ACCOUNTABILITY FOR THE HUMANITARIAN FIASCO IN CONTEMPORARY ARMED CONFLICTS
(A CASE STUDY OF THE DEMOCRATIC REPUBLIC OF CONGO)

by

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A thesis submitted in conformity with the requirements for the degree of Masters of Law
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Abstract

Accountability for the humanitarian Fiasco in Contemporary Armed Conflicts

(A case study of the Democratic Republic of Congo)

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by

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The just ended decade unleashed probably the most harrowing and baffling phenomena in human history. Notwithstanding concerted, consistent and relentless efforts by the international community to avoid a repetition of scenes reminiscent of the Holocaust, the Rwanda genocide caught us flat footed. Events in East Timor, Cambodia and the Former Yugoslavia have been similarly dreadful. However, international law scholars- to date- maintain that the law of armed conflicts has not only come of age but that it is also fully and adequately developed just as it is universally widely accepted. This Thesis sets out to prove such scholars wrong and to demonstrate that the present state of the law is remarkably deficient for reasonable expectations in the promotion and protection of human integrity in the context of armed conflicts.
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The struggle continues- I still need you all.
Contents

Introduction...........................................................................................................1

Chapter 1

1:00 Background....................................................................................................6
1:01 Classification of armed conflict.................................................................10
1:02 State sovereignty............................................................................................13
1:03 International humanitarian law......................................................................15
   1:03:1 The impact of changes in the classification of war on IHL.................29
   1:03:2 Categories of protections under IHL..................................................22
      1:03:2:1 Prisoners-of-war.................................................................23
      1:03:2:2 Civilians........................................................................24
      1:03:2:3 Combatants...........................................................................26
   1:03:3 Extension of IHL to internal Armed Conflicts..................................27
   1:03:4 The cross-roads.................................................................30
1:04 International human rights law.....................................................................40

Chapter two:

IHL and IHR implementation mechanisms

2:00 Introduction...................................................................................................43
2:01 International mechanisms:..........................................................................46
   2:01:1 Protecting power..............................................................................46
   2:01:2 International fact-finding...............................................................53
      2:01:2:1 The International Fact-Finding Commission..............................53
      2:01:2:2 The UN ad hoc mechanisms....................................................55
      2:01:2:3 The Human Rights Commission and its 'special rapporteurs'....57
Chapter Three:
International Criminal prosecutions and other retrospective mechanisms

3:00 Introduction........................................................................................................66
3:01 Prosecutions in international law........................................................................67
3:02 Prosecutions versus other mechanisms .............................................................69
3:03 Propriety of prosecutions in the DRC.................................................................73
3:04 Criminal prosecutions in international law- Retribution or utility?.................77
3:05 Some practical huddles- free and fair criminal prosecutions?.........................79
3:06 ICTR for DRC?...................................................................................................83
3:07 Rule of law versus political reconstruction- which way?.................................85

Chapter Four:
Conclusion................................................................................................................91
Introduction

Attempts to mitigate human suffering, albeit for different reasons, predate our clear knowledge. The laws of war (IHL) are probably as old as war itself. As early as 3000 years BCE, there were rules- in different cultures- protecting different categories of victims of armed conflict or regulations limiting or prohibiting the use of certain methods and means of warfare.

It was, however, not until 1859 during the battle of Solferino, a terrible battle between French, Italian and Austrian forces that the modern law of war was borne- thanks be to Henry Dunant who witnessed the carnage of the bloody war. Unlike before when the applicability of humanitarian rules was restricted to a particular war and region and, also viewed as the sole responsibility of belligerents, modern IHL has been developed to avoid these weaknesses. In particular, not only is the respect and promotion of IHL the responsibility of every civilized State (irrespective of its position regarding a given war) but its rules are also of universal application to all armed conflicts. However, it will also be remembered that due to differences in the nature of armed conflicts, particular rules of IHL have been developed to apply in different types of armed conflict. Broadly speaking, the distinction is drawn between international and internal armed conflicts.

The Law of war (IHL) is thus a special branch of international law. At its core is the cardinal principle that the means and methods of warfare are not unlimited- even in war situations, respect for humanity ought to be ensured. In this connection, IHL is therefore distinct from the law of peace (The Law of Hague) that relates to the right of States to wage war. In effect, the responsibility for hostilities is not of any relevance in the IHL realm. Similarly, IHL differs from human rights law that sets limits to the power of the State in respect to all persons who are subject to its authority and, which applies in both peace and war times. On the contrary, IHL
applies only in war times. It is however worth to remember that, between the non-derogatory norms of human rights and IHL, the distinction is growing more and more blurred as does that between international and internal armed conflicts.

Until recently, not only were issues of human rights and internal armed conflicts regarded as being the sole responsibility of the State where they occur but also true, IHL was solely viewed as being only applicable to international wars. While the nature of war has remarkably changed since the Second World War, its tragic consequences have virtually remained unchanged save for the worse. Independence wars and similar internal conflicts became the order of the day. Though never or rarely directly involved, it has continued to be a reality that such conflicts often involve the support of foreign States. Thus, though incapable of satisfying the traditional definition of international wars, such conflicts equally defy the proper definition of internal or civil armed conflicts. Yet, for the victims, humanitarian needs remain much the same as in international wars. War is war no matter its description.

In 1977 in the two Additional Protocols, the international community undertook to extend the application of IHL norms to types of all armed conflicts. The first Protocol supplemented the provisions on international wars found in the Geneva Conventions and extended that definition to include wars of decolonization (self-determination). Additional Protocol II supplemented common Article 3 to the four Geneva Conventions regarding internal armed conflicts.

Today, most scholars agree that IHL is, at least as far as its rules go, adequately developed. However, as the same scholars note, the respect for the rules falls far short of reasonable expectations. The past decade in particular left everyone wondering whether the law already at
the vanishing point had not fully vanished. The events in Rwanda, Serbia, Kosovo, East Timor and the Democratic Republic of Congo are but a few examples to remember.

In this study, through the examination of the DRC armed conflict, I attempt to explore some of the issues that may help account for such an ironic state in the law. While it is conceded that the instant case study may be an extreme case of the nature of armed conflicts taking place generally in the world, it should also be remembered that it offers an excellent choice because of its multidimensional structure. In this one conflict, we are able to explore the impact of the changes in the classification of armed conflicts on IHL as well as the practical and conceptual constraints faced in the implementation of the law both proactively and retrospectively at once.

The thesis seeks to elicit that; the blanket deference accorded to the concept of State Sovereignty as further manifested in the role of classification of armed conflicts, the ambiguities and incoherence in the relevant legislative provisions and, the double standards displayed by the international community constitute the principle reasons for the humanitarian and human rights fiasco. While, from the retrospective paradigm, inconsistency, competition among different mechanisms and the political/future considerations on addition to practical constraints pose serious challenges.

The first chapter sets out the background to the armed conflict by briefly stating the facts. It then progresses into a conceptual analysis of the foundational concepts in the entire study namely; classification of the armed conflict, the doctrine of State sovereignty, IHL and human rights law. In depth, the chapter portrays the conceptual complications associated with the application of IHL to the new breed of armed conflicts that, for lack of a better term, could be described as 'internationalized internal' armed conflicts. Through illustrations and examples, it is particularly
shown that the law's failure to accord equal protection between the belligerents in such blurred conflicts is one cause for its practical failures. Thus, the status-based criterion in the allocation of rights and duties between belligerents is inimical to the normative conceptual foundation of the law itself and is bound to continue undermining the present efforts towards respect for the law.

The second chapter discusses the major preventive (proactive) mechanisms employed in the implementation of IHL and human rights during armed conflicts. These include: Protecting Power, investigative and fact finding mechanisms as well as national implementation measures. It is particularly shown that the doctrine of State Sovereignty literally plays a central role in undermining the effectiveness of these mechanisms. It is equally shown that some of the defective mechanisms presently in use are the consequence of deliberate measures taken by violator States to check against interference in what they regard as internal matters- a clear display of double standards. Generally, commitment seems to be seriously wanting at the international community level.

The third chapter focuses on retrospective measures. Specifically, international criminal prosecutions are considered as an emerging norm. Its development is explored as well as its relation to alternative mechanisms (e.g. truth and reconciliation commissions and amnesty). Further, both conceptually and practically, the chapter assesses the relevancy of prosecutions both generally and in the DRC context in particular. Finally, the chapter illustrates how the need for political reconstruction and the development of rule of law pose indomitable challenges to the requirement of prosecutions for egregious crimes.

Chapter four is but a conclusion. It is particularly advanced that; the law is not as fully and adequately developed as posited by some scholars. It is also contended that the allocation and
application of the concept of State Sovereignty ought to be qualified in conformity with the political and social realities that abide in a given country. Moreover, it is also noted that more emphasis ought to be paid to proactive rather than retrospective mechanisms in the promotion and protection if IHL and IHR.
Chapter 1

1.00 Background

The country presently known as the Democratic Republic of Congo [hereinafter referred to as DRC] is the former Zaire having acquired the new name only in 1997. For the poor country, the new name came with new problems. The euphoria that greeted the victorious match by the forces of the present government into Kinshasa (the capital) was soon to turn into unprecedented disaster. Hardly a year after taking over office in Kinshasa from the former dictator, Mobutu Sese Seko, with the support of Uganda and Rwanda, Laurent Desire Kabila 1 was yet in another war against his former allies who had become bedfellows of rebel groups.

On 2nd August 1998, a group of ethnic Banyamulenge related to the Rwandese Tutsi lodged a war against the newly installed “liberator” with the support of none other than Uganda, Rwanda, and Burundi- the very forces that had supported him-Kabila to oust Mobutu forcefully. To-date, the war that has drawn in almost the entire continent whether directly or otherwise, rages on with devastating material and humanitarian consequences. The forces behind Kabila (the government side) include troops from Zimbabwe, Angola, Chad, Sudan, and Namibia. 2 More fascinating and paradoxical, gunfire has sometimes rattled between foreign forces (though on the DRC territory). This has equally had quite severe and tragic consequences on the poor and helpless Congolese civilians. In one of the three recorded engagements between Rwandan and Ugandan troops in Kisangani (a city in Eastern DRC), it is reported that Red Cross workers buried more than 300 civilians who included children and men killed on their way home. 3

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1 Kabila was assassinated early 2001 and was succeeded by his son Joseph Kabila.
Unfortunately, not only is the end to this bizarre war uncertain but its repercussions on the civilians is a continuing insult to the international community and a challenge to international human rights and humanitarian law. It is reported: “Congo entered its third year of devastating war in August with no end in sight.” Albright has deservedly referred to it as "The African First World War." The general disappointment regarding the humanitarian specter is evident in her remark: “the most disturbing aspect of the conflict in the Congo has been the horrific abuse of fundamental human rights by all sides”

So far, all the initiatives by the international community to not only bring this bloody war to an end but also achieve respect for humanitarian and human rights law have proven futile. Even the Lusaka Cease-fire Agreement that had the blessing and support of the United Nations, the European Union and United States let alone the parties to the conflict (all of them endorsed it with signatures) has been equally rendered futile. It is noted: “None of the actors fully respected their commitments under the Lusaka Cease-fire Agreement signed in July and August 1999. Rebel factions and their foreign backers and government troops showed little inclination to respect basic norms of international human rights and humanitarian law in their treatment of civilian populations.”

Horrendous violations of international human rights norms as well as IHL have characterized the conflict since its very beginning. In what takes the shape of a systematic program, thousands of civilians have been massacred. Religious as well as relief workers have suffered the same fate.

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6 ibid.
7 At least 30 main peace initiatives have been so far undertaken as per the UN General Assembly Doc. A/54/361, P26. http://www.unhchr.ch/huridoca.
8 HRW 2001 supra note 4 at 40.
Extra judicial executions, rape and other forms of sexual harassment, arbitrary detentions, obstruction of humanitarian assistance, destruction of means of livelihood and suppression of all forms of freedom have taken a massive toll with impunity. A few illustrations will suffice.

In just August 1998 alone, both the government and rebel forces in violation of the Geneva Conventions of 1949 killed 1,334 people. While over the New Year, 500 civilians including the workers of the Red Cross and priests including their families were massacred by the forces of Congolese Rally for Democracy (RCD-one of the rebel forces involved in the war). The helpless and poor women and children have also had their share of blood cuddling experiences. It is reported: “Human Rights Watch documented the killing of thirty people in a February 5 attack by the RCD and its RPA (Rwandan Patriotic Army) allies... RCD rebels and Rwandan soldiers tied up men, raped their wives in front of them then killed them.” In yet another incident in late 1999, it is noted that, after being sexually tortured RCD soldiers buried some women alive. Further disregard to IHL is apparent in the following report: “Uganda hastily trained and equipped thousands of young Congolese, many of them children to build armed wings for its local allies...”

Moreover, in what seems like yet another genocide in the region and against the same Tutsis or their sympathizers, as it were in Rwanda only seven years ago, it is reported:

“Frequent leadership disputes in the RCD-ML exacerbated ethnic tensions and re-ignited a deadly interethnic war in the region of Bunia between the agriculturist Lendu people and the pastoralist Hema, who are identified with the Tutsi and the

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9 See HRW 2000 supra note 2 at 37-42
11 HRW 2000, supra n. 2 at. 39.
12 HWR 2001, supra n.4 at 41.
13 ibid.
Ugandan Hema. At least seven thousand were killed and another 200,000 were displaced in less than a year.\textsuperscript{14}

In related developments, it is noted: "The Mai-Mai and Hutu fighters also committed atrocities against the civilian population, particularly communities identified with the Tutsis..." just as "Burundian Hutu and Mai-Mai fighters jointly attacked Congolese Tutsi communities in the Ruzuru plain and the Haut plateau areas of south Kivu."\textsuperscript{15}

The violations of international human rights and humanitarian law are boundless in this armed conflict. The would-be survivors are exposed to all sorts of risks, as humanitarian assistance is not accessible to many of them. It is reported that by mid year (1999) upward of 1.3 million Congolese had been displaced and another five million completely or partially separated from their traditional supply routes, mainly because of the generalized security. "Those uprooted by the war", it is further reported, "were deprived of access to humanitarian services by the same factors that caused their flight and isolation."\textsuperscript{16} The tragic and bizarre war continues with gigantic proportions. By the end of the year 2000 the situation had further seriously deteriorated as this report shows:

"The consequences of the most bizarre war in Africa are heavy, and yet seem not to attract any ones attention. According to reliable estimates from the United Nations Observer Mission in the Congo [MONUC] officers, within twenty-eight months 1,700,000 Congolese were killed by the invasion forces composed of the armies from Rwanda, Uganda and Burundi. More than two million people live in inhumane conditions."\textsuperscript{17}

\textsuperscript{14} Ibid.
\textsuperscript{15} Ibid.
\textsuperscript{16} Ibid. at 40.
1.01 Classification of armed conflicts

“That the laws of armed conflict are to be applied in armed conflicts might seem too obvious a proposition to require statement. The criteria of application of the international humanitarian laws of armed conflict have nevertheless, at various times, proved to be problematic, largely concerning the technical meaning of the term ‘war’...the term has unfortunately become bound up in legal technicalities of definition which have rendered it increasingly less suitable as a criterion for the application of international humanitarian law.”

A clear and proper understanding of the type of any armed conflict is crucial in the selection of the applicable law. It should be recalled that, in times of armed conflict, different legal rules apply and are accordingly differently implemented depending on the type of the armed conflict in question. Thus, whether it is internal/civil or international or combined is important to note. This task, as shall be seen shortly, is not an easy one though. With regard to the DRC armed conflict, the controversy and difficulty surrounding the classification is vividly manifested in the clash between the views of the Rapporteur and the Secretary General on its classification. On one hand, the special Rapporteur on the DRC defined this armed conflict as an internal one but with the participation of foreign forces19. On the other hand, the Secretary General has characterized it as a combination of both an internal and international conflict.20

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17 According to the “AfroAmerica Net work” as reported in “The Monitor” newspaper of 29 Dec. 2000 at www.monitor.co.ug under “Great Lakes” news. Important to note here too is that the figures do not include the atrocities committed by the allied troops in support of the Kabila forces.
20 Ibid.
Internal or civil-armed conflicts [wars], as the name suggests, refer to the armed conflicts that occur within the territory of a given state between the national forces and dissident ones. They are sometimes also referred to as liberation wars. Examples include the Kurdish war in Iraq and the war in Southern Sudan to mention but a few.

International armed conflicts/wars, on the other hand, refer to wars between or amongst different States. Examples include the two World Wars, the Gulf War of 1990-1, the Ethiopia –Eritrea war of 1999 and, the NATO - Yugoslavia war of 1999.

Unlike non-State (internal/civil) armed conflicts, there are fairly well developed rules of international law, both customary and treaty based, that govern the entire branch of international wars. Thus, despite the controversy that surrounds the definition of the term 'international war', there are a few conventionally accepted conditions that are generally accepted as benchmarks in the ascertainment of the existence of one. These include: use of armed force between the forces of the belligerent states, rapture of diplomatic relations, abrogation of treaties, declaration of war, prohibition of trade with the enemy state and application of rules concerning belligerents such as rules on permissible weapons, targets and means of warfare, methods of combat and humanitarian rules.

