ENDING INTERNATIONAL HUMANITARIAN LAW VIOLATIONS IN INTERNAL ARMED CONFLICT: A CASE STUDY OF THE RWANDA GENOCIDE 1994

BY

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THIS DISSERTATION IS SUBMITTED IN PARTIAL FULFILMENT OF THE REQUIREMENTS FOR THE AWARD OF THE DEGREE OF MASTER OF ARTS IN INTERNATIONAL STUDIES, INSTITUTE OF DIPLOMACY AND INTERNATIONAL STUDIES, UNIVERSITY OF NAIROBI

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DECLARATION

This dissertation is my original work and has not been presented for a degree in any other university

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This dissertation has been submitted for examination with my approval as university supervisor

Signed _____ **Date** 7 November 2003

Dr. Makumi Mwagiru

DEDICATION

For my parents Manyange Ombati and Mary Manyange without whose love and support I could not have come this far. You are always in my thoughts and prayers.

May you never see the horrors of war.

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LIST OF ABBREVIATIONS

AP I	Additional Protocol I of 1977 to the Geneva Conventions of 1949
APII	Additional protocol II of 1977 to the Geneva Conventions of 1949
CDR	Coalition for the Defence of the Republic
FAR	Rwandese Armed Forces
RPF	Rwandese Patriotic Front
GC	Geneva conventions
ICC	International Criminal Court
ICL	International Criminal Law
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IHL	International Humanitarian Law
IL	International Law
IMT	International Military Tribunal
MRND	Movement for Democracy and Development
NGO	Non-Governmental Organization
OAU	Organisation of African Unity
RPA	Rwanda Patriotic Army
RPF	Rwanda Patriotic Front
UNAMIR	United Nations Assistance Mission in Rwanda
UNGA	United Nations General Assembly

ABSTRACT

This study examines the prospects of ending international humanitarian law violations in internal armed conflict. It surveys the Rwanda genocide 1994 in order to establish whether or not, IHL was observed during the genocide. The study establishes that all parties to the conflict flouted IHL. The study examines the application of IHL by the International Criminal Tribunal for Rwanda and observes that it has been able to make several advancements in the development of IHL, specifically in being the first tribunal to prosecute individuals for the crime of genocide and rape as a crime in international law.

The study establishes that the protective provisions of IHL were not invoked during the genocide and nor did the provisions help to alleviate the atrocities suffered by the Tutsi people during the genocide. The study also establishes that there is a need to establish individual criminal responsibility for IHL violations at the international level. Mechanisms must be devised to be able to arrest all individuals and to avoid giving amnesty to individuals accused of IHL violations. Impunity should be avoided as it encourages others to commit crimes in future knowing that they can get amnesty.

Based on these, the study makes the following conclusions. Firstly, that there is need to disseminate IHL provisions as widely as possible. All states parties to the Geneva Conventions of August 1949 and the Additional Protocols of 1977 should undertake their responsibilities to disseminate IHL to all persons who may get involved in conflict. Second, there is a need to supplement international criminal tribunals with other methods of peaceful settlement of disputes, including methods like mediation; conciliation, inquiry, good offices, negotiations and launching of internationally

supported peace processes alongside other available diplomatic methods of conflict settlement.

Finally, in future it will be important to look beyond the legal framework '*outside the box*' to find solutions to conflicts. This will involve a pluralist approach with a multiplicity of disciplines and methods of conflict management. It must be understood that IHL provides for the settlement of conflicts whereby the underlying issues in a conflict are not addressed, the future must endeavour to utilise conflict management methods that led to resolution of the conflicts.

CHAPTER ONE

Background to the application of International Humanitarian Law in internal armed conflict

Introduction

During April to July 1994 between 500 000 and one million Rwandan men, women and children were slaughtered in the genocide of the Tutsi minority and in massacres of the moderate Hutu who were willing to work with the Tutsi.[1] This, it has been argued could have been prevented. There was anticipation that the international community would intervene to help civilians in the event of killings on a massive scale, but neither the UN nor any foreign government showed any inclination to intervene. The international community watched as the bloody genocide continued. The United Nations Military Assistance in Rwanda (UNAMIR) troops, whose mandate prevented them from intervening, watched helplessly as people were slaughtered before their eyes. The Hutu militiamen who understood that UNAMIR could not do anything continued with the genocide without any interference.

By the time the UN Security Council discussed sending a larger peace keeping force with a broader mandate to protect civilians the genocide was almost complete, most of the potential targets either having been killed or forced to flee for their lives. In a number of places where widespread genocidal killings had occurred, armed forces did not distinguish militia who were armed and potentially dangerous from civilians. The militia went from door to door killing unarmed civilians.[2] This deliberate slaughter of non-combatants was a clear violation of international law, specifically Geneva

[1] See Prunier Gerard, *The Rwanda Crisis 1959-1994 : History of a Genocide,* Hurst, London, 1995, p.274.
[2] Ibid.

Convention IV on the protection of the civilian population and common article 3 to all the Geneva Conventions.

International Humanitarian law or the law of armed conflict comprises of universally accepted set of rules regulating the conduct of war. The international instruments containing International Humanitarian Law (IHL) consist of the Geneva Conventions of 1949 and the two Additional Protocols of 1977, the 1980 Convention on Conventional Weapons, the 1993 Convention Banning Bacteriological Weapons, the 1977 Ottawa Treaty Banning Landmines, the 1988 Rome Statute for the Creation of the International Criminal Court and the Protocol on the Rights of the Child.

It is therefore, assumed that, in all situations of armed conflict, IHL should apply and is to be respected. States, which are party to the Conventions, have a duty to ensure the implementation of, and respect for the legal obligations created by the treaties. Humanitarian law is founded on the principle of the immunity of the civilian population. Persons not taking part in hostilities may under no circumstances be attacked; they must be spared and protected. IHL requires that a distinction be made between civilians and combatants and between military objectives and civilian objectives.

Despite this, civilians always endured horrific ordeals in the Rwanda genocide as direct targets. Despite being invoked rhetorically by parties to the Geneva Conventions, the respect for IHL provisions is under threat now more than ever. Reports of the plight of war victims, refugees and the displaced civilian populations continue. In recent wars, the belligerents have shown an increasing tendency to flout the Conventions and Protocols entirely. The problem is not the failure to abide by the rules, but a failure to

acknowledge that the rules exist.[3] However, the protective provisions of IHL have prevented or reduced such violations in many other cases.

The research problem

Many states continue to ignore their responsibility to observe IHL provisions in times of internal armed conflict. In many instances, the state officials who are entrusted with the responsibility to enforce the provisions have committed, planned, and conspired to violate IHL themselves. The prevalence of the IHL violations in most instances goes unpunished. This could be a clear indication that the intended deterrence of invoking IHL has not been achieved. In cases of genocide, there has been lack of prosecutions and impunity for the crime of genocide. Belligerents aware of the impunity that has characterized IHL violations hardly observe any restraints in waging such conflicts.

Contrary to the expectation that the Geneva Conventions of 1949 and the Additional Protocols of 1977 could be applied effectively to deter such violations in times of internal conflict, violations continue to be perpetuated with impunity. Civilians have continued to suffer in times of conflict. They have been displaced, killed and all types of violence have been vented on them. To the victims of such violations the enforcement of IHL means little in the aftermath of horrific crimes committed against them. It can be argued that the Geneva Conventions of 1949 and the Additional Protocols of 1977 did not protect civilians during the Rwanda Genocide.

Further, the Rwanda population suffered despite Rwanda being a signatory to the Genocide Convention, the 1949 Geneva Conventions and the Additional Protocols of

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[3] Claude Bruderline, Jennifer Leaning, 'No challenges for Humanitarian Protection', *British Medical Journal*, Vol.319, Issue 7207, pp. 421-430.

1977. The Rwanda military and the Hutu militiamen as expected should have followed the law of the conduct of hostilities to minimize the effects of the genocide on the civilian population.

This study will examine the prospects of establishing mechanisms to ensure better implementation of IHL in internal armed conflict. The study will explore the concept of impunity in perpetrating IHL violations, international criminal law and individual criminal responsibility for IHL violations. Finally, the study will examine the role of international criminal tribunals in addressing such violations.

The study will be guided by the question; why it was difficult to enforce IHL during the Rwandan genocide 1994. The study seeks to understand why IHL has not been effectively implemented in internal armed conflicts and to reassess its relevance in today's internal conflicts and in the future.

Objectives of the study

Broadly stated the study aims to analyse the application of International Humanitarian Law in internal armed conflict and how to end impunity for IHL violations.

The specific objectives are to:

1. Examine the relevance of IHL of internal armed conflict.
2. Examine the role of international criminal law and *ad hoc* criminal tribunals in ending impunity for violations of international humanitarian law.
3. Examine the extent to which IHL was (not) observed during the Rwanda genocide 1994.
4. To establish effective strategies in the implementation of IHL in internal armed conflict.

Hypothesis

1. The implementation of IHL in internal armed conflict has been ineffective in ending impunity of violations of IHL
2. IHL is unknown by many belligerents in internal conflicts
3. IHL was flouted by all parties during the Rwanda genocide

Justification of the study

The challenges posed to the international community by contemporary forms of internal conflicts and the violations of IHL are complex and difficult. Rieff[4] argues that the world is entering an age of genocide, with grave breaches to IHL. Impunity is becoming more frequent and is likely to continue if not all violations of IHL are addressed and the violators punished. The area of concern is that of enforcement of IHL in modern times. The agony represents the difficulties in seeking quick and effective enforcement of IHL, in the increasing number of internal conflicts prevalent in the world today. For instance, the conflicts in former Yugoslavia, Rwanda, Burundi, Democratic Republic of Congo, Sierra Leone, Liberia, Angola, Sudan, Kosovo, Cambodia and Iraq are evidenced by gross violations of IHL.

These violations will have to be effectively addressed if impunity for violations is to be stopped in future wars.[5] The issue that has preoccupied the international community and drawn the attention of many governments, international and regional organizations is how to end impunity for IHL violations and effectively enforcing IHL.

This study sets out to analyze the application of IHL in internal armed conflict and how to end impunity for IHL violations. The study will come up with

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[4] See Rieff David, 'Age of Genocide', *New Republic*, Vol 214, Issue 5, pp.1-27 .
[5] See The Economic Intelligence Unit, *Country Report :Rwanda , Uganda and Burundi* , London, 1998, pp. 24-35.

recommendations on how to implement the law and make it more effective in ending impunity in internal armed conflict. This information will be useful to policy makers and implementers involved in IHL. The study will contribute to the literature and data that will be useful for researchers, students and implementers and will form a basis for future studies of a similar nature.

Theoretical framework

Hoffman[6]defined theory in International Relations as a systematic study of observable phenomena that tries to discover the principal variables, to explain the behaviour and to reveal the characteristic types of relations among national units. Singer[7]defines theory as a body of internally consistent empirical generalizations of descriptive, predictive and explanatory power expressed in the form of hypothesis and propositions that are testable, verifiable and falsifiable.

This study will utilize the pluralist theory of international law. Pluralism sees the international system as being complex, where states are not the only actors. It argues that states are not necessarily the only or most important actors nor are their boundaries impermeable. They point to cooperation politics and the possibility of a greater harmony of interests. Pluralist theorists see international law as the application of human dignity and as a function of decision-making. For them policy and decision-making should be guided by the need to promote, protect and articulate human dignity.

Pluralism was championed by Laswell[8] who argued for a global community of common identity. Later scholars like McDougal and Falk[9] postulated a policy oriented

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[6]See Theodore et.al, *An Introduction to International Relations*, 3rd Edition, Longman, London, 1986, p.27.
[7] ibid.
[8] See Laswell H and McDougal, *Jurisprudence for a Free Society* ,Yale, 1992, p.247.
[9] See McDougal, *Public International Law in a Morden World*, Pitman, London, 1987, p.10.

jurisprudence with emphasis on the dignity of man in a new world order. Pluralists see international law as a result of the interacting responses to problems by decision makers, with multiple actors and variables whose actions must be taken into account. Mwagiru[10]asserts that the pluralist school fixes international law within the ambit of the social sciences with respect to the procedures adopted and the tools of analysis; it is akin to the pluralist theory of international relations. It is concerned with definition of the problem, objectives, and hypothesis and about who is to make what decisions, in what structures, by what procedure and in accordance with what criteria. Like the pluralist theory in international relations, it focuses on threats facing humanity and calls for a world order based on participatory and legitimate global institutions. It seeks to discover the nature of conflict and the means by which they can be avoided.[11]

McDougal[12]argues that pluralists view the world as a complex of interrelationships between various entities, and that states are no longer the only actors in the global process. The various actors in the international system make effort to escape the overwhelming power of the state. This policy-oriented school regards law as a comphensive process of decision-making. It sees international law as a dynamic system operating within a particular type of world order. The pluralist school emphasises that law is a constantly evolving process of decision-making and its evolution will depend on the knowledge and insight of the decision maker.

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[10] See Makumi Mwagiru *A Critical Comparison of the Analytical Frameworks on International Relations and International Law,* M.A Thesis in International Conflict Analysis, University of Kent at Canterbury, Rutherford College, 1991, p.84.

[11] See Shaw M, *International Law* , 2nd edition, Grotius Publishers, Cambridge, 1997, p.48.

[12] Ibid.

Falk[13] asserts that international law is not the only way in which transborder issues can be dealt with, but it is the most prestigious way and that law and politics cannot be divorced, their relationship being symbiotic. The basis of pluralist theory is that international law should not be seen as a body of rules divorced from power and social processes. The interactions of decisions by decision makers are what produce international law. The pluralists argue that international law is a collection of actions and claims, which decision makers make on behalf of their countries. The pluralists believe that in order to understand international law, it is necessary to appreciate the needs and values of the international society. The pluralists see law as dynamic and that international law must be seen in the light of international order and the limitations of state power. For the pluralist the overriding goal of international law is the dignity of man.[14]

The pluralist theory will help to analyse the research problem because it attempts to look *outside the box*[15] it emphasises the need to address and understand the social political processes that led to the creation of the law in the first place. Contemporary conflicts have witnessed the increasing number of actors in the conflicts. States are no longer the only actors in conflicts, nor are they the only subjects of international law. The multiplicity of actors in conflict necessitates a change in approach in dealing with conflicts. This will involve multiple approaches outside the legal framework to solve conflicts. International law is not the only means through which internal conflicts can be

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[13] See Falk, *Human Rights and Sovereignty* , Holmes and Meier, New York, 1981, p.232.

[14] See McDougal M.S , Laswell H and Riesman W.M.,' Theories About International Law: Prologue to a Configurative Jurisprudence', *American Journal of International Law*, Vol 8, Issue 231, 1968, pp.188-196.

[15] This term is borrowed from Makumi Mwagiru 'Thinking Outside the Box: The International Criminal Tribunal for Rwanda and Issues of Governance and Reconciliation', August 2003, Institute of Diplomacy and International Studies, University of Nairobi.

addressed, international law helps to reach settlement of disputes but does not solve the conflicts. There is therefore the need to supplement the law with other methods of peaceful settlement of disputes. For the pluralist the overriding goal of international law is the dignity of man[16] with the universalisation of human rights states must safe guard the human rights of the citizens.

Literature review

The literature for this study will be divided into two parts, literature on the Rwanda genocide and literature on International Humanitarian Law.

Literature on Rwanda Genocide

The word "genocide" was coined in 1943 by Lemkin[17]who invented a neologism from the Greek word *genos* (race or tribe) and the Latin suffix *cide* (to kill). He envisaged the creation of two new international crimes: the crime of barbarity, consisting in the extermination of social collectivities, and the crime of vandalism, consisting in destruction of cultural and artistic works of these groups. The intention was to declare these crimes punishable by any country in which the culprit might be caught, regardless of the criminal's nationality or the place where the crime was committed. Lemkin's [18] efforts culminated in the Convention on the Prevention and Punishment of the Crime of Genocide on 9 December 1948.[19]

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[16] See McDougal M.S , Laswell H and Riesman W.M.,' Theories About International Law: Prologue to a Configurative Jurisprudence', *American Journal of International Law*, Vol 8, Issue 231, 1968, pp.188-196.

[17]See Lemkin Raphael, 'Genocide, A Modern Crime', *Free World*, Vol. 9, No. 4, New York , 1945, p. 39-43. This article is a summary of the concepts and proposals Lemkin originally presented in *Axis Rule in Occupied Europe: Laws of Occupation - Analysis of Government - Proposals for Redress*, Washington, D.C., Carnegie Endowment for International Peace, 1944, pp. 670-692.

[18] See Lemkin Raphael, Genocide - A Modern Crime, op.cit.

[19] See International Committee of the Red Cross, *Geneva Conventions of August 12, 1949,*

Destexhe[20] proposed that the term 'genocide' be limited to situations where all counts enumerated in the Genocide Convention apply and to no others. To him only three events in the 21st century can be genocides: the massacres of the Armenians by the Turks in 1915, the Jewish holocaust 1939-1945 and the extermination of the Rwandan Tutsis in 1994. Article 2 of the Convention on the Crime of Genocide of 1948[21] defines genocide to mean, the commitment of any of the following acts with intent to destroy, in whole or in part, a national, ethical, racial, or religious group, as such:

a) Killing members of the group;

b) Causing serious body or mental harm to members of the group;

c) Deliberately inflicting conditions to bring its physical destruction in whole or in part;

d) Imposing measures intended to prevent births within the group;

e) Forcibly transferring children of the group to another group.

Delisie *et.al*[22]assert that genocide requires sustained social organization and rationalization. Although the concept of mass extermination may be irrational, the means are calculated. Simply put, genocide is designed to accomplish one absolute objective the destruction of a distinct human population. Genocide is distinguishable from all other crimes by the motivation behind it.

Laurent [23] argues that tribal conflict was virtually unknown to Rwanda before colonialism; during the genocide the established churches and their leadership was silent or worse, participants. They facilitated rather than stood against genocide .The

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Geneva, 1995, p.30.

[21] See The United Nations Convention on the Prevention of Crime of Genocide of 1948.

[22] See Delisle al et, Legality ,Morality and Good Samaritan, *Orbis* , Fall 2001, Vol.45, Issue 4, pp.535-546.

[23]See Mbanda Laurent , *Committed to Conflict, the Destruction of the Church in Rwanda,* Fountain Publishers, Kampala, 1995, p.24.

media called on the militia to move fast and finish the job, inciting them to send the Tutsi back to their origin through the local rivers all the way down the river Nile.

Mbanda [24] observes that for some the programme of Tutsi extermination was a dream come true. According to him, it was not only a 1994 phenomenon the actual desire started in 1950. Kamukana [25]traces the origin of the conflict on three principal views: ethnicity,the attempt to redress the colonial imbalances and as a problem of governance where the government had failed to address relevant developmental issues.

Hintjens[26] examines the tragedy of the Rwandese genocide and the reasons behind the massacre. She points to the role of the Rwandese state in perpetuating the crime and notes the indifference of the international community. While Anyidoho[27] discusses the difficulties and problems, United Nations Assistance Mission in Rwanda (UNAMIR) encountered when carrying out its operations before, during and after the civil war of 1994.

Campbell [28]raises the questions, why there was insufficient international political will to employ decisive military force to stop genocide in Bosnia, Rwanda and Kosovo; how political will can be built to suppress future genocide and what the 21st Century will look like if genocide is not halted. He includes frightening statistics to illustrate that

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[24] Ibid.

[25]See Kamukana Dixon, *Rwanda Conflict, its Roots and Regional Implications*, Fountain Publishers, Kampala, 1995, p.27.

[26] See Hintjens H,'Explaining the 1994 Genocide' *Journal of Modern African Studies*, Vol.37, No.2 1999, pp.137-163.

[27]See Brigadier General Henry Kwami Anyidoho ' In United Nations Assistance Mission For Rwanda *(UNAMIR)* In Crises., shares his experiences when, after the Arusha Peace Agreement had been signed, he was sent to Rwanda as the Deputy Force Commander and Chief of Staff to the Rwanda Assistance Mission.

[28]See Kenneth J. Campbell, *Genocide and the Global Village*, University of Delaware , West Chester, 1999, p.46.

genocide is a very contemporary problem and one that has happened in the very recent past.

Gourevitch[29] gives a horrifying account of the Rwandan genocide taken from a letter written by a group of Tutsi priests to a Hutu counterpart who turned his back on them during the fateful 100 days in the spring of 1994 when nearly a million people died, most of them hacked down with machetes. Alison[30] argues that the Rwanda slaughter 'could have been prevented. The United States, Belgium, France and the UN Security Council all had prior warning about the 1994 genocide in Rwanda and could have prevented it. The Americans were interested in saving money, the Belgians were interested in saving face, and the French were interested in saving their ally, the genocidal government.

Dallaire [31]wrote that in 1994 UN officials were accused of consistently refusing troop requests by the commanding officer of the UN peacekeeping force in Rwanda. Belgium pulled its troops out following the deaths of 10 Belgian peacekeepers on the first day of the genocide. Belgium subsequently supported the US position against increasing the peacekeepers' mandate. France, a close ally of the Hutu government in Rwanda, has been accused of sending them military support both before and during the genocide.

Carol and John Berry[32] discuss how the tragedy of 200,000 displaced people in Kosovo provoked a huge international reaction, while the genocide of 800,000 Rwandans was met with the withdrawal of U.N. troops. The point that they make concerns the promise the international community made to itself in 1945 to "never again" allow

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[29] Philip Gourevitch, The Genocide Fax *The Guardian,* Wednesday, March 31, 1999.

[30]See Des Forges Alison, *Leave None to tell the Story: Genocide in Rwanda,* New York , Human rights watch, 1999.

[31]See Lt Gen Romeo Dallaire of Canada warned of 1994's systematic killing, but support forces were never sent.

[32]See Carol and John Berry *Genocide in Rwanda,* ,Oceana, London, April 6, 1999, pp.1-37.

genocide to take place. "Never Again" happened again, and the world sat by and watched.

Campbell [33]argues that the challenge posed by contemporary forms of genocide is complex and difficult, He recommends a more pro-active approach to stopping genocide that includes three components: monitors that can detect the early warning signs of impending genocide, military force ready to intervene , a punishment component—a world court to prosecute perpetrators of genocide. Campbell argues that, the international community is reluctant to enter into a country's internal conflict. He asserts that Genocide and the Genocide Convention are falling through the cracks, but there is nobody to enforce and monitor this problem.

The Clinton administration[34] stated that the Convention for the Prevention of Genocide "allows" rather than obligates its signatories to intervene. Since the genocide took place, there have been continued efforts to develop an African response force to deal with situations like Rwanda, where the west refuses to intervene.

Literature on International Humanitarian Law

IHL or the Law of Armed Conflict or the Law of War is defined as all those rules of international law, which are designed to regulate the treatment of the individual, civilian or military, wounded or active in situations of armed conflict. From the first Geneva Convention of 1864, contemporary IHL has evolved in stages. About sixteen treaties have been adopted. Today, Customary International Law, the Geneva Convention of 1949 and the Additional protocols of 1977 are the main instruments of IHL. Humanitarian law is applicable in both international armed conflict (in such cases the

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[33] Ibid.

