

THE UNIVERSITY OF THE WESTERN CAPE

FACULTY OF LAW

Improving compliance with International Humanitarian Law by non-State armed groups in the Great Lakes Region of Africa

A mini-thesis submitted in partial fulfillment of the requirements for the LL.M Degree,
University of the Western Cape



NAME: Carine KANEZA

DEGREE: LL.M (International and Human Rights Law)

SUPERVISORS: Professor Letetia van der Poll (University of the Western Cape)
Professor François De Villiers (University of the Western Cape)

November 2006

Cape Town, South Africa

DEDICATION

To my father and husband, true panafricanists who taught me to broaden my understanding of Africa towards new horizons.



Table of Contents

Abbreviations	6
Summary of the mini-thesis	8
Chapter I: Defining non-State armed groups under International Humanitarian Law	10
Introduction.....	10
1.1 The International legal framework.....	11
1.1.1 The Geneva Conventions and the Additional Protocols.....	11
1.1.1.1 The Geneva Conventions.....	12
1.1.1.2 The Additional Protocols.....	13
a) Additional Protocol I.....	14
b) Additional Protocol II.....	15
1.1.2 Definition of non-State armed groups.....	15
1.1.3 The question of belligerency.....	18
1.1.4 Other international legal regimes: International human rights law, international criminal law and the United Nations.....	19
1.1.4.1 International human rights law.....	19
1.1.4.2 International criminal law.....	21
a) The International Criminal Tribunals for former Yugoslavia and Rwanda.....	22
b) The International Criminal Court.....	22
1.1.4.3 The United Nations.....	23
1.2 International obligation of compliance under International Humanitarian Law.....	24
1.2.1 The international legal and political status of non-State armed groups....	24
1.2.2 Treaty making capacity of non-State armed groups.....	25
1.2.3 Common Article 3 as a legal basis for compliance.....	27
1.2.4 Protocol II as a legal basis for the obligation of compliance.....	29
1.3 Summary.....	31

Chapter II: Challenges relating to compliance of non - State armed groups with International Humanitarian Law	32
Introduction.....	32
2.1 Legal challenges.....	33
2.1.1 The issue of the treaty-making capacity of non-State armed groups.....	33
2.1.2 The threshold of application of International Humanitarian Law to non-international armed conflicts.....	34
2.1.3 The internationalization of internal armed conflicts.....	35
2.1.4 The State-centred framework.....	36
2.1.5 The tensions between international criminal law and national reconciliation.....	36
2.2 Non-legal challenges.....	37
2.2.1 The diversity of non-State armed groups.....	38
2.2.2 Social and cultural relativity.....	38
2.2.3 The current international political framework.....	39
2.2.4 The lack of a comprehensive cooperation framework between the International Committee of the Red Cross and African organisations.....	40
2.3 Countries under consideration: Uganda, Rwanda and Burundi.....	42
2.3.1 Uganda.....	42
2.3.1.1 Background to conflict.....	42
The war in northern Uganda.....	43
2.3.1.2 Violations of International Humanitarian Law.....	45
2.3.2 Rwanda.....	46
2.3.2.1 Background to the conflict.....	47
2.3.2.2 Violations of International Humanitarian Law.....	49
2.3.3 Burundi.....	50
2.3.3.1 Background to the conflict.....	50
2.3.3.2 Violations of International Humanitarian Law.....	52
2.4 Summary.....	53

Chapter III: Strategies for improving compliance with International Humanitarian Law by non-State armed groups.....	55
Introduction.....	55
3.1 Analyzing non-State armed groups.....	55
3.2 Classical tools to secure compliance.....	57
3.2.1 Legal tools for enforcement and promotion of compliance.....	57
3.2.1.1 Criminal responsibility.....	57
3.2.1.2 An individual complaints procedure for violations of International Humanitarian Law.....	59
3.2.1.3 Involvement of non-State armed groups in the development of International Humanitarian Law.....	62
3.2.1.4 Promotion of respect of the law.....	64
3.2.2 Other means of securing compliance.....	65
3.2.2.1 Dissemination.....	65
3.2.2.2 Facilitation of compliance by Other High Contracting Parties.....	66
3.2.2.3 The media.....	67
3.3 International Humanitarian Law and post-conflict mechanisms.....	68
3.3.1 Using traditional tools of conflict resolution in the dissemination process: The cases of Uganda, Rwanda and Burundi.....	69
3.3.1.1 The case of Uganda.....	69
The <i>Acholi</i> traditional approach to International Humanitarian Law and the <i>Mato Oput</i> ceremony.....	70
3.3.1.2 The case of Rwanda.....	73
The <i>Gacaca Courts</i> and <i>Abakangurambaga</i>	73
3.3.1.3 The case of Burundi.....	76
Proverbs and the institution of <i>Ubushingantahe</i>	77
a) Translation of International Humanitarian Law into Burundian proverbs.....	77
b) <i>Ubushingantahe</i> as a channel for dissemination of	

International Humanitarian Law.....80

3.4 Summary.....81

Chapter IV: Challenges, Recommendations and Conclusion.....82

4.1 Challenges and Recommendations.....82

4.2 Conclusion.....86

Bibliography.....87



Abbreviations

AJIL	American Journal of International Law
ACHPR	African Charter for Human and People's Rights
ACHR	American Convention on Human Rights
Art.	Article/articles
ASR	Articles on State Responsibility
AYIL	American Yearbook of International Law
BYIL	British Yearbook of International Law
CNDD-FDD	<i>Conseil National pour la Défense de la Démocratie- Forces pour la Défense de la Démocratie</i>
Doc.	Document
ed/eds.	editor/editors
e.g.	<i>exempli gratia</i> ; for example
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EJIL	European Journal of International Law
EPIL	Encyclopaedia of Public International Law
<i>Et al</i>	<i>et alii</i> ; and others
FDLR	<i>Forces démocratiques de libération du Rwanda</i>
FNL	<i>Force Nationales de Libération</i>
FRODEBU	<i>Front pour la Démocratie au Burundi</i>
GA	United Nations General Assembly
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
i.e.	<i>id est</i> ; that is
IHL	International Humanitarian Law

ILM	International Legal Material
ILR	International Law Reports
LNTS	League of Nations Treaty Series
LRA	Lord's Resistance Army
MRND	<i>Mouvement Révolutionnaire National pour le Développement</i>
NJIL	Nordic Journal of International Law
NRA	National Resistance Army
NRM	National Resistance Movement
NSAG	non-State armed groups
p./pps.	page/pages
para./paras.	paragraph/paragraphs
PARMEHUTU	<i>Parti du Mouvement d'Emancipation du Peuple Hutu</i>
Rep.	Report(s)
Res.	Resolution(s)
RPF	Rwandan Patriotic Front
SC	Security Council
UK	United Kingdom
UN	United Nations
UNC	Charter of the United Nations
UNTS	United Nations Treaty Series
UPDF	Uganda People's Defence Forces
UPRONA	<i>Union pour le Progrès National</i>
US	United States of America
YBILC	Yearbook of the International Law Commission
Vol.	Volume(s)

Summary of the mini-thesis

Currently, one of the most dramatic threats to human security is constituted by internal armed conflicts. In 1998, violent conflicts took place in at least 25 countries.¹ Of these armed conflicts, 23 were internal, engaging one or more non-State armed groups (herein after called NSAGs).² A crucial feature of internal conflicts is the widespread violation of humanitarian law and human rights by armed groups, from rebel groups to private militias. Despite the increased role of non-State armed groups in internal conflicts, International Humanitarian Law (herein after called IHL) and human rights standards offer only limited opportunities to persuade armed groups to comply, whereas a collection of legal instruments has been developed to supply State actors with a comprehensive framework, guiding the conduct of their combatants.

This present mini-thesis aims at identifying various ways of promoting a better implementation of the Geneva Conventions and its Protocols by NSAGs in the Great Lakes Region. Three national conflicts from the Great Lakes Region will be evaluated with the view of determining the extent to which the non-State actors from that region can be receptive to the “culturalization” of the Geneva Conventions.³ The research will highlight the use of cultural tools and concepts to “contextualize” the dissemination and implementation of IHL. In addition, it is hoped that this mini-thesis will help clarifying and identifying key challenges to the compliance with IHL by NSAGs.

The mini-thesis is divided into four chapters. Chapter one, divided into two main paragraphs will provide the legal framework concerning the status of NSAGs as well as the origin of their obligation of compliance with IHL.

Chapter two, divided into three paragraphs provides a discussion on legal and non-legal impediments to the compliance with international legal regulations by NSAGs. Three case

¹ Bruderlein, C., “The role of non-State actors in building human security”, Centre for Humanitarian Dialogue, Genève, 2000, info@hdcentre.org.

² *Ibidem*.

³ Some activities have been initiated in that regard by the ICRC as discussed in subsequent sections.

studies from Uganda, Burundi and Rwanda will illustrate the discussion.

Chapter three highlights throughout its 3 paragraphs a set of legal and non-legal strategies for improving compliance with IHL by NSAGs. Finally in chapter four containing two paragraphs, a concluding discussion will crystallize the arguments by identifying the main challenges to the issue of compliance and the way forward.

As the research is aimed at improving the compliance of armed groups with IHL, primary sources, such as the Geneva Conventions (in particular common Article 3), official documents from the legislative history of such conventions, official documents from governments, international organizations and case law from international courts and tribunals were consulted.

The intended research will also consider various articles and arguments from academics, field experts and professionals in order to identify key practical challenges presented by the legal issue of compliance by NSAGs in general and in the Great Lakes Region of Africa in particular.

Although the research will be focused on three countries from the Great Lakes Region as well as examples from other parts of the world, this will be done bearing in mind that the proposed research is not primarily aimed at conducting a comparative study.

CHAPTER I: Defining non-State armed groups under International Humanitarian Law

“The treaties were crafted as a fine balance between what is legitimate military necessity and what are the basic demands of humanity, even in war. The wisdom and experience of those who reached agreement on that balance should not be underestimated.”⁴

Introduction

International law and the laws of war were originally not designed to deal with matters occurring within the States (as we will see later in subsequent sections of this chapter),⁵ but rather to regulate the interaction between State entities. As the reality of international politics is changing, it is appropriate to evaluate the relevance of international legal order. Is the present international legal system sufficient to deal with the challenges of NSAGs? Is it even relevant for practitioners involved in negotiations or other interactions with armed groups such as the LRA⁶ in Uganda, the FDLR⁷ in Rwanda or the FNL⁸ in Burundi?

The purpose is to establish under which international regimes NSAGs operate so as to better understand the mechanisms governing their behaviour and the potential impact of international norm's setting in this field. This first chapter is divided into two main paragraphs. Paragraph 1.1 will present an overview of the Geneva Conventions and the Additional Protocols.⁹ It will thereafter explore the most appropriate definition of NSAGs.¹⁰ A discussion on the notion of belligerency will follow the latter as this issue impacts on the definition of the role and status of NSAGs as well as the compliance by the latter with IHL.¹¹ The first part of the chapter will in closing provide a general assessment of other

⁴ Dr. Jacob Kellenberger, President of the ICRC, found in: *Challenges faced by the ICRC and IHL*, Washington, Georgetown University, 2006, www.icrc.org.

⁵ See para. 1.1.1.1.

⁶ Lord's Resistance Army.

⁷ *Forces Démocratiques de Libération du Rwanda*.

⁸ *Forces Nationales de Libération*.

⁹ See para. 1.1.1.

¹⁰ See para. 1.1.2.

¹¹ See para. 1.1.3.

international regulations that might complement IHL in the context of an internal armed conflict.¹²

Paragraph 1.2 will crystallize the analysis of the politico-legal framework by examining the extent of the political and legal status of the NSAGs¹³ as well as the origins of their international obligation of compliance to IHL.¹⁴ A summary of the observations with regard to the issues discussed will conclude this first chapter.

1.1 The international legal framework

Laws regulating armed conflicts have existed for centuries, but the bulk of these provisions have been concerned with wars between States.¹⁵ Relatively little attention has been paid to the enormously important area of internal armed conflict. From regulations applicable through the Geneva Conventions and their Additional Protocols to the doctrine of belligerency and the current academic debate on the definition of NSAGs, this part seeks to provide an analysis of those rules which exist in international law to protect civilians during internal armed conflicts.

1.1.1 The Geneva Conventions and the Additional Protocols

IHL is based on a fundamental (though sometimes artificial) distinction between international and non-international armed conflicts.¹⁶ This distinction, which is deeply entrenched in the 1949 Geneva Conventions on the Protection of War Victims, has been maintained and even confirmed with the adoption in 1977 of two Additional Protocols to these Conventions. Protocol I applies solely to international armed conflicts and Protocol II to non-international armed conflicts.

¹² See para. 1.1.4.

¹³ See para. 1.2.1.

¹⁴ See para. 1.2.2.

¹⁵ Moir, L., *The Law of Internal Armed Conflict*, Cambridge University Press, U.K., 2002, pps.306, at p.1.

¹⁶ Mullerson, R., *International Law, Rights and Politics: Developments in Eastern Europe and the Cis*, Routledge, UK, 1994, pps.90, at p.4.

1.1.1.1 The Geneva Conventions

Although humanitarian law as a distinct and specialised discipline of international law is a relatively recent phenomenon, it has its basis in human history.¹⁷ The recurrent conflicts between societies and amongst States have almost invariably been accompanied by the evolution of norms and procedures to govern such hostilities.¹⁸ The most spectacular achievement of this evolution was the adoption of the four Geneva Conventions of 1949, namely:

- 1) Geneva Convention (I) for the Amelioration of the Conditions of the Wounded and Sick in Armed Forces in the field.
- 2) Geneva Convention (II) for the Amelioration of the Conditions of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea.
- 3) Geneva Convention (III) Relative to the Treatment of Prisoners of War and;
- 4) The Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War.

The outcome of the extensive negotiations and compromises at the adoption of the 1949 Geneva Conventions, on the matter of applicability in non-international conflicts, was one single article in each of the conventions.¹⁹ This calls for a brief overview of this article as the latter constitutes a key point of legal reference for the topic of this thesis.

Common Article 3

Article 3 is applicable in case of armed conflict not of an international character occurring in the territory of one of the contracting parties to the 1949 Conventions. It also applies to a situation where the conflict is within the State, between the Government and the rebel forces or between the rebel forces themselves.²⁰ Protocol II which is supplementary to

¹⁷ *Ibidem*.

¹⁸ Rwelamira, M.R., "The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949", pp. 227-236, in *Studies and Essays on International Humanitarian Law and Red Cross Principles, in Honour of Jean Pictet*, Swinarski, C.(ed.), ICRC, Geneva, 1984, pps.1143.

¹⁹ Suter, K., *An International Law of Guerilla Warfare*, London, 1984, at p.8.

²⁰ Common Article 3 of the 1949 Geneva Conventions.

this article has expanded this provision. Article 3 offers an international minimum protection to persons taking no active part in hostilities, including members of armed forces in certain situations specifically stated in the article.²¹ However, this article is applicable to the situation of non-international armed conflicts in a limited way as circumscribed in the provision itself.²²

The ambiguity surrounding the article had been used by States to further limit its applicability.²³ The problem with this article is that it is applicable only to a situation, which is deemed an “armed conflict”. However, the term “armed conflict” has not been defined in the Convention. In the absence of the definition of armed conflict, it is left to the State to determine whether an armed conflict exists or not. In practice, low intensity conflicts are not considered as armed conflicts.²⁴

1.1.1.2 The Additional Protocols

The outbreak of and particularly the prevalence of internal conflicts revealed the inadequacy of IHL, whose primary concern was to regulate wars between two sovereign States and therefore international in character.²⁵ Yet there can be little controversy over the fact that in the recent past, internal conflicts have become a prevalent phenomenon.

The intransigence of the colonial regimes particularly in Africa magnified the problem to even more alarming proportions. With the intensification of armed struggles conducted by liberation movements, war became to be accepted as a modality to bring about change and a more equitable economic and social dispensation.²⁶

It is against this background and indeed in recognition of the complexity of the current conflicts that the ICRC presented a comprehensive report at the XXIst International Red

²¹ See para. 1, pt 2.

²² For the customary nature of common Article 3, see Abi-Saab, R., *Droit Humanitaire et conflits internes: origines et évolution de la réglementation internationale*, Martinus Nijhof Publishers, 1986.

²³ *Ibidem*.

²⁴ *Ibidem*.

²⁵ “Guide to National Security Policy and Strategy”, US Army War College, Bartholomeed, J.Jr (ed.), 2004.

²⁶ Rwelamira, R., M., *op.cit*, at p.229.

Cross Conference held in Istanbul in 1969. Two conferences were subsequently convened in Geneva in 1971 and 1972. At the Diplomatic Conference convened by the Swiss Federal Government in 1974,²⁷ two draft protocols were presented: Protocol I dealt with international armed conflict while draft Protocol II was concerned with conflicts of a non-international character. The two Protocols which were exhaustively discussed during the four sessions of the Diplomatic Conference from 1974 to 1977 were finally authenticated in June 1977.²⁸

a) Protocol I

Common Article 2 in the 1949 Conventions clearly stipulates that the Conventions were to apply in “cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties”. The obvious implication of common Article 2 was therefore that the Conventions applied to international wars, i.e., wars between two contracting parties. The only mitigation to this rigorous provision is provided for by common Article 3 as above mentioned, which specified certain minimum standards to be applied in internal armed conflicts, i.e., wars of a non-international character.²⁹

Protocol I supplements Article 2 common to the Geneva Conventions by elevating three categories of wars of self-determination to the status of international armed conflicts. Protocol I includes under the situations envisaged under common Article 2 all armed conflicts “in which people are fighting against colonial and alien occupation and against racist regimes in the exercise of their right of self-determination as enshrined in the Charter of the United Nations and the Declaration of Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations”.³⁰

²⁷ *Introduction to the Commentary on the Additional Protocols I and II of 8 June 1977*, <http://www.icrc.org/ihl.nsf/COM/470-750001?OpenDocument>.

²⁸ *Ibidem*.

²⁹ Higgins N., “International Humanitarian Law to Wars of National Liberation”, *Journal of Humanitarian Assistance*, 2004, www.jha.ac/articles/a132.pdf.

³⁰ Art. 1(4), Additional Protocol to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), of 8 June 1977.

b) Protocol II

By limiting itself to three situations, other situations in which persons may be forced to resort to force for other reasons are excluded from protection extended by Protocol I.³¹ Such conflicts can take the form of resistance groups, or even dissident groups whose main objective is to overthrow or challenge their governments. All these conflicts are classified as mere internal conflicts and are regulated by Protocol II. Protocol II in essence supplements Article 3 common to the Geneva Conventions. It covers all the situations not covered by Protocol I which take of place in the territory of a contracting party between its armed forces and dissident armed forces or other organized groups which under responsible command exercise control over a part of its territory as to enable them to carry out sustained and concerted military operations.³² The Protocol, however, excludes situations of internal disturbances and tensions which take the form of riots, or isolated sporadic acts of violence.³³

1.1.2 Definition of non-State armed groups

While NSAGs have always existed, to this day there is no clear consensus on how to describe them or define them, or on what should be expected from them.³⁴ To qualify as an armed group, working definition normally focuses on roughly four characteristics:³⁵

- Some level of organizational coherence or hierarchical structure;
- The use of violence for specifically political ends;
- At least a minimum degree of independence from State control;
- And (usually) some degree of territorial control.

The most comprehensive set of definitions is found in the Geneva Conventions. Protocol

³¹ Rwelamira M.R, *op.cit.*, at p.234.

³² Part I, art. 1(1), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³³ Part I, art. 1(2), Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II).

³⁴ Policzer, P., "Neither Terrorists Nor Freedom Fighters", paper presented at the American Political Science Association Conference, Chicago, September 2004, <http://www.armedgroups.org>.

³⁵ Shultz R.,H.; Farah D.; Lochard I. V., "Armed Groups: A tier-One Security Priority", *occasional paper 57*, USAF Institute For National Security Studies, USAF Academy, Colorado, 2004.

II, for example, stipulates that the conventions apply to groups that have a clear organizational hierarchy that enables leaders to control subordinates, and which control sufficient territory to permit them to carry out “sustained and concerted military operations”.³⁶ Protocol I also explicitly excludes “mercenaries” defined in part as parties driven by “the desire for private gain” as opposed to political ends.³⁷

The most stringent requirements specifically addressing “armed groups” refer to the status of prisoners of war. To qualify for the prisoner of war protections afforded by the Geneva Conventions, an armed combatant must be commanded by someone responsible for subordinates, have a fixed distinctive sign recognizable at a distance, carry arms openly, and conduct operations in accordance with the laws and customs of war.³⁸

Bruderlein defines “armed groups” as non-state actors with a basic command structure which use violence to achieve political ends, and which are independent from state control.³⁹ Bruderlein also notes that contemporary conflicts, particularly in the context of collapsed States, facilitate the rise of “irregular and disorganised combatants, criminal-types, bandits and looters,” which are not included in the definition.⁴⁰

Other organisations combine specific characteristics with examples of NSAGs in their working definition. For example, Geneva Call, which aims to get armed groups to adopt “Deeds of Commitment” to stop the use of landmines, refers not to armed groups but rather to “non-State actors”, or NSAS. This term refers to “any armed actor operating outside state control that uses force to achieve its political/quasi political objectives. Such actors include armed groups, rebel groups, liberation movements and de facto governments”.⁴¹

³⁶ Part I, art. 4a(6).

³⁷ Art. 47, 2c.

³⁸ Art. 4 of the Geneva Convention Relative to the Treatment of Prisoners of War.

³⁹ Shultz R.,H.; Farah D.; Lochard I. V., *op.cit.*

⁴⁰ *Ibidem.*

⁴¹ <http://www.genevacall.org/about/about.htm>.

While defining armed groups according to characteristics such as territorial control, autonomy from state control, political ends, and hierarchical organization seems logical, there are at least three basic obstacles to such approach:

First, many of the groups that the humanitarian and human rights community have to deal with on a daily basis do not easily fit into these categories.⁴² Some groups do not have clearly defined political ends, do not control territory, have a diffuse command structure, and may be autonomous but not clearly independent from state control. Yet these groups nevertheless pose serious problems for humanitarian and human rights groups attempting to protect the rights of people living in areas where they operate. The LRA in northern Uganda does not have a clearly articulated political agenda outside the implementation of the Ten Commandments.⁴³

Second, many States themselves do not easily fit into these categories. Many weak States have failed to create or deliberately dismantled-cohesive bureaucratic hierarchies, and have eschewed political ends (such as the provision of security) in favour of criminal ones such as profiteering.⁴⁴

Finally, those armed groups may combine political with various degrees of criminal activities, may have greater or lesser degrees of territorial control, or none at all, etc. Looking for static dichotomies is bound to fail in a world where the actors and motives are fluid, dynamic and evolve over time.