Against this background, it is understandable that both the Secretary General and the Special Rapporteur have difficulty in the application of conventional terms- international war and internal armed conflict- in the description of the armed conflict presently under consideration. As they noted in their respective classifications, the conflict indeed includes elements of both international and internal armed conflicts. Generally, however, it ought to be noted that the

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22 For instance The Hague and Geneva Conventions of 1954 and 1980 respectively as well as the four Geneva Conventions of 1949 and the Additional Protocol I of 1977, to mention but a few.
23 I. Detter, The Law of War, 2nd Ed. (Cambridge: Cambridge University Press, 2000) at p. 4 - 8. In total, however, he discusses over five different definitions of war.
traditional classification of armed conflicts has, over the past few decades, remarkably been reduced to more or less anachronistic and abstract notions. Detter quite rightly attests to this reality when he notes: "... the traditional difference between inter-state wars and civil or internal wars no longer suffices. Some internal wars will 'count' as international wars; they are so to speak 'internationalized' internal wars, a heavy but realistic expression." 24

This difficulty in the definition of contemporary armed conflicts has equally remarkably affected the appreciation and application of both humanitarian and human rights law. Quite indubitably, it has engendered the development of the concept of categorization of IHL into two broad divisions namely: IHL applicable in internal armed conflicts and IHL applicable in international armed conflicts. Similarly too, it has also partly been responsible for the extension of the application of human rights law to armed conflicts and in effect it has seriously blurred the distinction between the two branches of international law.

As earlier pointed out in the introduction, it is, inter alia, the object of this study to examine the relationship between changes in the classification of armed conflicts and the corresponding applicable law. In particular, an analysis of the response to changes in the classification of wars is undertaken with a view to establishing whether it is justified and sustainable or not. The salient question is thus; how adaptable/dynamic can IHL and international human rights law be in the ever-changing material conditions that affect their application in the contemporary world?

Presently, however, it will be important to briefly consider the force (concept) belies most of the challenges that characterize the entire humanitarian discourse.

24 Ibid p.46.
Despite centuries of application, the term “sovereignty” that occupies a core position in the entire discipline of international law still poses problems with regard to its definition. Martti rightly observes: “If the term “sovereignty” had a fixed, determinate content, then whether an act falls within the State’s legitimate sphere of action could always be solved by simply applying it to the case... Though, it is notoriously difficult to pin down the meaning of sovereignty literature characteristically starts out with a definition.”

He further explains that “Sovereignty” is usually connected with the ideas of independence (“external sovereignty) and self-determination (internal sovereignty). In what he regards as a classical definition the term is defined as follows: “sovereignty in the relations between states signifies independence, independence in regard to a portion of the globe is the right to exercise therein to the exclusion of any other state, the functions of a state.” The Permanent International Court of Justice (PCIJ) further defined the term independence as, “…the continued existence of (a state, MK) within her present frontiers as a separate state with the sole right of decision in all matters economic, political, financial or other…”

Nonetheless, neither of these definitions is adequate. It is thus noted: “It is obvious that the definitions set out above do not provide an answer. To define “sovereignty” as “independence” is to replace one ambiguous expression with another. To explain it in terms of a “sole right to decision” seems more concrete but that, too, creates difficulty. For does not any international

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26 Ibid. p. 207.
27 Ibid. as cited from the Island of Pamas case (1928) II UNRIAA, P.829
28 See ibid as cited from the Austro-German Customs Union Case, Ser.A/41p. 45.
obligation entail a restriction of that "sole right?" It is further questioned: "And if restrictions are continued without this depriving the state of its sovereign status, how do we know if they are those implied by either state incase of a dispute between two or more of them?"

Other scholars have also attempted to find some definition for the rather elusive term. Drawing guidance from historical studies, Abiew contends that the original meaning of sovereignty is related to the idea of superiority. Thus, the sovereign (the state) is the holder of ultimate power. He then accordingly concludes that the term implies that the state is under the legal influence of no superior power. But, with regard to international human rights protection, he is fast to realize the weakness in this definition to which he points out: "It follows as an upshot of this theory of state sovereignty that human rights are considered a matter of domestic and not international concern."

All in all, whatever the true meaning of this elusive concept, certain assumptions are known to characterize it. To these, Henkin offers useful guidance, thus:

"Among the traditional assumptions sometimes deemed implicit in international "sovereignty," one might identify the following: --that the state system is committed exclusively to state values, principally to state autonomy and the impermeability of state territory, and to the welfare of the state as a monolithic entity; --that international law is based on the consent of states, and is made only by states and only for states; --that the international system and international law do not (may not) address what goes on within a state; in particular, how a state treats its own inhabitants is no one else's business, not the business of the system, not the business of any other state; --that a state may concern itself with what goes on inside another state only as that impinges on its own state interests. (Therefore, a state may presume

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29 Ibid. 209
30 Ibid. Emphasis added.
32 Ibid. It is now beyond debate that, under human rights jurisprudence, State Sovereignty does not allow States to treat their citizens in any way they please especially if that treatment entails violations of the fundamental human rights.
to afford "diplomatic protection" to its diplomats or its nationals, not to other human beings.) --that International law cannot be "enforced": a state can only be persuaded, induced, to honor its international obligations and will do so only when it is in its national interest to do so; --that a state's sovereignty shields its constitutional system from international influences."\(^{33}\)

However, as the instant case study demonstrates, the concept of State Sovereignty has only grown less discernible. As the facts show, the DRC is a defacto divided State just as Sudan and Angola could be said to be. Consequently, the blanket and insensitive application of the concept of State Sovereignty to such States- notwithstanding the elaborate assumptions given above- greatly verges on the abstraction of the entire concept.

Nonetheless, the concept retains colossal powers in the entire discipline of international law. Moreover, this remains a reality despite the positive steps\(^{34}\) recently witnessed in an attempt to reduce its undesirable consequences - especially regarding human rights and humanitarian protection. In fact, despite the consensus in human rights and humanitarian jurisprudence that minimum standards of humanity are a concern to all States and the entire human community, the amount of attention and deference accorded to this concept in IHL is quite baffling and ironic. This ironic reality is vividly portrayed hereinafter.

1:03 International humanitarian law (IHL)

Different jurists and legal scholars, in reference to this branch of international law, use different terminology. Examples include: The Laws of Armed Conflict, International Law of Armed Conflict,
Humanitarian Law, Laws and Custom of War, Humanitarian Law Applicable in Armed Conflict, the Law of Geneva or Humanitarian law properly so called. However, precisely speaking, humanitarian law is primarily based on the four Geneva Conventions of 1949 which deal respectively with the: amelioration of the condition of the wounded and sick in armed forces in the field, the amelioration of the condition of wounded, sick and ship-wrecked members of the armed forces at sea, the treatment of prisoners of war and the protection of civilian persons in time of war. Civilian objects are also protected. Furthermore, it determines the rights and duties of belligerents in the conduct of military operations and limits the choice of means for causing injury or suffering to the enemy. It, in other words, by putting limits to warfare, bans total war. Pictet thus rightly sums it up as the law that ".... [i]ntends to safeguard military personnel placed 'hors de combat' and persons not taking part in hostilities."^

The scope of application of this branch of international law, however, continues to arouse debates. Historically, IHL was exclusively developed for application in international armed conflicts or wars. Indeed, it was only until 1949- close to a century of its recognition- that a IHL was first recognized as being applicable to internal armed conflicts. However, even then, its application to such armed conflicts still remained highly questionable. As a matter of fact, the generality of the common article 3 clearly left a lot to desire as compared to the well drafted and detailed provisions that related to international armed conflicts in the same Conventions.

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35 Some writers like Detter, supra note 23, use the phrase “law of war” inclusively for both the law of Geneva [humanitarian law] and the law of Hague [the law of peace].
36 Shaw, supra note 21, at p.730.
37 ibid.
39 J. S. Pictet, Humanitarian Law and the Protection of War Victims, (Leyden: Sijthoff, 1975) at p.17. [hereafter referred to as Pictet 1975]
40 Article 3 common to the four Geneva Conventions marked the beginning of this development.
41 For more detailed analysis on this article and the extension of IHL to internal armed conflicts, please see p. 30 infra.
But the pressure on the international community to intervene in internal armed conflicts continued to increase as both the rate their occurrence and the gravity of their tragic consequences intensified. Apparently, just as the Yugoslavia and Rwanda tragedies indicate, some of these conflicts tend to be more devastating than truly defined international wars/armed conflicts. In effect, as clearly defined international wars became less common while non-State armed conflicts continued to prove more devastating, tragic and prevalent, the question as to whether the law of armed conflicts was to pay deference to history (classification) or evolve to address the demands of the present day became more pressing. By 1968, the General Assembly passed resolution 2444(XXIII) in which they clearly stated the principles of IHL. In this restatement, it was demonstrated in no uncertain terms that IHL's scope was to be determined by humanitarian considerations other than mechanical and abstract considerations such as the conventional classification of armed conflicts. Rightly considering this resolution as the statement of the general principles that give expression to the main substance of humanitarian law, Gasser precisely notes:

"In particular, one recalls the principles codified by UN General Assembly Resolution 2444(XXIII) of 19 December 1968 which are applicable in all circumstances, at all times and in all types of armed conflict: (a) that the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited; (b) that it is prohibited to launch attacks on the civilian population as such; (c) that distinction must be made at all times between persons taking part in the hostilities and members of the civilian population to the extent that the later be spared as much as possible."42

From the foregoing quotation, it will be noted that that the issue of the designation/status of parties to armed conflicts is not mentioned. In other words, it is, in the contemporary sense, immaterial whether it is internal or international war or whichever description one may choose. This new approach to IHL led to further developments that culminated in the enactment and adoption of the 1977 Additional Protocols to the 1949 Geneva Conventions.43

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42 Ensuring Respect, supra note 38 at 15-6. For more coverage on this topic, see p 24 infra.
43 For more analysis of this development, please see extension of IHL to internal armed conflicts, infra.
Yet again, caution ought to be taken to ensure the distinction between humanitarian law- the Law of Geneva- from the other closely related branches of international law namely: The law of The Hague and international human rights law. As between the IHL and the law of peace (the law of the Hague), Pictet makes a remarkably clear distinction. He advances that the law of The Hague is the law that determines the rights and duties of belligerents in the conduct of operations and limits the choice of the means of doing harm and is basically composed of two domains thus; The 1954 convention for the protection of cultural property, signed at the Hague itself and the convention concluded at Geneva on 10 October 1980 under the auspices of the United Nations forbidding or limiting the use of certain conventional weapons. Their main purpose is to regulate hostilities and they are accordingly based, in part, on military necessities and the preservation of the state.44

On the contrary, the law of Geneva focuses on the effects of war rather than the Hostilities themselves. The law of The Hague thus defines the circumstances in which one may resort to arms and impose sanctions on the aggressor, *ius ad bellum*, (the right to make war). While the law of Geneva establishes the conditions of the conflict and which must apply equally to all the victims, *ius in bello*, (the law of war)45. In this text, effort shall be taken to maintain the distinction between the two. In particular, the focus of this text is *ius in bello*.

Though closely related too, IHL is distinct from international human rights law [as shall shortly be further illustrated]. Briefly however, unlike some international human rights norms, IHL norms are

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44 Pictet 1975, supra note 39.
non-derogatory.\textsuperscript{46} Similarly, IHL norms constitute jure cogens- they are mandatory and no two or more States may exempt themselves or release one another. Additionally, their importance is such that all States- and not only the parties to a given conflict- have an interest in respecting these principles: they thus constitute obligations erga omnes.\textsuperscript{47} Also, whereas international human rights norms apply both in times of peace and armed conflict, IHL strictly only applies to armed conflict.

\section*{1:03:1 The impact of the changes in the classification of war on IHL}

Whereas the foregoing discussion seems to suggest that the scope of IHL is a settled matter, the reverse, however, seems to be true with regards to its implementation. States still resist it\textsuperscript{48} while some scholars still seem to question its extension to non-State armed conflicts. The following statement by Adam Roberts is specifically important to note: "When a civil war is internationalized, in the sense of involving foreign troops on both sides, there is a much stronger argument that the whole body of the laws of war is formally in force, especially as concerns the conduct of outside forces involved."\textsuperscript{49}

From Adam's statement, two quite valid interpretations could be made. To begin with, his statement implies that there are two categories of international law with one being more effective and

\begin{itemize}
\item [\textsuperscript{46}] For instance article 29(2) of the Universal Declaration of Human Rights states, “In the exercise of his rights and freedoms, every one shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.
\item [\textsuperscript{47}] Shaw, Supra note 21 at 16.
\item [\textsuperscript{48}] State cooperation with UN agencies during armed conflicts is still highly viewed as interference with internal State matters. This applies even to States involved in wars with dissident forces. As the second chapter will illustrate, the DRC government has actually, on several occasions, refused cooperation with UN regarding the investigations into humanitarian and human rights violations.
\end{itemize}
preferable to the other. Further, it also means that the two categories apply to different types of war. Indeed, not only- as earlier pointed out- are categories of IHL based on the classification of armed conflicts but also true, the IHL applicable to international armed conflicts is a much more preferable type.\textsuperscript{50} In effect thus, the changes in the classification of armed conflicts still greatly hound and affect the development and effectiveness of IHL.

Apparently thus, the tension between the situational and substantive scope of the law is an on-going one. But, what is it about the classification of armed conflicts that makes it so insurmountable in this noble search for adaptability and flexibility in the law?

Both compliance and enforcement of the law -IHL- like every branch of international law, requires the willingness on the part of the States concerned. Unfortunately for IHL, the first bridge is usually acceptance of its applicability by a given country involved in some form of armed conflict. States are often reluctant to accept IHL application, as it tends to connote the existence of hostility between the parties concerned.\textsuperscript{51} The usual politics of denial and counter denial of the obvious by States is probably no better depicted elsewhere.

Treating it as the main obstacle in the meaningful extension of the applicability of IHL to internal armed conflicts, remarkable efforts have been accordingly taken to replace the term 'war' with 'armed conflicts'. It is, however, questionable what changes this can substantively lead to - for is it any better than mere renaming of the same thing? This apparently trivializing and superficial

\textsuperscript{50} A more detailed exposition on the difference between these two categories of IHL is covered on under 'the crossroads, \textit{infra} p.33.

\textsuperscript{51} Probably for political reasons and for fear of escalating hostilities, States generally usually find it hard to acknowledge out right hostilities with other States while through diplomatic means, they actually try settling the very issues that they publicly deny. In a similar fashion, States are usually reluctant to acknowledge internal wars as such and instead prefer to regard dissident forces as mere bandits or terrorists. For instance, for over ten years, there has been on-going military engagement between LRA rebels and the Ugandan government but the Ugandan government continually insists it is fighting terrorists and bandits and not rebels.
approach has, quite justifiably indeed, attracted some founded criticisms. In his observation on the futility of this development, Detter specifically notes:

There is now a trend to prefer the term 'armed conflict' to that of 'war', almost as if it were a third category. Some writers have chosen to use the term 'armed conflict' in preference to the more traditional 'formal war'. It may be convenient and there are certainly many eminent authors who prefer to take this line- to avoid using the term 'war' and include internal wars under 'armed conflict' so as to explain the extension of the law of war to such internal armed conflicts. But it is equally, and possibly more, convenient to extend the notion of 'war' to include also non-State armed conflict. After all, scholars may define terms as they wish...”

Thus, it is not by changing the language that effective changes in IHL shall be achieved. Surely, the resistance with which the extension of IHL to internal armed conflicts has been met is not based on mere meanings of words. As this text will further illustrate, real and substantive issues are involved. The solution and proper approach to this issue, thus, calls for more than a mere interpretative and linguistic exercise. The proper and appropriate approach, it is submitted, lies in a conceptual perception and assessment of the law. It is specifically advanced that effective and sustainable developments in IHL aimed at meeting the changing demands shall only be achieved through reconciliation and balancing among the different conflicting and competing concepts that basically characterize the entire discipline of international law. In particular, it is my strong conviction that this project can only be accomplished through a proper appreciation of the conceptual structure and development of the entire body of IHL. To begin with, the concept of protection in armed conflicts—rather an abnormal moral context- deserves emphasis.

52 Detter, supra, at17-8, [footnotes omitted].
"Armed conflicts are nevertheless still a reality, and a reality perceived by all actors as being morally different from crimes committed by one side or a punishment inflicted by the other side. There is no conceptual reason why such a social reality - unfortunately one of the most ancient forms of intercourse between organized human groups- should not be governed by law."\(^53\)

As far back as 1868, it was noted that the means of warfare are not unlimited.\(^54\) This cardinal principle of the entire discipline of IHL was equally recognized in the Hague Conventions of 1899 and 1907.\(^55\) In addition to the UNGA resolution of 1968\(^56\), article 35 of Protocol I elaborately states:

"In any armed conflict, the right of the parties to the conflict to choose methods and means of warfare are not unlimited", "it is prohibited to employ weapons, projectiles, and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" and, "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment".

Quite evidently thus, the purpose of limitations imposed by IHL in the conduct of hostilities is but to ensure a minimum standard of protection that retains and guarantees human integrity. Accordingly, IHL requires that belligerents must always avoid the infliction of unnecessary injury and suffering. In other words, all persons and objects that have no direct contribution to the military effort must be spared. However, for purposes of this text, emphasis will be laid on protected persons.

\(^{53}\) M. Sassoli & A. A. Bounvier, How does law protect in war?, (Geneva: ICRC, 1999) at 68-69. [hereafter referred to as Sassoli].

\(^{54}\) This was the spirit of the Declaration of St. Petersburg of 1868, see H. P. Gasser, International Humanitarian Law: An Introduction (Geneva: HAUPT, 1993) as separately reprinted by Henry Dunant Institute, 1993) P. 50. [hereafter referred to as An Introduction]

\(^{55}\) ibid. p51. In particular, he notes, Convention (IV) respecting the Laws and Customs of War on Land, with accompanying regulations are significant in this regard. Article 22 of the regulations states: "The right of belligerents to adopt means of injuring the enemy is not unlimited".

\(^{56}\) See supra, at 19.
'Protected persons', is a general term used in references to different categories of persons entitled to protection under IHL. Quite articulately, it has been defined thus:

"A protected person" is any one, who on the basis of the Geneva Conventions and their Additional Protocols, has the right to special protection, i.e. to special protected status. The law of Geneva distinguishes between the following categories of protected persons: wounded, sick and shipwrecked members of the armed forces and civilians; prisoners of war; civilian detainees; civilians on the territory of the enemy; civilians in occupied territories."  

