

IMO STATE UNIVERSITY, OWERRI, NIGERIA



EXCELLENCE IN SERVICE

# NIGERIAN JOURNAL *Of* LEGAL STUDIES

Volume IX

2010/2011

ISSN 1117 - 7527

- \* Proof Of Customs Under The Evidence Act 2011- A Welcome Paradigm Shift.
- \* Legal Implications Of Risk Management In Financial Institutions In Nigeria
- \* Evolving A Workable Principle Of Criminal Punishment
- \* Shared Legal Responsibilities Of Nurses In Nigeria
- \* Is Defection From One Political Party To Another By Elected Public Officials Justified Under The Law
- \* Civil Liability Of Nurses In Nigeria
- \* The Problems With The Law On Rape In Nigeria
- \* Pre-Action Notice As A Clog In The Wheel Of Right Of Access To Court.
- \* Gay Marriage, Human Rights And African Cultural Heritage
- \* Revisiting The Doctrine Of Ultra Vires Under CAMA, 2004.
- \* Common Misconceptions In Nigerian Intellectual Property Rights System: A Legal Appraisal
- \* Trends In The Nigerian Stock Exchange: Insider Trading In Perspective.
- \* Reconciling Economic Growth And Development With Environmental Protection In Nigeria
- \* Sustainable Development In Developing Countries: Socio-Political And Economic Perspectives For Africa
- \* Tackling The Challenges Of Litigation In Environmental Law Cases
- \* The Stand-By Arrangement Of International Monetary Fund, Its Evolution And Workings: An Appraisal
- \* International Dispute Resolution And The International Court Of Justice (ICJ): An Overview Of Its Roles And Limitations
- \* Appraisal Of Generational Classification Of Human Rights
- \* The Rules Of IHL Governing The Conduct Of Hostilities In Non-International Armed Conflict
- \* Achieving Gender Equality In Public Voice In Nigeria: The Role Of Law
- \* When Is A Man, A Man And A Woman, A Woman?

DE LIBERTUS

## List of Contributors

- Obiaraeri, N.O Esq.* - Assoc. Professor of Law and HOD, Public Law, Imo State University Owerri, Nigeria .
- Onuoha R. A.* (Ph.D) - Assoc. Professor of Law and HOD, Private and Property Law, Imo State University Owerri.
- Chukwumaeze U. U.* (Ph.D) - Assoc. Prof. of Law and HOD, Jurisprudence, Public and International Law, Abia State University, Uturu, Abia State.
- Duroha H. N. (Esq.)* - A private legal practitioner based in Owerri
- Nnadi Ine (Ph.D)* - Senior Lecturer, Associate Dean, Faculty of Law, Imo State University Owerri
- Okorie C.K.* (Ph.D) - Lecturer, Faculty of Law, Imo State University, Owerri.
- Ugwuadu, C. K. Esq (LL.M)* - Lecturer, Faculty of Law Imo State University, (IMSU) Owerri.
- Ojilere A. Esq.* (LL.M) - Lecturer, Faculty of Law, Imo State University, Owerri, Nigeria.
- Nwogu, M. I. O.* (LL.M) - Faculty of Law, Nnamdi Azikiwe University, Awka
- Olufemi Abifarin (LL.M)* - Faculty of Law, Kogi State University, Anyigba, Kogi State
- Ogbaegbe, K.N. Esq.* (LL.M) - Lecturer, Faculty of Law, Imo State University, (IMSU) Owerri.
- Ike D. O.* (LL.M) - Lecturer, Faculty Of Law, Imo State University
- Olong, M. A.* (Ph.D) - Senior Lecturer & H.O.D, Commercial & Industrial Law, Kogi State University, Anyigba
- Professor Nnabue U. S. F.* - Dean of Law, Faculty of Imo State University, Owerri
- Elvis-Imo I.R.* (LL.M) - Lecturer, Faculty of Law, Niger Delta University, Yenegoa.
- Nkwoh J. C.* (LL.M) - Lecturer, Faculty of Law, Imo State University, Owerri
- Okpara, C. I.* (L.L.M) - Lecturer, Faculty of Law Abia State University, Uturu
- Chinweze C. E. Esq.* (LL.M) - Lecturer in the Faculty of Law. Imo State University, Owerri
- Alisigwe H. C. Esq.* LL.M) - Lecturer in the Faculty of Law. Imo State University, Owerri
- Onyema O. Esq.* (LL.M) - Lecturer in the Faculty of Law. Imo State University, Owerri
- Olaoluwa R. O.* (Ph.D) - Senior Lecturer, Faculty of Law, Lagos State University, Ojo, Lagos
- Arinze- Umobi C.* (Ph.D) - Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka
- Anyogu F.* (Ph.D) - Senior Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka
- Iguh A.* (LL.M) - Lecturer, Faculty of Law, Nnamdi Azikiwe University, Awka

