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It is necessary to underline here that when the Prosecutor takes the initiative to refer a case, he notifies all State Parties to the Statute,<sup>111</sup> because State Parties can also be competent to prosecute these crime. Thus, to avoid any violation of the Rule stipulated in Article 20<sup>112</sup> of the Statute, the Prosecutor informs them in writing that the case is already the object of an investigation by the Court.

### **c) Referral by a State Party to the Rome Statute**

Every State Party to the Rome Statute can, according to Article 14, approach the Court so that it can open an investigation into offences and crimes against humanitarian staff. For that purpose the State in question will have to give to the Court the elements of proofs required by Rule 63 of the Regulation of Procedure and Evidence and Article 69 of the Statute. If the case is referred to the Prosecutor by a non-party State, it deposits with the Clerk of the Court a declaration of its desire to accept the competence of the Court's jurisdiction.<sup>113</sup>

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<sup>107</sup> Ibidem Article 5, Crimes within the jurisdiction of the Court.

<sup>108</sup> Rule 104 of the International Criminal Court Rules of procedure and evidence, June, 2000.

<sup>109</sup> Ibidem Rule 54(1).

<sup>110</sup> Rule 55 of the International Criminal Court Rules of procedure and evidence op.cit.

<sup>111</sup> Ibidem Rule 52(1).

<sup>112</sup> Article 20(2) of the International Criminal Court states that, nobody can be judged by another jurisdiction for a crime aimed at the article 5 for which he was already condemned or settled by the Court.

<sup>113</sup> Rule 44 of the International Criminal Court Rules of procedure and evidence op. cit.













## CHAPTER IV: LIMITATION OF PROTECTION

### 4.1 Introduction

Although strong legal provisions support the protection of humanitarian workers, the facts show that this protection is of a relative efficiency. The protection thus deserves to be refined.

The legal protection of humanitarian workers in practice remains relative. This relativity is due to a number of factors both connected to the nature of the conflicts and to court procedures. These factors will be considered next.

### 4.2. Factors connected to the conflicts

The proliferation of non-international armed conflicts puts international peace and security at risk and causes terrible sufferings to civil populations, including staff of humanitarian organizations.<sup>136</sup>

Since the end of the Cold War, conflicts are no longer supposed to be inter-state in nature.<sup>137</sup> Yet some European countries, following the example of the former Yugoslavia, remain aware of this type of conflict.<sup>138</sup> On the African continent, however, internal conflicts have become the norm. Genocides, identity conflict, rebellions and others are becoming more and more observable in the African continent.<sup>139</sup>

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<sup>136</sup> In his introduction of *Law and Civil War in the Modern World*, John N. Moore details the most prominent motivational factors for civil and internal wars.

<sup>137</sup> McCoubrey, H.; White, N.D., *International organizations and civil wars*, 1995, p 5.

<sup>138</sup> Ibidem.

<sup>139</sup> “Burundi Civil War was an armed conflict lasting from 1993 to 2005. The civil war was the result of long standing ethnic divisions between the Hutu and the Tutsi tribes in Burundi. Estimated death at 300,000.

Ituri conflict is a conflict between the agriculturalist Lendu and pastoralist Hema ethnic groups in the Ituri region of northeastern Democratic Republic of Congo (DRC). There have been many phases to the conflict; the most recent armed clashes are from 1999 to 2003. Estimated death at 80,000.”

#### 4.2.1 Evolution of the nature of the conflicts

The nature of the conflicts in which humanitarian aid missions have to take place has radically changed. The zone of conflict is badly defined, and often corresponds to the whole territory of a country.

Many of the causes of present violent conflicts have deep historical roots. These roots explanations are to be found in the combination of poverty and political repression.<sup>140</sup> It would thus be useful to have some knowledge of the origins, root-causes and manifestations of conflicts situations.

Colonialism in Africa involved violence in the conquest of the native peoples, destroying and interfering with their social and political institutions. New borders were established arbitrarily without any consideration to ethnic realities or diversities, nor was there any consideration to the long-established traditional political systems and economic structures.<sup>141</sup> These developments fractured cultural groups and caused considerable tension and damage, and subsequently became the terms of reference in Africa with deadly consequences<sup>142</sup>.

