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Addressing genocide through international humanitarian law response mechanisms: A case study of Rwanda

by

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CERTIFICATION

This is to attest that the research on, "**Addressing genocide through international humanitarian law response mechanisms: A case of Rwanda**" was conducted by Brighton Danana, and was completed under my supervision.

………………………… ………………
Dr JB Tsabora Date

DEDICATION

This project is dedicated to my wife, Definate, son Munyaradzi Leroy and daughter Laura Lindsey, for being a source of inspiration in my entire academic life, for your encouragement, support and tolerance that has inspired me to achieve this academic milestone.

ACKNOWLEDGEMENTS

This dissertation is not a result of happenstance but rather an outcome of an attempt to address genocide through International Humanitarian Law (IHL) response mechanisms looking at the case study of Rwanda. The researcher is extremely grateful to his supervisor, Dr James Tsabora for his valuable guidance in this research, the teaching staff and students in the LLM taught program at the Faculty of Law, the non-teaching staff at the same faculty and above all the Almighty who made everything possible.

DECLARATION

I, the undersigned, Danana Brighton, hereby declare that this dissertation is my own original work that has not been submitted and shall not be presented at any other institution for a similar or any other academic award. This dissertation does not infringe on the rights of others and does not contain any unlawful statements. It has neither been submitted for publication nor published elsewhere in any print or electronic form. No part of this research may be reproduced, stored in any retrieval system, or transmitted in any form, or by means of electronic, mechanical, photo-coping, recording or otherwise without the prior permission of the author and the University of Zimbabwe.

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Signature *Date*

ABBREVIATIONS AND ACRONYMS

APA	Arusha Peace Accord
APII	Additional Protocol II
IAC	Internal Armed Conflict
IHL	International Humanitarian Law
NIAC	Non-International Armed Conflict
IHRL	International Human Rights Law
DRC	Democratic Republic of Congo
UNSC	United Nations Security Council
ICTR	International Criminal Tribunal for Rwanda
MICT	Mechanism for International Criminal Tribunals
RPF	Rwandan Patriotic Front
ICRC	International Committee of the Red Cross
NGO	Non-Governmental Organization
ICC	International Criminal Court
UNAMIR	United Nations Assistance Mission for Rwanda
OAU	Organization of African Unity
UNOMUR	United Nations Observer Mission Uganda-Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
GC	Geneva Conventions

TABLE OF CASES

1. *The Prosecutor vs Dusko Tadic* (1997) IT-94-1-T
2. The Prosecutor vs Fatmir Limaj (2005) IT-03-66-T

TABLE OF STATUTES AND STATUTORY INSTRUMENTS

1. Common Article 2 of the Geneva Conventions of 1949
2. Common Article 3 of the Geneva Conventions of 1949
3. Article 1 of Additional Protocols II of 1977
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6. Statute of the International Criminal Tribunal for Yugoslavia
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10. Article 19 of the 1954 Hague Convention on Cultural Property
11. Article 3 of the Statute of the Tribunal of the ICTY
12. Article 6 (c) of the Charter of the International Military Tribunal
13. Article 5 of the Statute of the ICTY
14. Article 3 of the statute of the Tribunal for Rwanda
15. Article 4 of the statute of the Tribunal for Rwanda
16. Article 13 of Additional Protocols II of 1977

ABSTRACT

This study investigated the fabric of international humanitarian law response mechanisms, given the obtaining status quo wherein a lot of 'grave' breaches to humanitarian concerns are manifest, an aspect largely attributable to the inadequacy of regulatory frameworks and institutions to deal with conflict situations. Against this background, the research took a case study of Rwanda, positing how problematic the distinction between NIACs and IACs has come to be in international humanitarian law. The study traced how the nature of genocide has evolved from Nuremberg to Rwanda, in the process unveiling the applicability of IHL as well as IHRL in this context which aspect is anchored on the research's findings. This research adopted a purely desktop-oriented methodology that was used along with the doctrinal approach, as these were deemed as both convenient and consistent with the demands of a research of this nature. The study was therefore qualitative in nature involving a thorough and comprehensive review of existing literature. The research argues that for IHL to keep abreast with paradigm shifts, fundamental changes broadening its scope, applicability and jurisprudence are a prerequisite. The first prerequisite is a somewhat admission of 'guilt', starting with the legal custodians and direct actors, that is states and insurgent groups. The need to amicably foster treaties, not circumventing them in order to avoid recurrences of grave breaches of IHL such as genocide is important in this regard. The second necessity appeals to the Rwandans themselves to engage in practical and restorative means through which real reconciliation can be achieved and to the global world at large to assist in this effort thus drawing lessons which may be applied to future conflicts. The research makes a detailed analysis and discussion of historical and other factors identifying Rwanda's case as of significant interest, comparing it with preceding incidence warranting the application of IHL. The study concludes by summarizing major arguments and findings as well as suggesting recommendations as how best IHL can be applied by the 'stewards' responsible, either by mobilizing participation from stakeholders towards a common construct or as a remedial framework in times of crisis.

CHAPTER 1: INTRODUCTION AND BACKGROUND

1.1 Introduction

The curse of armed conflict in Africa has been problematic on the continent for some time, particularly after the advent of independence in several African states as seen most recently in the Sudan. The nature of armed conflict in Africa can largely be classified as Non-International Armed Conflict (NIAC). The causes of such conflicts have been broad and varied, characterized by total chaos and untold suffering on the affected areas' populations. The fact that the belligerents involved, be they state actors or non-state actors have shown unwillingness to comply and conform to the norms of International Humanitarian Law (IHL), has only served to exacerbate an already compromised security and social environment.[1]

Conflicts in the Sudan, Nigeria, Sierra Leonne, DRC, Liberia, Uganda, Burundi, Rwanda, Somalia, Mozambique, Angola and other parts of Africa usually follow a pattern of gratuitous violence and absolute disregard for basic human rights perpetrated on the unarmed civilian population and prisoners of war. This is especially common in internal conflicts where the gratuitous savagery is more acute than in inter-state conflicts. The reason appear to be that the enemy one is dealing with is more personal and less abstract than in international conflicts.[2]

The development of IHL particularly after the Second World War has gathered impetus mainly in direct response to such atrocities. The fact that most legal instruments dealing with the law of war and armed conflict do not directly deal with situations of NIAC is particularly telling and this has thus rendered the enforcement of IHL to such conflicts problematic.[3] The Rwandan genocide is a case in point and shall be used in this paper to illustrate this assertion. The question which arises and which this paper shall seek to

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[1] Understanding armed groups and the applicable law, *International Review of the Red Cross,* Vol.93, No 882, June 2011.
[2] R Mullerson, IHL in internal conflicts.
[3] See generally S Rondeau, Participation of armed groups in the development of the law applicable to armed conflicts, *International Review of the Red Cross,* Vol 93 No 883, September 2011.

answer is whether the problem emanates from a lack of legal instruments supporting the enforcement of IHL or the unwillingness of the actors to comply with the dictates and norms of IHL.

It has been observed that compliance with IHL and human rights law shall always remain a distant prospect in the absence of, and absent acceptance of the need for systematic and consistent engagement with non-state armed groups.[4] The obtaining status quo in most conflicts is such that armed groups are pitted against each other or against the state. Engaging such stakeholders would prove vital for those working towards championing compliance with the law as well as strengthening the protection of conflict victims.[5] In such engagement endeavors however, several issues arise such as what arguments can be invoked to convince armed groups? How can their adherence to IHL be strengthened when they themselves are outlaws in terms of domestic law? How can there be engagement with armed groups in an international context wherein any dialogue can be perceived as a form of betrayal or complicity? The critical issue however remains to do with making tangible progress towards convincing armed groups to comply with their obligations under international law. This must necessarily take into account in the majority of cases, the position of their principal adversary, the state.

This study attempts to appreciate the applicability of IHL in addressing genocide in general with the Rwandan conflict in particular taken as a case in point to demonstrate the limitations of its application. The author therefore regards IHL as posing an embodiment of guiding philosophical frameworks, customary precedencies and/or guidelines against which to mainstream the application of IHL. As stated above, this study acknowledges the Rwandan genocide as a type of NIAC but it should be noted that the research advances the position that NIACs came to apply principles of IHL only recently based on the absolute sovereignty of states to deal with their citizens as they deemed necessary. The study argues further that IHL should regulate NIACs because

[4] C Hofmann and U Schneckener, *Engaging non-state actors in state and peace building: Options and strategies,* Vol 93 No.883 September 2012.
[5] Hofmann and Schneckener (note 4).

the conflicts usually target civilians and serious breaches of IHL are committed when states fail to exercise restraint. Ultimately, the study shall draw lessons on how IHL can be applied to future genocides or NIACs as it will expose some response mechanisms which got used or ought to have been used in the case in question.

1.2 Background of the study

The Geneva Conventions,[6] negotiated and signed in the aftermath of the Second World War (1949) and the Additional Protocols thereto[7] of 1977, provide for the implementation of IHL, a paradigm most state parties have acceded to and ratified. The scope of GC applies in times of war and armed conflict to governments who would have ratified their terms. The details of applicability are spelt out in Common Articles 2 and 3.[8] Common Article 3 is applicable to NIACs and it states that certain minimum rules of war apply to armed conflicts in which *"where at least one Party is not a State"*. The legal interpretation of the term *'armed conflict'* and therefore the applicability of this article is however still debatable.[9] For instance, its applicability is subjective to conflicts between Government and rebel forces, two rebel forces or in other conflicts carrying connotations of war whether carried out within the confines of one country or externally.

There are two criteria to distinguish NIAC from lower forms of violence. One criterion suggests that the level of violence must be of certain intensity, for example when the state can no longer contain the situation with regular police forces. The other criterion takes the view that the involved non-state actors need to have a certain level of organization, like a military command structure.[10] Other GC derivatives are not applicable in this situation but only the provisions contained within Article 3, and additionally within the language of Additional Protocol II. The rationale for this limitation is to avoid conflict with the rights of sovereign states that were not party to the treaties. The researcher is quite aware of the controversy revolving around interpretation and

[6] Article 3 thereof.
[7] Additional Protocol II of 1977.
[8] These Articles refer to application of the Convention and conflicts not of an international character.
[9] Rondeau (note 3).
[10] Hoffmann and Schneckener (note 4), p.604

applicability of certain aspects of Common Article 3. The researcher therefore advocates for the need to make amendments to IHL rules so as to foster a seamless jurisdiction in conformity with the laws regulating NIACs.

