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# Obligations of non-State armed actors in internal armed conflicts

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# Summary

Internal armed conflicts are today the more common mode of warfare and a growing concern for the international community to address. In this, the difficulty of addressing non-State armed groups has grown in salience and importance. Non-State armed actors are held by the international community as responsible for their actions based on international humanitarian law. As such, if international humanitarian law is to be effective in non-international armed conflicts, it is essential to fully understand what these standards are and what armed opposition groups must do to fulfil their obligations under international humanitarian law.

Both Common Article 3 and Additional Protocol II to the Geneva Conventions of 1949 state they are applicable to both parties to a conflict and are addressed in absolute terms. As such, the duties flowing from these provisions bind not only States, but also non-State armed groups. However, international practice has rarely indicated which measures groups must take to comply with the wide range of international norms applicable to such armed opposition groups. Human rights treaties provide a valuable interpretative device to expand upon and clarify the obligations imposed on the parties under international humanitarian law. Indeed, the necessity to utilise human rights law draws attention to the lack of efficient and effective enforcement mechanisms in international humanitarian law. Furthermore, the implementation of obligations on non-State actors is still inherently tied up with age-old problems of State sovereignty, but without State measures to enforce compliance with the minimum of standards the all too common reality of internal armed conflicts can escalate, with horrific consequences. International humanitarian law developed around the notion that the legal norms provide actual restraints to guide the conduct of individuals and are not mere theoretical matters between States. To fulfil this purpose, the facts on the ground need to be recognised and the challenge of addressed armed groups confronted.

# Abbreviations

ACHR	American Convention on Human Rights
API	Additional Protocol I to the Geneva Conventions of 1949, 1977
APII	Additional Protocol II to the Geneva Conventions of 1949, 1977
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights]
GA Res.	General Assembly Resolution
IACHR	Inter-American Commission on Human Rights
IACtHR	Inter-American Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Convention on Economic, Social and Cultural Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross and Red Crescent
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
SC Res.	Security Council Resolution
SCSL	Special Court for Sierra Leone
UN	United Nations
UNHCHR	United Nations High Commissioner for Human Rights

# 1 Introduction, Scope and Methodology

Internal armed conflicts are the more common mode of warfare today and a growing concern for the international community. In 1998, only two of the twenty-five major armed conflicts in the world were waged between States.<sup>1</sup> Similarly, in 2002 there was only one inter-State conflict, while there were sixty-six intrastate conflicts.<sup>2</sup> However, the historical development of the law of armed conflict was primarily aimed at preventing humanitarian abuses by States. This dramatically changed with the adoption of the four Geneva Conventions of 1949,<sup>3</sup> all of which include Common Article 3 as a means to regulate armed conflict not of an international character.<sup>4</sup>

Common Article 3, applicable to all parties to the conflict, including non-State armed actors, was a significant development for the protection of civilians during internal armed conflict and a move from a State-centric perspective of warfare. The subsequent adoption of the Additional Protocol II to the Geneva Conventions<sup>5</sup> took this a step further, outlining wide-ranging obligations parties to the conflict must undertake where the

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<sup>1</sup> SIPRI, *Armaments, Disarmament and International Security*, SIPRI Yearbook 1999 (Oxford University Press, Oxford, 1999). Note law stated in thesis research as at 31 August 2008.

<sup>2</sup> D. Capie and P. Policzer, *Keeping the Promise of Protection: Holding Armed Groups to the Same Standard as States*, A Policy Brief Commissioned for the UN-Secretary-General's High Level Panel on Global Security, The Armed Groups Project University of British Columbia, 15 January 2004, p. 1, available at <[www.armedgroups.org/the-armed-groups-project/working-papers](http://www.armedgroups.org/the-armed-groups-project/working-papers)> (last visited 24 July 2008) [hereinafter Capie and Policzer 2004]. Of these 66 intrastate conflicts, 35 were internal conflicts involving only non-State actors. See further Uppsala Universitet, UCDP Database, available at [www.pcr.uu.se/gpdatabase/search.php](http://www.pcr.uu.se/gpdatabase/search.php). See also L. Harborn and P. Wallenstein, *Pattern of major armed conflicts, 1990-2006*, SIPRI Yearbook 2007, (Oxford, Oxford University Press, 2007).