[34]See Human Rights Watch ,' *Rwanda Genocide'*, 1995, pp.1-117.

Geneva Conventions and Additional protocols apply) ands in non- international conflict (Article 3 common to the four conventions and protocol II are applicable.) Protection of civilian persons and populations in times of war is specially spelt out in Additional protocol 1 part IV and in the Geneva Convention Relative to the Protection of Civilian Persons in Times of War in Convention IV of 12th August 1949.

Taubenfeld[35] asserts that in war three basic concepts are in conflict namely military necessity, humanity and chivalry. There are efforts to see that humanity is not neglected. He argues that for years international interest in the preservation of at least some semblance of civilization in the midst of war has found expression in a number of international conventions. He also looks at the Genocide Convention (Dec, 9, 1949) and tries to elaborate its relevance to the humanitarian conduct of hostilities and the aims of the 1949 Geneva Conventions.

Oona[36] discusses the effect of IHL as laid down in various international treaties, on the actual number of prosecutions of individuals responsible for genocide, torture and other war crimes. She contends that after years of states being quite unwilling to prosecute such crimes, the ICTR plays a vital role in ending the culture of impunity by using International Humanitarian Law treaties to bring the individuals responsible for those crimes to trial. She concludes that it is important for other states to assist in these legal processes.

Scharf [37] writes that the most frequent response of the international community to genocide, crimes against humanity and war crimes has been to do nothing. Very few of

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[35] See Howard J.K., *Applicability of the Laws of War in Civil War in Law and Civil War in the Modern World*, John Hopkins University Press, United States of America, 1974, p.265.

[36]See Oona King , *Rwanda Genocide and Law*, Oxford University Press, London, 1994, p.106.

[37] See Scharf et.al, 'Responding to Rwanda : Accountability Mechanisms in the Aftermath of Genocide,' *Journal of International Affairs*, Spring 99, Vol.52, Issue 2, pp.621-632.

the perpetrators of such crimes have ever been brought to justice and governmental bodies or governmental organizations have seldom exposed the basic truth of what happened. Sometimes this has resulted from international indifference or paralysis. On other occasions, justice and truth were bartered away to achieve short-term peace. Whereas, Baldwin[38]argues that the International Tribunal for Rwanda (ICTR) should follow the precedent set in the Nuremberg tribunal and the *Roechling Case* which allow individuals to be punished for violations of international humanitarian law. Nkubito[39]argues that 300 000 people committed crimes against humanity in the Rwandese genocide, 20 000 are major killers who should effectively be tried by the ICTR.

According to Garbis[40] the crisis in Rwanda was seen exclusively as a humanitarian catastrophe affecting hundreds of thousands of refugees, eliciting international compassion, but distracting attention from the genocide that had already run its course. As Destexhe affirms, humanitarian action provided a way of responding to the crisis while continuing conveniently to overlook the fact that genocide had taken place.

International humanitarian law[41] is seen as being essential in determining the illegal character of violence perpetrated against civilians in war. It should therefore be at the centre of any strategy to protect them and to restore the integrity of international law. The International Committee of the Red Cross[42] acknowledges that war has

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[38]See Baldwin K, 'Can civilians be held Legally Responsible for Violations of International Humanitarian Law in a Non- International Conflict ? The Rwanda Genocide Prosecution Project ,New England School of Law International War Crimes Project, 2000, pp. 1-22.

[39]See Alphonse Marie Nkubitos Rwandese Justice Minister, Report *2000.*

[40] See Garbus Martin, 'Time for Trial in Rwanda' , Daily Nation, 3.27.95.p.12.

[41]See United Nations Chronicle, *Massacres, Mindless Violence and Carnage Rage Rwanda* , Sep 1994, Vol.31, Issue 3, p.15.

[42]See International Committee of the Red Cross, *International Humanitarian Law,* Geneva, 1993, p.27.

changed and that civilians have increasingly become the objects of attacks. In their view, however, violations of law do not necessarily signify its obsolescence. On the contrary, international humanitarian law remains highly relevant in contemporary conflicts (such as instances of ethnic cleansing and failed states) and serves to mobilise considerable efforts to further its application.

Hakizimana[43]argues that genocide is a serious crime under international law, and that the International community did nothing to prevent or stop this massacre, with some states even supporting it. This, the author concludes, makes the officials of those states accomplices in genocide and therefore they should be brought to justice, whoever and wherever they may be.

Eboe-Osuji[44] illustrates how a century of impunity by heads of states ends and a new one dawns. He describes a number of positive developments in recent years, including the reaffirmation by the international community of the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes and the willingness of states to bring them to trial. The author demonstrates that the work of the Rwandan and Yugoslavian Tribunals already gives evidence of the effects of these developments, and concludes that even though this development may not mean an end to international criminal conduct, it does mean that the offenders may never hope to escape the long arms of the law.

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[43]See Muhoza Hakizimana, *In The Role of the French Government in the Rwanda Genocide*, Fountain Publishers, Kampala, 1999. p.19.

[44]See Chile Eboe-Osuji,'Crimes against Humanity: The End of Impunity in a New Order of International Criminal Law, *International Criminal Law*,Vol. 10, No.2, 1996, pp.23-29.

Yocoubian[45] suggests that international law is doomed to irrelevance and that International legal rules function best when they command a broad consensus, reflect the positions of the major powers and other actors with serious interests at stake, and do not demand radical changes in most states' behaviour. In such cases, international law can legitimate efforts to induce change in the behaviour of the few recalcitrant non-conformists.

Flinterman[46] gives an overview regarding the solutions to the conflicts in the Great Lakes region. The main finding is that even though responsibility for lasting solutions lies first of all in the hands of the inhabitants and the leaders of the countries in this region, there are also important possibilities for the international community to play a constructive role. In this report, suggestions are made for regional solutions and as those regarding the specific countries, and the significant part the international community could play in it.

In 1968 the UN General Assembly[47]unanimously adopted a resolution concerning the respect for human rights in periods of armed conflict which recognizes the necessity of applying fundamental humanitarian principles in all armed conflicts, and stated that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited but most important is prohibited the launch of attacks against the civilian populations.

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[45]See 'The Efficacy of International Criminal Justice: Evaluating the After math of the Rwanda Genocide', *World Affairs*, Spring 99,Vol.161, issue 4, pp. 176-186.

[46] See Cees Flinterman, *Main Findings of the Netherlands Delegation to the Great Lakes Region, Rwanda and Burundi,1995*.

[47] See United Nations, General Assembly Resolutions, 2396,Resolution 2345 and Resolution 2383 1968.

Literature gap

The literature reveals a theoretical discrepancy between genocide and the available measures for effective implementation of International Humanitarian Law. It is clear that most efforts have concentrated on drafting and signing international treaties and on post-genocide measures to punish the perpetrators. However, the effective application of these treaties to deter conflict/genocide is clearly lacking. Most of the literature reviewed showed that International humanitarian law was not invoked before or during the genocide as a preventative measure.

This study seeks to fill these gaps in the failure to address measures available for using the law to prevent genocide and in addressing impunity of violations of the law.

Methodology

The study will use both primary and secondary sources of data. Primary sources will involve informal interviews with officials at the Rwandan embassy, officials of the ICTR, and members of NGOs that operate in Rwanda. The secondary sources will involve review of both published and unpublished materials, this could include books, journals (electronic and print), periodicals, United Nations reports, magazines, bulletins and internet sources

Chapter Outline

Chapter one gives the background to the application of IHL in internal armed conflict. Chapter Two explores the relevance of international humanitarian law in internal armed conflict. Chapter Three explores the role of international criminal law and individual criminal responsibility in international law. Chapter Four explores IHL violations during the Rwanda genocide. Chapter Five analyses critically the application of IHL internal armed conflict. Chapter Six provides the conclusions of the study.

CHAPTER TWO

The relevance of international humanitarian law in internal armed conflict

Introduction

Chapter One discussed the background to the study on ending IHL violations in internal armed conflict. The Chapter outlined the problem statement, the study objectives, hypothesis, justification, theoretical framework, methodology, literature on the Rwanda genocide and literature on IHL and a chapter outline. This Chapter will discuss the relevance of international humanitarian law in internal armed conflict. It will also analyze the developments in international humanitarian law that have contributed to developments in the area of internal armed conflict. The Chapter will also discuss the relation between *jus ad bellum* and *jus in bello* and finally it will survey IHL versus international human rights law.

The nature of International Humanitarian Law

International Humanitarian Law or the Law of Armed Conflict, or the Law of War is defined as all those rules of international law, which are designed to regulate the treatment of the individual, civilian or military, wounded or active in situations of armed conflict. The law relating to armed conflict is customarily divided into the *jus ad bellum* (the right to resort to war) and the *jus in bello* (the law during war).International Humanitarian Law incorporates two ideas of different natures, one legal and the other moral. Humanitarian law is the transposition of international law of moral and specifically humanitarian concerns. This law is intimately bound to humanity. It is upon this category of law that the life and liberty of countless human beings depend in times

of war.[1] IHL are customary rules, which are specifically intended to resolve matters of humanitarian concern arising directly from armed conflict whether of an international or non-international nature. IHL acknowledges that war is a fact; it will always cause causalities and the concern of IHL is to set limits to permissible violence. There is the right to kill the enemy while protecting the civilians.[2]

IHL applies with equal force to all parties in an armed conflict irrespective of which party was responsible for starting that conflict. IHL is the law applicable to the conduct of hostilities once a state has resorted to the use of force. IHL sets limits to the way in which force may be used by prohibiting certain weapons and methods of warfare. IHL is not concerned with the legality of states recourse to force.[3] IHL regulates the treatment of persons who are *hors de combat*, the wounded, sick, shipwrecked, persons parachuting from a disabled aircraft, prisoners of war and civilian internees as well as the enemy's civilian population. IHL insists that armed attacks be directed only at military objectives and even then, they should not cause disproportionate civilian causalities .IHL offers two systems of protection, that of international armed conflict and non-international armed conflict.

The term International Humanitarian Law is relatively new and does not appear in the Geneva Conventions of 1949 and in the Additional Protocols of 1977. IHL as it is known today comprises of four Conventions and two Additional Protocols. The Geneva Conventions central concern is the protection of victims of war. The four Geneva Conventions are linked by certain general principles, specifically by the common

[1]See Pictet Jean, *Development and Principles of International Humanitarian Law,*Martinis Nijhoff Publishers, Geneva, 1995, p. 42.
[2] See Pictet Jean, *International Dimensions of Humanitarian Law,* Henry Dunant Institute, Geneva 1988, p. 3.
[3] See Fleck Dieter (ed) *Handbook of Humanitarian Law in Armed Conflicts,* Oxford University Press, New York, 1995, p.102.

articles. Such articles are found among the general provisions at the beginning of each convention. The Geneva Conventions are declaratory of customary international law. They were signed on August 1949 and entered into force on 21st October 1950.

The first Geneva Convention is on the Amelioration of the Conditions of the Wounded and the Sick in the armed forces in the field. This convention deals with the respect and protection due to medical personnel and establishments, the wounded, sick and the dead. The second Geneva Convention is on the of the Amelioration of the Conditions of the Wounded and the Sick the Shipwrecked members of armed forces at sea. The protections offered here are parallel to those of the first Convention, but they differ because of the different environments. The rule here is that, after a naval fight parties must take all measures to search for the shipwrecked, wounded and sick and the dead. The provisions in these Conventions were supplemented by Protocol I, 1977, Parts I and II.[4]

The Third Geneva Convention of 1949 is concerned with the treatment of prisoners of war. The Convention consists of a comphensive code centred on the requirement of humane treatment and protection in all circumstances particularly against acts of violence or intimidation and against insults and public curiosity. This means that displaying prisoners of war or confessing to crimes or criticing their own government must be regarded as a breach of the Convention. The prisoners of war (PoW) basic category comprises of, members of the armed forces, volunteer corps, militias, resistance movements, civilian support staff and members of an uprising. These

[4]See, Adam R and Guelff R., (ed) *Documents on the Laws of War* , Clarendon Press, Oxford, 1982, pp.169-193.

are required to conduct themselves in accordance to the law of war[5].From the time of capture, prisoners of war are the responsibility of the enemy power, any acts or omissions that can cause death to PoW be prohibited.

The fourth Geneva Convention is the first international agreement in the laws of war to exclusively address the treatment of civilians; it concerns the protection of the civilian persons in time of war. The Fourth Geneva Convention[6] provides sets of rules for the protection of civilians. For example, the right to respect and honour for a person, ,respect for personal convictions and religious practices and the prohibition of torture and other cruel, inhuman or degrading treatment, hostage taking and reprisals.[7] The fourth Geneva Convention defines in detail the many ways in which civilians must be dealt with to shield them from the direct or indirect effects of conflicts, among the responsibilities that this convention sets for the warring parties are actions that grant medical personnel, protection from harm. The traditional legal effort to protect civilians in war under the fourth Geneva Convention of 1949 is accomplished by distinguishing civilian from military targets.

Additional Protocol 1, 1977 is concerned with the protection of victims of international armed conflict. It supplements rather that replace the 1949 Geneva Conventions. The Protocol made two important contributions to the law of war, firstly, the Protocol attempts to bring certain armed conflicts within the ambit of the more developed regime, for example wars of national liberation. Second, it enlarged the category of lawful belligerents in several ways.[8] For example, it attempts to afford legal

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[5] See, Adam R and Guelff R., (ed) *Documents on the Laws of War*, op.cit. pp. 194-215.
[6] See, International Committee of the Red Cross, *Understanding International Humanitarian Law. Basic Rules of the Geneva Conventions and their Additional Protocols*, Geneva, 1983, pp.153-165.
[7] See, Malcolm Shaw, *International Law* (2nd ed), Grotius Publications, Cambridge, 1986, p.810.
[8] See, Article 44 of Additional Protocol 1, 1977.

recognition to certain types of guerrilla activities by modifying the requirements of distinctive emblems and carrying of arms openly, the Protocol provided for the first time a definition of mercenaries and for the identification and protection of medical aircrafts.

Additional Protocol II,1977,develops and supplements Common Article 3[9] without modifying its existing conditions of application. It applies to all armed conflicts which are not covered by Additional Protocol 1[10]and which take place within a states territory, between its armed forces and organized armed groups, in sufficient control of part of the territory to enable such groups to carry out sustained and concerted military operations and to implement Additional Protocol II. This Protocol does not apply to situations of internal disturbances and tensions such as riots, isolated and sporadic acts of violence and other acts, which are not deemed armed conflicts.

The Development of International Humanitarian Law Conventions and their Application

Throughout history, the development of the laws of war has been influenced by religious concepts and philosophical ideas. Customary rules of war are part of the very first rules of international law.[11] From the Middle Ages until the 17th century discussions of the rules of war were dominated by the theological considerations with some elements of classical philosophy. Christianity also contributed to the development of the laws of war, at the *Lateran co cilium* of 1215 when the use of the crossbow was forbidden between opposing Christian knights. The writings of St. Augustine on the just war doctrine in the middle ages and later adopted by St. Thomas Aquinas restricted the

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[9] See Later in this Chapter for a Discussion of Common Article 3 to the 1949 Geneva Conventions and Additional Protocol II.

[10] See Article I of Additional Protocol I of 1977.

[11] See Roling V.A, 'The Significance of the Laws of War' in Cassese, *Current Problems of International Law*, Clarendon Press, Oxford, 1994, pp.133-153.

unlimited right to wage war, the just war doctrine maintained that a just war required a lawful authority, a just cause and a rightful intention. However, these just war theories led to difficulties, because two enemy states could both argue that they were fighting a just war, in such cases that was to assess whether the war was just or not. The decision on whether it was a just war was purely subjective.

Prior to the just war doctrine, Grotius had written that everything that served the needs of war was allowed, while everything which was not necessary for warfare was forbidden. In 1772, Jean Jacques Rousseau in T*he Social Contract* wrote that war is a relation not between man and man but a relation between states and individuals are enemies only accidentally ,not as men, nor, as citizens but as soldiers not as members of the country. The 19th century saw the ideas, which gained acceptance in the 18th century, given practical effect. A number of major treaties, some of which are still in force were adopted. Several customary rules of warfare were codified; in addition, individual initiatives saw the creation of the International Committee of the Red Cross, which has played a central role in the development of IHL.

The first attempt to codify the laws and customs of war since the exposition of the classical law of war by Grotuis, Vattel and Gentili[12] was the code of land warfare drawn by Francis Lieber during the American civil war. However, the 1868 Declaration of St. Petersburg may be considered the real starting point of the present laws of warfare. At this Declaration, very important principles of the law of war were recognized and specific weapons were forbidden.[13] The Declaration of St. Petersburg prohibited the use of a specific type of bullet (expanding bullet) for humanitarian

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[12] See Scott (ed) *The Classics of International Law,* Carnegie Institute, Washington, 1916, p.234.
[13]See Roling V., 'The Significance of the Laws of War' op.cit. p.134.

reasons. It also adopted the principle that the only legitimate objective that states should endeavour to accomplish during war was to weaken the military forces of the enemy.[14]

The next development in the move to codify the laws of war was the Brussels conference 1874 .The Brussels Declaration adopted a draft International Agreement on the Laws and Customs of War. It contained fundamental restrictions that the laws of war do not allow belligerents an unlimited power as to the choice of injuring the enemy. (This was never ratified, as not all, the parties were willing to accept it as binding.)[15] In 1880, the Institute of International Law at Oxford adopted the Oxford Manual on the Laws of War on Land[16]; it contained a few restrictions on the means and methods of warfare. The next attempts at the codification of the laws and customs of war are found in the Hague Conventions.[17] The first Hague Convention of 1899 was an attempt to revise the Brussels Declaration, while the second Hague Peace conference revised these rules.

The starting point for the Geneva laws was at the Diplomatic Conference of 1864, which adopted the Convention of Geneva of August 1864 for the Amelioration of the Conditions of the Wounded in Armies in the Field. Its great contribution to international law was the concept of neutrality as proposed by Dunant.[18] The Convention assured for all time and in all places respect for the wounded and their treatment in the same manner regardless of the side to which they belonged. This Convention contained ten articles, which covered the essential elements whereby, military ambulances and

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[14]See Schindler D, Toman. J(ed), *The Laws of Armed Conflic::A Collection of Conventions, Resolutions and other Documents*, Martinus Nijhoff, Dordrecht, 1988, pp.35-102.
[15] See Ibid.
[16]See Ibid.
[17] See Friedman, *The Law of War, A Documentary History*, Random House, New York, 1972, See also Higgins, *The Hague Peace Conferences*, Cambridge University Press, Cambridge, 1909, pp. 201.
[18] See Dunant H, *A Memory of Solferino*, .American National Red Cross, Washington, 1959.

hospital were recognized as neutral. The principles of the Geneva Convention gradually extended to other categories of war victims. The first conflict in which the Convention was applied by both parties in a fully satisfactory manner was during the Serbo-Bulgarian war of 1885 in which the mortality was 2 per cent. The two states understood that the Geneva Convention worked for their reciprocal benefit.

The Conventions later underwent a series of revisions to adapt to the new realities. The International Committee of the Red Cross was the initiator of these successive developments in IHL. The first revision was made in 1906.[19] This saw the increase of the articles from ten to thirty-three without modifications of the essence of the Convention. During the First World War, the Convention was applied except with respect to the repatriation of medical personnel from which belligerents departed by keeping a number of doctors and nurses in prison camps to care for their wounded compatriots.

The second revision was made in 1929, this took into account the developments of medical aviation. The conference also recognized the right of the Muslim countries to use a red crescent in place of the Red Cross.[20] The Geneva Conventions were relatively well respected during World War II, but the belligerents were reported to have held doctors and nurses from the opposing side in prisoner of war camps to treat their compatriots.

After the Second World War, there was little interest in the laws of war and the proposals in the International Law Commission to start the codification of the laws of war failed. This is attributed to the high expectations that the United Nations would be

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[19]Pictet Jean, *Development and Principles of International Humanitarian Law*, Martinus Nijhoff Publishers, Geneva, 1995, p. 30.

[20] See Pictet Jean, *Development and Principles of International Humanitarian Law*, op.cit.p. 32.

able to prevent war, and the codification of the laws of war would be disrespective to the United Nations Charter.[21] However, the 1949 diplomatic conference on international humanitarian law saw the adoption of the four Geneva Conventions, which were signed in August 1949 and entered into force on 21st of august 1949.

After the adoption of the Geneva Conventions, developments in the character of warfare led to the growing realization that the laws of war required further adoptions to the conditions of contemporary hostilities. This was triggered by three main issues, first, the resort to guerrilla warfare raised questions concerning the application of the law to such combatants. Second, events in armed conflicts and occupations demonstrated the need for further protection to be given to victims. Finally, the increase in internal conflicts after second world war lead to the need to further clarify the application of the law to such conflict.[22] The diplomatic conference on international humanitarian law held between 1974 to 1977 saw the adoption of two Additional Protocols to the Geneva Conventions of 1949;Additional Protocol I on international conflicts which supplements the Geneva conventions and Additional Protocol II, which is concerned with internal armed conflicts.

Other Conventions that supplement the Geneva Conventions and their Additional Protocol include the 1980 Convention on Conventional Weapons ,the 1993 Convention Banning Bacteriological Weapons, the 1977 Ottawa Treaty Banning Landmines , the 1988 Rome Statute for the creation of the International Criminal Court and the Protocol on the Rights of the Child.

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[21] Roling V, The Significance of the Laws of War' op.cit, p.135.
[22] See Adam Roberts and Guelff R, (ed) *Documents on the Laws of War*, op.cit. p.387.

International humanitarian law in the regulation of non-international armed conflict.

In 1758, Vattel argued that certain principles of humanitarian law should apply in civil conflict.[23] At that time civil wars were regarded as mere uprisings and criminal in nature in which the incumbent government was at liberty to deal with these disputes as it thought fit. The only subjects of international law then were states. Prior to the decline of the idea of resort to war as extra -legal or legal ,the application of the laws of war in civil conflicts depended on whether belligerent status was accorded to the rebels or not. Such recognition of belligerents status either by incumbent government or by third states was to turn the civil conflict into an international war, then the laws of war become applicable to such a conflict, this however declined with the outlawry of war.

In other civil wars respect for the laws of war depended upon the personal character of the military commanders and the extent to which they were able to enforce discipline in their forces. The development of rules of war in civil conflicts also developed as a reaction to events and situations that were taking place. A case in point is the Spanish Civil war 1936-1939, this was notable for its lack of humanitarian restraints; it focused attention to an unprecedented extent on the problem of humanitarian rules in civil conflict.

The slow progress in the extension of the law of armed conflict to civil war can be attributed to some factors[24] These include the fact that, inadequacy of the regulation of internal conflict has been to a large extent the product of the development of international law in the context of, and concerning the relations between states; for long the domestic affairs of the state were considered beyond the scope of international law.

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[23] See Scott (ed) *The Classics of International Law* , op.cit

[24] See Gardam Judith, *Non- Combatant Immunity as a Norm of International Humanitarian Law,* Martinus Nijhoff, London, 1993, p.124.