Decolonisation and the newly attained sovereignty forced African countries to meet the challenges of nation building, a process that took many European societies centuries to complete. Some leaders, faced with these challenges, attempted to practice improbable socialist reform and development; others used state institution as personal patrimony.<sup>143</sup> By the beginning of the 1980s the economic, social and political problems in most African countries had reached crisis proportions.<sup>144</sup> African countries had failed to produce and maintain economic growth to support the needs of the populations.<sup>145</sup>

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<sup>140</sup> Alley R., *Internal conflict and the international community*, 2004, p 17.

<sup>141</sup> Mohiddin A., "Democracy and the Management of Conflicts and Development in Africa", 2000, <http://unpan1.un.org/intradoc/groups/public/documents/CAFRAD/UNPAN010857.pdf> [accessed on 7 September 2009]

<sup>142</sup> Ibidem

<sup>143</sup> Holzgrefe, p 302, see Alley (2004) p 27.

<sup>144</sup> Mohiddin A., op.cit.

<sup>145</sup> Mohiddin, Ibidem.

Bad governance and corrupt leadership had accelerated and deepened the inequalities between the poor and the rich. The unexpected expand of disparities in income and wealth contributed to the failing of state capacity to provide for the public good.<sup>146</sup> States decline may vary from state to state, but commonalities do exist. Some leaders inherited poor countries, weak infrastructures and multitude of ethnic groups at independence.<sup>147</sup> Serious social and political problems as well as ethnic conflicts were manifested in many African countries.

As an adjacent cause of internal conflict, the political exploitation of ethnic differences give cause to perceived injustice. The situation goes out of control when those facing group discrimination fear that it will worsen unless they react. There are many examples of internal armed conflict which resulted from leaders, who exploited ethnicity under conditions where social inequality already existed<sup>148</sup>.

Ethnic violence erupts when social, political and economic divergences reach the point where groups ethnically brand each other.<sup>149</sup> This was the case in Rwanda in April 1994, when Radio Mille Collines was broadcasting its ethnic hatred and propaganda across the country, urging Hutus to commit violence against Tutsis.<sup>150</sup> The importance of the role of the media, and its power to create or destroy the fundamental human value was raised. Also the responsibility and accountability of those who control such media.<sup>151</sup> The ICTR chamber found that the radio broadcasts were engaged in ethnic stereotypes, and promoted hatred and a called to take up arms.<sup>152</sup>

A sense of leadership betrayal surrounds many African countries. The promised improvement of the well-being for all citizens was not fulfilled.<sup>153</sup> The collapse of the

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<sup>146</sup> Ibidem,

<sup>147</sup> Holzgrefe, p.301.

<sup>148</sup> Alley ibidem.

<sup>149</sup> Alley p 25.

<sup>150</sup>Thompson, A., *The media and the Rwanda genocide*, 2007.

<sup>151</sup> See *Prosecutor v Ferdinand Nahimana, Jean Bosco Barayagwiza, Hassan Ngeze* ictr-99-52-T, para 945.

<sup>152</sup> Ibidem para 949 ;

<sup>153</sup> Mohiddin op.cit.

post independence States relate directly to the poverty of these States and their adverse geographical situation.<sup>154</sup> States are in crisis not exactly because they are poor, but because they are afflicted by high profitable commodities which should provide resources nation building, but instead provides the resources for interminable internal conflict.<sup>155</sup>

Uncontrolled violence within States threatens the human rights and the lives of civilians caught in the cross-fire.<sup>156</sup> This has been well illustrated by the cases of conflicts in Congo Brazzaville,<sup>157</sup> Angola,<sup>158</sup> DRC,<sup>159</sup> and Sudan.<sup>160</sup>

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<sup>154</sup> Holzgrefe p 304.

<sup>155</sup> Ibidem, see Alley p 31.

<sup>156</sup> Ibidem p 305.

<sup>157</sup> As the presidential elections programmed for July 1997 approached, tensions between the Lissouba and Sassou-Nguesso camps mounted. When President Lissouba's government forces enclosed Sassou-Nguesso's compound in Brazzaville with armored vehicles, Sassou-Nguesso ordered his militia to resist. Thus began a 4-month conflict that damaged and destroyed Brazzaville. On the side of Sassou-Nguesso, Angolan troops invaded Congo in October and overpowered the Lissouba government. In late 1998 fighting between Sassou-Nguesso's government forces and a pro-Lissouba and pro-Kolelas armed opposition suspend the transition to democracy and caused destruction and loss of life in southern Brazzaville and in the other regions, and displaced hundreds of thousands of persons. In November and December 1999, the government signed a peace agreements with representatives of many, though not all, of the rebel groups.