This study focuses on IHL, in particular its applicability to armed conflicts between and within states.[11] It recognizes that IHL places emphasis on constraining the parties involved in such conflict to minimize human suffering, both of combatants and civilians, and in so doing, is complemented by international human-rights law (IHRL).[12] The principal goal of IHL is therefore to humanize war, thereby helping minimize human suffering and the long-term negative consequences of war.[13] The Rwandan genocide of 1994 has a history attached to ethnic propaganda.[14] Colonization gave Tutsis dominance until 1959 when the Hutus violently took over power.[15] To illustrate the importance of IHL to Rwanda, it is important to note that Rwanda has a long history of conflict. Genocide, systematic rape, and the use of child soldiers are three of the most significant war crimes facing sub-Saharan Africa today.[16] Womenaid International notes that, *'Conflicts have sporadically occurred in 1912, 1959, throughout the 1960s, 1973 and 1990 - all setting a pattern for the 1994 eruption. However, that year saw unprecedented violence, severe human rights violations, systematic, widespread and flagrant breaches of international humanitarian law and genocide.'*[17]

The use of IHL in Rwanda followed the 1994 genocide. The ICRC captured the 1994 genocide in the following manner, *'During 100 bloody days from April to July 1994, Rwanda experienced one of the worst mass atrocities in history. Between eight-hundred*

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[11] E More, *International Humanitarian Law and Interventions-Rwanda, 1994*, International Journal on Genocide Studies and Prevention, 2007.
[12] More (note 11).
[13] M Eli, *The Limits of International Humanitarian Law*, Accessed 10 March 2020. https://www.du.edu/korbel/hrhw/researchdigest/africa/HumanitarianLaw.pdf.
[14] Womenaid International 'Rwanda: crimes against humanity,' Accessed 10 March. http://www.womenaid.org/press/info/humanrights/rwanda%20hr.html.
[15] Womenaid (note 14).
[16] Eli (note 13), p. 30.
[17] Womenaid (note 14).

thousand to one million Tutsi and moderate Hutu were massacred by Hutu extremists - a rate of killing four times greater than at the height of the Nazi Holocaust.'[18]

The above prompted the United Nations Security Council (UNSC) to establish the International Criminal Tribunal for Rwanda (ICTR) to locate and prosecute those most responsible for the 1994 Rwandan genocide.[19] The ICTR was created to prosecute three categories of offenses against the law of nations, classified as human-rights violations committed during the Rwandan conflict, that is, genocide, crimes against humanity and violations of humanitarian law.[20] By 1994, ninety three people had been indicted by the ICTR and of these sixty one were sentenced, fourteen were acquitted, ten were referred to national jurisdictions for trial, three died before trial, two indictments were withdrawn before trial and three fugitives were referred to the Mechanism for International Criminal Tribunals (MICT).[21] As the ICTR came under criticism, national officials implemented the Gacaca system, a form of restorative, as opposed to retributive justice.[22] Generally, crimes against humanity committed at non-international level are not considered as grave breaches of humanitarian law since nation-states are reluctant to apply international rules.[23] This classification of non-international armed conflicts however ignores the fact that NIACs are the prevalent type of armed conflict today and often cause civilian suffering on a scale surpassing that in international armed conflicts (IACs).[24]

1.3 Statement of the problem

The introduction and implementation of IHL has had a negative effect on its enforcement owing to its perceived inconsistency and uncertainty particularly on the African continent in situations of NIAC. The law of armed conflict was not designed in a

[18] ICRC (2014), *'The ICRC remembers: 20th anniversary of the Rwandan genocide*,' Accessed 10 March 2020. https://www.irmct.org/specials/ictr-remembers//.
[19] ICRC (note 18).
[20] H Alexander, *Justice for Rwanda: Towards a universal law of conflict*, Golden Gate University Law Review, 2004. 427.
[21] ICRC (note 18).
[22] Eli (note 13) at page 31.
[23] Alexander (note 20) at page 428.
[24] J Pejic, *The protective scope of Common Article 3: More than meets the eye*, International Review of the Red Cross, 2011. 189.

fashion to deal with a specific conflict situation. It was written and designed as a guideline. According to the ICRC, armed groups generally have no say in the development of the rules of international law by which they are bound and expected to comply. States are the authors of such rules in general as well as those applicable in time of armed conflict in particular. This scenario may well make armed groups less inclined to feel that they have to respect those rules and sometimes reject them totally thus resulting in genocide.

1.4 Research Questions

The study was guided by the following questions;

- What is the nature of genocide and what problems does it pose for IHL frameworks?
- How does IHL respond to genocide during NIACS? In what manner did the Rwandan genocide provide lessons relating to IHL responses to genocide during NIACs?
- What lessons can be learnt from IHL response mechanisms to genocidal conflicts on the continent?

1.5 Theoretical Framework

The researcher considers that the major legal theory of law of impact to situations of NIAC is the utilitarian theory which shall be used to substantiate the implications of enforcing IHL in African conflicts. In addition, aspects of the natural law theory shall also be considered and applied to help analyses the subject under study. Undoubtedly, foundational concepts of IHL are also grounded on human morality, thus resonating with the theory of natural law which is a theme to be explored in this study. Utilitarianism argues that the law should be a medium of happiness and orderly existence of society.

1.5.1 Utilitarian theory

This research borrows upon the utilitarian theory of international order from a jurisprudential standpoint. This theory proceeds from Bentham who envisaged the

creation of an international world order wherein national leaders seek the greatest common good and equal utility of all nations.[25] It is a theory deemed important as it considers the importance of human rights. The utilitarian theory thus focuses on a tragic opportunity cost in how the major humanitarian and human rights organizations sets priorities and allocate their resources.[26] The theory's importance is largely attributed to an increasing perception regarding international humanitarian law as part of human rights law applicable in armed conflict.[27] IHL speaks to principles such as proportionality and distinction which tend to limit civilian suffering among other things.

The applicability of the utilitarian theory is captured by Mill, who characterizes utilitarian consequentialism as focusing on actions which are proportionally right as they tend to promote happiness and wrong as they produce the reverse of happiness.[28] Pain and pleasure are the chief focuses of the theory, which shows that; *"Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other the chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think: every effort we can make to throw off our subjection, will serve but to demonstrate and confirm it"*.[29]

From a humanitarian law perspective, the victims of non-international armed conflicts should be protected by the same rules as the victims of international armed conflicts.[30] The ICRC notes that; *"States have for a long time considered such conflicts as internal affairs governed by domestic law, and no State is ready to accept that its citizens would wage war against their own government. In other words, no government would*

[25] G Postema, *Utilitarian International Order: Bentham on International Law and International Order* (2018), Accessed 10 March 2020. ,https://www.researchgate.net/publication/323265897_Utilitarian_International_Order_Bentham_on_International_Law_and_International_Order.
[26] D A Habibi, *Human Rights and Politicized Human Rights: A Utilitarian Critique*, Journal of Human Rights, 2007.
[27] Habibi (note 16).
[28] R Dreveskracht, *Just War in International Law: An Argument for a Deontological Approach to Humanitarian Law Approach to Humanitarian Law*, Buffalo Human Rights Law Review, 2010.237.
[29] J Bentham, Stanford Encyclopedia, (2015).
[30] ICRC *Non-international armed conflicts*, Accessed 10 March 2020. https://casebook.icrc.org/law/non-international-armed-conflict.

renounce the right in advance to punish its own citizens for their participation in a rebellion. Such renunciation, however, is the essence of combatant status as defined in the law of international armed conflicts".[31]

While the above view may give states the power to deal with NIACs, the utilitarian theory balances between sovereign absolutism and moral military decision-making.[32] The researcher therefore acknowledges how complementary the two theories are, in converging towards the same construct the research pushes for.

1.5.2 The Natural Law Theory

Aristotle is considered to be the father of natural law theory and his association with natural law is largely due to the way in which he was interpreted by St Thomas Aquinas. His theory asserts that enacted law should correspond to the laws that are in tandem with nature. The theory's view can be summarized by the maxim *lexiniusta non estlex* meaning that an unjust law is not a true law.[33] According to the theory, the foundations of law are accessible through human logic and it is from these laws of nature that man-made laws gain force. The pertinent theme is therefore that the existence of objective moral principles which depend on the essential nature of the universe are discoverable by natural reason. This aspect resonates with the concept that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid for necessity as the rules for human conduct are rationally connected with truths concerning human nature.

The natural law theory is applicable to the subject under discussion on two counts. The first is the need for obedience to a higher moral authority, thus predisposing combatants to observe and respect humanitarian law in NIAC. The second is the fact that rules of human conduct are logically connected with truths concerning human nature. This explains why despite the relative ignorance of IHL in the majority of African conflicts, semblance for the recognition of and respect for humanitarian law is evident.

[31] ICRC (note 18).
[32] K V Nakutis, *Absolutism, Utilitarianism, and Moral Military Decision Making,* Masters Theses, 1999.
[33] A Harris, *Theories of Justice: An Overview,* p.76.

1.6 Methodology

This research is purely a desktop research, qualitative in nature and comprising a review of as well as a comprehensive analysis of existing literature. A doctrinal approach will thus be employed as a benchmarking tool for the analysis of legal rules, standards and principles by lawyers.[34] The doctrinal approach to this dissertation is suitable since legal theory can be doctrinally examined, given that IHL is a doctrine sharing a lot of similarities with other disciplines of international law such as international human rights law.

Textbooks, journals, statutes, articles, regional as well as IHL international instruments shall be reviewed and a contemporary comparative analysis with other conflicts in Africa which has experienced similar NIACs will be undertaken. Other primary and secondary data will be utilized including internet sources, newspaper articles, journal articles, international instruments and textbooks.

1.7 Justification / Significance of the study

The study is premised on the assumption that addressing genocide through the implementation of IHL response mechanisms in NIAC can be beneficial in resolving the challenges of NIACs in Africa. In the current conflict-ridden continent, there is greater need and urgency to ensure the enforcement and implementation of IHL in African conflicts, more particularly those whose characteristics falls under NIACs. Accordingly, an understanding of IHL fundamentals is of critical importance in increasing armed groups' ability to accept the principles of IHL so as to assist policy makers in the formulation and implementation of policies that will benefit African conflicts at large. Observance of, and compliance with IHL in Africa is declining due to the way the law of war is perceived and implemented, with member states more bent on polarizing any machinations that could threaten unfettered enjoyment of their sovereignties.

[34] R A Posner, *The Problematics of Moral and Legal Theory*, Harvard University Press, 2009. 91.

1.8 Limitation

The genocide occurred twenty-six years ago and the ICTR which was formed during that time carried out its duties successfully and as such the research appears after the fact. To counter this limitation, this dissertation shows that the doctrinal analysis that is preferred in this research provides useful insights on the conduct and methods of warfare during NIACs. Specifically, it zeroes-in on the advocacy that NIACs should be treated as grave breaches of IHL. The lack of consensual definition on what amounts to grave breaches also serves as a limitation. This study considers the work of the ICRC and other scholarly views to provide useful insights on why NIACs must be classified as grave breaches and must prioritize IHL principles.

1.9 Ethical Considerations

This research is not human-centered. Ethical considerations relating to plagiarism are however observed. The researcher will sign an anti-plagiarism declaration to show that his work and research properly acknowledges sources.

1.10 Chapter Outline

Chapter 1 is the introductory chapter. Chapter 2 gives a detailed analysis of the distinction between non-international armed conflicts and international armed conflicts to determine how IHL applies to the two situations. Chapter 3 deals with the evolution of genocide in Rwanda. Chapter 4 provides detailed findings on why IHL should apply to NIACs, with specific reference to the Rwandan situation. Chapter 5 concludes the research and suggests some recommendations which can be implemented to effectively manage NIACs.

1.11 Conclusion

This chapter considered the introductory aspects of the research. The next chapter deals with the detailed analysis of the distinction between international armed conflicts and non- international armed conflicts.

CHAPTER TWO: DISTINCTION BETWEEN NON-INTERNATIONAL ARMED CONFLICTS AND INTERNATIONAL ARMED CONFLICTS

2.0 Introduction

This chapter introduces the concept of armed conflicts and explains the difference between IACs and NIACs. The chapter also explores the application of IHL in NIAC. Discussed in this chapter as well are cases of international armed conflicts and lessons that could be drawn from those conflicts.