Broadly speaking, the concept of protected persons could be divided into two categories of persons namely: prisoners of war and civilians. Yet, implicit in the notion of 'protected person' is the concept of transgression. During armed conflicts, just like in every natural situation, the power of transgression of other person's rights mainly lies with the powerful- the armed soldiers (fighters). Thus, it is important to fully appreciate these two concepts- protected persons and combatants (fighters) in the realm of IHL in order to engage in any attempts to transform the law.

1:03:2:1 Prisoners-of-War (PoW)

Article 4 of the Third Geneva Convention and Articles 43 and 44 of Additional Protocol I elaborately cover the various categories of persons who may be entitled to Prisoners-of-War status. The general rule, though, that permeates all the different categories enumerated therein is that, all persons involved in the fighting, even though not combatants, who fulfill the conditions enumerated in Article 4 (2) of the third Convention and fall in the hands of the enemy are

57 An Introduction, supra note 54, at 24.
prisoners of war. The conditions include: "that of being commanded by a person responsible for his subordinates; that of having a fixed distinctive sign recognizable at a distance; that of carrying arms openly;" and "that of conducting their operations in accordance with the laws and customs of war."

Numerous Articles in both the Third Geneva Convention and Additional Protocol I relate to the rights of PoW. Essentially, they are supposed to be in the hands of the enemy Power and not in the hands of the individuals or military units who have captured them. They are entitled to respect for their persons and their honor and, it ought to be noted, they are supposed to retain their full civil capacity they had at the time of their capture. Thus, they continue to enjoy their civil rights according to the law of their origin.\(^5^9\)

\section*{1:03:2:2 Civilians}

Strictly speaking, hostilities should only take place between the forces of the conflicting parties. Thus, at all times, ordinary persons should always be excluded not only in direct hostilities but must also be respected by the combatants/belligerents. However, as the old adage goes- where two elephants meet, it is always the grass to suffer- civilians indeed usually turn out to be the worst victims of warfare. Nevertheless, the protection of civilians during armed conflicts was restricted to the nationals of the parties to the conflict till 1977. Article 4 of the Geneva Convention IV states:

\(^5^8\) In international armed conflicts, fighting troops are referred to as combatants. While, in internal or non-State armed conflicts, they lack a technical name but are often referred to by different names. For instance such terminology as belligerents, rebels, dissidents and/or insurgents is commonly used.

\(^5^9\) Specifically see Articles 12 and 14 og Convention III. For more rights generally see the Third Convention and numerous Articles in Additional Protocol I.
"Persons protected by the Convention are those who, at a given moment and in any manner whatsoever, find themselves, in case of a conflict or occupation, in the hands of a party to the conflict or Occupying Power of which they are not nationals."

Further, Article 13 which defines the scope of protection clearly states:

"The provisions of part II cover the whole of the populations of the countries in conflict..."

However, this definition attained clarification and extension in the Additional Protocol I. Article 50 defines a civilian as any person who does not belong to the armed forces. In case of any doubt, such person should be regarded as a civilian. Further, civilian population comprises all persons who are civilians. It is also worth mention that the protection of civilians during armed conflict also extends to civilian property.60

Correlatively, civilians also have obligations that they must observe to ensure their protection. In particular, since they are not party to the hostilities, civilians are proscribed from participation in hostilities. It is candidly noted: "As "non-combatants", civilians may therefore not take part in hostilities. Any civilians who do so must reckon with the loss of protection and the use of force against them. Yet they retain their status as civilians."61

Moreover, in international armed conflicts, it is provided that to protect the civilian population as a whole, safety zones may be set up with the consent of all parties.62 Under Article 64 of the Additional Protocol I, the powers of the Occupying Power to enact penal legislation are limited

60 Numerous Articles in both the Fourth Geneva Convention and the Additional Protocol I concern the restriction of means and methods of warfare to military objectives with the exclusion of civilian objectives including civilian property. Articles 49, 51, 52, 54, 56 and 17, of Protocol I and Convention IV respectively are examples.

61 An Introduction, supra note 54 at 40.
to areas that constitute a threat to it. Otherwise, the penal legislation of the occupied territory remains in force.

1:03:2:3 Combatants:

In principle, IHL is basically hinged on two basic concepts - protected person and combatant.63 Article 43 (2) of Additional Protocol I defines combatants as:

"Members of the armed forces of a party to conflict (other than medical personnel and chaplains covered by Article 33 of the Third Convention) are combatants, that is to say, they have the right to participate directly in hostilities."

Being the principal actors during hostilities, combatants are mainly charged with duties and responsibilities that, if followed, would ensure compliance with the IHL overriding principle - the right of the parties to the conflict to chose means and methods of warfare is not unlimited. Important to note too, combatants have the right to directly participate in hostilities. It is emphasized:

"[T]he combatant and - only the combatant- is and will be allowed to fight. He is allowed to use force, even to kill, and will not be personally held for his acts, as he would be were he to do the same thing as a normal citizen. But the combatant does not have a free hand, ... the means and methods by which he may wage war are limited by international law".64

In addition to the above, perfidy as a means of warfare is prohibited vide Article 37 of Additional Protocol I.65 Thus, combatants must observe a minimum of honesty.

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62 Articles 14, 15, 59 and 60 of Protocol I.
63 An introduction, supra note 54 at 24.
64 Ibid. It should, however, be kept in mind that only troops of independent sovereigns qualify for combatant status. Dissidents, or whichever the name used, are not covered by the provisions of IHL that relate to combatants.
65 Under Articles 38,39, 40, 41, 42, of Additional Protocol I, all forms of conduct capable of misleading the enemy soldiers such as use of unauthorized signs like the Red Cross or any other recognized protective signs or threats intended to mislead the enemy are prohibited.
However, prior to an assessment of these concepts and their application in the contemporary armed conflicts, it is worthwhile to analyze the recent developments in IHL in response to the changing trends in armed conflicts. In particular, the extension of IHL beyond international wars deserves appreciation.

1:03:3 Extension of IHL to internal Armed Conflicts

War is war. No matter what description one gives it- be it international or internal or internationalized internal- death, despair, hopelessness, hatred, but also villages and cities in ruins are the common consequences. Similarly, the needs of the victims of war- the combatants as well as those placed hors de combat, and the civilians- are all the same irrespective of the description one chooses. For these realities, it is deserving that; IHL- the only branch of law presently known to apply to armed conflicts and, though formally and initially developed for international wars, should also be applicable to all armed conflicts- regardless of their description. For a system of law that developed with the particular purpose of mitigating suffering in war, this development does not only make it more normative, realistic and organic but also less utopian. However, difficulties are bound.

The process of extending the application of IHL to internal armed conflicts is not a new one. By 1949 at the conclusion of the Geneva Conventions, it is evident this development was accorded some consideration. Common Article 3 to the Four Geneva Conventions, in its preamble, states:

"In the case of armed conflict not of an international character occurring in the territory of one the High Contracting Parties, each party to the conflict shall be bound to apply...."
The Article then enlists the principal categories of protection and persons to be protected. These, in internal armed conflicts, include members of the armed forces who have laid down their arms, civilians and the wounded and sick. In its conclusion, the Article states:

"The parties to the conflict should further endeavour, to bring into force by means of special agreements, all or part of the other provisions of the Convention." And, "The application of the preceding provision shall not affect the legal status of the parties to the conflict".

Unlike international armed conflicts/wars, it was only this article, general as it is, that was specifically and exclusively directed to the application of IHL in internal armed conflicts. Moreover, as earlier observed, it was the first time IHL application to non-State armed conflicts/wars attained recognition among States. According to Gasser, which conclusion I share too, this bold inroad into State Sovereignty with their acceptance required special justification. As he observes, the justification for this novel development lay in two grounds: "First of all, States have certainly realized that unbridled violence and murderous weapons cause just as much injury in civil war as in conflicts between States." He continues: "A further explanation is the enormous progress... of the idea of human rights... International human rights law "interferes" quite consciously and deliberately in the internal affairs of States." However, for about three decades since 1949, compliance continued and, indeed, continues to be elusive. The difference between the aspiration and realization has more or less only widened.

Partly due to its generality, implementation of the article continued to fall far short of reasonable expectations. Consequently, Additional Protocol II followed as a supplement in 1977. Yet, about

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66 An Introduction, supra note 54 at 67.
three decades ever-since its enactment, it still remains highly questionable how much progress, if any at all, the protocol has caused. The most interesting thing to note about this development is not only the delay with which the inroad has been made but the nature too. In particular, unlike Additional Protocol I that was negotiated and concluded about the same time, Additional Protocol II is still so generally drafted that it is almost impossible to fully comprehend and apply.

But, this is perhaps hardly surprising. A look at the events that surrounded the enactment of the Protocol reveals such astounding hypocrisy that anything to the contrary in its implementation could, perhaps, have been surprising. Literally indeed, as shall be seen, States still remarkably demonstrate lack of genuine commitment to the development a legal regime that truly emphasizes focus on the individual more than political considerations. It is extensively noted:

"This Protocol had a strange fate. During several years of discussion and negotiations - ... a protocol was hammered out to be presented to the plenary of the Diplomatic Conference, which met in May 1977. The Draft Protocol, as it emerged out of the committees, had many weaknesses and omissions compared to the ICRC draft, but it nevertheless represented considerable steps forward. But then the sudden and unexpected thing happened, at the end of May 1977, that an alternative text was introduced in the plenary and adopted with only small modifications. This text, ... and it contained serious amputations of the committee draft protocol. The text negotiated at committee level was to a large extent eliminated. In some cases, this was done by the consensus not to press the given article of the committee draft to a vote, in other cases by votes where a so-called "gentlemen's agreement" had been formed to prevent the necessary two-thirds majority for the committee draft text. In many cases, not even a simple majority for the committee draft was obtained."  

67 Apparently, as the facts of the DRC armed conflict show together with the fresh memories of the events in Cambodia, Sierra Leone, Rwanda and Yugoslavia did show in the just ended decade, it is only evident that the tragic consequences of armed conflicts- especially of internal nature- have only worsened.
The crossroads

That IHL is applicable to non-State armed conflicts, as shown above, is not subject to any debate. However, equally vivid and indisputable is the fact that its actual implementation and the realization of its objectives in that respect remains far from achieved. A number of factors- both conceptual and practical- may be held accountable for this contrast between the rules, as they appear in the treaties, and their practicality/compliance. Conceptually, the inapplicability of the concept of combatant to such conflicts deserves attention. Similarly, the difficulty in the applicability of the justifications for the proscription of infliction of further injury to fallen soldiers/fighters in non-State armed conflicts also deserves examination. The practical constraints mainly relate to the utopian and general and imprecise nature of the applicable provisions of the law.

In the preceding discussion, it was shown that IHL hinges on two principle concepts- combatant and protection (protected person). Thus, to achieve protection, the law makes limitations on the powers of combatants without necessarily endangering them or undermining their cause. That way, IHL is able to mitigate human suffering during war while at the same time distancing itself from meddling in the justification or otherwise of the war or, in other words, the innocence or blameworthiness of either of the parties (The law of Peace). Consequently, IHL ensures that unless found in breach of humanitarian norms, belligerents are not subject to prosecution for engaging in hostilities per se.

In principle, thus, a combatant is offered two options while on the frontline- either to continue fighting (and reckon with the consequences) or to surrender whether voluntarily or as a result of being wounded (and be entitled to PoW status protection). It is thus highly arguable that, under such

conditions, chances of combatants getting desperate are remarkably minimized and the likelihood of their compliance with the law highly raised.

Accordingly, the issue that requires attention presently is; what becomes of IHL without one of these two principle concepts on which it hinges?

To fairly appreciate the relevance of this question, as far as internal armed conflicts are concerned, it is important to appreciate the conditions that affect the other side- dissidents- too. It is specifically submitted that in all countries allover the world, taking up arms against any government is considered treasonable- a capital offence at that. It is thus arguable that, in absence of special arrangements, all dissident forces who fall in the hands of government soldiers are subject to prosecution and, on conviction, liable to suffer death or life imprisonment- it being a capital offence. How easy, indeed, could it be for any person faced with such options to comply with rules that may as well lead to the same?

It should particularly be remembered that compliance with IHL greatly calls for constraint in the conduct of hostilities. Sometimes, the test may be so high that one's own safety is at stake. The following hypothetical illustration may help to elicit this point further.

While on the frontline, a group of dissident soldiers (troops) consider escaping from the continually thundering artillery fire from the government side. The direction they wish to take has a few civilian buildings that have generally been deserted. However, as they near these structures, they hear some sounds from these structures but can not figure out which kind of people may still be in there. Thus, immediately, they must decide on what to do. Apparently, as any one could figure out, their options-

if they are options at all- are not many. Thus, they could move back to the frontline and possibly succumb to superior fire from the government side. They could, alternatively, surrender and be taken for prosecution which might only mean lawful execution. Or they would have to choose between destroying the structures and proceed with their escape or, just take the risk of passing through the structures and be arrested or meet their creator if there are government troops.

It might not be easy for one seated in an air-conditioned glamorous conference hall to appreciate what these choices mean for such a dissident. It would, thus, not be surprising that it will be easy for lawyers and human rights activists to, on the basis of the law, argue that the acceptable answer is anything except the destruction of the structures and whoever may be in there. However, what such voices seem to forget is that in so arguing, they actually ask the dissident to choose what kind of death he/she would prefer. As could be ascertained from the foregoing illustration, beyond compromising their lives, there is actually no choice to destruction of the structures' civilians.

However, a government soldier would have had a completely different range of options to consider. Put in the same position, IHL guarantees protection for government troops as combatants. In principle, thus, one would simply surrender and thereby save the 'civilians' without necessarily compromising his life. This notion that insurgents should be expected to play by the rules which are so tilted that compliance with them (such rules) only benefits their adversaries while it worsens their situation calls for special justification. Besides, whereas the status argument may merit some

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69 Article 50 of Additional Protocol I clearly states that, in case of any doubt as to whether any person is a civilian, that person shall be considered to be a civilian.

70 Should it turn out that in consequence of trying to save the structures and the 'civilians' in there they are arrested, for the States with the death sentence as part of its laws, the fate of such dissidents is not debatable. For the ones without the death sentence, it might as well be life imprisonment.

71 I, of course, appreciate the fact that insurgents sometimes prefer to execute the government troops that they take hold of. But, this may as well be viewed as a consequence of the situation they are subjected to under IHL.
recognition in some situations—such as in democratic States—it is particularly difficult to make the same proposition in undemocratic countries where legitimacy is not even certain.\textsuperscript{72}

It is a foundational principle of IHL that belligerents are treated equally irrespective of their contribution or responsibility for the outbreak of hostilities. That continues to be the justification for the maintenance of the distinction between \textit{ius in bello} and \textit{ius ad bellum}. Indeed, as the following quotation attests, this has been and continues to be the principle. It is noted:

"IHL has therefore to be respected independent of any argument of \textit{ius ad bellum} and has to be completely distinguished from \textit{ius in bello}. Any past, present and future theory of just war only concerns \textit{ius ad bellum} and cannot justify.... That those fighting a just war have more rights or less obligations under IHL than those fighting an unjust war."\textsuperscript{73}

It is accordingly concluded:

"This complete separation between \textit{ius ad bellum} and \textit{ius in bello} implies that IHL whenever there is de facto an armed conflict, however that conflict can be qualified under \textit{ius ad bellum}, and that no \textit{ius ad bellum} arguments may be used in interpreting IHL; it also, however, implies, for the drafting of rules of IHL, that they may not render the \textit{ius ad bellum} impossible to be implemented, e.g., render efficient self defense impossible."\textsuperscript{74}

Yet, what other than suggesting that dissidents are never justified in their cause could be extrapolated from the application of the concept of combatant to the government side and its denial to the dissidents?\textsuperscript{75} It is only a common fact— one that could never have escaped the draftsmen of

\textsuperscript{72} Moreover, legitimacy as between the government side and the dissidents is sometimes a contentious matter. For instance, how is the Kinshasa government's claim to legitimacy as against that of the dissidents' resolved?

\textsuperscript{73} Sassoli, supra note 53, at 84.

\textsuperscript{74} Ibid 85.

\textsuperscript{75} Quite conceivably, it may also be argued that the disparity is based on the difference in status and powers between the governments and dissidents. However, such an argument, which I have no doubt finds its roots in the concept of State Sovereignty, has very little relevance in some of the armed conflicts that especially rock the third world. As the DRC conflict clearly shows, on what basis would the Kinshasa government lay any claim to State Sovereignty? In the first place, none of the sides has a better claim to legitimacy—both being based on military might as opposed to the will of the people. Secondly, both sides have as much power in the respective areas/territories they control. Thirdly, though with varying degrees, both sides are recognized in diplomatic dealings concerning the DRC— as
IHL applicable to internal armed conflicts- that any legal system that fosters disparity only breeds contempt for the law and leads to its eventual disregard. Not only does it create despair but it also breeds vengeance. It is thus scarcely surprising that such armed conflicts have turned out to be more vicious that the more sophisticated internal wars that are governed by a much better balanced legal regime.