<sup>3</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 75 U.N.T.S. 31 (1949) [hereinafter GCI]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter GCIII]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter GCIV].

<sup>4</sup> Common Article 3 of GCI, GCII, GCIII, and GCIV, *ibid* [hereinafter Common Article 3].

<sup>5</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature 12 December 1977, 1125 U.N.T.S. 609 [hereinafter APII].

threshold for applicability of the Protocol has been met. In creating these obligations, the international community has clearly indicated that internal wars are a concern of international law.

As non-international armed conflicts have become more prevalent in the post-World War II era, the consequences and effects of these conflicts have impacted on international peace and security, demanding the international community to address the regulation of these conflicts once again.<sup>6</sup> In turn, the difficulty of addressing non-State armed groups has grown in salience and importance.

Armed non-State actors are held responsible for their actions by the international community based on international humanitarian law. This trend appears likely to grow as the work of the International Criminal Court evolves, which has jurisdiction for international crimes committed during the course of internal armed conflicts.<sup>7</sup> As such, if international humanitarian law is to be effective in non-international armed conflict, it is essential to fully understand what these standards are and what armed opposition groups must do to fulfil their obligations under international humanitarian law.

The asymmetry between States and armed opposition groups creates difficulties in the application of international humanitarian rules.<sup>8</sup> Despite this, it is possible to discern a minimum set of obligations to which non-State actors will be held by the international community. This thesis outlines the obligations of non-State armed actors during internal armed conflicts under Common Article 3 and APII, using the conflicts in Colombia and Uganda as illustrative examples throughout. Several determinations are necessary to facilitate this investigation: in what way are non-State actors

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<sup>6</sup> See for example SC Res. 660, UN Doc.S/RES/660 (1990), adopted in 2932<sup>nd</sup> meeting, 2 August 1990; SC Res. 794 (1992), UN Doc. S/RES/79, adopted in 3145<sup>th</sup> meeting, 3 December 1992; SC Res. 864 (1993), UN Doc. S/RES/864, adopted in 3208<sup>th</sup> meeting, 6 May 1993. See further G. J. Andreopoulos, 'Violations of Human Rights and Humanitarian Law and Threats to International Peace and Security', in R. Thakur and P. Malcontent (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States*, (Tokyo, United Nations University Press, 2004).

<sup>7</sup> Rome Statute of the International Criminal Court, UN Doc. A/CONF.183/9 (1998) [hereinafter Rome State 1998].

<sup>8</sup> R. Geiß, 'Asymmetric conflict structures', IRRC Vol. 88, No. 664 pps. 757-777 (December 2006).

bound by international law, what international instruments and rules address non-State actors, and what mechanisms have been adopted to ensure compliance with international humanitarian obligations on non-State actors will be reviewed.

Before analysing what obligations non-State actors have under international humanitarian law, it is important to establish when international humanitarian law applies to non-State armed actors and what exactly they are bound by. Chapter two gives an overview of how international humanitarian law applied to non-State actors prior to the adoption of the Geneva Conventions 1949 and Additional Protocols 1977,<sup>9</sup> how this changed with the adoption of Common Article 3 and APII, and the thresholds of applicability for these two instruments. Also addressed are the problems associated with applying humanitarian law to non-State actors and whether non-State actors are bound beyond international humanitarian law by international human rights law. A number of obligations flow from international humanitarian law that must be respected during the armed conflict. Chapter three analyses the provisions of Common Article 3 and APII to identify the obligations contained therein, as well as standards and measures necessary to ensure compliance. Finally, Chapter four analyses the various mechanisms employed by States to enforce international humanitarian law obligations on non-State armed actors in order to establish peace and accountability. From this analysis, it is clear that although international humanitarian law standards for non-State armed actors have been established, ensuring such standards are met and maintained remains difficult and rare. Lingering problems associated with State sovereignty have affected implementation, yet without State measures to enforce compliance with the minimum of standards, the all too common reality of internal armed conflicts can escalate with horrific consequences.

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<sup>9</sup> *Supra* notes 3 and 5; Protocol Additional to the Geneva Conventions of 12 Aug. 1949, and Relating to the Protection of Victims of International Armed Conflicts, opened for signature Dec. 12, 1977, 1125 U.N.T.S. 3 [hereinafter API].