Distinction between IACs and NIACs and the application of IHL

2.1 What is a NIAC?

In situations of armed conflict under traditional international law, the legal definition appeared to classify them as either belligerency or insurgency. The former category applied to armed conflicts between sovereign states while the latter applied to a conflict within the territory of a sovereign state. International law treated the two classes of conflict in a distinct manner, that is interstate wars were regulated by a body of international legal rules, governing the conduct of hostilities and the protection of persons not participating (or no longer participating) in armed conflict. In contrast, there were very few international rules governing NIACs as states preferred to regard internal strife as rebellion, mutiny and treason falling within the purview of national criminal law and by the same token justifying excluding intervention by other states in their own domestic jurisdiction. This position was clearly sovereignty-oriented and reflected the

traditional outlook of the international community, based on the co-existence of sovereign States inclined to look after their own interests rather than community concerns or humanitarian law demands.[35]

From the 1930s, however, the aforementioned distinction has gradually become blurred, though treaty law still regards the two as entirely different. A closer analysis of the two however reveals similarities, particularly the fact that they deal with protecting persons who do not or are no longer participating in hostilities such as the wounded and the sick. The two in reality have differences regarding the way deal with the protection of persons and their combatant status.[36]

2.2 Classification of Armed Conflicts

There are a number of factors which makes the classification of armed conflicts as either international or non-international rather complicated. Some conflicts can be internal with respect to the participants and causes, while others may feature significant external involvement for example where arms being supplied from abroad, the presence of foreign instructors, advisors or mercenaries and even participation of foreign troops. Such differences may, among other things transform a conflict into an international one. In line with this reasoning, some conflicts can also be of a mixed character that is partly internal and partly international, in which case warranting 'compromise' to the legal rules applicable NIACs are referred to in Common Article 3 of the Geneva Conventions of 1949 as those *"occurring in the territory of one of the High Contracting Parties"*.[37]

Additional Protocol II of 1977 (APII) states that the protocol *"should apply to all armed conflicts which are not covered by Article 1 of the Protocol Additional to the Geneva Conventions (Protocol I), taking place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to*

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[35] G Abraham, *Law of Non-International Armed Conflict.* Accessed at www.icrc.org. p.10
[36] Abraham (note 35), p.12.
[37] Schindler & Toman (eds), *The Laws of Armed Conflicts,* The Hague: Martinus Nijhoff, 3rd ed, 1988. p.376.

implement this Protocol".[38] It further specifies that *"….this Protocol shall not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of similar nature, as not being armed conflicts"*.[39]

2.3 Application Threshold to Conflicts

A certain level should be reached above which an internal conflict can be considered more than a mere disturbance, tension, riot or other violence not reaching the dimensions of an armed conflict. The requirements set out in Common Article 3 apply to a conflict as soon as it is considered an armed conflict not of an international character. An important question follows this description, namely what constitutes an armed conflict? The Appeals Chamber in the Tadic decision concluded that *'… an armed conflict exists whenever there is … protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until … in the case of internal conflicts, a peaceful settlement is reached....'*[40]

In the eyes of governments fighting against rebels or insurgents, the latter are considered common criminals such as is the case with Russian law or Sri Lankan law respectively which classified Chechen rebels[41] and Tamil Tigers as criminals in their territories. In this respect some governments often do not recognize that there is an internal armed conflict justifying the application of international humanitarian law norms. A pertinent observation leads to the conclusion that most of, if not all states criminalize acts aimed at overthrowing existing governments forcefully. In the same vein such *'freedom fighters'* are criminals under international law as well owing to hostage taking and other terror tactics employed by some of them which are contrary to international law. The argument is that, If international humanitarian law extends its protection to them, it should also obligate them to comply with its requirements.[42]

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[38] (note 37). p.691.
[39] (note 37).
[40] Abraham (note 35) at page 15.
[41] Human Rights Law Journal (1996), *The Conflict in Chechnya*, 17 (1-2). pp.133-9.
[42] R Mullerson, International Humanitarian Law in Internal Conflicts, 2 J. Armed Conflict L. 109. 1997.

A major difficulty arises when foreign involvement transforms a conflict whose participants and causes are mainly domestic into an international conflict. The conflict in Rwanda was considered by the UN Security Council as well as the Statute of the International Criminal Tribunal for Rwanda as an internal conflict despite traceable foreign involvement. It is a fact that troops of the Tutsi-dominated Rwandan Patriotic Front (RPF) were trained and had their military bases in Uganda. In contrast with the Statute of the Tribunal for the former Yugoslavia (ICTY), there is no reference, for example, to grave breaches of the Geneva Conventions of 1949. A loophole could therefore be attributed to the lack of reference to “armed conflict” in Article 3 of the Statute dealing with crimes against humanity.[43]

2.4 Yugoslavia: Lessons drawn from the conflict

The conflict in the former Yugoslavia, considered international by the Committee of Experts set up by the Security Council Resolution 780 (1992), was different. The grounds for such treatment were based upon the character and complexity of the armed conflicts concerned together with the web of agreements on humanitarian issues the parties concluded among themselves.[44] Apparently, the majority of the authors who have written about the conflict such as Theodor Meron share this view and he noted that *"the Statute of International Criminal Tribunal for the Former Yugoslavia ... treats the ensemble of conflicts in the former Yugoslavia as international"* [45]

The Statute of the ICTY however does not expressly define the character of the conflict. In fact, in its decision on the *Tadic* case, the ICTY’s Appeals Chamber opted for a more nuanced approach which described the conflict as having either an international or internal character. Involvement of the Croatian Army in Bosnia-Herzegovina as much as the Yugoslav National Army ('JNA') did with hostilities in Croatia, rendered the conflict international.[46] In the same token and as noted by Richard Baxter, that participation of

[43] Mullerson (note 42)
[44] UN Doc. S/1994/674, para.44.
[45] T. Meron, "International Criminalization of Internal Atrocities",89 *A.J.I.L, 1995. p.556.*
[46] *The Prosecutor v Dusko Tadic aka "Dule" (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)* IT-94-1-AR72, 2 October 1995. para.72.

the United States in the Vietnam War, made humanitarian law applicable to the conflict under Article 2 of the (1949) Geneva Conventions. Baxter acknowledged that as one analyses the various pairings of opposing belligerents, one is compelled to give a separate classification to each such pair.[47]

2.5 Nicaragua: Lessons drawn from the conflict

The International Court of Justice held that the conflict between the Nicaraguan Government and the Contras was not one of an international character. The implications of this decision were that the contras' actions against the Nicaraguan Government were subject to domestic law applicable to conflicts of that character while in the same vein the United States' actions in and against Nicaragua fell under the legal rules relating to international conflicts.[48]

The Appeals Chamber on the other hand interpreted the conclusion of an agreement arrived at by conflicting parties, particularly that signed by Alija Izetbegovic, Radovan Karadzic and Miljenko Brkic on 22 May 1992, as evidence showing that the parties themselves considered the conflict between them internal. The Chamber however, in view of its magnitude, decided to extend the application of some provisions of the Geneva Conventions that are normally applicable in international armed conflicts to cover the conflict. A similar position was taken by the International Committee of the Red Cross (ICRC) at whose direction and under whose auspices the agreement was reached. In addition to the conclusion arrived at by the Appeals Chamber, it also noted that had the ICRC not believed that the conflict governed by the agreement at issue was internal, it would have acted in contravention to a common provision of the four Geneva Conventions by formally expunging any agreement designed to restrict the application of the Geneva Conventions in case of international armed conflicts.[49]

[47] R. Baxter, *Ius in Bello Interno:* The Present and Future Law, in J. N. Moore (ed.), *Law and Civil War in the Modern World,* Baltimore: Johns Hopkin University Press, 1974. p.522.

[48] *ICJ Rep.* 1986, p. 3 at 114.

[49] ICTY, Decision of 2 October 1995, para.73.

The above case proves that even if parties to a conflict conclude agreements intending to make international humanitarian law applicable, this does not necessarily make the conflict international. On the contrary, IHL norms ought to apply automatically if the conflict is an international one. Common Article 3(2) of the Geneva Conventions expressly provides that while foreign involvement may internationalise a conflict, this does not render that conflict international. Cases of interest include those of Bosnia-Herzegovina where a village fought against a village and a neighbour against a neighbour, or that of Muslims in Bihac who revolted against the predominantly moslem government in Sarajevo, hardly making the conflict eligible to be classified as an IAC.[50]

It can be concluded that as is currently obtaining, armed conflicts are replete with a mixture of internal and international attributes which may then warrant the use of different legal rules of international humanitarian law applicable in the same conflict. Care should however be taken to treat certain armed conflicts with caution wherein grave crimes are committed thus potentially classifying parts of a conflict as internal but not qualifying as crimes under international law. In such cases the most serious and systematic atrocities would still be within reach of and punishable under international law. Accordingly, though such acts may not qualify as war crimes, they would still constitute crimes against humanity or genocide making individuals responsible under international law without regard to the context in which they would have committed the atrocities.[51]

Some crimes may remain unpunished not because the conflict has been classified as internal but due to other factors. This could be due to factors brought about by the distinction made by international law not only between IACs and NIACs, but also between internal conflicts where IHL is applicable and internal disturbances, riots or other violence falling short of the dimensions of an armed conflict.[52] In this respect, Article 1 of Additional Protocol II provides a threshold beyond which the Protocol

[50] Mullerson (note 42).
[51] Mullerson (note 42).
[52] Mullerson (note 42).

becomes applicable, whose scope could be reviewed and or extended to cover areas failing the essence of justice.

The evolution of international human rights law has however, though gradually, bridged some differences between the law applicable in IACs and NIACs. The same developments are also limiting differences between legal norms which apply in internal armed conflicts and those which apply in cases of internal disturbances, riots or other acts of violence. Advocacy could assist to expedite compliance mainly to parties potentially or actually in conflict as by not being compliant with the requirements of non-derogable international human rights standards, they could less likely be compelled to apply norms of international humanitarian law.[53] Efforts to help improve compliance with rules of international humanitarian law as well as human rights law in internal conflicts can be by way of political pressure, economic sanctions, appeals to public opinion and UN intervention. This may take different forms such as assistance through humanitarian relief and human rights organizations, criminal responsibility of individuals who commit war crimes or crimes against humanity as well as humanitarian armed intervention.

The traditional distinction between humanitarian law applicable in IACs and NIACs has become blurred but this does not necessarily mean that there are no differences between the two. The development of international human rights law and especially those norms which are non-derogable, that is, those which cannot be derogated from even in cases of public emergency, has been the main driving force behind the bridging of the gap between these two branches of international humanitarian law. The same role has been also played by the development of the concept of crimes against humanity.[54]

2.6 The Law Applicable in Internal Armed Conflicts

Common Article 3 of the Geneva Conventions of 1949 and Additional Protocol II of 1977 contain rules applicable in internal conflicts. Most commentators agree that the

[53] Mullerson (note 42).
[54] Mullerson (note 42).

requirements of Common Article 3[55] have become customary law. Theodor Meron notes that *"the norms stated in Article 3 (1) (a-c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights treaties, that they must be regarded as embodying minimum standards of customary law also applicable to non-international armed conflicts"*.[56] He also believes that at least the fundamental due process principle stated in Article 3(1) (d) also embodies customary law.[57]

The Commission of Experts established by the Security Council in 1992 found in its final Report in 1994 that *"The treaty-based law applicable to internal armed conflicts is relatively recent and is contained in Common Article 3 of the Geneva Conventions, Additional Protocol II, and article 19 of the 1954 Hague Convention on Cultural Property. It is unlikely that there is any body of customary international law applicable to internal armed conflict which does not find its roots in these treaty provisions."*[58] The Appeals Chamber of the ICTY in October 1995 found that the traditional dichotomy between laws applicable in international armed conflicts and in internal ones *"has gradually become more and more blurred, and international legal rules have increasingly emerged or have been agreed upon to regulate internal armed conflicts"*.[59] The Chamber concluded that *"a State-sovereignty-oriented approach has been gradually supplanted by a human being-oriented approach"*.[60] The decision of the Danish High Court of 25 November 1994 concluded that *"a change in customary law concerning the scope of the "grave breaches"* system might gradually materialize,[61] that is, it would extend to internal conflicts as well.[62] At the same time, the Appeals Chamber established that Article 3 of the Statute of the Tribunal which deals with violations of the laws and customs of war is applicable in both international and internal conflicts.[63]

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[55] Common Article 3.
[56] T. Meron, *Human Rights and Humanitarian Norms as Customary Law,* Oxford: Clarendon Press, 1989. p. 34.

[57] Meron (note 56), p.34-35.
[58] UN Doc. S/1994/674, para.52.
[59] Supra (note 46). para.97.
[60] (note 46).
[61] (note 46). para.83.
[62] Supra (note 56). p.41.
[63] Article 3

In 1938 the British Prime Minister, Chamberlain explained the British protest against the bombing of Barcelona during the Spanish civil war in the following terms; *"The one definite rule of international law, however, is that the direct and deliberate bombing of non-combatants is in all circumstances illegal"*.[64] There were also indications that in civil wars in China (in the 1940s), in Yemen (1967), in the Congo (1964), in Nigeria (1967), El Salvador (1988) there were attempts made to apply rules of international humanitarian law which are normally applicable in international armed conflicts.[65] In 1970 the General Assembly of the UN unanimously adopted resolution 2675 on *"Basic principles for the protection of civilian population in armed conflicts"* which was meant to cover all categories of armed conflicts.[66]

2.7 Conclusion

In conclusion Mullerson notes that, *"if we look at this corpus of law applicable in internal armed conflicts, we see that it is rather impressive. International humanitarian law, both treaty-based and customary, is being cross-fertilized by international human rights law. In the development of international human rights law, I would single out two strands which are especially important for the evolution of norms of humanitarian law applicable in internal conflicts. The first of these is the emergence of so-called non-derogable rights which should not be derogated from even in cases of public emergency. The second strand is the development of the concept of crimes against humanity which encompasses the most serious and massive human rights violations"*. [67]

[64] 333 House of Commons Debates, co. 1177 (23 March 1938). Emphasis added.
[65] ICTY in *Tadic,* (note 46). paras.102, 103, 105, 106, 107.
[66] UN Doc. AIC.3/SR.1785 (1970).
[67] Mullerson (note 42).