<sup>158</sup> The civil war in Angola was a power struggle between the two rival movements in the pre-1975 war of independence against Portugal. The National Union for the Total Independence of Angola (UNITA), led by Jonas Savimbi, refused to accept the new Soviet-backed government of the Popular Movement for the Liberation of Angola (MPLA), and launched an extended bush war with the help of South Africa and the United States. 1992 election, won by the MPLA, caused a temporary halt to the fighting as the defeated UNITA launched the bloodiest phase of the war during 1993. In 1994 the Lusaka Protocol, called for the formation of a coalition government. The war ended in 2002, following the death of Jonas Savimbi at the hands of the Angolan Armed Forces in February. The government and UNITA rebels had signed in March a ceasefire and continued the political process define in the Lusaka Protocol of 1994. In August, the war was officially declared over when UNITA disbanded its military faction.

<sup>159</sup> The conflict in the DRC has involved seven nations, Angola, Burundi, Rwanda, Uganda, Eritrea, Zimbabwe and Namibia. When Congolese President Laurent Kabila came to power in May 1997, fall Marshall Mobutu, with the aid of Rwanda, Uganda, Angola, Burundi and Eritrea, it was hoped that stimulation would be seen in the region. Instead, the situation deteriorate. Kabila was accused by rebels (made up of Congolese soldiers, Congolese Tutsi Banyamulenge) of turning into a dictator, of mismanagement, corruption and supporting various paramilitary groups who opposed his former allies. As the conflict had raged on, rebels controlled about a third of the entire country. Laurent Kabila had received support from Angolan, Zimbabwean and Namibian troops. In 2001, Laurent Kabila was assassinated and his son Joseph Kabila was sworn in as the new President of the DRC. He said that he would further the need for cooperation with the United Nations in deployment of troops, further dialog of national reconciliation and help revive the stalled Lusaka peace agreements. However, the alignments of power have been in flux with many parties involved. In 2006, Joseph Kabila was elected president but the war in the DRC is still not over. The main fighting has been on the eastern side of the DRC. It is mostly under foreign control, and over three quarters of the estimated number of killings have taken place there, with approximately 90 per cent of the DRC's internally displaced population having fled violence from that region. The future of the DRC remains uncertain.

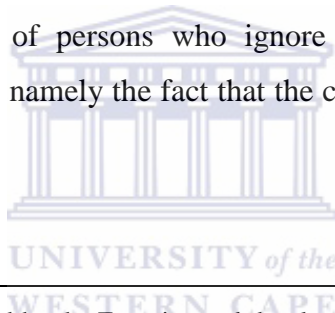


#### 4.2.2 Emergence of new actors to the conflicts

The traditional notion of an armed conflict whereby two regular armies of two or several States are involved is changing. This is noticeable with new types of conflicts such as those occurring in Africa nowadays which involve non-state armed groups referred to as militias, rebels or freedom fighters.<sup>161</sup> Despite the fact that these groups have always existed, they were originally seen as a domestic political or criminal problem within the particular State.<sup>162</sup>

The actors in modern-day conflicts are armed factions that have objectives other than those of the government. After seizing power, their intention may include putting an end a situation they consider unusual.<sup>163</sup>

Militias or rebels are groups of persons who ignore one of the most fundamental principles of an armed conflict, namely the fact that the civil populations may not be the



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<sup>160</sup> In the 1800s, Sudan was controlled by the Egyptians and developed a substantial slave trade. In 1881 a rebellion of northern tribes drove the Egyptians from Sudan. The North was predominately Muslim and more similar to Egypt than the traditionally African South. The British exploited ethnic and religious differences as a means to maintain control, as they had in many other colonies. The South of Sudan was declared a “closed area” and was isolated in almost all respects. prepared to abandon its colony, Britain wanted to prevent Egypt from gaining total control. To counterbalance Egypt’s influence in the North, Britain sought to include Southerners in a federated government and opened the closed areas. Sudan gained its independence in 1956. As usual, the stage was set for violent conflict and factions fought for control over a weak and ineffectual government in Khartoum.

