades defying military solutions and not succeeding in attracting the right political formula for their solution.³ This is manifested in the problems of Southern Sudan, Ethiopia, Nigeria, Chad, Liberia, Mali, Senegal, Uganda, Zaire and Somalia. In all these countries, internal cleavages manifested in the case of force. This may arise from the context for political power or the desire to secede. In other situations, there is the context for political power: Chad, Zaire, Liberia, Sierra-Leone, Uganda and Somalia provide apt examples. The desire to establish political supremacy has necessitated the resort to the use of force.

Another scenario that has characterized the conflict topology of Africa is the attempt at secession. This scenario has been aptly demonstrated by situations in Nigeria (The Biafran Saga) and Sudan. While the situation in Nigeria abated in 1970, the conflict that raged on in Sudan for its independence was enhanced by the United Nations' intervention.⁴ It has also been argued in these two cases that the question of self-determination was also an issue.⁵ In the case of Sudan, it was resolved in the emergence of South Sudan becoming an independent State from Sudan on the 9th July, 2011.⁶ It is normal that all sorts of issues are canvassed in a conflict situation in order to sustain the justification or position taken by the actors. More so, that the actors desire the support of the world community and it is, therefore, consistent with the appropriate propaganda to raise issues that appear credible to sustain such sympathy and support.⁷

² Onje Gye-Wado: The Legal Basis for Peace Keeping Operations in Africa: A Study of Regional and Sub-Regional Charter// in Peace Keeping as a Security Strategy in Africa (Chad and Liberia as Case Studies) Vol. I, Vogt. M.A et al Edited 1996, p. 187.

³ Onje Gye-Wado, *op. cit.*, p. 187.

⁴ Hennie Strydom: The Lesson of Darfur// In African: Year Book on International Humanitarian Law, 2005. p. 148.

⁵ Onje Gye-Wado, *op. cit.*, p. 188.

⁶ The Republic of South Sudan became independent on the 9th of July 2011 following a referendum that passed with 98.83% of the vote. It is now a member of the United Nations and the African Union and in July 2012 signed the Geneva Conventions. See <http://www.mediawiki.org> accessed on 10th June 2013

⁷ Frey-Wouters, E., "The Relevance of Regional Arrangements International Conflicts in the Developing World" in Moore, J.N (ed), **Law and Civil War in the Modern World**, John Hopkins University Press, 1974, chapter 18.

There also is the consideration of self-determination.⁸ The concept of self-determination has been available to people who are politically, socially and culturally united but have not yet attained independent status as states. This means that they are still part and parcel of an independent state struggling for separation and attainment of independent status or it is a dependent territory trying to secure an independent status.

Intra-state conflicts generally are governed by the **article 3** common to the Geneva Conventions of 12 August 1949⁹ without modifying its existing conditions of application. These conflicts are also governed by Protocol II Additional to the Geneva Conventions of 12 August 1949 which shall apply to all armed conflicts which are not covered by **article I** of the 1977 Protocol Additional to the Geneva Convention of 12 August 1949 and relating to the protection of victims which take place in the territory of state party to the Geneva Convention of 12 August 1949; and relating to the protection of Victims of International Armed Conflicts (Protocol I) and which takes place in the territory of a party between its armed forces and dissident armed forces or other organized groups which, under responsible command, exercise such control over a part of a territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.¹⁰ It should be noted that Protocol II additional to the Geneva Convention of 12 August 1949 shall not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic sets of violence and other acts of a similar nature, as not being armed conflicts.¹¹

In Africa today the situations not covered by Protocol I and Protocol II Additional to the Geneva Convention of 12 August 1949 such as riots, strikes, demonstrations, isolated and sporadic acts such as kidnapping are on the increase. These acts and others which are of similar nature are not classified as armed conflicts.¹²

⁸ Wilson H., **International Law and the Use of Force by National Liberation Movements**, Oxford, Clarendon, 1988, Chapter 4; Eze O.C., **Human Rights in Africa**, NIIA 1984 Chapter 4; Brownlie, **Principles of Public International Law**, Oxford, Clarendon, 1979, p. 593.

⁹ These conventions are four as follows: Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the field; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention Relative to the Treatment of Prisoners of War and Geneva Convention relative to the Protection of Civilian Persons in Time of War.