CHAPTER THREE: EVOLUTION OF GENOCIDE IN RWANDA

3.0 Introduction

A case study is an in-depth examination of an extensive amount of information about very few units or cases for one period or across multiple periods of time. This chapter aims to explore the case study of the Rwandan conflict of 1994. The chapter will give a background of the causes and the events that encompassed the genocide and will also include descriptions of the subsequent efforts by external parties to circumvent the continued occurrence of the genocide.

3.1 Background

Following the Second World War, the conception of crimes against humanity developed rapidly. Article 6 (c) of the Charter of the International Military Tribunal in Nuremberg defines crimes against humanity as; *"…..namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated."* [68] Genocide has developed into a crime in its own right. It has been singled out in the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. It also has a distinctive place in the draft Statute of a permanent International Criminal Court which has been elaborated by the International Law Commission.[69]

The perception of crimes against humanity, as was primarily acknowledged in the Charter and Judgment of the Nuremberg Tribunal, was associated to the circumstances of an armed conflict. In describing crimes against humanity, Article 5 of the Statute of the ICTY refers to the concept of an armed conflict, whether international or internal in nature. Conversely, the Statute of the Tribunal for Rwanda arguably did not comprise of

[68] C. Van den Wyngaert (ed.), *International Criminal Law: A Collection of International and European Instruments* The Hague: Kluwer, 1996. p. 419.

[69] (note 68). p.483.

any allusion to any kind of armed conflict. In the *Tadic case* the Appeals Chamber of the ICTY stated that, *"it is by now a settled rule of customary international law that crimes against humanity do not require a connection to international armed conflict. Indeed, as the Prosecutor points out, customary international law may not require a connection between crimes against humanity and any conflict at all"*.[70] Article 3 of the Rwanda Statute requires that crimes against humanity were committed *"as part of widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds"*.[71] In situations like in Bosnia and Rwanda therefore, many crimes can be qualified as war crimes and crimes against humanity concurrently.[72]

The Statute of the Rwanda Tribunal, the jurisprudence of the Yugoslav Tribunal, as well as, some foregoing practice confirms that the interpretations of the international criminality of violations of humanitarian law of internal armed conflicts are outdated.[73] Article 4 of the Statute of the Rwanda Tribunal provides for the criminal responsibility of those individuals who have sullied provisions of Common Article 3 and APII.[74] The Appeals Chamber of the ICTY, dealing with issues of individual criminal responsibility in internal armed conflict, noted that the International Military Tribunal at Nuremberg had already concluded that *"a finding of individual criminal responsibility is not barred by the absence of treaty provisions on punishment of breaches"*.[75]

3.1.1 Introduction of the situation in Rwanda

The massacre which ensued in Rwanda in 1994 spiralled into a genocide which started on April 7, 1994. This hateful incident left approximately a quarter of its pre-war population either dead or pursuing refuge in a different place. This dismaying affair principally affected agriculture, the population's foremost profession, as civil strife increased in the middle of the growing season projected by NGOs as having caused a harvest loss of around 60%.[76]

[70] *Prosecutor v Dusko Tadic,* supra (note 46). para. 141.
[71] Article 3
[72] Mullerson (note 42).
[73] Mullerson (note 42).
[74] Mullerson (note 42).
[75] *Prosecutor v Tadic, supra* (note 8). para.128.
[76] A Guichaoua, *Les crises politiques au Burundi et au Rwanda*, p. 237.

Rwanda was formerly populated by three ethnic groups namely 84% Hutu, 15% Tutsi and 1% Twa, with the Hutus generally being agricultural labourers and Tutsis landowners. The geneses of the Rwandan civil conflict can be traceable to the Belgian colonial rule of 1916 to 1962. This was characterised by disunions between the two principal ethnic groups by the colonial administration. Tutsis were favoured in terms of education and employment over the Hutus who were neglected. The Belgian colonial administration also introduced identity cards to extricate one's ethnic origin.[77] These acts inevitably led to rigidities between Hutus and Tutsis. In 1959, a civil war led to the upheaval of the then reigning Tutsi King, and the allowing of independence three years later concreted a means for a Hutu-led government ushering in the Tutsis' nemesis. The Tutsi's exiled following these developments later fashioned the nonconformist group Rwandan Patriotic Front (RPF). From 1990 to 1994, the RPF attacked Rwanda in the name of democracy, moral governance and the rights of refugees. In a bid to resolve this conflict, the government and the RPF entered into the Arusha Peace Accord (APA) in 1993.[78]

The genocide was not an overnight achievement. It was an ingenious arrangement and the causative dynamics of anger, fear, and division developed over the years. The destruction from this violence can still be witnessed in the country due to the extraordinary number of orphans and refugees, the septicity of thousands of rape victims with HIV/AIDS, and the profoundly embedded resentment nested in the hearts of survivors. Preliminary exertions towards justice failed extensively to respond to the needs of the country as a whole and so the efforts of the International Criminal Tribunal for Rwanda were condemned.

3.2 The 1990 War

As noted by Lindsay Scorgie, the effects of colonial rule were felt during the course of the succeeding few decades that followed independence. Hutu leaders opted to

[77]Guichaoua (note 76).
[78] Guichaoua (note 78).

preserve power rather than address the colonial era's psychological loss. In October 1990, the 'rebel' RPF occupied Rwanda with the support of the Ugandan government, demanding a share of power and the right for the Rwandan refugees to return home. This marked the beginning of a three-year civil war in which regional countries vainly made arbitration efforts to help reconcile the parties' differences and sojourn the war arranging the groundwork for the Arusha Accords. The chief facilitator of the Arusha Accords illustrated that the Rwandan conflict was extremely resolute and gyrated around the rudiments of human life explicitly; land, safety, security, identity, recognition, esteem and unhindered opportunities for human development as a whole.[79]

3.3 Root Causes

3.3.1 Rwanda's Political Systems Were Structured by the Ecosystem

Central Rwanda was a sustainable agricultural region, which was the location of choice for Hutu kingdoms. When collectively considered in addition to agriculture resources, the environment was conducive for a geographical specialisation as far as use of natural resources was concerned. This reinforced a colonial configuration, endorsing a convergence of two dissimilar categories of land resource use in the same ecological environment, typifying socio-ecological background of Rwanda's ethnic relations. The Rwandan socio-political system was thus built on a contradictory setting as most of its Hutu and Tutsi populations had to compete for the same land resources for their livelihood. This contradiction, highlighted by a philosophy emphasising supremacy of pastoralism, fashioned the political system that administrated the country until 1959, and that still influences present day Rwandan politics. The construction of Rwanda as a nation consequently resulted from a creation of Tutsi monopoly over the control of natural resources and the gradual reduction of Hutu access to such resources as acknowledged by Gasana.[80]

[79] Guichaoua (note 78).
[80] L K Gasana *"Le Rwanda doit se démilitariser pour réussirsadémocratisation et sa reconstruction"*, 1194 p. 27-29

3.2.2 Skewed Natural and State Resources Control

Nahimana discussed elements that led to division of Rwanda as being merely political. The monopoly over natural resources which the Tutsis had was realised by an increasing rigor in cattle clientship system which started as a customary two-way exchange. Tutsi cattle owners found cattle clientship an exceedingly rewarding activity and set up a comparable system for agricultural land to maximise exploitation of the Hutu peasantry and of ordinary Tutsis. Tutsi chiefs also took advantage of the increased militarisation of the country skewed in their favour, to accrue land resources through cattle raids and land confiscations. Exponentiation of exactions on Hutu and average Tutsi augmented the necessity for their protection by powerful patrons.[81]

Under cumulative population pressure, the peasantry could afford no other alternative but to accept the arduous demands of land lords. With the deficiency of access to private land resources, clientship ties became a supernumerary resource and a coerced route for survival to Hutu peasants. As time passed, the system became further despotic for land clients and further lucrative for the Tutsi chiefs. Kigeli IV Rwabugiri even got to centralise his monarchy's political regulation of natural resources to reinforce his influence. Natural resources which had been a means to an end for Tutsi became, in addition, an apparatus of this supremacy.[82]

By 1949, the population immensely increased resulting in a state of affairs described by Linden & Linden in the following rapports *"...there was considerable land shortage in some provinces by the 1950s. The kingdom was only about 100,000 square miles and had to support a leisured class of some 2,000 chiefs and about 50,000 Tutsi who never tilled the soil. The high productivity of the land well manured by cattle, with bananas and a wide range of grains and leguminous crops, made land valuable, especially when large tracts served as pasture for the Tutsi herds."* This steered stagnation of the clientship system as there was no longer a parallel increase in tenants, inferring increasing joblessness for excess Hutu labour. Concomitantly, there was an

[81] F. Nahimana, *"Le Rwanda" Emergence d'un Etat*, Paris, L'Harmattan, 1993.
[82] F Nahimana (note 81).

accumulative disparity of access to natural resources within the Tutsi elite, as there were no more takeovers of territories to expand the resources and spread Tutsi landlords. An elaborate social stratification steadily amassed in the 1950s, making discontented Hutu and Tutsi elites start to voice their opinion against that chosen by the Germans and the Belgians which had ominously impacted on ethnic associations by supporting Tutsis to control the Hutu peasantry over the entire country.[83]

Harroy, P.J. acknowledged that the situation became tenser as land and cattle clientships underwent an unprecedented crisis, having failed to adjust to new demographic and social realities. Under Belgian rule, the monarch did not enjoy any more control over means of State violence nor administration over the Catholic Church which had become too vocal because of the deteriorating situation of the common people. In addition, colonial authority had become unfriendly to the indigenous oligarchy that he headed, thus making him unable to use force to prevent the social explosion of 1959. The Hutu and Tutsi elite, who advocated equal access to land resources and non-discrimination in the administration and education, became quite popular with the Hutu peasantry and poor Tutsi, now too aware of the unwillingness of the monarchy to improve their access to natural resources. Natural resources sharing project, thus became a key factor for the revolution to occur, and for the fundamental changes in power and resource relationships, marking the system's failure to equally appropriate land resources, under conditions of a fast increasing population and a prevailing rural economy. [84]

3.2.3 Land Resource Vs State Resource-based Power in the Republic Era

The 1959-1961 Social revolution resulted in a levelling down of the ruling Tutsi aristocracy as far as their land resources were concerned, quasi-geometrically redistributing them among landless Hutu families. egalitarian ideology The process of land redistribution, thus following an egalitarian ideology, caught the new Republic regime unaware of the fact that it would be the foundation of the agricultural crisis of the

[83] I Linden & J Linden, *Church and revolution in Rwanda*, 1977. p. 16.
[84] J P Harroy, *Rwanda" Souvenirs d'un compagnon de la marche du Rwanda vers la démocratie et l'indépendance*, 1984. p. 88

1980s, as it got implemented in the absence of institutions that could help to set up an efficient use of land based resources for the benefit of all, save for North West of Rwanda. In particular, it can be recognised that there was no institutional instrument to regulate partitioning of landholdings for hereditary rights, sale of land property, and to discourage accumulation of land for mere prestige or speculation. [85]