## 1.1 Scope

International humanitarian law and the position of non-State actors under international law are vast and complex subjects. Therefore, the scope of this thesis is principally limited to the obligations of non-State armed actors in internal armed conflicts under international humanitarian law. However, the obligations of States will be addressed where appropriate, particularly in the Chapter four discussion regarding the duty to enforce humanitarian obligations. The purpose of using Colombia and Uganda as illustrative examples is not to list violations of international humanitarian law committed by parties to the conflict, but to demonstrate some of the legal complexities involved in applying international humanitarian law to non-State actors and enforcing these obligations.

### 1.1.1 Armed opposition groups in internal armed conflicts

The terms of “internal armed conflicts” and “non-international armed conflicts” are defined explicitly in Chapter 2.2 and are used interchangeably throughout the thesis.

Armed groups are very diverse, in their aims, degree of organisation, control over their members, territory or people, and particularly in their inclination to respect humanitarian rules.<sup>10</sup> In general, such groups are armed, use force to achieve their objective and are not under State control.<sup>11</sup> A wide variety of actors have been included in this definition, including guerrillas, rebel groups, militias, insurgents and their variants. Private security or private military corporations are not included in the remit of this

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<sup>10</sup> M. Sassòli, ‘Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law’, paper submitted at the at the Armed Groups Conference, Vancouver, 13-15 November 2003, available at <http://www.c-r.org/our-work/accord/engaging-groups/index.php> p. 4 (last visited 24 July 2008) [hereinafter Sassòli 2003].

<sup>11</sup> Definition used by International Council on Human Rights Policy, ‘Ends & means: human rights approaches to armed groups – Main Report’, (ICHRP, Geneva, 2000), p. 5 available at [www.reliefweb.int/library/documents/2001/EndsandMeans.pdf](http://www.reliefweb.int/library/documents/2001/EndsandMeans.pdf) (last visited 24 July 2008).

definition.<sup>12</sup> For the purposes of this study, “non-State armed actors” will be used interchangeably with “armed opposition groups”, “armed dissident groups”, “insurgencies” and “insurgent movements”. National liberation movements as defined under Article 1(4) of Additional Protocol I to the Geneva Conventions 1949<sup>13</sup> are not discussed. Likewise, discussion of the obligations of States in internal armed conflicts is limited to specific areas, although it is recognised that the obligations on armed opposition groups and State actors in an internal armed conflict are intertwined.

### 1.1.2 Colombia

The conflict in Colombia has been chosen as an illustrative example for a number of reasons. The length, intensity of the conflict, and variety of actors involved were key to including Colombia as an illustrative example because they demonstrate a number of important factors in the application of international humanitarian law to non-State armed actors. Furthermore, the mechanisms employed by the Colombian government in enforcing humanitarian obligations highlight the complexities involving in achieving justice and preventing further violations.

The origins of the conflict can be traced back to the mid-1960s, making it one of the world’s longest non-international armed conflicts.<sup>14</sup> Although its intensity has varied during the forty-plus years of conflict,<sup>15</sup> no resolution has been found to date and there are approximately three million people internally displaced recorded.<sup>16</sup>

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<sup>12</sup> *Ibid.*

<sup>13</sup> API, *supra* note 9, article 1(4).

<sup>14</sup> A. Cariollo-Suarez, ‘*Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict*’, 15 Am. U. Int’l L. Rev. 1 (1999) p. 10 [hereinafter Cariollo-Suarez 1999]. See also The Center for International Policy’s Colombia Program, [www.ciponline.org/colombia/index.htm](http://www.ciponline.org/colombia/index.htm) (last visited 24 July 2008) for an account of the conflict.

<sup>15</sup> For example, there was a sharp escalation of the conflict during the 1980s, following a repressive military response to the insurgency movement. Despite the variance in intensity, the conflict has not abated in over forty-years, Cariollo-Suarez 1999, *supra* note 14, pps. 10-11.

