

# Somalia; A Gender approach to Protection and Direct Participation in Hostilities



University of Oslo  
Faculty of Law

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# Table of contents

## Abbreviations

## Chapter 1                      The Conflict in Somalia

1.1	Background to the conflict in Somalia	1
1.2	Introduction	2
	1.2.1 Objective of the investigation	4
	1.2.2 Methodology	4
1.3	Clarifying the Conflict	5
	1.3.1 Transitional Government of Somalia	5
	1.3.2 African Union Mission in Somalia	6
	1.3.3 Islamic Courts Union	6
	1.3.4 Al Shabaab	7
1.4	Legal rules applicable in the conflict	8
	1.4.1 Interplay between the Regimes	8
	1.4.2 International Humanitarian Law	9
	1.4.3 Domestic Law of War in Somalia	10
	1.4.4 Islamic Law of War	12
1.5	Protection of Civilians	14
	1.5.1 International Humanitarian Law	14
	1.5.2 Domestic Law of War in Somalia	15
	1.5.3 Islamic Law of War	18
	1.5.4 Conclusion	18

## Chapter 2                      Protection Given to Women

2.1	Women and Protection in Armed Conflict	19
2.2	Interpretation of rules within International Humanitarian Law	19
	2.2.1 Women in International Humanitarian Law	19

2.2.2	Special Protection Conferred to Women in International Humanitarian Law	21
2.3	Interpretation of Rules within Domestic Law of War in Somalia	23
2.3.1	Women in Domestic Law of War in Somalia	23
2.3.2	Special Protection Conferred to Women in Domestic Law of War in Somalia	25
2.4	Interpretation of Rules in Islamic Law of War	26
2.4.1	Women in ILW and Special Protection Conferred	26
2.5	Analysing Factual elements in the conflict	27
2.5.1	Cultural Changes	27
2.6	Comparing Protection measures in the Regimes	28
2.7	Conclusion	30

### **Chapter 3 Direct Participation in Hostilities**

3.1	Introduction	31
3.2	Civilians in Non-International Armed Conflict	31
3.3	Notion of Direct Participation in Hostilities	32
3.3.1	Conduct required	33
3.3.2	Temporal Scope	34
3.4	Women in Hostilities	35
3.4.1	Women Directly Participating in Hostilities	36
3.4.2	Women as exceptions	37
3.5	Interpretation of the rules under Somali War Law	38
3.5.1	Women Directly Participating in Hostilities	38
3.5.2	Women as exceptions	40
3.6	Direct Participation in Islamic Law of War	41
3.7	A comparison of the regimes	42
2.7.1	Women and Direct Participation in hostilities	43
2.7.2	Conclusion	44

## **Chapter 4     Conclusion**

4.1	Conclusion	45
4.2	Interplay between the Regimes	45
4.1	Do the parties to the conflict owe women special protection in the regimes?	46
4.2	If a woman does decide to participate directly in hostilities does the fact that she is a woman influence the perception of her role or the application of the regimes?	47
	<b>Bibliography</b>	<b>48</b>

## Abbreviations

Art.	Article
Para	Paragraphs
P.	Pages
ICJ	International Court of Justice
ICTY	Int. Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
ICC	International Criminal Court
DLWS	Domestic Law of War Somali in Somalia
IHL	International Humanitarian Law
DPH	Direct Participation in Hostilities
IPH	Indirect Participation in Hostilities
ILW	Islamic Law of War
ICRC	International Committee of the Red Cross

## **Chapter 1                      The conflict in Somalia**

### **1.1        Background to the conflict in Somalia**

Somalia is located in the Horn of Africa, it shares borders with Djibouti, Kenya and Ethiopia. The people of Somalia remain unique in Africa, as they possess a common language, a common culture, and are united through common descendants<sup>1</sup>. Prior to 1960 it was a country with two regions under separate rule, The British Protectorate in the North and the Italian Trusteeship Territory of Somalia in the South. The country achieved independence 1<sup>st</sup> July 1960, and within 1969 had two separate democratically elected governments, the first president of Somalia was Dr Adan Abdulle Osman,<sup>2</sup> and his successor was Dr. Abdirashid Ali Sharmarke. President Sharmarke was assassinated by one of his bodyguards, which is when Major General Mohammad Siad Barre took power in a military coup and was named President of Somalia October 1969<sup>3</sup>.

President Siad Barre commenced on a repressive military rule, which lasted for 21 years<sup>4</sup>. The regime began on clan based-persecutions, which undermined the people of Somalia their fundamental human rights and freedoms<sup>5</sup>. This eventually led the military rule to its demise, and eruption of a full scale civil war. Following on from this the Security Council acting under Chapter VII of the United Nations Charter of 1945 (UN Charter), determined that the civil war was a threat to international peace and security,<sup>6</sup> and initiated the United Nations Operation in Somalia (UNISOM) in 1992<sup>7</sup>. UNITAF was a United Nations Force

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<sup>1</sup> Alasow, the case of Somalia (2010) p. 3

<sup>2</sup> He became the first African President to peacefully hand over power to a democratically elected successor. GA Report Somalia (2011) p. 4

<sup>3</sup> Gordon, United Nations Intervention (1994) p. 550

<sup>4</sup> Alasow, The case of Somalia (2010) p. 1

<sup>5</sup> GA Report Somalia (2011) p. 4

<sup>6</sup> SC Res 688 (1992)

<sup>7</sup> SC Res 751 (1992)

led by the United States Military under the mission name ‘Operation Restore Hope’<sup>8</sup>. The Security Council authorised UNITAF to ‘use all necessary means to establish as soon as possible a secure environment for humanitarian relief operations in Somalia’<sup>9</sup>. In May 1993 they handed over responsibility to UNISOM II, which had a mandate to ‘assist the people of Somalia to promote and advance political reconciliation’<sup>10</sup>. On the 5<sup>th</sup> June 1993 UNISOM II became involved in an armed conflict, which left 18 American soldiers and several hundred Somalis dead<sup>11</sup>. After a continued failure in Somalia the United Nations withdrew from Somalia in 1995, leaving the country without a government.

## 1.2 Introduction

This thesis will explore the conflict in Somalia and seek to examine whether or not the simple fact of being a woman in International Humanitarian Law (IHL), Islamic Law of war (ILW) or Domestic Law of War in Somalia (DLWS), will offer special protection. It will also analyze if a woman does decide to participate directly in hostilities whether the fact that she is a woman influences the perception of her role, and the application of these rules.

The first chapter will give an introduction to the parties and the general conflict. It has to be noted that there will not be a focus on the breaches of IHL, DLWS, and ILW but rather on the rules applicable in the conflict, and an introduction to the general protection that civilians receive in the regimes<sup>12</sup>.

The second chapter will give an analysis of the specific protection women receive in IHL, DLWS and ILW. The main investigation angle in this chapter is how women are perceived under IHL, DLWS and ILW in relation to the special protection conferred to women, if

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<sup>8</sup> Meredith, *The state of Africa* (2006) p.746

<sup>9</sup> SC Res 794 (1992)

<sup>10</sup> SC Res 814 (1993)

<sup>11</sup> Alasow, *The case of Somali* (2010) p. 43

<sup>12</sup> ILW will not be explored in as much detail as rules of DLWS and IHL, since these Islamic ideals lack full implementation in Somalia even though Islam is the majority religion, Alasow, *The case of Somalia* (2010) p. 122. However the rules of IWL must be explored to some extent as it represents rules that have to be abided by in Islam, since they derive directly from the Quran.

any under the regimes. Further whether or not women in IHL, DLWS and ILW are generally interpreted as weak, and the effects this has on the rules. There will also be a comparison between the regimes as to which gives higher standard of protection, so as to be able to determine which regime applies.

The third chapter will investigate the aspect of Direct Participation of women in Hostilities. There will first be a brief examination of the concept of Direct Participation in Hostilities (DPH) in IHL, ILW and DLWS. Then the chapter will link the findings from the previous chapters and determine whether being a woman has any influences on perceptions in regards to application of DPH and in the regimes.

The fourth chapter will conclude the findings in terms of the special protection that women receive in all the regimes. There will also be a conclusion as to if a woman that decides to DPH whether the fact that she is a woman influences the perception of her role, and the application of the regimes. The conclusion will also include any discrepancies, which will take into consideration the overall factual circumstances of the conflict.

The time frame and territory, which will be focused on in this investigation is South Somalia from 1991 until 2011. This time frame, and territory has been chosen, in direct correlation with the fall of the regime of Siad Barre in 1991<sup>13</sup>, until the present time in which difficulties still remain in South Somalia.

The relevant parties that have operated in this time frame is too vast to cover in this investigation, thus the parties to the conflict, which will be explored will have the time frame from when the current Transitional Federal Government of Somalia (TFG) came into power, which was in 2004 until the present time. The Northern and Middle regions of Somalia will not be explored, as they are relatively safe from major hostilities.

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<sup>13</sup> When Siad Barre was ousted in 1991 Somalia became a country of clan based civil war. Simon, just war or peace (2003) p. 140.



### 1.2.1 Objective of the investigation

Women are the objective of this study due to that women in general represent a vulnerable group in armed conflict<sup>14</sup>. Further the continued fragmented nature of the conflict made it common to question the applicability of traditional humanitarian law to the conflict. At the outset of war a former diplomat with the Somali Ministry of Foreign Affairs noted that ‘when the slow disintegration of (Somali) society and institutions, as well as the destruction and violence started, the rights of Somali women began eroding, and they became a voiceless group’<sup>15</sup>. The study of women and their rights not only under IHL, but also in DLWS is crucial to the continuance of studies on Somali rules, and encouraging compliance in the conflict, and in particular in relation to women.

### 1.2.2 Methodology

To be able to complete this investigation there will be continued referencing to sources of DLWS, ILW, and IHL. The method that will be followed throughout the thesis for interpretation of IHL, DLWS, and ILW will relate directly to the interpretation methods found in the rules. For IHL this will be the Vienna Convention on the Law of Treaties. For DLWS, and ILW there is no clear interpretation rule thus this will be investigated, and highlighted as applicable. The factual information gathered in the investigation will be clarified and brought into the analysis along with the relevant rules applicable. These will include factual scenarios of the regimes in practice, and specifically relate to women. Factual documents on Somalia will also be used to set the overall context of the discussion. In chapter two of the thesis there will be reference to feminist methods of interpretation of certain rules of IHL, however this will not be applied in any other chapters. Sources of law will be applied throughout including legal sources from Somalia. The relevant terminology in Somali will highlighted below.

Biri ma Geydo	Spared from the spear
Hiro	An act which gives rise to lasting resentment and bitterness

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<sup>14</sup> ‘Women and children are disproportionally targeted in contemporary conflicts and constitute the majority of all victims SC Rep. 1154 (2002) p. 1

<sup>15</sup> Women in Somalia (1994) p. 93

### 1.3 Clarifying the Conflict

The motives for conflict in Somalia have varied greatly in the chosen time frame. This has ranged from conflict to attain equality and peace, to private gain<sup>16</sup>. The groups involved in hostilities have ranged from fractions claiming independence, to warlords trying to capture control of state assets and territory, and a whole host of other armed groups operating for different goals and purposes<sup>17</sup>. For the purposes of this present investigation the parties will be limited to the major groups that were operational during the chosen time frame, who control territory and represent the biggest challenge for the TFG. In the paragraphs that follow there will be a brief introduction to the main parties involved and the territory in which they operate.