¹⁰ **Article 1(I)** Protocol II, Additional to the Geneva Conventions 1949.

¹¹ **Article 1(II)** Protocol II, Additional 10 the Geneva Conventions 1949.

¹² **Article 1(II)** as in note 10 above

THE APPLICABILITY OF THE INTERNATIONAL HUMANITARIAN LAW TO INTRA-STATE CONFLICTS

International humanitarian law applies generally to intra-state conflicts. This situation is captured in clear and unambiguous term in **article 2** common to the four Geneva Conventions of 1949 in the following words:

In addition to the provisions of which shall be implemented in peace time, the present convention shall apply to all cases of declared war or of any other armed conflicts which may arise between two or more of the ... parties, even if the state of war is not recognized by one of them. The convention shall also apply to all cases of partial or total occupation of the territory of a ... party, even if the said occupation meets with no armed resistance. Although one of the powers in conflict may not be a party to the present convention, the powers who are parties thereto shall remain bound by it in their mutual relation...¹³

Intra-state conflicts are also known as internal conflicts which are generally referred to as non-international armed conflicts. International humanitarian law always focused on international conflicts between two or more countries. But the **article 3** common to the Geneva Conventions of 12 August 1949 laid the first foundation in consideration of conflicts not covered by International humanitarian law in general known as armed conflict not of international character. The above seemed ambiguous. This ambiguity was clarified by Protocol 11 Additional to the Geneva Conventions.¹⁴ In its clarification, **article 1 Paragraph 2** of Protocol II Additional to the Geneva

Convention of 12 August 1949 declares that "this protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts.

The above now takes us to the question or division of Non-International Armed Conflicts into two categories, viz:

- 1) The Provisions of **article 1(1)** Protocol 11 Additional to the four Geneva Convention of 1949 and Common **articles 3** to the four Geneva Conventions of 1949 as stated above as armed Conflict.
- 2) Situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature as not being armed conflicts.

¹³ Article 2, Common to the four Geneva Conventions of 12 August, 1949.

¹⁴ 13 Article 1(II) Protocol II Additional to the Geneva Convention of 12 August 1949.

It is pertinent to observe that the situations covered by international humanitarian law in **article 3** common to the four Geneva conventions of 1949 and in **article I** of Protocol II Additional to the Geneva Conventions of 1949 are not listed.

It can thus be inferred that the only qualification of intra-state armed conflict is a conflict that involves the armed forces of the state in question against a dissident armed force(s) or any organized armed group(s) which under responsible command exercise control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol.

The above represents a scenario where a surgeon who is able to diagnose a patient with a known disease will recommend the patient for treatment but where he is unable to diagnose the disease, the patient is not qualified to benefit from the treatment offered to other citizens in a government hospital despite, the fact that it is evident even to a non-surgeon that the patient is in dire need of treatment. **Article 1** of Protocol II Additional to the Geneva Conventions is based on the prevalent conditions in civilized nations majority of which are in other continents outside Africa. The question of intra-state conflicts have been allowed to thrive under the guise of defence of a state's sovereignty, territorial integrity and independence,¹⁵ and under the principle of non-interference in the internal affairs of states¹⁶ which effectively gives whoever is in power almost absolute powers to rule according to the dictates of his self interest and colleagues under the guide of the ruling party put in place by the same persons.

The situation in Africa especially between 1963 when the OAU was created and year 2002 when it was dissolved and replaced by the African Union, was a time of absolute powers for African states where power corrupts and absolute power corrupts absolutely. The above situation led to a situation of less involvement of the people in governance which led to bad governance, corruption in high places, relegation of public utility and services to a deplorable level of unfunctionality whereby everyone has to fend for himself. The above condition led to situations of internal disturbances and tensions, such as riots, strikes, isolated and sporadic acts of violence but the international humanitarian law which ought to devise a mechanism for their accommodation is not yet seeing the need to bring these situations under its regulation.

The above situation has influenced a departure of the African Union from that of Organisation of African Unity (OAU) in its principles. Although the term "Armed

¹⁵ **Article 2 (1)(3)** Charter of the Organisation of African Unity (OAU)

¹⁶ **Article 3 (2)** Charter of OAU

Conflict was not used in the in **article 4** on principles but terms like *conflict*, *war crimes*, *genocide* and *crimes against humanity* were used among other relative terms in International Humanitarian Law.