This may be illustrated by the UN Charter article 2(7).[25] Despite the changing reality, state sovereignty is still an effective barrier to the increased international regulation of non-international armed conflict; civil wars are a particularly difficult area for a state to allow outside interference as the existence of the state is frequently threatened by the very conflict.

Second, between the signing of the treaty of Westphalia and the beginning of the growth of the modern Nation State and 1949 nearly all major wars were large scale international armed conflicts with the exception of the American civil war and the Spanish civil war. The international community was pre-occupied with devising rules for the former type of conflict at the neglect of laws for internal wars.[26]

The International Committee of the Red Cross had for a long time supported the elimination of the distinction between non-international and international conflict, for the purposes of application of the laws of armed conflict. The move to apply IHL in civil wars irrespective of the legal status of the parties to the conflict, commenced in 1949 in the negotiations of the fourth Geneva Convention on the Protection of Civilians.[27] The International Committee of the Red Cross's idea, to eliminate the distinction received support from developments in the areas of human rights and several UN General Assembly Resolutions dealing with respect for human rights in all armed conflict[28]. It is clear from this resolutions that, it was perceived to be inappropriate to distinguish between international and non-international armed conflict, as principles of human

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[25] Nothing contained in the present United Nations Charter shall authorize the United Nations to intervene in matters, which are essentially within the domestic jurisdiction of any state.
[26] See Cassese, *International Law in a Divided World*, Oxford Press, 1986, p.280.
[27] See Sandoz et.al (ed) *A Commentary on the Additional Protocols*, Martinus Nifhoff, Dordrecht, 1987, p.1322, See also Pictet, *Developments and Principles of Humanitarian Law* op.cit. pp.30-33.
[28] See General Assembly Resolution, 24444 (XXIII) 19 December 1986; General Assembly Resolution. 2675(XXV) 9 December 1970

rights in armed conflict know no such artificial boundaries. It was not necessarily intended that the rules relating to traditional armed conflict should apply in their entirety to non-international armed conflict, for instance that the basic principles common to both human rights and humanitarian law should apply.[29]

Before 1949, International Humanitarian Law applied to wars between states and had no formal bearing on internal armed conflicts. However today a few laws of war provisions relate to internal armed conflict, they constitute summaries of the essential rules applicable to all armed conflicts. In times of internal conflict the following laws of wars are applicable, article 3 common to all the four Geneva Conventions, Additional Protocol II of 1977, article 19 of the Hague Convention on Cultural Property, certain weapons conventions and customary law.

The 1949 Geneva Conventions were primarily aimed at international armed conflict. However, Common Article 3 was developed and was later reinforced by Additional Protocol II, 1977 that apply by virtue of its article 1 to all non-international armed conflicts. Common Article 3 was the first attempt at developing the principles of humanitarian law for non-international armed conflicts. The original Stockholm draft of Common Article 3 provided that once the threshold level of a conflict had been met in a civil dispute, all the provisions of the four Geneva Conventions applied, this never prevailed in the diplomatic conference of 1949, they were abandoned and article 3 become a self-contained code, or mini-convention for civil conflicts.[30]

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[29]See Cassese, *The Geneva Protocols of 1977 on the Humanitarian Law of Armed Conflict, A Collection of Conventions, Resolutions and Other Documents.* Martinus, Nifhoff, Dordrecht, 1955, p.252.

[30] See Pictet Jean (ed) *Commentary on the First Geneva Convention* op.cit. p. 38-43.

Common Article 3 states that, "In cases of armed conflict not of an international character occurring in the territory of the high contracting parties, each party to the conflict shall be bound to apply ,as a minimum, the following provisions;

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

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

a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;

b) Taking of hostages;

c) Outrages against personal dignity ,in particular humiliating and degrading treatment;

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

2) The wounded and sick shall be collected and cared for.

An impartial humanitarian body ,such as the ICRC may offer its services to the parties to the conflict. The parties to the conflict should endeavour to bring into force ,by means of special agreements, all or part of the other provisions of the present convention. The application of the preceding provisions shall not affect the legal status of the parties to the conflict.

At the time of enactment, the provisions of common article 3 did not reflect customary law, but with time, they came to gain the status of customary law. Though the provisions represent a minimum, they have an absolute character, which is reinforced by the co-existence of the laws of human rights. One major difficulty in regarding common article 3 as customary in nature is the fact that states refuse to acknowledge its application in situations where there is little doubt that the threshold requirements for its application have been met. For example in the Algerian conflict France refused ,until very late to acknowledge the application of article 3,however there are cases in which states have accepted the relevance of article 3 to their disputes examples; Guatemala(1964) Algeria(1955-56) Libya(1958)Yemen(1962) and the Dominican republic(1965)[31]

The states which deny the application of article 3 relied on the ambiguous wording of the article to maintain that their conflicts did not fall within it. However they did not deny the need to comply with the article in any circumstances, for instance the international court of justice in the *Nicaragua Case* had no difficulties in overcoming the lack of the state practice in finding that article 3 was customary in nature[32]

The rules contained in article 3 are considered as customary law and represent a minimum standard from which the belligerents should never depart (article 3 does not define the concept of non international) article 3 covers organized armed groups against the government, and organized groups against each other, note that no control of territory is necessary for article 3 to apply.

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[31] See Lysaght, *The Scope of Protocol II and its Relation to Common Article 3 of the Geneva Conventions and other Human Rights Instruments*, Chicago Publishing House, 1983. p.194 ,See also Fraleigh, The Algerian Revolution as a case of International Law in Falk (ed) *The International Law of Civil War* op.cit. p.194.

[32] See Gardam Judith *Non- Combatant Immunity as a Norm of International Humanitarian Law*, op.cit.p.169.

The diplomatic conference of 1974-77, which negotiated Additional Protocol I, and II were preoccupied from the beginning with political arguments as to the legitimacy of wars of national liberation. The tension between interests of sovereignty and elementary humanitarian principles was one of the factors which led to the various compromises in the final form of Protocol II which weakens its operations. Several states took the stance that any form of international regulation of internal armed conflict was contrary to the notions of sovereignty. Others argued that there should be equal protection for all victims of armed conflict irrespective of the legal status of the conflict.[33]

Objections to the development of customary rules in civil wars are based on two grounds.[34] One is an objection voiced during the negotiations on Protocol II, that the attempt to establish rules for civil conflicts was very recent and there has been no time for the practice to develop. Second was the claim that such practice only grows out of relationships between states, and in civil wars, states can not in any meaningful sense of the term be regarded as the real actors of the body of law. Although several states attempted to ensure an effective Protocol for civil wars, there were divisions amongst states as to the content of Protocol II and the field of application continued to be the subject of differences between states. Although it was adopted by consensus, it disguised fundamental differences between states.[35] The complex rule of article 1 as to the scope of application was a contributing factor.

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[33] The New Zealand delegate argued for the changing view of sovereignty, For example, Human Rights Regimes, Laws of Genocide and Racial Discrimination. There is increasing recognition in the international community that the traditional concept of the inviolability of state sovereignty no longer reflects the reality.

[34] See Kalshoven, Applicability of Customary International Law in Non International Conflicts *in* Cassese(ed), *Current Problems of International Law*, .Milan, 1975,.pp.246 -269.

[35] See CDDH/SR 56(62) many states declared that if the Protocol had been put to vote they would have abstained .See, for example : Nigeria CDDH/SR56(12) Indonesia CDDH/SR(21)

The other major defect of Protocol II is the high level of conflict required for its application, it would not apply to the majority of civil wars currently in the international arena[36] states were less inclined to accept these obligations in relation to a wide range of conflicts, the solution arrived at by the negotiating parties is to narrow the field of application of Additional Protocol II in two ways. One is the requirement that the armed forces of the high contracting parties are involved, and that opposition be either armed forces or dissident armed groups who are under responsible command and exercise such control over a part of its territory as to enable them carry out concerted and sustained military operations. Second that the protocol does not apply to situations of internal disturbance and tensions.

Gardam [37]agues that there are three categories of civil wars established by the conventional rules , those that attract the operations of art 3, those that meet the criteria of article 1 of Additional Protocol II and those situations of internal disturbances and tensions which are outside the scope of humanitarian law but are covered by the law of human rights. Despite these criticisms, Additional Protocol II was applicable to the internal conflicts in El Salvador, the Philippines, Rwanda and other aspects of fighting in the former Yugoslavia. Additional Protocol II adds to article 3 and contains the first attempt to regulate by treaty the methods and means of warfare in internal armed conflicts.

Mexico CDDH/SR/56 (28) Sudan CDDH/SR/56(38) India CDDH/SR.56(49) and Philippines CDDH/SR.56(61)

[36] See Gardam Judith, *Non-Combatant Immunity as Norm of International Humanitarian Law, op.cit* p.128.

[37] Ibid.

The Relationship between *jus in bello* and *jus ad bellum*

The law relating to armed conflict is customarily divided into the *jus ad bellum* (the right to resort to war) and *jus in bello* (the law during war or the rights and duties, which operate once a war has started). The development of international law and international relations has given rise to a number of rules imposing certain obligations on states in their conduct of international relations. This has come because of the wide spread struggle of peoples and states for the establishment of an international legal order of peace and peaceful co-existence among states irrespective of their social and economic systems.

Historically the development of the *jus in bello* had depended on the development of *jus ad bellum*. The justness of the resort to force determined the extent of the application of the *jus bello*. This interdependence disappeared with the advent of the Nation State and the emergency of the *jus belli ac pacis* (the right to wage war).The theory of *jus belli ac pacis* no longer prevails in International Law, it has been taken over by the United Nations Charter provisions.

The development of the jus ad bellum

After the decline of the just war theory in the 19th century and up to the end of the first world war, the view prevailed that war in its origin is an extralegal conception. War was viewed as a fact and an event that occurs and manifests itself without any legal assistance. [38] International law at this time, did not concern itself with the situations in which states could resort to war. It was considered the right of a sovereign state to wage war.

[38] See Wright Q, (2nd ed) *A Study of War*, University of Chicago Press, Chicago, 1965, p.210.

Stone[39] wrote that the resort to war was neither legal nor illegal. There was however, no consensus that the resort to war was not part of international law. It was considered that the practice of states of attempting to justify their wars with legal reasons indicated that the justness of the resort to war fell within the province of international law. A recurrent theme in the writings on the status of war in international law during this period was that war must be regulated by international law if the system was to be seen as truly a legal one. The fact that international law refrained from restricting the liberty of states to go to war indicated that war was permitted. Consequently, the prohibition of aggressive war in the 18th century implied the denial of the doctrine of extra -legality and a confirmation that prior to interdiction war was legal.

Up to the 1917 war and the use of force, primarily armed force in relations among states were considered a legal means of settling international disputes. Oppenheim[40] wrote that war was in law a natural function of the state and a prerogative of its uncontrolled sovereignty. List[41] also wrote that in contemporary international law war remains the most extreme means of exercising a real or imagined right in the settlement of international disputes. In 1917, Lenin drafted a decree on the Peace and Renunciation for the first time the need to prohibit aggressive war and to declare it an international crime was outlined.

Prior to this, the Hague Conventions of 1899 and 1907 had made significant contributions to the development of the laws and customs of war. The Hague Conventions had attempted to restrict recourse to force by states. Article 1 of the

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[39] See Stone quoted in Wright Q, *A Study of War*, second edition, op.cit p.102.
[40] See Oppenheim, *International Law*, Vol .2, London, Longmans, 1944, p.145.
[41] See List quoted in Oppenheim, *International Law*, op.cit, p.148.

Convention for the Pacific Settlement of International Disputes with a view of obviating the recourse to force, bound the contracting states to ensure pacific the settlements of disputes. The Convention respecting the limitations of the employment of force for the recovery of contract debts, although limited in scope, was an attempt to achieve this same end.

The 1920s were characterized by the emergence in international law of the principle of the prohibition of force and the threat of the use of force, the principle of non-aggression and prohibition of aggressive wars.[42] The Treaty of Versailles and the establishment of the League of Nations saw the beginning of modern attempts to outlaw the resort to force. The purpose of the Covenant of the League of Nations was to achieve international peace and security, through international law and the maintenance of justice. Woodrow Wilson in his fourteen points outlined the ideas which influenced the development of the principle in the League of Nations. The Covenant of the League of Nations did not prohibit the use of armed force but merely limited it. The preamble proclaimed the need to accept the obligation not to resort to war.

According to Articles 12, 13 and 15 of the Covenant League of Nations, in specific cases and in certain circumstances the members of the League had the right to resort to armed force. For instance, states could resort to war as a lawful method of settling international disputes.[43] The Covenant imposed restraints on the liberty of states to resort to war; it did not forbid war altogether. Article XII forbade the resort to war by a member before submitting its dispute to arbitration, judicial settlement or to the League

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[42]See Blishchnko I.P,' The Use of Force in International Relations and The Role of the Prohibition on Certain Weapons, in Cassese (ed) *Currents Problems of International Law, Essays of the United Nations Law and on the Law of Armed Conflict*, Milano, Italy, 1975, pp.157-174.

[43] See Blishchenko, The Use of Force in International Relations and The Role of the Prohibition on Certain Weapons, op.cit. p.159.

of Nations, Legal Council. In no case could a member resort to war until three months after the arbitrators' award or judicial decision.[44]

At the same time, a number of bilateral treaties on non-aggression whose essence was the direct renunciation of the use of force were signed. These include, between 1925 and the outbreak of world war II, eleven treaties on non-aggression signed between the Soviet Union and its neighbouring states. Between 1928-1927 France signed treaties of non-aggression with Romania and Yugoslavia. The 1928 Paris Pact (Kellogg-Briad) was significant in the development of customary international law. In article, 1 it stated that, the high contracting parties condemn recourse to war for solutions of international disputes and renounce it as an instrument of national policy in their relations with one another.

The increasing destructiveness of war because of rapid advances in weapons and the influence of the Soviet ideology led to a new emphasis on the outlawing of the use of force culminating to article 2(4) of the United Nations Charter. Today the principle of renunciation of the use or threat of the use of force is a fundamental principle of international law as is stated in article 2(4) of the United Nations Charter.

Article 2(4) imposes definite obligations on states to renounce the use or threat of the use of force against the territorial integrity of any state in any manner inconsistent with the United Nations Charter. This was reaffirmed in 1970 by the United Nations

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[44] See Mc Corquodale R and Dixon Martin, *Cases and Materials on International Law*, .Blackstone Press, London, 1991, p.284.

General Assembly Declaration on the Strengthening of Security and on the Principle of International Law Concerning Friendly Relations and Cooperation among States[45]

In various provisions of the Charter (the preamble, article 41 and 42), the concept of force included not only armed force but also economic and political forms of coercion. The legal framework for the impermissible and permissible uses of force is contained in article 2(4) and Chapter VII of the Charter. The system is based on the prohibition of the use of aggressive force in international relations, the retention of the right to individual and collective self defence against armed attack and the establishment of a collective security system with various enforcement mechanisms. Article 51 preserves the right of states to individual and collective self-defence.

Several questions have been raised by the text of article 2(4) for instance, what type or degree of force amounts to its violation, What amounts to the threat of the use of force, and the effect of the words 'against territorial integrity 'or independence of state. This has given rise to debates between two schools, the permissive school and the restrictive school. For Schachter[46] force is an ambiguous term; it can cover a wide range of conduct other than armed aggression, for example the use of economic and political pressure. The permissive school argues that the UN Charter does not change the direction of international law on the use of force. The pre-1945 law is still valid in determining the scope of the prohibition and the exception is self-defence. Bowett[47]limits

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[45] See Howard-Ellis, *The Origin, Structure and Working of the League of Nations*. George Allen and Union, London, 1928, p.47. See also Bowett, *The Law of International Institutions* (fourth ed), Stevens and Sons, London, 1982, p.45.

[46]See Schachter ,'The Rights of States to Use Force' in Cassese, *The Current Regulation on the Use of Force* , op.cit, pp. 1624-1647.

[47] See Bowett, *The Law of International Institutions*, fourth ed, Stevens and Sons, London, 1982, p.243.

the ambit of article 2(4) to the threat of, or use of physical armed force and not to include economic or political pressure.

The view of the restrictive operation of article 2(4) is widely accepted. It argues that the Charter radically altered the right to the use of force. Hence article 2(4) contains a total ban on the unilateral use of force except for the exceptions, which the Charter specifies. The restrictive operation of the article in international law was captured in the *Nicaragua Case* in which the International Court of Justice referred to an armed attack as the gravest form of the use of force.[48] Concerning the question of what amounts to the threat of the use of force, Sandurka[49] argues that although treated theoretically as separate wrongs, in practical terms the threat of the use of force has very little distinct ambit of operation. Article 2(4) must be read together with article 2(3), which requires members to settle their disputes by peaceful means.

Concerning the question of territorial integrity, there is more support for the restrictive interpretation. This is limited to activities which involve annexation or permanent occupation or control. Such interpretation allows the use of force within the boundaries of a foreign state unless a portion of that territory is lost permanently.[50]

The impact of jus *ad bellum* on the development of *jus in bello*

According to Wright[51]the reason for maintaining the distinction between the two (*jus ad bellum and jus bello*) is the humanitarian nature of the rules. He points out that the

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[48] See Brownlie, 'The United Nations Charter and the Use of Force 1945-1988' in Cassese, *The Current Legal Regulation on the Use of Force,* op.cit, *pp.* 497-515.
[49] See Sandurka' The Threat of Force' *American Journal of International Law* vol. 82, No.239, 1988, pp.165-183.
[50] See D'Amato *International Law Process and Prospect,* Transnational Publications, Dobbs Ferry 1987, p.58.
[51] Wright Q, 'The Outlawry of War and the Law of War' *American Journal of International Law, Vol.* 365, 1963, pp. 346-375.

rules are conferred by international law on individuals[52] not on states; individuals are entitled to the benefit of the rules even if the state is engaged in illegal hostilities. Thus, humanitarian law always applies irrespective of the legality of the resort to force. Wright, writes that doubts were cast on the desirability of addressing the issue of the codification of the laws of war rather than concentrating on the prohibitions of warfare. It was feared that attempts to codify the law of armed conflict involved the acceptance that conflict was inevitable and even acceptable.

Brownlie[53]argues that the practice of states had established by 1945, a customary rule that the use of force other than for self-defence was illegal. Further, it was thought that attempts at developing the law of war were unnecessary and even counter-reproductive. He concludes that the International Law Commission in 1949 concluded that the codification of the laws of war was tantamount to showing lack of confidence in the efficiency of the means at the disposal of the United Nations in maintaining international peace.[54]

The concentration on the elimination of the resort to force inevitably diverts attention from the implementation and development of IHL. The major focus becomes the distinction between the permissible and impermissible use of force. IHL is not concerned with the legality of a states recourse to force, which is a matter of *jus ad bellum*. IHL or *jus bello* applies with equal force to all the parties in an armed conflict irrespective of which party was responsible for starting the conflict. This is the law applicable to the conduct of hostilities once a state has resorted to the use of force. It

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[52] The issue of individual criminal responsibility will be discussed in Chapter Three.
[53] See Brownlie,' The United Nations Charter and the Use of Force 1945-1988' in Cassese *The Current Legal Regulation on the Use of Force, op.cit.* pp. 201-233.
[54] Ibid.

comprises the whole of the established law serving the protection of individuals in armed conflict. It sets limits to the way in which force may be used by prohibiting certain weapons and methods of warfare, by insisting that armed attacks be directed only at military objectives and even then that they should not cause disproportionate civilian casualties.

Humanitarian Law versus Human Rights Law [55]

The definition of human rights in relation to armed conflict refers to the rights of individual combatants, those wounded and sick, prisoners who are *hors de combat*, those who attend to the needs of the latter, and the rights of civilians. Since time immemorial, attempts have been made to control the horrors of war and to maintain that even in times of armed conflict man must comply with certain principles, whether they are described as the law of God, of chivalry or of humanity.

In the classical times, there was some measure of recognition that if conflicts occurred, there were some people who were considered outside the scope of its activity and were entitled to protection. With respect to human rights and the punishment of violations an example is in 1474 at Breach, where the allied cities established a tribunal to try Peter of HagenBach for offences against the laws of god and man; he was accused of indulging in looting, pillage, murder ,attacks on civilians and neutral merchants, for which he was found guilty and executed.[56]

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[55] The United Nations Bill of Human Rights comprising of the Universal Declaration of Human Rights, The Covenant on Economic, Social and Cultural Rights and The Covenant on Civil and Political Rights will be ignored for the purposes of this discussion, since they do not deal in any way with the problem of armed conflict. This are indeed threatened in times of armed conflict as derogations are permitted. See also Green L.C *Essays on the Modern Law of War*, Transnational Publishers, New York,1985, p.93; see also, United Nations Document .ST (HR/1) *Human Rights: Compilation of International Instruments of the United Nations*, 1973.

[56] See Schwarzenegger, *International Law*, op.cit p.45.

In the feudal times, as the modern state system was beginning to develop and armed conflict was becoming a contest played according to rules which remained uncodified, but were generally accepted as rules of chivalrous conduct to be observed. Over the course of the next two centuries, princes begun to lay down rules governing the conduct of their forces and imposing duties of humanity with regard to the treatment of civilians. At the same time there were developments for the more humane treatment of civilians, and a growing need to care for those who were *hors de combat* by reasons of their wounds. Clearly, there seem to have been repeated efforts made to achieve some recognition of human rights in so far as the wounded and sick were concerned.

It was not until the experiences of Florence Nightingale in the Crimea war and following the publication of Henry Dunant of 1862[57] that there was an attempt to give effect to the earlier ideas. Shortly after the publication of Dunant, the first Geneva Convention was adopted, introducing as a matter of universal international law, recognition for the human rights of the sick and wounded and those who attended to them.[58] Later the Lieber code, the Brussels Final Protocol and the Oxford Manuals,[59] attempted to codify the laws of war while seeking to preserve the respect for human rights. Broadly stated the concern of such agreements was the humane treatment of persons during armed conflict.

The significance of the Hague Regulations[60] in human rights is the assertion that the belligerents do not possess unlimited discretion as to the means they can employ for

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[57] See Dunant H, *A Memory of Solferino*, op.cit.
[58] See Green L.C, *Essays on the Modern Law of War*, op.cit p.87.
[59] See Gardam Judith, *Non-Combatant Immunity as a Norm of Humanitarian Law*, op.cit, p.102.
[60] See Schindler and Toman, *The Law of Armed Conflict, A Collection of Conventions Resolutions and other Documents*, op.cit. p.551.

injuring the enemy and that they may not harm one who has laid down his arms. After the end of the first world war there was little development in the law of armed conflict that might be considered to be concerned with human rights. A few notable developments were: the 1925 Geneva Protocol prohibiting the use of asphyxiating, poisonous or other gases and of bacterial methods of warfare, and the Kellogg-Briad pact of 1928 which contributed to the preservation of human rights by outlawing the use of force and aggression.