#### 1.3.1 Transitional Federal Government of Somalia

The TFG is the state actor established in February 2004 Nairobi, Kenya<sup>18</sup> as a result of the Somali National Reconciliation Conference<sup>19</sup>. The Inter-Governmental Authority initiated the peace conference for Development; its members are composed of Djibouti, Kenya, Somalia, Sudan and Uganda<sup>20</sup>. It was the fourteenth time such a result had been tried since 1991 since the fall of the government led by Siad Barre<sup>21</sup>. Its mandate was intended to last 5 years, but has however been extended to 2011 by the Transitional Federal Parliament (TFP)<sup>22</sup>. The TFG and AMISOM are currently engaged in hostilities against Al shabaab.

#### 1.3.2 African Union Mission in Somalia

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<sup>16</sup> From 1988 until 1991 the hostilities were centered on attaining equality and removing the government of Siad Barre, since then the hostilities have continued taking various intensities for different purposes, mainly to gain control, which has led to total anarchy in the majority of Somalia. Mccoubery, International Humanitarian Law (1998) p. 33

<sup>17</sup> After the collapse of Siad Barres government political struggle erupted over control in Mogadishu and over the entire country Somalia Shay, between Jihad and Restoration (2011) p.8

<sup>18</sup> TFG Charter (2004)

<sup>19</sup> Statement by President of SC (2004) p.1

<sup>20</sup> Hull and Svensson African Union Mission in Somalia (2008) p. 8

<sup>21</sup> Prendergast, Jensen, Blowing the Horn (2007) p. 2.

<sup>22</sup> The TFP is the legislative body of the TFG, Art 28 (1) TFG Charter (2004)

The African Union Mission (AMISOM) in Somalia came into existence in Addis Ababa on the 6<sup>th</sup> March 2007 on behalf of the African Union to provide support for the TFG<sup>23</sup>. The main aims were to promote peace and stability in Somalia in accordance with International Law, and the Charter of the United Nations and the Constitutive Act of the African Union.<sup>24</sup> The mandate of AMISOM as reflected in Article 5 of the Mission Agreement was to ‘provide support to the TFG in its effort to stabilize Somalia’. AMISOM has been partly successful in that it has been able to provide additional security to the TFG, in protecting territory that has been regained such as, the airport and the seaport.<sup>25</sup> The continued presence of AMISOM in Somalia serves as a crucial support system for the TFG’s struggle to gain proper control of Somalia from armed groups such as Al Shabaab. Unlawful tactics associated with TFG and AMISOM include reports of indiscriminate shelling, and shooting<sup>26</sup>.

### 1.3.3 Islamic Courts Union

The Islamic Courts Union (ICU) a non-state actor was formed when the TFG challenged the ICU for control of the capital Mogadishu<sup>27</sup>. The ICU had taken almost all control of the capital and south Somalia by early July 2006<sup>28</sup>. The group was compromised by local Islamic courts in South Somalia, and had been operational since the fall of the Government in 1991<sup>29</sup>. It took on roles such as running the courts, and built a health system for locals in the absence of a functioning government<sup>30</sup>. The TFG was not able to sit in the capital Mogadishu due to the dangers arising from the conflict with the ICU<sup>31</sup>. Thus the TFG

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<sup>23</sup> The mission agreement was entered into by the TFG of Somalia and the African Union. p.1 Status of mission Agreement (2007)

<sup>24</sup> Status of Mission Agreement (2007) p. 2

<sup>25</sup> Operational Guidance Note (2009) p. 2. Further it has a permanent role in protecting these key territories, Military Component (2011)

<sup>26</sup> Amnesty International Annual Report (2011) []

<sup>27</sup> Abild, Creating Humanitarian Space (2010) p.77

<sup>28</sup> Operational Guidance Note (2007) p. 2

<sup>29</sup> Hull and Svensson African Union Mission in Somalia (2008) p. 8

<sup>30</sup> Ibid.

<sup>31</sup> Operational Guidance Note (2006) p. 2

requested military assistance from Ethiopia to rid the country of the Islamists, which was approved.<sup>32</sup> Through this invasion the ICU were defeated<sup>33</sup>.

#### 1.3.4 Al Shabaab

Al Shabaab is the non-state actor that serves to be the most imminent threat to the TFG and AMISOM. It was previously the militant wing of the ICU, and has continued in its resistance of the TFG and its allies.<sup>34</sup> Its recruitment target group consists of young men, and Al Shabaab continues its growth into more extremist behavioral patterns<sup>35</sup>. The group has been deemed a terrorist organization by many countries including the United States and Great Britain.<sup>36</sup> It has used military tactics indiscriminately such as suicide bombings in Somalia, but also in other countries such as Uganda<sup>37</sup>. For those acts it seeks to promote and achieve its aim of forcing foreign troops to leave Somali territory, but also to gain control and weaken the government<sup>38</sup>. It has gained control of extensive territory outside of the capital, and is currently continuing in its hostilities against the TFG and AMISOM.<sup>39</sup> Al Shabaab is able to govern the territories through local administrations;<sup>40</sup> in this manner for the purposes of IHL it can be deemed to have control of territory and is a sufficiently organized armed group.

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<sup>32</sup> This was also a United States backed operation, Marchal, Warlordism and Terrorism (2007) p. 1093. The operation did not have a Security Council Mandate.

<sup>33</sup> Lyons, Ethiopia-Eritrea Conflicts fueling Somalia Crisis (2007) []

<sup>34</sup> Hanson, Al Shabaab (2011) []

<sup>35</sup> Somalias Divided Islamists (2010) p. 5

<sup>36</sup> Operational Guidance Note (2010) p. 3

<sup>37</sup> The telegraph July (2010) Al Shabaab carried out two bomb attacks in Kampala killing 64 people watching the world cup. []

<sup>38</sup> It also wishes to implement a strict interpretation of Sharia in the country Al Jazeera. *who are Al Shabaab?* August 2009 []

<sup>39</sup> From February 2009 Al Shabaab has had territorial control over most of South Somalia Hanson, Al Shabaab (2011) []

<sup>40</sup> Operational Guidance Note Somalia UK Home Office July 2010 p. 3

#### 1.4 Legal rules applicable in the conflict

The armed conflict that has continued for over two decades in Somalia has been for many a situation of lawlessness and a complete disregard of basic humanitarian standards. These violations are not only in terms of IHL, but also in ILW, and traditional rules of DLWS. All parties to a conflict have responsibilities to abide by a number of legal rules that apply in a conflict, such as reflected in Art. 22 of The Hague regulations which specifies that '*the right of belligerents to adopt means and of injuring the enemy is not unlimited*'<sup>41</sup>. Common Art. 3 to the GC gives a threshold of applicability 'in the 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'. It is clear that the conflict in Somalia can be classified as a Non-International Armed Conflict (NIAC) as there exists groups that are in a situation of armed conflict towards the state<sup>42</sup>. In the following sections there will first be an investigation to the interplay between the regimes of IHL and DLWS. Then there will be an evaluation of rules within the regimes, beginning first with the legal rules that stem from the Geneva Conventions (GC) and customary IHL, then DWLS, and finally within ILW.

##### 1.4.1 Interplay between the Regimes

In this examination rules of IHL, DLWS, and ILW will be explored, as well as the interplay between the rules, when they apply, and if there are discrepancies represents an issue in application.

The interplay between regional customary laws of war and IHL, is that IHL will apply except in circumstances where regional law gives higher protection 'In contrast to general public international law that recognizes customary regional law almost unconditionally, there is a general opinion that there is no room for regional customs within the scope of applicability of IHL unless such customs provide higher standards than the general rules'<sup>43</sup>.

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<sup>41</sup> Convention on the Laws and Customs of War

<sup>42</sup> See section 1.3.3 and 1.3.4

<sup>43</sup> Practice and Customary Law in military operation (2011) p. 90

In this conflict the rules that stem from IHL in a NIAC will be applicable. The rules of DLWS represent a traditional custom that has traditionally governed hostilities between clan warfare in Somalia. However due to the existence of a conflict in Somalia this has given rise to the application of IHL, thus IHL will apply in all circumstances except, when DLWS gives higher standards of protection.

#### 1.4.2 International Humanitarian Law

Somalia is a signatory to the GC of 1949 and is bound to follow the rules that flow from the conventions. It is crucial to note that Somalia is not a signatory to the Additional Protocols of the 1949 Conventions (AP I and II). The particular article of relevance and applicable to NIAC is Common Art. 3 to the GC of 1949. Case law has added a further criterion for the applicability of Common Art. 3, the court in Tadic highlighted that the forces must display a minimum level of organization, and that the armed conflict must present a minimum of intensity<sup>44</sup>. The parties to the conflict have organization within their group as shown above<sup>45</sup>, the conflict does reach the threshold of intensity,<sup>46</sup> and it is clear from sections above that the relevant threshold of application of Common Art. 3 has been met and therefore applies to all parties in the conflict in Somalia. It is crucial to highlight that Customary International law applicable in NIAC apply as soon as the requisite threshold for common Art. 3 has been established<sup>47</sup>.

In dealing with the issue of AMSIOM presence in Somalia this does not have an effect of internationalising the conflict, and increasing the scope of rules applicable to an International Armed Conflict (IAC). In the AMISOM mandate between the African union, and the TFG both parties declared that ‘the mission conducts its operation in Somalia with full respect for the principles and rules of the international conventions... these international conventions include the four Geneva conventions...and their additional protocols.’<sup>48</sup> This declaration can be interpreted as without a binding effect on the

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<sup>44</sup> ICTY Tadic (1995) para. 70

<sup>45</sup> See section 1.3

<sup>46</sup> Ibid

<sup>47</sup> ICTY Tadic (1995) para. 70

<sup>48</sup> Article 9 (a) Status of Mission Agreement

application of IHL to the conflict<sup>49</sup>. Therefore the expansion of rules to that are applicable to the conflict will not be applied, due to the absence of another state involved in the conflict<sup>50</sup>.

#### 1.4.3 Domestic Law of War in Somalia

The rules of DLWS were not available in written form until the ICRC initiated a process in 1997 in which the result became the Spared by the Spear booklet.<sup>51</sup> The booklet highlights all the traditional reasons for entering into hostilities, and conduct taken in the hostilities. Further it gives an explanation of the group that has always been immune in hostilities, namely women, children, leader, men of religion, guests, peace delegates, protected persons, travellers, unarmed, and war wounded. The Somali people have always tried to adhere to the shared principles based on ‘considerations of honour and moral rectitude’<sup>52</sup>, this was so that the parties could limit the effects of hostilities, so as to not make peace a more difficult task<sup>53</sup>. Somalis accept the history and teachings of the rules, and thus it is crucial to highlight these aspects in the following examination of the thesis. The main framework of the legal rules in the Spared by the Spear booklet will be highlighted, and referenced to throughout.