The anachronism of this system is best demonstrated by what actually happens in the real world. It is noted: "Major difficulties usually arise with regard to the status of captured insurgents. The ICRC seeks pragmatic ways in which to ensure that the treatment of captives will meet humanitarian standards."\(^\text{76}\) He then suggests: "[o]ne solution would be to treat captured rebels as if they were prisoners of war, without giving them *de jure* prisoner-of-war status."\(^\text{77}\)

In close connection to the status argument, it is also important to consider the applicability of underlying philosophy in the development of IHL to internal armed conflicts. The underlying rationale, the precursors of present-day international humanitarian law, was articulated by Jean-Jacques Rousseau in 1762, thus: "war is in no way a relationship of man with man but a relationship between States, in which individuals are only enemies by accident, not as men, but as soldiers."\(^\text{78}\)

Quite elaborately this (Rousseau's) philosophy has been expounded:

"... [T]he purpose of a bellicose attack may never be to destroy the enemy physically. In so doing, he lays the foundation for the distinction to be made between members of a fighting force, the combatants, on the one hand, and the remaining citizens of the enemy State, the civilians not participating in the conflict, on the other. The use of force is epitomized by the negotiations and signing of the Lusaka Peace Agreement. Thus, in countries where democratic governance is highly lacking, the justification for one side to punish the other for remains remarkably wanting.\(^\text{76}\) An Introduction, supra 54 at 77. Incidentally, as he indicates, treatment of dissidents as prisoners-of-war is not what necessarily happens but it is just a proposal. As a matter of fact, most States still subject fallen insurgents to domestic prosecution.\(^\text{77}\) Ibid.\(^\text{78}\) Jean-Jacques Rousseau, A Treatise on the Social Contract, Book 1, Chap. IV. Also cited in An Introduction, supra 54 at 7.
permitted only against the former, since the purpose of war is to overcome enemy armed forces, not to destroy an enemy nation. But force may be used against individual soldiers only so long as they put up resistance. Any soldier laying down his arms or obliged to do so because of injury, is no longer an enemy and may therefore, ... no longer be the target of a military operation. It is in this case pointless to take revenge on a simple soldier, as he can not be held responsible for the conflict."79

How is this reasoning applicable to internal armed conflicts where, as it often happens to be, the government soldiers find themselves in war, to use Rousseau's word, only by accident against the dissidents to whom such word can not be said to apply? Unlike in international wars where the reasons for waging war are determined by the government, factors that make individuals to pick up arms against their governments are varied- sometimes very personal. As Gasser notes, "the causes of such conflicts are manifold; often, however, it is the non-observance of the rights of minorities or of other human rights by dictatorial regime that gives rise to the breakdown of peace within the State."80

Therefore, if the reason the disabled soldier should be treated humanely in international wars is because he is involved in the hostilities only accidentally, what is the place of that philosophy in internal armed conflicts where the insurgents are personally and deliberately involved? Thus, whereas the material conditions that appertain in non- State wars demand extension of IHL to such situations, the rationale and conceptual structure of IHL poses profound difficulties. Accordingly, whereas there are similarities in the practical and moral arguments to be made between internal and international armed conflicts, but for conceptual reasons, it is remarkably questionable how far IHL may be able to provide an answer in absence of a more fundamental transformation81 in the entire discipline. This is especially true as far as voluntary individual compliance is concerned.82

79 Ibid. at 7-8.
80 Ibid. p.67.
81 It should specifically be noted that to ensure parity between belligerents in internal armed conflicts, States would be required to dispense with their right and powers to prosecute dissidents- an argument which has multifarious implications on the entire discipline of international law. For instance, it would imply a more formal recognition of
Yet, conceptual complications aside, there are glaring practical difficulties apparent in the provisions of the law. In this analysis, a few of the IHL provisions applicable in internal armed conflicts shall be considered. Thus, an assessment of the provisions of the applicable treaties—especially Additional Protocol II—will be examined.

Article 6 of the Protocol provides for penal prosecutions. Whereas it is not expressly stated as to whom the obligations therein are addressed, systematic and logical construction would only lead to the conclusion that it is intended for and addressed to the belligerents—the government and dissident forces in a given armed conflict. Thus, the treaty requires that dissident forces, just like the government, must ensure minimum humanitarian standards— in particular rule of law— in the territories/areas under their control. In this pursuit, it is implicit that the two sides ought to enjoy equal powers in the respective areas under their control— at least as far as IHL implementation and compliance is concerned. This however should still be viewed in light of Article 3 common to the four Geneva Conventions that provides that "the application of the preceding provisions shall not affect the legal status of the Parties to the conflict."

However, the upshot of this argument completely becomes meaningless at a practical level. To confer prosecutorial powers on the dissident forces presupposes recognition of their entire judicial process. In essence, it particularly implies that the government side ought to be willing to recognize the judgements handed out by the given dissident groups. I simply do not see governments that, to
begin with, find serious difficulty in acknowledging the existence of internal wars moving so far as to recognize the decisions of entities whose very existence is disputed.83.

Noteworthy too, the situational threshold of IHL in internal armed conflicts remains to be ascertained. According to some scholars, "[T]he only criteria here should be the intensity of the conflict and the need for protection of its victims."84 However, with regard to scope, Article I of Protocol II, in part, states that the Protocol:

"... shall apply to all 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...".

Thus, what, in particular, constitutes control? Is it a question of time, size of territory being controlled or does it have to be actual or ostensible? Incidentally, it not enough to categorize armed conflicts as either non-State or inter-State. For, especially with respect to non-State armed conflicts, the mode of war also calls for attention especially with regard to delimitation of the requisite scope of IHL application. It will be remembered, for instance, that a good amount of internal armed conflicts nowadays are fought as guerilla wars with bases in foreign territories.85

Moreover, the increasing blur between non-State and inter-State armed conflicts raises more practical concerns. In particular, this confusion tends to create very easy ways of avoiding the constraining effects of IHL on belligerents. However, as will shortly be demonstrated, this

abnormal context in which these events occur, there is every reason to make the law more balanced and meaningful for all the parties whose compliance is required.

83 For instance, for over fifteen years, Uganda has been involved in civil wars with forces (Lord's Resistance Army) she continually refers to as bandits and terrorist. Thus, the idea of armed conflict is thereby consequently defeated.

84 An Introduction supra, at 23.
difficulty is particularly reflected as a consequence of the absence of equal protection to belligerents depending on entities concerned. Thus, it could still be argued out as being a consequence of the selective application of combatant status.

Ordinarily, the legal position respecting different parties to such armed conflicts could be stated as follows:

"-between the government and the insurgents, Article 3 and Protocol II apply; - between the government and a third party State intervening on the side of the insurgents, the law relating to international conflicts becomes applicable; - between the third party State intervening on the government side and the insurgents, Article 3 and Protocol II apply; between States intervening on both sides, the law relating to international armed conflicts must be observed."\(^{85}\)

Simple and clear as this may seem, its practical applicability is, on the contrary far from simple. In particular, such conflicts only worsen the controversies in the law and make it the less applicable. Conceivably, the distinctions that it tends to draw between forces that otherwise view each other as equals/partners only makes the law to seem more mechanical, anachronistic and totally utopian. The ludicrousness of this interpretation is that, as regards the government and the foreign troops on the government side, their fate in case of being captured, largely, depends on luck. If they are captured by the government (foreign) troops on the dissident side, they qualify for prisoner-of-war status. While, if they are unfortunate to be taken by dissident forces, they are subject to the uncertainties that characterize the application of IHL to internal armed conflicts (as shown above). Equally possible, their placement may highly depend on the intention and desire of the 'allies' into whose hands they fall. Thus, if the involved governments (with greater obligations under international law) wish to avoid responsibility for 'desired' crimes, they would

\(^{85}\) For instance, as Uganda and Rwanda argue to justify their involvement in the DRC war, the dissident forces against their governments do operate from the DRC where they have bases. Similarly, for instance, the Lord's Resistance Army (a dissident group fighting the Uganda government since 1987) has its base in Sudan.
simply have to circumvent the law by executing the same through their partners- insurgents - whose status and obligations (except as individuals\textsuperscript{87}) under international law is quite unsettled.

Similarly, while the foreign forces fighting together with dissidents (and conduct the war as partners to the rebel forces) benefit from prisoner of war status, their counterparts- the dissidents- remain fated to be governed by the ambiguous and less protective rules of Additional Protocol II and common Article 3.

Thus, by far and large, the application of IHL in internal armed conflicts may only be realistic with regard to the civilian population. This, however, also remains debatable given the methods of warfare usually employed- such as guerrilla warfare.\textsuperscript{88} Besides, the development of IHL from the civilian perspective constitutes a novel phenomenon. Not only is such an approach utopian and unrealistic but it also stands in clear contradiction and congruence with the development of IHL itself.\textsuperscript{89} Ordinary, protection ought to commence with the protection of belligerents. Absent of this, it sounds illogical to expect a desperate belligerent to exercise any restraint in the course of his or her engagement especially if his/her own life is at stake. In a situation where capture almost directly translates into death, to require a dissident to exercise restraint- even for the safety of civilians- simply sounds utopian.\textsuperscript{90}

\textsuperscript{86} An Introduction, supra 54 at 77.
\textsuperscript{87} For more on individual responsibility, please see chapter three- infra.
\textsuperscript{88} In such instance, the blur between civilians and belligerents naturally increases the susceptibility of civilians to fall victims of IHL violations.
\textsuperscript{89} IHL initially focussed on the mitigation of the suffering of the soldiers placed \textit{hors de combat} and prisoners of war. It is, indeed, not by accident that the rules dealing with the protection of civilians during war as developed in the fourth Geneva Convention and Protocol I were preceded by the rules regarding the protection of prisoners of war and the wounded, sick and ship wrecked members of the armed forces. While that is not to argue that the rules relating to civilian protection are in any way inferior to the others, it is important to remember that soldiers are just as human beings as any one of us. Dissident forces are just as forces as the term could be used. It will thus make very little sense to them if their fate is considered not only secondary but also inferior to that of their counterparts- the government troops.
In principle, while humanity deserves paramount recognition and respect, be it in war, the process for the achievement of that end, it must be remembered, can not be conducted as though it were in the abstract. It is, in particular, very vital to reconcile the goals with both the conceptual structure of the intended remedy (IHL) and the contextual realities. In essence, without significant changes in the structure of international law at large and IHL in particular—the notion of State sovereignty being at the core— IHL in internal armed conflicts will remain a dream. It is of utmost importance in this search to redefine or establish which aspects of State Sovereignty can be shared for the sake of humanity without, if possible, practically dismantling the entire concept.

1:04 International human rights law (IHR):

International human rights law relates to those rights that are drawn from the International Bill of Rights. The Bill of rights is constituted by the norms and rules enshrined in the: Universal Declaration of Human Rights [hereinafter referred to as UDHR], International Covenant on Civil and Political Rights [hereinafter referred to as ICCPR] and the International Covenant on the Economic Social and Cultural Rights [hereinafter referred to as ICESCR]91. However, other multilateral treaties as well as resolutions or declarations with a more limited or focussed subject than the aforementioned have also grown out of the United Nations. This category develops further the content of rights that are more tersely described in the two covenants or, in some cases, which escape mention in them.92

90 See more on this issue in the third chapter.
Thus, broadly speaking, other than being part of international customary law fundamental international human rights are also treaty-based. Their enforcement is, therefore, subject to the principles that govern both treaty-based and international customary law. In principle and generally, compliance and respect for international law is primarily based on good faith. The doctrine of *pacta sunt servanda* [every treaty in force is binding upon the parties to it and must be performed by them in good faith\(^93\)] is quite uncontroversial on this issue. In the same manner but to a greater extent, compliance with norms of customary international law is the obligation of every State irrespective of the existence of any treaty or being Party.

Yet, a close examination of the conduct of States reveals appalling results. For instance, the DRC as well as the rest of the other countries commission of the heinous crimes, in the instant conflict under discussion, are States-Parties to most of the international human rights treaties and the Geneva Conventions.\(^94\) It is particularly important to note that such violations as torture, disappearances, extra-judicial executions, genocide, targeting of civilians, destruction and exploitation of means of livelihood and obstruction of humanitarian assistance are indeed violations of customary international law.\(^95\) Besides, they are non-derogatory and part of *jus cogens* and, they are obligations *erga omnes*. Above all, they constitute the violation of the professed purpose of the United Nations Organization. Thus: “to achieve international cooperation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and fundamental freedom for all….”\(^96\) Thus, though quite distinct, the main focus of both human rights and humanitarian

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\(^92\) Ibid.


\(^95\) Restatement (Third) The Foreign Relations Law of the United States, in Alston, supra note 91, at p. 233. Also see p. 1211 for the authority that war crimes and atrocities as part of international customary law are crimes of universal jurisdiction.

\(^96\) Article 1(3) of the UN Charter.
law is respect for human integrity. And, as earlier noted, the application of human rights law to war times is but a recent development in international law.

The paradox, however, remains that States are more comfortable with the human rights categorization and application than the humanitarian one- be it in armed conflict situations, while humanitarian activists deem it better to invoke humanitarian law. This could perhaps be due to the historical development of the two branches of international law. As earlier shown, IHL was initially developed to apply to war. Thus its application usually tends to be linked to the existence and acknowledgement of war- a situation which could justify increased interference from without. It is articulated:

"Any international interest in events taking place inside soon encounters a major obstacle, which is the attitude of governments that internal problems are to be excluded from outside interference. At stake is the meaning of a State's Sovereignty within the international community... The assertion that international humanitarian law should be made applicable to internal armed conflicts is a bold one. It calls for special justification."

The next chapter specifically examines the existing mechanisms for the implementation of IHL and human rights law. In particular, the 'Protecting Power' as well as the other important mechanisms are analyzed. National implementation measures are also considered.

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97 An Introduction, supra note 54 at 67.
98 McCOUBREY, supra, note 18, p.5-8.
99 An introduction, supra note 54 at 67.
Chapter II

IHL and IHR implementation mechanisms

2:00 Introduction:

Though at the risk of sounding tautological, it should be kept in mind that the main focus of this thesis is the violations of the fundamental norms of international human rights and humanitarian law in internationalized internal armed conflicts. The DRC conflict is mainly treated as a case study in the search for compliance, a problem that happens to take enormous proportion of the troubles facing the international community. As Aldrich rightly observes: "the central problem confronting international humanitarian law today is the problem of compliance-how Nation States and the members of armed forces that those states send into combat, can be brought to comply with the law throughout the course of military operations." And, he rightly concludes: "This is central because compliance in practice continues to fall far short of reasonable expectations..."100

Ironically, it is generally contended that the law itself is not only adequately developed but also widely accepted. Thus:

"The legal protection for the sick and wounded, prisoners of war, ship wrecked and civilians in armed conflict is extensive, detailed and widely accepted. The 1949 Geneva Conventions comprise of 450 treaty articles and the 1977 Protocols add another 130. There are more than 160 States Parties to the 1949 Conventions, slightly more than 100 to additional Protocol I and nearly 100 to Additional Protocol II."101

100 H. G. Aldrich, "Compliance with the law: Problems and prospects" in Fox and Meyer, supra note 38 at 3.
101 Ibid.
It is further noted: "[a]t present, international humanitarian law has reached a degree of development which can be qualified as adequate. This holds true in particular for the substantive rules i.e. for those rules which prohibit certain acts or enjoin specific behaviour."  

But, it is justifiably questioned:

"Yet who would deny that civilians have suffered tremendously in the many wars which have occurred since 1945, that captives of all sorts have been severely abused under tyrannical regimes or by uncontrolled individuals and that through acts of warfare not only have human lives and property been destroyed but also hope and belief in a better world have been shattered?"  

Indeed, as it is noted, "many of these horrors could have been avoided if existing humanitarian law had been respected by all sides."

This striking contrast between the richness of the law and its failure to address its focus has prompted similar criticism from other scholars. Aldrich who equally agrees that the law in books is adequate though anaemic in practice comments: "... such anaemia could well prove fatal, as widespread non-compliance tends to bring the law itself into disrepute. No wonder Lauterpacht had this to say: "If international law is in some ways, at the vanishing point of law, the law of war is, perhaps even more conspicuously, at the vanishing point of international law." 

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102 Ensuring Respect supra note 38 at p.16.
103 ibid.
104 ibid.
105 Aldrich, supra, note 100 at p.4.
For over half a century, if the law so well developed and widely accepted continues to present such a bleak future, the inevitable question to ask turns out to be: what and where is the problem? It is part of my project in this thesis and particularly in this part to explore this challenging question. My way of exploration will be by analysis of the major implementation mechanisms.

Noteworthy too, by necessary implication, the assessment of humanitarian law will also include the applicable international human rights law. This is mainly as a consequence of the fading distinction (in some instances) between the two branches of law. It is indeed noted: "[t]here is manifestly a significant degree of convergence between the concerns of international humanitarian law and those of the international law of human rights. However, the precise nature of interface between these two sectors is a more controversial question." Present developments in the codification of the law also speak to this conclusion. It is observed:

"From their inception, the law relating to human rights and the laws of war, evolved along different lines, the former being primarily concerned with the relationship between states and their own nationals in times of peace, and the latter being primarily concerned with the treatment of enemy persons in time of war. However, the distinction between the two areas began to be blurred. On the one hand, the provisions of the 1949 Geneva Conventions came to be seen as embodying individual rights of protected person; and on the other hand, certain human rights conventions included provisions for at least their partial application in times of war. Certain provisions of the two 1977 Geneva Protocols (for example, Article 75 of Protocol I and Article 6 of Protocol II) are directly derived from the 1966 International Covenant on Civil and Political Rights."  

In the following pages, an examination of the implementation mechanisms is undertaken. The activities of international Non Government Organizations including the ICRC are, though highly recognized in their contribution to the protection and promotion of the rights at issue, not

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107 Maccoubrey supra note 18 p.5
considered in this text. This is mainly because they are not subject to the concepts that affect the implementation of the law.

2:01 International implementation mechanisms

2:01:1 The Protecting Power:

The system of protecting power is recognized by all the four Geneva Conventions of 1949. Pictet defines a protecting power as: "... a State instructed by another State (known as the Power of Origin) to safeguard its interests and those of its nationals in relation to a Third State (known as the State of Residence)." The 1977 Geneva Protocol vide article 2(c), for the purposes of the Protocol, offers the following definition: "Protecting Power’ means a neutral or other State not a Party to the conflict which has been designated by a Party to the conflict and accepted by the adverse Party and has agreed to carry out the functions assigned to a Protecting Power under the Conventions and this Protocol."