During the second world war, the first indications that there was a new approach to the importance of human rights in times of conflict appeared in the various statements made by the United Nations that condemned acts of aggression, murder, deportation to slave labour and the plunder of property. The London Charter, which gave rise to the Nuremberg Charter, condemned traditional war crimes such as murder, extermination, enslavement and other inhumane acts committed against the civilian population.

From the viewpoint of the modern law of armed conflict, the most important documents to be considered in examining the reality of human rights during armed conflict are the 1949 Geneva Conventions and the Additional Protocols of 1977.[61] The first three conventions (Convention on Treatment of the Wounded and Sick in Land Warfare, the Convention on the Treatment of the Wounded and Sick and the Shipwrecked at Sea, and the Convention on Prisoners of War) relate mostly to the human rights of the service personnel ,the aim of which is to ensure the protection of the life of those who have been rendered *hors de combat* by wounds, sickness, shipwreck or capture. The Conventions lay down provisions concerning their health, welfare, food

[61] Ibid.

and medical treatment. Broadly, the Conventions also prohibit their torture, reprisals: they accord special protection and respect to women, and prohibit punishment without trial. The Conventions provide that no person in the enemy's hands may be subjected to biological experimentation or exposed to contagion or infection.

The horrors of world war two not only produced pressure to make the promotion of human rights a basic purpose of the UN (now embodied in article 1 of the UN Charter) but also led to the creation of crimes against humanity as an international offence and to the 1948 Convention on the Prevention and Punishment of the Crime of Genocide and ultimately 1949 saw the adoption of the four Geneva Conventions; and for the first time also internal conflicts were regulated by treaty.

A major step was taken at the 1968 UN human rights conference in Teheran, where a resolution titled 'human rights in armed conflict' encouraged states to afford more respect to existing humanitarian conventions and to add further rules to protect civilians ,prisoners of war and combatants in all armed conflicts. In some respects, the influence of human rights law was inevitable, for much in the Geneva Conventions devoted to protecting individual's overlaps with the civil rights as well as economic and social ones. The influence of human rights law on IHL can also be seen in the wordings of the Additional Protocols. Since the 1970s, the UN has concerned itself with important aspects of IHL,in particular in the Human Rights Commission and its sub-commissions for the elimination of discrimination and the protection of minorities. The most dramatic example is the Protocol Additional to the Convention on the Rights of the Child, which is solely devoted to preventing the recruitment and participation of children in hostilities.

CHAPTER THREE

The role of international criminal law and *ad hoc* criminal tribunals in ending impunity for IHL violation

Introduction

Chapter Two discussed the relevance of international humanitarian law in internal armed conflict; it analyzed developments in humanitarian law, which have contributed to progress in the law relating to internal armed conflict. The Chapter also discussed the relation between *jus ad bellum* and *jus in bello*. This chapter will examine international criminal law, individual criminal responsibility and the role of *ad hoc* criminal tribunals in contributing towards ending impunity for violations of IHL in internal armed conflict.

This chapter will be divided into two parts. Part one, focuses on international criminal law, the status of the individual in international law, and the concept of impunity. Part two, will examine the role of *ad hoc* criminal tribunals in contributing to ending violations of IHL with impunity. It will focus on the role of the International Criminal Tribunal for Rwanda in ending impunity and in the development of IHL in internal armed conflict.

International Criminal Law

International criminal law refers to criminal laws which are promulgated by the international community as such, rather than by any particular state. Efforts to establish an international criminal law for violations of humanitarian law are not new, they have

come a long way and have intensified recently. Bassiouni[1] reports that the first prosecution for initiating an unjust war was reported in Naples in 1268, when Conradian Von Hohenstanfen was executed for committing war crimes. Later in 1447 Peter Von Hagenbach ,the governor of Breisach a town in Austria was put on trial for war crimes; the prosecutor indicted the accused for having trampled under foot the laws of god and man. The accused's defence of superior orders did not avail him and a court of 28 judges found him guilty and sentenced him to death.

The modern idea of establishing a criminal court was launched in 1899 with the Hague Convention for the Pacific Settlement of Disputes. The 1919 Versailles treaty was yet another step towards establishing a war crimes court. The treaty provided for the prosecution of Kaiser Wilhelm II of Germany and 21 other suspects for a supreme offence against international morality, the sanctity of treaties, and for war crimes against other German officers and soldiers in an international tribunal. The trial was unfortunately thwarted when Kaiser took refuge in the Netherlands[2]

In the same year, the allies established a special commission to investigate the responsibility for acts of war and crimes against humanity. In 1920, the treaty of peace between the allies and the Ottoman Empire provided for the surrender by Turkey of such persons as might be accused of crimes against humanity.[3] Between the two world wars a wave of terror swept Europe, for example the nationalist claims in the Balkans

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[1] See Bassiouni C,' Crimes against Humanity: The Need for a Specialized Convention' *Columbia Journal of Transnational Law*, Vol.31, No. 31, 1994, pp. 153- 175.

[2] See Charlotte Ku and Paul Diehl, *International Law Classics and Contemporary Readings*, Lynne, *USA, 1998*, p.281. See also, Jules Deschenes 'Toward International Criminal Justice', in Rogers S.Clark, Madeleine Sann (eds), *The Prosecution of International Crimes*, Translation Publishers, London, 1996, pp. 32-45.

[3] Unfortunately, the Treaty of Lausanne gave them amnesty. See, Schwarzenberger .G, *International Law as Applied by International Courts and Tribunals*, Stevens and Sons London, 1968, p.228.

and Hitler's aggression. In 1936 Hitler justified his policy of exterminating the Jews by revealing that the absence of the interest of the international community in prosecution of such conduct, and creating appropriate international structures to enforce this gave him the comfort of knowing that he might succeed in his intentions.[4]

In 1937, the League of Nations adopted a Convention against Terrorism and annexed a protocol which provided for the establishment of a special international criminal court to prosecute such crimes. After world war two with the London Charter of August 1945, it become obvious that crimes against peace and war crimes had been committed. The Charter established the International Military Tribunal (IMT) at Nuremberg, which was designed to prosecute major war criminals in the European theatre. In 1946, a similar international military tribunal was established in Tokyo to prosecute major Japanese war criminals in the far Eastern theatre.[5] These were the first modern application of IHL on a significant scale evidenced by the multiple trials of individuals who were tried by the tribunals. Since world war, two there have been many examples of conduct that would fit the Nuremberg principles and which could have been tried in war crimes tribunals but have not been tried. For example atrocities committed during the Vietnam war, in Cambodia and in Iraq among many others.

The creation of the United Nations *ad-hoc* tribunals, the International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda) for violations of humanitarian law was a culmination of several earlier Security Council resolutions adopted in reaction to the former Yugoslavia and later the Rwanda genocide

[4] ibid.
[5] Ibid.

of 1994 and in Sierra Leone.[6] They are the first tribunals established by the international community, independent of the victorious powers of the conflict. They were created by an international organization reflecting the political will of a broad section of the international community.

However prior to the two *ad hoc* tribunals there was a feeling that there was a need to establish a permanent court as opposed to *ad hoc* tribunals that could be more effective in punishing such acts. In 1989, the General Assembly urged for the establishment of International Criminal Court (ICC), with a recommendation to investigate acts of terrorism. The International Law Commission was requested to prepare a report, and in 1990, it proposed the creation of the ICC. The sixth committee of the General Assembly subsequently addressed the issue in 1991 and proposed that the issue should be studied further. The diplomatic conference of 1998 culminated in the adoption of the ICC statutes and the ICC came into existence on July 12 1998.

The ICC was officially launched in March 2003. It is designed to deal with crimes committed by individuals and not disputes between states, which fall within the jurisdiction of the International Court of Justice. It will handle the crime of genocide, war crimes or mass atrocities against civilians when no national court is able or willing to do so. It is a permanent court and not an *ad hoc* court.[7]

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[6] See Durham Helen,' International Criminal Law and the *ad-hoc* Tribunals' in Timothy and Durham *The Changing Face of Conflict and the Efficacy of International Humanitarian Law,* Martinus Nijhoff, London, 1999, pp.20-28.

[7] The court is yet to begin its work, most of the staff is yet to be hired and the court will probably not take up its first case until 2004.

The development of the individual as a subject of international law.

Individual Criminal Responsibility in International Law before 1945

In traditional international law, only states were considered to be subjects of international law. Later international organizations become recognised as subjects of international law. Unlike national law, which governs the relations of individuals with their fellow citizens, international law governed relations between sovereign states. The international system was composed only of states, which were the sole subjects of international law. The development of the idea of territorial sovereignty recognized states as the only actors in international law.[8] Scholars and Jurists during this time rejected the existence of other subjects of international law. Most argued that individuals as a general rule lack the standing to assert claims for violations of international treaties, in the absence of a protest by the state of nationality.[9]

The individual as such was not considered as a subject of the international community. Like territory individuals could only be the object of international law and could appeal to it, nor be governed by it. Their acts never constituted a violation of that law. They could not conceivably bring an action against a state either by means of arbitration or before an international tribunal.[10] The law required states to assert their nationals' claims on their behalf for only states could observe the rules of international law.

In the juridical life of states, individuals only appeared behind the political unit of which they formed a part. Individuals were not recognized by international law and their state of nationality alone were authorized to enforce their rights. States were free to

[8] See O'Connell D.P., *International Law,* Stevens and Sons, London, 1970, p.106-7.
[9] Laterpacht E, *International Law, Vol.*2, Cambridge University Press, Cambridge, 1975, p.487.
[10] See Nicolas Politis, *The New Aspects of International Law,* Rumford Press, Washington, 1928, p.18-32.

ignore or even to waive those rights. The law was never directly concerned with individuals and could touch them only indirectly through and by the intermediary of their state of nationality. Individuals could not denounce the protection of their state, even if their rights were violated. Treaties could not confer rights directly on an individual, and it was assumed that the individual only had a status in municipal law.

By the beginning of the 17th century, international law regarding the status of the individual was conceived more flexibly. This marked a departure from the rigidity that had characterized earlier times. As Grotius wrote, international law governed not only the relations between states but also the relations between states and individuals and between citizens of different states.

The growth of positivist theories, particularly in the 19th century emphasized the centrality and even the exclusivity of the state in this regard. The positivists opposed the attribution of international personality to any other entity apart from the state.[11] Towards the mid 19th century, the status of the individual in international law was the object of vigorous reaction in which differences in opinion were manifested with several jurists taking different standpoints. For example, Heffter[12] argued that individuals *per se* apart from their nationality, have international rights and duties; not only are they subjects but also members of the international community. Geffecken had championed the opposing view; he asserted that only states can be immediate subjects of international law.

Towards the end of the 19th century Westlake adopted the ideas of Heffter with a few modifications. He stated that the duties and rights of states are all merely the duties

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[11] Shaw M.N., *International Law*, 2nd edition, Grotius Publications, Cambridge, 1986, p.183.
[12] See Heffter, Geffeken, Westlake and Hehm quoted in Nicolas Politis, *The New Aspects of International Law*, op.cit. pp. 19-26.

and rights of individuals who compose them. For Westlake, the state is a metaphysical being; it acts through individuals. Since the states cannot act without individuals acting on their behalf, rights and duties are directed towards the individual. Rehm in support of this view distinguished between members of the international community and subjects of the international community. He argued that whereas states are members, individuals are its subject. Later Kaufmann showed very forcibly that the old doctrine has ceased to be correct. For him individuals have an international life, and international law not only regulates the rights and duties of states, but also governs the rights and duties of citizens of several states either with each other or with the states. He supported this with the case of the Relch tribunal in Germany, which admitted that the rights of individuals may arise directly from treaties. [13]

A third school argued for individual responsibility with a limited personality. This school tries to reconcile the views of the other two schools. It tries to give the individual a modest place beside the state. Its proponents like Diena held that the individual has no rights against the state, but he may have some rights against international bodies. Calvaghen goes further to assert that while states are still the normal subjects of international law, individuals may be subjects by way of exception. There are several instances where the individual was recognized as a subject of international law, for example the rules that granted to individual the right to appeal to the League of Nations regarding cases of minorities or of the proceedings against governments.[14]

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[13] See Kaufmann quoted in Baker P. J, 'The codification of international law', *The British Year Book of International Law*, 1924 pp. 38-56. See also Garner J, *Recent Developments in International Law*, Calcutta, 1925, pp. 708-774. See also Baker, 'Some Observations on the Codification of International Law', *American Journal of International Law*, 1925, p.327-332.

[14] See Diena and Calvaghen quoted in Nicolas Politis, *The New Aspects of International Law*, op.cit. p.31.

Direct juridical action was admitted more than once in practice. For instance in the mixed arbitral tribunals created under the peace treaties of 1919-20, the individual concerned could bring an action against a foreign government and obtain a verdict against the government .The direct appeal of individuals was also recognized before the international prize court in 1907. The Treaty of Versailles 1919 recognized the right of the allied and associated powers to bring individuals accused of crimes against the laws and customs of war before a military tribunal.

Prior to 1945, recourse to international justice was rarely granted to an individual. For instance, when the statute of the Permanent Court of Justice was drawn up, it was opposed by the Committee of Jurists of the Hague. It was alleged that the exclusive field of the court was international law ,which could not be invoked by private individuals because they were not its subjects. Second, it was claimed that the direct recourse to international justice was inadmissible in all cases, for national law gives individuals rights to take claims to it, it was therefore found unnecessary to open the international court to private individuals.[15]

Individual criminal responsibility in international law after 1945

Events and atrocities committed during the Second World War increased the concern for the legal and social protection of human rights and fundamental freedoms. Lauterpacht stressed the need for an international bill of the rights of man.[16] The question of the status of the individual is closely bound with the rise in the international protection of human rights. In modern international law, treaties such as human rights treaties impose duties directly on individuals. As far as obligations are concerned,

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[15] Ibid.

[16] See Lauterpacht, *International Law and Human Rights*, Cambridge University Press, Cambridge, 1950. P.127. See also The Universal Declaration of Human Rights 1948.

international law imposed direct responsibility on individuals in certain specified matters; for example in cases of piracy and slavery, offenders are guilty of a crime against international society and can thus be punished by an international tribunal or by a state.[17]

In the London Charter that established the International Military Tribunal, the following acts or any of them were crimes coming into the jurisdiction of the tribunal for which there was to be individual responsibility: crimes against peace, war crimes and crimes against humanity. On the question of individual responsibility, the Nuremberg Charter states that international law imposes duties and liabilities upon individuals as upon states and that individuals have international duties which transcend the national obligations of obedience imposed by the individual's state.[18]

Crimes against peace were authoritatively defined and prosecuted for the first time at the Nuremberg tribunal. Today article 6 of the Nuremberg Charter represents general international law. It is generally recognized that there are acts or omissions for which international law imposes criminal responsibility on individuals, and for which punishment may be imposed, either by a properly empowered international tribunal or by national or military tribunals. Nuremberg was followed by the Universal Declaration of Human Rights 1948. They challenged the traditional notion that only states and not individuals were the subjects of international law. Human rights later become universalised and it became widely accepted that the individual was a subject of international law.

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[17] See Bassiouni, *Crimes Against Humanity in International Criminal Law*, Martinus Nijhoff, Boston 1992, p. 193-195.

[18] See Brownlie, *Principles of Public International Law*, 4th edition, Clarendon Press, Oxford, 1985, p. 562. See Chapter Two.

The concept of crimes against humanity led to the adoption by the General Assembly in 1948 of the United Nations Convention on the Prevention and Punishment of the Crime of the Genocide,[19] in which the individual bears responsibility under international law for commission of the crime of genocide. In 1949, the Geneva Conventions[20] provided for individual responsibility for serious breaches of the obligations, which it lays down. The Geneva Conventions are considered be the most direct subjection of the individual to international law; they confer duties and responsibilities directly to individuals.

The Nuremberg tribunal laid the groundworks for the modern individual responsibility by asserting that international law imposes duties and obligations on individuals as well as states and that individuals can be punished for violations of international law. The trials asserted that crimes are committed by men, not abstract entities and only by punishing individuals who commit such crimes can the provisions of international law be enforced. The principle of command responsibility is well established in international law, that any person who orders a subordinate to commit a violation for which there is individual responsibility is responsible as the individual who actually carries it out. The principle of command responsibility has been incorporated in article IV of the Genocide Convention and is also expressed in article 86(2) of Additional Protocol I of 1977. It also finds expression in the Draft Code on crimes against the Peace and Security of Humanity.[21]

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[19] See Chapter One.
[20] See Chapter Two.
[21] See Report of the International Law Commission on the work of its Forty-Third Session (A/46/10).

Addressing the concept of impunity in international law

Throughout contemporary history, the international law doctrine of sovereign immunity, by which a sovereign is immune from the legal process for official acts committed in his or her capacity as head of state, has been mixed with the practice of sovereign "impunity" in which leaders who have directed and participated in the most heinous crimes usually for political reasons have been beyond the reach of law.

The age of impunity by heads of states has prevailed through the past as the following cases will illustrate . In Ethiopia for 17 years during the reign of Mengistu, the military government carried out systematic gross violations of human rights of Ethiopians while counting on the power and impunity of an absolute state. Despite national trials conducted that found over five thousand persons guilty of the crime of genocide and war crimes, most of those who were charged including Mengistu live in exile with little prospect of them being apprehended and charged for the violations.[22] In Somalia ,the perpetrators of attacks on Pakistan and American United Nations peacekeepers in 1993 received international amnesties. This gave Aideed impunity for the crimes he committed.

In Cambodia, genocide and mass killings were reported between 1975-79, where an estimated two million people were killed through state sponsored terrorism. However to date no known internationally recognized trial of the Khmer Rouge has been conducted. The impunity is demonstrated by the unwillingness of the international community to bring them to justice. The late Pol Pot, leader of the Khmer Rouge, was protected by the United Nations on the grounds that it was necessary to

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[22] See Olonisakin F, 'An International War Crimes Tribunal for Africa: Problems and Prospects' African *Journal of International and Comparative Law*, Vol.9, No.4, Dec 1997, pp. 822-835.

avoid upsetting its peace plans in Cambodia. In addition to the UN amnesty the new leadership in Khmer Rouge, pardoned the top leaders arguing that their prosecution could ignite a civil war.[23]

This illustrates the dilemma of trading justice for political reasons in situations of impunity to facilitate regime change or to secure an end to internal conflicts. Giving amnesty or pardon to perpetrators is common in negotiations for peace, because these negotiations are at times held with the very perpetrators of the atrocities committed against people. Judge Goldstone in challenging this practice of trading peace for justice asserts that if there is no justice, there is no hope for reconciliation or forgiveness because the victims do not know whom to forgive. To him justice is needed to break the cycle of hatred and vengeance that may lead to more impunity.[24]

Impunity has been used to secure an end to internal conflicts such as in Sierra Leone ,where as part of the Lome peace agreement, rebel leader Foday Sankoh and other rebel leaders received a general amnesty . this was in return for a end to civil was in Sierra Leone, which was never achieved through this agreement.

Other cases that demonstrate impunity by heads of states are that of Idi Amin, the former president of Uganda, who killed many of his people and comfortably lived in exile in Jeddah, Saudi Arabia until his death without being made to answer for his deeds. Buyoya [25]asserts that Burundi has a long history of impunity and so long as justice is not done, it is difficult to prevent the recurrence of the atrocities committed. The fact that cases have never been dealt with continues to develop feelings of revenge.

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[23] See Robertson G, 'An End to Impunity' in Robertson G, (ed) *Crimes Against Humanity: The Struggle for Global Justice*, Penguin Press, London, 1999, pp. 223-225.

[24] Judge Goldstone quoted in Olonisakin, An International War Crimes Tribunal for Africa: Problems and Prospects' op.cit, p.830.

[25] Buyoya P, 'The Challenge of Fighting Impunity' in Gakunzi D (ed) *Building Peace in Burundi, Mission Possible*, Harmattan, Paris, 1999, pp. 121-125.

These feelings develop into endless cycles of conflicts. He also argues that in Burundi, to flout a quest for justice is to make history repeat itself. Leaders like Said Barre of Somalia and Saddam Hussein former president of Iraq among many others may be cases to illustrate the impunity of heads of states that could to a large extent encourage and institutionalize the concept of impunity.

Eboe-Osuji[26] illustrates how a century of impunity by heads of States ends and a new one dawns. He describes a number of positive developments in recent years, including the reaffirmation by the international community of the duty of every state to exercise its criminal jurisdiction over those responsible for international crimes and the willingness of states to bring them to trial. He uses the case of Pinochet of Chile to illustrate his assertions. The attempts to try Pinochet for various grave human rights violations in Spain demonstrated that individuals regardless of their rank can be tried for violations of IHL.[27]

The common indictment of international law is not the absence or ambiguity of the rules, but the lack of enforcement. The argument is that the law is broken with impunity due to the lack of a central policing agency. Rules are violated regularly with no mechanisms to punish offenders, and when sanctions against offenders exist, they are primarily based on the principle of self-help.

The trend towards impunity is characterised by the establishment of amnesty and truth and reconciliation commissions for crimes committed. Giving amnesty undermines the respect for the rule of law and this encourages similar violations in the

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[26]Chile Eboe-Osuji, Crimes *against Humanity: The end of Impunity in a New Order of International Criminal law*, New York University Press, New York, 1996, p.234.

[27] Although on health grounds Pinochet was ruled unfit to stand trial in Spain, the attempt to try him is a milestone in demonstrating the end of impunity for human rights violations and a way forward in international criminal law.

future. The relevance of individual prosecutions is that they serve as a deterrent to prevent the occurrence of such crimes. Truth and reconciliation encourage individuals to commit crimes knowing that they will confess and be forgiven. Whichever way one may justify impunity, it is a big obstacle to ending violations of IHL violations and should be avoided if such violations are to come to an end.

The role of the ICTR in ending impunity for international humanitarian law violations.

Accountability for violations of humanitarian law took root only after the second world war when the international military tribunals at Nuremberg and for the Far East were established to prosecute German and Japanese war criminals. Unfortunately, the Nuremberg Charter, and the attribution of individual criminal responsibility was not utilized between the Nuremberg trials in 1946 and the ethnic cleansing in the former Yugoslavia. This was despite the large number of cases of genocide, crimes against humanity and war crimes committed during that period. Morris[28]writes that after the second world war more than 250 internal wars and oppressive regimes were reported, but with very few prosecutions for violations of IHL,genocide or crimes against humanity.

The next major advance was in the establishment by the Security Council of the International Criminal Tribunal for the former Yugoslavia, which was followed 18 months later by the establishment of the ICTR.[29] The idea of the International Criminal

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[28] See Morris M, 'International Guidelines Against Impunity : Facilitating Accountability', in Bassiouni M (eds) *Reigning in Impunity for International Crimes and Serious Violations of Fundamental Human Rights* , The Hague, 1998, pp. 42, 46 and 62.

[29] See UN Document S/RES/827, 25 May 1983; See also UN Document S/RES/955 of November 1994; This is discussed later in this chapter.