Hostilities were previously most common between clan fractions, and thus the rules of DLWS govern the conduct of hostilities by non-state actors. The rules of DLWS will apply to the conflict when it gives elevated protection than that which is found under IHL<sup>54</sup>. At

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<sup>49</sup> Declarations may have the effect of creating legal obligations, but not all imply obligations, The ICJ in Nuclear Tests (1974) para 43-44

<sup>50</sup> ‘Shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties’ Common Art. 2 GC

<sup>51</sup> In their pursuit to codify the rules, they collected a number of elders from different clans across Somalia to share their knowledge. The result of these meetings became the spared from the spear booklet. Once the booklet was complete the ICRC went into partnership with a local radio to inform individuals of DLWS. The radio shows runs once a day. Through this manoeuvre The ICRC was able to create awareness, of the fundamentals of humanity, and the traditional rules of DLWS. ICRC, How a radio show can save lives (2008)

<sup>52</sup> Spared from the spear p. 61

<sup>53</sup> Spared from the spear p. 61

<sup>54</sup> See section 1.4.1

the centre of these rules lies a great similarity between the rules of IHL, and the rules of protection, not only to combatants and civilians, but also restraints on types of weapons that can be used<sup>55</sup>.

It can be argued that the threshold for the application of DLWS is quite low, and relates directly to the level of intensity of hostilities. In previous hostilities the number of people involved, and territories in which the hostilities were fought, were much smaller than in the current day conflict. These low intensity hostilities did not bar the application of DLWS. In current hostilities the number of people involved and territorial scope is larger than in previous hostilities. Therefore since the level of intensity, and territory is much higher in present day conflict the threshold for application of the customary rules is met.

The main rules that will be covered in the current investigation will be highlighted below<sup>56</sup>:

1. There should be no violation of the traditional Somali war convention<sup>57</sup>.
2. We should not disgrace our lineage; we must fight with integrity and moral reserve.
3. Any male member of the enemy, who is not covered by traditional immunity, should not be spared.
4. The weak and vulnerable members of the enemy such as women children and the aged should be left unharmed.
5. The men of religion who are loaded with holy books in the service of Allah's cause should be left alone.

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<sup>55</sup> IHL prohibits using means and methods of warfare, which causes superfluous injury or unnecessary Rule 70 These include Poison (Rule 71), Nuclear weapons (Rule 72), Biological weapons (Rule 73), Chemical weapons (Rule 74), Riot Control Agents (Rule 75), herbicides (rule 76), expanding bullets (Rule 77), exploding bullets (78) weapons primarily injuring by non-detectable fragments(rule 79), booby traps (rule 80), landmines(rule 81), incendiary weapons and blinding laser weapons(rule 84), blinding laser weapons (rule 86) ICRC Customary IHL (2005) . In DLWS these include whips, poison, poisoned arrows, axes, machetes and knives used for slaughtering animals; acts of violence that was prohibited killing someone by strangulation or choking, burying someone alive, insulting's ones lineage, spitting in ones face, hitting someone with a shoe or slapping him on the face. Further mutilating the body of a dead person or uncovered its genitals were considered outrages p. 55 Spared by the Spear

<sup>56</sup> Spared from the spear p. 23

<sup>57</sup> This is referring to the rules of DLWS



6. Those individuals who are unconcerned with and oblivious to the war and who are not involved in the fighting should not be killed.
7. We should not abandon our wounded on the battlefield. We should rather fight tenaciously to rescue them and evacuate them to safety.
8. The wounded of the enemy must not be finished off: you should rather leave them alone.
9. If certain men belonging to the enemy (specified by their names) are taken alive, they should not be killed but delivered to the commander.
10. If one of us pledges his personal protection to a man from the enemy or if a captured man belonging to the enemy invokes the name of a member of our clan, and declares that he seeks the protection of that particular kinsman of ours, he should not be touched with harm.
11. You should concentrate on looting the horses and camels and driving away as many of these animals as possible. You must confiscate whatever weapons you can find.
12. You should leave the cleft-hoofed animals (i.e. cattle sheep and goats) for the use of weak household members; and if a woman comes to you crying on account of a particular animal, then leave it behind for her.
13. The sanctity of private homes should not be violated, and their contents should not be touched, except for the purpose of getting a drink of water.
14. The body of a man who is killed should not be searched for gain and any property that he had with him should not be confiscated.
15. The bodies of the enemy dead should not be mutilated or burned; and particularly inhumane methods of killing such as choking or strangulation should not be used<sup>58</sup>.

#### 1.4.4 Islamic Law of War

Another branch of legal rules that have to be taken into consideration in protection of civilians in the conflict is ILW as Somalia is a Muslim country<sup>59</sup>.

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<sup>58</sup> These rules were followed in an offensive or raid on a 'blood seeking or murderous operation' the commander would highlight the rules, which were strictly to be followed. Spared from the spear p. 23. The commander would add 'Do not cause our lineage to be disgraced fight with honour and moral restraint.' Spared by the Spear p.61

<sup>59</sup> Somalia is classified as an Islamic state, the majority are Sunni Muslims, and less than 1 per cent are Christian. Somalia A Country Study, p. 31. Further it is a member of the Organisation of the Islamic Conference, in which a muslim majority is a prerequisite, Art 3. 1 Charter of the Organisation of the Islamic

The principal source of reference of ILW is found in the Quran<sup>60</sup>. Rebellion or civil war under ILW is forbidden, this represents a separation, and Muslim law is based on the unity of Islam<sup>61</sup>. The difference between rebellion and civil war is if the rebellion grows to the proportion equal of that of a government, and hostilities continue, then it becomes a civil war<sup>62</sup>. The conflict in Somalia represents a civil war under ILW as Al Shabaab has taken control of certain territory, and remains in continuous hostilities against the state. Even though civil war is forbidden there are provisions relating to conduct, and rights under the law of rebellion<sup>63</sup>. Rebellion is defined as ‘the act of resisting or defying the authority of those in power’<sup>64</sup>. Within the framework of ILW there are two types of rebellion namely Hirabah and Baghy<sup>65</sup>. Further the two clearest examples for when Baghy will apply, is when the group controls territory, and the group challenges the legitimacy of the Government<sup>66</sup>.

Applying this criterion of ILW to the conflict in Somalia, ILW will apply, As Al shabaab, continue to challenge the legitimacy of the TFG and in doing so, along with being in control of territory, fulfills the application criteria for Baghy. Thus in this conflict the rules of ILW will apply between the parties<sup>67</sup>. If there are collisions between the rules of ILW and IHL, the rules of IHL will prevail<sup>68</sup>.

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Conference. In Art. 8. 2 of the TFG Charter (2004) it is declared that Islamic Shariah shall be the basic source for national legislation.

<sup>60</sup> The Quran Surah 49, part 26, Al Hujurat, para 9

<sup>61</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 184

<sup>62</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 186

<sup>63</sup> Rebellion falls under the rules of the doctrine fasad fi l-ard (Disturbing peace and order in land) Tabassum. *Combatants, not bandits* (2011) p. 125

<sup>64</sup> El Fadl, *Rebellion and violence* (2001) p. 4

<sup>65</sup> Hirabah gives rise to the national criminal laws of the state, because the individuals do not challenge the legitimacy of the government, whereas Baghy has to involve challenging the legitimacy of the state. Tabassum. *Combatants, not bandits* (2011) p. 126

<sup>66</sup> Ibid p. 126

<sup>67</sup> The rules of Baghy also apply between AMISOM and AL Shabaab due to that AMISOM have joined in the hostilities to support the TFG, who are predominately Somali, and Muslim.

<sup>68</sup> As discussed in section 1.4.1

## 1.5 Protection of civilians

This section will explore the general protection that civilians receive in the conflict. This will relate specifically to the rules set to limit the conduct of hostilities by the parties to the conflict<sup>69</sup>. This general investigation on protection of civilians will enable the discussion in chapter two, namely to investigate whether or not women receive special protection under the regimes other than what is conferred in general.

### 1.5.1 International Humanitarian Law

There is no definition of civilians found in the rules relating to NIAC, however Common Art. 3 GC sets a minimum humanitarian standard on protection of individuals in a NIAC. In the case of Nuclear Weapons the court illustrated the fundamentals of civilian protection ‘the fabrics of humanitarian law are the following, the first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants: states must never make civilians the object of attack’<sup>70</sup>. Thus the main protection that civilians receive in an armed conflict lies with the rule of distinction between civilians and combatants. Civilians should not be the objects of an attack, only combatants can be targeted<sup>71</sup>. The other rules on protection of civilians flow from this principle.

Any threats and violence to spread terror among the civilian population is prohibited<sup>72</sup>. Such acts include indiscriminate and widespread shelling, offensive support or strike operations, and the regular bombardment of cities<sup>73</sup>.

Indiscriminate attacks are prohibited<sup>74</sup>. In regards to weapons that are incapable of distinguishing between civilian and military the court in Nuclear Weapons held that ‘the

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<sup>69</sup> Fleck, *International Humanitarian Law* (2008) p.237. The rules that sets limits to the conduct of military operations is called the Law of the Hague after the 1907 Hague Regulation.

<sup>70</sup> ICJ *Nuclear Weapons* (1996) para 78

<sup>71</sup> This rule is customary in its nature and applies both in NIAC and IAC. Rule 1 ICRC Customary IHL (2005)

<sup>72</sup> Rule 2 ICRC Customary IHL (2005)

<sup>73</sup> ICRC Customary IHL (2005) p. 11

prohibition of weapons that are incapable of distinguishing between civilian and military targets constitutes an intransgressible principle of customary international law<sup>75</sup>.

The parties to the conflict must at all times distinguish between civilian objects and military objectives. Attacks may only be directed against military objectives. Attacks must not be directed against civilian objects.<sup>76</sup>

Attacking, destroying, removing or rendering useless objects indispensable to the civilian population are prohibited<sup>77</sup>.

Following on from these rules, the parties must ensure that they take all feasible precautions in their attacks, by taking constant care to spare the civilian population, civilians and civilian objects<sup>78</sup>.

#### 1.5.1 Domestic Law of War in Somalia

In DLWS the protection given to civilians fall within the customary rules which have been illustrated above<sup>79</sup>. Certain individuals will fall in the immune groups of *biri ma geydo*,<sup>80</sup> and receive protection if they do not participate in the hostilities. The term *biri ma geydo* has its origins in the practice of not felling certain trees on account of their shade, fruits, rarity or religious associations<sup>81</sup>. It now is used as the term for describing individuals who

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<sup>74</sup> Rule 11. Rule 12 highlights that the following definition of indiscriminate attacks are customary: Indiscriminate Attacks are those which a) are not directed at a specific military objective b) which employ a method or means of combat which cannot be directed at a specific military objective; or which employ a method or means of combat the effects of which cannot be limited as required by International Humanitarian Law. ICRC Customary IHL (2005)

<sup>75</sup> ICJ Nuclear Weapons (1996) para. 243

<sup>76</sup> Rule 7 ICRC Customary IHL (2005)

<sup>77</sup> Rule 54 ICRC Customary IHL (2005)

<sup>78</sup> Art. 57 AP 1

<sup>79</sup> Section 1.4.3

<sup>80</sup> Spared from the spear p. 29

<sup>81</sup> Ibid

are to be spared from violence at all times, due to the fear of disgrace, divine retribution or practical considerations<sup>82</sup>.

The immune groups of biri ma geydo fall within different categories, which will be explored below.