Before long, population growth increased land hunger, leading to unhindered partitioning of landholdings or hereditary rights and developing of a land market with a fast accumulation of land resources in the hands of those non-peasants who were close to power. This led to a scarcity of land resources for the new generations of rural families and a gradual reconstruction of a complex social stratification, returning the country into unequal access to land resources, a system that the 1959 Social revolution had sought to abolish. By the eighties, the peasantry that constituted more than 92% of the population was in acute competition for land resources with the tiny bourgeoisie comprising the administrative, military, technocratic, political and business elites. [86]

This new stratification highlighting intra-ethnic differentiation pertaining to land and other resources overtook the ethnic stratification that the revolution had tried to destroy. The 1970s, golden years for the economy of independent Rwanda, prior redistribution which led to a tremendous increase in agricultural production, eluded the people from foreseeing the impending social explosion that was to come. In the same period, the system of accumulation of land resources by those in power and State administration developed, as State became the main instrument of accumulation under the Second Republic. Behind rewarding jobs, there was access to land, credit, and foreign exchange. Competition for land resources among people of unequal financial means led to alarming disparities, not only of landholding for different categories of families, but also in the use of their production potential as poor farmers were squeezed in steep unproductive lands where soil got constantly removed by erosion. Almost all these farmers, like most other poor Rwandans, are Hutu believed by the outside world to have

[85] S Marysse, T de Herdt, & E NdayambaJe, *"Rwanda" Appauvrissementetajustementstructurel*, 1994. p. 47
[86] S Marysse, T de Herdt, & E NdayambaJe (note 85).

shared power, from their hostile lands, with the tiny Hutu elite of the national bourgeoisie.[87]

This imbalance or the inequitable and disorderly land tenure thus resulted in a structural famine. By mid-1990, before the October 1990 war, it was already clear that as a result of this inequitable land tenure and high population pressure, the social explosion was a matter of only a few years. At some point when the regime suffered an incapacity to redistribute State resources among its clients as well as attracting new ones, dissatisfied elites, among them Tutsi businessmen, started to express opposition to the political system, leading to an intra-elite crisis. In comparison, the 1980s are very similar to the 1950s as years of systemic crisis. While in the 1950s there was a crisis of the unequal land resource appropriation, the 1980s were characterised by a crisis of egalitarian land allocation of the earlier years of the Republic era. Land scarcity resulted in overexploitation of smaller landholdings, and accelerated deterioration of crop production environment, leading to a massive exodus of environmental refugees quitting hostile lands, particularly in Gikongoro and Kibuye prefectures, for Tanzania which repatriated them in 1990 as illegal immigrants. [88]

These phenomena showed the weakness of a development model emphasising a rural development based on activities requiring land, and, consequently, excluding landless social
groups. At the end of the 1980, the three decades of rural development projects were a total
failure as far as financial resources invested are concerned. Beneficiaries of agriculture development programmes have obviously been families having sufficient land to apply extension programmes. [89]

[87] S Marysse, T de Herdt, & E NdayambaJe (note 85).
[88] S Marysse, T de Herdt, & E NdayambaJe (note 85).

[89] S Marysse, T de Herdt, & E NdayambaJe (note 85).

Between 1985 and 1992, whereas the total population increased by 20%, the proportion of poor people grew by 70 %21. The poor peasantry and youth had not been captured by the dozens of rural development projects, except by occasional salaried employment. Also, most rural development projects followed State logic and became pipelines of international finance to further develop the burgeoning national bourgeoisie, and to strengthen state power. Most of the resources were used on project infrastructure, vehicles, and other imports. The more resources a project had, the more the elites reaped, and the less target beneficiaries got. This is why in spite of a heavy financial investment per capita, rural development projects have failed to halt the trend to structural famine and to break the vicious circle of rural poverty (Gasana).[90]

The lessening of family landholdings and subsistence-orientation of rural economy did not constitute a possibility of decent life to the educated elite. With the undeveloped private economy sector, State employment acquired an increasing importance, not only for economic
security but also for status and political influence. It also took over the role played by cattle and *ibikingi* in pre-revolution Rwanda, making those in power use refusal employment to dissidents and would-be dissidents, just as Tutsi monarchs used confiscation of *ibikingi* from their political enemies. Loss of employment for political reasons meant going back to the land in one's commune of origin. Tying down opponents in their home areas was used against supporters of the first Republic regime after the 1973 military coup as a means of preventing the spread of dissension or a mere exhibition of power. [91]

Thereafter, this incited people to purchase as much land as they could, mostly from poor farmers, and to construct villas there, to prepare a good cushion for use if they had to fall off State employment. Having a land and a villa for State officials became a mark of status. These are some of the factors that explain how land resource ownership became skewed in favour of wealthier citizens. [92] Furthermore, the systemic crisis

[90] L K Gasana, 1994, *L'homme, l'arbre et la forêt au Rwanda" Problèmes d'un pays enclavé et trèspeuplé*, 1994 p. 24
[91] Gasana (note 90).
[92] Gasana (note 90).

became instrumental to generate the ethnic problem, where the basic focus of war was power, overshadowing the society's fundamental problems of poverty and injustice suffered by weak social groups in general. The overwhelming majority of the poor were Hutu, and the majority of poor Hutu were women and youth, who had no links with power, and no land resources of their own. Although there was such an ethnic concentration of poverty mainly of Hutus, concentration of wealth was not at all ethnic.[93]

3.2.4 Connection with the Military

In Rwanda, traditional use of State violence in exercising power has got deep roots in history. It is this violence that facilitated Tutsi political domination over Hutu masses. Dissension has always been fought by extermination, and prevention has been done by maintaining terror against groups where disagreement that leads to discord can originate from. Silence of oppressed groups has always been the golden rule of coexistence with those in power. As this power has always been in the hands of one ethnicity, the militias were recruited from the same ethnicity. Militiamen were usually Tutsi, and Hutu could only belong to non-combat units. In the aftermath of the 1959 Social revolution, there was a return to pre-colonial model of setting up an ethnic army that excluded people belonging to the ethnic group that was ousted from power. This army was used as an instrument of the new executive to protect Republican institutions against attempts of former aristocrats to return to power. This remained defence mission ever since independence and the armed forces seemed to be unprepared for external defence mission until the RPF October 1990 invasion. [94]

The war that started in October 1990 and ended dramatically in 1994 clearly showed that armed forces constitute one of the most powerful structural problems that threatened unity of Rwanda and impeded its socio-economic development. Instead of abiding to a positive national defence mission, they have demonstrated their capacity to exterminate rival groups that abound in a deeply segmented society. It was the military and militia organisations of both ethnicities, Hutu and Tutsi, which made possible the

[93] Gasana (note 90).
[94] Gasana (note 90).

rapid genocide. This exacerbated the lethal fact, proven by post-revolution history, that armies in Rwanda did not demonstrated the ability to serve but against Rwandans, so noted Desouter, S. & Reyntjens.[95]

Fear is thus evident in the country's society, owing to the country's evilness. There is inter-ethnic fear between Hutu and Tutsi, and intra-ethnic fear among Hutu of different regional groupings. Each group fears that if the other one gets more armed it will not only jump to power but exterminate the others as well, leading to creation of mono-ethnic armies by those who get a chance to be in power, which then create conditions of no return to avoid the swing of power from one group to the other. This strategy is shared by both Hutu and Tutsi armed extremist groups, in the official and non-official armies, with Tutsi extremists aiming at ethnic demographic parity with Tutsi supremacy in all the elites, and Hutu extremists, at ethnic purity.[96] This explains why every ethnic clash is bloodier than the preceding one, and a vicious circle of violent hatred and vengeance is established. At each ethnic massacre, more devastating means are used, and there is more grief and pain accumulating at individual and group level. But also, each time there is more poverty, and with a population explosion, there are more people to be killed in this ominous circle. This can again be explained by comparing the atrocities committed in 1959 and those of 1994. Given this trend, one would hope to never again see another conflict that would lead to mass killings. [97]

Historically, Rwandan armed forces are doomed to protection of group interests against real or hypothetical threats of the rest of the population, which has made impossible the search of solutions to major society's problems by dialectical approaches. In 1973, a handful group of officers decided and managed to topple a legal government and to prepare the imposition of a new constitutional order. In 1994, following the assassination of President Juvenal Habyarimana, a military assisted coup put in place authorities who did nothing to stop the genocide, the worst genocide on the African continent. In July 1994, an army of Tutsi rebels of the Rwandese Patriotic Front set up a

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[95] S Desouter & F Reyntjens, *"Rwanda" Les violations des droits de l'homme par le*, FPR/APR, 1995. p. 37.
[96] Desouter & Reyntjens (note 95).
[97] Desouter & Reyntjens (note 95).

new ethnic hegemony based on a search of firm Tutsi supremacy in the military, state administrations and the economy.[98]

With this military victory and the ensuing criminalisation of administration and the judiciary, terror conditions within Rwanda are maintained to free land and other resources by keeping more than 2.000.000 in refuge. Tutsi as a group, are thus able to restructure State and space to maximise their physical, economic, and political security, and to reconstitute supremacy in use of natural and state resources. There is therefore emergence of an *ethnie-Etat* which is by far less hospitable to the majority of Rwandans than the former *parti-Etat,* and of a sharp contradiction between it and the masses it is supposed to serve. The price for maximum security for one ethnic group is maximum tension for society at large and insecurity of individuals. The slogans of liberation war give way to realities of war of conquest. Spoils of war include not only real estate and equipment belonging to Hutu, but State as well according to the Mundo Negro.[99]

3.2.5 Durable Peace – The Instruments

Drawing from the above discussion, it appears that ethnicity is an effect of underlying conflicts on hegemonic control of natural and state resources. Hegemonic control of power, first by Tutsi aristocracy until 1959, then by successive Hutu sub-regional groups until Tutsi military elite took over in 1994, has been the instrument of such natural and State resource control. Power control was criminalised to facilitate limitless accumulations of wealth by individuals within privileged groups and in exclusion of rival socio-ethnic groups. All this has been made possible by the use of military violence perpetrated by mono-ethnic armies. So far Rwandans have not been able to work out consensual modalities of equitable access to resources and power. [100]

The model of land resources redistribution of egalitarian deployed after the 1959 revolution led to the same inequality as the model of in egalitarian based on cattle and

[98] Gasana (note 90).
[99] Mundo Negro of September 1995, p. 8
[100] Mundo Negro (note 99).

land client ship which led to that revolution. Inequalities in natural and State resources control have been, in respective epochs, the purpose and the instruments of power control by hegemonic groups, and factors of ethnic conflict. However, as an ethnic conflict produces germs for more violence in a socio-economic and political environment where pretexts abound, from symptom this spiralling ethnic conflict becomes a structural problem. Efforts to reduce tension in Rwandan society must as acknowledged by Ndoricimpa, must address first and foremost structures and institutions that lead to inequality of access to land and state resources, and what nourishes inter-ethnic fear. These comprise, as described below, reorganisation of State institutions, demilitarisation, and fast economic development. [101]

3.2.6 Efforts to reduce tension in Rwanda

3.2.6.1 Power sharing between the State and the people

As already discussed above, it is evident that too much centralisation of power has led to lethal bipolar conflicts with opportunistic exploitation of ethnicity. Recent events have clearly demonstrated that in order to avoid further mishandling of ethnicity by sub-groups competing for power, and destruction of society by ethnic bipolarisation, a multi-polarity approach that takes into account all the major cleavages in society should be envisaged. [102]

Presently, these are regions and ethnicities within which other cleavages, existing and potential, such as socioeconomic status, gender, confession, are nested. In the long term, even the ethnic conflict may be considered as nested in the region factor, so that a solution for the region conflict may serve as a solution for ethnic and other social conflicts. In the past, when there were parliamentary elections, electoral frontiers were ethnic, gender, sub-regional, and even confessional.[103]

[101] Bishop Alfred Ndoricimpa, *"Presentation to the Assembly of Christian Council of Tanzania C.C.T"*. 1995.

[102] Ndoricimpa (note 101).

[103] Ndoricimpa (note 101).