For the purpose of this thesis, we will put a stronger emphasis on the *raison d'être*⁴⁵ of any armed group as the main criteria of its definition i.e. to challenge the State. The degree or effectiveness of state control over a given group is important, but is not where the emphasis should be placed, especially when studying the roles and dynamics amongst armed groups in Africa such as the LRA, the FDLR and others.

⁴² *Ibidem.*

⁴³ *Ibidem.*

⁴⁴ Policzer, P., *supra*, at note 34, at p.7.

⁴⁵ *Ibidem.*

Armed groups, in the meaning of this mini-thesis, are challenging the authority of existing government, or competing with other groups for control and sovereign authority. Therefore, they will mostly be referred to as non-State armed groups but also in some instances as rebels and insurgents. Connected to the definition of NSAG is the issue of belligerency, which will be discussed in the following section.

1.1.3 The question of belligerency

Roth identifies three categories of internal armed conflict, with varying legal implications, under traditional international law: rebellion, insurgency and belligerency.⁴⁶ Rebellion is defined as an internal armed conflict not reaching the level of intensity necessary for the international community to have to react at all, and not necessarily posing a real threat to the authority of the existing government. Insurgency is identified as the middle stage of armed conflict occurring when the group violently challenging the government in a State has gained control over certain territory and is organized in such a manner as to be able to carry out hostilities with respect for international standards relating to warfare.⁴⁷

Recognition of insurgency does not alter the status of any of the party to the conflict, nor does it provide for any right to diverge from the principle of non intervention. Roth further points out that States nowadays recognize insurgency “individually rather than collectively, implicitly by their conduct rather than expressly by declaration, on an ad hoc basis rather than in accordance with articulated principles, and as a matter of convenience rather than as of perceived duty”.⁴⁸

Recognition of belligerency imposes an obligation of neutrality on the international community. Another implication on the other hand, in most imaginable cases favourable to the State, is that once insurgents are recognized as belligerents, the responsibility of

⁴⁶ Roth, B.R., *Governmental Illegitimacy in International Law*, Oxford, 1999, pps.173.

⁴⁷ Under traditional international law, the laws of war are brought into play by international recognition of the non-State party of the conflict as belligerents.; See Benvenuti, P., “International Humanitarian Law and the Means For Improving Its Effectiveness : A Comprehensive Appraisal”, International Humanitarian Law Seminar, Arusha International Conference Center, Arusha, 2004, www.unimib.it/giurisprudenza/dgine/Documenti/Bacheca.

⁴⁸ *Ibidem*.

the government for acts committed on parts of its territory under the control of the armed opposition turns into a duty to observe due diligence. However, express recognition of belligerency in state practice is virtually non-existent and has been for a long time.⁴⁹ Recognition of belligerency has not been given since the American Civil War and there must be serious doubts whether the notion has not fallen into desuetude. The belligerency has gradually been replaced with an approach relying on purely objective criteria.⁵⁰

1.1.4 Other international legal regimes: International human rights law, international criminal law and the United Nations

1.1.4.1 International human rights law

IHL is increasingly perceived as part of human rights law applicable in armed conflicts. This trend can be traced back to the United Nations Human Rights Conference held in Tehran in 1968.⁵¹ The Conference not only encouraged the development of IHL itself, but also marked the beginning of a growing use by the United Nations (UN) of IHL during its examination of the human rights situation in certain countries or during its thematic studies.⁵²

The area of international human rights law has developed rapidly during the course of the second half of the 20th century.⁵³ A reference to fundamental human rights was also inserted in the Preamble and article 1(3) of the UN Charter, and was thus recognized as one of the principles on which the organization rests. Since the adoption of the Universal Declaration of Human Rights and Fundamental Freedoms in 1948,⁵⁴ a vast number of

⁴⁹ Doswald-Beck, L., "The Legal Validity of Military Intervention by Invitation of the Government", in 56 *British Yearbook of International Law*, 1985, pp.189-257, at p.197.

⁵⁰ For subjective criteria for the recognition of belligerency based on the attitude of the recognizing States, see Riedel, E.H., "Recognition of belligerency", in Berhardt, *EPIL IV*, pps.47-50.

⁵¹ Doswald-Beck, L.; Vite S., "International Humanitarian Law and Human Rights Law", *International Review of the Red Cross*, 1993, <http://www.icrc.org/>.

⁵² *Ibidem*.

⁵³ *Ibidem*.

⁵⁴ General Assembly Res.217 A (III), "Universal Declaration on Human Rights and Fundamental Freedoms".

international human rights instruments⁵⁵ and various regional instruments⁵⁶ have been adopted and implemented with various successes.

The most important general observation to be made is that like human rights law, IHL is based on the premise that the protection accorded to the victims of war must be without any discrimination. Firstly, it prohibits the starvation of civilians as a method of warfare and consequently the destruction of their means of survival (which is an improvement on earlier customary law).⁵⁷ Secondly, it offers means for improving their chance of survival by, for example, providing for the declaration of special zones that contain no military objectives and consequently may not be attacked.⁵⁸

The interlinking of human rights and IHL can also be seen in the work of bodies responsible for monitoring and implementing international law. In this connection, it is interesting to note that in recent years the Security Council has been citing IHL more and more frequently in support of its resolutions. The most recent example of this tendency can be found in its Resolution 808 (1993) on the conflict in the former Yugoslavia, in which the Security Council decided to establish an international tribunal “for the prosecution of persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991”.

1.1.4.2 International criminal law

International criminal law is another branch of international law relevant for the study of the behaviour of NSAGs. This body of law may come to have immense implications for the potential of the international community to respond to atrocities committed in internal conflicts, by States as well as armed groups.

⁵⁵ Rosenne, S., *Human Rights: A compilation of International Instruments*, Vol.I, Universal Instruments, Leiden, 2004, pp.211-212.

⁵⁶ Rosenne, S., *The Perplexities of Modern International Law*, Vol.II, Leiden, 2004, at p.201.

⁵⁷ Sachar, R., “International Humanitarian Law with Particular Reference to International Criminal Court”, ISIL, *Yearbook of International Humanitarian and Refugee Law*, 2001, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/1.html>.

⁵⁸ *Ibidem*.

The first International Criminal Tribunals in Nuremberg and Tokyo were established after World War II by the allied victors in order to try German and Japanese war criminals.

The jurisdiction of the Nuremberg and Tokyo Tribunals covered four types of crime which were defined more specifically in the Nuremberg and Tokyo Charters,⁵⁹ i.e. War Crimes, Crimes Against Peace, Crimes Against Humanity and the Crime of Aggression.

The question of a global judicial authority for international crimes was formally placed on the UN agenda in 1947.⁶⁰ The high expectations as to the results of the Commission's efforts are reflected in the UN Convention on the Prevention and Punishment of the Crime of Genocide of 1948. Pursuant to article 6 of this convention, persons charged with genocide shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal "as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction".

Changed political parameters in the early 1990s gave new impetus to the tribunal project. The end of the Cold War enabled the Security Council to play a more central role in accordance with Chapter VII of the UN Charter with respect to measures to maintain or restore international peace and security. One of the steps taken by the Security Council in this respect was to establish two ad hoc tribunals for the former Yugoslavia and Rwanda.

a) The International Criminal Tribunals for former Yugoslavia and Rwanda

Traditionally, the laws and customs of war did not apply to non-international armed conflicts or situations of internal violence. Common Article 3 was the first statement of minimal standards to be applied in armed conflicts not of an international character. The Geneva Conventions do not characterize violations of common Article 3 as grave breaches. Thus, it was uncertain whether individual criminal responsibility arose under such violations. However, the International Court of Justice and the International Criminal Tribunals for Rwanda (ICTR) and the former Yugoslavia (ICTY) have since characterized

⁵⁹ Mahmoudi, S., "Aggression and Other International Crimes", <http://www.juridicum.su.se>.

⁶⁰ "Human Rights : A Brief Introduction", Report of the Norwegian Ministry of Foreign Affairs, 1999-2000, UD report: odin.dep.no/ud/english/doc/white_paper/032001-040007/hov003-bu.html.

the protections of common Article 3 as “elementary considerations of humanity,” violations of which produce individual criminal responsibility as a matter of customary international law.⁶¹

1) ICTY: The ICTY Statute does not make explicit reference to either common Article 3 or Additional Protocol II.⁶² However, the Tribunal interpreted Article 3 of the ICTY statute, which provides jurisdiction over a non-exhaustive list of the laws and customs of war, to encompass all obligations in force on the territory of the former Yugoslavia at the time the alleged offences were committed.

2) ICTR: Rwanda is of particular interest here because the conflict that occurred was purely non-international in character. Article 4 of the ICTR statute⁶³ grants the Tribunal jurisdiction over serious violations of common Article 3 and Additional Protocol II.

b) The International Criminal Court

The UN General Assembly convened a diplomatic conference in Rome from 15 June to 17 July 1998, which culminated in the adoption of the Rome Statute of the International Criminal Court.⁶⁴ The treaty will have already made a significant impact in that it signals that in future perpetrators of serious international crimes will not be able to count on impunity.

The International Criminal Court may prosecute individuals for War Crimes, Crimes against Humanity and Genocide.⁶⁵ While the term “War Crimes” is linked to armed conflicts, no corresponding limitations apply to the terms “Genocide” and “Crimes against Humanity”. Thus the jurisdiction of the court will cover such crimes whether they are committed in connection with an armed conflict or in other contexts.

The initiative of bringing a situation before the court may be taken by either a State Party

⁶¹ *Prosecutor v. Dusko Tadic*, Appeals Chamber of the ICTY, 2 October 1995.

⁶² Statute of the International Criminal Tribunal of the Former Yugoslavia at www.icty.org.

⁶³ Statute of the International Criminal Tribunal of Rwanda at www.ictt.org.

⁶⁴ Report of the Norwegian Ministry of Foreign Affairs, *op.cit.*

⁶⁵ Art. 5(1), Rome Statute of the International Criminal Court, www.icc-cpi.int.

to the Rome Statute, by the Security Council or by the Prosecutor of the International Criminal Court.⁶⁶ A major advantage of having a permanent global criminal court, rather than new ad hoc international tribunals, will be a significant reduction in the time it takes for the international community to react. It is to be hoped that this will help to avert mass atrocities. The Rome Statute of the ICC includes prohibitions applicable to internal armed conflicts within articles 8(2)(c) and 8(2)(e).

1.1.4.3 The United Nations

Another measure, by which the international community can increase the protection for civilians and put pressure on NSAGs and thus potentially influence their behaviour, is through forcible measures by the Security Council under Chapter VII of the United Nations Charter (UNC).⁶⁷ Such measures could take the form of economic or military action to be performed by member States in relation to non-State entities. In some instances the Security Council has even created direct duties for non-State groups.⁶⁸

The power of the UN Security Council to impose mandatory sanctions under Chapter VII was first used in the mid-1960s in reaction to the proclamation of independence by the colonial regime of Southern Rhodesia.⁶⁹ Since then this authority has been used on numerous occasions, but always against State or defined collectives, such as non-State groups.⁷⁰

In 1997 the Security Council adopted resolution 1127 imposing sanctions targeted against the leadership of the NSAG, UNITA, active in Angola. This was the first time individuals were directly targeted by sanctions imposed by the Security Council. Since then the

⁶⁶ Art. 13 (a), (b) and (c).

⁶⁷ Following the competence of the Security Council to take forceful measures under Chapter VII of the UNC (art. 25 UNC).

⁶⁸ SC Res.770, 13 Aug. 1992, and SC Res.942, 23 Sept., 1994, relating to demands on the parties to the Bosnian conflict, in particular the Bosnian Serb party, to accept a proposal for territorial settlement.

⁶⁹ The colony gained internationally-recognised independence from Britain in 1980 and change its name into the Republic of Zimbabwe.

⁷⁰ SC Res.1306 (2000) through which a ban on trade with diamonds produced by Revolutionary United Front (RUF) in Sierra Leone was imposed; also SC Res. 1556 (2004) through which an arms embargo was imposed on the Janjaweed militia in Darfur, Sudan.

practice has continued and there are examples of recent resolutions from the Security Council imposing targeted sanctions on individuals with connection to governments or non-State groups.⁷¹

1.2 International obligation of compliance under International Humanitarian Law

Although the laws concerning international armed conflict are significantly more developed and detailed, certain provisions of IHL are incontestably binding upon State and NSAG parties to a non-international armed conflict. This second paragraph examines the nature of the legal and political status of NSAGs as well as the source and the extent of the obligation of compliance relying upon the latter.

1.2.1 The international legal and political status of non-State armed groups

A non-State armed actor wishing to enter negotiations on the basis of parity with a State faces huge obstacles to achieving the legitimacy of a place at the negotiation table. Max Weber defined the State by its monopoly over the legitimate use of force.⁷² States have traditionally been hostile to insurgents in their territory, on the obvious grounds that they do not like the status quo to be disrupted by people who seek to topple the “lawful government” and possibly to change the whole fabric of the State.⁷³

The inimical attitude of States towards armed groups has manifested itself in three principal forms. First of all, international law does not specify when a group of rebels starts to possess international rights and duties. It only establishes certain minimum requirements for being eligible to international subjectivity. It is for States to decide by granting or withholding recognition of insurgency or belligerency, whether these requirements have been fulfilled.

⁷¹ SC Res.1267 (1999), reinforced by SC Res.1333 (2000) and SC Res. 1390(2001).

⁷² Weber, M., *Politics as a Vocation*, in Gerth, H.H.;Mills, W., From Max Weber: *Essays in Sociology*, Routledge and Keagan Paul, Boston, 1958, p.78.

⁷³ Cassese,A., *International Law in a Divided World*, Clarendon Press, Oxford, 1986, pps.429, pp.80-81.

There is second way in which hostility to rebels comes to the fore. While third States are authorized to provide assistance of any kind, including the dispatch of armed forces to the “lawful government”, they are duty-bound to refrain from supplying assistance (other than humanitarian) to armed groups.

A third consequence of this hostility is the paucity of international rules applicable to the rebellious party. All in all, it can be argued that only very few general rules address themselves equally to rebels and to States (provided of course that the former prove they have control over the territory and civil commotion reaches a certain degree of intensity and duration and that in addition, at least a few States grant them recognition).⁷⁴

1.2.2 Treaty-making capacity of non-State armed groups

In article 2 paragraph 1(a) of the 1969 Vienna Convention on the Law of Treaties (ILC), it is stated that a treaty is “an international agreement concluded between states in written form” (italics added). The conclusion easily drawn from this statement is that a NSAG cannot be a party to a treaty. But a reading of the article 3 of the convention alters this conception. Article 3 reads: “The fact that the present convention does not apply to international agreements concluded between States and other subjects of international law or between such other subjects of international law shall not affect : a) the legal force of such agreements “. The 1969 Vienna Convention thus seems to presume the existence of agreements between States and “other subjects of international law”, or between such subjects, with international legal force.

A glance at the legislative history of the 1969 Vienna Convention reveals the origins of this reasoning. According to article 8 paragraph 2(b) of the ILC Draft Convention on the Law of Treaties⁷⁵ “para-statal entities recognized as possessing a definite if limited form of international personality, for example, insurgent communities recognized as having

⁷⁴ *Ibidem.*

⁷⁵ *YBILC* (1958), Vol.II, pp. 20-29.

belligerent status de facto authorities in control of specific territory”.⁷⁶ It should be noted that the treaty making capacity of “para-statal entities” would not be unlimited under the Draft. Paragraph 4 of article 8 provided for a limitation relating to the status otherwise afforded to a subject under international law. The parties “must be contracting within any limits on their capacity arising from their status”. Article 8 did not make it to the final version of the 1969 Vienna Convention. It serves, however, as an indication on what the drafters of the Convention conceived as “other subjects of international law” as expressed in the present article 3. The ILC also expressly declared that the “other subjects” referred to in article 3 includes “insurgents”.

Having analysed the different aspects of the international politico-legal status of NSAGs, we will examine, in the next two sections, the basis for the obligation of compliance to IHL regulations by NSAG. This basis arises from the binding nature of the main IHL regulations in internal armed conflicts, i.e. the common Article 3 and the Additional Protocol II.

1.2.3 Common Article 3 as a legal basis for the obligation of compliance

Common Article 3 states clearly who is bound by its provisions-it is to be observed by “each Party to the conflict”. There is nothing controversial in the imposition of obligation upon the contracting parties-they have chosen to become parties to the Convention and are bound by its terms accordingly.⁷⁷ In contrast, the attempt also to bind insurgent parties poses the question how can common Article 3 impose binding obligations upon non-State parties who have never agreed to the Conventions and who, furthermore, have no capacity to become parties to the Conventions as such? Cassese considered it to be “undisputed”⁷⁸ that Article 3 binds insurgents, while the Belgian representative at the 1974-1977 Diplomatic Conference believed that Protocol II must be binding upon insurgents, since it was intended to develop and supplement common Article 3, which “is

⁷⁶ *Ibidem*.

⁷⁷ Moir, L., *supra*, at note 15, at p. 52.

⁷⁸ Cassese, A., “The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts”, 1981, 30 *ICJL* 416 at 424.

binding on both States and rebels”.⁷⁹ There is clearly, then, a general acceptance by both scholars and States that common Article 3 binds States and insurgents alike. But on what basis?

The legal justification most commonly advanced is the doctrine of legislative jurisdiction.⁸⁰ This provides that insurgents are bound as a result of the parent State’s acceptance of the Convention, since upon ratification the Conventions become binding on all of a State’s nationals, the legally constituted government having the capacity to legislate for all nationals. There would certainly appear to be a “strong indication that State practice assumes that these provisions...are binding also for the rebels...” and therefore once can point both to “state practice and opinion juris” to the effect that the “ratification of Art.3 of the Geneva Conventions...has the effect that also rebels are bound”.⁸¹

An alternative justification for the binding force of Article 3 upon NSAGs is to assert that treaties entered into by States are upon NSAGs providing the rebel authority exercises effective control over part of the national territory.⁸² NSAGs are then said to be bound by reason of the fact, and to the extent, that they purport to represent the State or part of it.⁸³

Another hypothesis holds that NSAGs are bound by common Article 3 as individuals under international law. This could occur (provided the parent State is a party) through the Conventions which, “in keeping with other developments in modern international law, treat persons and entities other than States as subjects of international rights and duties”.⁸⁴

Alternatively, the insurgents might be bound by customary international law, Article 3 merely being confirmation of the existing law which binds all States,⁸⁵ irrespective of their accession or otherwise to the Conventions. There is support for this in the work of several

⁷⁹ *Ibidem.*

⁸⁰ *Ibidem.*

⁸¹ Cassese, A., *supra*, at note 78, at 34.

⁸² Pictet, J.S., *Commentary on the Geneva Conventions of the 12 August 1949*, Volume II, *Commentary I*, Geneva, 1960.

⁸³ *Ibidem.*

⁸⁴ Oppenheim, *International Law*, Vol.II, pps.211, at n.3.

⁸⁵ *Ibidem.*

scholars,⁸⁶ and it is difficult to argue with the view that Article 3 represents customary international law in light of the judgment in the *Nicaragua* case, where the International Court of Justice (ICJ) stated that: “Article 3 defines certain rules to be applied in the armed conflicts of a non-international character”. There is no doubt that, in the event of international armed conflicts, these rules constitute a minimum yardstick, in addition to the more elaborate rules which are also to apply to international conflicts; and they are rules which, in the Court’s opinion, reflect what the Court in 1949 called “elementary considerations of humanity”.⁸⁷

Article 53 of the Vienna Convention on the Law of Treaties states that a peremptory norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character” Are these criteria met by common Article 3? The answer is probably that they are, and that it is reasonable to regard Article 3 as a peremptory norm.

1.2.4 Protocol II as a legal basis for the obligation of compliance

The same justifications have commonly been advanced regarding the binding nature of Protocol II as presented above in relation to common Article 3. In order for the Protocol to have any legal effect for insurgents, two criteria must accordingly be met:⁸⁸ a) The High Contracting Parties *must have intended* the Protocol to bind NSAGs, and b) NSAGs must, in turn, *accept* the rights and obligations thereby conferred upon them.

The intention of the delegations at the Diplomatic Conference is difficult to determine objectively since some States clearly accepted the Protocol on the understanding that rebels would neither be bound by, nor receive rights through, its operation, whereas others took the opposite view.⁸⁹ Cassese therefore suggested that the intention of the

⁸⁶ Greenspan, *Modern Land Warfare*, 624 and Castren, *Civil War*.

⁸⁷ International Court of Justice, www.icj.org.

⁸⁸ Moir, L. *supra*, at note 15, at p.97.

⁸⁹ *Ibidem*.

parties be discovered from examining the actual text of Protocol II, and he proceeded to set out three heads under which the objective intention to bind NSAGs can be clearly demonstrated.⁹⁰ The first of these concerns the relationship between Additional Protocol II and common Article 3. Protocol II “develops and supplements” common Article 3, which retains its own autonomous existence. In those situations where Protocol II is applicable, therefore, Article 3 necessarily continues to apply. Common Article 3 *does* bind both parties to internal armed conflict, so Protocol II must do likewise.

Cassese’s second argument rests on the fact that article 1(1) of Protocol II outlines certain conditions which must be met before the Protocol becomes applicable. These relate to responsible command and territorial control on the part of the NSAGs, enabling them to “carry out sustained military operations and to implement the Protocol”. The need to comply with Protocol II in order for its provisions to apply clearly shows that NSAGs will gain rights or duties from their compliance.

Cassese’s third argument⁹¹ turns on article 6(5) of the Protocol, which provides that: “At the end of the hostilities, the authorities in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained”. By imposing a duty on “the authorities in power” once the conflict is over, the paragraph clearly refers to both the government and the NSAG.⁹²

Turning to the second aspect necessary for a treaty to bind third parties, the willingness of NSAGs to abide by Protocol II must be ascertained in each individual conflict, and might take the form of a unilateral declaration to that effect,⁹³ or perhaps a request to a body such as the ICRC to guarantee respect for the provisions of the Protocol.