The first being the weak and vulnerable. This includes women, children, the aged, and the sick<sup>83</sup>. This group is known as the weak members of the household and thus harming and abusing is regarded with strong disapproval<sup>84</sup>. Further killing a weak member of the household is strictly forbidden<sup>85</sup>.

The second category represents men of religion. The men of religion or students of religion are to be protected at all times. This is due to the fact that they were never involved in hostilities, and as neutrals played an important role in mediation and reconciliation between the parties<sup>86</sup>. Further anyone who killed a man of religion would have committed the most serious evil and would be punished<sup>87</sup>.

The third category is protected persons. A person falling within this group would have the characteristic of being in the minority, such as a man living with the people of his mother, or living in a settlement where his lineage was in the minority, a member of the warring party who sought protection from a third party not involved in the conflict, and a prisoner of war that sought protection from their captors<sup>88</sup>. This category is observed as to the people protecting the individual, if such a person was killed it would be as if the perpetrator had targeted him with that same attack.<sup>89</sup>

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<sup>82</sup> Ibid

<sup>83</sup> Ibid p. 30

<sup>84</sup> Ibid

<sup>85</sup> Ibid p. 34

<sup>86</sup> Ibid p. 35

<sup>87</sup> Ibid 'In the present world or even in the hereafter' p. 35

<sup>88</sup> Ibid p. 36

<sup>89</sup> Ibid p. 36

The fourth category is peace delegates who were not to be harmed as they seek to create peace between the parties. This protection applies whilst they are travelling through territory of other clans, and during their stay<sup>90</sup>.

The fifth category includes traditional leaders, who are the head of a clan. Killing or humiliating leaders is strongly discouraged<sup>91</sup>.

The sixth category included guests, as guests are protected persons; Somali people have a tradition of hospitality towards its guests, so this is important to be abided by.<sup>92</sup>

The seventh category is travellers. These travellers would have immunity, even if they travelled in the territory of the other warring party as long as it was not for purposes related to the war<sup>93</sup>.

The eighth category is the unarmed and the neutral. This included members of the adversary clan who did not carry weapon, protected persons, the person unaware of the hostilities, and people living among the parties to the hostilities<sup>94</sup>.

The ninth and final category is the war wounded. It was only the case that such a person would be protected if the fighting had stopped then he would become a weak person, and would thus have to be cared for<sup>95</sup>.

These rules of protection in DLWS in many ways can be said to resemble the protection that a civilian will have under IHL, but it gives an added factor of protection due to that the categories of protected persons have been specified in such detail. It might also be the case that DLWS provides more protection in Somalia due to that the population can relate more to the rules. They were in older times rigorously abided by, because of the shame and the

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<sup>90</sup> Ibid p. 37

<sup>91</sup> Ibid p. 39

<sup>92</sup> Ibid p. 41

<sup>93</sup> Ibid p. 41

<sup>94</sup> Ibid p. 41

<sup>95</sup> Ibid p. 43

dishonour of killing a protected person would have brought about severe consequences within the community.

### 1.5.2 Islamic Law of War

The rules relating to protection of civilians found in DLWS have great associations and most of the rules in *Spared by the Spear* are in accordance with ILW<sup>96</sup> with protection that civilians receive under ILW. A great historical example, which sums up the protection of rules in ILW, is Ali b. Abi Talib who 1) refused to attack before he was attacked first 2) spared the lives of and property of the prisoners, the wounded, and the fugitive 3) refused to take any of the women or children captive 4) pardoned his enemies and 5) ordered that no booty should be kept<sup>97</sup>. The rules encompass the fundamentals of humanity and are to be observed.

### 1.5.2 Conclusion

The investigation above set the general overview of the conflict in Somalia, including the parties that are operational in the conflict, these included both state actors,<sup>98</sup> and the main non-state actor<sup>99</sup>. The conflict in Somalia was classified as a NIAC, even though there is a presence of AMISOM in Somalia involved in the hostilities. This was due to that AMISOM is involved in the hostilities to support the state, and not the non-state actor, which would have led the classification of the conflict as an IAC. The general protection for civilians in IHL, DLWS, and ILW were established, and the general interplay between the rules was highlighted, and will be applied throughout. This chapter has set the general overview to enable the investigation to become more gender specialised in chapter two.

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<sup>96</sup> *Spared by the Spear* p.51

<sup>97</sup> El Fadl, *Rebellion and violence* (2001) p. 34

<sup>98</sup> TFG and AMISOM participating on behalf of the TFG

<sup>99</sup> Al Shabaab

## **Chapter 2                      Analysing Protection Given to Women**

### **2.1      Women and Protection in Armed Conflict**

In the previous chapter the general rules relating to protection under the regimes, and the general interplay between the rules were discussed. This chapter will focus on how women are perceived under IHL, ILW and DLWS, and special protection conferred to women, if any under the regimes, other than what is conferred to civilians in general.

### **2.2      Interpretation of rules of International Humanitarian Law**

Interpretation of the rules of IHL falls directly into the realm of the Vienna Convention of the law of treaties (VCLT). According to article 31(1) ‘A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose’.

#### **2.2.1    Women in International Humanitarian Law**

It has been suggested that the characteristics of men in IHL are ‘bravery, fortitude, self-reliance’, and for women ‘chastity, modesty frailty and dependence’<sup>100</sup>. These characteristics of women in IHL can imply an understanding of women being weak and vulnerable in the regime.

Looking at the perception of women in IHL it can be argued that it represents an image of women being weak as such. This however has a great bearing on how women were perceived as at the time of drafting. Women in many circumstances are more vulnerable to rape, prostitution, and indecent assaults in hostilities. The very act of raping women is used

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<sup>100</sup> Gardam, Jarvis, Women, Armed Conflict and International Law (2001) p. 11



as a tactic and method in many contemporary conflicts<sup>101</sup>. Gardam and Jarvis argue that a woman within the scope of IHL encapsulates a woman of a Christian construct<sup>102</sup>, and that she is also culture specific<sup>103</sup>. The reasoning that they use for the argument is that the majority of the lawmakers at the time were themselves Christians and Western and as such the regime has a cultural aspect to it, namely Western<sup>104</sup>. This however is irrelevant in regards to protection received in the regime, because the protection does not differentiate based on culture. Further the rules of IHL have developed into a comprehensive regime over the years, which have been applied to countless conflicts. Thus it can be argued that IHL has become a universal regime.

It is also arguable that women are perceived as weak as such in many cultures in general, and more so in conflicts. However the picture in some contemporary conflicts paints a very different picture. Women in many societies gain their strength and courage in hostilities, and are able to provide for the family in a different manner than before<sup>105</sup>. These roles can take on forms such as providing for the family income, becoming head of the house, becoming combatants or even peace mediators<sup>106</sup>. Taking this factor into consideration it can be argued that men in armed conflicts are in fact weaker than women in certain circumstances, due to that they are more at risk in regards to targeting, and detention. Statistics show that sometimes 96 per cent of detainees and 90 per cent missing persons are men<sup>107</sup>.

The overall protection of women and men in IHL can be argued as disproportionate even though there are special protections conferred to women in certain circumstances. Gardam and other feminist writers make the distinction between combatants and non-combatants, in that it can be understood to mean the protector and the protected. Signifying that this is a

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<sup>101</sup> 'Women are targeted by the use of sexual violence including as a tactic of war to humiliate...instill fear' SC Res 1820 (2008) p. 1

<sup>102</sup> In that women's roles are defined by the Christian tradition.

<sup>103</sup> Gardam, Jarvis, *Women, Armed Conflict and International Law* (2001) p. 107

<sup>104</sup> *Ibid* p. 107

<sup>105</sup> They may take over men's traditional functions, Gardam, Jarvis, *Women, Armed Conflict and International Law* (2001) p. 17

<sup>106</sup> ICRC *Women in war* (2007)

<sup>107</sup> *ibid*

result of the social construct of gender, and that this is reflected in the division<sup>108</sup>. The arguments to support these theories relate around the unequal protection offered to non-combatants and the lack of equal protection of women until recently by the failure to regulate rape of women in hostilities<sup>109</sup>. This reflects a valid point in that, even though rape is not limited to only women in hostilities<sup>110</sup>, the fact that women are more vulnerable to rape, and the failure by the international community until the 1990s to prosecute rape as a war crime, reveals the disproportionate protection. Rape is still a common act in contemporary conflicts,<sup>111</sup> however it is important to illustrate that regulating protection from rape of women in conflicts has moved on greatly from the large failures in previous times<sup>112</sup>.

From looking at the overall interpretation of women under IHL it is clear that the ultimate protection that a women receive does not depend on what IHL construed a woman to be, but what the rules are and how they give protection to women. The general view of women in IHL does take into consideration the vulnerability that women can face in armed conflict, and seeks to provide protection<sup>113</sup>. IHL does not perceive women as weak in certain circumstances; IHL rather recognises certain aspects where women need the added benefit of further protection.

### 2.2.2 Special Protection Conferred to Women in International Humanitarian Law

Gender is generally irrelevant under IHL<sup>114</sup>, with the exception of certain provisions intended to protect women<sup>115</sup>. This section will explore the rules when women have to be

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<sup>108</sup> Gardam. Gender and Non Combatant Immunity (1993) p. 348

<sup>109</sup> Ibid p. 350

<sup>110</sup> For rape to be a war crime under the ICC statute the female component is not a prerequisite, as rape in general is listed as a war crime. Art. 8 (2) (e)

<sup>111</sup> ‘Despite repeated condemnations...sexual violence in situations of armed conflicts...such acts continue to occur and in some situations have become systematic and widespread, reaching appalling levels of brutality’. SC Res 1820 (2008) p. 2

<sup>112</sup> The Far East Tribunal ignored the abduction and deception of two hundred thousand girls that were transported to comfort stations, but now understood as rape camps Copelon, Gender Crimes (2000) p.221

<sup>113</sup> The rules will be discussed in section 2.2.2

<sup>114</sup> Lindsey, Women an Overview (2010)

<sup>115</sup> Ibid

given special protection within the regime of NIAC, and Customary Law than what is given to their male counterparts, not because they are weak as such, but rather because of the circumstance they find themselves in. These generally relate to protection whilst in enemy hands.

Article 76 in Additional Protocol 1 gives women special protection against rape, forced prostitution and any other form of indecent assault<sup>116</sup>. The types of acts detailed above entail the individual criminal responsibility of a person, which is considered a war crime in both IAC and NIAC<sup>117</sup>.

Common Art. 3 to the GC, does not refer explicitly to the protection of pregnant women and dependant infants directly as is done in AP I<sup>118</sup>. However this reflects a customary rule of IHL applicable in NIAC<sup>119</sup>, and thus pregnant women and dependant infants will receive the same protection of care, their cases considered with outmost priority and the death sentence not passed on a pregnant women, as they would in an IAC<sup>120</sup>.

In regards to detention of women in the regime of IAC, Art 76 (5) GC 4, Art. 25 (4) GC3, and AP I Art. 75 (5) clarifies the obligation that women have to be confined in separate quarters and be under the direct supervision of women,<sup>121</sup> and in the context of detention Art 14 (2) GC3 emphasises that women shall be treated with all the regard due to their sex. These provisions are also not detailed as such under the NIAC regime, but these provisions represent customary IHL<sup>121</sup>, and thus apply. Further in World War 2 the ICRC sent a note to German, American, British and French Government emphasising that the Geneva

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<sup>116</sup> Rule 93 ICRC Customary (2005)

<sup>117</sup> Art. 7 (1) (g) ICC statute: Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity. Also listed as a war crime NIAC Art. 8 (2) (e) (vi) For Rape to be a crime against humanity it must be 'part of a widespread or systematic attack' Art. 7 (1) ICC Statute.