CONTENTS

PROOF OF CUSTOMS UNDER THE EVIDENCE ACT 2011- A WELCOME PARADIGM SHIFT. ----- 1

LEGAL IMPLICATIONS OF RISK MANAGEMENT IN FINANCIAL INSTITUTIONS IN NIGERIA ----- 10

EVOLVING A WORKABLE PRINCIPLE OF CRIMINAL PUNISHMENT ----- 22

SHARED LEGAL RESPONSIBILITIES OF NURSES IN NIGERIA -----38

IS DEFECTION FROM ONE POLITICAL PARTY TO ANOTHER BY ELECTED PUBLIC OFFICIALS JUSTIFIED UNDER THE LAW ----- 45

CIVIL LIABILITY OF NURSES IN NIGERIA ----- 55

THE PROBLEMS WITH THE LAW ON RAPE IN NIGERIA ----- 66

PRE-ACTION NOTICE AS A CLOG IN THE WHEEL OF RIGHT OF ACCESS TO COURT. -----77

GAY MARRIAGE, HUMAN RIGHTS AND AFRICAN CULTURAL HERITAGE -----86

REVISITING THE DOCTRINE OF ULTRA VIRES UNDER CAMA, 2004 ----- 102

COMMON MISCONCEPTIONS IN NIGERIAN INTELLECTUAL PROPERTY RIGHTS SYSTEM: A LEGAL APPRAISAL ----- 110

TRENDS IN THE NIGERIAN STOCK EXCHANGE: INSIDER TRADING IN PRESPECTIVE. -----119

RECONCILING ECONOMIC GROWTH AND DEVELOPMENT WITH ENVIRONMENTAL PROTECTION IN NIGERIA ----- 129

SUSTAINABLE DEVELOPMENT IN DEVELOPING COUNTRIES: SOCIO-POLITICAL AND ECONOMIC PERSPECTIVES FOR AFRICA ----- 155

TACKLING THE CHALLENGES OF LITIGATION IN ENVIRONMENTAL LAW CASES ----- 169

THE STAND-BY ARRANGEMENT OF INTERNATIONAL MONETARY FUND, ITS EVOLUTION AND WORKINGS: AN APPRAISAL -----179

INTERNATIONAL DISPUTE RESOLUTION AND THE INTERNATIONAL COURT OF JUSTICE (ICJ): AN OVERVIEW OF ITS ROLES AND LIMITATIONS ----- 185

APPRAISAL OF GENERATIONAL CLASSIFICATION OF HUMAN RIGHTS ----- 199

THE RULES OF IHL GOVERNING THE CONDUCT OF HOSTILITIES IN NON- INTERNATIONAL ARMED CONFLICT ----- 210

ACHIEVING GENDER EQUALITY IN PUBLIC VOICE IN NIGERIA: THE ROLE OF LAW -----220

WHEN IS A MAN, A MAN AND A WOMAN, A WOMAN? -----230

# THE RULES OF IHL GOVERNING THE CONDUCT OF HOSTILITIES IN NON-INTERNATIONAL ARMED CONFLICT

Rufus Olu Olaoluwa (Ph.D)