3.2.7 Demilitarisation as a condition of inter-ethnic confidence building

The prerequisite for reconciliation and national reconstruction of Rwanda has to be demilitarisation as sufficiently argued by Gasana and Nsengimana, "*Le Rwanda doit se démilitariser pour réussirsadémocratisation et sa reconstruction*". The point underlying their vision is that with ethnic armies, ethnicities that are excluded will always prepare resistance, in order to oppose or impose violence. Society will thus be maintained under explosive ethnic tension. There is no doubt that ethnicity is a reality, and so are memories of past inter-ethnic victimisations and revolving cycles of vengeance. It is equally a reality that ethnic violence is confounded in state violence, and both are embedded in ethnic armed forces. [104]

All the above said, demilitarisation cannot be achieved by Rwanda alone without the support and firm supports by neighbouring countries and the international community. It is most important that armed extremists who lost power or those who won it be asked to dismantle their lethal structures, and allow interplay of political forces. There will, be no end to ethnic violence if non armed Rwandan democrats are excluded from contribution to the running of their country's affairs. [105]

Currently, search of reconciliation is impeded by lack of a unified approach among Francophone and Anglophone superpowers that have manifested another type of ethnic bipolarisation of their own, and seem to have chosen sides. In particular, the Anglophone superpowers are the ones that are failing to play the role of facilitators of dialogue by lending unhindered cooperation and helping to consolidate Tutsi power. It is under their biased indifference that the new ethno-military regime has set up an *ethnie-Etat,* with quasi mono-ethnic armed forces, administration, parliament, and economy.[106]

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[104] Ndoricimpa (note 101).
[105] Ndoricimpa (note 101).
[106] Ndoricimpa (note 101).

3.2.8 Reduce socio-economic inequalities and combat poverty

Lasting solutions to the Rwandan ethno-political conflict will bear no durable results if they do not include programs of fast socio-economic development. It is with social development and economic growth that society will determine common national goals, and offer guaranties to every single individual against violence rooted in poverty and fear of a hungry neighbour. The state of law for the elites cannot co-exist with the state of misery for the rest of the population. [107]

A continued economic insecurity will continue to lead to physical insecurity, particularly if affected groups see ethnicities, as determinants of an unjust order. Rwandan society cannot get rid of explosive ethnic tensions if its social groups continue to develop at different velocities. There is therefore an urgent need for the current Rwandan government to use the Marshal plan that was put together for Rwanda by the international community to combat the appalling poverty that continue in rural Rwanda after the destruction of economic infrastructure as a result of the genocide, and the instauration of a social and economic apartheid against the excluded Hutu majority ethnicity since July 1994. There should be more support to efforts of reconciliation, and to expand the carrying capacity of an overpopulated Rwanda. [108]

The role that economic development can play in national reconciliation should not be underestimated. New development projects can be conceived as opportunities to reunite Rwandans at a local level around solidarity actions promoting shared social goals. There is therefore a need to engineer a new type of schemes aiming at resolution of social conflict through a shared development. It is necessary to go forward from government's discourse on reconciliation to decentralised reconciliation through concrete community programs and engagement of youth.[109]

3.3 Conclusion

The underlying factors of the ethnic conflict in Rwanda are basically related to inequality of access to natural resources, inherent in a skewed control of power, in a country with

[107] Ndoricimpa (note 101).
[108] Ndoricimpa (note 101).
[109] Ndoricimpa (note 101).

a predominantly rural economy, and where over-population annihilates economic progress, the state constitutes for groups of elites in power, an instrument of accumulation of wealth and of suppression of rivals of a different ethnic group. Ethnicity in this case is therefore a symptom of unresolved problems of ethnically skewed power control, inequitable access to natural resources, and appalling rural poverty. Restoration of inter-ethnic confidence requires total demilitarisation of the country in order to construct a State that is hospitable to all social groups. Security for individual citizens must be assured by new institutions that increase their political participation.[110]

On the country level, decentralisation models can respond to this preoccupation. But in the long run, their efficiency is limited by the inelasticity of natural resources base and an increasing population. Fast social and economic development and federation with neighbouring states constitute therefore a more durable solution. More efforts towards real reconciliation are needed in order to guarantee a sustainable peace in Rwanda.[111]

[110] Ndoricimpa (note 101).
[111] Ndoricimpa (note 101).

CHAPTER 4: MAJOR FINDINGS

4.0 Introduction

This chapter described the major findings of the study. The major findings were in line with the research questions stated in Chapter One. The chapter described the importance of classifying NIAC as grave breaches of IHL, and highlighted the Rwandan genocide illustrating its significance to the application of IHL in NIAC.

4.1 The importance of classifying NIAC as grave breaches of IHL: The case of Rwanda

Under IHL Common Article 3 to the Geneva Conventions of 1949 NIAC applies to "*armed conflicts not of an international character occurring in the territory of one of the High Contracting Parties* ". These include armed conflicts in which one or more non-governmental armed groups are involved. Depending on the situation, hostilities may occur between governmental armed forces and non-governmental armed groups or between such groups only. In order to distinguish an armed conflict, in the meaning of Common Article 3 from less serious forms of violence, such as internal disturbances and tensions, riots or acts of banditry, the situation must reach a certain threshold of confrontation. It has been generally accepted that the lower threshold found in Article 1(2) of APII, which excludes internal disturbances and tensions from the definition of NIAC also applies to Common Article 3. Two criteria are usually used in this regard;[112]
Firstly, the hostilities must reach a minimum level of intensity. This may be the case, for example, when the hostilities are of a collective character or when the government is obliged to use military force against the insurgents instead of regular police forces.[114]
Secondly, non-governmental groups involved in the conflict must be considered as "parties to the conflict" meaning that they possess organized armed forces. This means for example that these forces have to be under a certain command structure and have the capacity to sustain military operations.[115]

[112]*See ICTY, The Prosecutor vs Dusko Tadic* (1997) IT-94-1-T, para. 561-568

114See ICTY, The Prosecutor vs Fatmir Limaj (2005) IT-03-66-T, para. 135-170

115 D Schindler 'The Different Types of Armed Conflicts According to the Geneva Conventions and Protocols', 1979. Vol 163 No 11. RCADI. 147

With reference to breaches of IHL, the biggest issue is the determination of who decides what applies to NIACs. The technicalities described above are an example of the loopholes that are exploited in the occurrences of NIACs. The problem lies in the fact that breaches of IHL may occur and not be considered as significant until the aforementioned conditions are met. Put differently, acts of aggression against a population may be perpetrated unnoticed and fail to be addressed as significant until the government reacts or until it is determined that the non-governmental groups are parties to the conflict.

The states involved in the conflict are eager to engage in armed conflict because of the presence and availability of an already organized military resource and the option of kill instead of capture when engaging the non-government armed group is tempting. This emanates from the fact that states do not want to appear unable to maintain order when confronted with armed conflict and thus prefer to demonstrate their power instead of diffusing the situation and avoid the negative consequences of warfare.

In terms of Article 1 of Additional Protocol II, a more restrictive definition of NIAC was adopted. This instrument applies to armed conflicts "*which take place in the territory of a High Contracting Party between its armed forces and dissident armed forces or other organized armed groups which, under responsible command, exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations and to implement this Protocol*".[116] This definition is narrower than the notion of NIAC under Common Article 3 in two respects.

Firstly, it introduces a requirement of territorial control, by providing that non-governmental forces must exercise such territorial control "*as to enable them to carry out sustained and concerted military operations and to implement this Protocol*". Secondly, Additional Protocol II expressly applies only to armed conflicts between state

[116]Additional Protocol II, art 1, para. 1

armed forces and dissident armed forces or other organized armed groups. Contrary to common Article 3, the Protocol does not apply to armed conflicts occurring only between non-state armed groups. In this context, it must be stated that Additional Protocol II "*develops and supplements*" common Article 3 "*without modifying its existing conditions of application*".[117] This means that this restrictive definition is relevant for the application of Protocol II only, but does not extend to the law of NIAC in general. The Statute of the International Criminal Court, in Article 8, para 2 (f), confirms the definition of a non-international armed conflict not fulfilling the criteria of Additional Protocol II.[118]

With respect to the Rwandan conflict, NIAC under Article 1 of Additional Protocol II, does not classify the subsequent actions of non-governmental parties executed to control the said territory, as violations or non-violations of IHL. The initial invasion of Rwanda organized by a Hutu Colonel but executed by a predominantly Tutsi Rwanda Patriotic Front was an act of war against the then Habyarimana one-party state. According to IHL this was in violation of its provisions. However, under Article 1 of Additional Protocol II, the initial actions of the RPF could not have been classified as NIAC because the RPF did not possess any territory within Rwanda at the time, hence could not carry out sustained and concerted military operations and implement this Protocol. It was not until the Arusha Accords of 1993 could the RPF be said to have any territory.

Three main principles of IHL exist in NIAC as well as in IAC. Firstly there is the principle of humane control without adverse distinction. Secondly, there is the principle of 'unnecessary suffering' and prohibition of superfluous injury and thirdly the principle of distinction between combatants and civilians and between military objectives and civilian objectives. NIACs possess all the characteristics of conventional war even if not defined as such considering the absence of an agreed definition of armed conflict in treaty law. Characteristics such as the organization of the conflict, which is the presence

118 Statute of the ICC, art. 8 para. 2(f) 'It applies to armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups'

of two distinguishable adversaries engaging each other, as well as the intensity of hostilities where the organized armed group may be justified in using force against the High Contracting party, are notable. NIACs are certainly grave breaches of IHL due to their destructive nature and capacity to contribute to loss of human lives, displacement of civilians and violations of human rights as a result of military operations.

In the case of Rwanda, the conflict was between armed groups with territorial control (the Rwandan government and RPF). The threshold of violence or intensity of hostilities was high on state territory (which was also an initial causative agent) and was also based on internal disturbances and tensions that stemmed from the ethnic differences and interactions between the ruling Hutus and the exiled Tutsis. The conflict in Rwanda included the participation of civilians in combat and hostilities, that is, there was no definition of civilians from combatants.

This was in violation of the third principle of NIAC in IHL which provides that firstly, the parties to the conflict must at all times distinguish between civilians and combatants. Attacks may only be directed against combatants. Attacks must not be directed against civilians. Secondly, civilians are persons who are not members of the armed forces. The civilian population comprises all persons who are civilians. Thirdly, civilians are protected against attack, unless and for such time as they participate directly in hostilities. In the months that followed the negotiated peace settlement in 1993, Hutu extremists used radio stations to broadcast hate propaganda against the Tutsis. This was in violation of the second rule in the distinction between civilians and combatants, in that acts or threats of violence the primary purpose of which is to spread terror among the civilian population were prohibited under IHL.

4.2 Highlighting the Rwandan genocide and illustrating its significance to the application of IHL in NIAC.

Historically, Rwanda is not a nation shy of its own controversies with regards to the violations of IHL. It has been demonstrated that elements that assumed power often subjugated those under them, with both the Hutu and Tutsi engaging in violence regularly. The factors that played a significant role in the genocide, particularly that of

racist ideology has been the subject of argument with some schools of thought claiming that genocide can be blamed on the Hutu ethnic group determined to eliminate the Tutsi ethnic group in a premeditated and systematic manner, while others contradict this argument.[119] There is however consensus that the Rwandan genocide that lasted 100 days from April to July 1994 was and may still be one of the foremost test cases for IHL. Although the Rwandan crisis can be traced as far back as 1959, the actual genocide occurred in two phases in 1990 and 1994. The first phase was the civil war from the 1st of October 1990 to the 6th of April 1994, while the second phase was the genocide's aftermath, principally from the 6th of April to the end of 1994.

In the first phase, a UN peacekeeping force, the United Nations Assistance Mission for Rwanda (UNAMIR I), implemented an administrative and ostensibly democratic procedure of decision making set out in the Arusha Accords of 1993 which called for a new power-sharing arrangement.[120] With the massacre posing a threat to peace, no humanitarian intervention to end the genocide occurred until late June, when the UN sanctioned the French-led Operation Turquoise. UNAMIR II was deployed after the genocide was stopped by the Rwandan Patriotic Front (RPF) in July 1994. This particular genocide was inimitable because of the considerable participation of civilians in carrying out the massacres, the sheer brutal nature of its execution, the killing of Hutu by Hutu for political and social motives, and the genocidal killing by civilian Hutu mobs of Tutsi civilians.[121]

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[119] Klinghoffer, *International Dimension*; A Des Forges, *Leave None to Tell the Story: Genocide in Rwanda*, New York: International Federation of Human Rights, 1999; A Des Forges, *''Ten Lessons to Prevent Genocide,' '*Accessed 30 May 2007.

http://www.peace.ca/ ten_lessons_to_prevent_genocide_.htm.