In 1958 General Abboud seized power, but was quickly confronted by the Anya Nya rebels and the allied Sudan African National Union (SANU) and a civil war spread in 1964. In 1989, when General el-Bashir and the National Islamic Front gained control, they declared a holy jihad and mounted increasingly successful counter attacks against the SPLA led by Dr. Mashar.

Sudan’s civil war is being fought essentially without rules. All of the factions, government or guerrilla, have committed atrocities, without concern for human rights, or condemnation and sanctions from an international community that isn’t watching. The death toll is unknown and humanitarian organizations estimate refugees numbers as high as 4 millions, of which as many as 2 millions have died while in flight. The Sudanese government has refused access to the region to aid groups and independent observers. See also Holzgrefe, op.cit.

<sup>161</sup> Policzer, P., “Neither Terrorist Nor Freedom Fighters”, paper presented at the American Political Science Association Conference, Chicago, September 2004, [www.armedgroups.org](http://www.armedgroups.org) [accessed on 5 November 2009].

<sup>162</sup> Ibidem; see also Higgins, N., “The Application of International Humanitarian Law to Wars of National Liberation” [www.jha.ac/articles/a132.pdf](http://www.jha.ac/articles/a132.pdf) [accessed on 7 November 2009].

<sup>163</sup> Holzgrefe op.cit.

object of an attack. Recent conflicts in Africa have also seen the development of children's active participation to armed conflicts.<sup>164</sup>

The UN General Assembly defines youth as individuals aged between 15 and 24 years, and children as being under the age of 15. However, the Convention on the Rights of the Child<sup>165</sup> and the African Charter on the Rights and Welfare of the Child<sup>166</sup> consider both categories as child persons under the age of 18. In the context of an armed conflict this ambiguity is exacerbated, since armed conflict often forces young people into adult roles as fighters and sexual partners at an age that, they would have been protected from such exposure in other societies.<sup>167</sup>

Being a gender neutral term, youth apply to both the female and male gender. Yet provisions for the support and demobilisation of child soldiers are inclined to assume that the children in question are male. However, it is estimate that up to 40% of child soldiers may indeed be girls<sup>168</sup>

The use of child soldiers has become so frequent that it challenges the image of children as passive victims to the conflict<sup>169</sup>.The realities in the East of the DRC and Rwanda provide an outline of the profile of these new actors. In most instance children were abducted from their families or from the streets to serve as combatants.<sup>170</sup> In 1998 President Kabila DRC gave his blessing to young children who were called *Kadogo*.<sup>171</sup>

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<sup>164</sup>For more details see Amnesty International, Democratic Republic of Congo: Children at war on [www.amnesty.org/en/library/info/AFR62/034/2003](http://www.amnesty.org/en/library/info/AFR62/034/2003) [accessed on 6 November 2009].

<sup>165</sup>Convention on the Rights of the Child adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989 entry into force 2 September 1990.

<sup>166</sup>The African Charter on the Rights and Welfare of the Child adopted by the Organization of African Unity (OAU) in 1990 and was entered into force in 1999. Like the United Nations Convention on the Rights of the Child (CRC), the Children's Charter is an instrument that defines rights and universal principles and norms for children.

<sup>167</sup>Acord 'Lost Generation' Young People and Conflict in Africa. p 58 on [www.acdi-cida.gc.ca](http://www.acdi-cida.gc.ca) [accessed on 7 November 2009].

<sup>168</sup> Ibidem p 59.

<sup>169</sup> Ibidem p 63.

<sup>170</sup> See Report of Graça Machel, Impact of Armed Conflict on Children on [www.un.org/rights/introduc.htm#contents](http://www.un.org/rights/introduc.htm#contents) [accessed on 6 November 2009]; see Amnesty International, Democratic Republic of Congo op.cit.

<sup>171</sup> Child soldiers were recruited by Laurent Desiré Kabila in 1996 for the liberation war, with Rwanda and Uganda against the Mobutu regime in DRC.