## Abstract

International law has traditionally focused on the regulation of international armed conflicts to the neglect of internal armed conflict. This was due to the idea that intra-state violence was a matter for the state concerned and was not relevant to the international community... since 1994, the international law of internal armed conflict has changed dramatically, in large part due to the work of the international criminal tribunals, which have clarified and elucidated the law. Today, there exist a healthy body of international law that regulates internal armed conflict<sup>1</sup>. The rules of conduct of hostilities in non-international armed conflict cannot be different from the general rules but who is a participant and in what capacity is the crucial question to be addressed herein.

## I. Introduction

The conduct of hostilities can only take place in an armed conflict whether between parties to the law of war or groups who are not parties to the law of war. War or armed conflict for whatever reasons has been outlawed by general international law and by the United Nations Organization<sup>2</sup>. The object of war is not to die for your country but to make the other bastard die for his – *George Patton*. Political power grows out of the barrel of the gun – *Mao Zedong*. War does not determine who is right, only who is left. *Bertrand Russell*.

According to Dwight D. Eisenhower, every gun that is made, every warship launched, every rocket fired signifies in the final sense, a theft from those who hunger and are not fed, those who are cold and are not clothed. This world in arms is not spending money alone. It is spending sweat of its labourers, the genius of its scientists, the hopes of its children. Under the clouds of war, it is humanity hanging on a cross of iron<sup>3</sup>.

Despite the above knowledge or thinking about war, it has come to be part of human existence. This is because man is an inordinate being not always satisfied with what he has or where he is. But there ought to be better alternatives than war.

Traditionally, war is declared and waged between sovereign states with whole range of rights bothering on independence and non-interference. Once the principles of non-interference and non-intervention are established between some states, armed conflicts (wars) are termed international while others are

---

\* Ph.D, B.L. Senior Lecturer, Faculty of Law, Lagos State University, Ojo, Lagos

<sup>1</sup> Sandeash Sylvakumara. 'The International Law of Armed Conflict', Oxford Law Journal of International Criminal Justice, Vol. 9, Issue 1, p. 1.

<sup>2</sup> Art. 2 para 4 United Nations Charter, 1945. Note that this Charter refusing state to resort to the use of force equally allows states the right to personal or collective self defence. See Art. 57 of the UN charter.

<sup>3</sup> Botha C.P 'International Humanitarian Law Conduct of Hostilities'. Presented at All African Course on International Humanitarian Law Organised by ICRC in Conjunction with Good Governance Programme at the Centre for Human Right, University of Pretoria. 4-13 November, 2008, Pretoria, South Africa.

termed non-international armed conflicts. Whether an armed conflict is international or non-international what are (is) the difference to the victims of such conflicts? In this paper, rules governing the conduct of hostilities will be analysed especially in non-international armed conflict under International Humanitarian Law.

## II. Non-International Armed Conflict Under International Humanitarian Law

Armed conflict ought by all standards to be armed conflict so far as there is distinction between combatants and non-combatants, military objectives and civilian objects. But this is not to be because there is the law of armed conflicts, provided for in different international conventions, agreements, treaties etc which made a differentiation between International Armed Conflict and Non-International Armed Conflict.

International armed conflict is the main object of international humanitarian law as it addressed the situations of armed conflict between sovereign states parties to international treaties on armed conflict<sup>4</sup>. International Humanitarian Law provides for Non-International Armed Conflict initially as traditional vestiges under the jurisdiction of states. In appreciating the significance of recent developments affecting the scope of Non-International Armed Conflict in International Humanitarian Law, it has been canvassed that the relevance of traditional international law to the concept of non-international armed conflict is an area that is frequently overlooked<sup>5</sup>. However, its merits scrutiny not only as the predecessor of the current legal regime governing situations of non-international armed conflict, but also as the starting point for international concern over adherence to Humanitarian Standards in such situations<sup>6</sup>.