Court[30] has been part of the human rights movement since 1948. The statute of the ICC covers the crime of genocide,[31] crimes against humanity, [32]war crimes [33]and the crime of aggression.[34] The statute outlines that states parties to it must enact appropriate domestic legislation to prosecute grave breaches of international law. The international court will operate when national jurisdiction has completely broken down and it will complement national jurisdiction but not replace it. The court must have the freedom to act when appropriate and necessary, unrestricted by improper and irrelevant considerations. When the ICC begins functioning, its operations it will be expected to apply lessons learned from the ICTY and ICTR. The court's success will rely heavily on the active support of national governments, which will have to provide evidence, enforce its rulings and most critically to deliver suspects to its courtroom.

The ICTR was created on 8th of November 1994, by the UN Security Council Resolution 955. At the same time it adopted the ICTR statutes and requested the United Nations Secretary General to make political arrangements for its implementation. It was established under Chapter VII of the United Nations Charter, which allows for the United Nations to take action with respect to threats to international peace, breaches of the peace and acts of aggression. This was in response to the government of Rwanda's request for a tribunal to try persons who had committed serious acts of genocide in Rwanda. The Security Council requested the establishment of the Commission of Experts to Rwanda to investigate specific violations of IHL. It found serious breaches of IHL on both sides of the conflict and that genocide had been committed against the Tutsi

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[30] See Henry Sterner, *International Human Rights in context. Law Political Morals*, Philip Alston Press, New York, 1999, p. 1192.
[31] See Statutes of International Criminal Court, Article 6.
[32] Ibid Article 7.
[33] Ibid Article 8.
[34] Ibid Articles 121 and 123.

group. The ICTR was set up to try those who had committed violations of IHL and genocide.[35] The main task of the ICTR is to help restore and maintain peace in Rwanda, by trying persons allegedly responsible for acts of genocide and other grave breaches of IHL committed in Rwanda, and Rwandan citizens suspected of committing such acts and violations who are in the territory of neighbouring states.[36]

The Security Council created a precedent this being the very first time an international judicial organ was given competence for violations of IHL committed in an internal conflict. The creation of the ICTR marks a refusal to accept impunity. It also signals the international community's commitment to ensuring respect for IHL and trying those responsible for seriously violating it. The main difference between the ICTY and the ICTR and the earlier criminal tribunals set up after world war II is that the earlier tribunals were set up by the victors to punish the vanquished. Unlike the earlier tribunals, the ICTY and the ICTR were set up by the international community seeking to bring perpetrators of genocide and other crimes against humanity to justice.

Crimes punishable by the ICTR

The ICTR Statute establishes the tribunals' jurisdiction to prosecute persons responsible for genocide[37]crimes against humanity[38] and for serious violations of article 3 common to all the four Geneva Conventions and Additional Protocol II ,1977 relating to the protection of victims of non-international armed conflict.[39]

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[35] see Security Council Resolution, 935 (1994)

[36] See Preamble of the Statues of ICTR, UN Doc S/RES/955 1994. See also, Ce'cile Aptel, 'The International Criminal Tribunal for Rwanda' *International Review of the Red Cross*, Nov-Dec, No.10, 1997, issue.321, pp. 675-683.

[37] See the ICTR Statutes, Article 2. (The definition of genocide is taken from the Genocide Convention) See also Chapter One.

[38] See Article 3 of the ICTR Statutes.

[39] See Article 4 of the ICTR Statues and Chapter Two.

The conditions for individual criminal responsibility are set out in article 6 (1) of the ICTR Statutes. It provides that anyone who at any time, planned instigated ,ordered ,committed or otherwise aided or abetted the three categories of crimes may be held criminally responsible for the them. Article 6(1) disclaims the 'impunity"/immunity of government officials and heads of states. It provides for the criminal responsibility of superiors in respect of acts of their subordinates if the superior knew or had reason to know of such acts and failed to take the necessary steps to prevent or punish the perpetrators.

Harhoff [40]writes that the definition and application of the Genocide Convention raises questions relating to the conflict in Rwanda and to the ICTR statutes. One is the issue of how the Tutsi social group can be defined to fit the definition in article 2 of the ICTR statutes. The definition of Tutsi and Hutu is not reliable as a truly objective yardstick for any national, ethnic, racial or religious categorization. This definition is based on subjectivity and will refer to those who perceived themselves as Tutsi or who were known as such. This he argues is difficult to operationalise in reference to the definition of article 2. Second is the assertion that choices must be made between the application of article 2(3) that provides that the crime constitutes conspiracy ,incitement, attempt and complicity in genocide and article 6(1) that refers to planning, instigating, ordering ,committing ,aiding or abetting. The prosecutor has to choose one ,otherwise he will be forced to explain for example the difference between incitement and instigation.

[40] See Harhoff Fredrick, 'The Rwanda Tribunal, A Presentation of Some Legal Aspects', *International Review of the Red Cross*, Nov-Dec, 1993, No.321, pp. 664-672.

As indicated in the preamble of Security Council Resolution 955 of 1994 one of the main objectives of the ICTR is to deter the culture of impunity, for part of the explanation for the killings of many Rwandans in 1994 lies in the fact that for the past forty or more years ,there have been cyclical waves of mass killings in Rwanda and Burundi with no one held accountable in a judicial process. It is its argued that the perpetrators of the previous massacres were known by many but nothing could be done to them. This may have encouraged the 1994 massacres.

Meron[41]argues that it is not the number of persons who appear before the tribunal or those it will eventually try that will count, but it is the signals it sends out, that the age of impunity is coming to a close and it will not be easy to get away with such crimes in the future. Human life is precarious and should be respected and protected and those who abuse it will be held responsible and be sought whoever they are to account for their deeds. The trials at the ICTR send a signal to those leaders or people who have violated the fundamental rights and freedoms of their peoples with impunity for many years that human rights are no longer the restricted domain of the state but are the concern of the international community as a whole. The world has both a right and a duty to raise questions and demand satisfactory answers for such violations.[42]

The work of the ICTR[43] is raising people's awareness of the importance and value of human life. For a long time crimes have been committed against people by all sorts of leaders, and so far most of them have got away with it. In some communities impunity

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[41] See Meron Theodore ', The International Criminalization of Internal Atrocities '*American Journal of International Law*, Vol.89, 1995, pp. 553-569.

[42] See Chris Maina Peter, 'The ICTR Bringing the Killers to Book', International *Review of the Red Cross*, Nov-Dec, No.321, 1993, pp.695-704.

[43] See chapter four for examples of cases the tribunal has completed and the sorts of sentences it has handed down.

is an entrenched way of life. Through its judgments in the cases submitted to it, the tribunal will help to stem out the culture of impunity. The sentences handed down will demonstrate to the political and military authorities and to the warlords, that they may one day be tracked down, judged and punished for any violations of IHL they have committed in internal conflict.

Although the ICTR has no mandate to develop IHL, like any other judicial body it will be called upon as part of its work to clarify the applicable rules of law, spell out the customary rules concerning non-international armed conflict and to assess the acts of criminals in the light of the relevant provisions of the Geneva Conventions and Additional Protocol II. All this will reaffirm humanitarian law, clarify and determine the scope and content of the rules and in some cases, it will gradually develop the law.[44]

The establishment of the ICTR and the ICTY is a great leap forward in establishing beyond doubt that individuals are now, bound by certain legal obligations directly under international law. They also establish that individuals can be held responsible before an international forum for violations of their obligations. This is a big contribution towards the development of international criminal law and individual criminal responsibility in international law. Meron[45] argues that the statutes, rules of procedure ,evidence and the practice of the tribunal stimulates the development of IHL

Djiena [46]further asserts that the ICTR has been helping to enforce IHL ever since its hearings opened. Its major role is in disseminating and promoting IHL as part of the struggle to bar impunity, and to enhance national conciliation and respect for human

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[44]See Djiena Wembou, 'International Criminal Tribunal for Rwanda: It's Role in the African Context' *International Review of the Red Cross*, Nov-Dec, No.321. 1993, pp. 685-694.
[45]See Meron Theodore 'The International Criminalization of Internal Atrocities,' op.cit, p.55.
[46] Ibid.

dignity. The start of its activities sparked in-depth discussions of IHL within African universities and among political leaders. Many symposia were organized in Africa concerning sources of IHL, rules applicable by the tribunal, the relationship between states and the tribunal and on the contents of the Geneva Conventions and Additional Protocol II.[47]

International criminal law and international humanitarian law evolved essentially as a response to war and this provided the basis for the development of the laws of war. International criminal law was initially concerned with crimes committed during war, its scope has expanded to include crimes against peace ,and those that take place during peacetime. Today there exists a permanent court (ICC),two *ad hoc* criminal tribunals(ICTYandICTR) and one in Sierra Leone. It is assumed that these courts will put into practice the notion of individual criminal responsibility and the concept that there can be no impunity for IHL violations. This will go a long way in ending IHL violations.

[47] Seminars on enforcement of IHL took place in 1996 in Cote'd'Voire, Togo, Ethiopia, Nigeria Senegal and in 1997 in Benin and Mozambique among many others.

CHAPTER FOUR

International Humanitarian Law violations during the Rwanda genocide

Introduction

Chapter Three discussed the development of international criminal law, the development of individual criminal responsibility in international law, and the role of *ad hoc* criminal tribunals in ending impunity for IHL violations. This chapter will examine the IHL violations in Rwanda between April and July 1994 and also the attempts by the ICTR to address IHL violations.

The chapter will be divided into two parts. The first part will provide the background including, brief information on the Rwanda genocide, the types of IHL violations during the genocide, and factors that contributed to the IHL violations in Rwanda. The second part will discuss the applicability of international law to the situation in Rwanda 1994 and the role of the ICTR in bringing about accountability for such violations and the ending of impunity in Rwanda.

The Rwanda genocide 1994

A number of massacres have been perpetrated in Rwanda since 1959, in particular in 1959, 1963, 1966, 1973, 1990 1991, 1993 and 1994. All these were systematic and were principally carried out against Tutsi individuals.[1] This is a clear indication of the impunity in Rwandan society, where all perpetrators of previous genocides went unpunished, which encouraged the reoccurrence of such massacres. These conflicts had produced a large number of refugees within the Great Lakes region who for a long time wanted to return to Rwanda but whose right to return was not respected. A lot of

[1] See Prunier Gerald, *The Rwanda Crisis -1959-1994 History of Genocide*, Fountain Publishers, Kampala, 1995, p.267. See also, Amnesty International in Rwanda, 'Prosecution *of Tutsi, Minority and Repression of Government Critics*, and 1990-*1994*.

contempt for the government had built up among the people in exile. They started plotting to overthrow the government so as to be able to return to their homeland.[2]

In 1990, the Tutsi-led Rwanda patriotic forces (RPF) invaded Rwanda. Within two weeks of the invasion the first regional summit was held in Arusha under the auspices of the Organisation of African Unity. The summit called for a cease-fire and set in motion other meetings and consultations aimed at seeking a peaceful resolution to the conflict. Following a year of negotiations, an agreement was reached on a set of protocols covering human rights issues, power sharing in a transitional government and parliament, the resettlement of refugees and internally displaced persons, and the creation of a unified army. Presidential and parliamentary elections were to be held at the end of the transitional period and a commission would be appointed to draft a new constitution for Rwanda. The presidential and parliamentary elections have now been held in 2003 and the constitution is currently being written. In August, 1993, following the signing of the Arusha agreements, the UN Security Council approved the establishment of the UNAMIR with a peace keeping force.[3]

However, the Arusha agreements were faced with two major obstacles. One, was the failure to install the transitional government, the second was the failure to deploy the UNAMIR I on time .The Habyarimana led government delayed the implementation of the Arusha Agreements in anticipation of building a larger force to defeat the RPF. The Hutu hard liners feared that the transitional government would compromise their privileges and monopoly of power. For these extremists, retaining power at all costs was

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[2] Interview with Colonel Frank Rusagara, a Colonel in the Rwanda Defence Forces, He was involved in the 1990 invasion of Rwanda by the RPF, and held various posts during and after the Rwanda genocide.

[3] See Hugh M and Olivier R, *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts*, Polity Press, Cambridge, 2000, pp-133-136.

the only way to guarantee the Hutu hegemony in Rwanda. Hutu extremists set out to resist any attempts to implement the Arusha accords.[4]

Meanwhile there were renewed clashes between the RPF and Rwandan government troops. With mounting pressure from the international community Habyarimana flew to Tanzania for a regional conference to remove the obstacles to the peace process. A range of other issues pertaining to the implementation of the accords were concluded. Haybarimana re-assured the conference that he could embark on the peace process on his return. Unfortunately, his plane was shot down as he was about to land at the Kigali airport on 6th April 1994.

The shooting down of the plane carrying Juvenal Habyarimana and Cypron Ntyamira president of Burundi and members of the entourage triggered massacres between April and July 1994 in which between 500 000 and one million Rwandan men, women and children were slaughtered in the genocide of the Tutsi minority and moderate Hutu who were willing to work with the Tutsi.[5] The Rwanda massacres seemed to have been planned, systematic in nature, and carried out under inhumane and cruel conditions. These events undoubtedly constitute grave and massive violations of IHL and genocide.

Broadly stated, there are three categories of people who were responsible for the genocide in Rwanda. The planners were a small tight group belonging to the Habyrimana regime's political, military and economic elite, who had decided through a mixture of ideological and material motivation to radically resist the political change of implementing the Arusha Agreement for a power sharing arrangement. Many had

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[4] See Kamukana Dixon, *Rwanda Conflict; Its Roots and Regional Implications*, Fountain Publishers, Kampala, 1997, pp. 52-57.

[5] Prunier Gerard, *The Rwanda Crisis 1959-1994: History of Genocide*, op. cit. p.274.

collaborated in the 'zero network' (death squad) in earlier massacres and had shared the common ideology of radical Hutu domination over Rwanda. This 'core network', includes many close associates of the late President Juvenal Habyarimana and various members of the former political, military and economic elite. The group also includes regional and local officials, including mayors, political party heads, and militia leaders, officials of *Radio de Milles Collines* and ordinary citizens who broadcast the Hutu hatred for the Tutsi, and encouraged the killings.[6]

The second category comprised the actual killers, who included military superiors and subordinates who supervised and carried out the killings and organized militias. They were highly centralized and organized by the presidential guard. They targeted the Tutsi social group, journalists, politicians and civil rights activists. In this category also are the *Interhamwe* and *Impuzamugambi* militias (clandestine and political party militias) who tended to be low class people who conducted house-to-house searches and inspected roadblocks. Their estimated number of the actual killers was about 50,000 and they were directed by civil servants in the central government and local councils.

The killers also included the unwilling accomplices and ordinary citizens who were forced to kill the Tutsi. This group comprises the 20,000 individuals who would be turned over to the Kigali courts. The third category is a catchall for the small fry, who will probably never be tried. These are the people who were themselves victimized, who

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[6] See Baldwin K, 'Can Civilians be held Criminally Responsible for Violations of International Humanitarian Law in Internal Armed Conflict.' *New England School of Law Journal, 2000,* pp.2-15 See also Prunier G, *The Rwanda Crisis -1959-1994 History of a Genocide,* op.cit pp. 237-273.

were forced to kill or be killed, or were caught up in the fighting or who feared Tutsi revenge.[7]

Who were the victims?

The majority were people belonging to the Tutsi social group in Rwanda. All Tutsis were targeted. No attempt was made to distinguish between armed Tutsi and unarmed civilians, women, children, babies and old people. Hutu militants or sympathizers of the opposition were also targeted. In many situations intellectuals, journalists, professionals, university people, doctors in hospitals, priests, and human rights activists were targeted. In most cases, they were attacked with machetes, axes, cudgels and iron bars. The victims were hunted down to their final refuge in orphanages, hospitals and churches.

Persons responsible for IHL violations during the genocide

No accurate picture can be drawn for responsibility for violations of IHL in this conflict, because of the complex nature of the conflict and the involvement of almost the whole population. In many cases, responsibility for the violations cannot be attributed to any single person or group. However, it is possible to delineate violations by the main actors in the conflict.

Violations by armed forces and other armed groups

The Rwandese armed forces (FAR) engaged in a massive and hurried recruitment campaign in 1990 that saw increase of the forces from 5000 to 40 000 within a short period. The undue haste with which recruits were selected and instructed had a negative impact on the discipline of the combatants and on their training in the rules of

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[7] See Mackintosh Anne, 'The International Response to Conflict and Genocide: Lessons from the Rwanda Experience', *Journal of Refugee Studies*, Vol. 9, No.10, 1996, pp. 334-343.

war. Most of those who were recruited were ignorant of the existence of the laws of war. This ignorance coupled with the low wages explain crimes committed by Rwandan armed forces(FAR) like the rape of Tutsi women, looting civilian properties, armed attacks on civilians, revenge killings and mass murders of civilians within and outside the combat zones. FAR engaged in summary executions of civilians sympathetic to the Rwandese patriotic front (FPR). FAR was active and planned certain killings of the Tutsi. They incited the people to kill the Tutsi and offered logistical support to the killers.

FAR militiamen blocked ambulances, and humanitarian aid and assistance convoys, obstructing the flow of aid to the affected civilian population, and in some instances, they prevented populations under threat of violence from fleeing the area by setting up roadblocks.[8]

The Rwandese Patriotic Front (FPR) on the other hand, is accused of carrying out summary executions in which they singled out members of the National Revolutionary Movement for Democracy and Development (MRND) and the Coalition for the Defence of the Republic (CDR). Certain crimes against humanity are alleged to have been carried out by the RPF. For instance, there are reports of mass graves attributed to the RPF including eight in Kigali.[9] The massacres by the RPF were less systematic than those of the Hutu militia and RPF. There are substantial grounds to conclude that crimes were committed by some Tutsi elements against the Hutu, but there is no evidence to conclude that these acts were with intent to destroy the Hutu ethnic group within the meaning of the Genocide Convention of 1949.

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[8] See *The United Nations and Rwanda 1993-1996* , The United Nations Department of Public Information, New York, Blue Book Series, Vol X, pp 205-208

[9] See *The United Nations and Rwanda,* op. cit p 208

Youth organizations of political parties [10] had been converted into militias. Two of these militias, the MRND and the CDR were responsible for incitements to genocide of the Tutsi, for massacres of the civilian population and for political assassinations. The militia recruited children and displaced persons as soldiers. They forced civilians to take part in violent demonstrations in return for payment.

Clandestine organizations like the 'Zero Network' (death squad) whose main objective was to get rid of troublesome individuals in order to create a climate of terror and insecurity so as to discredit the peace process initiated in the Arusha Accords, used assassinations of the regimes opponents by poisoning, terrorist attacks, faked robberies and confrontations.[11]

Violations attributed to civilians

Civilians here refer to the government officials (prefects, sub- prefects, mayors, councillors, sector leaders and prison authorities) and private individuals. The role of government officials[12]in the massacres of civilian populations consists in encouraging, planning, directing operations and actual participation in the killings. The government officials were instrumental in the spreading of rumours, and supplying the militia with equipment. Most of the officials were in positions to intervene to prevent the killings, but they did not take any steps to stop the killings of civilians by the mobs. Prison authorities were responsible for the deaths of convicts in suspicious circumstances. They did not provide food or medicine for the prisoners. There are reported cases of killing of prisoners, mysterious disappearances, torture and inhuman living conditions in the prisons.

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[10] Ibid.
[11] Ibid.
[12] Ibid.

Genocide was championed by certain private individuals allegedly close to those in power. They fomented killings by the Hutu mobs, who participated in most of the killings. They went door to door killing their neighbours whose identity they knew very well. Private individuals were involved in the radio broadcasts inciting the Hutu to kill the Tutsi, political rally addresses, distribution of posters and leaflets with Tutsi extermination messages. Some religious leaders were accomplices to the genocide by being instrumental in identifying Tutsis in their congregation and handing them over to be killed.[13]

Factors that facilitated IHL violations

Following the deaths of the presidents of Burundi and Rwanda on 6th April 1994, there was a collapse of the Rwanda state and what prevailed was the absence of the rule of law. With no functioning government structures in place, the systematic wave of massacres took place. Lawlessness characterized Rwanda and to a large extent facilitated the massacres and IHL violations.[14]

A tradition of impunity[15] had characterized Rwanda for a long time since most criminal cases were known to go unpunished. No legal action had been taken against the planners and killers of the earlier massacres whether civilians or members of the armed forces. On numerous occasions, political party militias set up roadblocks near army posts and conducted identity checks in defiance of the law and committed acts of violence against passers by. The impunity that had characterized IHL violations in Rwanda assured a reproduction of violations of all types and the continuation of the

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[13] Mbanda Laurent *Committed to Conflict: The Destruction of the Church in Rwanda*, Cromwell Press, London, 1997, pp. 81-87.

[14] See Prunier G, *The Rwanda Crisis -1959-1994 History of Genocide*, op.cit. See also Destexhe Alaine, *Rwanda and Genocide in the Twentieth Century*, Pluto Press, London, 1995, p. 303. See also International Crisis Group, *Five Years after the Genocide in Rwanda:: Justice in Question*, pp. 2-20.

[15] See Chapter Three.

status quo. Acts of violence recurred periodically and the persons responsible who in most cases are known by everybody went unpunished. Impunity had become part of everyday life for many Rwandese people, and ethnic violence had become a practice, which, if not accepted, was at least firmly rooted in Rwandese folk memory.[16]

The Rwandan judicial system[17] had serious shortcomings such as insufficient training of the judges. Out of 659 judges, only 34 had studied law at university level; none of the cantonal court judges had any legal training. There was lack of respect for the principle of security of tenure of judges. There was also a lack of adequate resources to finance the judicial system. This failings of the judicial system made possible the impunity enjoyed by persons responsible for killing.

The absence of any system for the protection of minorities, particularly the lack of an effective police force in the overpopulated rural areas contributed to the violations. At most, there were one or two officials who would be incapable of facing up to a large rampaging mob. The final authority rested on the local government officials who, in most instances were accomplices in the massacres and even instigated them.

The role of the media particularly the two radio stations close to the government; Radio Rwanda and the Radio-Television *libre des milles collines* in spreading unfounded rumours and in exacerbating ethnic problems and instigating acts of violence has been documented.[18] Injurious propaganda that was broadcast by the media cannot be down played in its role in inciting the genocide. Appeals through the media that incited hatred and violence were broadcast that branded Tutsi as enemies and traitors who deserved to

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[16] See *The United Nations and Rwanda 1993-1996* ,op.cit, p.240

[17] See International Crisis Group, *Five Years after the Genocide in Rwanda Justice in Question,* op.cit.

[18] See Gourevitch D,' The Genocide Fax' *New Yorker*, 11, May 1998, pp. 42-45. See also 'Anarchy Rules in Kigali, Rwanda' *New York Times* 14, April 1994 p.21. See also,' The bleeding of Rwanda' 16th April 1994, *The Economist,* p.45. See also Genocide in Rwanda, *The Economist,* 21st May 1994, p. 12.

die. Posters and leaflets dehumanized the Tutsi as snakes, cockroaches and animals. The radio broadcasts called on the Hutus to send the Tutsi back to their origin through the rivers Nyabarongo and Akagera and to fill the half-empty graves.