Manipulated by Kabila rebels, these children became militias and conducted traumatizing practices, consisting of killing all those who were presented to them as being enemies and destroying everything in their wake.<sup>172</sup> The cruelty of the militias showed itself through the perversity with which they treated the bodies of the victims they killed. These militias feared neither God nor men; they were engaged in destabilizing barbaric acts often resulting from certain rites of initiation. According to the ICRC, certain tribes in Africa would be purely warriors and would consider killing as sign of bravery.<sup>173</sup> The respect for a human person is not at all therefore a concern for militias and worse still, the respect for those who come to relieve the sufferings they cause.

The new actors in non-international armed conflicts commit rape, kidnap humanitarian organization staff and hijack humanitarian aid. It could therefore rightly be said that they are criminals rather than parties to the conflict.<sup>174</sup> Young children, considering the circumstances in which they are recruited, have no knowledge of the notions of human rights and IHL. Numerous belligerent parties since the Cold War have never heard about the four Geneva Conventions of 1949, know neither the ICRC nor the emblems of the Red Cross, the Red Crescent and the Red Crystal, and consider the death and the suffering of civilians as means to reach their personal and political objectives.<sup>175</sup>

For these actors, war consists of killing all those who have an ethnic, religious and racial difference. The fact that these actors did not received formation on rules that must govern an armed conflict, brings them to criminalize the war. These armed groups have their own war logics, which are not at all similar to the logics and rules of war instructed to the members of regular armed forces.<sup>176</sup> These young recruited in the street or generally forced to join militias, come from very poor families. They are persons who live their everyday life in poverty and are trying their utmost to get out of these living

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<sup>172</sup> Amnesty International, Democratic Republic of Congo op.cit.

<sup>173</sup> *Domestici-Met, MJ*, "One hundred years after The Hague, 50 years after Geneva - international humanitarian law in an age of civil war", in *IRRC* n°834, June 1999, pp.277-301.

<sup>174</sup> Amnesty International op.cit.

<sup>175</sup> Forsythe, D.P., "Le comité international de la croix rouge et l'assistance humanitaire : analyse d'une politique", in *RICR* n°821, septembre octobre 1996, pp. 553-554.

<sup>176</sup> Policzer, P., "Neither Terrorist Nor Freedom Fighters" op.cit.

conditions.<sup>177</sup> Civilian and humanitarian staff in particular, pay the price. Pillaging, organized crime, kidnapping, rape and other illicit practices are justifiable means to reach their purpose. Besides, the logistics of humanitarian aid missions makes them legitimate targets<sup>178</sup> in the eyes of militia. Driving expensive vehicles and equipped with sophisticated equipments of communication (radio transmitter, etc.) humanitarian workers are perceived by the African militias as wealthy.<sup>179</sup>

Generally, these individuals arise from sectors of society where the conditions of life are very precarious.<sup>180</sup> It is necessary to realise, however, that humanitarian missions have to share responsibility for the breach of their security as this responsibility ensues very often from suspect attitudes they might display in the field.<sup>181</sup> The ICRC was too often forced to remove his teams from the field at the very moment when the needs of humanitarian assistance were pressing, because the conditions of security were insufficient. The suspension of the operations of the ICRC was only temporary in some case. The ICRC and the other humanitarian organizations were victims of threats, kidnappings and murders.

Only an action which joins over time, to tie contacts with all the factions and all the armed groups, to promote essential principles of humanitarian right and make sure of the acceptance of the humanitarian aid, can allow to surmount gradually these obstacles.<sup>182</sup>

#### **4.2.3 Evolution of humanitarian initiatives in the field**

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<sup>177</sup> In 2003, an Amnesty Report states that Congo DR has one of the largest number of child soldiers, see article on child soldiers in eastern DRC on [www.globalpolicy.org](http://www.globalpolicy.org) [accessed on 16 June 2009].

<sup>178</sup> De Montclos, P., *L'aide humanitaire, aide a la guerre?*, 2000, p.127.

<sup>179</sup> Actually, these militias identify more and more humanitarian workers with the rich western world; this contributes to the reproduction of the kidnappings of these last ones. Indeed, the militias organize kidnappings of these humanitarian workers because they hope to obtain in return ransoms allowing them to equip themselves in armament to pursue the conflict.

<sup>180</sup> See Machel report op.cit.; see Amnesty International, Democratic Republic of Congo, Report op.cit supra note 16.

<sup>181</sup> Bouignon F., "Le droit international humanitaire à l'épreuve des conflits de notre temps", in *RICR* n°835, septembre 1999, pp.487-498.