⁹⁰ Cassese, A. *supra*, at note 73, at p.427.

⁹¹ *Ibidem*.

⁹² Moir, L., *op.cit*, *supra*, at note 15, at p.99.

⁹³ *Ibidem*.

1.3 Summary

The legal and political perspectives addressed in this first chapter are a necessary preliminary to the discussion of the present substance of IHL in situation of internal armed conflict. The chapter presented the international legal framework relating to NSAGs in situation of a non-international armed conflict.

It was shown that the practice of recognition of belligerence in internal conflicts is obsolete and has come to be replaced by a development towards the use of more objective criteria. A discussion was also provided on a definition of NSAGs and the different legal instruments applicable to situations and environments in which they operate: the body of IHL applicable to internal armed conflicts, human rights law and the emerging system of international criminal law. It was also demonstrated that the current legislation presents some crucial gaps with regard to the legal definition of an internal armed conflict as well as the role, duties and responsibilities of its main actors, i.e. NSAGs.

The reluctance of States' parties to the Geneva Conventions to extend some legal personality and political status to NSAGs as well as the traditional state-centric international system have created legal and practical obstacles with regard to the protection of civilian population. It has further been shown that the Security Council of the UN possesses extensive authority to intervene in situations of internal conflicts and put pressure on armed groups.

The current political-legal framework has led, notwithstanding the binding nature of common Article 3 and Protocol II and its legal implications, to crucial challenges in terms of the adherence of NSAGs to international norms relating to the conduct of hostilities. The second chapter explores these various challenges in more detail.

Chapter II: Challenges related to the international obligation of non-State armed groups to comply with International Humanitarian Law

“International conventions have traditionally looked at States to protect civilians, but today this expectation is threatened in several ways.”⁹⁴

Introduction

Although the laws concerning international armed conflict are significantly more developed and detailed, certain provisions of IHL are incontestably binding upon State and NSAG party to a non-international armed conflict. Norms of IHL applicable in non-international armed conflict include the provisions of Article 3 common to the four Geneva Conventions (1949), the 1977 Second Additional Protocol to the Geneva Conventions (where the State has ratified), and norms of customary international law.⁹⁵

In practice, however, the challenge of enforcing compliance with these provisions faces a number of serious obstacles, both legal and non-legal. This second chapter will analyze the legal challenges faced by academics and practitioners when dealing with the issue of compliance by NSAGs⁹⁶ as well as other various practical obstacles.⁹⁷

⁹⁴ Kofi Annan, UN Secretary General, in “We the People: The role of the United Nations in the 21st Century”, Report of the UN Secretary General to the Millennium Assembly, UN, 2000, at p.46.

⁹⁵ A limited number of additional treaties specifically mention application during non-international armed conflicts, and are therefore applicable where the State has ratified : 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Article 9) and its Second Additional Protocol of 1999 (Article 22); 1998 Statute of the International Criminal Court (Article 8 c-(f)). In addition, two Conventions provide that State parties undertake to destroy or ensure the destruction of chemical weapons and antipersonnel mines under their “jurisdiction and control”, whether they were used in international or non-international armed conflicts: 1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction; 1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction. Finally, note the amendment of the scope of another convention and two of its protocols, to cover non-international armed conflicts: Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects (1980), as amended on 13 October 1995 and 3 May 1996, and its Protocol IV on Blinding Laser Weapons (1995) and Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices (1996).

⁹⁶ See para. 2.1.

⁹⁷ See para. 2.2.

The structure of this chapter, dealing with the various implications of the international legal system for engagement with NSAGs, will also provide examples of practical challenges through the cases studies of Uganda, Burundi and Rwanda.⁹⁸

2.1 Legal Challenges

2.1.1 The issue of the treaty-making capacity of non-State armed groups

One important legal obstacle is the impossibility of ratification by armed opposition groups.⁹⁹ Although this does not affect the fact that armed groups are nonetheless legally bound by relevant provisions of IHL, in practice this may be difficult to ensure. Armed groups may be unwilling to consider themselves bound to international obligations agreed to by the very government against which they are fighting. Indeed, armed groups may not only disregard and dismiss their obligations under IHL; they may actively attempt to destroy or thwart its application.¹⁰⁰

Furthermore, even where States have recognized that an armed conflict is on-going within its borders, the fact is that IHL does not grant members of armed opposition groups a specific "status," such as exists in international armed conflict. An illustrative example of this is reflected in the status provided to a peace agreement between a NSAG and a State under IHL. In 1996, a peace agreement was concluded between the Guatemalan government and the rebels of the *Unidad Revolucionaria Nacional Guatemalteca* (URNG).

The "Accord for a Firm and Lasting Peace" put an end to the 34-year long civil war that had killed over 100,000 people and resulted in the disappearances of 40,000 others.¹⁰¹

⁹⁸ See para. 2.3.

⁹⁹ Mack, M.L., "Compliance with International Humanitarian Law by Non-State Actors in Non-International Armed Conflicts", *working paper*, International Humanitarian Law Research Initiative, 2003, www.ihlresearch.org.

¹⁰⁰ *Ibidem*.

¹⁰¹ Arnsion, C., *Introductory Note on a Firm and Lasting Peace*, 1996, in ILM, 36(1996), pps.258, at p.258.

The agreement was co-signed by the former Secretary General of the UN, Boutros-Boutros Ghali, who was also requested to verify the compliance of the parties with the agreement.¹⁰² In a commentary to the agreement, Grote concludes that the legal nature of the agreement is unclear, but that it is not to be regarded as a treaty under international law since one of the parties to it is not a State.¹⁰³ In support of this contention, Grote cites article 2 of the 1969 Vienna Convention on the Law of the Treaties. However, this is not a conclusion to be necessarily drawn from the Convention. Article 3 of the Convention explicitly states that the limitation contained in the article 1 is not to affect the legal status of agreements concluded by other subjects of international law.

2.1.2 The threshold of application of International Humanitarian Law to non-international armed conflicts

The “armed conflict” threshold of common Article 3 is, without question, ambiguous. In addition, non-international armed conflicts interact with international conflicts in increasingly complex ways. For instance, the 11 September 2001 terrorist attacks on the United States set in motion the events leading to the international armed conflict between the US, UK, and Afghanistan, which is unquestionably covered by the Geneva Conventions.¹⁰⁴ Although that much is clear, the question remains whether IHL applies to the 11 September attacks themselves. And even if the 11 September 2001 attacks confirmed the existence of a non-international armed conflict between the US and al Qaeda, it is unclear whether and when the substantial number of pre-11 September attacks on the US triggered the application of IHL.¹⁰⁵ Moreover, opponents in these conflicts will often not be traditional combatants, which will in turn delay the recognition of a state of armed conflict even if the force is projected from abroad.

¹⁰² See Part V of the “Agreement on a Firm and Lasting Peace”, ILM 36, 1996, at p.304.

¹⁰³ For more details on the legal status of NSAGs, see Berts, H., “Non-state armed groups under international law: some legal aspects of engaging with non-state armed groups”, LLM Thesis in International Law, 2005, pps.97, at p.59.

¹⁰⁴ Jinks, D., “The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts”, Policy Brief, Harvard Program on Humanitarian Policy and Conflict Research (HPCR), 2003, www.hsph.harvard.edu

¹⁰⁵ *Ibidem*.

2.1.3 The internationalization of internal armed conflicts

The frequent "internationalization" of many contemporary internal armed conflicts may create confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. The Additional Protocols to the Geneva Conventions further the distinction between international and non-international armed conflicts but they leave unresolved the troublesome question of the law to be applied to armed conflicts in which there are both international and non-international elements.¹⁰⁶

While providing greater clarity to the broad principles identified in common Article 3, Additional Protocol II set a significantly higher threshold for its own application, limiting its scope: "to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions of 12 August 1949 (Protocol I) and which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organised armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol".¹⁰⁷

Therefore, unlike common Article 3 of the Geneva Conventions, Additional Protocol II will not apply to conflicts between two warring dissident groups. It will only apply in conflict that in fact approximate to traditional conceptions of inter-State warfare, namely where an organized dissident armed forces exercises military control over a part of the territory of a State party. In the context of internationalized armed conflicts, which by definition contain both international and internal elements, determining which set of rules applies and to what aspect of the conflict is critically important.

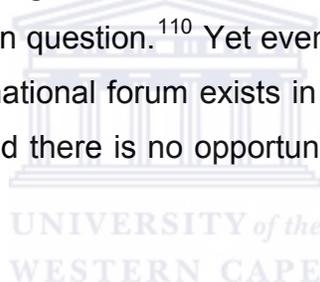
Finally, the increased prevalence of private security companies involved in situations of armed conflicts complicates the issue of who is bound to adhere to the provisions of IHL.

¹⁰⁶ Baxter, R., *The duties of combatants and the conduct of hostilities (Law of the Hague)*, in *International Dimensions of Humanitarian Law*, Henry Dunant Institute, Unesco, 1988, pps.100.

¹⁰⁷ Art.1, Additional Protocol II.

2.1.4 The State-centred framework

It is important to note that despite the existence of provisions related to non-international armed conflict, the laws and implementation or supervisory mechanisms of IHL remain predominately state-centred. Most of the rules themselves are addressed in terms of States' rights and responsibilities, although there are a number of ways by which IHL can be enforced against armed opposition groups.¹⁰⁸ States taking third parties-roles in situation of internal conflicts find themselves in a dilemma. It is natural for them to engage with the government of the State in question, while the issue of engaging with the NSAG involved in the conflict remain far more problematic due to respect for State sovereignty.¹⁰⁹ In stable States with a satisfactory degree of democratic governance, this may seem to be natural. One can make the argument, however, that the State-centric system appears more random and arbitrary in cases of so-called “weak” or “failed” States where many of attributes forming the base for the validity of State sovereignty on the international arena can be put in question.¹¹⁰ Yet even where the rules apply to non-State actors, in most cases no international forum exists in which the responsibility of the non-State actor may be invoked and there is no opportunity for relief (cessation of violations, reparations).¹¹¹



2.1.5 The tensions between international criminal law and national reconciliation

IHL as a legal regime needs to accord with political realities in order to remain relevant, but should always be interpreted in a manner consistent with its rationale. If credence is given to the notion of transitional or restorative justice which secures the principle of legal adjudication of violations, while not requiring unlimited prosecutions, limited amnesties

¹⁰⁸ Zegveld, L., *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002, pps.242, pp.97-228.

¹⁰⁹ Berts, H. *supra*, at note 103, at p.61.

¹¹⁰ *Ibidem*.

¹¹¹ ICRC, “Improving Compliance with International Humanitarian Law”, background paper prepared for Informal High-Level Expert Meeting on Current Challenges to International Humanitarian Law, Cambridge, 2004, International Humanitarian Law research Initiative, Program on Humanitarian Policy and Conflict Research at Harvard University, www.hsp.harvard.edu.

within internationally accepted parameters can be considered consistent with the fundamental principles of IHL.¹¹² It is thus necessary to determine whether or not an amnesty law is justified under IHL. The basis for validity is founded on the argument that without the recognition of limited amnesty for war crimes, it would be impossible, or at least much more difficult to secure peace or to initiate or further a reconciliation process. This argumentation was used by the South African Constitutional Court to justify the broad amnesties granted under the Promotion of National Unity and Reconciliation Act.¹¹³

The UN has also shown support for amnesty agreements covering international crimes that appear necessary to end military stand-offs.¹¹⁴ In recent years however, there has been a tendency for it to reject the possibility of amnesties for international crimes in peace agreements.¹¹⁵ Nonetheless, this practice does not foreclose all possibilities of recognition of such amnesties, but merely puts the legal threshold and justification requirements for the recognition extremely high.



¹¹² Naqvi, Y., "Amnesty for war crimes: Defining the limits of international recognition", ICRC, 2003, 583-625, No. 616.

¹¹³ National Unity and Reconciliation Act 34 of 1995, www.trc.co.za.

¹¹⁴ For example, in 1993 the United Nations gave its full support to the Governors Island Agreement which granted full amnesty to members of General Cedras' and Brigadier Biamby's military regime accused of committing crimes against humanity in Haiti from 1990-1994. The Security Council described the Agreement as "the only valid framework for resolving the crisis in Haiti". Statement of the President of the Security Council, UN SCOR, 48th session, 329th metg., at 26, UN Doc.S/INF/49, 1993. See also Scharf, M., "Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?" *Texas International Law Journal*, Vol.31, No.1, 1996, pp.1-42.

¹¹⁵ Although the UN endorsed the 1999 Lome Peace Agreement ending the civil war in Sierra Leone, which included a broad amnesty, UN Special Representative for Sierra Leone, Francis Okelo, made an oral disclaimer that the amnesty does not apply to genocide, crimes against humanity, war crimes and other serious violations of IHL. UN Doc.S/1999/836,p.2, para.1. Also see Stahn,C., "United Nations peace building, amnesties and alternative forms of justice: A change in practice?", *International Review of the Red Cross*, Vol.84, No.845, 2002, pps.191.

2.2 Non-legal challenges

In addition to the legal obstacles to ensuring compliance with IHL in non-international armed conflicts, various non-legal factors should be considered.

2.2.1 The diversity of non-State armed groups

Armed groups are very diverse, in their degree of organization and control over their members, territory or people, their aims, in particular in their inclination to respect humanitarian rules. Conflicts vary as to the intensity of the conflict and violence, the extent of armed group control over a disputed territory, if any, and the level of organization and control the armed group possesses over its members.¹¹⁶

The objectives and motivations for waging conflict are as diverse as the actors involved: the violent struggle may be for pursuit of power, related to territorial disputes, economic interests, ethnic or religious differences, denial of fundamental human rights or the rights of minorities, or simply driven by common criminality. Willingness to adhere to IHL may depend to a large extent on the compatibility of adherence with the aims or objectives of the armed group.

2.2.2 Social and cultural relativity

Armed groups are inherently social entities and their existence has to be understood within their social environment. A critical objective of protection strategies is to embark armed groups on a path of compliance based on their social and cultural values, without interfering with the political issue at conflict: their recognition as legitimate political actors. For example, although Taliban fighters and Northern Alliances forces in Afghanistan have been fighting each other for years on ideological and religious grounds, they are far closer

¹¹⁶

Mack, M.L., *supra*, at note 99.

to each other in social and cultural terms than with any other groups or entities in the world.¹¹⁷

Understanding the social and cultural nature of armed groups is undoubtedly the most important asset of protection strategies. To exert influence on the perception of armed groups of their obligations under international law, humanitarian organizations, and the international community in general, must be in a position to appreciate the social and cultural environment of these groups. In many situations, the basic principles of protection strategies can be presented to armed groups in a way that makes sense in social and cultural terms. Interpreting international standards in social and cultural terms does not require their perversion.

Furthermore, armed group leaders may not have the level of influence or resources to properly disseminate IHL provisions to their members. The "cell" structure of some modern armed groups, removing traditional hierarchical chain of command, may also limit the possibilities for dissemination and increased knowledge. Each of these variables poses unique challenges, as they may translate into varying degrees of capacity or willingness to comply with IHL provisions.

2.2.3 The current international political framework

According to Policzner,¹¹⁸ we are faced today with a uniquely complex situation. Armed groups are widely recognized to be of paramount political importance, but there is far less consensus over how to deal with them than there was a decade ago. "The war on terror" has in fact opened a window of international sympathy for regime whose authority is threatened by insurgent groups in States troubled by internal disturbances.

¹¹⁷ Bruderlein, C., *supra*, at note 1.

¹¹⁸ Policzner, P., *supra*, at note 34.

States may even receive the help of the international community to curb the activities of NSAGs on their territory, through targeted sanctions and other international enforcement measures.¹¹⁹ The development towards increasing “blacklisting” of NSAGs runs an obvious risk to stigmatize armed groups and further alienate them from the international community and political dialogue.

Most armed groups have been barred from participating in conferences on international standards applicable to armed conflicts and contacts with armed groups remain under intense political pressure from many sides.¹²⁰

2.2.4 The lack of a comprehensive cooperation framework between the International Committee of the Red Cross and African organisations

In more recent years, the ICRC has stepped up the dissemination of knowledge of IHL on an institutional basis through systematic cooperation with international and regional organisations.¹²¹ The ICRC’s work to promote IHL in African diplomatic circles since the 90s has been particularly evident in the following five areas: the integration of humanitarian concerns and IHL issues in OAU resolutions; the incorporation of humanitarian principles in African peace agreements;¹²² the role of OAU-ICRC cooperation in the anti-personnel mines campaigns;¹²³ the adherence of African States to

¹¹⁹ SC res.1530, in which the Basque Separatist Organization ETA was singled out as responsible for a major train bombing in Madrid in 2004. The bombing was later linked to Islamic fundamentalists, seeking “revenge” for the Spanish participation in the war in Iraq, in BBC New analysis: “Madrid Blasts, Who is to Blame?”, March 18 2004, www.news.bbc.co.uk.

¹²⁰ While hundreds of non-governmental organizations were represented at the Rome Conference among the more than 130 state delegations, several in an official capacity, no representatives of armed groups were present, see Bruderlein, C., *supra*, at note 1.

¹²¹ Ewumbue-Monono, C.; Von Flue, C., “Promotion of international humanitarian law through cooperation between the ICRC and the African Union”, ICRC, Vol.85, No.852, 749-773, at No.749.

¹²² The Cotonou Agreement on Liberia in 1993, the May 1993 Kinyira Agreement between the Government of Rwanda and the Rwandan Patriotic Front, the July 1999 Lusaka Accord on a Ceasefire in the Democratic Republic of Congo.

¹²³ The ICRC-OAU cooperation in the mine-awareness campaign was jointly coordinated at three regional seminars in 1995 (Addis Abeba, Harare and Yaounde).

IHL instruments;¹²⁴ and the participation of African diplomats in programmes organized or sponsored by the ICRC.¹²⁵

Despite the years of cooperation in promoting and spreading knowledge of IHL and the activities of the ICRC and the attempts to incorporate humanitarian law in the OAU-AU transformation process between 1992-2002, a symposium organized in Addis Abeba in August 2003 by the African Diplomatic Club with the ICRC's support showed that there is still a significant lack of understanding of IHL concerning the International Red Cross and Red Crescent Movement.¹²⁶ Prominent sources of misunderstanding were the "ownership" of IHL or its "Africanisation", the role of IHL in facing new challenges such as international terrorism, or the cooperation between the ICRC and the African humanitarian non governmental organisations (NGOs). These difficulties have resulted from differences between the mandate of the ICRC and that of most African organizations; the latter's largely exclusively focus on humanitarian assistance as opposed to the ICRC's broader approach encompassing humanitarian protection.¹²⁷ One can also include the poor integration of humanitarianism into the agendas of African organisations, the lack of adequate human and financial resources for humanitarian work in Africa, and the prevalence of impunity for State parties and armed opposition groups.

2.3 Countries under consideration: Uganda, Burundi, Rwanda

Peace and stability in the Great Lakes Region depends on how well NSAGs and the constituencies they represent are included in the national process. There is also a real need to find a delicate balance between justice, reconciliation and inclusive governance.

¹²⁴ Between 1994 and 1999, 10 African States became party to the Protocol (I) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977, 10 African States became party the Protocol (II) Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts of 8 June 1977, and 6 African countries became party to the Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, of 10 October 1980.

¹²⁵ Ewumbue-Monono, C., *Promoting Humanitarian public diplomacy in Africa*, Center for Research on Democracy and Development in Africa (CEREDDA) Publishers, Buea (Cameroun), 2003, pp.75-76.

¹²⁶ Ewumbue-Monono, C., Von Flue, C., *supra*, at note 121.

¹²⁷ *Ibidem*.

This part will be analyzing three different countries from the Great Lakes Region, i.e Uganda, Rwanda and Burundi. The various conflicts that occurred in the three countries are strong illustrations of the various challenges in IHL of addressing the issues of the protection of the civilians.

2.3.1 Uganda

Despite impressive economic growth, and various efforts to improve human security and socio-economic development over the last twenty years,¹²⁸ the government continues to be confronted by violent conflicts, most notably in northern Uganda. The conflict in the north gives expression to historic tensions, not least a sense of alienation and exclusion among northern ethnic groups, especially the *Acholi*.

2.3.1.1 Background to the conflict

Uganda became independent on 9 October 1962. The Prime Minister, Apollo Obote had formed a government with the help of the King Alone party (Kabaka Yekka, or KY) through an alliance between KY and the party of the former, the Uganda People's Congress (UPC). The UPC had no social base in the main Kingdoms of Uganda and most of its followers were drawn from northern Ugandan ethnic groups including the *Acholis* and *Langis*.¹²⁹

The UPC and KY teamed up to form the first post-independence government through an arrangement where Obote served as executive Prime Minister, and the King of Buganda, Kabaka Mutesa I, served as non executive Head of State. The UPC-KY alliance was not based on political principles, but it was an attempt by both groups to use each other. The

¹²⁸ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *Building Nations, Transitional Justice in the African Great Lakes Region*, the Institute for Justice and Reconciliation, 2005, pps.143, at p.74.

¹²⁹ Amaza, O.O, *Museveni's Long March , From Guerilla to Statesman*, Fountain Publishers Ltd., Kampala, Uganda, 1998, pps. 263, at p.9.

result was the intrigue and counter-intrigue which had been inherent in the original alliance itself.¹³⁰

In 1966, a mere four years after independence, the UPC-KY alliance collapsed as a result of personality clashes between Milton Obote and the King. Tensions reached boiling point when faced with a growing threat from the unrest that was starting to settle in among the powerful Buganda intellectuals and business class, Obote sent troops to invade the Buganda Palace and Royal Courts.¹³¹

The King was forced into exile, and the Kingdom's property was confiscated. Political parties were banned, and other Kingdoms in the country were also banished. Uganda went into a period of armed conflict, coups and counter coups starting with Obote's overthrow in 1971.¹³² The political instability culminated into the seizing of power in 1986 by a revolutionary movement (National Resistance Movement) led by the current President of Uganda, Yoweri Museveni.