<sup>118</sup> Art. 76 (1) protection to pregnant mothers and dependant infants who find themselves under arrest; detention or internment related specifically to the conflict should have their cases considered with outmost priority and Art. 76 (2) AP I where the death penalty should be avoided to the maximum extent feasible on pregnant mothers or mothers with dependants for an offence related to the conflict

<sup>119</sup> Rule 134 ICRC Customary (2005)

<sup>120</sup> This is also supported in Human Rights Law in Art. 6 (5) of the ICCPR

<sup>121</sup> Rule 119 ICRC Customary (2005)

Convention on Prisoners of War also applied to women and even to preferential treatment<sup>122</sup>. This represents the view of the ICRC at the time, and can be considered in times of application. These obligations that arise when women are put in detention reinforce the responsibility of the detaining party to be equal, and in some cases give preferential treatment in matters relating to detention.

## 2.3 Interpretation of Rules within Domestic Law of War in Somalia

Interpretation of law in general in Somalia has many layers. It is not clear how all the laws in force are interpreted, but it is clear that in many circumstances it is interpreted strictly, and in many circumstances the laws are not enforced at all due to the civil war in Somalia. In the last 20 years or so Somalia has not had a functioning legal system in which laws have not been enforced to govern the people. The added factor of absence of a sustainable government able to enforce rule of law has led the local to resort to *xeer* in which to govern locally<sup>123</sup>.

The laws that are in force in Somalia are for the most the laws that were enacted before the civil war. There is no real interpretation method for the special law of DLWS, but by looking at rule 1 in *Spared by the Spear* 'There should be no violation of the traditional Somali war convention', gives an understanding that there can be no deviation from the rules.

### 2.3.1 Women in Domestic Law of War in Somalia

In DLWS the gendered distinction is clearer, where women are perceived as the protected, and men as the protectors. These rules favour women to the extent that they should not be harmed due to their nature and characteristics of being a woman. They are the givers of life, they are weak and thus to be saved. This section will explore further how women are perceived in the rules of DLWS.

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<sup>122</sup> Herrmann and Palmieri, *A historical Approach* p. 27

<sup>123</sup> *Xeer* is a social contract based on agreed practices between clans in Somalia, which governs practices of the whole territory Duyvesteyn, *Clausewitz and African war* (2005) p. 62

In Somalia war is considered strictly only for a man, which is why women in traditional Somali relations are presumed not to take part in hostilities<sup>124</sup>. Women were the ‘farms and seeds that ensured the survival and continuity of society and killing them was viewed as being tantamount to cutting down the tree at its base, leading society down the road to annihilation and extinction’<sup>125</sup>. In the Somali culture the critical aspect of honour of women has always been of relevance. A man who attacks a woman in hostilities has throughout the Somali history been considered a coward, and surrounded by shame<sup>126</sup>. If a woman or a child were killed this would become *hiiro* ‘an act which gave rise to lasting resentment and bitterness’<sup>127</sup>. The actions which followed from such an act was usually revenge and was associated with an old saying ‘One forgets about confiscated property, but one does not forget an act of *hiiro*’<sup>128</sup>. Further the destruction of a woman’s honour has also been used as a cause for conflict, illustrated by if a man abducted a married woman or sexually abused a young woman, this would be a cause for a dispute and conflict<sup>129</sup>. This gives an understanding that women are not only weak, but are also considered as a vital part in society and is thus given protection by their clans and family.

This very rudimentary categorisation that defines women as weak in DLWS actually entitles them to *prima facie* full protection in hostilities. Thus in the case of Somalia the gendered disadvantage that women have in fact provides them with an advantage in hostilities.

In the Somali customs when conflicts in the past has arisen women where the sole providers of information to the warring parties or clans, they were not seen as threats as they were able to provide information to both parties, help in mediating, and giving information in regards to plans and intentions<sup>130</sup>. In the current hostilities there are women

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<sup>124</sup> Spared from the spear p. 32

<sup>125</sup> Spared from the spear p. 31

<sup>126</sup> ‘Such a man would have been treated like a coward, who took his anger out on the helpless’ Spared from the spear p. 31

<sup>127</sup> Spared from the spear p. 31

<sup>128</sup> Spared from the spear p.31

<sup>129</sup> Spared from the spear p. 16

<sup>130</sup> Ahmed, Renhals, heritage of war (1999) p. 123 see also Spared from the spear p. 59

groups that in fact have been instrumental in mitigating, and resolving disputes<sup>131</sup>. Women may be considered as weak in combat situations, but their interpretation as weak changes in situations of mediation as they become powerful players in putting an end to the hostilities. They are then not given a role as a weak person, but in fact become the givers of peace.

### 2.3.2 Special Protection Conferred to Women in Domestic Law of War in Somalia

Since women in DLWS are considered as weak as such under the rules of DLWS in hostilities, the question then becomes one of to which extent are women in Somalia given a special right of protection in hostilities.

Within the framework of rules in DLWS, women are given the ultimate protection of immunity due to their characteristics as the vulnerable members of the households. From the first rule in DLWS, namely that there should be no violation of the rules, it can be inferred that women should always be spared and that they have an absolute protection against the effect of hostilities. In clarifying which type of circumstances and time period women should be given absolute protection from the hostilities, this applies throughout the hostilities and in all circumstances. This implies that women would also be treated more favourably in situations of such as detention<sup>132</sup>.

It can be argued that this gives an unfair advantage to women in general, because as women are given complete immunity in hostilities as members of the group Spared by the Spear<sup>133</sup>. This represents an unequal protection measure between the sexes. However men can receive the same protection if they fall within the categories of immune groups or if they are unconcerned with the fighting<sup>134</sup>. The crucial difference rests on the fact that they do not receive this immunity, because of their sex, whereas that is the case for women.

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<sup>131</sup> The Save Somali Women & Children (SSWC) Organization was established in 1992 and have continued their fight to gain rights for women in conflicts. Somalia a nation without a state (2007) p. 18

<sup>132</sup> If a woman 'fell into captivity she would not have been harmed, but treated respectfully and later returned safely to her kin' p.32 Spared from the spear

<sup>133</sup> See Chapter two section 2.3.1

<sup>134</sup> Rule 6 Spared from the spear

## 2.4 Interpretation of rules in Islamic Law of War

ILW represents rules that the Quran is the principal source<sup>135</sup>. Thus these rules create absolute rules that have to be followed by Muslim parties. There is no real interpretation method for these specific rules, but they will be explored as if they represent absolute rules and that there should not be any deviation of ILW by a Muslim party to the conflict<sup>136</sup>. In the section below there will be a brief investigation as to how women are perceived in the regime of ILW, and to which extent women are given special protection, if any.

### 2.4.1 Women in Islamic Law of War and Special Protection Conferred

Women in ILW are generally protected from the effects of hostilities. There is a prohibition placed on killing women<sup>137</sup>. Further the enslavement of women is also prohibited. Women are exempt from military service, but if manpower is short then women can be liable for military service<sup>138</sup>. For women to be able to join military expeditions, even to nurse the wounded this has to be with the permission of her near relatives<sup>139</sup>. Women also are able to give protection in the form of quarter<sup>140</sup>. Rape is in general prohibited in Islam, which brings serious consequences for an individual, thus this would apply in situations of war as well<sup>141</sup>. Within the framework of ILW it can be deduced that women are interpreted as weak and vulnerable in that they are only liable for military service if manpower is short. Further the fact that near relatives has to be consulted before joining military expeditions further highlights this. However women have also taken part in hostilities for centuries as nurses, transporters of the wounded, cook, water carriers, and

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<sup>135</sup> The Quran Surah 49, part 26, Al Hujurat, para 9

<sup>136</sup> This includes AMISOM as they are fighting on behalf of the TFG which represents a Muslim party to the conflict

<sup>137</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 10 and p. 212. This prohibition is mentioned in conjunction with the prohibition of mutilation, which reflects the gravity of the prohibition.

<sup>138</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 170

<sup>139</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 261

<sup>140</sup> This act involves giving protection by not killing or capturing the individual. Hamidullah, *The Muslim conduct of State* (1973) p. 217

<sup>141</sup> quoting a hadith 'those who kill and rape should be crucified' El Fadl, *Rebellion and violence* (2001) p.51

in some emergency cases as fighters<sup>142</sup>. The majority of roles have been limited to support services; however there are examples throughout history where women have in fact participated as combatants<sup>143</sup>. Thus under rules of ILW, women do not only remain weak, but can also be of great value in hostilities, either performing support roles or as combatants.

## 2.5 Analysing Factual elements in the conflict

To be able to understand the impact protection of women under the regimes have on women in Somalia, factual situations will briefly be discussed below. The outcome of the factual investigation below will have great relevance for discussion in the next chapter, when the aspect of direct participation will be discussed.

### 2.5.1 Cultural Changes

The cultural changes that have taken place in Somalia in the last decades have had an effect on the historical customs in relation to hostilities. In this next section there will be a brief investigation as to these changes and what effects they have had.

The lack of compliance by all parties to the conflict in Somalia has led to a continuance of violations of rules in DLWS, ILW and IHL. These include reports of suicide attacks by Al Shabaab members, and indiscriminate shelling by the TFG and AMISOM<sup>144</sup>. Even though the death rates in Somalia are declining, and have been since 2001<sup>145</sup>, there can be other explanations such as mass displacements, and higher number of injuries.

The political and religious change that has taken place in Somalia in the last 20 years has had a fundamental impact on the traditional life of women in urban areas. Crimes, which are not supported by the national legal system, take place under areas controlled by Al

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<sup>142</sup> Ibid p. 260

<sup>143</sup> In Hamidullah, *The Muslim conduct of State* (1973) p. 261, the writer gives an example of the battle of Qadisiyah (in year 14 AD) where women armed with sticks were valuable in the battle.

<sup>144</sup> Amnesty International Annual Report 2011 []

<sup>145</sup> index Mundi



Shabaab, allegedly in line with Shariah Law<sup>146</sup>, these include amputation, stoning and flogging<sup>147</sup>. The harsh interpretation and implementation of Shariah Law by Al shabaab has resulted in a stricter lifestyle not only for women, but also for men<sup>148</sup>. Women have become subject to arbitrary power measures and impunity by local leaders of Al Shabaab<sup>149</sup>, resulting in imprisonment and sever beating,<sup>150</sup> for acts of not wearing proper dress or found working<sup>151</sup>.

These practices implemented by Al Shabaab and enforced rigorously results in moving away from the nomadic culture of the Somali people. The practices that are enforced represent a new culture, a culture that does not incorporate the traditional rules of DLWS.

## 2.6 Comparing protection measures in the regimes

Through the discussions above it is clear that the regime of IHL varies in many ways compared to DLWS, and ILW, these will be highlighted below.