Art. 3 common to the Geneva Conventions of 1949 and supplemented by Art. 1 of Additional Protocol II laid down the legal provisions of what is Non-International Armed Conflict. Although, there is no clear definition of what is Non-International Armed Conflict, Art. 3 common to the Geneva Conventions 1949 provides that:

In case of Armed Conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions:

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

<sup>4</sup> From the Convention for the Amelioration of the condition of the Wounded in Armies in the field of 22 August 1864 through the Four Geneva Conventions of August 12 1949 and the three additional Protocols, to the more recent Convention on Cluster Munitions (CCM) 2008. On Cluster Munitions. See also Andrew Carswell, 'Cluster Munitions and International Humanitarian Law'. Paper delivered at All African Course on International Humanitarian Law organized by ICRC in Conjunction with Good Governance Programme at the Centre for Human Rights, University of Pretoria, 4-13 November 2008 Pretoria South Africa, p. 14.

<sup>5</sup> Anthony Cullen. *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge Studies in International and Comparative Law, 2010, p. 1.

<sup>6</sup> Ibid.

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; d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

2) The wounded and sick shall be collected and cared for... The application of the preceding provisions shall not affect the legal status of the parties of the conflict<sup>7</sup>.

Article I of AP II provides further that:

“This protocol... shall apply to all armed conflicts which are not covered by Article I of the Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts (Protocol I) and which take place in the territory of a party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this protocol<sup>8</sup>”

It is pertinent to note that Additional Protocol II to the Geneva Conventions 1949 of 1977 is categorical about the application of Additional Protocol II. It provides 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 not being armed conflicts<sup>9</sup>”.

All situations of armed conflicts not covered by Article I of the Protocol II Additional to the Geneva Conventions and relating to the protection of victims of international armed conflicts are also provided for by Article I Protocol I Additional to the Geneva Conventions in the following terms:

“In cases not covered by this protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictate of public conscience<sup>10</sup>”

From the above it is seen that the same rules apply to armed conflicts anywhere and at any time whether international or non-international once the armed conflict exist outside the provisions of Article 1(2) AP II. Article I(2) AP II provides that: This Protocol shall not apply to situations of

<sup>7</sup> Article 3 Common to the Four Geneva Conventions of 12 August 1949.

<sup>8</sup> Article 1, Protocol II Additional to the Geneva Conventions of 12 August 1949 (Art. I and II).

<sup>9</sup> Art. 1 (2) AP II

<sup>10</sup> Article 1 (2) Additional Protocol I of the Geneva Conventions of 1949.

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.

### III. The Rules Of Engagement In Non-International Armed Conflict

The purpose of the provision of Article 3 common to the Geneva Conventions of 1949 is not to distinguish between the rules applicable during international armed conflict and/or non-international armed conflict. It only purport to insist on the application of a minimum standard of the application of the rules of international armed conflict during armed conflicts not of international character. That is while the phrase “*each party to the conflict shall be bound to apply, as a minimum, the following provisions*”<sup>11</sup> This being the case, the rules in Treaties and customary law on armed conflict affects both international armed conflict and non-international armed conflict almost equally as there is no known act against the interest of a victim of international armed conflict that is or should not be available to a victim of non-international armed conflict.

International Humanitarian Law is based on a large number of treaties, in particular the Geneva Conventions of 1949 and their Additional Protocols, and a series of other Conventions and Protocols covering specific aspects of the law of armed conflict. There is also a substantial body of customary law that is binding on all states and parties to a conflict<sup>12</sup>.

The core of International Humanitarian Law is the Geneva Conventions including the Hague Conventions<sup>13</sup>. The initial text of Geneva Conventions of 1864 was revised and recast in 1906 and again in 1929. Their current version was adopted on 12 August 1949, in the wake of the Second World War, and is known as the four Geneva Conventions. International Humanitarian Law covers two main areas, the protection of persons who are not, or no longer taking part in fighting on one hand and restrictions on the means and methods of warfare such as weapons and tactics<sup>14</sup> on the other.