Extensively, Roberts provides a summary of the activities of a Protecting Power. In particular, the 1949 Geneva Convention IV makes extensive provision for Protecting Powers to look after the interests of civilians, including in occupied territory. Such powers include: a general duty to protect the interests of parties to the conflict, lending their good offices in cases of disagreement either about the interpretation of the Convention, its application, facilitation of

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109 Convention I, articles 8-11; Conventions II and III, articles 8 and 11 and Convention IV, articles 9 and 12.
111 Article 9.
112 Art. 12, see also art. 52.
the establishment of hospital and safety zones and localities,\textsuperscript{113} required to be informed of any transfers or evacuations in or from occupied territory,\textsuperscript{114} ability to verify the state of food and medical supplies in occupied territories,\textsuperscript{115} must be informed of all charges instituted by the occupant against protected persons involving the death penalty or sentences of two years or more and they have various other rights and duties as regards legal proceedings\textsuperscript{116}. Further, the Protecting Power can supervise the distribution of collective relief shipment to internees\textsuperscript{117} just as they can go to all places where protected persons are, particularly to places of internment, detention and work.\textsuperscript{118}

However, as earlier pointed out, after the Second World War, dramatic changes took place in the nature of wars and by 1960s, efforts to effect necessary amendments to the 1949 four Geneva Conventions had gained momentum. It is noted:

"After the adoption of the four 1949 Geneva Conventions, developments in the character of warfare led to the growing realization that the laws of war required further adaptation to the conditions of contemporary hostilities. For example many armed conflicts occurring in the decades after the Second World War were regarded, at least by some, as non-international in character and hence the need arose to further clarify the application of the law in such conflicts.\textsuperscript{119}"

This movement led to the birth of the two Additional Protocols of 1977 to the four Geneva Conventions of 1949. The focus and relation of these protocols is clearly stated: "...the conference formally adopted the two Protocols Additional to the Geneva Conventions..., addressing respectively international and non international armed conflicts. According to their

\textsuperscript{113} Art. 14.
\textsuperscript{114} Art. 49.
\textsuperscript{115} Art. 55.
\textsuperscript{116} Arts. 71,74 and 75.
\textsuperscript{117} Art. 109.
\textsuperscript{118} Art. 143. Also see, Roberts Adams, ibid. p.33. He also notes that other organization other than States such as the ICRC may serve as a Protecting Power.
\textsuperscript{119} Roberts and Guelff, supra note 108 at 419.
titles as well as their terms, the Protocols supplement rather than replace the 1949 Geneva Conventions.\textsuperscript{120}

Additional Protocol one further enlists numerous detailed provisions the subject of which is a Protecting Power.\textsuperscript{121}

However, as the preceding discussion has apparently shown, Protecting Power is restricted to international armed conflicts. The guiding principal for its scope of application is found in Article 2 common to the four Geneva Conventions of 1949. The Article clearly states:

"In addition to the provisions which shall be implemented in peace time, the present convention shall apply to all cases of declared war or of any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognized by one of them. The Convention shall also apply to all cases of partial or total occupation of the territory of a High Contracting Party, even if the state of war is not recognized by one of them."

The remaining part of the article covers a situation where one of the parties to the armed conflict is or may not be party to the Convention and, I find it completely impertinent to the present discussion since all the States involved in the DRC armed conflict are parties.\textsuperscript{122}

Despite the fact that all the parties to this conflict are High Contracting Parties to the Geneva Conventions, the conflict continues without a Protecting Power. It is however, reasonably, not unexpected and scarcely surprising. Whereas the idea is a noble one, it is highly impracticable. Its reliance on diplomacy between warring States let alone the difficulties posed by the blur in the classification of most contemporary armed conflicts are factors enough to render its

\textsuperscript{120} ibid.
\textsuperscript{121} see arts; 5, 6, 11(6), 33(3), 45, 60(2), 70(3) and 78(1).
\textsuperscript{122} UNESCO Supra n. 94.
application and effectiveness, if ever, exceedingly wanting. No wonder, indeed, in a period of over fifty years, despite the multiplicity of armed conflicts involving States, the system is remembered to have been employed only twice. It is recalled: "…but the system has not been a success in practice. It had only been used twice in Suez and Goa affairs of 1956 and 1971 respectively."\textsuperscript{123}

Part of the complications that dog the system have been articulated by Pictet thus: "It will be seen at once that the activities of a protecting power are dependent on two arguments: the first between the Power of Origin and the Protecting Power and the second between the Protecting Power and the State of Residence."\textsuperscript{124} Elaborately, Shaw further explains:

"The drawback of this system is its dependence upon the consent of the parties involved. Not only must the Protecting Power be prepared to act in that capacity, but both the State of which the protected person is a national and the State holding such persons must give their consent for the system to operate. Since the role is so central to the enforcement and working of humanitarian law, it is a disadvantage for it to be subject to State sovereignty and consent. It only requires the holding State to refuse its co-operation for this structure of implementation to be greatly weakened leaving only reliance upon voluntary operations."\textsuperscript{125}

Yet the nature of the armed conflict under examination poses further complications to the possible successful application of the system. The armed conflict in question is far from what was envisaged in article 2 common to the four Geneva Convention and to which the System of Protecting Power was designed and intended to apply. The mere fact that foreign troops have joined forces with dissident forces not only seriously complicates this issue but equally renders the applicability of the system close to impossible. Ideologically, if the High Contracting Parties involved were to respect this system, chances that the 'marriage' with the dissident forces would

\textsuperscript{123} Detter, supra n.23 at p.370.  
\textsuperscript{124} Cited by A. Roberts, supra n.37 at 32.  
\textsuperscript{125} Shaw, supra n.21 p 738-9.
collapse begs of no doubt. To argue otherwise would be to suggest the unlikely and unthinkable—that the Congolese dissident forces should being mere agents of the foreign forces. While that may, _de facto_, be true or possible, history has it that all dissident forces, even as they further foreign interests, find it inevitable to feign patriotism. Thus, since the relevant provisions regarding the Protecting Power system have no concern for non-State parties to an armed conflict, there would be no basis for such forces to honor such arrangements except as puppets of the foreign forces—the very impression they must fight or at least be seen to do so. This tension inevitably makes it harder for the involved foreign States to accept the Protecting Power system.

Further to that, the mere fact that the States involved have developing economies only further compounds the issue since their survival instincts, necessarily, dictate in favor of these coalitions. For instance, despite repeated clashes between the Ugandan and Rwandan troops as well as the rebel factions, efforts have always been made to ensure continuity of the coalition among themselves—it is the only way of avoiding being flashed out.

Moreover, by its very nature, the system of Protecting Power necessarily operates on the principle of a consensus between the warring sides. Not only should they agree to the Protecting Power, but they must, though implicitly, also be agreeable on the existence of an armed conflict between them. This is yet another issue that affects the conflict presently under consideration. While DRC authorities allege that the Ugandan and Rwandan forces are fighting deep into their territory, the Ugandan and Rwanda authorities insist that their forces are only operating in areas close to their boarders. They also insist that they are not fighting the DRC government but the dissident forces attacking their respective territories that are operating from the DRC. The effect of this kind of arguments on the implementation of the Protecting Power system was once encountered in the Vietnam War. It is recalled:
"The US government and its military command in Vietnam facilitated the activities of the ICRC in observing the treatment of prisoners held by the South Vietnamese, but Hanoi never accepted the ICRC as its Protecting Power, in the South, partly, of course, because it refused at that time to admit that its forces were involved in the South and it never permitted the ICRC to function in any way in the North."126

The Additional Protocol I attempted to address this issue. The problem was, however, not fully addressed as the following observation clearly demonstrates:

"This problem was addressed during the negotiations of Additional Protocol I, and some improvements were achieved, but they were limited. Article 5 of the Protocol reaffirms the duty of the Parties to a conflict to designate and accept a Protecting Power for each such Party and to permit it to function as foreseen in the Conventions (paragraphs 1 and 5)."127

Thus the law still does not prescribe the ICRC or any other body as an automatic fall back in case no Protecting Power is put in place. On the other hand, consensus continues to prove hard to secure.

Some attempts to make use of the Protecting Power system in the instant conflict have been made. Under article II-Security Concerns- of the Lusaka Peace Agreement vide sub-article 9, it is apparent that the ICRC was charged with some of the tasks of a Protecting Power. It reads:

"The parties shall allow immediate and unhindered access to International Committee of the Red Cross (ICRC) and Red Crescent for the purpose of arranging the release of Prisoners of War and other persons detained as a result of the war as well as the recovery of the dead and the treatment for the wounded."

126 Aldrich, supra, n.58 at p. 11.
127 Ibid.
However, as earlier observed, the Peace Agreement only seems to have been successful at satisfying the ceremony of signing as its implementation continues to be a matter of speculation.

Quite apparently, the foregoing discussion is a manifestation of the impact of the classification of armed conflicts and the doctrine of State Sovereignty in the protection and promotion of both international human rights and IHL. While the system of Protecting Powers continues to relate to States only, it highly falls short of meeting the challenges posed in the contemporary types of armed conflicts. Similarly, for as long as it continues to pay a lot of deference to the Sovereignty of States involved in armed conflicts by requiring their consent as a prerequisite to its application, the Protecting Power mechanism will continue to be of little use-if any- at all. There is therefore a need to readdress the structure of the system of Protecting Power in view of the nature of contemporary armed conflicts. As Dettter argues, "... By reason of equality of belligerence, nations and movements fighting for independence (liberation) are also bound (by rules of the law of war)."\textsuperscript{128} The up short of this argument is, however, that States, in a bid to safeguard their sovereignty as usual, fear that any such admission would give such groups an undeserved 'standing' which could endanger the security of States.\textsuperscript{129}

With regard to the difficulty of the choice of a Protecting Power between warring States, it is proposed, the power of every State to withhold its consent should be further limited. After all, the argument that IHL norms are non derogatory and, \textit{erga omnes}, should, as Gasser observes, mean that no State can choose when to respect them and the entire world community has a duty to see them observed.\textsuperscript{130}

\textsuperscript{128} Dettter, supra, note 23 p.439. In brackets mine.
\textsuperscript{129} Ibid.
\textsuperscript{130} supra n.60 at p.20 and 21.
The special nature of the rules under discussion here is stated: "... the commitment binding States to humanitarian law treaties appears to be stronger than that relating to ordinary treaties of international law. Consequently, compliance with such treaties must be ensured by institutional measures which go beyond the ordinary procedures to guarantee the fulfillment of international obligations." It is against this background that State sovereignty, at least as far as the non derogatory and *erga omnes* rules under present discussion are concerned, should be redefined and limited to a degree that promotes, and not hinders, the protection of these rights and norms.

2:01:2 INTERNATIONAL FACT-FINDING/INVESTIGATIONS

The range of institutions and organs involved in fact-finding missions are numerous. However, for purposes of this text, three of them deserve special consideration namely: (a) the International Fact-Finding Commission, (b) the United Nations *ad hoc* fact-finding committees/mechanisms and (c) the Human Rights Commission and its 'special rapporteurs'.

2:01:2:1 The International Fact-Finding Commission

Article 90 of the 1977 Geneva Protocol I provides for the establishment of a permanent International Fact-Finding Commission to:

"(I) enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violations of the Conventions or this Protocol;" and,

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131 Ibid p.18.
(ii) facilitate, through its good offices, the restoration of an attitude of respect for the
Conventions and this Protocol.”

While Article 90(1) (b) stipulates that the Commission would be established when twenty
members agree to its competence. On 20 November, Canada filed its declaration and thereby
marked the commencement of the procedure that led to the election of the Commission in June
1991. While it is probably too early to pass judgment on the Commission, some pessimism
is already being expressed. Justifiably, it is remarked: “As experience with the Geneva
Conventions has shown, the mere existence of a fact-finding commission does not mean that it
will be used. The challenge is there. It remains to be seen whether States will rise to meet it.”

Indeed, three years after its establishment, the Commission was yet to be put into use. A number
of reasons, none of which seems likely to find a solution any sooner, have been raised to account
for this ugly beginning. Rather rhetorically, Roberts asks: “Why, in its three years of existence,
has use not been made of the International Fact-Finding Commission?” Rather unsurprisingly,
the old problem of international law- Sovereignty- still provides the answer: “One part of the
problem is the continuing reluctance of many states to make a declaration accepting its
competence.” There is, however, a more fundamental problem, namely:

“...the reluctance of States, including those that have accepted the Commission’s
competence, to invoke its services in view of the fact it may have to deal with issues
as sensitive as the applicability of the Conventions, and the characterization of
particular acts as “grave breaches” or “serious violations.” Besides, the
commission can only make recommendations as opposed to decisions.”

132 Hampson Francoise, Fact-finding and the International Fact-Finding Commission, in Fox and Meyer supra n. 29 at p.53.
133 ibid, p.82, also quoted in Roberts Adam, supra n.49, at p.36.
134 Roberts, ibid,
135 ibid.
136 Detter, supra n.23, at p.732.
Thus, in a nutshell, like most treaty organs, the Commission's effectiveness will greatly depend on the good will of the member States. The same old problem of dealing with State sovereignty is apparent in this mechanism. History, on the other hand, clearly teaches that the violator States are rarely willing to honor their international obligations even under the very treaties they are party to. Thus, there is every reason to be pessimistic about the effectiveness of just another treaty organ. The future does not promise much either. The list of problems is only on the increase. For instance, conflicting with similar bodies, loss of appeal, credibility and relevance are but a few to be mention. As though to write it off, the UN Security Council has established ad hoc mechanisms for investigating and taking action regarding violations, most notably, in connection with the wars in former Yugoslavia and Rwanda. The very violations the commission could have been expected to deal with.

2:01:2:2 The UN ad hoc mechanism:

Whereas it is conceded that this mechanism, to some extent, is bound to undermine the operations of the International Humanitarian Fact-Finding Commission (IHFFC), it is nevertheless a highly commendable step. The mechanism has the desired potential of operating with little reliance on the consent/sovereignty of a given State. It is a timely development in the movement for the universal recognition of humanitarian law and human rights. The faster State sovereignty lost some of its sacred position, the sooner the victims of atrocious regimes may hope for rescue and humanity may attain its supreme position.

\footnote{ibid p. 36-37.}
Though criticisms may be made against both of these systems, maintaining both of them may create a ‘propping’ mechanism whereby the weaknesses of one are countered by the strengths of the other. For instance, unlike the IHFFC, the ad hoc mechanism is free from, above all, the ‘chains’ and ‘fangs’ of sovereignty.

The comparative advantages of the *ad hoc* mechanism over the IHFFC have been enumerated, thus:

“It is not necessary for individual states to initiate the process; states or other entities can be investigated irrespective of whether they have accepted the competence of the Commission; the relevant body of law can be identified separately in each instance; and can thus be appropriate to the particular conflict and the facts alleged, the range of problems and situations which can be investigated is therefore greater, since it is not limited to clear cases of international armed conflict; there are fewer obstacles to publication of the outcome of the investigation; and the fact-finding process can be linked to action in form of prosecutions.”[138]

Bold steps against the concept of State Sovereignty are gaining momentum. Not long ago, the UN Secretary General, Dr. Boutros Boutros-Ghali boldly warned:

“[i]t is now increasingly felt that the principle of non-interference with essential domestic jurisdiction of States can not be regarded as a protective barrier behind which human rights could be massively or systematically violated without impunity. The fact that in diverse situations, the United Nations has not been able to prevent atrocities, can not be cited as an argument, legal or moral, against the necessary corrective action, especially when peace is threatened, the case for not impinging on the sovereignty, territorial integrity and independence of States is by itself indubitably wrong. But it would be weakened if it were to carry the implication that sovereignty, even in this day and age, includes the right of mass slaughter or of launching systematic campaigns of decimation or massive exodus.”[139]

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[138] Ibid.

[139] Ibid.
In approval of this development, it is noted: “[a]fter a long period of inability to act, the Security Council has seemingly become the master of collective security and apparently is about to take over, step by step, the responsibility for the administration of humanitarian law. The future will show how the Security Council will cope with its responsibilities.”

Yet, what does this optimism have to do with the specter in the DRC? How many more must die before these beautiful words merit implementation? Or, were they the curses of a duck against the eagle that grabbed its ducklings? Here below is yet another mechanism and its application in the DRC.

2:01:2:3 The Human Rights Commission and its ‘special rapporteurs’

As earlier observed, the distinction between human rights and humanitarian law is increasingly becoming blurred and thence the concern about and the implementation of one, especially during armed conflicts, necessarily involves the other. Indeed, as the name suggests, the primary concern of the UN Commission is the protection of human rights. However, as Gasser rightly observes: “suffice it to say that the Human Rights Commission has often referred to humanitarian law in its consideration of the state of human rights in a given country, in particular in a country shaken by internal strife”. This ‘line-crossing” in the protection of human rights law and IHL continues to attract support among scholars.