The rejection of alternative political power was a major factor that facilitated the violations. Rwanda was characterised by the struggle for power, either the seizure of political power or the retention of power by the representatives of one ethnic group previously the underdogs, who used all means principally the elimination of the opposing ethnic group. This is best exemplified in the resistance to implementation of the Arusha Peace Agreements of August 1993, thus a rejecting the power sharing arrangements and political coexistence.

Most members of the international community were unwilling to intervene in the Rwanda conflict. Most perceived it as an internal civil war and hence their unwillingness to interfere in the internal affairs of an independent state. Alison[19] argues that the United States, Belgium, France and the UN Security Council all had prior warning about the 1994 genocide in Rwanda and could have prevented it. The Americans were interested in saving money, the Belgians in saving face, and the French in saving their ally, the genocidal government. Dellaire [20]wrote that in 1994 UN officials were accused of consistently refusing troop requests by the commanding officer of the UN peacekeeping force in Rwanda.

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[19] Des Forges Alison; *Leave None to Tell the Story Genocide in Rwanda,* New York, Human Rights Watch, and International Federation of Human Rights, 1999.

[20] Lt Gen Romeo Dellaire of Canada warned of 1994's systematic killing, but support forces were never sent.

International Humanitarian Law violations in Rwanda April-July 1994

Massacres of civilian populations were perpetrated by the Rwandese security forces and by other sectors of the population. Most killings took place away from combat zones. The numbers of victims is estimated to be between five hundred thousand and one million people. These massacres took the form of murder of all kinds, cruel treatment, torture and inhuman or degrading treatment. The massacres of civilian populations are a violation of article 3 common to the Geneva Conventions.[21] In particular murder, cruel treatment and torture are prohibited by common article 3. These massacres are also violations of Additional Protocol II in particular article 4 on fundamental guarantees which reinforces common article 3. The massacres are also a violation of article 13 of Additional Protocol II on the protection of civilian populations, which states that the civilian population and individual civilians shall not be the object of attack and acts or threats of violence which spread terror among the civilian population are prohibited.[22]

Death threats and political assassinations were used to eliminate the regime's opponents who included politicians, academicians, journalists and human rights activists. There were reported extra judicial executions of Tutsis in what was described as acts of revenge. Extra judicial executions and reprisals are prohibited in common article 3. In particular, the passing of sentences and carrying out of executions without

[21] See Chapter Two for details on Common Article 3.

[22] See International Committee of the Red Cross (Revised Edition), *Protocols Additional to the Geneva Conventions of August 1949*, Geneva, 1996, pp. 91 and 97. See also International Committee of the Red Cross *Understanding Humanitarian Law: Basic Rules of the Geneva Conventions and their Additional Protocols*, Geneva, 1993, pp.8-11 See also Frits Kalshoven, *Constraints on the Waging of War*, International Committee of the Red Cross, Geneva, 1991, p.53.

previous judgment pronounced by a regularly constituted and competent court affording all judicial guarantees are prohibited.[23]

Violations against vulnerable groups

Violations against vulnerable groups such as women were common during the conflict. Sexual crimes were committed against women.[24] Rape was systematic and was used as a weapon against Tutsi women. This was done regardless of age or condition, girls and pregnant women, those who had just delivered, nuns and corpses were not spared. Gang rape and incest were common.[25] Clearly outrage upon personal dignity, in particular humiliating and degrading treatment ,rape, enforced prostitution and any form of indecent assault are prohibited by in common article 3 (1)(a) and (c) and in Additional Protocol II , article 4, (2)(a),e) and (f) and article 13 (2) . Sexual violence against women and girls in situations of armed conflict constitutes a breach of international law. Perpetrators can be held accountable for rape as a war crime, rape as crime against humanity or as an act of genocide. (if their acts meet the definitional elements of each).[26]

Violations against children

Violations against children were common in this conflict. Children were involved both as perpetrators and as victims.[27] Even before the massacres, many children had been recruited by the two parties to the conflict (APR and FAR). The

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[23] See International Committee of the Red Cross, *Understanding Humanitarian Law*, op. cit, and p.9.
[24] See Human Rights Watch, '*Shattered Lives; Sexual Violence during the Rwandan Genocide and its Aftermath*, New York, 1996, p.27-36.
[25] Ibid, See also *The United Nations and Rwanda 1993-1996* , op.cit, pp. 292-296 .See also, Murungi Betty, 'Prosecuting Gender Crimes at the International Criminal Tribunal For Rwanda' *Africa Legal Aid Quarterly Journal*(up coming)2001. See The United Nations and Rwanda, op.cit.
[26] See Applicability of International Law to the situation in Rwanda later in this Chapter for a discussion on some groundbreaking rulings by the ICTR in recognizing rape as a war crime.
[27] See UN Doc e/CN.4/1996/68, 29 January 1996

number of child soldiers (*kadogos*) is estimated at 4,820 and their ages ranged from 5 to 17 years. According to both international humanitarian law and international human rights law the current age for participation in armed conflicts is fifteen years. The issue of recruitment of children has been the subject of debate between the UNICEF and other humanitarian organizations. This led to the adoption in January 2000, of the Optional Protocol to the Convention of the Rights o f the Child. This Protocol sets a minimum age of eighteen years for participation in armed conflict, while any use whatsoever of children in a military context is prohibited.[28]

There is no doubt about the participation of child soldiers on both sides of the Rwanda conflict; children participated actively in the killings and summary executions that occurred. The recruitment and active involvement of children in the conflict was in violation of Additional Protocol II, article 4 (3a-e). The article spells out the protection and care that children require in case of internal armed conflict. In particular, article 3(c) states that children who have not attained the age of fifteen years shall not be recruited into the armed forces or groups, nor be allowed to take part in hostilities. Therefore, the involvement of child soldiers in the Rwanda conflict was a clear violation of this article.

Violations of freedom of movement

Violations of freedom of movement and population displacement were clearly evident in this conflict. It is estimated that approximately 16,500 Rwandese left their homes to seek refuge in other areas within the country, whereas more than 500,000 others are reported to have crossed the borders into neighbouring states.[29] All the signs

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[28]See Hughes, Lisa, 'Can International Law Protect Child Soldiers?' *Peace Review*, September 2000, Vol 12, Issue 3, pp. 1-6.

[29] See Fillip Reynjens, 'Rwanda: Genocide and Beyond' *Journal of Refugee Studies Vol. 9 No 3, 1996*, pp .240-251, See also Rachel Van Der Meeren, 'Three Decades in Exile: Rwandan Refugees 1960-1990, pp. 252-268 and Bonaventure Rutinwa,' Beyond Durable Solutions: An Appraisal of the

were that the mass exodus had been forced and planned. Additional protocol II, article 17 spells out prohibition of forced movement of civilians, article 17(2) states that civilians shall not be compelled to leave their own territory for reasons connected with the conflict.

Large numbers of people were restricted in their movement, both in government-controlled areas and in locations under the RPF. These included persons who were forced to move as the front line advanced ,those who were not actually detained by force but could not leave the places where they were and were some times caught up between the lines of fighting and in certain cases were taken as hostages. The taking of hostages is forbidden in common article 3 and article 4 of Additional Protocol II.

Some people assembled and were confined to places such as stadiums, hotels, hospitals, churches and orphanages where their movement was restricted and in many instances, they were killed in such places. Additional Protocol II, article 5 spells out how persons whose liberty has been restricted should be treated; the same is also provided for in the fourth Geneva Convention four on the treatment of civilians. Clearly, the provisions spelt out in article 5 of Additional Protocol II and in the fourth Geneva Convention, were violated in this conflict. However, this provision does not completely prohibit population displacement. Indeed, some elements of this provision have a bearing on the legality of forcible population displacement.

New Proposals for Prevention and Solution of Refugee Crises in the Great Lakes Region', *Journal of Refugee Studies, Vol. 9, No 3, 1996,* pp. *291-302.*

Obstruction of humanitarian aid convoys and workers

There are reports of the impossibility of providing humanitarian aid and assistance in Rwanda during this period to those who were in need. Death by starvation threatened those who were caught between the lines of fighting, those in hiding and those in the remote areas where food could not reach them. This was because aid convoys were denied access.. Humanitarian installations such as the hospital run by the ICRC in Kigali were fired at on repeated occasions, and several humanitarian aid workers were wounded. The Rwandan armed forces and the youth militia are reported to have obstructed humanitarian aid convoys and threatened humanitarian aid workers.[30] These acts were violations of Additional Protocol II, articles, 9 and 11, which require that medical and religious personnel shall be granted all help for the performance of their duties, and that medical units and transport shall be respected and protected at all times and shall not be the object of attack.

The use of torture against detainees

The use of torture against detainees was also reported in detention facilities. It has been noted that most of those who were captured were killed.[31] The conditions under which prisoners were held were deplorable, characterized by overcrowding and inhuman and degrading treatment. Mistreatment took the form of "neck lacing", rape and physical assault and denial of food, medical treatment, beds and other basic needs. Additional Protocol II article 5 spells out provisions to be respected as regards to persons who have been detained for reasons of the conflict. Article 6 on penal prosecutions applies to the prosecution and punishment of criminal offences related to

[30] See Leaning J,' No Challenges for Humanitarian Protection', *British Medical Journal*, Issue 7207, Vol .319, pp. 230-430.

[31] See Guy Vassal Adams, *Ruanda: An Agenda for International Action*, Oxfam Publication, 1994, pp. 25-26.

the armed conflict. Article 6(2) states that no sentences shall be passed and no penalty executed for an offence except that pronounced by a court offering essential guarantees of independence and impartiality.

Endangering the survival of the civilian population

There were reports of the outbreak of epidemics whose cause was the consumption of water contaminated by the disposal of corpses in the rivers and other environmental hazards.[32]Article 14 of Additional Protocol II prohibits the destruction of objects indispensable to the survival of the civilian population such as drinking water installations and supplies. Therefore, these acts constitute violations of the provisions of article 14 of Additional Protocol II.

Applicability of international law to the situation in Rwanda

The applicability of international legal norms to the situation in Rwanda (April – July 1994) depends on the legal status of the conflict which will be determined by the factual situation in Rwanda at that time and the legal norms in force, the scope of the specific norms of IHL determined by their content, and the legal status of these norms as determined by their sources of law.[33] Rwanda acceded to the Geneva Conventions of August 1949 on May 1964 and acceded to the Protocols Additional thereto of 1977 on 19th November 1984. Rwanda is a party to the Conventions on the Prevention and Punishment of the Crime of Genocide , which it acceded to on April 16, 1975.

Even if Rwanda had not ratified the Genocide Convention, it would still have been bound by it. This is so because the Convention forms part of customary international law. It is universally accepted and recognized by the international

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[32] Ibid.

[33] See *The United Nations and Rwanda, 1993-1996*, op. cit. p 35.

community. The same parts of the Convention, specifically those against the commission of genocide have attained the status of *jus cogens*. Thus, these specific prohibitions of the Convention apply to all members of the international community and not to the parties alone.

IHL has a universal jurisdiction, meaning that all states are legally bound by the provisions of the four Geneva Conventions and the Genocide Convention whether they are a party to the Conventions or not. This is because human rights are universal and transcend state boundaries, and therefore a state cannot justify violations of IHL or the commission of acts of genocide claiming that it is a not party to the Conventions. The Conventions will still be applicable to such a state. Individuals who violate any of this Convention may be tried as war criminals under international criminal law.[34]

The applicability of IHL

The application of IHL to the genocide in Rwanda hinges on the status of the conflict. First, there must be an armed conflict, and the conflict in Rwanda was an armed conflict as is evidenced by the means and methods employed by those involved and the large scale of atrocities committed. Second, the rules of IHL that apply to the conflict will depend on whether the armed conflict is considered an international or a non-international conflict. In the context of the Rwanda genocide, it has been argued that the conflict become internationalised by the active participation of other states and through peacekeeping and humanitarian assistance and the influx of refugees to the neighbouring states, the Rwanda conflict qualifies as a non-international armed

[34] See Judgment of the ICTR in the Akayesu Case on the Status and Application of Additional Protocol II and Common Article 3 discussed later in this chapter.

conflict,[35] because the use of armed forces was carried out within the territory of Rwanda, and it did not involve the use of force in the territory of another state. It also qualifies as a genocide because the use of force was carried out with the intention of exterminating a particular group, the Tutsi.

Accordingly, the obligations set out in Common Article 3 to the four Geneva Conventions of 1949 governing situations not of an international character[36] will apply to the conflict. Common article 3 prohibits violence to life. In particular murder of all kinds, mutilation, cruel treatment and torture, the taking of hostages, outrage on personal dignity, the passing of sentences and carrying out of executions, are prohibited. Article 3 (2) provides that the wounded and the sick shall be collected and cared for.[37]

Further, Additional Protocol II, which develops and supplements common article 3 applies to the Rwanda conflict. Article 4 prohibits acts against all persons who do not take a direct part or who have ceased to take part in hostilities. The article also provides that children should be provided with the care and aid they require, and that children under the age of fifteen years shall neither be recruited into the armed forces or groups nor allowed to take part in hostilities.[38]

Article 13 of Protocol II[39] on the protection of the civilian population provides that the civilian population and individual civilians shall enjoy general protection against the dangers arising out of military operations. To give effect to this protection

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[35] See Chapter Two.
[36] Ibid.
[37] Ibid.
[38] See Chapter Three.
[39] See, Protocol II Additional to the Geneva Conventions of August 12, 1949, Article 3, 7, 8, 9, 14, and 17.

some rules must be observed. Civilians may not be the object of attack and they shall enjoy protection unless and for such a time as they take a direct part in the hostilities.

The applicability of crimes against humanity

The applicability of crimes against humanity to the armed conflict in Rwanda will depend on the content and legal status of crimes against humanity as a norm of international law. During the formulation of crimes against humanity at Nuremberg , it was not clear at the outset whether norms prohibiting crimes against humanity were intended to overlap with norms prohibiting war crimes, or whether they were an independent juridical concept. If the normative content were to remain frozen in its Nuremberg form, then it would not possibly apply to the situation in Rwanda in 1994.

However, the normative content originally employed by the Nuremberg tribunal has undergone substantial evolution since the second world war. It has expanded and broadened through certain international human rights instruments adopted by the UN since 1945. In particular, the Genocide Convention of 1948 reaffirms the legal validity of some of the normative contents as conceived in article 6 of the Nuremberg Charter.

The Nuremberg Charter established that crimes against humanity covered certain acts committed against civilians. As a juridical category, it was conceived to apply to individuals regardless of whether the criminal act was committed during a states armed conflict or not, and regardless of the nationality of the individuals who commit the crimes, or of the victim.

So far, the ICTR has held trials of violations of IHL and for crimes against humanity. For instance, Jean Paul Akayesu[40] was charged with committing the crime of

[40] See *Prosecutor v Jean Paul Akayesu*, ICTR 96-4-t, Judgment by Trial Chamber 1, 2 September 1998 Para. 497.

genocide, crimes against humanity and for violations of common article 3 to Geneva conventions and Additional Protocol II. Akayesu pleaded not guilty to the charges. He was however found guilty of committing genocide (specifically direct and public incitement to commit genocide) and crimes against humanity (specifically extermination, murder, torture, rape and other inhumane acts) and was sentenced to life imprisonment. Akayesu was in an authoritative position as a mayor and had the power to stop the killings but he did nothing. The witnesses' testimonies that he was wearing a military jacket, carrying a rifle and assisting the military in their tasks was sufficient evidence.

However the trial chamber proved beyond reasonable doubt that Akayesu did not incur responsibility for violating article 3 common to the Geneva conventions by asserting that, Akayesu was neither a member of the armed forces nor under the military command of either of the belligerent parties, and that it can not be proved that he was legitimately mandated and expected as a public official to support or fulfil the war efforts.[41] Therefore the ICTR held that Akayesu was not guilty of violations of Article 3 common to all the Geneva Conventions (specifically murder and cruel treatment) and of article 4(2)(e)of Additional Protocol II (outrage upon personal dignity, degrading and humiliating treatment and indecent assault).

However, the *Akayesu Case* has been criticized by scholars who feel that the ICTR incorrectly concluded that Akayesu was not guilty of violating common article 3. For example, Baldwin[42]argues that the ICTR should have found him guilty of violating common article 3, because he was in an authoritative position as a mayor and had the

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[41] See Jean Paul Akayesu Judgment, paras. 640-644.
[42] See Baldwin K. 'can civilians be held criminally responsible for violations of IHL in non-international armed conflict, new England school of law

power to stop the killings but he did nothing, in mitigation Akayesu had said that the people respected and obeyed his orders. The witnesses' testimonies that he was wearing a military jacket, carrying a rifle and assisting the military in their tasks was sufficient evidence.

Applicability of sexual crimes against women

In the development of IHL, rape and sexual crimes against women have been brought to the fore for the first time by the ICTR. The *Akayesu Case* was again the setting for this development. Akayesu was charged with rape as a crime against humanity in count 13 of the indictment, and rape as a violation of article 3 common to the Geneva Conventions in count 15.[43] In its judgment, the trial chamber found Akayesu guilty of crimes against humanity (rape) as charged in count 13 of the indictment. Akayesu had encouraged the rape of Tutsi women by this attitude and utterances.

The ICTR defined rape as a physical invasion of a sexual nature, committed on a person under circumstances which are coercive. The ICTR underscored the fact that rape and sexual violence also constitute genocide, it argued that sexual violence was an integral part of the destruction of the Tutsi ethnic group. The rape of the Tutsi women was systematic and was perpetrated against all Tutsi women and solely against them.

This judgment was a big development of international law relative to sexual violence crimes in three ways. First, the Akayesu judgment was the first time an individual had been convicted of rape as a crime against humanity by an international court. Its importance lies in the fact that there was no mention of rape in the Nuremberg Charter. Second, the judgment provided for the first time in legal history a definition of

[43] See Jean Paul Akayesu, Judgment paras op.cit, Para. 417.

rape as a crime under international law.[44] The other contribution of this definition was by ruling that rape was an act of genocide and thus a genocidal crime.

Following *Akayesu Case* there have been other cases before the ICTR in which charges of rape were proffered against accused persons. These include, the case of *Prosecutor v Alfred Musema.*[45]The ICTR has also made history by being the first international tribunal to indict and charge a woman with rape.[46]Pauline Nyiramasuhuko was charged with rape as a crime against humanity under the principle of superior responsibility.

Applicability of the Genocide Convention of 1949

The qualification of the Rwanda conflict as a genocide has been illustrated.[47] Evidence indicates that the extermination of the Tutsi had been planned in advance. They were carried out in a systematic concerted and methodical way and were motivated by ethnic hatred. The main objective of the killings was the extermination of the whole Tutsi social group.[48]

Article 1 of the Genocide Convention affirms that genocide, whether committed in times of war or peace is a crime in international law which ratifying states undertake to prevent and punish. Article 2 provides that the following acts are punishable: genocide, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide and complicity in genocide. The purpose of the Convention was to prevent the destruction of racial, national, linguistic, religious or

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[44] See *Prosecutor v Jean Paul Akayesu* paras 596-598. This definition has been cited in subsequent cases in the ICTR and the ICTY in the following cases: *Prosecutor v Anto Furundzija* Case No. IT-95-17/I-T, 10 December 1998; *Prosecutor v Delalic et al* Case No. IT-96-21-T 16 November 1998; and *The Prosecutor v Kunarac et.al*, Case No. IT-96-23/2 22 February 2001.

[45] See Case No. ICTR-96-13-T.

[46] See *Prosecutor v Pauline Nyiramasuhuko and Arsene Shalom Ntahobali,* Case No. ICTR -97-21-1.

[47] See Chapter Three.

[48] See Chapter One for the definition of genocide.

political group. There are ample grounds to conclude that every provision laid down in article 3 of the Genocide Convention[49] was violated in Rwanda in respect of a specific Tutsi group within the meaning of article 2, if one studies the documentations of the trials at the ICTR.[50]

On 2 September 1998 the ICTR in *Prosecutor v Jean Paul Akayesu*[51] delivered the first ever judgment for the crime of genocide by an international court. The Akayesu judgment established a precedent for the application of the crime of genocide. The chamber found Akayesu guilty on nine counts of genocide and crimes against humanity. He was sentenced to life imprisonment and his appeal against conviction and sentence was dismissed.

Applicability of the concept of Individual criminal responsibility in international law[52]

The attribution of the responsibility of the individual is not entirely new in international law. Military trials of individuals for committing war crimes date back to 1419.[53] International legal norms stipulating individual responsibility are considered part of customary international law and part of *jus cogens*.[54] The Nuremberg trials established clearly the principle that the individual, regardless of office or rank, shall be held responsible in international law for war crimes, crimes against peace or crimes against humanity. The principle of individual responsibility enforced by the

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[49] See Article III, of The Convention on the Prevention and Punishment of the Crime of Genocide Dec 1949.

[50] Ibid, Article II

[51] See *Prosecutor v Jean-Paul Akayesu*, ICTR 96-4-T Judgment by Trial Chamber 1, 2 September 1998.

[52] See Chapter Three.

[53] See Keen, *The Laws of War in the Middle Ages*, New York, 1965, pp. 234-456.

[54] See Sunga L, Individual Responsibility in International Law for Serious Human Rights Violations, *Netherlands International Law Review*, Vol 41, Issue 3, 1994, pp. 403-406 and Bassiouni, Crimes against Humanity in *International Criminal Law*, Martinus Nifhoff, .Boston, 1986.

Nuremberg tribunal is today universally recognized by the international community as the principle that guides the operations of ICTY and the ICTR.

The ICTR established that Akayesu was individually responsible for nine counts of his indictment, in his capacity as a mayor, he was responsible for maintaining law and order and he had authority over the police. Akayesu had admitted during his trial that the inhabitants of Taba respected him and followed his orders. Therefore, Akayesu was also criminally responsible for the acts of his subordinates, because he knew of their intentions to commit genocide, yet he failed to prevent them.

In another development in IHL, the ICTR become the first international tribunal to punish a head of state for genocide. Jean Kambanda, Prime Minister of Rwanda and interim head of government during the genocide, shattered the concept of impunity by a head of state for violations of IHL. The indictment charged Kambanda with genocide, conspiracy to commit genocide, direct and public incitement, complicity and crimes against humanity. Kambanda pleaded guilty to six counts in his indictment. He was convicted on all counts and sentenced to life imprisonment.[55] The *Kambanda Case* was a great leap in IHL, with political and other significance. It was the first time an individual confessed for the crime of genocide. His confession proved beyond reasonable doubt that genocide had been committed in Rwanda. This had a great impact on genocide suspects imprisoned in Rwanda by triggering a significant number of confessions from more suspects shortly afterwards.[56] This case set the precedent for the 1999 indictments and transfers to The Hague of Slobodan Milosevic, former

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[55] See *Prosecutor v Jean Kambanda*, Case No. ICTR 97-23-S.