The principles of African Union includes but not limited to:

- 1) Principle of peaceful resolution of conflicts among member states...
- 2) Principle of prohibition of the use of force or threat to use force among member states of the union.
- 3) Principle of non-interference by any member states in the internal affairs of another.
- 4) The principle of the right of the African Union to intervene in a member state pursuant to a decision of the Assembly in respect of grave circumstances namely; war crime, genocide and crimes against humanity.
- 5) Respect for democratic principles, human rights, the rule of law and good governance; and
- 6) The principles of respect for the sanctity of human life, condemnation and rejection of impunity and political assassination, acts of terrorism and subversive activities¹⁷.

It is pertinent to note that the Constitutive Act of the African Union in one breath provides for non-interference of any member in the internal affairs of another¹⁸, but in another breath it also provides for the right of the African Union to intervene in a member State in respect of grave crimes like war crimes, genocide and crimes against Humanity.¹⁹

This in itself has fulfilled the provisions of the Rome Statute.²⁰ This is bridging the gap between international law and municipal law in the application of international humanitarian law to intra-state conflicts. It is our candid opinion that for international humanitarian problems arising from conflicts to be solved, there has to be a re-definition and re-direction of the items under **article 1(2)** Protocol II Additional to the Geneva Conventions so that they can be classified as non-international or internal conflicts without any further division or distinction.

¹⁷ African Union Constitutive Act, **Art. 4**

¹⁸ *Ibid.*, **Art. 4(g)**

¹⁹ *Ibid.*, **Art. 4 (h)**

²⁰ Rome Statute of Internal Criminal Court. **Art. 5**

The intra-state conflicts in Darfur (Sudan) and many African states fall into this category.

There has been a perceptible increase in privatization of war in many parts of Africa, for example in Sierra-Leone and Liberia, but the same phenomenon is also found in other Countries outside Africa such as Afghanistan, Chechnya and Columbia. Such wars are driven not so much by politics as by economics, the belligerents become war enterprises. The motives for war are economic and links with organized crime, illegal trade and trafficking, often make them even more lucrative. In the final analysis, many of these conflicts transcend intra-state sphere.²⁷ The mechanism for enforcement of international humanitarian law against violation during intra-state conflicts is a complex but realistic approach to the process of implementing international legal rules within the mechanism of municipal laws.

There is need for African states to act as a matter of urgency to ratify and domesticate all international legal rules on humanitarian law. As such, there can be redress of situations leading to conflict. This in turn will increase the good relationship between humanitarian organisations and Individual States in order to be able to quickly and adequately react and render help to victims of armed conflict in whatever sphere or dimension it occurs. This will also allow for the enforcement of **article 3** Common to the Geneva Conventions in relation to impartial humanitarian body such as the International Committee of the Red Cross.²⁹

There should be an intensive public enlightenment programme in African States so that knowledge about war, its devastating effects on humans, economy, environment and others may be disseminated. People should be able to know that their victims are not their enemies and that unlawful attack should not be directed at innocent victims and combatants who have surrendered or are incapacitated to submission to the opposing party.

This should be extended to all institutions of learning not minding the level because those who are out of school and who are not employed are a ready army in the hands of people who are at the helm of affairs during intra-state conflicts. There are a lot of institutions and decisions for the enhancement of good governance, for alleviation of poverty and enthronelement of democracy in all African states such as New Partnership for African Development (NEPAD), African Peer Review Mechanism that can bring about new relations in and

²⁷ *Ibid.*, p. 152.

²⁸ *Ibid.*, p. 154.

²⁹ **Article 3(2)** Geneva Convention III of 1949.

amongst African States. These countries should try to encourage themselves to achieve these laudable programmes and the issue of enforcement of international humanitarian law against violation within the context of intra-state conflicts in Africa will be drastically reduced, if not totally erased.

CONCLUSION

Conflicts at whatever level in Human Society occurs as a result of inequality which a party is unable or not ready to cope with until things improve by natural process. The emergence of conflicts especially within the context of intra-state relations had led to a lot of destruction of human life, economic resources and disrupts peaceful co-existence between persons and groups of persons since time immemorial.