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140 Adams [footnotes omitted], supra n. 49 at 37.
141 Ensuring Respect supra not 38 at p.40.
Broadly speaking, there are three different procedures used by the Commission to address violations. Notably these are:

“(1) confidential consideration of a situation under 1503 procedure; (2) public debate under the 1235 procedure, which may lead to the appointment of a special rapporteur of the commission, a special representative of the Secretary-General or some other designated group or individual to investigate the situation; (3) and the designation of a ‘thematic’ rapporteur or working group to consider violations anywhere relating to a specific theme (such as torture, disappearance or arbitrary detention).”\(^{143}\)

In the instant project, regard shall mainly be had to the use of rapporteurs in fact finding. The UN Commission has been involved in the examination of the human rights and humanitarian law situations in a number of different countries. For instance in: Afghanistan, Iraq, Kuwait, Lebanon and the DRC to mention but a few.\(^{144}\) While greatly viewed as being ineffective, the UN Commission is, on the other hand, also said to have a remarkable contribution to the promotion of respect for both human rights and international humanitarian law. It is argued:

"Debates on...countries have served as incentives to better respect for international humanitarian law and of course human rights law...Their (rapporteur’s) recommendations are also instrumental in promoting humanitarian law and human right, law as various reports on Afghanistan, Iraq, Kuwait and El Salvador clearly show. In another method, the commission has established working groups or appointed special rapporteurs for discussing special areas, such as torture, disappearance of persons or extra-judicial killings. Their findings have also contributed to better respect for international standards during civil war."\(^{145}\)

The critics however contend that the UN Commission is remarkably wanting in its promotion of human rights as well as humanitarian law. A few factors are held accountable for its poor performance, among others, the duplication of procedures and thus insensitivity to different demands by different situations deserves mention. It is duly observed:

\(^{142}\) Also see ibid.
\(^{143}\) Alston, supra n. 91 at p.611.
\(^{144}\) see ibid.
"...the system has grown like 'topsy' and the boundaries between the different organs are often only poorly delineated. For the most part this pattern has hardly been accidental. Rather, it is the inevitable result of a variety of actors seeking to achieve diverse, and perhaps sometimes even irreconcilable, objectives within the same overall institutional framework."146

It is further illustrated:

"In principle each of [the above-named] procedures is relatively distinct from the others in terms of its origin, the nature of its mandate, the steps to be followed and the types of outcome available. In practice there is considerable overlap. It is conceivable that different aspects of a particular situation would be under review by all three procedures at the same time. Moreover, the same situation might be considered simultaneously by one or more of the treaty bodies (such as the ICCPR Human Rights Committee or the Committee Against Torture)."147

Additionally, the system has been infiltrated by political schemers and opportunists whose main objectives are not to curb violations but to divert the system from checking violations in their own governments. This selfishness and hypocrisy has rightly been exposed:

"[The various UN special procedures] add up to an increasingly effective and professional human rights system...Recently, however, many of these same abusive governments have taken steps aimed at weakening this machinery...First they have competed for election to the commission, where they form powerful voting blocs...In one procedural trick after another, the abuser governments have tried to limit what can be investigated, where and how investigations are undertaken and who receive the results. They have also sought to delay public reporting of findings, downgrade the relevance of conclusions reached by experts and raise domestic law as a shield against intrusion...But the aim is simply to ensure that the UN does not develop the capacity to investigate, report publicly or respond effectively to stop violations."148

It is, indeed, no wonder that whereas the substantive law generally regarding international human rights law as well as IHL is adequately developed, its implementation, does not only seem
selective but it also still remains very poor. UN members are engaged in double standards. On this note, it has rightly been observed:

“For individuals whose human rights are being violated, and for groups that seek to defend them, the effectiveness of the UN’s human rights system depends to an important degree upon its ability to ‘enforce’ respect for the legal norms that originated within it. But the very concept of such international ‘enforcement’ is controversial and resisted by a significant number of governments (a few of which do so overtly, while many others use more subtle methods...it is therefore not surprising that the UN’s often hotly contested efforts to establish institutions and procedures capable of securing enforcement have been less successful than its work in setting human rights standards, often consensually.”\textsuperscript{149}

Whereas, as a Charter based organ, the UN Commission should have the mandate to investigate violations in any part of the member states, the truth, going by the foregoing revelation, is that it can only do so selectively. It is consequently not surprising that the seriousness with which the international community deals with violations in any given part of the world is determined by considerations other than the concern for the plight of the victims.

Yet again, the mechanism suffers another setback from the implicit requirement of consent of the government/forces concerned. Being a non-treaty creation but rather Charter based, one would surely have expected its operation to be based on UN membership and not consent. However, incidentally the reverse is true. This has been clearly demonstrated in the DRC conflict. Thus:

“The authorities who took over the government on 17 May 1997 have refused to cooperate with the Special Rapporteur of the Commission of Human Rights, the joint mission established pursuant to Commission resolution1997/58 and the Investigative Team of the United Nations Secretary-General set up on 15 July, the Special

\textsuperscript{148} Ibid. p. 695.
\textsuperscript{149} Ibid p. 592. I find this reasoning entirely applicable to the developments in humanitarian law-the protecting power mechanism being a clear case in the point.
Rapporteur requested the Government of the Democratic Republic of Congo to allow him to visit the country in August... He never received a reply.↵

Further developments in the DRC indicate that even if the UN Commission attempted to carry out its activities without seeking the consent of the government of the country in question, that government could still, quite easily and with impunity, frustrate the progress and results of such activities. For instance, just like the DRC government once did, that is achievable by simply harassing the witnesses. It is reported:

"On 17 April 1998, the Secretary-General withdrew the Investigative Team, which he had established in July 1997 to investigate complaints of atrocities in the Eastern part of the country, because of the "total lack of cooperation" on part of the Congolese authorities, who "had harassed and intimidated witnesses who had testified before the investigators"... The Office of the High Commissioner considered this a serious setback in the battle against impunity."”

Conclusively, the role of investigation mechanisms by the international community in the promotion and protection of international human rights and humanitarian law are still a long way to go in meeting their goal. In principle, deference to State sovereignty still plays a role here too. While it could have been thought that the ad hoc UN mechanism were capable of undermining the doctrine and thus making some progress, the Congo experience points in the opposite direction. Just like the other fact finding mechanisms, such as the Fact-Finding Commission and the rapporteur system, it is evident that it is almost impossible to conduct any successful investigations in a sovereign State without its cooperation. While it is true that the doctrine of State Sovereignty has suffered some battering in last few decades, the State still retains immense capacity to interfere with investigations and hence influence the outcome. Harassment of

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151 Ibid paragraph 7.
witnesses, as was the case in the instant case study, is just one of the many options at the disposal of the State. The others to think of could include restriction of access to either places or documents such as in the Iraq case. While such measures as the imposition of economic sanctions may be employed, in retaliation, by the international community, their effectiveness is still debatable. Noteworthy too, the UN system is embarrassingly wanting in its transparency and genuineness in the struggle for protection of the norms at issue. The tension between nationalistic and international interests remains a reality.

2:02 National implementation mechanisms

"... the laws of war are implemented largely through the medium of individual countries. It is usually through their government decisions, laws, courts and courts-martial, commissions of inquiry, military manuals, rules of engagement, and training and educational systems, that the provisions of international law have a bearing on the conduct of armed forces and individuals."\textsuperscript{152}

While the above quotation is absolutely justified, the question that remains to be resolved is how much can national systems be relied on in the protection and promotion of international norms? This question becomes the more deserving if the violations at issue, as in the present case, are in accord with the national policy of the States involved.\textsuperscript{153} Indeed, if States were keen to enforce violations of the laws of war and international human rights, there would probably have been no urge for the establishment of an international criminal court. Similarly there could have been very little justification for the establishment of the international criminal tribunals such as the ICTY and ICTR. Chances that any government will diligently undertake to prosecute its nationals (especially troops) for the violations of the laws of war, whichever way, largely

\textsuperscript{152} Adam, supra n.49, p.10.
depends on the relationship between the government in power at the point of such violations and its successor. For instance, while the Hutu regime (whose policy was in accord with the elimination of the Tutsi) was in power, there was never any attempt to hold the perpetrators of the past genocide accountable. This continued unabated until it culminated into the most devastating genocide that the world witnessed in 1994. Similarly, whereas there is evidence suggesting that some Tutsis were also involved in the commission of some war crimes in the 1994 genocide, so far records only show that the Hutu members are being prosecuted. Yugoslavia and Iraq offer other useful examples too.

Dissemination constitutes to be one of the most effective mechanisms in the promotion and protection of the law of war. This implies training troops and civilians, in peace-time, to respect the law of war and understand that its violation is punishable and is internationally outlawed. While this may seem like the most effective mode of promotion and protection of the law of war since it promotes individual responsibility, the extent to which it can be achieved is reason for increased pessimism. Illustrating its importance in the promotion of the law of war, Aldrich extensively notes:

"International humanitarian law binds both States and individuals and compliance with that law depends in the real sense upon both. We have all heard of the violation of the law by individuals- for example, the soldier or group soldiers who, whether in

153 This is evident in the Lusaka Peace Agreement by the parties involved whereby it is recognized that there is deliberate orchestration of genocide and other war crimes by the parties involved.
154 C. M. Christina, "An assessment of the role and effectiveness of the ICTR and the Rwanda National justice system in dealing with the mass atrocities of 1994" (2000) in the Boston International law Journal, 163. It is noted that in 1959, 1963, 1966 & 1973, interethnic massacres occurred but no one was prosecuted or even held accountable.
155 Ibid, p. 185. Whereas there are no details of the composition of suspects in the domestic system of Rwanda, it is unlikely that the Tutsis, especially those ones who could have committed the crimes in support of the incumbent regime, are also being prosecuted.
156 It would indeed be more or less miraculous for one to expect a person like Sadam (Iraq) and Slobodan (Yugoslavia) who are themselves material for prosecution to attempt to ensure a system that holds violators of the laws of war and international human rights accountable in their respective countries. Actually, whereas Sadam is not, Slobodan is already an indictee of the ICTY for war crimes.
panic or rage, deliberately kills civilian non-combatants, or prisoners of war or the civilian non-combatant who becomes a terrorist and a murderer... Such individual behaviour may result from ignorance of the law... 

He, however, also vividly articulates the problem of investing in this mechanism, thus:

"Even States whose governments fully intend to comply with the law may fall short in the dissemination of the law... For example, how much instruction in the law of war is given in the British educational system? In the United States I know that I was never taught anything about the law in my schools or university... To the best of my knowledge, most countries are not dramatically better in this regard." 

It is thus evident that the capacity of domestic mechanisms to better the implementation regime of the law of war and international human rights is subject to so many limitations. In the absence of democratic governance and rule of law, as is usual in most countries involved in the violation of the law of war and international human rights, the law of war and international human rights is bound to continue to suffer serious set backs in its implementation. Further, poor dissemination by most governments continues to deal another serious blow to the movement for the respect of the law.

All in all, whether at the international or national level, the prevention mechanisms for the violation of humanitarian and human rights law continues to fall far short of the expected standard! At the international level, the mix up in the nature of contemporary armed conflicts (between international and civil ones) has added to the challenges and huddles posed by the doctrine of State sovereignty. While at the national level, lack of a system of rule of law coupled with ignorance of the law, take responsibility. While this chapter was dedicated to ante

\(^{157}\) Aldrich, supra n.100 at p. 4.
(preventive/proactive) mechanisms, the next one attempts to address post (retrospective) measures. In particular criminal prosecutions are considered.

Ibid. Actually it would be very surprising to expect better compliance in this regard among the developing countries with limited resources, poor military training and very notorious human rights and humanitarian law protection records.
Chapter III: Criminal prosecutions for violation of humanitarian and human rights law:

3.00 Introduction:

The foregoing chapter has attempted to show that the international community and more specifically the United Nations has, in hard cases like the instant one, reached a dilemma in the prevention of gross violation of international human rights and international humanitarian law. This is specifically largely true with regard to the traditional mechanisms. Over two million people massacred and over five million others as the victims of violations of their fundamental rights with yet many more to be added onto the list as the armed conflict rages on, is but a clear testimony to this. Can retrospective measures provide better hope?

A new norm and mechanism is in emerging. It is increasingly becoming clear that, unlike in the past when only States would be held accountable for IHL and fundamental human rights violations, a new rule of international law imposing individual responsibility for these violations is seriously taking roots. The establishment of international criminal tribunals and the present campaign for the establishment of an international criminal court with jurisdiction to prosecute and punish individuals for international crimes vividly attests to this assertion.

159 Dr. Lyal S. Sunga; Individual Responsibility in International Law for Serious Human Rights Violation (Boston: Nijhoff, 1992) [introduction] p.1 where he argues that a new rule of international law imposing individual
Prosecutions in international law

International law as traditionally known could never have been thought of as entailing individual criminal responsibility in the manner it is conceived presently, thus, irrespective of the consent of the State concerned. A simplified but classical definition helps to demonstrate this point:

"International law is the body of rules of conduct, enforceable by external sanction, which confer rights and impose obligations primarily, though not exclusively, upon sovereign States and which owe their validity both to the consent of States as expressed in custom and treaties and to the fact of the existence of the international community of States and individuals."\(^{160}\)

It is thus arguable that if early scholars like Austin had ever contemplated such a development as criminal prosecutions and sanctions, probably their pessimism about it, as a system of law, could have been remarkably altered. In principle, the emergence of international prosecutions against individuals is not only novel but; it is also bound to entirely transform the jurisprudence of international law as a whole.

The earlier criticisms made against the jurisprudence of international law deserve mention. In his analysis, John Austin regarded it as 'law improperly so called'. Not only did he contend in his 'command', 'duty' and 'sanction' theory that international law lacks the requisite command structure but also that it is wanting in the regime of sanctions\(^{161}\). This criticism did not pass without a following in legal scholarship and not without grounds. Lauterpatch, one of the

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\(^{161}\) For more on this read lectures I & V by Austin John, The Province of Jurisprudence Determined, (Rumble Ed.) 1995.
distinguished contemporary international law scholars, made this point no less clear. Commenting on Austin's deduction, he notes:

"All these elements of the definition of international law are controversial. It is a matter of dispute whether it may properly be described as law in the sense generally accepted in jurisprudence; whether its rules extend to bodies and persons other than States;... Although it is generally accepted that international law is enforceable by physical compulsion, the precariousness and uncertainty of its enforcement have caused many to question, on that account, its claim to be considered as law in the proper sense of that term."\(^{162}\)

Prior to the Nuremberg Trials, international law was mainly perceived as being enforceable only against States— they being the only true subjects of international law then.\(^{163}\) Indeed, one of the defenses raised during the trials was that the accused were acting as agents of their States and thus could not be held liable under the doctrine of Sovereign immunity. Establishing a new development, the Court respectfully responded: "crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced."\(^{164}\)

Since then, the ICTR constitutes the second international criminal tribunal, after the one for the former Yugoslavia (ICTY), to try individuals for international crimes as the campaign for an International Criminal Court [ICC], for which these tribunals are setting a background, advances. Some scholars, and with sound reasons too, have applauded this development while they also make some caution.

A timely caution on the ICC and the entire development in the process of criminal prosecutions in international law has been offered, thus:

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\(^{162}\) Lauterpatch, Supra, n. 160.

\(^{163}\) This is no more. Presently, the subjects of international law include corporations and individuals.
"The opportunity to create an international court that provides fair, equitable and efficient justice is rare and important... Problems are serious however. Failure to address the formidable problems could cause the court to run a risk of failure that could be disastrous for international law, for the victims of the horrors that have occurred and that will occur, and for the world. Failure could come in at least two forms: (1) the court could merely be a conduit for retribution after a pro-forma "kangaroo court"; or (2) it will not have sufficient funding or expertise to prosecute fairly, justly and efficiently..."\(^\text{165}\)

The impact of such an absurdity on international law would be unquestionably thunderous to the entire discipline as it is duly observed:

"International law may be disparaged as meaningless. The victims of the horrific violations of the laws of humanity will have to live with the knowledge that the perpetrators, who flaunted the laws of humanity in the most cruel ways walk free... The cause of justice and international law or the cause of an international court could be set back badly."\(^\text{166}\)

On the other hand, the relevance of prosecutions and the criterion for their preference is equally increasingly becoming contentious. Specifically, it is contended that prosecution, in some contexts, may not be the appropriate remedy for the gross violations of IHL and fundamental human rights. Considered against prosecutions include such mechanisms as: amnesty and truth and reconciliation commissions.

3:02 Prosecutions versus other mechanisms

On the one hand, it is argued that prosecutions for international crimes of a massive scale ought to be considered with due regard to the context (social geography) in which they were

\(^{164}\) Sunga, supra, note 159 at 38


\(^{166}\) Ibid.
committed. Thus, as some scholars note, "[t]he social geography of a post genocidal society should affect the choice of policies implemented to redress the genocide." To this end, it is argued that other mechanisms such as amnesty, truth commissions and mechanisms designed to achieve restorative justice should be considered and, where need be, preferred to prosecutions.

In the same connection, Hannah Arendt, in support of amnesty and forgiveness observes:

"forgiveness releases us from the consequences of what we have done. Without forgiveness, our capacity to act would, as it were, be confined to one single deed from which we could never recover; we would remain the victims of its consequences for ever, not unlike the sorcerer's apprentice who lacked the magic formula to break the spell. Forgiveness offers a form of freedom, for only through this constant mutual release can men remain free agents."

Although postgenocidal societies may take different forms, the DRC society is best described by what Drumbl terms a pluralist postgenocidal society. "Here", he defines, "the oppressor group continues to coexist with a victim group and a third group; or there are several victims or oppressors who must coexist within the same territory or plitv." This is true given the fact that unlike dualist postgenocidal societies such as Rwanda where only two groups- the Tutsi and Hutu were involved, in the DRC conflict, there are foreign forces, and different local groups. For instance, there are Hutus, Nayamulenge (identified with the Tutsis), the Hema, Lendu and Mai Mai to mention but a few.

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167 M. A. Drumbl, "Scelerosis: Retributive justice and the Rwandan Genocide" (2000) 2 Punishment and Society, 287 at 288. Also generally see his other article; "Punishment, Postgenocide: from Guilt to Shame to Civis in Rwanda, 5 NYLR 2000 at 1221. [hereafter referred to as 'Scelerosis and Postgenocide respectively]

168 In both articles he argues that international criminal prosecutions may only be necessary in homogeneous and pluralist postgenocidal societies but not in dualist ones. In any case, he also argues that criminal prosecutions are not mutually exclusive to the alternative mechanisms such as truth commissions and amnesty and as such, both mechanisms should be considered complementary to each other. This is, however, in clear contrast with the other school of thought that only considers criminal prosecutions as the only appropriate remedy for crimes against humanity and war crimes.

On the choice of the appropriate mechanism in the redress/remedy of atrocities of a massive nature in such societies, it is stated: "Pluralist postgenocidal societies, like their counterparts, need to be especially sensitive to the consequences of implementing the rule of law." The advocates of this approach insist that this is in conformity with the political realities and needs of such communities.