The war in northern Uganda

In 1986, the NRM's armed wing, the National Resistance Army (NRA), failed to fully demobilize and reintegrate defeated soldiers in the north. This left the situation unmanaged and local inhabitants vulnerable and isolated. In this vacuum, various political and militia movements have emerged, finding form in a mix of traditional spiritualism, Christian extremism and guerrilla warfare. These movements came together in the establishment of the LRA in 1989.¹³³ The LRA has since come to be condemned worldwide for abducting children, attacking refugee camps and committing gruesome crimes, including cutting off noses, lips and private parts of victims. In the conflict opposing the Government and the LRA, civilians have been caught in the middle. By

¹³⁰ Villa-Vicenzo, C.; Nantulya, P.; Savage, T., *op.cit.*, at p.76.

¹³¹ Amaza, O.O, *op.cit.*, at p.7.

¹³² *Ibidem.*

¹³³ Westbrook, D., "The Torment of Northern Uganda: A Legacy of Missed Opportunities", *The Online Journal of Peace and Conflict Resolution*, Issue 3.2, 2000, www.trinstitute.org/ojpcr.

2005, nearly two million had been driven from their homes and relocated into squalid, disease-ridden camps, dependent on food aid for survival.¹³⁴ Many have lived in such camps for a decade, under conditions that the United Nation's chief humanitarian officer, Jan Egeland, has characterized as "the biggest neglected humanitarian emergency in the world." The emergency has become chronic.¹³⁵

The ICC has issued arrest warrants for its top leaders.¹³⁶ At the same time, government troops have been accused of waging a brutal campaign against rebel forces, the costs of which have frequently been borne by local communities. The causes of Uganda's northern war can be summarized as follow:¹³⁷

1) A fear on the part of the *Acholi* community that the NRM would take revenge for the atrocities that were committed in Uganda during the 25 years that the country's politics and military were dominated by northerners;

2) Successive rebel groups were upset at their loss of political and economic power which they attributed to the break down of the various peace agreements, especially between the then NRA rebels and the Tito Ockello government;

3) Successive rebel groups see violence as the only means to address these grievances after witnessing Uganda's successive violent power and;

4) LRA's tactic of abducting *Acholi* children and enrolling them into its army has silenced the communities and turned them into passive accomplices.

In May 2006, leaders of the semi-autonomous Government of southern Sudan officially announced that it had reached an agreement with the LRA to mediate peace talks

¹³⁴ Atkinson, R.R.; Finnstrom, S., "Uganda's moment for Peace", International Herald Tribune, 9 August 2006, www.iht.com

¹³⁵ *Ibidem*.

¹³⁶ International Centre for Transitional Justice (ICTJ), Headlines, 2006, www.ictj.org.

¹³⁷ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *op.cit.*, at p.75.

between the rebels and the Ugandan government. Uganda sent a negotiating team to begin talks which aimed at reaching a cessation of hostilities between the warring parties.¹³⁸

2.3.1.2 Violations of International Humanitarian Law

The LRA is responsible for years of wilful killings, beatings, large-scale abductions, forced recruitment of adults and children, sexual violence against girls whom it assigns as “wives” or sex slaves to commanders, large scale lootings, and destruction of civilian property. Its presence is one of the main factors of the displacement of nearly two million people in northern Uganda.¹³⁹ These egregious abuses include targeted attacks and deliberate killings, brutalization and mutilation of civilians, forced recruitment of child soldiers, rape and sexual abuse of women and children, looting and destruction of civilian homes, villages and other property, forced displacement and torture. The serious violations by the LRA contravene various international treaties ratified by Uganda, such as the Geneva Conventions (common Article 3), the International Covenant of Civil and Political Rights,¹⁴⁰ the Convention Against Torture, Additional Protocol II,¹⁴¹ the Convention on the Rights of the Child¹⁴² and the African Charter on Human and Peoples' Rights.¹⁴³ They are also contrary to the Universal Declaration on Human Rights.¹⁴⁴

Through amnesty, the Ugandan government has, since 2000, expressed readiness to forgive the LRA rebels and their leader, Joseph Kony, of war crimes, if they denounced the rebellion. Yet, the ICC has, since 2004, at the request of the Ugandan government, been investigating war crimes committed in the twenty-year-old conflict between the LRA

¹³⁸ The New Vision, online news, October 2006, www.newvision.co.ug.

¹³⁹ Human Rights Watch, “Uprooted and Forgotten, Impunity and Human Rights Abuses in Northern Uganda”, Human Rights Watch, 20 September 2005.

¹⁴⁰ Arts. 6, 7, 9, 17 and 24.

¹⁴¹ Arts. 4 and 17.

¹⁴² Arts. 6, 8, 9, 16, 19, 20, 27, 32, 34, 36, 38.

¹⁴³ Arts. 4, 5, 6.

¹⁴⁴ Arts. 3 and 5.

and the Government and recently expressed readiness to issue arrest warrants for the LRA leader Joseph Kony¹⁴⁵ and several of the top brass of the LRA.

While acknowledging the need for forgiveness and reintegration, it is argued that those who “bear the greatest responsibility for the crimes committed” should be brought to justice. However, it is acknowledged that since almost 80 per cent of the LRA’s soldiers are children¹⁴⁶ who have been abducted from their families and forced to commit horrendous crimes against their own people, the ICC faces the difficulty of categorizing members of the LRA as victims (those who deserve amnesty) or perpetrators (those who should be prosecuted).

2.3.2 Rwanda

Twelve years after the 1994 genocide in Rwanda, the Government is still in a process of reconstructing the country and reconciling a population composed of victims, perpetrators, accomplices and bystanders of a genocide that caused approximately a million deaths.¹⁴⁷ The revival of traditional tools of reconciliation has been a strategy that the Rwandan government is currently actively promoting as a solution for achieving reconciliation.

2.3.2.1 Background to the conflict

The Rwandan conflict is historically entrenched, running through the pre-colonial, colonial and post-colonial periods. It is embedded in myths, legends, contested histories and animosities between Rwandans, as well as between Rwandans and their neighbours. The

¹⁴⁵ Ssenyonjo, M., “Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court”, *Journal of Conflict and Security Law*, Vol.10, No.3, Oxford, 2005, pp.405-434.

¹⁴⁶ *Ibidem*.

¹⁴⁷ The aim of the genocidal project was, to use the words of one of its key architects, “to convert Rwanda into a nation of permanent killers and permanent victims”, Statement by Hassan Ngeze, the Chief Editor of Radio Television des Milles Collines (RTLM) in well – publicized radio broadcast on 12 February 1994.

forebears of today's *Hutus*, *Tutsis* and *Twas* had established links through marriage, social engagement and trade. They lived on the same hills, sharing a social and political culture which identities rooted in clans rather than ethnicity. This continued unabated until the second half of the nineteenth century when European powers assigned Rwanda to German rule. After World War I, however, Germany was required in terms of the decisions of the League of Nations to surrender the colony to Belgium.¹⁴⁸

The Belgians boosted the centuries old monarchy while favouring the *Tutsi* minority against the majority *Hutu*. They viewed the *Tutsis*, traditionally tall and seen to be aristocratic in appearance, as people with a natural aptitude to rule. Regarded as "Europeans under a black skin",¹⁴⁹ they were appointed in large numbers to leading positions in the colonial administration, while the *Hutus* were entrenched as a class of workers and subsistence farmers.¹⁵⁰ The Belgians continued to favour the *Tutsis* until after World War II, when the growth of socialism in Europe opened up new sympathies towards oppressed peoples in the colonies.

Amidst these developments, the Belgians shifted policy in favour of the *Hutus* who then demanded political reforms aimed at enhancing their status.¹⁵¹ Violence erupted with a massacre of *Tutsis* and a vast *Tutsi* exodus into neighbouring countries in 1959. The *Hutus* demanded the abolition of the monarchy which they saw as *Tutsi* dominated. In October 1961, the *Hutu Parti du Mouvement d'Emancipation du Peuple Hutu* (PARMEHUTU) was voted into power in the newly-formed parliament and *Hutu* leader, Gregoire Kayibanda, was elected President.¹⁵² During the years that followed, the PARMEHUTU leaders acted against and eliminated educated *Hutus* and rivals as well as thousands of *Tutsis*.

¹⁴⁸ Kolodziej, E.A., "The Great Powers and Genocide: Lessons from Rwanda", Vol.12, No.2, Taylor & Francis Group, 2000, pp.121-145.

¹⁴⁹ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *supra*, at note 128, at p.74.

¹⁵⁰ *Ibidem*.

¹⁵¹ Jha, U.S; Yadav, N., S., *Rwanda: Towards Reconciliation, Good Governance and Development*, Association of Indian Africanist, New Delhi, India, 2003, pps.227, at p.28.

¹⁵² *Ibidem*.

In 1973, General Juvenal Habyarimana, a northerner, overthrew Kayibanda.¹⁵³ In 1975, Habyarimana turned Rwanda into a single-party under the MRND (*Mouvement Révolutionnaire National pour le Développement*). *Tutsis* were required to withdraw from politics, government and the military. Dissenters and opponents were subjected to arbitrary arrest, torture and imprisonment without trial, and *Tutsis* in increasing numbers fled into exile. Many became part of the Rwandan Patriotic Forces (RPF) infrastructures and military forces based in neighbouring Uganda.¹⁵⁴

The RPF invaded Rwanda in October 1990 and civil violence was instigated by government forces against the *Tutsi* minority and regime critics. In the midst of these rising tensions, Habyarimana was forced to sign a ceasefire and form a coalition government in terms of the 1993 Arusha Accord that provided for the establishment of a Broad-Based Transitional Government (BBTG), repatriation of refugees, the integration of all military forces into one national army and the holding of democratic elections in 1995.¹⁵⁵ However, the parties were ultimately unable to agree on the installation of a transitional government and the situation became polarized. The tipping point was the shooting down on 6 April 1994 of an aircraft that carried President Juvenal Habyarimana. The events of the “100 days” are well known. The international community looked on as generations of mistrust, exploitation and violence came to expression in the chaos that followed.

2.3.2.2 Violations of International Humanitarian Law

Rwanda acceded to the Additional Protocols of 1977 on 19 November 1984, several years before the conflict of the early 1990s between the Government and the rebel Rwandan Patriotic Front (RPF) tore the country apart.¹⁵⁶ This raises the question whether

¹⁵³ Official website of the Government of Rwanda, www.gov.rw.

¹⁵⁴ *Ibidem*.

¹⁵⁵ 1993 Peace Agreement between the Government of Rwanda and the Rwandese Patriotic Front, Preamble, art.6; Peace Agreement between the Government of Rwanda and the Rwandese Patriotic Front on the Rule of Law: Chapter 1, art.4.

¹⁵⁶ Moir. L., *supra*, at note 15, at p.119.

the conditions necessary for the application of IHL were met? There was clearly an armed conflict in progress, taking place in the territory of a High Contracting Party and, although to a large extent ethnic, the conflict was indeed between the Government armed forces (mainly *Hutu*) and dissident forces (i.e. the mainly *Tutsi* RPF).

There was also clearly a degree of organisation and command, and sustained and concerted military operations were carried out by RPF. In light of this, it seems untenable to argue that the RPF's control over a large proportion of the country still did not permit them to implement the Protocol II if they wish to do so, and so it would appear that all of Protocol II's conditions were met. Indeed, the ICTR has held that the conflict was "an internal armed conflict within the meaning of Additional Protocol II".¹⁵⁷

It is now common knowledge that IHL was powerless to prevent the horrific suffering of thousands of civilians in Rwanda. The *Hutu* army and various militia organisations launched a campaign of genocide against the *Tutsis*, with huge numbers being massacred, and the full horror of events can be perhaps traced through various descriptions found in ICRC reports and press releases.¹⁵⁸ Breaches of Additional Protocol II, along with every other IHL and human rights instrument, were committed systematically and continually in Rwanda. Thousands of people were forced to flee their homes in fear of their lives. Genocide was committed on a huge scale. The widespread perpetration of atrocities makes it unnecessary to list individual breaches of Additional Protocol II as the IHL failed utterly.

2.3.3 Burundi

In 2005 Burundians went to the polls for the first time in twelve years, choosing a president, Pierre Nkurunziza, who declared his commitment to establishing the rule of law in a country marked by years of widespread human rights abuses. His government took

¹⁵⁷ *Prosecutor v. Akayesu*, case ICTR-96-4-T (Judgment of 2 September 1998) 37 ILM 1399 (1998), at para. 627.

¹⁵⁸ ICRC News 16/21, April 1994; ICRC Press Release 1772/21, April 1994; ICRC News 17/28, April 1994.

office under a new constitution that guarantees power-sharing between the *Hutu* and *Tutsi* ethnic groups and among political parties.¹⁵⁹ The new government seeks to end an ongoing war with the FNL, a guerrilla group that controls territory around Bujumbura, the capital.

2.3.3.1 Background to the conflict

The question of the role of ethnicity in explaining the conflict in Burundi has occupied a central place in the literature. Conflicts in Burundi have often been characterised as clashes between two inherently antagonistic ethnic groups.¹⁶⁰ In his influential book on conflict in Burundi, Lemarchand¹⁶¹ pointed out an important “paradox” in the history of Burundi. He noted that uncharacteristically for a sub-Saharan African country, ethnic groups in Burundi have a long history of peaceful cohabitation, speaking the same language, sharing the same culture and having submitted to the same traditional monarchy. However, in the end of the colonial era and throughout the independence era, the country experienced conflicts that, on the surface, opposed the *Hutus* to the *Tutsis*. Given that the *Hutus* and the *Tutsis* have not always antagonized, the source of the conflict is the introduction of ethnicity as a primordial determinant of access to power starting from the colonial era.¹⁶²

Burundi was a German colony until World War I. It then fell under a Belgian mandate, until independence in 1962.¹⁶³ The Belgian colonial administration privileged the members of the Burundian royal family and the *Tutsi* – a policy that continued in the post-colonial phase. The *Tutsi*, particularly those from the southern province of Bururi, dominated the political, military and economic structures in post colonial Burundi.¹⁶⁴

¹⁵⁹ BBC News, 26th, August 2005, www.news.bbc.co.uk.

¹⁶⁰ Ndikumana, L., “Distributional Conflict, the State and Peacebuilding in Burundi”, Research Paper, UNU World Institute for Development Economics Research, Finland, 2005, www.wider.unu.edu.

¹⁶¹ Lemarchand, R., *Burundi: Ethnic Conflict and Genocide*, Cambridge University Press, 1995. pps. 206.

¹⁶² Ndikumana, L., *op.cit.*

¹⁶³ Birabuza, A.: *Le mal burundais ou l'involution historique d'une vieille nation*, éditions de la Renaissance, Burundi, Bujumbura, 1999, pps.174., at p.43.

¹⁶⁴ *Ibidem.*

International pressure to hold majoritarian style elections in Burundi in 1993 reflected the enthusiasm of the international community in applying western-style democracy to Africa (the so-called third wave of democracy) at that time. However, the elections were set up too quickly, without establishing appropriate institutions or ensuring that the population was ready.¹⁶⁵ As events turned out, Melchior Ndadaye, the candidate from the predominantly *Hutu* party, *Front pour la Démocratie au Burundi* (FRODEBU), won the 1993 elections. However, less than three months after taking office President Ndadaye and other high-ranking FRODEBU members were assassinated by *Tutsi* radicals from the army.¹⁶⁶ These assassinations sparked inter communal killings and massacres across the country and deepened the mistrust between *Hutus* and *Tutsis*.¹⁶⁷

Following the horrific failure of elections in Burundi as well as the genocide in neighbouring Rwanda, international attention shifted towards power-sharing as the appropriate response to conflict in Burundi. A power-sharing agreement between the predominantly *Tutsi* *Union pour le Progrès National* (UPRONA) party and the predominantly *Hutu* FRODEBU party was brokered by the UN Special Representative of the Secretary-General, Ould-Abdallah, and signed in September 1994.

Within months of the signing of the 1994 Convention, sporadic killings continued and the political landscape remained divided. In July 1996, Pierre Buyoya was reinstalled as President of Burundi following another military coup. From 1996 onwards, the international response to the conflict in Burundi was fragmented. The on – again, off – again peace efforts culminated in the secret talks between Buyoya’s government and the CNDD-FDD which were facilitated by the community of Sant Egidio in 1996.¹⁶⁸ That process led to the start of the Arusha negotiations, which were initially led by Julius

¹⁶⁵ Reyntjens, F., “Burundi: Prospects for Peace”, Minority Rights Group International (MRG) Report, 2000, pps.32, at p.12.

¹⁶⁶ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *supra*, note 128, at p.4.

¹⁶⁷ By November 1993, out of a total population of 6 million, between 50 000 and 100 000 people were killed and over 800 000 people, mostly *Hutus*, went to neighboring countries as refugees. Another 400 000, mainly *Tutsis*, became internally displaced, See United Nations, Administrative Committee on Coordination, Subcommittee on Nutrition, 1994 Report, www.unsystem.org.

¹⁶⁸ Bentley, K.A.; Southall, R., *An African Peace Process: Mandela, South Africa and Burundi*, Human Science Research Council, 2005, pps.220, at p.59.

Nyerere and later by Nelson Mandela. After a gruelling and acrimonious four years, the Arusha Peace and Reconciliation Agreement was finally signed in 2000.

2.3.3.2 Violations of International Humanitarian Law

During the civil war in Burundi, soldiers of the Burundian armed forces and combatants of the FNL and other rebel movements have often been responsible for numerous violations of IHL.¹⁶⁹ Under the 1949 Geneva Conventions, the civil war is a non-international armed conflict. The conflict is covered under Article 3 common to the 1949 Geneva Conventions and the Second Additional Protocol of 1977 to the Geneva Conventions (Protocol II), as well as much customary law applicable to international conflicts. Burundi ratified the 1949 Geneva Conventions in 1971 and Protocol II in 1993.¹⁷⁰ Common Article 3 expressly binds all parties to an internal armed conflict, the Burundian armed forces and the FNL in this case.

Additional Protocol II adds provisions regarding the protection of civilians from the dangers arising from military operations, and particularly the protection of children during armed conflict. The cardinal rule of IHL is that civilians must not be the object of attack. Parties to an armed conflict are bound to respect international human rights and IHL. They will be responsible for violations of these laws by their own armed forces, and for violations by other irregular forces under their "overall control". The international community has affirmed that individuals can be held criminally responsible under international law for war crimes committed in violation of common Article 3 and Additional Protocol II.¹⁷¹

The failure by successive governments to investigate and bring to justice those responsible for large scale killings and other grave human rights violations has cost the lives of several hundred thousand Burundian civilians, while hundreds of thousands of

¹⁶⁹ Human Rights Watch, "Burundi: Missteps at a Crucial Moment", 2005, www.hrw.org.

¹⁷⁰ ICRC, "States parties to the Geneva Conventions and their Additional Protocols", www.icrc.org.

¹⁷¹ Amnesty International, "Burundi, Punishing the population - reprisal killings escalate", AI Index: AFR 16/006/2002, 1 June 2002, www.amnesty.org.

others have been displaced or forced into exile. Others have turned to vengeance, themselves perpetrating human rights abuses. The extrajudicial executions and other unlawful killings documented in various reports¹⁷² show that the need to hold the authorities accountable for humanitarian and human rights violations is as acute as ever.

2.4 Summary

This second chapter attempted to provide an analysis of different legal and non-legal challenges with regard to the issue of compliance of IHL by NSAGs. It describes the legal impediments to the application of IHL provisions in situations of non-international armed conflicts such as the ambiguity surrounding the threshold of application of the Additional Protocol II or the current state-centred framework. The section also outlines non-legal obstacles to a sustainable compliance of IHL by NSAGs. The discussions illustrate several issues ranging from the lack of a framework of cooperation between IHL organisations to the tensions between the application of IHL and national strategies of reconciliation in some countries. Finally three case studies were considered through the examples of Uganda, Rwanda and Burundi.

Engaging NSAGs is a necessity for third states or international organisations aiming at assuming an interlocutor role in relation to non-international armed conflicts. This requires an accurate understanding of the framework in which NSAGs operate. The next chapter will analyze various strategies to address the issues raised in this section. Again the examples of Uganda, Rwanda and Burundi will serve as case-studies for the practical application of our proposals.

¹⁷² Human Rights Watch interview, Bujumbura, in October 18, 19, 20, 25, 2005. See also IRIN, Burundi: "Itaka Denounces Rights Violations", October 21, 2005.

Chapter III: Strategies for improving compliance with International Humanitarian Law by non-State armed groups

“This demands from all of us an increased attention to the civilian costs of conflict. It requires Member States to live up to their responsibilities under international law. They must deal firmly with the reality of armed groups and other non-State actors who refuse to respect common principle of human dignity.”¹⁷³

Introduction

NSAGs represent a complex challenge. The traditional instruments to curb violations of human rights and humanitarian provisions were developed for use against the States. Because states have diplomatic relations with other states, can sign treaties and be parties to the major international institutions, a toolkit of familiar policy and legal instruments is available to deal with them when they fail to uphold international standards.

This chapter examines strategies to engage armed groups in adhering to IHL, a result that would greatly improve the protection of the populations in war situations. It will first examine the complexity and diversity of NSAGs, analyzing the opportunities and difficulties encountered in engaging armed groups on humanitarian and human rights standards.¹⁷⁴ Whereas the second section will present an overview of the main strategies for seeking the implementation of international standards by armed groups,¹⁷⁵ the third part will provide an analysis on the impact of IHL in post-conflict settings.¹⁷⁶ In the final instance, some complementary tools will be suggested for Burundi, Uganda and Rwanda. These tools will be based on the traditions and customs as well as the political background of these three countries.¹⁷⁷ A summary will conclude our discussion.

¹⁷³ Kofi Annan, Address to the UN General Assembly on Terrorism, UN, New York, 2001, SG/SM/7977.

¹⁷⁴ See para. 3.1.

¹⁷⁵ See para. 3.2.

¹⁷⁶ See para. 3.3.

¹⁷⁷ See para. 3.3.1.

3.1 Analyzing non-State armed groups

In 1999, to mark the 50th anniversary of the Geneva Conventions, the ICRC launched a large-scale survey covering some 15,000 civilians and combatants in 15 war zones with the objective of finding out their opinions on the rules to be respected in time of armed conflict and the reasons for which these rules are being often violated. The research was conducted by Greenberg Research Inc.¹⁷⁸ The study aimed at identifying key factors which influence the behavior of combatants so that they respect or violate IHL in any given situation.

The study permitted the ICRC to identify some key characteristics concerning the various factors influencing the behaviors of NSAGs. These include the group conformity, the impact of the chain of command, the spiral of violence and the gap between the acknowledgment and the application of IHL norms.