In the current investigation where gender is at the forefront, IHL deems this to be irrelevant in the application of the rules, however in certain circumstances protection afforded to a woman is in fact extended. This will only be limited to circumstances of detention. The regime of DLWS encapsulates a woman into the weak and vulnerable member of society, and they maintain this outlook. This is the basis for which they receive protection within DLWS. The difference between the two regimes is that DLWS provides immunity in all aspects during hostilities, and even in detention situations, whereas in IHL this is strictly confined to protection in detention. Women in IHL thus do not receive an extended protection in hostilities, other than that arising from being a civilian, and women in DWLS

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<sup>146</sup> These have included women being stoned to death after admitting an affair with her boyfriend even though she was not married, Somali woman, 20, stoned to death by Islamic militants after admitting affair with boyfriend Daily Mail (2009) []

<sup>147</sup> Somalias Divided Islamists (2010) p.4

<sup>148</sup> They enforce men to wear trousers no longer than the ankle AmnestyInternational Annual Report (2011) []

<sup>149</sup> Harsh War, Harsh Peace (2010) p.30

<sup>150</sup> Harsh War, Harsh Peace (2010) p.31

<sup>151</sup> Harsh War, Harsh Peace (2010) p.28

receive this regardless. In regards to ILW there is a general prohibition on targeting women, as there is in DWLS creating a special protection for women. Thus this regime does take on a gendered application in the prohibition. It is not specified in the rules whether women have full immunity from the effects of hostilities, but the general prohibition implies that they do. Women can join the military and participate in the hostilities, which imply that the general weakness that is associated with women in DLWS is not as dominant in ILW.

DLWS fails to provide women protection against sexual assaults or rape other than the general prohibition, by not highlighting this as a rule to be abided by in Spared by the spear. This represents a huge gap in protection specifically relating to women. IHL has in fact developed a stronger protection regime against this type of crime in hostilities. In ILW this is strictly forbidden and thus there is an absolute prohibition of rape. When discussing women in contemporary conflicts rape is in many cases widespread and often used as a method of warfare.<sup>152</sup> The lack of protection in DLWS leaves women virtually unprotected against such attacks within the scope of DLWS<sup>153</sup>.

In IHL the distinction is made between combatant and non-combatant, but the regime of DLWS does not incorporate the rules as clearly. The rules represent a code of conduct for individuals who would not be classed as combatants in the scope of IHL. However the distinction it does make is of great relevance in this investigation, namely the distinction made in relation to women. The individuals that fall in the group of Spared by the Spear are in fact the equivalent to civilians in IHL, but this does not remove the distinction of immunity in relation to women in DLWS.

In relation to the interplay between the regimes it is argued that women in fact receive a higher standard of protection under rules of DLWS and ILW in situations of armed conflict, however due to the total immunity women receive under the regime of DLWS this

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<sup>152</sup> SC Res 1820 (2008) p. 1

<sup>153</sup> The practice of rape was almost non-existent, until 1978, when it was used as a method of warfare by the Government against opposing clans. It has become the role of the family and clansmen to seek compensation, but only if they are able to confront the offending party, Alasow, The case of Somalia (2010) p.82

regime gives a higher standard of protection. This is not the case in situations of rape, and sexual assaults where the regime of IHL provides a higher standard.

## 2.7 Conclusion

The investigation in this chapter first established that gender represents an irrelevant factor in IHL, whereas in DLWS this lies at the very categorization of rules relating to women, as women are perceived as weak and vulnerable, except in cases of mediation. In ILW the regime also takes on gendered application, as there is a general prohibition on targeting, which gives women special protection. In regards to special protection that women receive under the regime of IHL this is limited only to situations when women are in detention. In DLWS and ILW women are given the special protection of immunity throughout hostilities. In regards to the interplay between the regimes it was found that DLWS gives a higher standard of protection to women, except in circumstances of rape, and sexual assaults. Thus in regards to women in the conflict rules of DLWS should apply as this will give a higher standard of protection.

## **Chapter 3     Direct Participation in Hostilities**

### **3.1     Introduction**

In chapter two the investigation related to how women were perceived under IHL and DLWS. The findings from chapter two show that under certain circumstance women in IHL are given special protection in matters relating to detention. In ILW the protection lies with the general prohibition on targeting of women. In DLWS this special protection is in the form of immunity, which applies to women throughout the hostilities. This chapter will link the findings from chapter two, and investigate whether being a woman has any influence on perceptions in regards to application of DPH in the regimes. There will first be a brief examination of the concept of DPH in NIAC, and in the sections that follow the investigation will relate to women commencing on DPH.

### **3.2     Civilians in Non-International Conflicts**

The ICRC guidance<sup>154</sup> on DPH gives a definition of civilians in relation to distinction in NIAC ‘All persons who are not members of the state armed forces or organised armed groups of a party to the conflict are civilians and, therefore entitled to protection against direct attack unless and for such time as they take a direct part in hostilities’<sup>155</sup>. In NIAC organised armed groups constitute the armed forces of a non-state party to the conflict and consist only of individuals whose continuous combat function is to take a direct part in hostilities (continuous combat function)’<sup>156</sup>

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<sup>154</sup> The ICRC made interpretative Guidance on the Notion of DPH and came out with 10 recommendations in regards to interpreting the notion of DPH. This is the institutional position adopted by the ICRC, as a general agreement on the notion lacking among states and international experts.

<sup>155</sup> ICRC Guidance (2009) p. 27

<sup>156</sup> (2009) p.27. In section 1.5.1 it was highlighted that there is no definition for a civilian in NIAC, this definition acts merely as guidance.

Combatant status is not available in a NIAC, thus an individual who DPH will not be entitled to combatant immunity or POW status if captured<sup>157</sup>. The national criminal laws in the country the conflict took place will regulate the activities commenced on by the individual<sup>158</sup>.

### 3.3 Notion of Direct Participation in Hostilities

The notion of DPH in IHL is not defined in treaty law or in customary Law. It rests on the principle of distinction between combatants and civilians. Through the lack of a real definition of DPH it has become one of interpretation in jurisprudence and academic research<sup>159</sup>. The notion is adjusted due to lack of better legal foundations in Common Article 3 to the Geneva conventions where it is specified 'taking no active part in hostilities'. In interpreting the difference between the words direct and active the court in *Akayesu* found these two phrases to be synonymous<sup>160</sup>. Thus an individual who is active or directly participating in hostilities, for the purposes of DPH will be classified the same. The notion of DPH takes on a neutral aspect of gender, in effect not distinguishing between male and female in its application.

Hostilities in general can be argued as the collective effort of the parties,<sup>161</sup> however taking part in hostilities by an individual may be defined, as acts, which by their very nature and objective are intended to cause damage to the army<sup>162</sup>. The distinction between Indirect Participation in Hostilities (Hereinafter IPH) and DPH would rest on the acts performed. Thus to satisfy the threshold for DPH an individual has to perform a specific act, which can amount to direct participation<sup>163</sup>. The Court in *Tadic* argued that a precise criterion to distinguish between DPH and IPH is not needed, 'It is unnecessary to define exactly the

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<sup>157</sup> Combatant status is only limited to IAC

<sup>158</sup> Fleck, *International Humanitarian Law* (2008) p. 613

<sup>159</sup> The ICRC made interpretative Guidance on the Notion of DPH and came out with 10 recommendations in regards to interpreting the notion of DPH. This is the institutional position adopted by the ICRC, as a general agreement on the notion lacking among states and international experts.

<sup>160</sup> ICTR *Akayesu* para. 629

<sup>161</sup> ICRC *Guidance on DPH* (2009) p. 43

<sup>162</sup> *Public Committee against Torture in Israel* (2002) p. 9

<sup>163</sup> *Ibid* p 11

line dividing those taking an active part in hostilities and those who are not so involved. It is sufficient to examine the relevant facts of each victim and to ascertain whether, in each individual's circumstances, that person was actively involved in hostilities at the relevant time'<sup>164</sup>.

In the next sections there will be discussion as to the conduct required and the temporal scope of loss of protection, before moving on to the investigation of women commencing on DPH.

### 3.3.1 Conduct required

In the Interpretive guidance on Direct Participation the ICRC endeavoured to create a list of elements in what constitutes as DPH. These will be highlighted below, and some case law will be included to give further guidance, as to the application of certain terms in practice.

The first element relates to the specific act that the person must make, and the relevant threshold of harm in the act. 'The act must be likely to adversely affect the military operations or military capacity of a party to an armed conflict or, alternatively, to inflict death, injury, or destruction on persons or objects protected against direct attack'<sup>165</sup>. An attack can also precede, outlast or run parallel to the armed conflict, without necessarily being part of it<sup>166</sup>. In the Lubango case the court clarified that DPH also covers combat related activities such as scouting, spying, sabotage and the use of children as decoys, couriers or at military checkpoints.<sup>167</sup>

The second element refers to the direct causation of the specific act and the harm. 'There must be a direct causal link between the act and the harm likely to result either from that act, or from coordinated military operations of which that act constitutes an integral

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<sup>164</sup> ICTY Tadic (1997) para.616

<sup>165</sup> ICRC Guidance on DPH (2009) p. 20

<sup>166</sup> ICTY Kronojelac (2002) para. 54

<sup>167</sup> ICC Lubanga (2007) para. 261

part'<sup>168</sup>. In cases regarding war crimes this link has to relate to an offence connected to the armed conflict<sup>169</sup>. In Tadic the court emphasized the point that the question to be determined is whether the offences were closely related to the armed conflict<sup>170</sup>

The third element relates to the specific advantage gained by one party to the conflict. 'The act must be specifically designed to directly cause the required threshold of harm in support of a party to the conflict and to the detriment of another'<sup>171</sup>.

To determine DPH it has to be looked at on a case-by-case basis. The United States Manual highlights that 'combatants in the field must make an honest determination as to whether a particular civilian is or is not subject to deliberate attack based on the persons behavior, location and attire, and other information available at the time'<sup>172</sup>.

### 3.3.2 Temporal Scope

The temporal scope of DPH represents a difficult aspect to clarify concretely in practice. Common Art 3 to the GC gives the understanding that civilians lose protection for such time as they take a direct part. This means that the duration of a civilian DPH and the duration of protection lost remains the same<sup>173</sup>. The difficulty lies with the definition and scope of 'for such time' in practice. Below there will be some clarification as to 'for such time' in practice.

In the case of Public Committee against Torture in Israel they reasoned that a person who has joined a terrorist network, and has committed a chain of attacks loses his protection as a civilian for 'such time', but for such a civilian the resting period between the attacks is merely preparation for the next attack<sup>174</sup>. This person assumes a continuous combat

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<sup>168</sup> ICRC Guidance on DPH (2009) p. 20

<sup>169</sup> ICTR Musema (2000) para. 973

<sup>170</sup> ICTY Tadic (1997) para. 207

<sup>171</sup> ICRC Guidance on DPH (2009) p. 20

<sup>172</sup> U.S Navy, The commanders Handbook on the law of Naval Operations (1995) para 11.3

<sup>173</sup> Third Expert Meeting on DPH (2005) p. 59

<sup>174</sup> Public Committee against Torture in Israel (2002) para 39 p.13

function and can be targeted for the duration on the conflict<sup>175</sup>. Thus for these individuals ‘for such time’ represents a continuous form, whereas a person who commenced on a single attack would regain the civilian status after the act, and cannot be targeted for the duration of the conflict unless he commences on another attack<sup>176</sup>.