; J Chretien, *The Great Lakes of Africa, trans.* Scott Strauss, New York: Zone Books, 2003.

[120] 'United Nations Observer Mission Uganda-Rwanda'', backgrounder, UN Department of Peacekeeping

Operations, n. d. Accessed 9 May 2007. [UNOMUR Backgrounder] http://www.un.org/Depts/dpko/dpko/co_mission/unomurbackgr.html

[121] Mamdani M, *When Victims Become Killers*, Princeton, NJ: Princeton University Press, 2001; Scherrer, *Genocide and Crisis*.

A part of the United Nations, African Union and other global agencies were cognizant of the former instability on which the catastrophe was founded. Warnings were given in response to human-rights investigations (for example, the UN report cautioning of the menace of genocide suggesting some preventive measures, compiled by Bacre Waly Ndiaye, special rapporteur on executions)[122] with efforts aimed at reducing the catastrophe through diplomacy and the deployment of UN peacekeeping forces. A part of the disputes included swelling racist media propaganda (which made inclusions of tactics to dehumanize the enemy), rise of extremist Hutus and the harmonized campaign of arms and hatred, which led to the annihilation of Tutsis to preserve Hutu privilege and influence.[123] The presence of problems of this nature, combined with social, political, and the economic state of affairs (including famine), formed the basis on for mass murder. The 1994 plane crash that resulted in the loss of the lives of two Heads of State, namely the presidents of Rwanda and Burundi, ignited events characterized by violence resulting in the annihilation of some 800,000 Rwandans, primarily Tutsis and some moderate Hutu. The massacre ended with the RPF triumph in July 1994.[124]

The case of Rwanda is significant to the application of IHL in NIAC because it provides an illustration of how a situation can rapidly deteriorate when ignored by the world community. The conflict saw the excessive use of violence aimed at dehumanizing the largely Tutsi and moderate Hutu victims. Women and children who made up the bulk of the victims, fell prey to systematic rape and other abuses targeted at stripping them of their dignity. These acts were in clear violation of the basic principles of IHL which

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[122]Ndiaye, B.W. *Question of the Violation of Human Rights and Fundamental Freedoms in Any Part of the World, with Particular Reference to Colonial and other Dependent Countries and Territories: Extrajudicial, Summary or Arbitrary Executions, UN Doc. E/CN.4/1998/68/Add.2 (11 August 1993)*. Accessed 30 May 2007.

http://www.sangam.org/FB_REPORTS/Index98Rapp.htm

[123] Scherrer, *Genocide and Crisis* (2001). Accessed 9 May 2007.

http://www.ideajournal.com/genocide-2001-lemarchand.htm

[124] Clarke, J.N. *"Early Warning Analysis for Humanitarian Preparedness and Conflict Prevention," Journal of Humanitarian Assistance (2004).* Accessed 9 May 2007.

www.jha.ac/articles/a146.pdf

provide that parties to a conflict must at all times distinguish between the civilian population and combatants in order to spare the civilian population and property. Neither the civilian population nor individual civilians may be attacked. Attacks may be made and carried out only against identified military objectives. People who do not or can no longer take part in the hostilities are entitled to respect for their lives and for their physical and mental integrity.[125] Neither the parties to the conflict nor individual members of the armed forces have an unlimited right to choose methods and means of warfare. It is forbidden to use weapons or methods of warfare that are likely to cause unnecessary losses or excessive suffering.[126] The Rwandan conflict was not unavoidable but once left unchecked proved to be disastrous within a very short space of time. The conflict is an important indicator of the potential for volatile situations to become disasters and can reshape consensus regarding how human rights laws should be viewed and implemented. The humanitarian interventions that did ensue were a result of the international community arriving late to quell the situation as demonstrated by efforts such as Operation Turquoise. This was the basis as to why processes such as the Arusha negotiations were completed but were never fully successful. There was minimal effective action, military or otherwise, to prevent the catastrophe, and when action was eventually taken, it failed.[127]

4.3 Examination of the IHL legislative history of genocidal conflicts on the African continent and the lessons to be drawn therefrom.

International law and customary norms are indispensable fundamentals for appreciating the history and probable answers to genocide, systematic rape, and the recruitment or use of child soldiers. For the purposes of the research, these discoveries were principally made on the history pertaining to acts of genocide. The starting point is the Fourth Geneva Convention's Additional Protocols I and II. These supplemented the original 1949 document to address the proliferation in violence against civilians in armed conflicts. The Convention on the Prevention and Punishment of the Crime of Genocide (1948), which defines the acts and framework of international responses to genocidal conduct, were unsuccessful in mobilizing applicable and suitable responses to the Rwandan genocide. International treaties such as those mentioned above, regardless of how suitably supported, are inadequate to deal with atrocities they were designed to

avert. International responses to unlawful conduct in war must be designed such that the trial proceedings provided for within each agreement are capable of curbing such illegal acts.[128]

Presently, war criminals infringe international law, despite ratification primarily because they are aware of the limited prospect of being held accountable. A consideration of war related criminal activities in sub-Saharan Africa is impossible without magnifying genocide, which denotes any act "committed with intent to destroy, in whole or in part, a national, ethnic, racial, or religious group".[129] Genocide occurs for economic, ethnic or political motives. Research has also demonstrated that the emotion of fear is regularly a substantial factor. The concerns of genocide extend not only throughout the affected country but a whole region. It disturbs all sectors, extending long into the future. Antagonism and cynicism between groups precludes effective private and public sector expansion and condenses economic and social progress at the national and regional level. A dwindled labor resource, essential to propel a country forward following war, presents a long-term difficulty. The trauma imposed on a people by genocide paralyzes a population so that even development ventures initiated cannot to be achieved.

This is essential when considering sub-Saharan Africa, a region which requires strategies of development to confront significant poverty and disparity. Contemporary advances in the study of genocide recognize that systematic rape and enforced migration are employed not only as apparatus of war, but also as a method of ethnic cleansing, which presents a unique array of consequences that threaten post-war peace. Rape executed on a massive scale with the determination of rescinding an ethnic identity accomplishes the same objective as the Janjaweed in Sudan and the Nazis in Germany, just at a considerably slower pace. Victims of genocidal rape are regularly left incapable to reproduce because of either damage or emotional abuse, which impedes the power of the community.

Genocide is deep-seated in age-old frustrations, fears, and divisions. Offenders must therefore be held accountable. Conversely, illicit sentences will not thwart all impending

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128M Eli 'The Limits of International Humanitarian Law', 2010. Topic Review Digest: Human Rights in Sub Saharan Africa

129United Nations, 1951

incidence of genocide. The international community must cultivate initial cautionary signs and institute applicable reactions to ethnic violence before genocide occurs. A necessity for upgraded post-genocidal healing agendas, which must take place on a case-by-case basis, is also required. All victims must be recognized and afforded the means to recover in the best possible way from mental, physical, and emotional wounds thus healing the genocidal past of a country to prescribe its future improvement.

Genocide has been occurring in Darfur, the western region of Sudan since 2004. 450,000 people are estimated to have been killed, with millions displaced within Sudan and in neighbouring Chad. The targets at the time were the Masalit, Zaghawa, and Fur, the three principal "African" ethnic groups in Darfur. The genocide was a consequence of a civil war that began in 2003, when two rebel groups, the Sudanese Liberation Army (SLA) and Justice and Equality Movement (JEM) attacked the airport in Al-Fasher, the capital city of Darfur. The rebels made demands with respect access to resources, government expenditure on infrastructure, and equal treatment by the government. The government responded by equipping "Arab" militias, known as the Janjaweed with weapons, to perform genocide. The Janjaweed would attack villages, typically at dawn, butchering all the men and boys, raping girls and women, torching homes, terminating food sources, and pilfering livestock.[130] Even though the government of Sudan refuted arming and supporting the Janjaweed, there was solid evidence to show that it was not only arming and supplying the militias but was also participating in the killings.[131] A peace agreement was eventually signed in 2005, but it was broken almost immediately, and the civil war and genocide continued. From 1996 to 1997, in the DRC the systematic annihilation of Hutu refugees, as well the murder, torture, and violence perpetrated on Tutsis in the DRC at the start of the August 1998 war, occurred within an armed conflict, and may also amount to war crimes.[128]

130J Flint and A de Waal *Darfur: A Short History of a Long War*. Zed Books, 2005

[131]B Steidle and W.G Steidle *The Devil Came on Horseback: Bearing Witness to the Genocide in Darfur.* Public Affairs, 2007.

4.4 Lessons learnt from an examination of the IHL legislative history of genocidal conflicts on the African continent

It can be argued that genocide is no less a crime against humanity as premeditated murder is no different from intentional homicide. The unfortunate reality is that, five years after the Rwandan genocide, and regardless of admissions of guilt regarding their inaction while the crimes were happening, States are barely equipped today to intervene and deal with genocide in central Africa.[132] Further, while the UNCG imposes a moral obligation on states to avert and denounce genocide, this was by no means contrary to what policy makers envisioned in 1994 that is the immediate deployment of military forces. Responses may be military as well as diplomatic, juridical and economic measures. Accordingly what is required by law, morality, and ethics requires proper interpretation.[133]

One can infer that the UNCG is concerned with both preventing and punishing the grave misconduct of genocide. While the two are intimately connected, in the deterrent function of law, punishment is often the facet most emphasized. Undeniably the convention does not conceal deterrent processes relative to propaganda associated with animosity, racist organizations, or preparatory actions theoretically leading to genocide. An ongoing debate is occurring about humanitarian involvement *per se*. These matters were apparent as stated earlier, in the failure to stop the Rwandan genocide, especially in the conduct of the UN and its constituent elements. American President Bill Clinton did however announce the formation of a genocide initial cautioning center, to be directed by the CIA and the State Department. Moreover, besides modifying the UNCG so as to augment the obligation to avert genocide, states may possibly mandate the use of force to deter genocide through a General Assembly resolution. Regional bodies (for example, the African Union) could also implement this approach. This would strengthen and produce binding regulations in as far as the convention's obligation to avert genocide is concerned. This could be further buttressed by expanding the range of punishable conduct to include, for example, the nature of

[132] Schabas, *Genocide in International Law*, 12, 546.

[133] Scheffer, *"Lessons from the Rwandan Genocide."*

hate propaganda employed to such disastrous effect in Rwanda and by obligating states to account for their compliance with the UNCG.[134]

A major flaw exposed by the international community's reaction or delayed reaction to the genocide in Rwanda is ''its extreme meagerness to respond immediately with hasty and conclusive action to humanitarian crises entwined with armed conflict.''[135] Rwanda demonstrated that, even with Security Council authorization of international action to resolve a humanitarian crisis, there is no assurance that effective action will occur. Without the correct administrative processes in place, IHL/IHRL cannot be effectively implemented. ''Rwanda in 1994 involved a catastrophe, not only by vital associate states, but in the headship of the UN and in the effective operations of the Secretariat as well.''[136] It also demonstrated that a ''non-aligned humanitarianism,'' with UNAMIR as ''a kind of hedged bet, in which intervening parties salve their consciences while circumventing the problematic political obligations that might essentially end civil war.''[137] Regrettably, IHL/IHRL's flaws, rather than their strengths, were revealed by the Rwandan catastrophe.

In 2001 Simon Chesterman claimed that international decree is diminished through the lack of clarity of the Security Council's directive.[138] Allen Buchanan echoed similar sentiments adding that, ''The opinion developing is that the obligation of Security Council authorization is a hindrance to the fortification of basic human rights in conflicts internal in nature.''[139] The Security Council's performance since Rwanda appears to endorse such sentiments. Buchanan disputes that the intervention in Kosovo and the ensuing deliberation regarding its justifiability have fixated attention on the insufficiency

[134]Schabas (note 162).