According to the study, combatants are subject to group conformity such as depersonalization, loss of independence and a high degree of conformity.¹⁷⁹ This is a situation that favors the dilution of the individual responsibility of the combatant within the collective responsibility of his combat unit.

Secondly, the study shows that combatants are also subject to a process of shifting individual responsibility from themselves to their superior(s) in the chain of command.¹⁸⁰ While violations of IHL may sometimes stem from orders given by such authority, they seem more frequently connected with a lack of any specific orders not to violate the law or an implicit authorization to behave in a reprehensible manner.

Another important finding of the study concerns the fact that combatants, who have taken part in hostilities and have been subjected to humiliations and trauma, are led, in the short term, to perpetrate violations of IHL. These situations of violence concern two processes

¹⁷⁸ "People on War Report", ICRC worldwide consultations on the rules of war, International Committee of the Red Cross, Geneva, 1999, www.icrc.org.

¹⁷⁹ *Ibidem*.

¹⁸⁰ *Ibidem*.

which interact to create a spiral of violence. The first is the cycle of violence which leads to victimized combatant¹⁸¹ to commit violations of IHL and secondly, the spiral of violations following an initial breach of humanitarian principles.¹⁸²

Concerning the issue relating to gap between the acknowledgment and the application of international humanitarian legal norms, one lesson extracted from the study is that IHL needs to be treated as a political matter rather than as a moral one. The communication should focus more on the norms than on the underlying values because the idea that a combatant is morally autonomous is inappropriate. The study demonstrated that IHL has a universal character in that individuals adhere to it in very different cultures, drawing both on religious and secular sources. It was further shown that if they perceive IHL from a normative point of view, they are less tolerant of violations. The norms draw an easily identifiable red line, whereas values represent a broader spectrum which is less focused and more relative.

This initial analysis is important as one must assess the main characteristics of the group to be approached and make a first determination of its cohesion to evaluate the opportunity to engage in a productive dialogue with the group. Bruderlein¹⁸³ elaborates by referring to additional factors such as the structure of group, the extent to which the group is independent from the state, political, economic and military factors.

3.2 Classical tools to secure compliance

In this section, enforcement and implementation of IHL of internal armed conflicts will be examined in terms of a) legal tools for enforcement and promotion of compliance and b) other means of securing compliance.

¹⁸¹ One who has suffered violence against his property, his loved ones or his own person.

¹⁸² "People on War Report", *op.cit.*

¹⁸³ Bruderlein, C., *supra*, at note 1.

3.2.1 Legal tools for enforcement and promotion of compliance

3.2.1.1 Criminal responsibility

Enforcement measures against individuals alleged to have violated IHL primarily entail their trial following hostilities. The clearest example is that of the Nuremberg Tribunal following the Second World War where many leading Nazis were tried for crimes against peace, war crimes and crimes against humanity. The trials at Nuremberg and those of other war criminals since¹⁸⁴ have, however, tended to be concerned with violations of the laws of international conflicts. The establishment by the UN of Criminal Tribunals for the trial of those alleged to have violated the law in the context of conflicts in Rwanda and former Yugoslavia, and the adoption of a Statute for an International Criminal Court with jurisdiction over crimes committed during internal armed conflicts, are therefore of great importance.¹⁸⁵

It is not enough in itself, however, that crimes against humanity and violations of the laws and customs of war committed during internal conflict are recognized as entailing individual criminal responsibility. International law must be effectively applied against individuals, and those responsible must be convinced. In that respect, although the establishment and pronouncements of the Yugoslav and Rwandan Tribunals are undoubtedly vital as regards the development of internal law, an examination of their practical enforcement of the law makes slightly more disappointing reading. As at September 2000, the Rwandan Tribunal had handed down 8 judgments,¹⁸⁶ and of the 94 individuals publicly indicted by the ICTY, only 18 judgments had been handed down.¹⁸⁷

¹⁸⁴ *Government of Israel v. Eichman* 36 ILR 5, and *Federation Nationale des Déportés et Internes Résistants et Patriotes and Others v. Barbie*.

¹⁸⁵ Moir, L., *supra*, at note 15, at p.233.

¹⁸⁶ *Prosecutor v. Akayesu*, Case ICTR-96-4-T (Judgment of 2 September 1998) 37, ILM 1399, 1998; *Prosecutor v. Kambanda*, Case ICTR-97-23-S (Judgment of 4 September 1998) 37 ILM 1411, 1998; *Prosecutor v. Serushago*, Case ICTR-98-39-S (Judgment of 5 February 1999), 38 ILM 854, 1999; *Prosecutor v. Kayishema and Ruzindana*, Case ICTR-95-1, ICTR-96-10 (Judgment of 21 May 1999), *Prosecutor v. Rutaganda*, Case ICTR-96-3 (Judgment of 6 December 1999) 39 ILM 557, 2000; *Prosecutor v. Musema*, Case ICTR-96-13 (Judgment of 27 January 2000); and *Prosecutor v. Ruggiu*, Case ICTR-97-32 (Judgment of 1 June 2000).

¹⁸⁷ *Prosecutor v. Erdemović*, Case IT-96-22-Tbis (Sentencing Judgment of 5 March 1998) 37 ILM 1182, 1998; *Prosecutor v. Delalić, Mucić, Delić and Landžo*, Case IT-96-21-T (Judgment of 16 November 1998);

The creation of the ICC, with jurisdiction over violations of the law committed during internal armed conflict should signal the end for ad hoc criminal tribunals. It is nevertheless difficult to see how problems concerning the apprehension of those believed to be responsible for violations would disappear. The enforcement of the laws of internal armed conflict at the international level is clearly not straightforward. Can domestic courts, therefore offer effective assistance?

Crimes against humanity are subject to universal jurisdiction¹⁸⁸ and with the acceptance that breaches of common Article 3 and the laws and customs of war entail international criminal responsibility, must also come the acceptance that these acts are equally subject to universal jurisdiction. The success of universal jurisdiction is dependent upon individual States enacting the relevant laws and taking the necessary steps to implement them. A lack of resources, evidence, and above all, political will has stood in the way.

Two other important factors have been highlighted in proceedings against the former Chilean dictator, Augusto Pinochet Ugarte, in the United Kingdom.¹⁸⁹ Although the situation in Chile never amounted to an armed conflict under common Article 3, the case was concerned mainly with torture, which is equally relevant to internal armed conflicts, both as a violation of the laws and customs of warfare and as a crime against humanity. First as outlined previously and confirmed by the Statute of the ICC,¹⁹⁰ the Pinochet case affirmed that there can be no question of sovereign immunity as regards the commission (or ordering) of torture, and therefore for the commission of other war crimes or crimes against humanity. Secondly and most importantly for our argument, the Pinochet Case is a reminder that, despite the importance of discussions relating to the customary law regulating internal armed conflict and criminal responsibility for its violation, individual

Prosecutor v. Tadić, Case IT-94-1-A (Appeal Judgment of 15 July 1999) 38 ILM 1518, 1999; *Prosecutor v. Jelisić*, Case IT-95-10 (Judgment of 14 December 1999); *Prosecutor v. Kupreškić et al.*, Case IT-95-16 (Judgment of 14 January 2000); *Prosecutor v. Blaskić*, Case IT-95-14 (Judgment of 3 March 2000); *Prosecutor v. Aleksovski*, Case IT-95-14/1 (Appeal Judgment of 24 March 2000), and *Prosecutor v. Furundžija*, Case IT-95-17/1-A (Appeal Judgment of 21 July 2000).

¹⁸⁸ Moir, L., *supra*, at note 15, at p.235.

¹⁸⁹ *R v. Bartle and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet and R v. Evans and Another and the Commissioner of Police for the Metropolis and Others, ex parte Pinochet*, 1999, 2 ALL ER 97.

¹⁹⁰ Art. VI of the Tokyo Tribunal Charter, art. 4 of Control Council Law No.10, and art. IV of the Genocide Convention.

criminal responsibility can also arise for offences under conventional international law.¹⁹¹

3.2.1.2 An individual complaints procedure for violations of International Humanitarian Law

The idea of a Humanitarian Law Committee was launched at the Hague Appeal for Peace and Justice for the 21st Century. Recommendation 13 of the Hague Appeal for Peace and Justice for the 21st Century states: “The Hague Appeal will advocate changes in the development and implementation of the laws in both these fields (IHL and human rights law), in order to close the critical gaps in protection and to harmonize these vital areas in international law”.¹⁹²

The lack of individual complaints procedures is one of the differences between IHL and human rights law. The success of individual complaints procedures in the human rights context raises the question whether supervision of compliance with IHL can be improved in a similar way.¹⁹³ Academics and researchers such as Zegveld¹⁹⁴ argue that a Humanitarian Law Committee competent to consider complaints submitted by individuals alleging violations of IHL is required. The mandate and procedures of this mechanism should be regulated in a Protocol additional to the 1949 Geneva Conventions. An individual complaints procedure under a human rights treaty such as, for example, the Optional Protocol to the International Covenant on Civil and Political Rights could serve as a model for such a Protocol. However, the procedure before a Humanitarian Law

¹⁹¹ Torture is specifically rendered criminal by the 1984 UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Each State party to the Convention must ensure that all acts of torture are offences under their own criminal law (Art. 4). Art. 5 requires States to take such measures as are necessary to establish jurisdiction over instances of torture where the offences are committed in territory under the State’s jurisdiction, where the alleged offender is a national of the State, or where the victim is a national of the State (if considered appropriate), and Art. 5(2) further provides that all States party shall take all necessary measures to establish jurisdiction where an individual accused of torture is present within the State’s jurisdiction, and where the State does not extradite him.

¹⁹² The Hague Agenda for Peace and Justice for the 21st century, www.haguepeace.org/appeals/english.html.

¹⁹³ This practice of human rights bodies encouraged Christopher Greenwood, in his Report on International Humanitarian Law presented on the occasion of the Commemoration of the 1899 Hague Peace Conference, to suggest that human rights instruments may remedy the lack of implementation mechanisms for humanitarian law, see Greenwood, C., *International Humanitarian Law*, in Kalshoven, F.(ed.), *The Centennial of the First International Peace Conference*, Kluwer Law International 2000, The Hague, pps.240-241, 251-252.

¹⁹⁴ Kleffner, J.; Zegveld, “Establishing an individual complaint procedure for violations of International Humanitarian Law”, *Yearbook of International Humanitarian Law 2000*, Vol.3, pp. 384-401, 2002.

Committee evidently needs to be adjusted to the special circumstances of an armed conflict.

A first issue to consider is the definition of IHL over which such supervisory organ would exercise its jurisdiction.¹⁹⁵ The protection of individuals during non-international armed conflicts, as codified in common Article 3 and Additional Protocol II, is rudimentary. This lack of regulation is in stark contrast to present realities, since contemporary conflicts are predominantly of a non-international character. In response, rules on international armed conflicts have been expanded over the years to apply as customary law in non-international armed conflicts as well. In order to take account of these developments it is vital that those norms shall also be within the competence of the Humanitarian Law Committee.

This brings us to the second question of considering the kind of violations the supervisory organ should be competent to deal with and whether it should be confined to serious violations. The Geneva Conventions and Additional Protocol I, for example, differentiate between “grave breaches” of the Geneva Conventions and other violations. Kleffner and Zegveld believe that the Humanitarian Law Committee should be competent to all kinds of violations of IHL.

Another question that must be answered when examining the establishment of a Humanitarian Law Committee is against whom a complaint could be brought. While human rights law is addressed first and foremost to states, IHL is addressed to the parties to the conflict, which may be in our case, non-state actors. Closely related to the question of definition of armed groups is the issue of attribution of acts and omissions to such groups. Holding a group accountable presupposes that an act of a human being is attributed to the group.¹⁹⁶ The International Law Commission has recognized that the

¹⁹⁵ *Ibidem*.

¹⁹⁶ Example of the UN Mission for El Salvador, ONUSAL. ONUSAL received complaints from individuals saying that they were threatened by FMLN that it would stop the coffee harvest if they did not pay the war tax. ONUSAL transmitted the complaints to the FMLN local command, which categorically denied responsibility. Significantly, FMLN contented that the threats were probably being made by ordinary criminals who were using the name of FMLN as a cover, Human Rights Division, Third Report of ONUSAL, A/46/876, S/23580, paras.147-149, 1992.

concept of attribution is indeed relevant to NSAGs.¹⁹⁷

It would seem that individuals should be able to file complaints with the Humanitarian Law Committee during and after a conflict. When an armed opposition group has become the new government or when it has formed a new State, it can be held responsible in that capacity for acts committed during the conflict.¹⁹⁸ However, when such a group has lost the conflict, and, in consequence, has totally ceased to exist as an entity, it will be difficult to hold it responsible for violations of IHL.

In sum, there is no doubt that NSAGs should fall within the competence of a Humanitarian Law Committee, and that this is feasible, however, the international responsibility of these groups under international law is still primitive and needs to be developed.

3.2.1.3 Involvement of non-State armed groups in the development of International Humanitarian Law

Non-international armed conflicts are by definition fought at least as much by armed groups as by governmental forces. If only the needs, difficulties and aspirations of the latter are taken into account by the law, it will be less realistic and effective. Moreover, independently of the realism of the rules, it is psychologically easier to have them accepted and respected by persons who were involved or represented in their development. It is always easier to obtain respect of a rule invoking the acceptance of that rule by the addressee than by arguing even the most sophisticated legal construction. Three steps can be initiated to involve NSAGs in the development of IHL.

A first step for creating a sense of ownership among NSAGs is to involve them into the development and reaffirmation of the law. Sassoli¹⁹⁹ is of the view that as far as customary IHL of non-international armed conflicts and customary human rights norms

¹⁹⁷ Art. 14 of the Draft Articles on State Responsibility refers to organs of an insurrectional movement, stating: “paragraph 1 is without prejudice to the attribution of the conduct of the organ of the insurrectional movement to that movement in any case in which such attribution may be made under international Law”.

¹⁹⁸ Art. 15, ILC Draft Articles on State Responsibility.

¹⁹⁹ Sassoli, M., “Possible legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights”, University of Quebec, Canada, Armed Groups Conference, 2003.

applicable to armed groups are concerned, this is already the case. Customary law is based on the behavior of the subjects of a rule, in the form of acts and omissions or (whether qualified as practice *lato sensu* or evidence for *opinion juris*) in the form of statement, mutual accusations and justifications for their own behaviour.²⁰⁰

Another option for States is to adopt in existing or in new international fora new legal standards in the fields of IHL and human rights to be respected by NSAGs, similarly to those adopted or suggested in UN and OECD for trans-national corporations.²⁰¹ When such rules for armed groups are elaborated, the views of those groups should be fully taken into account. It may be preferable to negotiate with individual armed groups specific codes of conduct they should adopt and which interpret and adapt existing IHL and human rights to their specific situation.²⁰²

A second step would consist of allowing and encouraging armed groups to commit themselves to the law. Common Article 3 encourages the parties to a conflict not of an international character “to bring into force, by means of special agreements, all or part of the other provisions” of the Conventions. Such agreements were in particular concluded, under the auspices of the ICRC, in the different conflicts in the former Yugoslavia.²⁰³ Under the auspices of the UN, similar less formal agreements, (sometimes referred to as codes of conduct), were concluded in Sudan, Congo and Sierra Leone.²⁰⁴ They have the particular advantage of clarifying the law for all parties to a conflict and of increasing the obligations compared to those that would anyway apply under the law of non-international armed conflicts.

Finally, NSAGs could be encouraged and assisted to give proper instructions to their

²⁰⁰ For more details on the rights and obligations conferred by IHL to non-State actors, see Guggenheim, P., *Traité de droit international public*, Vol.2, 1st ed., Genève, 1954, p.354.

²⁰¹ OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarification of October 2001, www.oecd.org/document.

²⁰² “Minimum Humanitarian Standards”, Analytical Report of the Secretary-General submitted pursuant to Commission of Human Rights Res. 1997/21, UN ESCOR, 54th Sess., UN Doc., E/CN.4/1998/87 (5 January 1998), paras.59-69.

²⁰³ Sassoli, M.; Bouvier, A., *How does Law Protect in War?* ICRC, Geneva, 1999, pps.1492, pp.1109-1118.

²⁰⁴ Commission on Human Rights, “Fundamental standards of Humanity”, Report of the Secretary-General submitted pursuant to Commission resolution 2000/69, UN ESCOR, UN.Doc. E/CN.4/2001/91 (12 January 2001) at paras.42-45.

members, and to establish internal monitoring systems to ensure that IHL is respected in the activities of the group.²⁰⁵ The Geneva Call requires each armed group signatory of a Deed of Commitment to establish self-regulating mechanisms (orders and directives, measures of information, dissemination and training, disciplinary sanctions in case of non-compliance, etc.) to ensure that its commanders and rank-and-file are aware and abide by the Deed of Commitment requirements.²⁰⁶

An additional, a more innovative, proposal would be to encourage and assist armed groups that have *de facto*, in particular territorial, control over persons who are not their members, to determine the rights and obligations of such persons by a sort of “legislation”. This could guarantee a minimum of rule of law, with all its inherent benefits, for such persons.

3.2.1.4 Promotion of respect of the law

The Geneva Call periodically requests armed groups that sign a Deed of Commitment to report on their compliance and on the measures taken to implement the deed.²⁰⁷ If NSAGs seriously report on their compliance, they may even be allowed to report on the compliance of their governmental or non-governmental opponents. Such reports might either be due periodically or on complaints by individuals or opposing groups affected by violations.²⁰⁸ The existence of a distinct body providing comments with regard to the IHL performance may facilitate confidential ICRC representations in the field to narrow the gap between such reports and comments, on the one hand, and the reality in the field, on the other hand. Such a distinct, independent, expert body receiving reports by armed groups and commenting thereupon might be established in the framework of the UN, by the periodical International Conferences of the Red Cross and the Red Crescent or by a periodical meeting of the High Contracting Parties to the Geneva Conventions,²⁰⁹ the first of which has been convened by Switzerland, the depositary of the Conventions, in

²⁰⁵ International Council on Human Rights Policy, “Ends and means: Human Rights approaches to armed groups”, 2000, pp.49-51, www.reliefweb.int/library/documents/2001/EndsandMeans.pdf.

²⁰⁶ Geneva Call online, www.genevacall.org/home.htm.

²⁰⁷ *Ibidem*.

²⁰⁸ Zegveld, L.; Kleffner, J., *op. cit.*

²⁰⁹ Sassoli, M., *supra*, at note 199.

1998.²¹⁰

3.2.2 Other means of securing compliance

3.2.2.1 Dissemination

If those who fight for armed groups are not properly instructed, i.e. not only by informing of and explaining the rules but also by making everyone understand that IHL applies also and precisely in the fight against the worst enemy, the often very detailed rules of IHL for different problems appearing in armed conflicts will never be respected.²¹¹ Steps can nevertheless be taken to ensure the implementation of IHL should armed conflict arise.²¹² There must be more likelihood of the relevant laws being observed if those involved in the conflict are aware in advance of their legal obligations.

Steps towards encouraging such a culture of compliance²¹³ will therefore involve the dissemination of that law as required by both Additional Protocol II and the Geneva Conventions of 1949. Each of the Geneva Conventions requires that: The High Contracting Parties undertake, in time of peace as in time of war, to disseminate the text of the present Convention as widely as possible in their respective countries, and, in particular, to include the study thereof in their programs of military and, if possible, civil instruction, so that the principles thereof may become known to the entire population.²¹⁴ This must include the provisions of common Article 3, so that a degree of knowledge of the laws governing internal armed conflict ought to be imparted to a State's entire population. Article 19 of Additional Protocol II additionally requires that the Protocol be "disseminated as widely as possible".

It is also important to translate the information on IHL into local and indigenous concepts for NSAGs that are fighting in countries where there is a low level of literacy.

²¹⁰ First Periodical Meeting on International Humanitarian Law, (1998), 366.

²¹¹ Sassoli, M., *supra*, at note 199.

²¹² Moir, L., *supra*, at note 15, at p.243.

²¹³ Greenwood, C. L., "International Humanitarian Law and the Laws of War", Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899, pursuant to UN GA Res.52/154 of 15 December 1997 and UN Doc.A/C.6/52/3, The Hague, 1999, para.163.

²¹⁴ Arts. 47, 48, 127, 144, 1949 Geneva Conventions.

Dissemination before the outbreak of an internal armed conflict is essential, as it will not only help to curb violations during the conflict, but will ideally create a spirit of humanitarianism that will serve to mitigate the tensions within a society before the outbreak of the armed conflict, hopefully making the outbreak less likely.

3.2.2.2 Facilitation of compliance by Other High Contracting Parties

When an armed conflict is in progress, the situation becomes much more dangerous as regards actions by third States to enforce IHL. Such steps could easily be construed as interference, leading to an escalation of hostilities. The exact content of the obligation to ensure respect in such cases is therefore vital and, not surprisingly, a matter of some debate. The International Court of Justice sought to clarify the issue in the *Nicaragua* Case, holding that the US, not being a party to the conflict between the Nicaraguan Government and the insurgent contras, was obliged to ensure respect for the Geneva Conventions (in this case, common Article 3) by the parties to the conflict, but, more specifically, by that party which it was supporting (i.e. the contras).²¹⁵

Beyond this, there are more active measures available to third States in seeking to ensure the application of IHL by parties to an internal armed conflict. The first and most obvious is to exert diplomatic pressure upon the party (or parties) violating IHL, either by lodging protests with ambassadors present in the third State, or through representatives in the area of conflict. Formal diplomatic channels are ordinarily available only with respect to government parties, but States with influence over insurgents are nevertheless likely to have channels of communication sufficient to bring pressure upon NSAGs.²¹⁶

Where diplomatic action fails to achieve the observance of IHL, States might opt to mobilize shame by publicly denouncing violations of the law by the party responsible.

There are, of course, limits to the action which may be taken by third States and it is impermissible to resort unilaterally to armed force in order to enforce IHL. This would not only be a clear intervention in the conflict, risking a transformation of its character and an

²¹⁵ *Nicaragua v. United States of America*, International Court of Justice, Judgment of 27 June 1986, para.220.

²¹⁶ Moir, L. *supra*, at note 15, at p.247.

escalation of hostilities, but it is strictly prohibited by article 2(4) of the UN Charter.