The First Geneva Convention of 1949 covers the protection and care for the wounded and sick of armed conflict on land<sup>15</sup>. The Second Geneva Convention concerns the protection and care for the wounded, sick and shipwrecked of armed conflict at sea<sup>16</sup>. The Third Conventions relates to the treatment of prisoners of war<sup>17</sup> and the Fourth Geneva Convention concerns the protection of civilians in times of war<sup>18</sup>.

<sup>11</sup> Article 3 Common to the Geneva Conventions 1949

<sup>12</sup> ICRC International Committee of the Red Cross: Treaties and Customary Law: Overview. See <http://www.ICRC.org/eng/war-andlaw/treaties-customary-law/overview-treaties>, accessed 6<sup>th</sup> June, 2011.

<sup>13</sup> International Law concerning the conduct of hostilities – a collection of Hague Conventions and some other International Instruments, ICRC, 1999.

<sup>14</sup> Ibid.

<sup>15</sup> The Geneva Conventions of August 12, 1949.

<sup>16</sup> Ibid.

<sup>17</sup> Ibid.

<sup>18</sup> Ibid.

Since 1949, three protocols have been added to the Geneva Conventions. The Additional Protocol I of 1977 relates to the protection of victims of international armed conflicts<sup>19</sup>. The Additional Protocol II of the same year 1977 covers the protection of victims of non-international armed conflicts<sup>20</sup> while the Additional Protocol III of 2005 created a new protective emblem, the red crystal, alongside the existing Red Cross and Red Crescent emblems<sup>21</sup>. International Humanitarian Law also includes a series of other treaties relating to specific weapons, tactics or protected persons and objects such as the 1954 convention on the protection of cultural property during armed conflict, the 1972 Biological Weapons Convention, the 1980 convention on conventional weapons, the 1993 convention on chemical weapons and the 1997 Ottawa Convention on anti-personal mines<sup>22</sup>.

#### **IV. The Application Of International Humanitarian Law In Non-International Armed Conflict**

The application of International Humanitarian Law in non-international armed conflict as provided for by the conventions and protocol II additional to the Geneva conventions 1949 has its purpose directed at guaranteeing fundamental humane treatment to persons who in one way or the other became victim of non-international armed conflict<sup>23</sup>. The objective of Protocol II is to Supplement Article 3 common to the Geneva Conventions. Article 4 of protocol II on fundamental guarantees provides that:

“All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors”

This Article 4 of Protocol II continues by totally prohibiting the following acts:

a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; b) collective punishment; c) taking of hostages; d) acts of terrorism; e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; f) slavery and the slave trade in all their forms; g) pillage; h) threats to commit any of the foregoing acts.

The protection of fundamental guarantees is not limited to adults. Thus, Article 4 Protocol II provides for the protection of children as follows: “Children shall be provided with the care and aid they require and in particular:

<sup>19</sup> Protocols Additional to the Geneva Conventions 1949, International Committee of the Red Cross 1977, revised edition 1996.

<sup>20</sup> Ibid.

<sup>21</sup> This Additional Protocol III was reported and analysed with the protocol annexed. See international review of the red cross, Vol. 88, No. 861 March, 2006, pp. 187-196.

<sup>22</sup> See Note No. 22.

<sup>23</sup> See Art. 3 Common to the Geneva Conventions of 1949 and Protocol II additional to the Geneva Conventions of 1949. Also see Omorogbe Yinka The Application of International Law in Situations of None International Armed Conflict: Sudan, Liberia and Iraq. Unpublished paper delivered at ICRC Seminar on IHL, Abuja, 2009

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 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.