On the other hand, other scholars insist that once committed, the best and most suitable remedy for the violation of international norms is international criminal prosecution. Cassese while disputing the validity and necessity of the alternative mechanisms observes that forgiving and forgetting war crimes and crimes against humanity is a futility at both a moral and practical level. At the moral level, he quotes:

"Within the framework of the prevalent moral amnesty granted to murderers, all those who were deported, executed or massacred, have none but us to think of them, we would complete their extermination; they would be definitively annihilated ... Those who have vanished forever now exist on through us in the devoted faithfulness of our memory; were we to forget them ..., they would simply cease to be. Should we even begin to forget the ghetto fighters, they would be murdered the second time."

He continues; "on a practical level, forgetting crimes against humanity and war crimes is, in any event a fiction- in fact, massacres and 'disappearances' are never forgotten ... The memory always lingers, and- if nothing is done to remedy the injustice- festers."
Different reasons are adduced in support of international prosecutions for violation of international law. Quite vividly, it is submitted:

"Punishment strongly reaffirms the rule of law and the norms that protect human rights. Even if liberal legal institutions are not yet in place, the very aspiration to seek punishment can sometimes summon them into existence... Punishment clearly separates a newly democratic government from the abuses of its predecessor. It restores to victims a sense of "dignity" and worth, thereby preempting the tendency of victims to seek their own revenge. Punishment separates "collective guilt from individual guilt," thus breaking seemingly endless cycles of group recrimination. It functions as an "effective insurance against future repression."

Moreover, while such scholars as Drumbl advance that the social geography of a postgenocidal society ought to be the informing factor for the type of remedy to be undertaken, the others maintain a different approach. In particular, Cassese states, *inter alia*, that factors that render prosecution impossible ought to be considered overriding in the deployment of other mechanisms. Commenting on the justification of the Truth and Reconciliation Commission in South Africa, he observes: "[t]he South African solution was predicated on the impossibility, or at least extreme difficulty of conducting prosecutions, given the secrecy and the deadly efficiency of the anti-apartheid abuses." He also argues that while such a solution may be acceptable in the South African context, mechanisms that fall short of prosecutions are not

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175 Cassses MLR supra, note 172 at 4. This conclusion is supported by the ruling by the South African Constitutional Court ruling in the Azania Peoples' case in which the Court ruled: "Much of what transpired in this shameful period is shrouded in secrecy and not easily capable of objective demonstration and proof ... Records are not easily accessible, witnesses are often unknown, dead, or unavailable or unwilling. ... The alternative to the grant of immunity from criminal prosecution of offenders is to keep intact the abstract right to such a prosecution for particular persons without the evidence to sustain the prosecution successfully, to continue to keep the dependents of such victims in many cases substantially ignorant about what precisely happened to their loved ones, to leave their yearning for the truth effectively unassuaged, to perpetuate their legitimate sense of resentment and grief and correspondingly to allow the culprits of such deeds to remain perhaps physically free but inhibited in their capacity to become active, full and creative members of the new order .... Both the victims and the culprits ... will hobble more than walk to the future with heavy and dragged steps, delaying and impeding a rapid and enthusiastic transition to the new society at the end of the bridge..." (with emphasis added)
appropriate for societies that are still riven by ethnic tensions and where the victims of genocide demand punishment. Thus:

"this medicine is inappropriate for a society which is still riven by, and built on, ethnic divisions and where the perpetrators of atrocities still preach the gospel of ethnic separation... or for a society such as that of Rwanda where ethnic hatred still persists and the victims of genocide, or their relatives, demand that the culprits be duly punished."\(^{176}\)

Though the methods of redress as well as the determinant factors remain manifestly controversial, context appears to merit utmost consideration. Though the advocates of non-legal measures are more emphatic on the relevance of context (both political and social), it is apparent, albeit lightly, that the advocates of prosecution equally recognize the importance and relevance of the appertaining political and social context. In particular, their recognition of the appropriateness of the South African truth and reconciliation commission, though considered as an exception, clearly speaks to this conclusion. Accordingly, how does the DRC situation affect these approaches? How ordinary or exceptional is it?

3:03 Propriety of prosecutions in the DRC

The armed conflict in the Democratic Republic of Congo, in some respects, shares a very close relationship with the Rwanda Genocide the world witnessed only seven years ago as it claimed close to a million lives in merely one hundred days.\(^{177}\) This relationship is clearly described:

"Operating out of refugee camps in the Democratic Republic of the Congo, in 1996 and 1997, former Rwandese Hutu militia groups entered the northwest section of

\(^{176}\) ibid.

\(^{177}\) Christina, supra 154 at 163.
Rwanda and organized ethnic attacks...Claiming that Rwandan security is in jeopardy, the Rwandan Patriotic Army ('RPA') launched a counter-offensive against these groups in the northwestern region of the country as well as in refugee camps in the Democratic Republic of the Congo.\textsuperscript{178}

The impact of this relationship on the remedial process in the DRC deserves attention. Not only are the violations of fundamental norms in the two countries similar but also, some of the suspects in the Rwanda genocide are equally involved in the DRC violations. The similarity in the atrocities committed is evident in the Lusaka Peace Agreement.\textsuperscript{179} It is particularly recognized:

"the acts of violence include; summary executions; torture; harassment; detention and execution of civilians based on their ethnic origin; propaganda inciting ethnic hatred; arming civilians; recruitment and use of child soldiers; sexual violence; training of terrorists; massacres; downing of civilian aircraft and bombing the civilian population."\textsuperscript{180}

With such profound similarities, interconnection and geographical proximity and, the fact that prosecutions have been preferred in Rwanda, what choice is there for the international as well as local actors in the DRC? This reality probably best explains, albeit vaguely, the preference for prosecutions in the Lusaka Peace Agreement. The Agreement specifically provides for:

"screening mass killers, perpetrators of crimes against humanity and other war criminals" and "handing over "genocidaires" to the International Crimes Tribunal for Rwanda."\textsuperscript{181}

However, the preference for criminal prosecutions in the DRC context calls for a second thought. The peculiarity of the armed conflict in the DRC poses increased challenges to transitional

\textsuperscript{178} Ibid at 186.
\textsuperscript{179} Also referred to as the DRC Cease-Fire Agreement. Signed amongst all the parties to the armed conflict including both the States involved, the DRC government and the rebel forces in Lusaka-the capital city of Zambia in July and August [respectively] in 1999.
\textsuperscript{180} Ibid, Article I (3) (c).
\textsuperscript{181} Ibid, chapter 8 art. 8.2.2 (B) & (C).
jurisprudence. The principle question one is confronted with while dealing with this conflict is how to reconcile justice with politics. Or, alternatively, how and where to draw the boundary between them.

Generally, the role of law in political transition remains a contentious one. Initially, the dilemma related to the conceptualization of the notion and concept of rule of law. In the postwar period, this constituted the crux of Anglo-American jurisprudential debate between the distinguished legal scholars of the time- Lon Fuller and H.L.A. Hart. As an advocate of legal positivism, Hart, in response to the Nazi prosecutions following the Second World War, argued that adherence to the rule of law included the recognition of the antecedent as valid. On the other hand, Fuller advanced that the rule of law meant breaking with the prior Nazi regime. 182

However, these arguments are criticized for their failure to address the distinctive problems of law in the transitional context. Specifically, Ruti notes:

"In the postwar period, this dilemma arose as to the extent of legal continuity with the Nazi regime: to what extent did the rule of law necessitate legal continuity? A transitional perspective on the postwar debate would clarify what is signified by the rule of law. That is, the content of the rule of law is justified in terms of distinctive conceptions of the nature of injustice of the prior repressive regime." 183

While the foregoing analysis is highly commendable, it ought to be noted that it is premised on certain presumptions that do not apply to the DRC and similar conflicts. The most cardinal of those presumptions is that the violations committed in such societies are institutionalized. For instance, under Nazi rule, the dehumanization of Jews was as institutional and, per se, lawful as the apartheid regime of South Africa with its racist laws.

However, it is not quite possible to make the same argument in light of such States as the DRC even though they may also be undergoing some form of political transition. This is true in the sense that, it can not be advanced that the atrocities being committed in the DRC and similar States with political strife are institutional in nature. Unlike in Rwanda, for instance, where the system was clearly discriminatory against the Tutsis which turned out to be the cause of political unrest thereby leading to the genocide and related crimes, the DRC case is, by large, quite different. While I do not purport to pass any judgement on the validity of the claims by the respective parties to the conflict, their conduct of the war tends to suggest that it may not be any more than power struggles and material ambition. Consequently, such systems deserve different approaches in the redress process than what may, generally, be referred to as transitional justice.

Indeed, save for the fact that the international community still recognizes the Kinshasa government as the lawful government in the DRC, the situation on the ground is so much like in Somalia. Like in Somalia, the DRC is split into various parts each under the direct and total control of different forces. The Kinshasa government shares with three rebel groups (Mission for the Liberation of Congo- MLC, RCD- Goma together with Rwandan forces and RCD-Kivu together with Ugandan forces. The conceptual and practical challenges posed by this political reality are discussed here below. Briefly, however, if the criminal prosecutions are to be considered, where does one begin in such political situations? What role can prosecutions play? How does the rationale of respect for humanity apply in such situations?

183 ibid. at 2020.
184 One particularly gets at a loss for a different conclusion if regard is had to how both the insurgents and governments on their side have kept conducting their campaign. For thee times, for instance. Uganda and Rwanda were engaged in direct hostilities - shamefully on the DRC territory. Similarly, power wrangles in the rebel camps have been the order of the day leading to incessant splits in their camps.
While the first question requires a practical appraisal of the practicality of criminal prosecutions, the latter two concern conceptual issues involved in the undertaking of such a project. I will, here below, begin with the assessment of the conceptual issues before embarking on the practical ones.

3:04 Criminal prosecutions in international law - Retribution or Utility?

Broadly speaking, there are two theories that attempt to account for punishment: retributive and utilitarian. The retributive view advances that punishment is an end in itself, is a right that in some sense balances out the wrong that has been done. This school of thought therefore suggests that justice requires punishment and hence the offender may be said to deserve his punishment.\(^{185}\) While the utilitarian view contends that punishment is not intrinsically right in itself but on the contrary, "since it involves the deliberate infliction of harm, is \textit{prena facie} wrong and can only be justified if it is likely to lead to some further good."\(^{186}\) It is further argued: "The mere fact that harm has been done by one man does not itself justify the doing of harm to him. Some further social end must be aimed at in order to justify the punishment."\(^{187}\) The social ends punishment may be inflicted to serve, it is submitted, include; deterrence-whether of the individual or of society at large ('general deterrence'), other methods of crime prevention and reform/rehabilitation.\(^{188}\)

\(^{186}\) ibid, p.9.
\(^{187}\) ibid.
\(^{188}\) ibid.
Whereas it may not be easy to tell which between the two theories is the main force behind any criminal system or particular sentence in a given case, the circumstances of a given system or case may render some guidance. With regard to the instant case, the objective of establishing the ICTR (being the court referred to in the Lusaka Peace Agreement) may be ascertained, to some extent, by paying regard to the events preceding its establishment. As the name suggests, the tribunal was originally specifically established in response to the Rwanda carnage of 1994 which was greatly blamed on a culture of impunity that had grown over decades. It is observed:

"Since 1959, no one had been punished for periodic collective massacres in Rwanda. Thus, a culture of impunity developed in which citizens do not feel obligated to a rule of law and do not have to fear retribution for their actions. At a Security Council meeting concerning the creation of the ICTR, Rwandan ambassador to the United Nations Manzi Bakuramutsa stated that "it is impossible to build a state of law and arrive at true national reconciliation if we do not eradicate the culture of impunity which has characterized our society." Thus, the ICTR was created to prosecute serious violations of international humanitarian law, to establish law and order, and thereby to contribute to the restoration and maintenance of peace and national reconciliation in Rwanda."\(^{189}\)

Against this background and considering the connection of the Congo catastrophe to the Rwanda Genocide, the resolution to prosecute perpetrators of similar egregious crimes in the region by none other than the States involved is a timely one. However, in light of the DRC context, the issue of who ought to be prosecuted and the justification for such prosecution stills remains to be addressed. While former will be addressed later in this chapter (see rule of law vs political reconstruction), the latter is hereby considered. In particular, what is the justification for international prosecutions?

A similar issue (regarding the purpose of punishment/prosecutions by the international courts system) was addressed by the ICTY in the Tadic case. Essentially, the defense had challenged

\(^{188}\) ibid. Also see Delgado R. 'Rotten social Background': Should the Criminal Law Recognize a Defence of Severe Environmental Degradation?" in 3 Law and Inequality, 9, 1985, p. 571 at 583-585.

\(^{189}\) Christina, supra, note 154 at 171-2.
the appropriateness of the prosecution of the defendant (Tadic) and the effectiveness of the mechanism in achieving its objective, the restoration of peace in the former Yugoslavia. In response, the court ruled: "It would be a total misconception of what are the criteria of legality and validity in law to test the legality of such measures ex post facto by their success or failure to achieve their ends..."\(^{190}\)

Overall, the exact capacity of international prosecutions in achieving the social goals remains uncertain and controversial. It is accordingly stated:

"Some advocates of a tribunal have focussed on the significance of prosecutions as a deterrent: both as a specific deterrence to those committed specific crimes... to make them stop; and as a general deterrent to others in other countries and at other times not to engage in such conduct. The extent to which punishment is a deterrent to ordinary crime is very debated though it is widely believed that the certainty and swiftness with which punishment follows the crime are as significant as the severity. One guesses that it is the same with crimes against humanity... the significance of what the tribunal achieves in deterring additional crimes against humanity is unlikely to be great."\(^{191}\)

Yet, even then, serious practical difficulties are bound. The possibility of free and fair investigations, time and competence of the ICTR and the danger of tearing the country (DRC) apart merit consideration.

**3.05 Some practical huddles: free and fair criminal prosecutions?**

Not only does a free and fair trial call for impartiality on the part of the judges, which I have no doubt the ICTR would satisfy, but also thorough and impartial investigations. In this case I am

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\(^{190}\) Cited in Sassoli, supra note 53 at p.1164.

\(^{191}\) Hesse and Post, supra note 169 at 49.
more concerned about the latter. It is quite evident from the foregoing part of this text that the some of the egregious crimes committed in the DRC are not spontaneous but a clear and systematic scheme undertaken by some of the parties to the conflict. The training and arming of civilians, as noted in the Lusaka Agreement, clearly speaks to this. The same parties have signed the Lusaka Peace Agreement that provides for prosecution of the persons involved in the commission of these atrocities. This resolution which is inevitably premised on the investigation of the parties calls for assessment.

What however has to be kept in mind is that most of the parties to this armed conflict are forces of foreign countries that are to be withdrawn as part of the implementation of the Peace Agreement. Who then, when and where will the investigation of these troops be conducted? How impartial can such investigations ever be in light of these facts?

The limitation of the ICTR in initiating prosecutions is quite clear and has indeed been articulated thus: "...having no police authority of its own, the ICTR operates at the whim of other countries to produce suspects for detention and trial. Under the ICTR statute, members of the United Nations are required to assist the tribunal in the arrest, detention, and transfer of the accused to the ICTR."192 Similarly, it must be remembered that investigations, that entail interrogation of various nationals [witnesses] and equally take a long period of time, necessarily require more of State cooperation and are thus serious conditioned on the whims of those States. Logically, a State that is bound to resist the arrest and detention of a suspect in its jurisdiction will definitely be more inclined to interfere with the investigations regarding that individual. A

192 Ibid 183.
State's capacity to interfere with UN investigations with impunity is well documented and the DRC authorities are a case in the point.\textsuperscript{193}

It is strongly arguable that the investigations into the Rwanda genocide are smoothly progressing because it is in the interest of the incumbent regime. There is otherwise no obligation on the Rwandan government to co-operate with the tribunal. Indeed, not long ago, this was once demonstrated thus:

"Rwanda severed diplomatic relations with the ICTR in November 1999 after the appeals chamber ordered the release of Jean-Bosco Barayagwiza, a director in the Foreign Ministry and the head of the radio station responsible for hate propaganda, because of procedural violations... This incident, however, illustrates that the Rwandan government could decide not to cooperate with the ICTR if it disagrees with its rulings."\textsuperscript{194}

Moreover, this is only mildly put. Rwanda's withdrawal of its cooperation is not limited to the disagreement on rulings-it could as well be any thing else.\textsuperscript{195}

Though the ICTR has jurisdiction to try all persons suspected of committing crimes against humanity and genocide, so far only the Hutus and of course mainly members of the deposed regime have been indicted. It was however established that even some Tutsis were involved in the commission of some of the crimes over which the tribunal has jurisdiction. It is stated:

"The Commission of Experts, established by the United Nations in 1994 to investigate crimes in Rwanda, concluded in their report that although they were unable to uncover any evidence that Tutsis had intended to destroy the Hutu ethnic group within the meaning of the Genocide Convention of 1948, there was overwhelming evidence to prove that Tutsis also committed crimes against humanity and serious violations of international humanitarian law. The ICTR, however, has

\textsuperscript{193} See fact finding mechanisms in chapter two above.

\textsuperscript{194} See Christina, supra n.154, p. 180-1

\textsuperscript{195} This is one other problem that is faced by the international criminal tribunals whose establishment is based on Security Council Resolutions and not any treaty to which a State can be said to be a State Party and thus, legally, regarded as being bound thereby.
only indicted and tried Hutu individuals charged with genocide and crimes against humanity perpetrated toward Tutsis."\(^{196}\)

It is thus too early to tell how the incumbent regime will respond when [hope it ever comes to be] it comes to time for the indictment of the Tutsis who were at the time acting in support of the incumbent regime and are probably part of the present government. That will be the test to tell whether this is yet another kind of "Victors' Justice."