<sup>182</sup> Ibidem

Among the factors contributing to the protection of humanitarian staff, humanitarian workers themselves contributed to their increased insecurity. In a situation where humanitarian staffs are materially equipped, they fall prey to armed groups. Furthermore, some humanitarian workers' conduct can compromise their image in the minds of the fighters.

#### 4.2.3.1. Publicity surrounding humanitarian missions

Over the last few years, the practice of humanitarian missions has changed considerably. Humanitarian aid, besides being a highly-rated and sound humanist method, has become an industry, even a market.<sup>183</sup> It is more and more guided by marketing tendencies. Certain humanitarian workers today limit humanitarian aid only to the media, which allows them to collect capital from international financiers.<sup>184</sup> Humanitarianism became a matter of advertising and money, driven by competitions.<sup>185</sup>

Humanitarian workers have been accused of caring more to respond to a limited and present need than to take time to reflect and to create real long-lasting actions.<sup>186</sup> Humanitarian aid should not be limited to combine measures to ease on-schedule sufferings, but should rather put in practice, without delay, real and sustainable programs for civilian populations.<sup>187</sup> Humanitarian workers, instead of constantly supplying food to the populations in distress, should put at their disposal ways of production, so that these populations can take care of themselves.<sup>188</sup>

These humanitarian deviations are perceptible both at the level of the methods of action and their attitudes in the field.<sup>189</sup>

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<sup>183</sup> Brauman., op. cit. , p.255. See also Davies R., "Humanitarian aid: economic implications and consequences". [www.fmreview.org](http://www.fmreview.org) [accessed on 18 May 2009].

<sup>184</sup> Seaman, J., International system of humanitarian relief in the "New World Order", in Harris, *The politics of humanitarian intervention*, 1995, p17-30.

<sup>185</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, op. Cit.

<sup>186</sup> Holzgrefe, JL., op.cit., p 278-282.

<sup>187</sup> Ibidem.

<sup>188</sup> The ICRC in Kinshasa in Democratic Republic of Congo distributed to the local populations equipment for gardening to develop market garden activities.

<sup>189</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, op. Cit.

#### 4.2.3.2. Doubtful conducts

It is customary today to encounter attitudes going categorically against core humanitarian principles. Infiltrations within certain humanitarian NGOs by persons foreign to the organization become engaged in "extra humanitarian" acts. In Rwanda in 1994, it was noticed that there were certain persons within humanitarian NGOs who were practicing espionage as well as collecting information to be used by the opposition.<sup>190</sup> All this took place under the "watchful" gaze of people in charge of these humanitarian organizations.

Moreover, it was noticed in the field that certain logos of humanitarian bodies were wrongly used to transport weapons intended to be used in the conflict.<sup>191</sup> This was the case in the DRC where the logo of the UN, as well as a certain NGO, was wrongly used to supply weapons to armed forces to enter Zaire (the former DRC).<sup>192</sup> All these practices, far from guaranteeing the credibility and at the same time the security of humanitarian staff, can seriously weaken the protection which is dedicated to humanitarian staff. However, when a humanitarian organization is engaged in such practices, it compromises the safety of all other humanitarian organizations.

What emerges from this is that there are practices which very often cause the various belligerent parties to violate consciously the rules of IHL. Such incompatible behaviour in relation to the principles of IHL by certain humanitarian workers can push armed group to violate rules and international standards relating to the protection of humanitarian staff.

#### 4.3 Procedural order limits

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<sup>190</sup> Report on the situation of human rights in Rwanda submitted by Mr. René Degni-Ségui, Special Rapporteur of the Commission on Human Rights, under paragraph 20 of resolution S-3/1 of 25 May 1994 on [www1.umn.edu/humanrts/commission/country52/68-rwa.htm](http://www1.umn.edu/humanrts/commission/country52/68-rwa.htm) [accessed on 4 April 2009].

<sup>191</sup> General Assembly, fifty-sixth session, A/56/905-S/2002/360, 8 April 2002 on [www.un.org](http://www.un.org) [accessed on 10 May 2009].

<sup>192</sup> « Donnez valeur de loi au devoir de sauver les vivants» in Dossiers Noirs de la Politique africaine de France on [www.survie-france.org](http://www.survie-france.org) [accessed on 13 January 2009].























