It is in order to checkmate or reduce its consequences on human, natural and other resources in society in the form of international humanitarian law rules which were established between States.

Rules alone cannot do the magic of enforcement. That is why enforcement of international humanitarian law has to be actively pursued by all States. African States in particular ought to ratify and domesticate all international humanitarian law conventions and disseminate its contents in national and local languages to their people in order for them to be conversant with these rules. This is because knowledge is power.

In addition to this, African states ought to overhaul their system of governance to accommodate all and sundry. The war against corruption in government circles is to be vigorously pursued and realistic economic development programmes should be engendered to the detriment of intra-state conflicts in Africa.

VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW DURING INTRA-STATE CONFLICTS IN AFRICA

The main aim of international humanitarian law is to respect the sanctity of human life, reject impunity and defend the right and conditions of the victims of armed conflict without contemplation as to the cause or who is responsible for the acts of the conflict.

The persons that are protected against violations of international humanitarian law in armed conflicts of non-international character include:

- 1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.²¹ These protected persons shall in all circumstances be treated humanely without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- a) Violence to life and person, in particular, murder of all kinds, mutilation, cruel treatment and torture;
 - b) Taking of hostages;
 - c) Outrages upon personal dignity, in particular, humiliating and degrading treatment; and
 - d) The passing of sentences and the carrying out of executions without previous judgment pronounced by regularly constituted court...
- 2) The wounded and the sick shall be collected and cared for.²²

The four main groups of violations as provided for by article 3(1), GC I, II, 111 & IV are the main forms of violations seen in most intra-state conflicts. For example in Liberia, killings were carried out in dastardly ways whereby victims are killed and butchered like animals in broad day light and even in front of moving cameras.²³

The situation in Sierra-Leone was the same. Those who escaped being killed are left alive with one or both arms cut-off.

²¹ Article 3(1) GC 1. 12 August, 1949.

²² Article 3(2) GC 1

²³ ICRC documentary films on the crisis in Liberia.

²⁴ In Rwanda, the high point of the conflict and its effects on its victims are the cases of rape based on discrimination against the Tutsi women from the offending Hutu men. In some instances, Hutu women married to Tutsi men were allowed to divorce their husband with immediate effect and allow them to leave before their dastardly operations but their children who are females were not spared as they were considered as Tutsi women.²⁴ In this account, rape was not just committed but the women were made to be naked and made to go out naked after the act after which other inhuman and degrading acts will follow before they are finally killed.

These violations are also the order of the day during situations of internal disturbances, riots, isolated and sporadic acts of violence not covered by international humanitarian law as provided for by Protocol II.²⁵

In all internal conflicts all over Africa the above trend is observed be it in Darfur (Sudan), Liberia, Rwanda, Chad, Somalia and elsewhere where intra-state conflicts has occurred.

MECHANISM FOR ENFORCEMENT OF INTERNATIONAL HUMANITARIAN LAW AGAINST VIOLATIONS DURING INTRA-STATE CONFLICTS

Human beings, their rights and dignity in whatever situation they find themselves must remain humane. Even as a victim of a conflict which is covered or not covered by international humanitarian law, human dignity should remain human dignity. It does mean that if special situations arise in the life of human beings threatening their existence or dignity, special rules should be made to address the situation as to maintain the status quo in human dignity without trying to assert who is at fault.

In intra-state conflicts, there usually exist asymmetry and owing to the fact that governments are mostly fighting a non-governmental armed group. In this type of conflicts, which is to be found in most of the areas where the ICRC works, inequality between the belligerent and their weaponry is the rule rather than the exception.²⁶ The term *symmetrical warfare* is generally understood to mean classic armed conflict between states of roughly equal military strengths.²⁷

²⁴ Jamie A. Williamson: "Case Commentary: Prosecutor V. Mikaeli Muhima" in *African Year Book of International Humanitarian Law*, 2006, pp. 164-1-74 esp. p. 169

²⁵ Article 1(2) Protocol II, Additional to Geneva Conventions of 1949.

²⁶ Toni Pfanner, "Asymmetrical Warfare from the Perspective of Humanitarian Law and Humanitarian Action" in *International Review of the Red Cross* Vol. 87, No. 857 March 2005, pp. 153-154.