The act of fundamental guarantees in non-international armed conflict cannot be complete without penal prosecutions and punishment for offenders who have breached the legal demands and provisions of the law. In the spirit of completing the provisions of complete fundamental guarantee during internal armed conflicts Protocol II Article 6 provides as follows:

- 1) This Article applies to the prosecution and punishment of criminal offences related to the armed conflict.
- 2) No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by a court offering the essential guarantees of independence and impartiality. In particular:
  - a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence;
  - b) no one shall be convicted of an offence except on the basis of individual penal responsibility;
  - c) no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under the law, at the time when it was committed; nor shall a heavier penalty be imposed than that which was applicable at the time when the criminal offence was committed; if after the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby;
  - d) anyone charged with an offence is presumed innocent until proved guilty according to law;
  - e) anyone charged with an offence shall have the right to be tried in his presence;
  - f) no one shall be compelled to testify against himself or to confess guilt<sup>24</sup>.

---

<sup>24</sup> Article 6 para 2 (a-f) Protocol II additional to the Geneva Conventions 1949

The above represent a detailed procedure which shall be applicable to violators of the provisions of Protocol II<sup>25</sup>. The violators are the accused before the court who may be former combatants, commanders of a unit of armed group or the armed forces of a party to armed conflict. Article 6 of Protocol II do not only guarantee the right to human treatment to an accused by providing for his rights during trial, but it also guarantees the protection of a convicted person. Article 6 para 3 provides that:

A convicted person shall be advised on conviction of his judicial and other remedies and of the time limits within which they may be exercised. The death penalty shall not be pronounced on persons who were under the age of eighteen years at the time of the offence and shall not be carried out on pregnant women or mothers of young children<sup>26</sup>

The application of International Humanitarian Law in non-international armed conflict is guaranteed by the creation of Special Courts or Tribunals to try such offences not minding the facts that these breaches were committed in the territory of a given state where its criminal law and procedure should have taken charge of such situations.

The Rome Statute provides for full prosecution of persons accused of the crime of genocide, war crimes, crimes against humanity, crimes of aggression<sup>27</sup>. The International Criminal Tribunal for the former Yugoslavia (ICTY) - a central tribunal for trial of persons accused of violation of non-international armed conflict. Also the International Criminal Tribunal for Rwanda (ICTR) and the Special Court for Sierra Leon (SCSL) complete the structural procedures for the trial of perpetrators of crimes of non-international armed conflict.

In the case *Duskō Tadic*, a Bosnian Serb<sup>28</sup> the decision addressed the challenge that the tribunal lacked subject-matter jurisdiction to try Tadic for war crime. The defence fo Tadic contended that 'there did not exist a legally cognizable armed conflict – either internal or international – at the time and place that the alleged offences were committed. The Appeals Chamber rejected the argument of the appellant

<sup>25</sup> The Provisions are particularly outlined in Articles 4 and 5 of Protocol II

<sup>26</sup> A person who was under the age of eighteen years at the time of the offence shall not be punished with death penalty. This is because, such person who committed an offence as a minor continues to be a minor afterwards and as such death penalty shall not be pronounced on him even if he is thirty years or more at the time of judgement. Also pregnant women are exempted from death including mothers of young children. The Article did not define what age limit can a child be said to be young. Generally, eighteen years is the limit for children. It thus mean that if a person under the age of eighteen years cannot be sentenced to death, the mother of such a person may also be allowed to be alive in order to be able to give life support to a child under the age of eighteen. The other ambiguity is whether the death penalty passed on a pregnant woman or mothers of young children is suspended until their children are eighteen years or the death penalty on those women is waived totally. It is the opinion of this writer that the death penalty on pregnant/or mothers of young children ought to be totally waived as the agony of detention before and during trial, the stress during trial coupled with carrying of pregnancy should be considered enough punishment for such categories of women. This however, should not be an incentive for women on death row to get pregnant in order to benefit from their wrongs.