[56] See Kingsley Moghalu, 'The Contribution of the ICTR to the Promotion and Observance of IHL', Paper Presented at the 2nd Regional Conference of Women Judges, Nairobi, Kenya, and 6-8 August 2001. p.17

president of Yugoslavia. It is expected that the ICTY will make significant references to the ICTR Kambanda judgment in its future judgment of Milosevic.[57]

It is documented that over 125,000 detainees are awaiting trial in local courts of Rwanda.[58]Whereas the ICTR has 55 detainees in Arusha in the United Nations Detention Facility most of them are high-ranking individuals. So far, the ICTR have handed down nine judgments, eight convictions and one acquittal. Clearly, the ICTR is faced with an uphill task to try the detainees, and is faced with many problems.[59] For instance the slow pace at which the trials are being concluded, the lack of cooperation from the Rwanda government and institutional and human obstacles. Some crimes have been committed by those now in power in Rwanda, and if they cannot be tried by the tribunal or the national courts, the danger of selective justice will be a serious obstacle to reconciliation and reconstruction in Rwanda. A survey of the trials so far conducted by the ICTR indicates clearly that not all the violations against IHL that occurred in Rwanda have come before the tribunal, and there are no indications that all the cases will be heard. Given the large number of the accused persons who are at large and considering the few cases (negligible, compared to the magnitude of the atrocities) the ICTR has been able to conclude since its inception, the prospects that the ICTR , the national courts and the Rwandan traditional courts (*gacaca*) will be able to try virtually all persons who were responsible for the genocide remain very uncertain

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[57] See Kingsley M, 'Peace Through Justice: Rwanda's Precedent for the Trail of Milosevic' *The Washington Post'*, 6th July 1999, pp. 9-11.

[58] See International Crisis Group Report, *Five Years after the Genocide, Justice in Question,'* op.cit, p.18.

[59] See F Viljoen 'The Role of the Law in Post Traumatized Societies: Addressing Gross Human Rights Violations in Rwanda, 1997, p.25.

CHAPTER FIVE

Ending international humanitarian law violations in internal armed conflict : A critical analysis

Introduction

Chapter One discussed the main issues that the study set out to examine. It stated that the main objective of the study was to analyze the application of International Humanitarian Law in internal armed conflict using the Rwanda genocide as a case study. The main issue raised in the chapter is the need to look for lasting solutions to end internal conflicts. The chapter discussed how over reliance on the international community to intervene to end the Rwanda genocide was futile. Many authors have argued that the Rwanda genocide could have been prevented, but the international community watched as the genocide proceeded.

Chapter One discussed the pluralist theory of international law which will form the basis for analysis in this chapter. As Mwagiru[1] asserts the pluralist school fixes international law within the ambit of the social sciences with respect to the procedures adopted and the tools of analysis. It is akin to the pluralist theory of international relations. The pluralist theory is concerned with definition of the problem, objectives ,and hypothesis and about who is to make what decisions, in what structures, by what procedure and in accordance with what criteria. McDougal[2] and Falk argue that pluralist theory emphasises the value of human dignity, human welfare and morality. Pluralism sees the international system as a complex system, where states are not the only actors. Pluralism sees international law as a result of the interacting responses to

[1] See Makumi Mwagiru *'A Critical Comparison of Analytical Frameworks of International Relations and International Law'* M.A Thesis, University of Kent at Canterbury, Rutherford College, 1991, p.84.
[2] See McDougal, *Public International Law in a Modern World*, Pitman, London, 1987, p.10.

problems by decision makers, with multiple actors and variables whose actions must be taken into account. Pluralist emphases that law is a constantly evolving process of decision-making and its evolution will depend on the knowledge and insight of the decision maker.

The study argues that states are no longer the only actors in international law. Recent conflicts have seen the increasing involvement of individuals, UN agencies and non-governmental organizations in humanitarian operations. This has increased the number of humanitarian actors in conflict situations. The study argues that international law is not the only means by which internal conflicts can be settled, and that to address conflicts, multiple methods of conflict management and resolution should be pursued.

Chapter Two discussed the relevance of International Humanitarian Law in internal armed conflict. It analyzed developments in IHL that have contributed to developments in the area of internal armed conflict. The chapter discussed the relation ship between *jus ad bellum* and *jus in bello* . Finally the chapter surveyed the development of International Humanitarian Law versus International Human Rights Law. The main issues raised in this chapter are, Firstly, the permissible and impermissible uses of force in international relations, and the need to observe IHL when states have opted to use force in the settlement of their disputes. The second issue raised is the structural problem of IHL that has rendered implementation problematic in internal armed conflict. The third issue is the relevance of territorial sovereignty as an hindrance to intervention in internal armed conflict .

Chapter Three defined international criminal law and analyzed how it has evolved from Nuremberg up to the establishment of the International Criminal Court. It

also discussed individual criminal responsibility in international law, the concept of impunity in international law and the role of *ad hoc* criminal tribunals in contributing towards ending impunity for IHL violations. Finally the chapter surveyed the role of the ICTR in ending impunity for violations of IHL in internal armed conflict. The main issues raised in the chapter are, the issue of impunity for IHL violations in internal armed conflict, individual criminal responsibility for IHL violations, and the role of criminal courts in addressing IHL violations.

Chapter Four discussed IHL violations during the Rwanda Genocide. It examined the types of violations and the factors that facilitated the IHL violations. The chapter concluded with a discussion on the applicability of international law to the Rwanda genocide. The main issues that were raised in the chapter are, ending impunity for IHL violations during the Rwanda genocide, individual criminal responsibility for IHL violations during the genocide, the structural problems of IHL that have made their application problematic in internal armed conflict, how IHL is to be applied when state structures have broken down as was the case during the Rwanda genocide, and lastly the problem that ,not all the violations that occurred in Rwanda have been addressed by the ICTR , the Rwanda national courts and the Rwanda traditional courts (*gacaca).*

Throughout the study the following main issues which will form the basis of analysis in this chapter emerged. The main issue raised in the study is the need to look for lasting solutions to end internal conflicts; Secondly, the structural problems in the rules of IHL for internal armed conflict, Thirdly, the issue of territorial sovereignty as a hindrance to intervention in internal armed conflict; Fourthly, is the issue of impunity for IHL violations in internal armed conflict; Fifthly the attribution of criminal

responsibility to the individual for IHL violations, and finally is the effective enforcement of IHL in internal armed conflict.

The need to search for lasting solutions to end internal conflicts

Chapter One, argued that in 1945 the international community made the promise that never again would it allow genocide to take place. "Never Again" happened in Rwanda 1994, and the world sat by and watched. The Rwanda slaughter could have been prevented. The United States, Belgium, France and the UN Security Council all had prior warning about the 1994 genocide in Rwanda and could have prevented it. Belgium pulled its troops out following the deaths of 10 Belgian peacekeepers on the first day of the genocide. Belgium subsequently supported the US position against increasing the peacekeepers mandate. France, a close ally of the Hutu government in Rwanda, has been accused of sending them military support both before and during the genocide.

There a is need to address the misplaced trust in the international community's power to resolve internal conflicts. This is an inhibiting factor to finding lasting solutions to internal conflicts. It is also based on erroneous assumptions, which need to be corrected and contested for the good of the conflicts and the image of the international community. Clearly, states are only willing to intervene in a conflict in which they have an interest or one that they feel will threaten their power and influence. This may explain why there was insufficient international political will to employ decisive military force to stop genocide in Bosnia, Rwanda and Kosovo. In these conflicts, the major powers did not have their interests at stake. Scharf[3] wrote that the most frequent response of the international community to genocide, crimes against humanity and war

[3] Scraft et.al, 'Responding to Rwanda: Accountability Mechanisms in the Aftermath of Genocide', *Journal of International Affairs*, Spring 99, Vol.52, issue 2, p.621.

crimes has been to do nothing. Very few of the perpetrators of such crimes have ever been brought to justice, and governmental bodies have seldom exposed the basic truth of what happened. Sometimes this has resulted from international indifference or paralysis, as was the case during the Rwanda genocide. On other occasions, justice and truth were bartered away to achieve short-term peace. For example, the Lome agreement which gave Fodah Sankoh and other rebel leaders amnesty in the hope of bringing peace to Sierra Leone which in the long-term was not achieved by this agreement among many other peace treaties.

Chapter One noted that Campbell[4] raises the questions, why there was insufficient international political will to employ decisive military force to stop genocide in Bosnia, Rwanda and Kosovo; how political will be built to suppress future genocide; and, what the 21st Century will look like if genocide is not halted. Clearly there is a need to find lasting solutions to end the conflicts going on in the world today. Flinterman[5] gives an overview regarding the solutions to the conflicts in the Great Lakes region. The main finding is that even though responsibility for lasting solutions lies first of all in the hands of the inhabitants and the leaders of the countries in this region, there are also important possibilities for the international community to play a constructive role. In this report, suggestions are made for regional solutions and solutions regarding the specific countries, and the significant part the international community could play in it. For instance, African states should look for their own homegrown solutions to solve their own conflicts. This motto of Africa solutions for Africa's problems is gaining momentum out of the experiences of the unwillingness of the international community to avail quick and

[4] Kenneth J. Campbell, *Genocide and Global village*, West Chester, USA, 2000, p.78.
[5] Cees Flinterman, *Main Findings of the Netherlands Delegation to the Great Lakes Region, Rwanda and Burundi, 1995.*

effective solutions to African conflicts. An example to point out is the use of the ECOMOG peacekeeping forces in West Africa, in the Sierra Leone conflict, the most recent being the intervention in Liberia in August 2003.

In the quest to find lasting solutions to end conflicts it will be important to address the root causes of the conflicts, to punish those who mastermind the conflicts and those who are involved in violations of IHL. For example, Mbanda[6]observes that in Rwanda, the programme of Tutsi extermination was not only a 1994 phenomenon, but that the actual desire started in 1950. Kamukana[7] traces the origin of the conflict on three principal views: that of ethnicity, the attempt to redress the colonial imbalances, and as a problem of governance where the government failed to address relevant developmental issues for its people. Hintjens[8] examines the tragedy of the Rwandese genocide and the reasons behind the massacres. She points to the role of the Rwandese state in perpetrating the crime and notes the indifference of the international community. Anyidoho[9]on the other hand discusses the difficulties and problems United Nations Assistance Mission in Rwanda (UNAMIR) encountered when carrying out its operations before, during and after the civil war of 1994. Chapter Four discussed the factors that facilitated IHL violations in Rwanda during the genocide. If the Rwanda problem is to be solved, there is a need to address the root causes of the problem, as this is a problem that is deeply entrenched in the Rwandan people and if it is not addressed,

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[6] Ibid.

[7] Kamukana Dixon, *Rwanda Conflict, its Roots and Regional Implications*, Fountain Publishers, Kampala, 1995, p.27.

[8] H.Hintjens, Explaining the 1994 Genocide' *Journal of Modern African Studies* ,Vol.37, No.2 ,1999, pp. 137-163

[9]Brigadier General Henry Kwami Anyidoho ' *In United Nations Assistance Mission For Rwanda (UNAMIR) In Crises.*, shares his experiences when, after the Arusha Peace Agreement had been signed, he was sent to Rwanda as the Deputy Force Commander and Chief of Staff to the Rwanda Assistance Mission.

the future may witness more Rwanda conflicts. So far, there are attempts to punish those who violated IHL and committed crimes against humanity during the genocide, but efforts to address the root causes of the problems that caused the conflicts are lacking and should be the focus if lasting solutions to the problem are to be found.

In future, it will be important to supplement criminal tribunals, peacekeeping and humanitarian intervention in internal conflicts with other methods of peaceful settlement of disputes. This will involve the use of good offices, mediation, reconciliation,negociation, investigations, launching of internationally supported peace processes alongside other available diplomatic methods of peaceful settlement of disputes, interventions by neutral states or by international organizations, religious or humanitarian organizations and well as sanctions by the United Nations Security Council. This can be used to avert conflicts and to impose compliance with IHL provisions. Preventative diplomacy can be used as an effective method to pre-empty potential conflicts (the fact that early warning systems did not work for the Rwanda genocide does not mean that they cannot work).

The problems of applying the rules of IHL in internal armed conflict

Chapter Two discussed IHL relevant to internal armed conflict and noted that objections to the application of customary rules in civil wars is based on two grounds [10] One, that the attempt to establish rules for civil conflicts is very recent and there has been no time for the practice to develop. This view featured during the deliberations for the Additional Protocols (1974-77). It was argued that IHL in internal conflict had not been applied in any conflict and therefore no precedents had been set for its application;

[10] See Kalshoven,' Applicability of Customary International Law in Non- International Conflicts' in Cassese (ed), '*Current Problems of International Law* ,Milan, 1975, pp. 269-282.

for that reason, such rules could not be considered as customary. Today this argument is not true because the rules have been applied in internal conflicts such as in El Salvador, the former Yugoslavia and in Rwanda.

Second is the claim that such practice only grows out of relationships between states, and in civil wars, states cannot in any meaningful sense of the term be regarded as the only actors in the conflict..[11] This assertion does not take into account the fact that states are not the only subjects of international law, for international law has evolved over the years to include other actors like individuals .It also overlooks the fact that with the universalisation of human rights and the diminishing of state sovereignty some issues transcend states boundaries.

Beigbeder[12]argues that the Geneva Conventions and the two Additional Protocols that have been ratified over the years have done little or nothing to deter the efforts of those who have planned or carried out IHL violations. Despite the existence of Common Article 3 in each of the 1949 Conventions, internal war has lost little of its savagery as witnessed in the Rwanda genocide 1994. It is difficult to establish the precise conditions under which this article can been applied. Lysaght[13] argues that one major difficulty in applying common article 3, is the fact that states refuse to acknowledge its application in situations where there is little doubt that the threshold requirements for its application have been met. The states which deny the application of Common Article 3, rely on the ambiguous wording of the article to maintain that their conflicts did not fall within it.

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[11] See Chapter Two.

[12] Beigbeder Yves *'Judging War Criminals The Politics of International Justice'*, St. Martins Press, New York, 1999, p.230.

[13] See Lysaght, *'The Scope of Protocol II and it's Relation to Common Article 3 of the Geneva Conventions and other Human Rights Instruments,* op.cit, p.194.

However, Lysaght's argument may be rejected if one considers the fact that at the time of enactment, the provisions of common article 3 did not reflect customary law, but with time, they came to gain the status of customary law. The provisions of the article are reinforced by the various human rights treaties and by Additional Protocol II of 1977.

Forsythe[14] considers common article 3 as a statement of affectionate generalities than of precise guidelines. This article never attempted to regulate the relations of third parties with the belligerents. He asserts that no one has ever been sure as to which factual situations the article applies. Two that no one has been sure exactly what is prohibited, in whatever situation it is, and where it is regulated. The text of the article, its drafting history and subsequent interpretation do not make clear the exact scope and full content of the article. He concludes that the vagueness of common article 3 has led to the widespread belief that this law has gone unnoticed.[15]

Common article 3 provisions do little more than extend certain fundamental humanitarian protections to non-combatants. They do not provide any definitive codification of the laws of war for internal conflicts. Moreover, the provisions are so general and incomplete that they cannot be regarded as an adequate guide for the conduct of belligerents in such conflicts. It would however be premature to dismiss the relevance of common article 3. The article has been successfully applied in cases where states have accepted its relevance to their disputes. For examples in Guatemala (1964),

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[14] See Forsythe David 'Legal Management of Internal War :The 1977 Protocol on Non-International Armed Conflict,' *American Journal of International Law*, Vol.72, April 1978, No. 2, pp. 272-295

[15] See Chapter Two.

Algeria (1955-56), Libya (1958), Yemen (1962) and the Dominican republic (1965).[16] It can also be established that the existence of this article, even with its deficiencies, laid a foundation for the development of IHL for internal conflicts.

The inadequacies of common article 3 were the reason for the preparation of Additional Protocol II which address conflict not of an international character. This Protocol can best be understood if one considers the negotiating process, currents of opinions manifested at the negotiating conference and its final text.[17] From the onset there was dissatisfaction among the delegates with the length of the text and with the fact that it ventured into domains which they considered sacrosanct and inappropriate for inclusion in an international instrument.

One major defect of Additional Protocol II is the high level of conflict required for its application.[18] States are less inclined to accept these obligations in relation to a wide range of conflicts. The solution is to narrow the field of application of Additional Protocol II by requiring that the conflict must be between the armed forces of the high contracting parties, and that opposition be either armed forces or dissident armed groups who are under responsible command and exercise such control over a part of its territory as to enable them carry out concerted and sustained military operations. This should be expanded in the light of the changing nature of internal conflicts, with the involvement of untrained forces and civilians, these requirements must reflect this changing reality.

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16 See Fraleigh, 'The Algerian Revolution as a Case of International Law' in Falk (ed) *The International Law of Civil War, op.cit,* pp. 194-256.

17 See Chapter Two.

18 See Gardam Judith, *'Non-combatant Immunity as a Norm of International Humanitarian Law'* Martinus Nijhoff, London, 1993, p.128.

However, the inadequacies of the Protocol do not imply its irrelevance. There is a need to modify the existing Protocol to reflect the changing nature of conflict. Despite criticisms, Additional Protocol II was applicable to the internal conflicts in El Salvador and the Philippines. Currently it is being applied by the ICTR for the Rwanda Genocide and by the ICTY in other aspects of fighting in the former Yugoslavia. Thus, it may be argued that if common article 3 and Additional Protocol II were observed, many of the worst human tragedies of recent internal armed conflict would have been avoided.

Territorial sovereignty as an hindrance to intervention in internal armed conflict

Chapter Two discussed state sovereignty as an effective barrier to the increased international regulation of non-international armed conflict. Civil wars are a particularly difficult area for a state to allow outside interference as the existence of the state is frequently threatened by the very conflict. The issue of national sovereignty and domestic jurisdiction prevailed during the deliberations on the Additional Protocols. Some states argued that Additional Protocol II should not appear to affect the sovereignty of any state party to it or the responsibility of governments to maintain law and order and defend their national unity. They felt that the provisions of the Protocol would militate against the sovereignty of states and interfere with their domestic affairs. They felt that internal law and order situations are the sole concern of states and these problems are to be dealt with according to the domestic laws of the states. Meanwhile others argued for a pure humanitarianism at the expense of national sovereignty.[19]

Chapter Four, observed that the issue of national sovereignty and territorial integrity has largely encouraged many parties to a conflict to violate IHL. Parties to a conflict aware that the international community will not interfere in an internal conflict

[19] Ibid.

continue to perpetuate atrocities against their peoples. For instance, the UN Charter and the OAU Charter (now African Union) have clauses on non-interference in the internal affairs of states. This allows states to defend their acts as being internal and call for the respect for the clauses on non-interference. In Africa states have interpreted the clause very dogmatically to serve their own interests.

The Rwanda genocide has demonstrated that it is dangerous and irresponsible to dismiss internal conflicts and the threat of new ones as purely internal or regional. This is because ultimately they represent a major threat to international peace and security. The conflicts become internationalised and their effects are felt outside state boundaries. For example, it is impossible to overlook the effects refugees threatened by internal conflict have on their host states and the instability that internal conflicts can bring to a region.

The Rwanda genocide also demonstrates how hollow the reference to state sovereignty has become. It is invoked by instigators and perpetrators of internal conflicts to justify their actions and to claim impunity. Otto[20] argues that sovereignty was the most abused political concept in the 20th century. In many instances, the evasion of state responsibility is characterized by the abusive and selective exercise of sovereignty. This is manifested by the denial of the obligations implied by sovereignty to provide for protection and good governance to all its citizens. He argues that sovereign states have a responsibility to protect their own citizens from avoidable catastrophe but when they are unwilling or unable to do so, that responsibility must be

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[20] See Otto Hieronymi, 'The Evasion of State Responsibility and the Lessons from Rwanda: The Need for a New Concept of Collective Security' *Journal of Refugee Studies*, Vol.9, No. 3, 1996, pp. 236-239.

borne by the broader community of states.[21] When this happens, the concept of sovereignty can no longer be applicable.

Humanitarian intervention is increasingly becoming institutionalised. In situations where there is a threat to life, the international community may intervene to protect lives. In such cases, the authority of the affected state is not necessary and is not sought. For intervention to qualify to be humanitarian, there must be immediate and fundamental threats to human life. Chapter Two discussed the permissible and impermissible use of force and argued that humanitarian intervention and self-defence were the only permissible use of force. In such instances, territorial sovereignty may be overlooked.

The attribution of criminal responsibility to the individual

Chapter One observed that obligations to observe IHL address itself to states parties to the conflict and to individuals. Chapter Three observed that the Nuremberg tribunal laid the foundation for individual criminal responsibility by asserting that international law imposes duties and obligations on individuals and states. Individuals can be punished for violations of international law. The Nuremberg trials asserted that crimes are committed by men, not abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced. Chapter Three also discussed the principle of command responsibility, that any person who orders a subordinate to commit a violation for which there is individual responsibility is as responsible as the individual who actually carries it out. Chapter Four noted that the

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[21] See *Report of the International Commission on Intervention and* State *Sovereignty* 'The Responsibility to Protect' International Development Research Centre, Ottawa, Canada, 2001 pp.1-85.

ICTR has been able to enforce the concept of individual criminal responsibility for IHL violations in Rwanda by trying individuals who committed the violations.

Suprenor [22] argues that in the absence of an international police force to bring the war criminals to justice there is a need to look for creative ways to arrest war criminals. He asserts that increasing the number of forums to prosecute war criminals will not serve to bring the war criminals to justice if the international community lacks the ability to locate and arrest indicted war criminals. He argues that extradition treaties, the use of military forces and United Nations Security Council economic sanctions are often ineffective means for obtaining custody of war criminals. While states are required under international law to cooperate with any efforts to prosecute war criminals ,the international community lacks enforcement measures to ensure compliance. The international community is overly reliant on each state's willingness to comply with its obligations under international law.

Recent conflicts have witnessed states unwillingness to honour such obligations. for example, the Saudi Arabia government was not willing to try Idi Amin nor was it willing to hand him over to Uganda for trial for whatever reasons. Given such unwillingness of states to comply with their obligations in international law Suprenor advocates for an international group which will be able to capture an indicted war criminal peacefully with the minimum amount of force. He argues that the United Nations Security Council should permit the ICTY and the ICTR to issue international arrest warrants the international group can enforce. The group should have the right to cross borders when travelling with the indicted war criminal to a location defined in the

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[22] See Suprenor Christopher 'International Bounty Hunters for War Criminals: Privatizing the Enforcement of Justice' *Air Force Law Review*, Vol.50, 2001, pp. 1-12.

indictment for delivery of the war criminal. He argues that given the examples of domestic groups in locating Nazi war criminals and the arrest in Smederevo, Serbia of Mr. Dragan Nikolic, an indicted war criminal was handed over to American stabilizing force soldiers by such a group, who had smuggled him out of Serbia and handed him to NATO troops in Bosnia who transferred him to the ICTY at the Hague.[23] With the possibility of state cooperation, the United Nations Security Council can reasonably expect the international group to capture indicated war criminals. The United Nations Security Council could draft a resolution to create the equivalent of state supervised bounty hunters.