<sup>16</sup> Security Council Report, *Update Report No. 4: Protection of Civilians in Armed Conflict*, 16 November 2007, available at <http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.3588183/>. Human Rights Watch, *World Report 2007*, (Human Rights Watch, New York, January 2008) pps. 199-204

Colombia ratified the Geneva Conventions on November 8, 1961. Additional Protocol II of the Geneva Conventions was ratified by Law 171 of 1994 without reservation and has been in force since February 1996. In addition, Colombia is a Member State of the Organisation of American States and a signatory to the American Convention on Human Rights.<sup>17</sup> The regional human rights system has played a major role in clarifying the parameters of international humanitarian law in the situation, as will be highlighted throughout the thesis.

The insurgency movement in Colombia is comprised primarily of two groups: the Fuerzas Armadas Revolucionarias de Colombia - Ejército del Pueblo (“Revolutionary Armed Forces of Colombia - People’s Army”)<sup>18</sup> and the Ejército de Liberación Nacional (“National Liberation Army”).<sup>19</sup> In addition, a plethora of paramilitary groups arose during the 1980s that quickly aligned themselves with the Colombian government army. The Autodefensas Unidas de Colombia (“United Self-Defense Groups of Colombia”) is a federation of several regional paramilitary groups.<sup>20</sup> The AUC paramilitaries, as well as FARC-EP and ELN guerrillas, have all been included on the US Department of State’s list of Foreign Terrorist Organizations.<sup>21</sup> Two lines of warfare have developed, one between the State army and the guerrillas, and the other between the guerrillas and the paramilitaries.<sup>22</sup>

A wide range of implementation mechanisms have been established by the Colombian government, yet reports of violations of international humanitarian law continue, including but not limited to hostage taking, torture, the use of antipersonnel mines and indiscriminate attacks, the

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available at <<http://hrw.org/englishwr2k8/docs/2008/01/31/colomb17754.htm>> [hereinafter HRW World Report: Colombia 2007].

<sup>17</sup> American Convention on Human Rights, OEA/ser. K/XVY1.1, Doc. 65, Rev. 1, Corr. 1 OASTS, No. 36 (1970) [hereinafter ACHR].

<sup>18</sup> Hereinafter FARC-EP.

<sup>19</sup> Hereinafter ELN. For an excellent overview of the general background to the conflict, military structures of the actors involved and analysis of international humanitarian law see Cariollo-Suarez 1999, *supra* note 14. See also Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law* (Human Rights Watch, New York, 1998) [hereinafter HRW *War Without Quarter* 1998].

<sup>20</sup> Hereinafter AUC. See further Cariollo-Suarez 1999, *supra* note 14, pps. 16-18 and HRW *War Without Quarter* 1998, *supra* note 19, pps. 100-131.

<sup>21</sup> HRW World Report: Colombia 2007, *supra* note 16.

<sup>22</sup> Cariollo-Suarez 1999, *supra* note 14, p. 6.

recruitment of minors, and the violation of due process guarantees when trials are undertaken.<sup>23</sup> All parties to the conflict have been accused of violating humanitarian law.<sup>24</sup> Recent efforts to demobilise certain paramilitary groups<sup>25</sup> combined with a renewed military effort against the FARC-EP<sup>26</sup> which have severely impacted its top command structure,<sup>27</sup> has provided a brief glimmer of hope in an otherwise bleak history of the conflict. As such, the conflict in Colombia addresses the applicability of international humanitarian law, substantive obligations and enforcement of humanitarian obligations.

### 1.1.3 Uganda

The Uganda conflict contrasts with the conflict in Colombia in an interesting manner. The Lord's Resistance Army<sup>28</sup> and the Ugandan government army (the Uganda People's Defence Forces) have waged war for over twenty years, following the 1986 regime change.<sup>29</sup> Since 2002, the estimated number of internally displaced persons has grown from 450,000

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<sup>23</sup> HRW War Without Quarter 1998, *supra* note 19, pps. 131-91.

<sup>24</sup> See Inter-American Commission on Human Rights, Third Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.10, Doc. 9 rev. 1, 25 February 1999 Ch. IV paras. 166-233 (1999) [hereinafter Third Report on Colombia 1999]. See also Report of the Office of the High Commissioner for Human Rights on the Situation in Colombia, UN Doc. A/HRC/4/48, 5 March 2007 [hereinafter OHCHR Report 2007].