<sup>27</sup> See the Rome Statute of International Criminal Court 1998, Articles 5, 6, 7 and 8. The text of Rome Statute circulated as document A/CONF. 183/9 of 17 July 1998 and corrected by process-verbaux of 10 November 1998, 12 July 1999, 30 November 1999, 8 May 2000, 17 January 2001 and 16 January 2002. The statute entered into force on 1 July 2002.

<sup>28</sup> *Prosecutor v. Tadic*, Case IT-94-I-T, Decision on Jurisdiction, 2 October 1995 (T C).

on the grounds that 'the temporal and geographical scope of both internal and international armed conflicts extends beyond the exact time and place of hostilities'<sup>29</sup>.

In order to apply international humanitarian law to the conflict in Sierra Leone, the Appeals Chamber considered the application of Article 3 common to the Geneva Conventions and Additional Protocol II and noted that Article 3 of the statute of SCSL is taken from the Geneva Conventions and Additional Protocol II, both of which apply to internal armed conflicts. Given its *pari materia* nature with article 3 common to the Geneva Conventions and Additional Protocol II, the chamber concluded that Article of these three documents applies to internal armed conflicts and at the same time form part of customary international law applicable to both international and non-international armed conflict<sup>30</sup>.

In addition to the crime of genocide and crimes against humanity, the ICTR is empowered to prosecute war crimes committed in the 1994 non-international armed conflict in Rwanda. Under Article 4 of its Statute, the ICTR is mandated to prosecute serious violations of Article 3 common to the Geneva Conventions of 12 August, 1949 for the protection of war victims, and of Additional Protocol thereto of 8 June, 1977. The violations include: violence to life, health and physical or mental well-being of persons, in particular, murder and cruel treatment, such as torture, mutilation or form of corporal punishment, collective punishment, taking of hostages; acts of terrorism; outrages upon personal dignity, in particular rape, enforced prostitution, degrading treatment or any form of indecent assault; pillage; the passing of sentences and their execution without previous judgments by regularly constituted courts affording all judicial guarantees, and threats to commit any of the foregoing<sup>31</sup>.

According to George William Mugwanya<sup>32</sup>, the ICTR statute for the first time in international law specifically mandates as international criminal tribunal to prosecute violations committed in non-international armed conflicts as enshrined in Common Article 3 and Protocol II Additional to the Geneva Conventions. In prosecuting these violations<sup>33</sup>, the ICTR has made a notable contribution to the elucidation of international law.

<sup>29</sup> Anthony Cullen: The Concept of Non-International Armed Conflict in International Humanitarian Law, Cambridge Studies in International and Comparative Law No. 66 2010, p. 118. See also Note No. 28.

<sup>30</sup> Chacha Murungu: Prosecution and Punishment of International Crimes by the Special Court for Sierra Leone. In Chacha Murungu and Japhet Biegon (eds.) Prosecuting International Crimes in Africa, Pretoria University Law Press (Pulp) 2011, pp. 113-114. See also Prosecutor v. Fofana Decision on Preliminary Motion on lack of Jurisdiction *materae*: Nature of the armed conflict May 25 2004 paras 31-32, see also paras 21-27.

<sup>31</sup> George William Mugwanya: The Contribution of the International Criminal Tribunal for Rwanda to the development of International Criminal Law. In Chacha Murungu and Japhet Biegon (eds.) Prosecuting International Crimes in Africa, Pretoria University Press (PULP) 2011, pp. 77-78, see also Prosecutor v. Akayesu (case ICTR-96-4-A) Judgment 1 June 2001, paras 430-445.

<sup>32</sup> *Ibid*, p. 78.

<sup>33</sup> Prosecutor v. Akayesu where the accused was charged with Genocide, crime against humanity and serious violations of Art. 3 Common to the Geneva Conventions of 12 August 1949 for the Prosecution of War Crimes and of additional Protocol II thereto of 1977. He was acquitted on war crimes. The prosecutor appealed this acquittal and the Appeals Chamber allowed the appeal.