However, the use of such an international group should be approached cautiously. They should first be verified before establishing their expansive use. Suprenor's argument will be difficult to enforce since the establishment of such a group will entail a United Nations Security Council Resolution, which would address how such a force will operate. The UN Charter envisioned that the UN would have its own standing army but this has never come to be. If after over fifty years the UN has not achieved its original intent to have its own army, It will not be able to envision the establishment of an international group to arrest war criminals. The nearest the UN can come to establishing such a group will be to expand the mandates of the UN *ad hoc* police forces that it frequently creates to assist with particular peace operations. However, it may be pre mature to dismiss the establishment of such a group. In future, if it is ever established, it would still be a significant step in the right direction in realizing individual criminal responsibility for war crimes.

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[23] See Zeliko Cviianovic 'Belgrade Crackdown: Bounty Hunters Strike inside Serbia to Seize War Crime Suspects' *The Independent*, London, and May, 18, 2000.

The main argument is that the international community should be able to devise more innovative means by which war criminals may be arrested, with the minimal use of force and delivered to the courtrooms . If individuals accused of such crimes are to be held responsible for their actions and if the concept of individual criminal responsibility is to be achieved and be a deterrent to war crimes, such an arrangement must be made.

Ending the Culture of impunity for IHL violations

The culture of impunity that shelters individuals responsible for violent assaults is one of the biggest obstacles to the ending of IHL violations. The unwillingness and inability of states to bring these people to justice undermine the effectiveness of the entire legal framework. The number of individuals that the two criminal tribunals (ICTY and ICTR) have been able to try is negligible, compared to the number of people who committed the atrocities and are at large.[24] This implies that not all or at least most of the war criminals may finally be tried. If this happens then the concept of individual criminal responsibility will only have been given substantial lip- service with no action to demonstrate it.

Chapter Three discussed the obstacles to addressing the culture of impunity, One of these is the trouble with giving amnesty to people responsible for IHL violations either in the name of national reconciliation or due to the inability to apprehend them. Some internal conflicts owe their occurrence to conscious manipulation by senior national political figures or parties, in or out of office, for immediate political purposes. This was the case for Rwanda and the ruling Hutu party; Serbia and Slobodan Milosevic, India and the Bharatiya Janata party in the events of 1992-93 and the war in

[24] See Chapter Three.

Sudan .These conflicts are initiated and prompted by political actors for political ends.[25] For a long time political leaders who mastermind conflicts have not been made to account for their deeds and they have enjoyed the impunity that has characterised such actions. This impunity has encouraged those who come into power to commit crimes knowing that they will never be called on to account for their deeds.

Neier[26] asserts that amnesties given to individuals who violate International Law create a culture of impunity. For him their 'seductive' appeal should be resisted because forgiving officials and others for IHL violations committed, is the only alternative to continuing bloodshed. Neier further argues that prosecuting the most culpable perpetrators or arch-criminals of genocide, war crimes and other massive human rights abuses can serve two principle purposes. First, by acknowledging the suffering of the victims and thus facilitating their recovery to the greatest extent possible and secondly to demonstrate that such important laws cannot be flouted with impunity. He emphasizes that crimes such as genocide are subject to the principle of universal jurisdiction, meaning that individuals indicted for them can be arrested at any place and at any time.

It must be the practice that penal and disciplinary measures must be taken for each individual (military or civilians) who violate IHL. They must be prosecuted according to the penal or disciplinary provisions that are provided for in IHL This must apply to all violations and to all individuals responsible for such violations if the concept

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[25] See Gray Mary and Sarah Moore 'Next Arena for Genocide?' *The Washington Post*, August 24, 1994.

[26] See Neier Aryer, *War Crimes, Brutality, Genocide, Terror and the Struggle for Justice*, Times Books, New York, 1999, p.283.

of individual criminal responsibility is to remain relevant in international criminal law today and in the future.

The effective enforcement of IHL in internal armed conflict

Chapter Two noted that states parties to the Geneva Conventions of 1949 and their Additional Protocols have a duty under international law to observe the legal provisions created by these treaties. These include ensuring implementation of and respect for IHL. To meet this end, various legislative, regulatory and administrative measures need to be taken.

However, international law is often criticized for lacking any formal means of enforcement.[27] Penrose[28] argues that international criminal law has failed and will continue to fail. Without a means of enforcement, international criminal law provides only a mirage of justice, since international tribunals lack any coercive power to bring the criminals before the court. This is so because the tribunals are not supported by an international police force. Yocoubian[29] argued that international law is doomed to irrelevance and that International legal rules function best when they command a broad consensus, reflect the positions of the major powers and other actors with serious interests at stake, and do not demand radical changes in most states behaviour. In such cases, international law can legitimise efforts to induce change in the behaviour of the few recalcitrant non-conformists. Campbell[30]argues that genocide and the Genocide

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[27] See Bartram Brown,' Primacy or Complementarily: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals, *Yale Journal of International Law*, Summer, 1998, Vol. 2, pp. 114-121.

[28] See Penrose Mary M,' Lest We Fail: The Importance of Enforcement in International Criminal Law', *International Law Review* Issue 21, Vol 321, 2000, pp. 364-390.

[29] Yocoubian, The Efficacy of International Criminal Justice, Evaluating the After Math of the Rwanda Genocide, *World Affairs*, Spring 99, Vol. 161, Issue 4, p.186.

[30] Ibid.

Convention are falling through the cracks, as there is nobody to enforce and monitor this problem.

The Cold War has been replaced, at least in part by the war against atrocities. With the end of the Cold War a pattern of internal armed conflicts waged by relatively untrained forces wielding relatively light arms and other crude objects like machetes has emerged. On any given day, the reports from the front line are about the violation or enforcement of IHL. In the last decade, government decision makers have spent much time determining how to prevent and respond to atrocities. Clearly, the issue that has seized the headlines and attention of many governments, international and regional organizations, alliances, nongovernmental organizations and private citizens is how to enforce IHL

Scheffer[31] argues the enforceability of IHL is not as some would have it, an exercise in equally distributing indictments among competing ethnic groups. It is the search for individual responsibility, rather than collective responsibility, for crimes that can be documented and prosecuted. The implementation of IHL refers to the likelihood that in a particular combat situation, its regulations will be observed and its violations punished. For Scheffer an important first step in enforcing IHL is to document the nature of war crimes by building case files that can be used to prosecute individuals. Rudiger[32] argues that public documentation can be a weapon to deter abuses and to lay the foundations for later prosecutions. For instance, the pictures broadcast on the wars in Iraq, Rwanda, Somalia and former Yugoslavia contributed to the attempts to address

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[31] See Scheffer David, 'The War against Atrocities' *Vital Speeches of the Day*, 04/15/99 Vol.65, Issue 13, p.391.

[32] See Rudiger Wolfram 'Enforcement of IHL in Internal Armed Conflict: A Critical Analysis' in Fleck D, (ed) *Handbook of International Humanitarian Law in Armed Conflict*, Oxford University Press, New York, *1995*, pp. 517-549.

the conflicts. Chapter Three noted that publicising and documenting the proceedings of the ICTR will stimulate and help to develop IHL. When offences against international law become known, each party to the conflict must expect the truthful enemy reports on its violations. This may impair the morale and consent of its own population.

Miskel [33]argues that the key policy lesson from Rwanda would be to develop a system to provide world leaders with a better early warning system for identifying and spotlighting states in danger of atrocities. However, it is clear that the emphasis on an early warning system is misguided. This is because actionable early warning is, and was ,already available in the Rwanda genocide. Such information was collected and distributed by many governmental and private organizations. Many foreign missions operated in the Rwandan capital throughout the preliminary phases of the crisis, while others functioned throughout the crisis. Numerous UN agencies and private humanitarian organizations also maintained their operations in the region before, during and after the crisis, and their reports were replete with compelling information about the extent and the severity of the crisis. The UN even had a military mission in the country (UNAMIR) that reported on the early stages of the conflict. Finally, the role of international media coverage in highlighting the crisis at an early stage cannot be down played. Thus, it can be argued that substantial early warning was available then and it continues to be available today throughout the world. Thus to invest on a new early warning system by the UN would be too little too late. It cannot be an effective means of enforcing IHL.

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[33] See Miskel James, 'Are We Learning the Right Lessons from Africa's Humanitarian Crises' *Naval War College Review*, Summer 1999, Vol.52, .Issue 3, and pp. 136 145.

The second policy lesson advanced by Miskel and Norton[34] is intervening to disrupt the preparations of extremists to avert or at the very least mitigate an outbreak of violence. For them, disrupting Rwanda-like preparations seems to be well within the capacity of law enforcement agencies. For instance, Gourevitch[35] estimated that a UNAMIR force of five hundred thousand armed troops would be required to reign in the developing violence. Clearly, in advocating for this they overlook the context of such violence. For instance, Rwanda as was discussed in Chapter One and Chapter Three, has a long history of civil war and bitter ethnic tensions, and most of that history is perhaps the result of the colonial power having played off the Hutu and Tutsi against each other for decades. Surely, such conditions that are deeply rooted in the Rwandan community will be little affected by foreign intervention to confiscate machetes, destroy hit lists and shut down hate radio stations. Clearly, such an intervention strategy could not have any impact on conflicts like the Rwanda genocide, but this is not to say that the two strategies proposed by Miskel are not workable. It still remains to be seen where they have been effective.

Chapter Two discussed that only through compulsory teaching in military training can the application of IHL be guaranteed. Each state must continuously instruct the forces under its control including the civilian, military or paramilitary authorities at all levels in IHL. The forces must have operational rules conforming to the law of armed conflict. Warren[36] asserts that educational efforts must be supplemented by effective enforcement. When members of the armed forces violate IHL, they must be held

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[34] See Miskel J and Norton Richard 'Humanitarian Early Warning Systems' *Global Governance* , July -Sep 1998, pp. 317-329

[35]see Philip Gourevitch 'The Genocide Fax' *New Yorker* , 11,may 1998, p.45.

[36] Warren Zimmerman 'Protection of War Victims' *United States of America Department of State Dispatch* Vol. 4,. Issue. 36, p.615.

individually accountable. He asserts that punishment for violations is under the purview of national law, but when effective national enforcement appears unlikely, the international community must be willing to step in.

It is imperative for the implementation of IHL, that its contents be known to persons involved in conflict. Those persons should be aware that violations carry disciplinary or penal consequences, and that persistent breach may lead to escalation of a conflict. Thus, compliance with IHL is in the interest of every individual party to the conflict. This can be achieved through dissemination and under the Geneva Conventions, it is the responsibility of states to disseminate IHL. Dissemination must be given greater emphasis and its coordination supervised. The civilian population, which is the greatest victim of armed conflict should be made aware of its rights and obligations under IHL. All persons who are likely to need the information must be reached. IHL must be included in training curricula for the armed forces, police colleges, universities, schools, journalisms, civil service, relief agencies and humanitarian organisations staff trainings and finally civic education trainings programmes. Dissemination can also be undertaken through seminars, publications, Information Education and Communication materials (IEC) public lectures, media programmes and sharing of information between various states on implementation of IHL

Respect for IHL in future wars will depend on whether instruction on the pertinent rules is improved and whether the necessary sanctions are imposed in case of violation. The rules of IHL are complex and there will be a need to simplify them so that they are easily understood by laymen. The more that persons without instructions or knowledge on IHL are involved in conflicts, the more there will be violations of IHL. It is obvious that IHL is either unknown or not believed in, or considered completely

irrelevant by many parties to internal conflicts. This can be seen in the increased grave breaches and violations of IHL evident in contemporary conflicts. Since many persons using force in internal conflicts have not been members of an official state army, it is not surprising that they are unaware of the existence of the rules applicable to such situations let alone their content. The only way to give such forces some idea of these rules is to make the entire civilian population aware of them.

Chapter Four established that violations of IHL during the Rwanda genocide were committed by all parties to the conflict and by the civilian populations. However, it cannot, or it is yet to be established, that the protective provisions of IHL prevented or reduced great sufferings in any cases. Chapter One also established that the protective provisions of IHL were not invoked or applied by any parties to the conflict.

Bruderlien [37]proposes that one possible strategy for the enforcement of IHL is to reassert the role of IHL. He argues that violations of law do not necessarily signify its obsolescence. On the contrary, IHL remains relevant in today's conflicts and serves to mobilize considerable efforts to further its application. Ignorance is no defence for violation of the law. These discussions may help to reinforce the argument that compulsory teaching of IHL might help to boost observance to the law.

The enforceability of IHL in cases where national enforcement has failed in the past has entailed the establishment of *ad hoc* criminal tribunals established under Chapter VII of the UN Charter. Chapter Two discussed the role of these *ad hoc* criminal tribunals in enforcing IHL within their jurisdiction. The chapter also discussed the role that the International Criminal Court will play in enforcing IHL. It is hoped that when

[37] Bruderlein Claude, 'No challenges to Humanitarian Protection, *British Medical Journal*, Vol. 319, issue 7207, pp. 420- 430.

the International Criminal Court starts its operations it will help to enforce IHL, but again that remains to be seen.

Leitenberg [38] argues that the use of force can be used to enforce IHL, for Chapter VII of the UN Charter provides for the use of force and such action may be necessary in circumstances that threaten peace, breach to the peace or an act of aggression. In the Charter, it is assumed that such troops would be UN forces. However, Bruderlein [39]argues that the use of force mandated by the United Nations Security Council or regional organizations entails political agendas that may jeopardize the neutrality of IHL. Furthermore, the use of force against parties may put civilians at even more risk. Martin[40] asserts that even though the UN Charter provides for recourse to force in extreme cases, any such force must conform to the UN Charter. The obligations to ensure respect for IHL cannot therefore be considered to be a sufficient ground for unilaterally or multilaterally deciding on military intervention as a means of putting to end grave breaches of the law. Therefore, the United Nations Security Council must consider all other parameters of a given situation and not just the issue of respect for IHL before employing the use of force.

Doswald-Beck[41] argues that IHL is implemented on three levels: by the individuals undertaking certain acts during an armed conflict, by the society for which they are acting, and finally by the efforts of the international community. He argues that

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[38]See, Leitenberg Milton,' Rwanda 1994: International Incompetence Produces Genocide' *Peacekeeping and International Relations*, Nov/Dec 1994, Vol.23, Issue 6, pp. 1-20.

[39]See Brudelein C,'No Challenge to Humanitarian Protection' op. cit.

[40]See, Martin I,' Hard Choices after Genocide: Human Rights and Political Failure in Rwanda' in Moore J.M, (ed) *'Hard Choices: Moral Dilemmas in Humanitarian Intervention'*, Rowman and Little Field, London, 1998, pp. 157-75.

[41] Doswald-Beck' Implementation of IHL in Future Wars' in Leslie C, and Michael Schmitt (eds) *The Law of Armed Conflict into the Next Millennium*, Naval War College International Law Studies, Vol.71, 1998.

generally laws that reflect the values of society or at least the interests of those in a position to enforce the law, have a good chance of being implemented. He also looks at two mechanisms for implementation, namely, national mechanisms in which efforts need to be made to induce states to comply with their duty under the Geneva Conventions to provide for universal jurisdiction for grave breaches. If states could arrange for national measures for implementing IHL, a great deal would be gained. This would make national courts able not only to try war criminals more effectively, but also to award reparation to victims of violations. Second, he looks at international mechanisms for the implementation of IHL, through *ad hoc* criminal tribunals and the international criminal court. International criminal law will go a long way in helping to try war criminals and to help bring to an end impunity for IHL violations. Chapter Three made reference to the role of *ad hoc* criminal tribunals in implementing IHL in the former Yugoslavia and Rwanda, and the role the international criminal court will play in implementing IHL.

Most of the conflicts in the world today are internal conflicts between armed segments within countries. About 90 per cent of the casualties are non-combatants, women, children, elderly citizens and many other innocents are injured and killed. Many of these conflicts involve gross and deliberate violations of IHL. Internal conflicts can be particularly devastating and states have a special responsibility to take measures to alleviate the atrocities caused.

CHAPTER SIX

Conclusions

This study has surveyed the application of International Humanitarian Law in internal armed conflict. The study has examined the extent to which IHL was (not) observed during the Rwanda genocide 1994. The study has examined the role of international criminal tribunals in ending impunity for IHL violations.

The study established that during the Rwanda genocide, individuals from both sides of the conflict and the civilian population committed serious breaches of International Humanitarian Law. In particular the warring parties flouted the Geneva Conventions and specifically violations of the obligations set out in article 3 common to all the Geneva Conventions and violations of Additional Protocol II. Individuals also committed crimes against humanity and acts of genocide against the Tutsi. However, the study established that there is no evidence to show that genocide was committed against the Hutu population.

The study noted that the Geneva Conventions and their Additional Protocols (despite a few structural difficulties) are still perfectly capable of fulfilling their roles. The challenge lies in strengthening and broadening the scope of the already existing law to be able to serve the purposes for which it is intended. This will only require adjustments in the light of recent experiences, and defining mechanisms for ensuring compliance with its rules. For as long a there is armed conflict, these rules will remain indispensable.

From the study, it is obvious that IHL is either unknown or not believed in or considered completely irrelevant by many parties to internal conflicts. This can be

justified by the increased grave breaches and violations of IHL evident in the conflicts going on. Since many persons using force in internal conflicts have not been members of an official state army, it is not surprising that they are unaware of the existence of the rules applicable to such conflicts, let alone their content. The only way to give such forces some idea of these rules is to make the entire civilian population aware of them.

The study established that the significance of the concepts of territorial sovereignty and national interests are diminishing, and that they can no longer be used to justify violations of IHL. Human rights are universal, and a threat to human rights may justify a humanitarian intervention without seeking the consent of the affected states. With technological advancement, communication is becoming more efficient and internal conflicts are becoming more internationalized. As information travels beyond territorial boundaries, each day the media reports on internal conflicts through out the world, this helps to publicize, create more attention and ultimately states may be called on to intervene in the conflicts. Therefore, in the 21st century it is difficult for a state to justify its actions based on territorial sovereignty, in the advent of technological advancements and universalisation of human rights.

Based on its hypothesis and from the survey of the Rwanda genocide, the study has demonstrated that impunity for IHL violations and the giving of amnesty to individuals who have been involved in IHL violations for whatever reason helps in the continuing of IHL violations, and that giving amnesty to such individuals for whatever reasons is in itself a violation of international law. For a long time crimes have been committed against people by all sorts of leaders, and so far, most of these people have got away with it.

The study surveyed through the trials so far conducted by the ICTR and established that not all the violations against IHL that occurred in Rwanda have come before the tribunal, and there are no indications that all the cases will be heard. Given the large number of accused persons in the detention facility in Arusha, the Rwanda prisons and those who are still at large and considering the few cases the ICTR has been able to conclude since its inception, the prospects that the ICTR and the national courts will be able to try all persons who were responsible for the genocide remain very uncertain.

However, it will be a great leap forward in ending impunity for IHL violations in Rwanda if all persons responsible for the genocide are tried. The work of the ICTR is raising people's awareness of the importance and value of human life. Through its judgments in the cases submitted to it, the tribunal will help to stem the culture of impunity. The sentences handed down will demonstrate to the political and military authorities and to the warlords, that they will one day be tracked down, judged, and punished for any violations of IHL they have committed in internal conflict. Although the ICTR has no mandate to develop IHL, like any other judicial body it will be called to clarify applicable rules of law, spell out the customary rules concerning non-international armed conflict, and assess the acts of criminals in the light of the relevant provisions of the Geneva Conventions and Additional Protocol II. All this will reaffirm the salience of IHL, clarify and determine the scope and content of the rules, and in some cases, it will gradually develop the law.

The study has demonstrated that the ICTR has been helping to enforce IHL ever since the trials begun. The start of its activities sparked an in-depth discussions of IHL within African universities and among political leaders. Many symposia were organized

in Africa concerning sources of IHL, rules applicable by the tribunal, the relation between states and the tribunal and on the contents of the Geneva Conventions and the Additional Protocols.

The study observes that international law in general lacks enforcement mechanisms and that the Rwanda genocide illustrates a failure of early warning, prevention and inadequate engagement by the international community. Despite these, the international community has a powerful role to play. For example, UN resolutions may play a critical role in setting the stage for conflict resolution, as did the United Nations Security Council Resolution 955 of November 1994 that set up the ICTR, which is today engaged in the active implementation of IHL.

The study also observed that crimes are committed by individuals and that it is by trying such individuals that IHL provisions will be enforced. The study also established that individuals regardless of their rank must be held responsible for their actions in international law. So far, the international criminal tribunals have been able to enforce individual criminal responsibility by trying individuals who were responsible for violations in Rwanda and the former Yugoslavia. The study also observed that the establishment of the international criminal court with universal jurisdiction would enhance the enforcement of international criminal law.

The study also observed that the ICTR has been able to make several ground breaking judgments. This has been in respect to sexual crimes in international law where for first time an individual has been convicted of rape as a crime against humanity by an international court. Its importance lies in the fact that there was no mention of rape in the Nuremberg Charter. Second, the judgment provided for the first time in legal history a definition of rape as a crime under international law. The other

contribution of this definition was by ruling that rape was an act of genocide and thus a genocidal crime. Third, the ICTR was the first to indict and charge a woman with rape as a crime against humanity under the principle of superior responsibility. The ICTR became the first international tribunal to punish a head of state for genocide. It was also the first time that an individual pleaded guilty for the crime of genocide, and so far, the ICTR became the first tribunal to convict an individual for the crime of genocide.

The study demonstrated that to be able to address the problem of Rwanda it would be very important to assess the root causes of the conflict and be able to find solutions to those causes. For if the root causes are not addressed the reconstruction of Rwanda society may never be achieved. The problems of colonial imbalances, power sharing, repatriation and resettlement of refugees, prosecution of war criminals and human rights violations must be addressed.

The study established that international law is not the only means to end IHL violations, There is need to supplement international criminal tribunals with other methods of peaceful settlement of disputes. This will involve methods like mediation, conciliation,, inquiry, good offices, negotiations of ceasefires and launching of internationally supported peace processes along side other available diplomatic methods of conflict settlement. Preventative diplomacy can be used as an effective method to pre-empty potential conflicts (The fact that early warning systems did not work for the Rwanda genocide does not mean that they cannot work elsewhere.) The use of multiple tracks of dialogue and influence to try to address conflict is a possibility that must be explored in future.

The way forward

IHL as an evolving discipline is faced with both structural and philosophical problems. For example, IHL like general international law does not outline any means of its enforcement nor penalties for their violations. In future, it will be important to think about the wider implications of IHL especially the social and political implications of the enforcement of this law. The application of international humanitarian law by the *ah hoc* tribunals raises some fundamental problems that need to be addressed, the tribunals for instance tend to care more about the perpetrators of international crimes at the expense of the victims, to such victims IHL is completely irrelevant. In such cases, the justice that the tribunals strive to achieve becomes selective and does not help to resolve the underlying problems that led to the conflict in the first place.

In future, it will be important to look beyond the legal framework *'outside the box'* to find solutions to conflicts. This will involve a pluralist approach with a multiplicity of disciplines and methods of conflict management. It must be understood that IHL provides for the settlement of conflicts whereby the underlying issues in a conflict are not addressed, the future must endeavour to utilise conflict management methods that led to resolution of the conflicts.

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