<sup>25</sup> See Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*. OEA/Ser.L/V/II.129 Doc. 6, October 2, 2007; Annual Report of the Inter-American Commission on Human Rights, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007, C.IV [hereinafter IACHR Annual Report 2007].

<sup>26</sup> International Crisis Group, Policy Briefing 'Colombia: Making Military Progress Pay Off' Latin America Briefing No. 17, (International Crisis Group, Bogotá/Brussels, 29 April 2008) [hereinafter ICG Policy Briefing Colombia 2008].

<sup>27</sup> J. McDermott, 'Leader's death harsh blow to Farc', *BBC News Report* (online addition), 25 May 2008, available at <http://news.bbc.co.uk/go/em/fr/-/2/hi/americas/7419578.stm> (last visited 24 July 2008).

<sup>28</sup> Hereinafter LRA.

<sup>29</sup> For an overview of the conflict, see M. Komakech, 'The Northern Uganda Conflict, Civil Society Initiatives and Interventions, and Human Rights Focus (HURIFO) Operations in the Conflict-Zone', HURIFO, November 14, 2003, available at [http://www.armedgroups.org/images/stories/pdfs/komakech\\_paper3.pdf](http://www.armedgroups.org/images/stories/pdfs/komakech_paper3.pdf) 2001, pps. 1-10 (last visited 24 July 2008) [hereinafter Komakech 2003]. Human Rights First, *Background on the Conflict in Northern Uganda*, available at [http://www.humanrightsfirst.org/international\\_justice/regions/uganda/uganda.htm](http://www.humanrightsfirst.org/international_justice/regions/uganda/uganda.htm) (last visited 24 July 2008) [hereinafter Human Rights First].

to over 1.7 million.<sup>30</sup> Over the course of the conflict, both parties have been accused of committing serious crimes of concern to the international community, and serious violations of the laws and customs applicable in armed conflicts not of an international character.<sup>31</sup> The LRA is also listed as an international terrorist group.<sup>32</sup> While the situation in Colombia demonstrates the overlap in protection between international humanitarian law and international human rights law, the conflict in Uganda demonstrates the overlap between international criminal law as a means of implementing international humanitarian law.

Uganda has been a party to the Geneva Conventions 1949 since 1964 and APII since 1991. Uganda is a State party to the Rome Statute of the International Criminal Court 1998<sup>33</sup> and in December 2003 it became the first State referral to the Court.<sup>34</sup> In October 2005, the Prosecutor of the International Criminal Court<sup>35</sup> unsealed arrest warrants for five leaders of the LRA for alleged crimes including rape, murder, slavery, sexual slavery, and forced enlistment of children.<sup>36</sup> The arrest warrants have provided an impetus for the recent peace talks by drawing the LRA to the negotiating

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<sup>30</sup> Internal Displacement Monitoring Centre, *1.7 Million IDPs in Northern Uganda*, available at [http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/2439C2AC21E16365C125719C004177C7?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/2439C2AC21E16365C125719C004177C7?OpenDocument) (last visited 24 July 2008); Human Rights First, *supra* note 29; International Center for Transitional Justice, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, 15, July 2005, available at <http://www.ictj.org/images/content/1/2/127.pdf> (last visited 24 July 2008) [hereinafter International Center for Transitional Justice 2005].

<sup>31</sup> For example, a thousand people on average die in the internally-displaced persons camps from conflict-related disease and malnutrition Republic of Uganda, Ministry of Health, "Health and mortality survey among internally persons in Gulu, Kitgum and Pader districts", July 2005, available at [www.who.int/hac/crises/uga/sitreps/](http://www.who.int/hac/crises/uga/sitreps/) (last visited 24 July 2008).

<sup>32</sup> Komakech 2003 *supra* note 29.

<sup>33</sup> Colombia is also a party to the Rome Statute 1998, [www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp](http://www.untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterXVIII/treaty11.asp) (last visited 24 July 2008).

<sup>34</sup> See ICC, *Press Release: President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, The Hague, 29 January 2004, available at [http://www.icc-cpi.int/pressrelease\\_details&id=16.html](http://www.icc-cpi.int/pressrelease_details&id=16.html) (last visited 24 July 2008).

<sup>35</sup> Hereinafter ICC.