The ICTR made it clear that criminal responsibility for war crimes is not limited to any particular class of persons, such as soldiers or governmental agents or representatives, but extends to any person, including civilians not linked to government. Therefore, as a matter of law, the 'Public agent or government representative' test is not applicable in determining culpability for war crimes. This was so in the case of Akayesu by the Appeals Chamber<sup>34</sup>. The trial chamber had acquitted Akayesu on war crime charges. In its opinion<sup>35</sup>

for Akayesu to be held criminally responsible under Article 4 of the statute, it is incumbent on the prosecutor to prove beyond reasonable doubt that Akayesu acted for either the Government or the RPF in the execution of their respective conflict objectives. As stipulated earlier in this judgment, this implies that Akayesu would incur individual responsibility for his acts if it were proved that by virtue of his authority, he is either responsible for the outbreak of or is otherwise directly engaged in the conduct of hostilities. He, the prosecutor will have to demonstrate to the Chamber and prove that Akayesu was a member of the armed forces under the military command of either of the belligerent parties, or that he was legitimately mandated or *de facto* representing the Government, to support or fulfil the war efforts. Indeed, the chamber recalls that Article 4 of the statute also applies to civilians<sup>36</sup>

## V. The Unity Of International And Non- International Armed Conflicts

In analyzing international and non-international armed conflicts as can be seen by the provisions of Article 2 and Common Article 3 common to the Geneva Conventions 1949, the threshold of the application and protection in both Protocols I and II additional to the Geneva Conventions are largely the same. The only difference is whether the provision should be applicable within a minimum limit as prescribed by Additional Protocol II or to be applicable with a maximum limit as prescribed by Additional Protocol I<sup>37</sup>. This should be so because armed conflict is armed conflict whether international or non-international and actions against which the different sets of provisions protect against have or will have the same consequence(s) on the victims in whatever place, time and space.

## VI. Conclusion

The rules of International Humanitarian Law governing the conduct of hostilities in non-international armed conflict are largely seen as minimum application of rules governing international armed

<sup>34</sup> George William Mugwanya op. cit, pp. 78.

<sup>35</sup> Prosecutor v. Akayesu para 440. In ICTY's Prosecutor v. Kunarač para 407, a trial chamber had also held that common Art. 3 to the Geneva Conventions 1949 may require some relationship to exist between the perpetrator and a party to the armed conflict.

<sup>36</sup> Cited in George William Mugwanya op. cit., p. 78.

<sup>37</sup> See Article 2 Additional Protocol I which extends the application of the international statute to include custom, principles of humanity and public conscience and see Article 1 Protocol II to apply to situations not covered by AP I which limits the same rules

conflict. This is largely seen in the provisions of Article 3 common to the Geneva Conventions 1949 which are part of the rules of international armed conflict but applicable to armed conflict not of international character.

The provisions of Article 3 common to the Geneva Conventions are in *para materia* to the provisions of Article 4 of Protocol II additional to the Geneva Conventions with more elaborations in Articles 5 and 6 of the same protocol.

The creation of International Criminal Tribunal to try offenders in non-international armed conflicts has in the main tried to erase the curtain separating international prosecutions from municipal prosecutions in crimes committed during armed conflicts not minding sovereignty and political independence of States.

The only acts left to the administration of local jurisdiction of states are acts or 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.

It follows that there is no 'armed conflicts' under the jurisdiction of states. This point is the main threshold that is actually removing the veil covering absolute regimes which are currently facing problems as they cannot commit acts of genocide, war crimes, crimes against humanity and the like without the intervention of the International Community and International Humanitarian Law. That is why it was not difficult to force the governments in Algiers, Egypt and the like to succumb to changes from pressure of the civilian.

The application of the rules of International Humanitarian Law in the conduct of hostilities in non-international armed conflicts is paying back its dividends by giving strong warning to present and future despots and anti-democratic forces in different countries. Even the opposition who are always ready to wrestle power through armed conflicts are also put on alert to embrace peace in their approach in doing things.