3.2.2.3 The Media

The media can be highly effective in reducing conflict in strife-ridden societies. International agencies and non-governmental organizations (NGOs) are increasingly convinced that an unbiased and diverse media ranks almost as high as emergency relief in countries facing or active in war. Reliable information such as where to get food, when it is safe to return, what common grounds exist among all sides, is an essential element of stabilizing a society. In countries moving towards democratic government, a free and accountable media, one that monitors rights, abuses and promotes divergent opinions helps deter a return to violence.

For instance, the media can help harmonize the implementation of peace building mechanisms in countries in transition by publishing the provisions of the peace agreement and generating more confidence in the operations to be conducted.²¹⁷ On the other hand, a biased or hate-mongering media can sabotage almost every other peace building effort and even lead to tragedies amounting to war crimes, genocide and crimes against humanity as in the case of Rwanda.

The media is also an important tool of dissemination for the ICRC. As a channel of information, it ensures that key decision-makers and opinion-leaders are informed about the activities of the ICRC. The media is also crucial in ensuring that international organizations are perceived as credible, independent and effective humanitarian organizations. Another strategy could be for the media to be a channel of denunciation through the use of tactics of naming and shaming in order to bring pressure upon groups to modify their behavior. Furthermore, the media can help raise awareness among decision-makers and opinion-leaders of the significance of IHL and can encourage their active support for its implementation.

²¹⁷ Price, M., Krug, P., *The Enabling Environment for Free and Independent Media*, Oxford University, 2000, pps.43, at p.3.

3.3 International Humanitarian Law and post-conflict mechanisms

The role of IHL in post-conflict situations has become an area of increasing focus. Three factors have contributed largely to these developments. The first has been the growing convergence of IHL and international human rights law, most obviously in the adoption, (virtually verbatim), of the fair trial provisions of the 1966 International Covenant on Civil and Political Rights in the two 1977 Protocols additional to the Geneva Conventions.²¹⁸

The second factor involves two interrelated developments. One is the emergence in recent years of a trend towards structured peace processes in relation to intractable violent conflicts. Examples include Northern Ireland, El Salvador, the former Yugoslavia, Palestine/Israel, South Africa, Burundi, and Sierra Leone. Since the balance of forces or the circumstances in these conflicts were such that no side was able to achieve a military victory and thus to impose its will on the other(s), the negotiating processes have had to attempt to reconcile the interests and concerns of all sides. This has frequently required that questions of past violations of human rights law and IHL be addressed.

The other, related development has been the process of structured transition from military to civilian rule in recent decades most obviously in Latin America (examples include Chile and Brazil). These processes have generated a discourse on “transitional justice”.²¹⁹

The third factor, which is directly related to the peace process issue, is the resurrection of the International Criminal Tribunal model, firstly through the creative use of Chapter VII of the UN Charter in the establishment of the ICTY,²²⁰ then by following this precedent with

²¹⁸ Vinuesa, R.E. “Interface, correspondence and convergence of human rights and international humanitarian law”, *Yearbook of International Humanitarian Law*, Vol. 1, 1998, p. 69; Dinstein, Y., *Human rights in armed conflict: International humanitarian law*, in Meron, T.(ed.), *Human Rights in International Law*, Oxford University Press, 1984, p. 345; Meron, T. “The humanization of humanitarian law”, *AJIL*, Vol. 94, 2000, pps. 239-278.

²¹⁹ Kritz, N.J. (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols., US Institute for Peace Press, 1995; Stotzky, I.P. (ed.), *Transition to Democracy in Latin America: the Role of the Judiciary*, Westview Press, 1993; Brysk. A., *The Politics of Human Rights in Argentina: Protest, Change and Democratization*, Stanford University Press, 1994, pps.291.

²²⁰ Murphy,S.D., “Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia”,

the ICTR,²²¹ and finally by the adoption of the treaty-based Rome Statute of ICC.²²²

Even in situations in which IHL is not employed in criminal trials in the post-conflict environment, it can still play an important role in the acknowledgement of truths about the conflict when drawn upon by reconciliation mechanisms. Humanitarian law offers a specific advantage in this regard in that its reach extends much more clearly to non-State actors than does international human rights law. And because reconciliation devices need not be tied to well-established laws, there exists the possibility that the codified standards being developed in the interface between human rights law and IHL can be drawn upon by these mechanisms in a way which might not be possible in criminal trials.

3.3.1 Using traditional tools of conflict resolution in the dissemination process: The cases of Uganda, Rwanda and Burundi

Sustaining respect for IHL and human rights regulations while healing the wrongs of the past is, indisputably, a profoundly complex and subjective process and needs to be recognized as such. Although there is much that needs to be done to support and enhance the process, traditional tools are mechanisms that are accepted by those who have suffered the most. It is therefore vital that we analyze the relevance of using different traditional tools for strengthening compliance with IHL or the dissemination of the latter by NSAG. Three countries, i.e. Uganda, Rwanda and Burundi will serve as case studies.

AJIL, Vol. 93, 1999, p. 57; Jones, J.R., *The Practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda*, 2nd ed., Transnational Publishers, 2000, pps.666.

²²¹ Morris, V.; Scharf, V.M.P., *The International Criminal Tribunal for Rwanda* (2 Vols.), Transnational Publishers, 1998.

²²² Arsanjani, M.H., "The Rome Statute of the International Criminal Court", *AJIL*, Vol. 93, 1999, pps. 22; McAuliffe de Guzman, M., "The road from Rome: The developing law of crimes against humanity", *Human Rights Quarterly*, Vol. 22, 2000, pps. 335; McGoldrick, D., "The permanent International Criminal Court: An end to the culture of impunity?", *Criminal Law Review*, 1999, pps. 627.

3.3.1.1 The case of Uganda

For hundreds of years, symbolic rituals have formed an integral part of the different ethnic groups in Uganda to address cycles of violence and revenge.²²³ All of them have relevance to the contemporary Ugandan situation. Among the various mechanisms, one in particular will be examined in the following section, i.e. the *Acholi* traditional approach to IHL through one of its mechanism, namely *Mato Oput*.

The *Acholi* traditional approach to International Humanitarian Law and the *Mato Oput* ceremony

Although abductions by the LRA have decreased dramatically in the past several months, over 25,000 children have been abducted within the past three years alone.²²⁴ Some reports estimate that the total number of children abducted by the LRA is 66,000 - far more than the 20,000-30,000 often cited by media reports.²²⁵ The ICC has issued arrest warrants for Joseph Kony and four other top commanders of the LRA (Raska Lukwiya, Vincent Otti, Okot Odhiambo and Dominic Ongwen) who are accused of committing war crimes and crimes against humanity in northern Uganda since July 2002.²²⁶

International human rights organisations have viewed the indictment as the right move to end impunity in the region.²²⁷ However, the influential *Acholi* traditional leaders have opposed the indictment of the four LRA top commanders, since they fear that this will prolong the war. This raises the question of the merits of seeking justice in a society where peace still does not exist. Should Uganda rely on methods of traditional justice, rather than international criminal trials? The *Acholi* traditional leaders have advocated traditional justice that is based on restorative principles. Pham *et.al.* have argued that, "the *Acholi* people should be allowed to respond to the legacy of past atrocities in their

²²³ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *op.cit.*, at p.130.

²²⁴ Uganda Conflict Action Network, "The Child Soldier Phenomenon in Northern Uganda", 2005, www.ugandacan.org.

²²⁵ *Ibidem*.

²²⁶ Tom, P., "The *Acholi* Traditional Approach to Justice and the War in Northern Uganda", 2006, www.beyondintractability.org.

²²⁷ *Ibidem*.

own way and employ means that resonate and accord with local traditions."²²⁸ Can the *Acholi* traditional justice deal with crimes that involve the violation of IHL?

Afako notes that, "*Acholi* traditions embody the principles and practices which have been central to the support for reconciliation and amnesty within that community."²²⁹ Forgiveness and reconciliation are said to be at the center of the traditional *Acholi* culture. Traditionally, the *Acholis* believe in the world of the "living-dead" and divine spirits. Their belief in this world plays a significant role in shaping how they see justice and reconciliation. The Liu Institute for Global Issues and the Gulu District NGO Forum point out that, "*Jok* (Gods or divine spirits) and ancestors guide the *Acholi* moral order, and when a wrong is committed, they send misfortune and illness (*cen*) until appropriate actions are taken by elders and the offender."²³⁰ As a result, the *Acholis* discourage an individual from being a troublemaker since the individual's actions can have grave consequences for his/her whole clan. This phenomenon of *cen* illustrates the centrality of relationships between the natural and the supernatural worlds in *Acholi*, the living and the dead, the normative continuity between an individual and the community.²³¹ The "living-dead" play an active role and have a lot of influence in the world of the living.

The traditional *Acholi* culture views justice as a means of restoring social relations. In other words, justice in the traditional *Acholi* culture should be considered as restorative. Paramount Chief *Rwot* David Onen Acana II pointed out that, "The wounds of war will be healed if the *Acholi* practice their traditional guiding principles."²³² He pointed out the following as the guiding principles: "Do not be a trouble maker," "Respect," "Sincerity," "Do not steal," "Reconciliation and harmony," "Forgiveness," "Problem solving through discussion," and "Children, women, and the disabled are not to be harmed in

²²⁸ Pham, P. *et al.*, "Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda", International Center for Transitional Justice and Human Rights Center, University of California Berkeley, 2005, www.reliefweb.int/library/documents/2005/hrc-uga-25jul.pdf.

²²⁹ Afako, B., "Reconciliation and Justice: 'Mato Oput' and the Amnesty Act", *Accord: An International Review of Peace Initiatives*, 2002, Issue 1.

²³⁰ Liu Institute for Global Issues and Gulu District NGO Forum, "*Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice*", September 2005, www.ligi.ubc.ca/admin/information/.

²³¹ *Ibidem*.

²³² Paramount Chief *Rwot* David Onen Acana II cited in USAID (2005) report on "Acholi Youths and Chiefs Addressing Practices of the Acholi Culture of Reconciliation", www.nupi.or.ug/pdf/Youth_Chiefconference.

war."²³³ Most of the principles emphasize the need to live in harmony with others and restoring social relations. This shows that traditionally, the *Acholi* are a peace-loving people. The *Acholi* traditional culture encourages individuals to accept their mistakes and take responsibility for their actions. It is important to note that an individual does this voluntarily. Individuals are encouraged to forgive and not to seek revenge. One of the mechanisms for forgiveness and reconciliation among the *Acholi* is the *Mato Oput* (drinking the bitter herb).

The name *Mato Oput* derives from a story in which two estranged brothers, fleeing from an approaching lion, hid in the same *Oput* tree.²³⁴ Forced to spend hours together, they began to talk again and eventually were reconciled. Associated with reconciliation, the *Oput* tree became a venue to which others in the community would return to address disagreements. Today, the ceremony involves a symbolic drinking of the *Oput* tree's bitter roots and is chiefly used when a crime has been committed against someone of another clan. A council of elders appoints a mediator or a reconciliation committee to negotiate with both clans.²³⁵ This process can be arduous and lengthy as it involves shuttling between communities. The aim is to produce agreement and usually some form of compensation as a prerequisite of the ceremony itself. At the appointed neutral venue, a goat and a ram are slaughtered side by side. The perpetrator and the victim kneel on the ground and first drink the bitter herbs from a calabash. The drinking of the bitter herb means that the two conflicting parties accept "the bitterness of the past and promise never to taste such bitterness again."²³⁶ The two slaughtered animals are then cooked and the clans eat together for the first time since the crime. The jaws of the animals are taken home by the opposing clan as a token of the reconciliation.

Can such a model work in the long run? How can IHL be enforced when thousands of civilians both *Acholi* and non-*Acholi* have been killed and maimed, and when it's most likely, given the nature and scale of the war, that the formerly abducted persons (FAPs)

²³³ *Ibidem*.

²³⁴ Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *supra*, at note 128, at p.130.

²³⁵ *Ibidem*.

²³⁶ IRIN, Uganda: "Traditional Ritual Heals Communities Torn Apart by War", June 9, 2005, <http://www.irinnews.org>.

do not know most of their victims? Can the *Acholi* traditional methods of reconciliation and forgiveness deal with actions that, according to Walzer, shock the conscience of humankind,²³⁷ especially since these actions are still being carried out?

One may reach the conclusion that the *Acholi* traditional approach to justice is inadequate in dealing with cases that involve the violation of IHL. On the other hand, the ICC is not helpful in restoring relationships. In this case, the traditional and western approaches to enforce the implementation of IHL and justice in general should not be viewed as being incompatible to each other, rather as complementing each other.

3.3.1.2 The case of Rwanda

The initiatives by the government to promote reconciliation are grounded in traditional practices. In addition there are a range of informal initiatives that have originated in local communities and are driven by individuals, cultural organizations, religious communities and related organizations. These include informal renditions of *Gacaca*-type courts, *Ingandos* that draw released prisoners and returning rebel soldiers and refugees back into the community, the *Abakangurambaga* who dedicate themselves to giving back to their communities, and the community celebration known as *ubusabane*. This section will focus on the *Gacaca courts* and the traditional group of *Abakangurambaga*.

The *Gacaca* Courts and *Abakangurambaga*

The *gacaca* is a traditional community-based mechanism of dispute resolution and a literal translation into English is “lawn” or “yard”, referring to the fact that parties to a dispute as well as members of the *gacaca* sit on the grass whilst determining the dispute.²³⁸ Historically, it was a non-state or informal system used by indigenous Rwandan families and communities for dispute resolution. Created on an ad hoc basis, it remained an unwritten law and proceedings varied depending on the circumstances of

²³⁷ Walzer, M. ,*Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 3rd.ed.,New York, Basic Books, 2000; Walzer, M. , *Arguing About War*, New Haven, Yale University Press, 2004.

²³⁸ Nantulya, P., “Panafricanist’s view of Gacaca”, *The New Times*, No.769, Rwanda, Kigali, 14-15 November. 2005.

the dispute.²³⁹

Generally, the types of conflict dealt with by the *gacaca* were related to issues that struck at the core of social cohesion, tolerance and peaceful co-existence in Rwanda's densely populated rural communes. Disputes over property rights, livestock, marriage, succession, attacks on personal dignity and physical integrity, etc. were most often brought before the elders for mediation. *Gacaca* courts were not made obsolete by colonisation or independence; they remained active in regulating the lives of Rwandans and maintaining social harmony and justice in communities. Legal pluralism allowed *gacaca* to flourish generally unhindered and it remained active throughout the 1990s, increasingly under minimum commune administration.²⁴⁰

The "new" *gacaca* is not an attempt by the government of Rwanda to duplicate the traditional *gacaca*. It is a unique process with similarities to the traditional mechanism but also incorporating a contemporary legislative framework derived from Rwanda's Penal Code, as well as international conventions to which Rwanda is a party, such as the Geneva Conventions and the Genocide Convention.²⁴¹ The Transitional National Assembly of Rwanda formally adopted proposals for the introduction of modern *Gacaca* Tribunals on 12 October 2000. Rwanda's Constitutional Court declared the Draft *Gacaca* Law constitutional on 18 January 2001.²⁴² An amended *Gacaca* Law was enacted in June 2004 and where differences exist, the current Law will prevail.²⁴³

The *Gacaca* Law provides for the establishment of 11,000 *Gacaca* Tribunals throughout the country, from Rwanda's lowest political and administrative level of the cell, to that of the sector. Each *gacaca* jurisdiction includes a general assembly, a seat (judges), and a coordinating committee. The general assembly of a cell is made up of all the cell's

²³⁹ *Ibidem*.

²⁴⁰ Mibenge, C., "Enforcing International Humanitarian Law at the National Level: The *Gacaca* Jurisdictions of Rwanda", Netherlands Institute for Human Rights Research, 2005.

²⁴¹ Organic Law No.16/2004 of 19/6/2004 establishing the Organization, Competence and Functioning of *Gacaca* courts charged with prosecuting and trying the perpetrators of the Crime of Genocide and Other Crimes against Humanity, committed between October 1, 1990 and December 31, 1994

²⁴² Art. 13.

²⁴³ Organic Law No.16/2004 of 19/6/2004.

residents over the age of 18. This community elects from its members 9 “honest persons” constituting the seat and 5 deputies.²⁴⁴

The Rwandan law requires that all category one offenders, namely genocide planners, organizers, supervisors and those who oversaw the genocide or used their authority to incite genocidal crimes, as well as notorious killers and individuals who committed acts of sexual torture or rape, be tried by the established court system and/or through the ICTR.²⁴⁵

It is apparent to even the most casual observer that the *gacaca* process conflicts in part with international fair trial standards. The right of all accused persons to be represented by a counsel and the right to a competent, independent and impartial tribunal immediately jump to mind. *Gacaca* does not provide for any form of legal representation, for neither the victims nor the perpetrators. The government has argued that this is by default the best form of equality of arms: Rwanda’s legal profession was decimated by the genocide and despite some recovery; it would be an impossible feat to provide all victims and perpetrators with legal representation. Advocates of restorative justice also suggest that the presence of legal counsels or active prosecutors in the *gacaca* process would “steal” the conflict and the responsibility for its resolution from the fractured community, and thereby retard reconciliation.²⁴⁶ Accessibility is a crucial component to the fundamental right to a remedy. *Gacaca* is giving Rwandans the opportunity to access justice. The courts are brought to the people, judges are known to and elected by them, and the accused is brought home to defend himself. In this way, we are seeing accessibility to justice that the ordinary criminal courts and the ICTR based in Arusha cannot really afford. In line with international fair trial standards, *gacaca* also promises to establish individual criminal responsibility without undue delay, again, its capacity to carry out expedient trials and determining issues far exceeds that of the ICTR and domestic

²⁴⁴ Art. 14 provides that a judge must meet the following requirements “(1) not have participated in genocide; (2) be free from sectarianism; (3) not to have been sentenced by a trial to a penalty of at least 6 months’ imprisonment;(4) to be of high morals and conduct; (5) to be truthful; (6) to be honest; (7) to be characterized by a spirit of speech sharing. Any person who meets these conditions and who has at least 21 years can be elected as a member of a *gacaca* tribunal without any discrimination of sex, origin, religion, opinion or social position.”

²⁴⁵ Art.51.

²⁴⁶ Mibenge, C., op.cit, *supra*, at note 240.

courts.²⁴⁷

Another interesting feature of the post-conflict strategies in Rwanda is the revival of the *Abakangurambaga* by the National Unity and Reconciliation Commission (NURC).²⁴⁸ They are “peace volunteers” who intercede in disputes and mobilize communities to address problems. The NURC has been actively involved in the repatriation of rebels from the neighboring countries. The Commission also facilitated the reintegration of ex combatants in their former communities. The *Abakangurambaga* have been involved in these various activities. It would be innovative to explore ways to train *Abakangurambaga* on IHL principles as they are preeminent actors in community activities. This could take the form of formal trainings of *Abakangurambaga* on IHL by the ICRC office in Rwanda.

3.3.1.3 The case of Burundi

Following the example of the 1990 Turku Declaration,²⁴⁹ the ICRC initiated and facilitated in 1994 the adoption of a Code of Conduct for belligerents and adapted to the war conditions of Burundi.²⁵⁰ The Code contained a set of basic rules of humanitarian behaviour and aimed at providing a better protection for civilians and decreasing the extent and intensity of the violence. The rules in the Declaration are formulated so as to

²⁴⁷ For more information on the historical context as well as a descriptive account of the 1994 genocide see ICTR, Judgment and sentence, *Prosecutor v. Akayesu*, Case No. 96-4-T, T.Ch.I, 2 September 1998, Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for Rwanda 1994-1999, Vol. 2, Antwerp: Intersentia, 2001, Commentaries-II-47-67.; Resolution 955 (1994) Adopted by the Security Council at its 3453rd meeting, on 8 November 1994.

²⁴⁸ By toughening the identity-based perceptions, the 1994 genocide has made Unity and Reconciliation for Rwandans as stated in Arusha Peace Agreements of 1993 (art.88) a complex and complicated matter. That situation has made it urgent and imperative to create such a commission so as to reunify a society which has been torn apart. In this context, a law to establish a non-judicial Commission for Unity and Reconciliation was adopted by the parliament in March 1999. See also Shyaka, A., *The Rwandan Conflict: Origin, Development, Exit Strategies*, study commissioned by the National Unity and Reconciliation Commission, 2005, pps.61, at p.50.

²⁴⁹ “Declaration of Minimum Humanitarian Standards”, reprinted in Report of the Sub-Commission on Prevention of Discrimination and Protection of Minorities on its Forty-sixth Session, Commission on Human Rights, 51st Sess., Provisional Agenda Item 19, at 4, U.N. Doc. E/CN.4/1995/116 (1995) Declaration of Turku, December 1990.

²⁵⁰ “Reflections on a dissemination operation in Burundi, Declaration for standards of humanitarian conduct: Appeal for a minimum of humanity in a situation of internal violence”, *International Review of the Red Cross*, 1997, www.icrc.org.

highlight the humanitarian principles which have the most often been violated in the Burundian context. These principles, contained both in IHL and the Burundian traditions are : respect for human life and dignity, special protection for certain categories of victims; respect for private and public property, and rejection of more violent means than the situation demands. The text is illustrated by 16 Burundian proverbs, selected to create a feeling of recognition and facilitate understanding of the rules.

Proverbs and the institution of Ubushingantahe

a) Translation of International Humanitarian Law into Burundian proverbs

Preceded by an introduction and followed by a conclusion, the rules are organized as follow:

Minimum Rules of Humanitarian Behaviour:

- 
- I. Let us Respect and Protect Individuals and their Dignity
 - II. Let us give Special Protection to Special Categories of Victims
 - III. Let us Respect Private and Public Property
 - IV. Let us Use Force Only with Moderation

Section I is illustrated by the proverb *“Death takes others, but will not forget you”* and *“Take revenge on your fellows, and you will destroy the entire family”*, two proverbs spelling out the consequences of dishonorable behaviour. This section contains rules such as:

“Let us treat every person with humanity and respect his or her dignity in all circumstances”;

“Let us not be vengeful, let justice takes its course. A spiral of violence would gradually destroy the whole family, clan and community”;

“Torture and cruel, humiliating, or inhumane treatment can in no circumstances be honorable: Let us never use them against our fellow, even if he is our enemy” and;

“Let us never have recourse to brutal acts such as rape, mutilation before or after death, or killing by

throwing people into latrines or burning them alive. Such manifestations of blind hatred leave indelible mental scars”.