For acts such as preparatory measures, and whether they fall into the classification ‘for such time’ the ICRC Guidance has reasoned that this is equated to preparatory measures with the military operations preparatory to an attack<sup>177</sup>. However the ICRC guidance was clear in highlighting that for a preparatory measure to amount to DPH this depends on a multitude of factors<sup>178</sup>. Thus this will not be the same in all circumstances, due to factual differences in all attacks, thus this must be distinguished on a case by case basis.

### 3.4 Women in Hostilities

The common conception of women in hostilities is that they are the victims and the weak that should be protected. Granted the reality in most conflicts is that women have a great disadvantage and face great danger as civilians. However in many circumstances women directly participate in conflicts<sup>179</sup>, and in some circumstances not in the same conventional way that are regularly associated with men such as members of the armed forces. In the following section there will be exploration as to when women take up arms and how the majority perform their part in an armed group. There will also be exploration as to when they participate in support services amounting to IPH. Further there will be illustrations of factual situations where women have commenced on DPH to help clarify the perception of women.

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<sup>175</sup> Fleck, *International Humanitarian Law* (2008) p. 614

<sup>176</sup> Ibid

<sup>177</sup> ICRC Guidance on DPH (2009) p. 65. In regards to Legitimate Combatants this rule is found in Art 44 [3] AP I

<sup>178</sup> ICRC Guidance on DPH (2009) p. 65

<sup>179</sup> SC Res 1154 (2002) p.2 and UNDP Gender Approaches in conflict p.11



### 3.4.1 Women Directly Participating in Hostilities

Women functioning in an armed group can be illustrated by one of the earliest examples, namely the Dahomey group that operated in West Africa in the eighteenth and nineteenth century. The group consisted of mostly female combatants that waged war in neighbouring cities, to capture slaves for trading in return for guns to wage further wars<sup>180</sup>. Women have made contributions to the general war effort such as Germany in World War Two where more than a million women worked in arms factories, amounting to IPH<sup>181</sup>. In recent times women have also taken a bigger part in participating as rebels in armed groups around the world amounting to a continuous combat function<sup>182</sup>.

When women usually participate in hostilities they take on a variety of support roles and in many cases DPH. The non-combatant roles amounting to IPH that women might take up in hostilities such as domestic services<sup>183</sup>. The combat roles they take on would be DPH, if they do not fall under a combatant classification. In an ICRC study on women in armed conflict one female Liberian rebel proved the common misconception that one party might have in relation to women. The very assumption that women are vulnerable and harmless in general gives women an advantage in hostilities in that they may not cause as much suspicion, and thus they can serve as a safer option when transporting ammunition, gathering intelligence or even as suicide bombers<sup>184</sup>. This frame that women have as innocent can be a powerful tactic, and what is not to be forgotten is that participating in hostilities is not a gender-based activity, it is human activity<sup>185</sup>.

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<sup>180</sup> Goldstein, War and Gender: How the Gender shapes the war system (2001) p. 60

<sup>181</sup> Krill, The protection of women in international humanitarian law (1985)

<sup>182</sup> In the civil war in Sri Lanka up to a third of the armed group Liberation tigers of Tamil Elam were women Lindsey, women and war (2001) In Nepal women also make up to one third of the Maoist fighters Women and armed conflict Women in war (2007)

<sup>183</sup> Women may also be used as sex slaves Sec Rep. 1154 (2002) p. 2

<sup>184</sup> ICRC Women in war (2007) p. 18

<sup>185</sup> Herrmann and Palmieri, A historical Approach p. 30

When women take up weapons and directly participate in the hostilities if they fail to distinguish themselves and satisfy the criteria for DPH they lose their protection against the effects of hostilities, just the same as a male would.

### 3.4.2 Women as exceptions

From the above discussions on DPH, the findings are clear in that the rules do not differentiate, nor show irregularities in the requirements that can be associated with a gender factor. The rules relating to DPH represent neutrality in its form and interpretation. The investigation will thus move onto whether women are treated differently if they DPH, which will be investigated by looking at factual situations.

Women that join rebel groups and DPH in many cases face harsher realities than their male counterparts. They are not given any exceptions in regards to their characteristics as women; they even face hostile attitudes amongst the armed group<sup>186</sup>. Some women that face enforced recruitment into hostilities face harassment and sexual abuse<sup>187</sup>. Even when they do not commence on acts constituting DPH but simply provide support amounting to IPH, they face harsher treatment. In the Democratic Republic of Congo women found supporting armed groups that villagers did not support, were buried alive by locals<sup>188</sup>. Reasons why women may face harsher realities when they DPH, can be a direct result of the cultural standings that women may have in the particular country of conflict. When hostilities are over women may face rejection by society for having overstepped traditional roles as women<sup>189</sup>.

From looking at the factual situations above it is clear that women are in fact treated differently if they DPH than their male counterparts, in that they face harsher realities during and after the conflict has ended. Thus even though the rules of DPH represent gender neutrality in its application, in practice women who DPH are treated more harshly than their male counterparts.

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<sup>186</sup> ICRC, *Women and War* (2007) p.18

<sup>187</sup> Ibid

<sup>188</sup> Rehn, Sirleaf, *Women, war, peace* (2002) p.10

<sup>189</sup> ICRC, *Women and War* (2007) p.18

### 3.5 Interpretation of the rules under Domestic Law of War in Somalia

The following sections on DLWS will investigate whether being a woman has any influence on perceptions in regards to application of DPH in DLWS. There will be an examination in regards to the concept of DPH in DLWS, women commencing on DPH, and if women are treated differently if they DPH.

DPH does not exist as a separate notion in DLWS. The rules of DLWS specifically relates to governing hostilities between clan warfare and fractions that have no links to governmental authorities. There are not rules in regards to attire or carrying arms openly, thus distinction between civilians and combatants become blurred. Thus DLWS does not only represent a code of conduct for hostilities it represents what would correspond to a code of conduct for irregular combatants in the framework of DPH within IHL. Through the lack of further guidance of DPH in DLWS it creates a loophole, which is not specifically addressed in DLWS. For this investigation DLWS will be looked at as the code corresponding to DPH, and any action that falls under rules of DLWS will be labelled DPH. Thus DPH within the framework of DLWS relates specifically to combat action, and protection of individuals that do not DPH.

#### 3.5.1 Women Directly Participating in Hostilities in Somalia

This section will investigate when women DPH, how they perform their roles, and what roles they participate in amounting to IPH. Further there will be illustrations of factual situations where women have commenced on DPH to help clarify the perception of women.

In earlier times in Somalia when President Siad Barre was in charge he imposed compulsory military service for the population, which included children, students and civil servants<sup>190</sup>. These skills were an advantage in which all armed groups operating at the time used.<sup>191</sup> In some circumstances women also took an active part in the conflict<sup>192</sup>. They

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<sup>190</sup> Duyvesteyn, Clausewitz and African war (2005) p. 41

<sup>191</sup> Ibid

might have been in many circumstances an extreme minority in the hostilities and taken a different type of role than what men had, but nonetheless they performed a function. This can be illustrated by when US forces in Mogadishu wanted to commence on a raid on the Olympic Hotel, the local Commander of Aidids forces warned individuals who took part in the hostilities this included women and children<sup>193</sup>. Women also took part by hiding weapons under their dresses,<sup>194</sup> and it is alleged that women were responsible for the mutilation of dead Pakistani forces<sup>195</sup>. Thus it was the case that women were also included for rebel recruitment to operate with the groups<sup>196</sup>.

In looking at statistics from 1990 until 2003 girls under 18 have participated in paramilitary, militia and armed opposition groups<sup>197</sup>, and as of November 2003 there were girls still operating in armed group or militias in Somalia<sup>198</sup>. Women have become more associated with spying as a form of DPH rather than in actual combat function<sup>199</sup>. Al Shabaab in particular uses underage girls to transport detonators, provide logistics support, collect intelligence and receive weapons<sup>200</sup>. Further Al Shabaab has set up a training camp for 120 girls where they learn the skills of intelligence gathering techniques, transport of explosives and driving<sup>201</sup>.

It is not clear if these girls consent to performing these acts for Al Shabaab or whether this represents enforced recruitment. Underage girls and women are also facing enforced recruitment to cook and clean amounting to IPH by Al Shabaab members, and in some cases are forced to marry<sup>202</sup>. Even though this does not amount to DPH, this is a reflection

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<sup>192</sup> Alasow (2010) p.89

<sup>193</sup> Ibid p. 87

<sup>194</sup> Ibid p. 49

<sup>195</sup> Bradbury, *The Somali Conflict* (1994) p. 30

<sup>196</sup> Duyvesteyn, Clausewitz and African war (2005) p. 57

<sup>197</sup> *Where are the girls* (2004) p.21

<sup>198</sup> Ibid p.25

<sup>199</sup> This was an act that was commonly associated in hostilities between clans. Traditional leaders used to send scouts to inform on enemy whereabouts and whether they knew of impending attacks Spared by the Spear p. 24

<sup>200</sup> *Sec Gen Children and Armed conflict* (2010) p.7

<sup>201</sup> Ibid

<sup>202</sup> Amnesty Report (2011), Amnesty, *In the Line of fire* (2011) p. 32-33

on the particular vulnerable situation women face in Somali in regards to joining armed groups.

Women who perform support serviced that amounts to IPH, represents a difficulty in relation to DLWS. Women can take part in providing moral support in the form of creating poems that incites hatred and vengeance<sup>203</sup>. Such acts have always been a common feature of Somali history, which cannot be deemed as DPH within the scope of DLWS. The difficulty this represents is illustrated by a statement by an elder and religious leader in Somalia ‘I believe that those civilians and fighters belong to one family group, once the civilians are going with the fighters — doing things like cooking, treating them, and any other necessary thing... Whatever happens to the civilians is up to them. If they collaborate with the fighters, then what happens is up to them’<sup>204</sup>. This represents a grey area for some people in Somalia as to the application of DPH, but it is clear that these individuals cannot be targeted due to that they are not performing acts that amount to DPH.

### 3.5.2 Women as exceptions

The rules of DLWS are argued represents the origin for DPH in DLWS. Thus it does take on gender related exception in the form of immunity granted to women. However in rule 6 the wording reads ‘those individuals who are unconcerned with...who are not involved in the fighting should not be killed’<sup>205</sup>. This implies that anyone can be deemed to be concerned and involved with the fighting, thus women specifically are not given exceptions in this regard. The questions becomes, do the rules of DLWS treat a male or a female that commences on DPH the same, are the criteria’s the same and are they afforded the same protection.

The criteria for DPH in DLWS remain the same for males and females; one must be involved in the fighting. However in what form an individual participates can vary from a women or a man. Take the instances where women have travelled to opposing camps, and provided information for their own clans. For a man this would be deemed spying, and

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<sup>203</sup> Alasow, The case of Somalia(2010) p. 90

<sup>204</sup> Lindsey, women and War taken from source from ICRC’ People of War Survey

<sup>205</sup> Rule 6 Spared from the spear

thus he would fall in the category of taking part in the hostilities, but for a woman this would not be the case. This is due to that women have always embarked on missions for their own clans in hostilities<sup>206</sup>. This has been to travel freely from the warring camps to provide information on plans or actions and mediate<sup>207</sup>. This act of providing information or spying would not have been enough for a woman to DPH, yet this would be a different case for a man.