[135]Carlsson et al., *Report of the Independent Inquiry,* 27.

[136]Evans and Shanoun, *Responsibility to Protect*, 73.

[137] M Ignatieff, *''State Failure and Nation-Building,'' in Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, 316.

[138] Chesterman, *Just War or Just Peace*.

[139] A Buchanan, *''Reforming the International Law of Humanitarian Intervention,'' in Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, 131.

of surviving international regulation in relation to humanitarian intervention. In the debate, a widening consensus posits that an intolerable cavity exists between what international law tolerates and what morality entails.[140] For Buchanan this validates prohibited action as a foundation for improving international law. This may be accurate where, as in the Rwandan conflict, political concerns preclude appropriate intervention. Tobias Vogel noted that the conflicts in Rwanda, Afghanistan and Sudan may perhaps have been serious, but as long as no regional authority sensed the possibility of threat from them, the prospects of external involvement would be minimal. This assertion is ethically flawed in the sense that it gives the impression of universal human rights standards prescribed by individual states under multilateral authorization while the truth is that it limits the legal obligation of states in dealing with genocide. Consequently the fact that these requirements are not taken seriously should not be a motivation to abandon them.[141] Michael Innes cautions that the future for humanitarian interventions appears bleak if we can repackage human-rights considerations to appeal to every party involved. Innes adds that, because states regard involvement as a right rather than a requirement (under the UNCG). Genocide deterrence is founded on policy pronouncements linked to national interests. In the absence of applicable processes of denunciation or consequences for failure a responsibility to intervene, political agendas and dysfunctional self-interest may triumph. Such interests are presently controlled by US military power thus facilitating a progression of discriminatory engagement process deemed to be standard.[142]

Recommendations from the Rwanda inquiry report[143] propose how the United Nations can advance its reaction to international humanitarian crises through establishing a UN Action Plan to prevent genocide, refining its capability in peacekeeping, mobilising resources, the political will to act in circumstances of genocide or gross violations of human rights, improving initial cautionary capability, introducing resilient processes to

[140] Buchanan (note 169).

[141] Vogel, *"Politics of Humanitarian Intervention."*

[142]Innes (note 129).

safeguard civilians in conflict situations, augmenting security for UN and supporting personnel, guaranteeing complete collaboration amongst officials accountable for the security of assorted UN personnel, improving information flow and communication within the UN system, improving the flow of information to the Security Council, increasing information on human-rights matters, directing national withdrawal operations with UN missions on the ground, scrutinizing prospective deferments of associate states from the Security Council in exceptional circumstances[144] and finally attaining the backing of the international community for the rejuvenation of Rwandan society post the genocide as well as acknowledging the UN's share of accountability in the failure to prevent or stop the Rwandan genocide. John Clarke reiterates this requirement for modification, proposing that improvement of international humanitarian intervention emphasize on the customs and organizations influencing and regulating the process.[145] Worrisome is the fact that the Carlsson report has not been acted upon, or, at least, the majority of the points registered have not been addressed. Even the position of special adviser on the prevention of genocide (established in 2004 with the appointment of Juan Me´ndez), is part time and underfunded.[146]

4.5 Concluding Observations

The definitive finding is that genocide regardless of any justification is an evil act that results in the senseless loss of human life as well as unnecessary human suffering. There is no moral or legal code that could ever enable genocide and the international community's attempt to distinguish genocide in all its forms is erroneous, both morally and legally.[147] Regardless of the record of military humanitarian intervention over the preceding decade, the global community has not realized the value of humanitarian equity in policy or action.[148] Rwanda is an undeniable illustration of this fact and little

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[145]Clarke, *"Pragmatic Approach."*

[146] I Matheson, *"First Rwanda, Then Darfur, and Next? How We Can Help to End These Horrors,"* The Times, 16 October 2006. Accessed 10 May 2007.

http://www.timesonline.co.uk/tol/comment/columnists/guest_contributors/article601484.ec

[147] Des Forges and Longman, *"Legal Responses,"* 51.

[148] Slim, *"Military Intervention."*

has been learnt, given the modern genocide afflicting Darfur, which validates the view of racialism in intervention.[149] The argument goes further to assert that this appears to replicate the international community's apathy over the Rwandan tragedy, although the United States had already affirmed the crisis as a genocide.[150] The UNCG expounds the manner in which the international community should react, but hesitation and inaction makes the international community complicit in atrocities.[151]

In 1999, Kofi Annan, then Secretary General of the United Nations, accepted the failure to avert or stop the Rwandan genocide in 1994, claiming that ''…of all my ambitions as Secretary-General, there is not an iota to which I feel more profoundly unswerving than that of permitting the United Nations to under no circumstances again flop in defending a civilian population from genocide or mass slaughter.''[152] The crisis in Darfur reveals how little have been learnt from the Rwandan genocide and the possibility of extending IHL/IHRL effectively in humanitarian intervention. Peter Beinart asserts that ''in retrospect, discontinuing genocide is an easy task. However, in Darfur, where it is currently occurring, ending genocide is ferociously tedious . . . Diplomacy has not clogged the genocide. It's time to give war a chance.''[153] As Christopher Taylor observes, it is of necessity to comprehend human malevolence in all of its ramifications, for it seems that otherwise we are hopeless, as what transpired in Rwanda, to let history repeat itself. In light of the chronological context of the 1948 Geneva Convention, the self-congratulatory triumphalism, the assertion that evil had been overwhelmed, the audacious pronouncements against genocide, Rwanda was merely too miniature, too far away, too underprivileged, and too black for the ''developed'' world to care about.[154]

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[149] Agbakwa, *''Genocidal Politics.''*

[150] S R Weisman, *''Powell Declares Genocide in Sudan in a Bid to Raise Pressure,''*, New York Times, 9 September 2004 (late ed.), A3.

[151] Innes, *''New Banality,''* 10.

[152] Quoted in Carlsson et al., *Report of the Independent Inquiry*, 2.

[153] P Beinart, *''How to Save Darfur,''* Time, 2 October 2006, 35.

[154] Taylor, *Sacrifice as Terror*, 182.

Finally, the obligation to restore humanity after catastrophe has yet to be acknowledged.[155] The criminal courts endure with their efforts, more than a decade after the genocide has taken place.[156] As observed by Des Forges and Longman, even if discontinuing impunity and constructing the rule of law remain critical for Rwandan society to unite and avert future violence, it remains unclear whether prosecutions as they are now being held will ensure this progression, or how they will achieve the desired results.[157] May develops this perspective in his discussion of the existent complexities of the international prosecution of genocide and the violation of state sovereignty.[158] Nevertheless, efforts must continue in the quest for the most effective manner to prevent mass atrocity and to deal with it whenever it occurs.[159]

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[155] Evans and Sahnoun, *Responsibility to Protect; HRW, "Ten Years Later."*

[156] Dubois, O. *"Rwanda's National Criminal Courts and the International Tribunal," International Review of the Red Cross 321 (1997): 717–31.* Accessed 10 May 2007.

http://www.icrc.org/Web/eng/siteeng0.nsf/html/57JNZA.

[157] Des Forges and Longman, *"Legal Responses"*, 49.

[158] L May, *Crimes Against Humanity. A Normative Account*, Cambridge: Cambridge University Press, 2005.

[159] M Osiel, *"The Banality of Good: Aligning Incentives against Mass Atrocity," Columbia Law Review 105 (2005): 1751–863. See Genocide Studies and Prevention 2:2 August 2007*, 172

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.0 Introduction

This chapter gives a summary of the major findings of the study, as well as conclusions and recommendations that may be used by future scholars and researchers. The chapter will also summarize the major arguments of each chapter. It sheds light on the issues that need to be addressed by the institutions in question after the research was conducted.

5.1 Summary of major arguments

The differences in the causes of conflict in Rwanda made the implementation of IHL very difficult. The parties involved in conflict were both seemingly justified for engaging in the conflict yet they both were violating the provisions of IHL. As a result, the law would have required to be manipulated in certain respects before it could be implemented to fit the scope of the Rwandan conflict. The conflict was characterized by an escalation in the brutality of the methods employed to inflict pain and suffering when looking at the situations in 1959 and 1994. The result was increased angst at individual as well as group level with each individual ethnic holocaust.

5.2 Summary of major findings

5.2.1 Evolution of the face of NIAC

An important finding made in this study was that the face, arrangement and profile of NIACs have developed as non-state actors acclimatize in order to accomplish their objectives. The necessity for a comprehensive elucidation of prevailing laws is therefore a prerequisite to encompass these new forms of NIACs. Examples used to illustrate this were the Syrian war, the Vietnam war, the Nicaraguan conflict, the Congo war, the Bosnia-Herzegovinian conflict, the Colombian war, the conflict in Bihac and the Mozambican conflict.

5.2.3 IHL institutions ineffective to deal with evolution of NIACs

The second essential finding made in this research was that IHL frameworks and institutions were too archaic to accommodate the changing face of NIACs. In fact, there is disagreement within the UN system. This has created an impression that the UN is unreliable concerning the provision of solutions to the challenges posed by the noted changes. This has been made clear by the fact that the antiquated nature of IHL presents an opportunity for states to circumvent current treaty regimes and in so doing not violate any law of war.

5.3 Summary of Recommendations

Tied to the findings from the research, were a number of recommendations. Some of these recommendations were strictly legal in nature, while other recommendations were general. The non-legal general recommendations however aided in serving a legal purpose indicating a requirement to re-assess IHL and IHRL theory and practice.

5.3.1 Develop an action plan to curb the possibility of genocide

It is recommended that the UN must establish an Action Plan aimed at preventing genocide, or at least that must act as an early warning system for genocide. This can be done through developing a system that detects autocratic traits in public speeches and presentations of individuals in power as well as legislation that allows for the punishment of individuals who use hate speech or any other defamatory language with the intention of belittling or degrading an ethnic or racial group. Such a mechanism can assist in the reduction of the occurrence of potential leaders who may possess such traits, as well as the subsequent arrests of individuals who may potentially take part in genocidal activities.

5.3.2 Introducing stronger measures to protect civilians in conflict situations

It is recommended that the protection of all civilians participating or not participating in hostilities should be of paramount importance for states implementing IHL in NIAC. Civilians such as the wounded during conflict and the sick should be high on the list of priorities. IHL should clearly prohibit rape and other forms of sexual violence as well. The treatment of detainees and judicial sureties, the complete prohibition of involuntary dislocation, vis-à-vis the background that IHL is not applying to circumstances of internal turmoil and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, while not being armed conflict (Art 1 (2) of APII) should be provided for in the framework.

5.3.3 Enhancing security for UN and associated personnel as well as ensuring full cooperation among officials responsible for the security of diverse UN personnel

It is recommended that the UN should enhance the security apparatus. This can be achieved through giving the security personnel the legal authority (jurisdiction) to exercise any acts necessary to protect civilians and groups targeted by oppressors without the approval of a vote from members of the Security Council. This can help stop a problem before it starts without having to use extra resources. A legal provision may be included to allow these activities to be covert so as to protect the integrity of the image of the nation of interest.

5.3.4 Coordinating national evacuation operations with UN missions on the ground

It is recommended that IHL should make provision for the establishment of "convenient" bilateral and multi-lateral ties forged between countries. This includes with incidence of such unsuccessful events, the nations involved can better advance and validate their

involvement, assisting in minimizing violations by availing evacuation resources and military bases as safe havens.

5.3.5 Examining potential suspension of member states from the Security Council in exceptional circumstances.

It is recommended that IHL should prescribe measures for punishing member states that do not observe protocol in exercising their right of engaging "self-defense" procedures in the face of exigencies under whose jurisdiction, the Security Council would have to be informed. The aim would be to breed a culture of accountability within the organization.

5.4 Conclusion.

The recommendations above were essentially directed at encouraging amendment of existing legislation pertaining to war, the repeal of existing ones, or the insertion or expansion of present laws aimed at nurturing the realisation of new normative standards. In so doing, it is hoped this will subsequently assist in addressing the current regulatory gap, clearly evident as this research sought to reveal.

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