Section I reflects the spirit of common Article 3, as well as makes direct references to atrocities committed in Burundi.

The second section, likewise drawing on the spirit of the same Article, declares that civilians, foreign nationals, refugees, women, children, the elderly, the disabled, the sick, the prisoners, and medical personnel must be protected at all time. The text refers to these groups as defenseless, a direct reference to Burundian tradition in which it is considered cowardly to attack defenseless persons. Women, children, and the elderly must on no account be killed in the fighting. Killing women was paramount to an attack on life itself.

The third section relates to the humanitarian principles of a) refraining from destroying people’s means of livelihood and b) safeguarding places of religious and cultural value.

The protection of religious and cultural heritage is spelled out in the Hague Regulations, the Geneva Conventions and its Additional Protocols. Similarly in Burundi tradition, there is a considerable number of sacred places, always the object of great respect and likewise safeguarded in times of war. Three of the rules in this section read:

“Let us not engage in vandalism and looting; let us not destroy the facilities indispensable to any community, in particular hospitals, health centres, schools, water sources, roads, bridges, etc.”;

“Let us respect holy places, places of worship, cemeteries and monuments, which are all essential to our collective consciousness” and;

“Even in the midst of the violence, let us respect the houses and goods of others. People’s privacy must be preserved: Let us refrain from ransacking their homes and from throwing their mats, bowls, clothes and other personal belongings out into the street”.

The fourth section draws on Article 3 and the Ban on Arms Which Cause Unnecessary Suffering contained in the Hague Regulations.²⁵¹ It also draws on the similar objective

²⁵¹ States have an obligation to review the legality of the weapons they intend to use. This principle, as it applies to new

found in the Burundian restrictions on the use of poisoned spear heads in conflict with tribes of the same branch, and on the use of ambush as a means of warfare in certain contexts. The section is illustrated by the proverb *“Do not call for lightning to strike down your enemies, for it may also strike down your friends”* a warning which used to be issued by Burundian elders to stave off revenge actions. The first rule, “before resorting to violence, or to any act that may lead to violence, let us first consult with our conscious, our families and wise men”, appeals to reason. This rule is accompanied by the proverb *“a naïve and sterile cow licks the blade of the axe”*, an insult to those who do not pay attention to the previous advice.

Finally, a key paragraph in the conclusion should be mentioned. It reads as follow: *“Let us remember that each person is individually responsible for his acts, even those committed as part of a group or encouraged by someone else”*. Together with the two proverbs *“Let the blade of knife cut the one who sharpened it”* and *“Those who urge you to destroy will never help you to rebuild”*, they constitute a direct support, albeit a rather theoretical one, for those who wish to resist incitement.

Burundians having an ancient tradition of starting and finishing their sentences with proverbs, this tactic was very successful in attracting the attention of various groups within the society.

Although ICRC chose a variety of channels to disseminate the final Code of Conduct, they did not focus particularly on using a traditional mechanism of conflict resolution, the institution of *Ubushingantahe*.

weapons, is enshrined in Art. 36 of Protocol I additional to the Geneva Conventions of 1949. One reason that a weapon might be deemed illegal is that it causes “superfluous injury or unnecessary suffering”. Since the 1868 Declaration of St. Petersburg the principle that the only legitimate purpose of war is to weaken the military forces of an opponent has been an accepted fundamental principle of IHL. It was established that this purpose would be served by disabling enemy combatants and that it would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable. This principle has been reaffirmed in various international instruments in the form of a prohibition on the use of “weapons, projectiles and material and methods of war of a nature to cause superfluous injury or unnecessary suffering” (In the words of Art. 35, para. 2, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I). See also the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980).

b) *Ubushingantahe* as a channel for dissemination of International Humanitarian Law

The institution of *Ubushingantahe* is composed by *abashingantahe*. *Abashingantahe* are people, customarily men, chosen from within communities to mediate disputes in a consultative manner.²⁵² The word itself comes from *gushinga* which means “to plant” and *intahe* which means a “figus stick”. The stick represents justice, truth and equity, thus the *mushingantahe* (the one who plants the stick) is the one who works for and represent those qualities in the community.²⁵³

Traditionally established to resolve property disputes, the role of the *bashingantahe* is today much broader, involving conciliation and occasionally judgment in individuals, family, and community disputes, authenticating contracts (pertaining to marriage, succession and sales of goods, for example), overseeing the maintenance of justice, providing guidance to politicians, and safeguarding respect for human rights and the common good.²⁵⁴

It would be useful to use *abashingantahe* as mediators between IHL practitioners (such as the ICRC), local organisations and the armed groups as these leaders might represent the community based-authority in rural areas. This entails to train and interact with communities around traditional principles that might be similar and compatible with the Geneva Conventions.²⁵⁵

A project such as the dissemination campaign in Burundi is inevitably a long-term venture, all the more if it is not designed to be imposed from outside but to attract support from within. This means taking into account the complexity of the local situation; elements such as the extreme fragmentation of the military, political and social hierarchy, the juxtaposition of traditional patterns of thought with western ideas, and an explosive mix of political, social, economic and other problems. The line followed would be essentially to

²⁵² Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *supra*, at note 128, at p.25.

²⁵³ Ntabona, A., “*Profondeurs et Limites du Concept d’Ubumwe/Unité, au Burundi et leurs implications sur les “rapports”cultures et développement*”, au Coeur de l’Afrique”, T.XXV, No3, 1985, pp.125-164.

²⁵⁴ *Ibidem*.

²⁵⁵ Kaneza, C., “Sending the word of International Humanitarian Law”, Rainfire: Women in Leadership, Desmond Tutu Peace Centre, 2005, at p.65.

initiate a dialogue around a minimum shared humanitarian standard, on the one hand among Burundians themselves, and on the other between Burundians and international organisations such as the ICRC.

3.4 Summary

This third chapter highlights the importance of identifying and understanding the different factors affecting the behaviors of NSAGs so as to define the parameters of engagement.

This is crucial for local actors and legal practitioners who are confronted by the challenge of understanding how to draw effective support from the NSAGs on the issue of respecting IHL provisions. A spectrum of instruments was reviewed ranging from legal enforcement tools, legal and social incentives to other means of promoting compliance such as the media.

A discussion on the impact that IHL can have in a post-conflict setting was provided with the view to subsequently analyze the various interconnections between IHL and traditional reconciliation tools. Finally, a discussion was also provided on the relevance of integrating traditional and cultural tools in the dissemination process of IHL in Uganda, Rwanda and Burundi. The next and final chapter summarizes the issues above discussed with the view to highlight the main challenges and formulate concurrent strategies. A conclusion will close our arguments.

Chapter 4: Challenges, Recommendations and Conclusion

“We must keep working with determination on the tough issues on which progress is urgent but has not yet been achieved. Because one thing has emerged clearly from this process, whatever our differences, in our independent world, we stand or fall together.”²⁵⁶

4.1 Challenges and Recommendations

This mini-thesis has presented a range of possibilities for improving and ensuring compliance in non-international armed conflict by NSAGs, with a particular emphasis on Uganda, Rwanda and Burundi. The analysis was conducted by first presenting the international legal and political framework surrounding intra-state conflict and NSAGs.²⁵⁷ The system was studied with the view to assess the extent to which the international framework facilitate interactions with NSAGs and promote conflict resolution in situations of internal violence.

There is a positive trend: the number of internal armed conflicts has decreased drastically during the last decade; the establishment of the ICC can potentially put an end to impunity for the worst violations against human dignity and there appears to be a movement within the UN in the direction of increased involvement in internal conflict situations.²⁵⁸ However, there also worrying challenges: the war on terror has created a situation where security concerns and confrontation take the lead at the cost of political dialogue, negotiation and compromise, which has furthered the sensitive nature of intra-state conflicts.²⁵⁹

From a legal as well as practical perspective, one can summarize by identifying five main problem areas or challenges in dealing with NSAGs, namely 1) the need for a generally accepted definition of armed groups, 2) the need for flexibility of the international systems

²⁵⁶ Kofi Annan, UN Secretary General, Address to the 2005 World Summit, New York, September 2005, www.ands.gov.af/src/src/summit05/Kofi_Annan_eng.pdf.

²⁵⁷ See Chap. I, para 1.1.

²⁵⁸ See Chap.I, para.1.1.5.3.

²⁵⁹ See Chap.I, paras. 1.1.2 and 1.2.1.1; Chap.II, paras. 2.1.4 and 2.2.3.

in situations of intra-state conflicts regarding the legal status of the parties to such conflict, 3) the need for innovative legal and non-legal tactics and strategies to promote compliance with IHL by NSAGs, 4) the need to reaffirm the development of IHL provisions related to internal conflicts and, 5) the need to strengthen the cooperation between international humanitarian organisations such as the ICRC and local actors especially in Africa.

The first conclusion to draw from our discussions is the need on one hand to revisit the classical definition of NSAGs in order to address the current evolving nature of their activities. This can be done through the analysis of the various factors influencing their behaviors. Secondly, much focus in this thesis has been on the issue of the status and potential international legal personality of NSAGs. It was shown that a group fulfilling the requirements for application of IHL, thereby is afforded the international personality for the purposes of applying these rules and entering into agreements with other subjects of IHL relating to the ending or regulation of hostilities.²⁶⁰ To conclude other international agreements or assume other roles under international law special recognition must be given by States or international organisations on an ad hoc basis.²⁶¹

Thirdly, it was argued that better accountability by armed opposition groups for IHL might be achieved by granting them an opportunity to express their consent to be bound by the rules, increasing their sense of responsibility concerning compliance.²⁶² This addresses the legal obstacle of impossibility of ratification by NSAGs. Express consent might be accomplished through special agreements between the States and non-State actors, which would provide added incentive to comply, based on mutual consent of the parties, making clear the equal and reciprocal IHL obligations on both the State and NSAGs. A unilateral declaration by the armed group of their commitment to comply with IHL might also be pursued, especially where the State is unwilling to enter into a special agreement.

²⁶⁰ See Chap. I, paras. 1.2.1.1 and 1.2.1.2.

²⁶¹ *Ibidem*.

²⁶² See Chap. III, para. 3.2.1.3.

It was also suggested that armed opposition groups might be encouraged to include reference to IHL in an internal code of conduct or disciplinary code.²⁶³ Any of these means of express consent would provide evidence of willingness to comply, increase the armed group's sense of responsibility concerning compliance, and assist with efforts by the armed group to disseminate their commitments and obligations to the members. One option could be the adaptation of the code of conduct to the traditional and customary context of the country at war.²⁶⁴ An illustrative example was provided through the case study of Burundi.²⁶⁵ In situations where the application of IHL has utterly failed, it might be necessary to combine traditional concepts of conflict resolution with international provisions in order to reconcile war torn communities. Rwanda is a good example of this type of initiative.²⁶⁶

The problem of threshold of applicability of provisions of IHL to non-international armed conflict might be addressed through an identification or reiteration of the fundamental legal standards of humanity that should be observed in all circumstances.²⁶⁷ The norms identified in this document would be existing fundamental considerations already binding in all situations- peacetime, internal disturbances and tensions, or in non-international or international armed conflicts. Such a document would not be intended to undermine or replace the more detailed provisions that already exist in IHL, but would provide guidance in situations of violence where the qualification of the conflict is unclear or where the State refuses to acknowledge that a situation of violence has risen to the level of non-international armed conflict.²⁶⁸

In terms of incentives to adhere to IHL, it might be important to consider the possibility of a grant of immunity from prosecution for participation in the armed conflict.²⁶⁹ This might

²⁶³ See Chap. III, paras. 3.2.1.3 and 3.2.1.4.

²⁶⁴ *Ibidem*.

²⁶⁵ See Chap. III, para. 3.3.1.3, a).

²⁶⁶ See Chap. III, para. 3.3.12.

²⁶⁷ See Chap. III, para. 3.2.1.4.

²⁶⁸ Meron, T., "Internal Strife: Applicable Norms and a proposed instrument" pp.250-251, in Dellisen, A.J.M; Tanja, G.J. (eds.), *Humanitarian Law of Armed Conflict, Challenges Ahead*, TMC Asser Institute, Martinus Nijhoff Publishers, 1991, pps.667.

²⁶⁹ See Chap. II, para. 2.1.5.

be achieved through the granting of some "combatant-like" status or amnesty for members of armed groups, removing the threat of domestic prosecution for acts of mere participation in hostilities. Alternatively, domestic courts may be encouraged to consider a reduction of punishment in cases of compliance with IHL where, during a domestic trial of members of armed groups for taking part in hostilities, the level of respect for IHL will be taken into consideration when deciding upon punishment or sentences. Sometimes one would have to consider the combination of an amnesty with some kind of legal process depending on the political, economic and social factors. The case of Uganda was also discussed as an illustration of the complexity between justice and reconciliation.²⁷⁰

In addition to these legal incentives, strategic incentives or arguments might also be used to convince armed opposition groups of the benefits and protections of adherence to IHL. Such incentives might include advising that compliance may lead to enhancing group legitimacy as a political actor or increasing for instance probabilities of dialogue with the State. NSAGs can also be reminded that one day the conflict will end, and that regardless of whether they take the role of legitimate governing authority or not, they may be held accountable for the crimes they committed during the conflict. Through the suggestion of strategic incentives and arguments, the specific objectives and motivations of the armed group may be taken into account.²⁷¹ The use of the media for purposes of dissemination and dialogue was also highlighted.

Given the absence of international fora for consideration of non-State actor compliance with IHL, a supervisory or monitoring mechanism was suggested.²⁷² Such a mechanism might be considered for use only in situations of non-international armed conflict or might be created for ensuring compliance with IHL in all situations of armed conflict. It might include functions such as reporting by NSAGs (and State actors) on compliance, an individual complaints mechanism, an investigative body and, for non-international armed conflict, the collection and supervision of special agreements of unilateral declarations.

²⁷⁰ See Chap. III, para. 3.3.1.1.

²⁷¹ *Ibidem*.

²⁷² See Chap.III, para. 3.2.1.4 a), b), c) and d).

Fourthly, the ICRC's study on *Customary International Humanitarian Law applicable in Armed Conflicts*²⁷³ highlights important developments regarding the role played by NSAGs. The study identifies 161 rules of customary IHL that strengthen the legal protection for victims of armed conflicts.²⁷⁴ The study shows that 25 years after their adoption, the essential rules of the Additional Protocols have become part of customary international law and bind all States and all parties to all conflicts. It shows, for example that the duty to respect and protect medical and religious personnel and objects as well as impartial humanitarian relief personnel and objects used for humanitarian relief operations are rules of customary international law binding in all types of armed conflicts. This will have the beneficial effect of facilitating knowledge of and clarifying the rules applicable in non-international armed conflicts.

Finally, the integration of IHL principles into AU resolutions has given them an African stamp and ownership, which facilitate understanding and acceptance and therefore should help to enhance implementation of the law.²⁷⁵ However, it is important that partnership be expanded from the current core of bilateral and delegated projects to a wider framework. This could take the form of incorporating various groups for training and dissemination such as *Abashingantahe* in Burundi and *Abakangurambaga* in Rwanda.²⁷⁶

These and other proposals are being actively discussed in various fora. It is hoped that these efforts will secure a greater protections for those vulnerable to the ravages of non-international armed conflicts in future.

²⁷³ "International Humanitarian Law and the Challenges of Contemporary Armed Conflicts", 28th International Conference of the Red Cross and Red Crescent, Geneva, December 2003.

²⁷⁴ Henckaerts, J.M; Doswald-Beck, L., *Customary International Humanitarian Law*, Cambridge University Press, 3 vol., 2005.

²⁷⁵ See Chap. II, para. 2.2.4.

²⁷⁶ See Chap.III, paras. 3.3.1.2 and 3.3.1.3.

4.2 Conclusion

IHL should certainly remain the core legal framework of any mechanism of humanitarian protection; it has a high level of acceptability and it imposes significant responsibilities on combatants. However, this legal framework of protection strategies can no longer be limited to IHL conventions and should include provisions from refugee and human rights law to address the needs of vulnerable groups. The role of non-state armed groups should be carefully reviewed and efforts should be devoted to promote increased levels of their participation and their accountability to international standards.

Unless the International Community is willing and able to intervene militarily to protect civilians in conflict situations such as Burundi, DRC or Sudan, any effective and sustainable protection is likely to start and end at the local level. Humanitarian protection strategies would gain in effectiveness through integration into overall efforts to prevent conflict and rebuild peace at the local and regional levels.

Ultimately, the effectiveness of future compliance mechanisms relies on our ability to adapt the normative basis for protection to the changing reality of conflicts, and to generate the political will to undertake committed actions. Current international conventions are the product of an age of innocence regarding the role and capabilities of states in the protection of civilians. This age has been brought to a sharp end by the genocide in Rwanda, the ethnic cleansing in the former Yugoslavia, and other large-scale tragedies of the 1990s. Effective protection strategies can no longer rely solely on the will and capacity of distant and disinterested States to ensure the immediate protection of civilians.

On the contrary, every step of these strategies should aim at strengthening the role of NSAGs, in collaboration with local communities, national institutions and regional organisations committed to the peaceful resolution of each crisis. In this context, the proximity and vitality of cultural and traditional mechanisms and concepts of conflict resolution is likely to remain a factor of central importance for the enabling of effective and relevant protection strategies. There are devices to enable these strategies to be

implemented. Whether they are used is a question of good faith, which ultimately is a question to be considered by the men and women who comprise the government of the international community of States.



BIBLIOGRAPHY

Books

Abi-Saab, R., *Droit humanitaire et conflits internes: origines et évolution de la réglementation internationale*, Martinus Nijhof Publishers, 1986.

Amaza, O.O, *Museveni's Long March, from Guerilla to Statesman*, Fountain Publishers, 1998.

Amien W.; Farlam P., *Basic Human Rights Documents for South Africans*, Law, Race and Gender Research Unit no.5, University of Cape Town, 1998.

Bentley, K.A.; Southall, R., *An African Peace Process, Mandela, South Africa and Burundi*, Human Science Research Council Cape Town, 2005.

Berridge, G., R., *Diplomacy*, Palgrave MacMillan, UK, 2002.

Bertrand, J., *Nationalism and Ethnic Conflict in Indonesia*, Cambridge University Press, 2003.

Birabuza, A., *Le mal burundais ou l'involution historique d'une vieille nation*, éditions de la Renaissance, 1999.

Bouvier A.; Sassoli M., *How Does Law Protect in War?*, Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law, ICRC Publications, Geneva, 1999.

Brownlie, I., *Principles of Public International Law*, 4th ed., Oxford, 1990.

Brysk A., *The Politics of Human Rights in Argentina: Protest, Change and Democratization*, Stanford University Press, 1994.

Bugnion, F., *Le Comité International de la Croix-Rouge et la protection des victimes de la guerre*, 2nd.ed., Genève, CICR, 2000.

Cassese A., *Human Rights in a Changing World*, London, 1999.

Cassese,A., *International Law in a Divided World*, Clarendon Press, Oxford, 1986.

Clapham, A., *Human Rights in the private sphere*, Oxford, Clarendon Press, 1993.

Cortright, D.; Lopez, A., *Introduction: Assessing Smart Sanctions: Lessons from the 1990s*, in Cortright, D. and Lopez, A., *Smart Sanctions: Targeting Economic Statecraft*, Lenham, 2002.

- Dallaire, R., *Shake Hands with the Devil*, Carroll and Graf Publishers, New York, 2004.
- Dinstein, Y., *Human rights in armed conflict: International humanitarian law*, in Meron, T.(ed.), *Human Rights in International Law*, Oxford University Press, 1984.
- Ewumbue-Monono, C., *Promoting Humanitarian public diplomacy in Africa*, Center for Research on Democracy and Development in Africa (CEREDDA) Publishers, Buea (Cameroun), 2003.
- Frowein, Krich, in Simma, B.et al eds. *The Charter of the United Nations: A Commentary*, Vol.I, 2nd ed., Oxford, 2002.
- Guggenheim, P., *Traité de droit international public*, vol.2, 1st ed., Genève, 1954.
- Hanski R.; Suksi M., *An Introduction to the International Protection of Human Rights*, A textbook, Institute for Human Rights Abo Akademi University, 1997.
- Jha, U.S; Yadav, N.S., *Rwanda: Towards Reconciliation, Good Governance and Development*, Association of Indian Africanist, New Delhi, India, 2003.
- Higgins R., *Problems and Process: International Law and How to use it?*, Oxford, Clarendon Press, 1994.
- Jones, J.R., *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda*, 2nd ed., Transnational Publishers, 2000.
- Kolodziej, E.A., *The Great Powers and Genocide: Lessons from Rwanda*, Vol.12, No.2, Taylor & Francis Group, 2000.
- Kritz, N.J. (ed.), *Transitional Justice: How Emerging Democracies Reckon with Former Regimes*, 3 Vols., US Institute for Peace Press, 1995.
- Kwakwa, E., *The International Law of Armed Conflict: Personal and Material Fields of Application*, Dordrecht, 1992.
- Lauterpacht , H., *International Law and Human Rights*, London 1950.
- Lemarchand, R., *Burundi: Ethnic Conflict and Genocide*, Cambridge University Press, 1995.
- Mahoney, K.P., *Human Rights in the 21st Century: A Global Challenge*, Kluwer, 1993.
- Malanczuk, P., *Akehurst's Modern Introduction to International Law*, Routledge, UK, 1997.
- McCoubrey, H., *International Humanitarian Law*, Aldershot, 1990.