Yet, the most unthinkable would be to require the respective States involved to prosecute their own nationals who could be suspected of committing international crimes. That would tantamount to failure to appreciate the long established role of precedent. The German conduct in 1919 should still be relatively fresh in our minds. Upon the conclusion of the First World War, the Allied Powers, in the Versailles Treaty, undertook to try persons accused of having committed acts in violation of the laws and customs of war. German made recognition of this right and was obliged to hand over German suspects to the Allied Powers for prosecution. However, in a dramatic move German pre-empted the allied plans by authorizing the Supreme Court of the Reich at Leipzig to try individuals for war crimes. The results of the prosecution speak for themselves:

"The net result of the trials was that out of a total of 901 cases of revolting crimes brought before the Leipzig Court, 888 accused were acquitted or summarily dismissed, and only 13 ended in a conviction; furthermore, although the sentences were so inadequate, those who had been convicted were not even made to serve their sentence. Several escaped and the prison warders who had engineered their escape were publicly congratulated."\(^{197}\)

If national systems are so unreliable, shall the ICTR attend to the prayers of the victims for justice? Is there any reason to be optimistic about the end of a culture of impunity in the region  

\(^{196}\) Christina Supra n. 154, p. 185
and establishment of one of compliance with the law-accountability? Save for the vague indications in the Lusaka Peace Agreement, as it will be seen below, there is probably no cause for excitement.

3.06 ICTR for the DRC?

"In November 1994, the United Nations Security Council adopted Resolution 955 creating the ICTR for the prosecution of "persons responsible for serious violations of international humanitarian law committed in the territory of Rwanda and Rwandan citizens responsible for such violations committed in the territory of neighbouring States, between 1 January 1994 and 31 December 1994."¹⁹⁸

In contrast to the ICTY, she further notes: "However, compared to the temporal jurisdiction of the ICTY, the ICTR's temporal jurisdiction is narrow in scope. The ICTY has the power to prosecute all persons responsible for serious violations of international humanitarian law in the former Yugoslavia since 1991, well before the mass genocide began."¹⁹⁹

Efforts by Rwanda, inter alia, to extend the tribunal's temporal jurisdiction hit a dead end: "[No] one has addressed the Rwandan government's concerns with the ICTR's temporal jurisdiction, ... The Rwandan delegation to the United Nations Security Council did not consider that the temporal jurisdiction of the tribunal was adequate to hold the orchestrators of the genocide accountable for their actions".²⁰⁰

¹⁹⁷ Sunga, supra note 159 at 23-4.
¹⁹⁸ Christina, supra note 154 at 174.
¹⁹⁹ Ibid 175.
²⁰⁰ Ibid 175
This background merely blurs the intention of the Lusaka Peace Agreement. How likely is it that the temporal jurisdiction of the ICTR shall be extended to cover the DRC violations? Besides, given the interconnection between the DRC and Rwanda genocide, how possible is it to extend the temporal jurisdiction of the tribunal to DRC without necessarily widening its jurisdiction over the Rwandan atrocities?

A similar issue arises with regard to the definition of the term "genocidaires" in the Lusaka Agreement. Incidentally, whereas the Agreement includes genocide among the crimes committed in the course of the armed conflict in the DRC, the term "genocidaires" as applied in the agreement is not given precise meaning. It is not clear whether it only applies to the persons suspected of having taken part in the Rwanda Genocide (the Interahamwe) or it generally applies to all persons suspected of committing genocide—be it in Rwanda or Congo. But, if the definition of "genocidaires" as used in the Lusaka Peace Agreement is to be restricted to the Rwanda genocide, what is the fate of the victims of the ongoing and recognized genocide in the DRC? To the victims, it may be asked, how could the international community be more selective?

This ambiguity leads to serious conclusions. With all the resources and expertise at the disposal of both the States Parties and the international community, can one help thinking it is just another deliberate move to avoid accountability? Whereas I do not purport to imply that the appropriate mechanism is necessarily prosecution, it is important for the actors to be clear and aware of the implications of their conduct to the international community, victims and the mechanism itself.

Moreover, given the pace of the ICTR, one wonders whether it would be competent to, without
undue delay, handle an additional load of cases. Already criticisms are piling up: "The ICTR has been criticized for not achieving its mandate swiftly enough. Although the ICTR has a multi-million dollar budget, the ICTR has completed only 4 trials, while the work on the 48 other cases is still underway." This developments call for an assessment of the justification for criminal prosecutions in the search for promotion and protection of both human rights and humanitarian law.

On a realistic note it is, thus, highly questionable that ICTR is possessed of the requisite capacity to be charged with yet another load of cases. Technical issues like extension of its temporal jurisdiction apart, its pace is more cause for concern especially if justice for the suspects is of concern too. Consequently, the only meaningful way of expediting the process would entail political reconstruction and thence, ensure domestic prosecutions like in Rwanda. This too, however, poses a different issue for the DRC. In particular, one wonders whether prosecutions may be an option after all. Here below is an examination of how the need for rule of law and political reconstruction interrelate.

3:07 Rule of law versus political reconstruction - which way?

Broadly speaking, the DRC situation calls for two principle objectives namely: rule of law and political reconstruction. Unlike in instances of state evolution- such as in liberation (external) and decolonization wars- where rule of law is the obvious and inevitable goal for the evolving State, in cases of political reconstruction, it can rightly be argued that the two notions are not

\[201\text{ Remember it was earlier observed that double standards are the order of events by the international community in the selection of mechanisms for implementation of the law of war and international human rights.} \]

\[202\text{Christina, supra n.154 p. 181}\]
necessarily compatible. The central point of difference between the two scenarios is simple. In liberation or decolonization wars, their successful conclusion implies severing between the two antagonistic communities and emerging with two independent States. Consequently, upon attainment of independence, it becomes every one's goal in the newly formed State to cooperate in national building and thereby making the development of rule of law more or less a matter of course. On the contrary, political reconstruction requires reconciliation between the previously antagonistic forces. That process requires forgiveness more than anything else and thus, in effect, implies sacrifice of accountability and hence rule of law. It ordinarily calls for such a high degree of compromise that to contemplate the place of rule of law with regard to the violations committed by the parties would seem immensely unrealistic.

Moreover, the purpose of international prosecutions in absence of a system of rule of law in the country concerned is equally highly questionable. In this connection, for instance, one imagines the futility of attempting to make an argument for international prosecution of the warlords of Somali (for various violations of IHL and fundamental human rights) where the State has literally disintegrated. The relationship between these notions and reduced significance of prosecutions in absence of internal political cohesion is articulated thus: "At root, the rule of law depends for its existence, on a reciprocity of expectation between the governed and the governors."\(^{203}\) It is further noted: "[I]nternational legal rights can shape the content of a community's ideals, particularly by offering "continuous and enduring" norms that promise stability during the "periods of political flux", but by themselves international rights cannot establish the relationship between the governed and the governors necessary to sustain the rule of law."\(^{204}\)
The trouble with this unquestionably valid proposition is how it impacts on the applicability of human rights and humanitarian law to the various States emerging from such political situations. In the same connection, it is now agreed that war crimes and crimes against humanity constitute part of customary international law and thus subject to universal jurisdiction without any limitation period. The inherent dilemma of these two different positions is simply that political compromise cannot, as far as the international community is concerned, entail amnesty for such crimes. Yet, on the other hand, at the core of political compromise is forgiveness. Moreover, it is further noted: "If only for practical grounds, prosecutions must be limited to those whose guilt is greatest: that is, those with the highest level of responsibility for the most egregious crimes. Prosecutions must focus on political leaders and military commanders..."

The central point that the international actors ought to pay regard to is whether to tow a pragmatic or utopian perspective, to chose between justice now for justice later or to be forward or backward looking. Quite evidently, to insist on the legal argument of accountability for crimes against humanity and war crimes with emphasis on the leaders- both political and military- is basically to stoke the violation of humanitarian and human rights norms in those parts of the world.

After all, prosecutions only serve as ex post facto mechanisms and hence offer very little to the victims during the continuance of hostilities. Ruti rightly notes:

203 Hesse and Post, supra note 169 at 20.
204 Ibid.
205 A. Neier, "Rethinking Truth, Justice and Guilt after Bosnia and Rwanda" in Post and Hesse supra, note 169, p. 39 at 44.
206 Ibid. at 46.
"Normalization of a permanent human rights culture ought not to be predicated on a utopian legalism that outstrips the international community's capacity to respond practically and effectively to extreme degradation and dehumanization. International processes and institutions should instead constantly remind us that the thick notion of radical transformation through law remains a messianic vision..."\(^{207}\)

On a practical and pragmatic note, she notes:

"Indeed, the exemplary experience of the ICTY demands that we recognize the importance of the role of the nation-state in protecting individual rights, even if the courts of a nation-state apply the international law of human rights. Full vindication of individual rights under international law presumes a working state with liberal institutions that reflect the rule of law."\(^{208}\)

Yet, it may as well be asked: are the two concepts mutually exclusive? Is it absolutely impossible to maintain both and maximize utility? The South African example of the truth and reconciliation commission has actually shown that the reverse is true- they are both achievable at once.\(^{209}\) However, I must add that this example ought to be taken in its context. The South African political context is quite peculiar. It is described:

"South Africa is a country with a modernized economic infrastructure that has not been devastated by civil war. It has a well developed legal system and educated local elites, working in very propitious regional and global conditions. It is blessed with former adversaries who are willing, albeit belatedly, to attempt a peaceful democratic settlement and with leaders who command enormous charismatic legitimacy."\(^{210}\)

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\(^{208}\) Ibid., 339-40. The point, in effect, is that priority ought to be accorded to political reconstruction. Though this may contradict the humanitarian and human rights jurisprudence, it is, however, a more realistic and practical approach.
\(^{209}\) The TRC tries to accommodate both trials and amnesty. For more analysis on the role of the TRC, see Jonathan Allen, Balancing Justice and Social Unity: Political Theory and the Idea of a Truth and Reconciliation Commission, in University of Toronto Law Journal, p 315.
\(^{210}\) Post and Hesse, supra note 169 at p.21-2.
Even then, it is still subject to debate how effective the system will prove itself as time goes by. 211

Rightly, it is questioned: "How much more vexing, then, are these issues when posed in nations that are currently struggling to emerge from violent civil conflict and that do not enjoy the advantageous circumstances of South Africa?" 212 The DRC context vividly portrays the relevance of this question. Beyond the practical point, such situations also raise conceptual issues.

At the practical level, the DRC is a country under the administration and control of three distinct forces. Each of these governments run its own budget—thanks be to the vast resources and globalization. Though not formally recognized as political leaders of an independent State, the rebel forces are nevertheless much happier than they ever were. Not only do they have dealings with multinational corporations but they also have diplomatic status. They are in diplomatic relationships with such States as Uganda, Rwanda and Burundi. They are invited to international conferences regarding the fate (or is it future?) of DRC such as the Lusaka Peace Accord. Besides, they control areas bigger and richer than some States. Thus, by all standards, they are much happier than they ever were. The question, therefore, remains; how does one secure political reconstruction in such a context without compromise? Absent of use of force, which is bound to cause more violations of the law of war, what is the role of the legal argument in the search for a rule of law system?

211 AZAPO case is among the numerous resistances the Commission has had to deal with. In this case, Bikos widow tried to challenge the Commission’s power to grant amnesty. (See Post and Hesse, supra note 169 p. 13-14).
212 Hesse and Post, supra, note 169 at 22.
Though outside the scope of this study, at the conceptual level, what is the place of recognition in the era of globalization? How much less are dissident groups subjects of international law?

Over all, while criminal prosecutions may provide a lot of hope for compliance with IHL and fundamental human rights where applied, there are profound difficulties posed by the contexts in which these violations are committed. For countries that are practically at the verge of being politically ripped apart or where individual accountability provides for no near hope to the end of the violations but, on the contrary, threatens the perpetuity of the violations, the relevance of prosecutions becomes a tough choice. The DRC situation is of the kind. To insist on the prosecution of the perpetrators of the atrocities is so much as good as defeating political reconciliation and thence only stoking the bizarre conflict. Yet, to succumb to political considerations is no more than IHL being held at ransom.
Conclusion

So much as it is a world of States is it also a world of human beings. However, though human creations, States are not necessarily instruments for the realization of human goals- at least not all the time every where. The tension between society and States dates far back to feudal era. In the contemporary history, the French Revolution serves as the epitome of this tension and further begs of the question- when does the will of the State represent the will of the people? Thus, when is a State supposed to be recognized as its people's expression and not antagonist/adversary? On the hand, like individuals do constitute the human community so do States/Nations constitute an international community. And, like human communities, States also have rules that guide and regulate their relations. As independent entities, States have a claim to unfettered management and administration of issues that occur within their boundaries- as dictated by the doctrine of State Sovereignty. Thus, under the principle of sovereign equality, all States- big or small, rich or poor, have equal powers over the management and administration of their internal affairs.

However, as earlier remarked, the interests of States sometimes harshly clash with those of their citizens. Many times, like it were in the French Revolution, questions of legitimacy of the regime arise. The resolution of such issues, under normal conditions, calls for democratic mechanisms- elections. In the developed world where democracy has come of age, this is only normal. However, the same can not be said of the resolution mechanisms that are usually employed in the developing world. Due to lack of popular mechanisms for resolution of such issues, some individuals -out of despair- resort to forceful means against their governments. With all the power at their disposal and the might they wield, most States react to such confrontations with alarmingly disproportionate force.
Yet, as indicated above, it is also a world of human beings. It happens- and many times too, that the insurgents in such cases win the support and admiration of other States. Being unable to engage in direct hostilities, such States -in most cases- choose to indirectly support the insurgents through the provision of moral and material support thereby making the task of defeating the insurgents a more protracted one for the concerned States. Sometimes, as the DRC case shows, the support of foreign States gets direct. Consequently, the classical definition of armed conflicts according to the designation or status of the parties involved- whether international or internal- has become very blurred.

The recent events in Rwanda, the former Yugoslavia, and the on-going tragedies in Somali, Sierra Leone and the DRC clearly show how gruesome such conflicts could get. Until recently, there almost seemed no way of intervention. However, since the end of the Cold war and the intensification of the globalization drive, the international community has demonstrated more than once that State Sovereignty does not entail the right to violate the fundamental rights of any State's subjects- not even if it were in war. Thus, fundamental human rights have grown to apply to war situations just as IHL has spread into internal armed conflicts. Besides, history clearly teaches us that colossal tragedies could be the consequence of internal conflicts- the two World Wars are a case in the point.

Unfortunately, despite the recognition of the applicability of IHL and international human rights law (IHR) to all forms of armed conflicts, their effectiveness with respect to the contemporary forms of armed conflicts leaves a lot to desire. Preventive measures have grown more and more ineffective. Retroactive measures are in the course of their development though serious difficulties are bound too.
Yet, on addition to the illustration of the tensions that characterize the law in the contemporary types of armed conflicts, this thesis has also shown that at the center of these tensions is the concept of State Sovereignty. In particular, the thesis has sought to elicit how this concept constrains the possibility of a smooth application of the law during and before the commencement of armed conflicts. Thus, by ensuring deference even where its applicability is uncertain, the concept not only distorts the reality but also exaggerates its relevance. For instance, as this thesis shows in the first chapter, on what basis do non-democratic military governments that are only in partial control of the territory of a given country—such as the DRC in this case—do make claims to the concept of State Sovereignty? And if there is none, as I strongly believe to be the case, why should the troops of such governments be entitled to superior status—combatant—as against the so-called insurgents who—save for not being in control of the capital city—could make exactly the same claims? For, like the so-called government side, they control a territory, have full and complete government structures in place and maintain their status by might and not right. This thesis therefore stands for the conclusion that it is because of such a detachment between the law and the reality that, to begin with, the argument that the law is fully and adequately developed is misleading and, secondly, that its fiasco is, under such conditions, only a matter of course.

Moreover, as the second chapter demonstrates, plenipotentiaries are always and will continue to be statesmen—they will always stand for the political interests of their governments. Very few—if ever at all—shall ever be representatives of humanity. It is thus no wonder that only less effective means are adopted at the expense of more effective ones in the promotion and protection of IHL and IHR—subjects that are seen by politicians and governments as gateways for external interference in matters of national jurisdiction. Unfortunately again, this is mainly a consequence of the indiscriminate deference and 'allocation' of the fallacious concept of state sovereignty.
Surely, what would one expect if - on matters of human rights and IHL protection- such undemocratic and notorious violators of the same norms intended for protection- were given equal powers to participate in the determination of their cause as the compliant members of the international community? The obvious- pretence, hypocrisy and double standards- is no wonder what indeed happens in the negotiation and adoption of measures for the implementation of such norms. Like suspects only reserve the right to state their case in matters of individual hearings, so should such violator States be treated rather than allowing them to adulterate the process.

Yet again, while it is still probably too early to pass judgement, the definition of international crimes- so far- only seems to follow that of might. Thus, unless posterity judges me wrong, as related to armed conflicts, might could as well mean right. As the third chapter demonstrates, despite findings of wrong doing on the part of the RPA (presently the incumbent regime in Rwanda but formerly the rebel group during the genocide) the ICTR has only indicted and prosecuted members of the then government. Those who belong to the incumbent regime, meanwhile, rest undisturbed. In similar circumstances- Charles Taylor (perhaps one of the most shameless violators of IHL and fundamental human rights in the recent past) was recently rewarded with the leadership of his country- Liberia. Presently, no one mentions his name in the circles of criminal prosecutions for egregious crimes. On this note, the third chapter also analyzes the challenges posed by political considerations viz. a vis the legal process. However, no easy solution seems available as all the alternative mechanisms are only emerging.

Above all, no matter which of the emerging retrospective mechanisms may turn out to prevail- it should be kept in mind that they are- indeed- only retrospective. They only apply after the fact, thus, consequent to unnecessary death, suffering and plunder. So, whereas such mechanisms may
eventually enhance compliance, preventive measures deserve paramount emphasis- the dead never return to mourn their death. We have surely been witnesses to a lot more than enough to warrant full and unreserved commitment to humanity.