In situations where women have fought in combat they have been given better protection in detention. A female would never be harmed, but treated respectfully and returned to her clan<sup>208</sup>. This can be different for men, in combat action, and perhaps in detention. From the discussions it can be deduced that for women to DPH in DLWS the criteria and the protection they receive, remain different than for men. This leads to that women are in many instances given exceptions in their actions, and given protection regardless. However this is not always the case in the current hostilities, where Al Shabaab has killed women that have been accused of spying for TFG forces<sup>209</sup>. The reality of the protection one can receive under DLWS and what is given in factual circumstances in the current hostilities reflect a deviation in this factual scenario from rules by the non-state actor, Al Shabaab.

### 3.5.3 Direct Participation in Islamic Law of War

This section will briefly investigate the rules relating to ILW and DPH of women.

The rules of IWL also represent a code of conduct for the notion of DPH as is found in DLWS. Thus this represents difficulty in regards to who can be classified as a combatant, as anyone can within the scope of ILW as long as they commence on an attack.

In regards to gender IWL does not distinguish between male and female. This remains irrelevant as women can commence on acts constituting DPH, but only in circumstances

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<sup>206</sup> Alasow (2010) p. 126

<sup>207</sup> Spared by the Spear p. 59

<sup>208</sup> Spared by the Spear p. 32

<sup>209</sup> Amnesty International Annual Report (2011) []

where they have received permission by near relatives<sup>210</sup>. ILW prohibits targeting of women, but they can be targeted if they DPH<sup>211</sup>. Thus DPH removes the general prohibition of killing women, but this is only limited to cases where a woman attacks and the killing is done in self-defense<sup>212</sup>.

When women participate in hostilities their roles can be limited to support roles amounting to IPH or DPH. However women are increasingly involving themselves in conflict and commencing on acts, such as suicide bombings<sup>213</sup>. When women are used for suicide bombing they have a greater advantage in relation to clothing and the general perception of women as vulnerable<sup>214</sup>.

Rules of DLWS in general prohibit the targeting of women, but this prohibition is removed if the woman commences on DPH, and this is done in self-defense. Thus the perception of women in ILW has some effect on the application of ILW, but this is arguably not to the same extent as males, as women can only be targeted in self-defense. Thus the perception of women has some effect.

### 3.6 A comparison of the regimes

The regime for DPH in IHL and DLWS are very different. From the discussions above it can be deduced that DPH within the scope of IHL involves acts, which leaves the civilian loss of protection against the effects of hostilities; however in the scope of DLWS, and ILW a person who is a combatant in IHL will have protection as a combatant. This has a direct link in terms of who can be classified as a combatant in IHL and who can in the scope of DLWS and ILW. The historical essence of clan warfare has in effect created a loophole in which any person can become a combatant. This creates a dilemma in regards to the rule of distinction. If anyone can become a combatant under rules of IWL and

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<sup>210</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 261

<sup>211</sup> Tabassum, *Combatants, not bandits* (2011) p. 132

<sup>212</sup> Hamidullah, *The Muslim conduct of State* (1973) p. 191

<sup>213</sup> Shirazi, *Muslim women in war and crisis* (2010) p.2

<sup>214</sup> In 2007 eight female suicide bombers were documented in Iraq, Shirazi, *Muslim women in war and crisis* (2010) p.2

DLWS, and receive protection from the rules, this distinction between civilians and combatants becomes blurred and in effect stops existing. This creates a danger for civilians who can in effect become targeted due to the failures of regulating these classifications.

The regime of IHL represents greater clarity in this field of DPH as the rules of distinction are more rigorously applied, and detailed. Thus in regards to the interplay between the regimes DPH gives a higher standard of clarity and application than what DLWS, and IWL gives, and thus should apply.

### 3.6.1 Women and Direct Participation in hostilities

The regime of IHL, and IWL does not distinguish on a gender factor between acts, which can be deemed to be DPH. The crucial difference between the regimes of DLWS and IHL is that women in DLWS can participate in acts which constitute DPH in IHL and remain an act which is not DPH in DLWS. Even in circumstances where an act constitutes DPH in DLWS, IWL and IHL, Somali women remain protected, and are treated better than their male counterparts. This reflects directly on the immunity that is reserved for women in DLWS, and the cultural significance of protection of women as vulnerable. It is clear that even though a woman commences on DPH within the framework of the rules of DLWS, she will not lose the immunity reserved. Thus a woman in DLWS remains Spared by the Spear even though she commences on acts of DPH, this is not the case for a woman in IHL, and IWL which can leave her with loss of protection against the effects of hostilities.

The interplay between the standard of protection women can receive under the regime of DLWS and IHL remains difficult. This is due to that even though DLWS provides women with a higher standard of protection if they DPH, this can create further issues such as abuse of the protection. IHL represents greater clarity in classification and the rules are interpreted more harshly to uphold the rules of distinction, which in turn gives civilians better protection overall. Even so this investigation is focused on women, and the regime of DLWS, gives a higher standard of protection for women, and thus should apply.



### 3.6.2 Conclusion

This chapter has investigated the notion of DPH in IHL and DLWS. The findings lead to the conclusion that DPH remains a controversial, and difficult area for application in practice, such as the uncertainty surrounding the time component, in matters such as how long an act can be deemed to be DPH. In DLWS, and ILW this notion does not exist *per se*, but the regime of DLWS becomes a code of conduct for DPH, since it regulates hostilities between non-state actors. This represents a greater difficulty in that anyone can become a combatant under DLWS and ILW, and be given combatant status, this has an effect of blurring the lines of distinction, and can lead to weaker protection for civilians overall. Thus IHL represents greater clarity in the notion than DLWS, and ILW.

The second part of the investigation related to women and DPH. This was whether being a woman has any influences on perception or the application of the rules relating to DPH. In ILW the perception of women has some effect as the prohibition of targeting is lifted in self-defense. Thus ILW takes gender into some consideration for the application of rules. In the strict legal sense IHL does not differentiate based on gender in the application of rules, however by looking at factual scenarios women in contemporary conflicts are in fact treated more harshly than their male counterparts. The same was found when looking at factual scenarios in Somalia, however the rules of DPH in regards to women and ILW actually gave women a higher standard of protection. Thus since women receive a higher standard in DLWS this should be applied to women that DPH in Somalia.

## **Chapter 4 Conclusion**

### **4.1 Conclusion**

This investigation focused on women as the objective of the study, as women represent a vulnerable group in armed conflict. The case of Somalia was chosen in order to investigate rights that women receive from the regimes of DLWS, ILW and IHL. The research question was whether or not the simple fact of being a woman under IHL, DLWS and ILW, would offer special protection in the regimes. Further if a woman did decide to participate directly in hostilities, whether the fact that she is a woman influences the perception of her role, and the application of the regimes.

In the first chapter the overview of the conflict in Somalia was given. Then the investigation moved on to the general protection civilians receive in the regimes. This allowed the discussion in chapter two where it was investigated if women receive special protection. It was established that gender represents an irrelevant factor in IHL, whereas in DLWS this lies at the very categorization of rules relating to women, as women are perceived as weak and vulnerable, except in cases of mediation. In ILW it was established that gender is a factor, and that women are given special protection in the form of a general prohibition of targeting. The special protection that women receive in IHL was strictly related to circumstances of detention. Whereas in DLWS women are given the special protection of immunity throughout the course of hostilities. The third chapter investigated the notion of DPH, and whether being a woman has any influences on perception or the application of the rules relating to DPH. It was established that rules of DLWS and ILW is a conduct for individuals who DPH, and that IHL offers greater clarity and overall upholds the principle of distinction better than in DLWS and ILW where this can become blurred. Gender is irrelevant in the application of DPH in IHL, however this was not the case for DLWS, where women that commence on acts of DPH will not give rise to the same application as the same act would for a man. Thus DLWS differentiates based on gender for the application on the rules. In ILW the special protection that women receive against targeting was removed if they DPH, but only then in cases of self-defense. Thus the

gendered special protection would not apply in cases of DPH. The factual scenarios explored gave the impression that women in contemporary conflicts, and in the conflict in Somalia face harsher realities than men in practice if they DPH. This however was not reflected in the legal regimes of IHL, where gender is irrelevant, and DLWS, where women are to receive a higher standard of protection than men, because they represent the weak and vulnerable members of society.

#### 4.2 Interplay between the regimes

The interplay between the regimes fell in the rule that DLWS and ILW could only be applied if it gave a higher standard of protection than what was given in IHL. Through the investigation it was found that ILW and DLWS give a higher standard of protection to women, except in circumstances of rape, and sexual assaults, where IHL gives a higher standard of protection. It was evident that DLWS gave women a higher standard of protection in circumstances of DPH, than IHL and DLWS. This meant that DLWS applied since it gives a higher standard of protection.

The discrepancies were clear in that IHL does not differentiate between men and women, but the regime of DLWS and ILW does this at its foundations. Even though the regime of DLWS and ILW gives women special protection, this overall can create further dangers for women. This might be in recruiting women specifically to be involved in acts such as spying or transporting weapons, which can increase enforced membership into armed groups, and in fact can, leave women with less protection in practice. In IHL the fact that gender is irrelevant in the application of the regime, represents clarity, fairness, and less room for women to be considered as weak and vulnerable as they receive equal status.

#### 4.3 Do the parties to the conflict owe women special protection in the regimes?

The parties operating in Somalia owe special protection to women in Somalia in the regimes. This is relating to both during hostilities and in detention. Under IHL women are given added protection outside of normal civilian protection due to their vulnerability in certain circumstances such as when they are pregnant, in detention, and against sexual assaults. In ILW this special protection is in the form of a general prohibition on targeting. In the regime of DLWS women are granted immunity from hostilities, and are not to be

harmed. This is given due to the general status a woman has in Somali society and customs. This has been abided by in conflicts throughout history, and represents a custom, in which there should be no deviation from.

From the findings above it is clear that women can receive special protection from all of the regimes, regardless of what regime is to be applied. However through the factual scenarios in the investigation it is clear that the parties to the conflict do not abide these rules. All parties to the conflict have a duty to abide by the rules that are applicable in the conflict, and must be followed at all times during conflict.

4.4 If a woman does decide to participate directly in hostilities does the fact that she is a woman influence the perception of her role or the application of the regimes?

Under the rules of IHL women that are found to have commenced on an act constituting DPH are not entitled to any preferential treatment. The parties to the conflict owe no obligations under the regime of IHL to give women special protection if they are found to DPH. IHL does not distinguish a woman in this regard. The notion of DPH does not take on a gendered view, and remains in its entirety neutral, and thus the characteristics of women become irrelevant. This is the same for ILW, where women lose their special protection if they commence on acts of DPH, but only in cases of self-defense.

In the regime of DLWS the parties owe women a special right of protection if they are found to DPH. This is due to their characteristics as women and the protection of immunity that they receive from DLWS. Acts such as spying which would leave a woman in the regime of IHL virtually unprotected is still retained if a woman did the same act under the regime of DLWS. Thus in the conflict if a woman does decide to commence on DPH she will still have to be given special protection under the rules of DLWS.

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