- Moir, L., *The Law of Internal Armed Conflict*, Cambridge University Press, UK, 2002.
- Morris, V.; Scharf, V.M.P., *The International Criminal Tribunal for Rwanda*, 2 Vols., Transnational Publishers, 1998.
- Mullerson, R., *International Law, Rights and Politics: Developments in Eastern Europe and the CIS*, Routledge, UK, 1994.
- Museveni, Y.K., *Sowing the Mustard Seed*, Macmillan Education, Oxford, 1997.
- Osiel, M., *Mass Atrocity, Collective Memory and the Law*, Transaction Publishers, London, 1997.
- Pictet, J. S., *Commentary on the Geneva Conventions of the 12 August 1949*, Vol. II, Commentary I, Geneva, 1960.
- Price, M.; Krug, P., *The Enabling Environment for Free and Independent Media*, Oxford University, 2000.
- Rosenne, S., *Human Rights: A compilation of International Instruments*, Vol.I, Universal Instruments, Leiden, 2004.
- Roth, B.R., *Governmental Illegitimacy in International Law*, Oxford, 1999.
- Shelton D., *Remedies in International Human Rights Law*, Oxford University Press, 1999.
- Stotzky, I.P. (ed.), *Transition to Democracy in Latin America: the Role of the Judiciary*, Westview Press, 1993.
- Suter, K., *An International Law of Guerilla Warfare*, London, 1984.
- Umozurike U.O., *The African Charter on Human and People's Rights*, The Raul Wallenberg Institute Human Rights Library, Vol.2, Martinus Nijhoff Publishers, 1997.
- Villa-Vicenzio, C.; Nantulya, P.; Savage, T., *Building Nations, Transitional Justice in the African Great Lakes Region*, Institute for Justice and Reconciliation, Cape Town, 2005.
- Veuthey, M., *Guérilla et droit humanitaire*, 2nd. ed., Geneva, ICRC, 1983.
- Walzer, M., *Just and Unjust Wars: A Moral Argument With Historical Illustrations*, 3rd ed., New York, Basic Books, 2000; *Arguing About War*, New Haven, Yale University Press, 2004.
- Weiss, T.G.; Collins, C., *Humanitarian Challenges and Intervention*, UK, Westview Press, 2000.

Zegveld, L., *The Accountability of Armed Opposition Groups in International Law*, Cambridge University Press, 2002.

Journals and Articles

Abi-Saab, G., "The implementation of Humanitarian Law", Cassese A.(ed.), *The New Humanitarian Law of Armed Conflict*, 1979.

Abi-Saab,R., "Humanitarian Law and Internal Conflicts: The Evolution of Legal Concern" pp.209-223, *Humanitarian Law of Armed Conflict Challenges Ahead*, Dellisen A.J.M, Tanja,J.G (ed.), Tmc.Asser Instituut, Netherlands, the Hague, 1991.

Afako, B., "Reconciliation and Justice: 'Mato Oput' and the Amnesty Act", *Accord: An International Review of Peace Initiatives*, 2002.

Andreopoulos, G. "The International Legal Framework and Armed Groups", Paper presented at the Curbing Human Rights Violations by Non-State Armed Groups Conference, Vancouver, BC, 2003.

Arnson, C., "Introductory Note on a Firm and Lasting Peace", 1996, in *ILM*, 36(1996), pps.258, at p.258.

Arsanjani,M.H., "The Rome Statute of the International Criminal Court", *AJIL*, Vol. 93, 1999.

Atkinson, R.R.; Finnstrom, S., "Uganda's moment for Peace", *International Herald Tribune*, August 9 2006, www.iht.com.

Benvenuti, P., "International Humanitarian Law and the Means For Improving its Effectiveness: A Comprehensive Appraisal", International Humanitarian Law seminar, Arusha International Conference Centre, Arusha, 2004, wwwold.unimib.it/giurisprudenza/dgine/Documenti/Bacheca/Benvenuti%202%20ingl.rtf.

Bierzaneck, R., "Quelques remarques sur l'applicabilité du droit international humanitaire des conflits armés aux conflits internes internationalisés", Swinarski, C. (ed.), *Studies and Essays on International Humanitarian Law and Red Cross Principles in Honour of Jean Pictet*, ICRC, Geneva, 1984.

Bruderlein, C., "The role of Non-State actors in Building Human Security", The Case of Armed Groups in Intra-State Wars, Human Security Network, Geneva, 2000, www.humansecuritynetwork.org.

Bujra, A., "African Conflicts: Their causes and their Political and Social Environment", *occasional paper*, No.4, Development Policy Management Forum, Addis Ababa, 2002.

Cameron, I., "UN Targeted Sanctions, Legal Safeguards and the European Convention on Human Rights", in *Nordic Journal of International Law*, 72 (2003), pp.1-56.

Cassese, A., "The Status of Rebels Under the 1977 Geneva Protocol on Non-International Armed Conflicts", 1981, 30 *ICQL* 416 at 424.

Capie, D.; Policzer, P., "Keeping the Promise of Protection: Holding Armed Groups to the Same Standards as States", The Armed Groups Project University of British Columbia, A Policy Brief Commissioned for the UN Secretary-General's High Level Panel on Global Security, January 2004, www.armedgroups.org.

Cohen, S., "State crimes of previous regimes: Knowledge, accountability and the policing of the past", *Law and Social Inquiry*, Vol. 20, 1995.

Eriksson, M.; Wallensteen, P., "Armed Conflict", 1989-2003, in *Journal of Peace Research*, Vol.41, No. 5, 2004, pp.625-636.

Grote, R., "The United Nations and the Establishment of a New Model of Governance for Central America: The Case of Guatemala", in Frowein, J.A. and Wolfrum, R.(eds.), *Max Planck Yearbook of United Nations Law* (1998), pp.239-286.

Higgins N., "International Humanitarian Law to Wars of National Liberation", in *Journal of Humanitarian Assistance*, 2004, www.jha.ac/articles/a132.pdf.

Jinks, D., "The Temporal Scope of Application of International Humanitarian Law in Contemporary Conflicts", Harvard Program on Humanitarian Policy and Conflict Research (HPCR), policy brief, 2003, www.hsph.harvard.edu

Kleffner, J.; Zegveld, L., "Establishing an individual complaint procedure for violations of international humanitarian law", Vol.3, *Yearbook of International Humanitarian Law*, 2000.

Gandhi, M., "Common Article 3 of Geneva Conventions 1949, In The Era Of International Criminal Tribunals", Notes and Comments, *ISIL Yearbook of International Humanitarian and Refugee Law*, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/11.html>.

Gasser, H.-P., "Ensuring Respect for the Geneva Conventions and Protocols: The Role of Third States and the United Nations", Fox, H.; Meyer, M.A.(ed.), *Armed Conflict and the New Law*, Vol.II: Effecting Compliance, British Institute of International and Comparative Law, London, 1993.

Gordon, P.H., "NATO After 11 September", Vol.43, Number 4, Routledge, 2001, pp. 89-106.

Jones, D.; M., Smith, M., "The perils of hyper-vigilance: the war on terrorism and the surveillance state in South-East Asia", Routledge, Volume 17, Number 4, 2002, pp.31-54.

Kaneza, C., "Sending the word of International Humanitarian Law", Rainfire: Women in

Leadership, Desmond Tutu Peace Centre, 2005, p.65-76.

Kleffner, J.; Zegveld, “Establishing an individual complaint procedure for violations of International Humanitarian Law”, *Yearbook of International Humanitarian Law 2000*, Vol.3, pp. 384-401, 2002.

Liu Institute for Global Issues and Gulu District NGO Forum, “*Roco Wati Acoli: Restoring Relations in Acholi-land Traditional Approaches to Reintegration and Justice*”, September 2005, www.liqi.ubc.ca/admin/information.

Mack, M.L., “Compliance with International Humanitarian Law by non-State Actors in non-international armed conflicts”, *Working Paper*, International Humanitarian Law Research Initiative, 2003, www.ihlresearch.org.

Mahmoudi, S., “Aggression and Other International Crimes”, www.juridicum.su.se.

McAuliffe de Guzman, M., “The road from Rome: The developing law of crimes against humanity”, *Human Rights Quarterly*, Vol. 22, 2000.

McGoldrick, D., “The permanent International Criminal Court: An end to the culture of impunity?”, *Criminal Law Review*, 1999.

Meron, T. , “The humanization of humanitarian law”, *AJIL*, Vol. 94, 2000.

Mibenge, C., “Enforcing International Humanitarian Law at the National Level: The Gacaca Jurisdictions of Rwanda”, Netherlands Institute for Human Rights Research, 2005.

Murphy, S.D., “Progress and jurisprudence of the International Criminal Tribunal for the former Yugoslavia”, *AJIL*, Vol. 93, 1999.

Naqvi, Y., “Amnesty for war crimes: Defining the limits of international recognition”, ICRC, 2003, 583-625, No. 616.

Ndikumana, L., “Distributional Conflict, the State and Peacebuilding in Burundi”, *Research Paper*, UNU World Institute for Development Economics Research, Finland, 2005, www.wider.unu.edu.

Ntabona, A., “Profondeurs et Limites du Concept d’Ubumwe/Unité, au Burundi et leurs implications sur les “rapports”cultures et développement”, au Coeur de l’Afrique, T.XXV, No.3, 1985.

Pham, P., “Forgotten Voices: A Population-based Survey on Attitudes about Peace and Justice in Northern Uganda”, International Center for Transitional Justice and Human Rights Center, University of California Berkeley, 2005, www.reliefweb.int/library/documents/2005/hrc-uga-25jul.pdf.

Philipson, L., “Engaging armed groups: the challenge of asymmetries”, Conciliation Resources, UK, 2005, www.c-r.org.

Policzer, P., “Neither Terrorists Nor Freedom Fighters”, Paper presented at the American Political Science Association Conference, Chicago, September, 2004, <http://www.armedgroups.org>.

Provizer, N.W., “The National Electoral Process and State Building: Proposals for New Methods of Election in Uganda”, *Comparative Politics*, Vol.9, No.3, 1977, pp.305-326.

Refugee law Project, “Whose Justice? Perceptions of Uganda’s Amnesty Act 2000: The Potential for Conflict Resolution and Long-Term Reconciliation”, *Working paper* No.15, Kampala.

Riedel E.H., “Recognition of belligerency”, in *Berhardt, EPIL* IV, pps.47-50.

Rodley, N. S., “Can Armed Opposition Groups Violate Human Rights?”, Mahoney, K. and Mahoney, P.(eds.), *Human Rights in the Twenty-First Century, Part I*, Dordrecht, pp.297-318, 1992.

Rosenne, S., “Human Rights: A compilation of International Instruments”, Vol.I, *Universal Instruments*, Leiden, 2004, pp.211-212.

Reyntjens, F., “Burundi: Prospects for Peace”, *Minority Rights Group International (MRG) Report*, 2000.

Rwelamira M.R., “The significance and contribution of the Protocols Additional to the Geneva Conventions of August 1949”, pp.227-236. *Studies and essays on international humanitarian law and Red Cross principles, in Honour of Jean Pictet*, Swinarski C. (ed.), ICRC, Geneva, 1984.

Sachar, R., “International Humanitarian Law with Particular Reference to International Criminal Court”, ISIL, *Yearbook of International Humanitarian and Refugee Law*, 2001, <http://www.worldlii.org/int/journals/ISILYBIHRL/2001/1.html>.

Sandoz, Y., “Implementing International Humanitarian law”, UNESCO, *International Dimensions of Humanitarian Law*, 1988.

Sarkees M.R.; Wayman F.W.; Singer J.D., “Inter-State, Intra-State, and Extra-State Wars: A Comprehensive Look at Their Distribution over Time, 1816–1997”, [International Studies Quarterly](http://www.ijournal.org), Vol.47, No.1, March 2003, pp. 49-70(22).

Sassoli, M., “Possible legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights”, University of Quebec, Canada, *Armed Groups Conference*, 2003.

Scharf, M., "The amnesty exception to the jurisdiction of the International Criminal Court", *Cornell International Law Journal*, Vol.32, 1999, p.510.; Scharf, M., "Swapping amnesty for peace: Was there a duty to prosecute international crimes in Haiti?" *Texas International Law Journal*, Vol.31, No.1, 1996, pp.1-42.

Shultz R.,H.; Farah D.; Lochard I.V., "Armed Groups: A tier-One Security Priority", *Occasional Paper 57*, USAF Institute For National Security Studies, USAF Academy, Colorado, 2004.

Stahn, C., "United Nations peace building, amnesties and alternative forms of justice: A change in practice?", *International Review of the Red Cross*, Vol.84, No.845, 2002, p.191.

Stewart J.G., "Towards a Single Definition of armed conflict in international humanitarian law: A critique of internationalized armed conflict", Vol.85, No.850, ICRC, 2003, www.icrc.org.

Ssenyonjo, M., "Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court", *Journal of Conflict and Security Law*, Vol.10, No.3, Oxford, 2005, pp.405-434.

Stinchcombe, A.K., "Lustration as a problem of the social basis of constitutionalism", *Law and Social Inquiry*, Vol. 20, 1995.

Temple-Raston, D., "Journalism and Genocide, A landmark case in Rwanda raises the issue: Can words kill? How much press freedom is too much?", *Columbia Journalism Review*, Issue 5, 2002, www.cjr.org/issues/.

Tom, P., "The Acholi Traditional Approach to Justice and the War in Northern Uganda", 2006, www.beyonintractability.org.

Vinuesa, R.E. "Interface, correspondence and convergence of human rights and international humanitarian law", *Yearbook of International Humanitarian Law*, Vol. 1, 1998.

Weber, M., "Politics as a Vocation", in Gerth, H.H., Mills, W., From Max Weber: *Essays in Sociology*, Routledge and Keagan Paul, Boston, 1958, p.78.

Westbrook, D., "The Torment of Northern Uganda: A Legacy of Missed Opportunities", *The Online Journal of Peace and Conflict Resolution*, Issue 3.2, 2000, www.trinstitute.org/ojpcr.

Westfield, E., "Globalization, Governance, and Multinational Enterprise Responsibility: Corporate Codes of Conduct in the 21st Century", 2001-2002, 42 Va.J. Int'l L.1075.

Press Releases

ICRC News 16/21, April 1994.

ICRC Press Release 1772/21, April 1994.

ICRC News 17/28, April 1994.

BBC News, 26th, August 2005, www.news.bbc.co.uk.

International and Regional Treaties

1864 Geneva Convention on the Amelioration of the Conditions of the Wounded in Armies in the Field, ICRC Treaty Database, <http://www.icrc.org/ihl>.

1925 Geneva Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases and of Bacteriological Methods of Warfare, 94 LNTS 65.

1929 Geneva Convention Relating to the Treatment of Prisoners of War, 118 LNTS 343.

1945 Charter of the United Nations (1945), UNCIO XV 335.

1945 Agreement for the Prosecution and Punishment of Major War Criminals, 82 UNTS 279.

1946 Agreement for the Establishment of an International Military Tribunal, 5 UNTS 251 (International Tribunal for the Far East).

1950 European Convention on Human Rights and Fundamental Freedoms (1950) 213 UNTS 222.

1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (Article 9) and its Second Additional Protocol of 1999 (Article 22).

La Convention de La Haye Concernant les Lois et Coutumes de la Guerre sur Terre, d'après les Textes et Documents des Conférences de Bruxelles de 1874 et de la Haye de 1899 et 1907.

1966 The International Covenant on Civil and Political Rights, with Optional Protocol, 999 UNTS 171.

1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

1969 American Convention on Human Rights (1969), 1144 UNTS 123.

1977 Protocol I Additional to Geneva Conventions relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3.

1977 Protocol II Additional to Geneva Conventions relating to the Protection of Victims of non-international Armed Conflicts, 1125 UNTS 609.

1980 Convention on the Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, www.icrc.org/ihl.

1982 African Convention on Human and People's Rights (1982), 1520 UNTS 217.

1984 Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, UNTS vol.1465 p.85.

1986 Vienna Convention on the Law of Treaties Between States and International Organizations, 25 ILM (1986) 543.

1993 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction.

1997 Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, 18 September 1997, www.icrc.org/ihl.

1998 Statute of the International Criminal Court, Doc.C.N 502 1998 (treaties-3 of 25 September 1998).

1999 International Convention on the Suppression of the Financing of Terrorism, <http://www.untreaty.un.org>.

2000 Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict, www.icrc.org/ihl.

Peace Accords

1993 Arusha Peace Agreement for Rwanda.

1993 Cotonou Agreement on Liberia.

The Kinyira Agreement between the government of Rwanda and the Rwandan Patriotic Front in May 1993.

General Peace agreement for Mozambique, Rome, 4 October 1992 published in the United Nations and Mozambique 1992-1995, 1995.

Agreement on a Firm and Lasting Peace, ILM 36, (1996), 258.

Lusaka Accord on a Ceasefire in the Democratic Republic of Congo in July 1999.

Peace Agreement between the Government of Sierra Leone and the Revolutionary

United Front of Sierra Leone, 7 July 1999, www.c-r.org/accord/s-leone/accord9/lome.shtml.

2000 Arusha Peace and Reconciliation Agreement for Burundi.

Security Council Resolutions

SC. Res. 770, 13 August 1992, and SC Res. 942, 23 September 1994, relating to demands on the parties to the Bosnian conflict, in particular the Bosnian Serb party, to accept a proposal for territorial settlement.

SC. Res. 764 (1992), 771(1992), 780 (1992), 787 (1992), 827 (1993), 913 (1994), 941 (1994), and 1010 (1995), concerning the Former Yugoslavia.

SC. Res. 814 (1993), concerning Somalia.

SC Res. 1193 (1998), concerning Afghanistan.

SC.Res.1267 (1999), reinforced by SC Res.1333 (2000) and SC Res. 1390(2001).

SC. Res. 1306 (2000), through which a ban on trade with diamonds produced by Revolutionary United Front (RUF) in Sierra Leone was imposed concerning Sierra Leone.

SC Res. 1530, in which the Basque Separatist Organization ETA was singled out as responsible for a major train bombing in Madrid in 2004.

SC Res. 1556 (2004) through which an arms embargo was imposed on the Janjaweed militia in Darfur, Sudan.

General Assembly Resolutions and Other Documents

GA Res. 95 (I) 1946, Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal.

GA Res. 174 (II) of 21 November 1947, on the mandate of the ILC.

GA Res.217 A (III) 1948, Universal Declaration on Human Rights and Fundamental Freedoms.

GA Res. 48/121 (1993), on e.g. the customary nature of the UDHR.

GA Res. A/res/56/83 (2002) Adopting ILC Articles on responsibility of States for Internationally Wrongful Acts.

Official Yearbooks and Reports

Yearbook of the International Law Commission (YBILC), (1958), vol.II.

Yearbook of the International Law Commission (YBILC), (1962), vol.II.

Yearbook of the International Law Commission (YBILC), (1994), vol.II.

Boutros Boutros-Ghali, "An Agenda for Democratization", New York: United Nations (1996).

Greenwood, C. L., "International Humanitarian Law and the Laws of War", Preliminary Report for the Centennial Commemoration of the First Hague Peace Conference 1899, pursuant to UN GA Res.52/154 of 15 December 1997 and UN Doc.A/C.6/52/3, The Hague, 1999.

Report of the Secretary General to the Security Council on the Protection of Humanitarian Access to Refugees and Others in Conflict Situations, 22 September 1998, UN.Doc.S/1998/883.

"A more secure world: Our shared responsibility", Report of the Secretary General's High Level Panel on Threats, Challenges and Change, UN, 2004.

International Case Law

International Court of justice

US Diplomatic and Consular Staff in Teheran Case, Merits, ICJ Rep. 1980, p.3 (Teheran Hostages Case).

Military and Paramilitary Activities in and against Nicaragua (*Nicaragua v. United States*) Merits Judgment, ICJ Rep. 1986 p.14 , (*Nicaragua* case).

International Criminal Tribunal for Rwanda

Prosecutor v. Akayesu, Case ICTR-96-4-T (Judgment of 2 September 1998) 37, ILM 1399, 1998.

Prosecutor v. Kambanda, Case ICTR-97-23-S (Judgment of 4 September 1998) 37 ILM 1411, 1998.

Prosecutor v. Serushago, Case ICTR-98-39-S (Judgment of 5 February 1999), 38 ILM 854, 1999.

Prosecutor v. Kayishema and Ruzindana, Case ICTR-95-1, ICTR-96-10 (Judgment of 21 May 1999).

Prosecutor v. Rutaganda, Case ICTR-96-3 (Judgment of 6 December 1999) 39 ILM 557, 2000.

Prosecutor v. Musema, Case ICTR-96-13 (Judgment of 27 January 2000).

Prosecutor v. Ruggiu, Case ICTR-97-32 (Judgment of 1 June 2000).

International Criminal Tribunal for former Yugoslavia

Prosecutor v. Erdemović, Case IT-96-22-Tbis (Sentencing Judgment of 5 March 1998) 37 ILM 1182, 1998.

Prosecutor v. Delalić, Mucić, Delić and Landžo, Case IT-96-21-T (Judgment of 16 November 1998).

Prosecutor v. Tadić, Case IT-94-1-A (Appeal Judgment of 15 July 1999) 38 ILM 1518, 1999.

Prosecutor v. Jelisić, Case IT-95-10 (Judgment of 14 December 1999).

Prosecutor v. Kupreškić et al., Case IT-95-16 (Judgment of 14 January 2000).

Prosecutor v. Blaskić, Case IT-95-14 (Judgment of 3 March 2000).

Prosecutor v. Aleksovski, Case IT-95-14/1 (Appeal Judgment of 24 March 2000).

Prosecutor v. Furundžija, Case IT-95-17/1-A (Appeal Judgment of 21 July 2000).

Electronic Materials

African Commission on Human and People's Rights,

<http://heiwwww.unige.ch/humanrts/africa/comision.html>.

African Human Rights Instruments, <http://heiwwww.unige.ch/humanrts/instree/afrinst.htm>.

American Society of International Law: <http://www.asil.org>.

Amnesty International, <http://www.amnesty.org>.

Armed Groups Project, www.armedgroup.org.

BBC News, www.news.bbc.co.uk.

Human Rights Watch, <http://www.hrw.org>.

International Centre for Transitional Justice (ICTJ), www.ictj.org.

International Court of Justice, <http://www.cij.org/cij/>.

International Criminal Court, <http://www.un.org.law/icc/statute>.

ICTR (International Criminal Tribunal of Rwanda), <http://www.ictt.org/>.

ICTR (International Criminal Tribunal of Rwanda), <http://www.ictt.org/>.

ICTY (International Criminal Tribunal for the former Yugoslavia), <http://www.icty.org>.

International Crisis Group, <http://www.icg.org>.

IRIN, <http://www.irinnews.org>.

NGO Conciliation Resources, www.c-r.org.

NGO Geneva Call, www.genevacall.org.

Official Website of the Rwandan Government, www.gov.rw.

Official Website of the United Nations, <http://www.un.org>.

Pan African News Agency, <http://www.africanews.org/pana/news/>.

The New Vision, online news, www.newvision.co.ug.

Treaty Database, International Committee of the Red Cross, <http://www.icrc.org>.

United States State Department, www.state.gov.

Uganda Conflict Action Network, www.ugandacan.org.