<sup>36</sup> Statement by Chief Prosecutor Luis Moreno-Ocampo, 14 October 2005, available at [www.icc-cpi.int/library/organs/otp/Uganda-\\_LMO\\_Speech\\_14102005.pdf](http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf) (last visited 24 July 2008). See also International Crisis Group, *Northern Uganda: Seizing the Opportunity for Peace*, Africa Report, No. 124, April 2007 available at [www.crisisgroup.org/home/index.cfm?id=4791](http://www.crisisgroup.org/home/index.cfm?id=4791) (last visited 24 July 2008) [hereinafter ICG Uganda Report 2007]; Human Rights First, *supra* note 29, for crimes allegedly perpetrated by the LRA.

table.<sup>37</sup> In 2006, the LRA and the Ugandan government entered into peace negotiations for the first time in over a decade to address cessation of hostilities, a comprehensive solution to the conflict, reconciliation and accountability, a formal ceasefire, and disarmament, demobilization and reintegration.<sup>38</sup> Despite drafting a final agreement, its conclusion has been forestalled until the question of the ICC arrest warrants is resolved. Violence continues whilst the government of Uganda has taken steps to undertake domestic prosecutions. To date, none of those under ICC arrest warrant have been apprehended. The situation in Uganda thus demonstrates the complexities of applying international humanitarian law to armed opposition groups and holding such groups to the standard imposed by the law.

## 1.2 Research Method

This thesis determines what obligations non-State armed actors are bound to under international humanitarian law during internal armed conflicts. Qualitative doctrinal research was undertaken to analyse content and application of the pertinent legal instruments, namely Common Article 3 and APII.

To determine the parameters of this question, qualitative doctrinal research was carried out to establish under what conditions international humanitarian law is applicable to internal armed conflict, the extent to which international humanitarian law applies in internal armed conflicts, and how international humanitarian law binds non-State actors. Questions of law are determined by relying on primary legal sources, including relevant treaties, jurisprudence of international criminal tribunals and regional bodies, and secondary sources, including academic opinions, reports and articles, and ‘soft law’ such as resolutions and declarations of United

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<sup>37</sup> N. Grono and A. O’Brien, ‘Justice in Conflict? The ICC and Peace Processes’, in the N. Waddell and P. Clark (eds.), *Courting Conflict? Justice, Peace and the ICC in Africa* (Royal African Society, London, March 2008), available at [http://www.royalafricsociety.org/index.php?option=com\\_content&task=view&id=415](http://www.royalafricsociety.org/index.php?option=com_content&task=view&id=415) (last visited 24 July 2008).

<sup>38</sup> ICG Uganda Report 2007, *supra* note 36.

Nations<sup>39</sup> bodies and regional actors. Additionally, the major instruments applicable in non-international armed conflict are analysed to establish the obligations applicable to non-State armed actors. Finally, non-doctrinal research was used to analyse measures implemented to enforce humanitarian obligations in the domestic arenas and the factors that influence the choice of mechanism utilised.

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<sup>39</sup> Hereinafter UN.

## 2 Applying International Humanitarian Law to Armed Opposition Groups

Common Article 3 is applicable in all situations of armed conflict. However, there is still ambiguity as to what constitutes an “armed conflict”, as well as when and to whom Common Article 3 applies. The first part of this chapter outlines the application of international humanitarian law prior to the adoption of the Geneva Conventions 1949, highlighting the definitions of “rebel”, “insurgency” and “belligerent”. Under international law, the purpose of this is to identify which groups are bound by the provisions of international humanitarian law in situations of non-international armed conflict. “Internal armed conflict” is then defined, highlighting the most recent developments in this area and thresholds of applicability, using the conflicts in Colombia and Uganda as examples of how this applies practically. After outlining in what situations armed opposition groups are bound, it is also important to address what obligations they are bound by. The chapter will provide a critical evaluation of the debate surrounding if armed opposition groups are bound by international human rights obligations in addition to international humanitarian law.

### 2.1 The path from rebellion to insurgency to belligerency - definitions

Prior to the adoption of the Geneva Conventions 1949, the application of international humanitarian law in situations of non-international armed conflict largely depended on the armed opposition group being recognised as belligerent. Today, however, Common Article 3 is applicable to all armed conflicts, marking the first codification of international law specifically applicable to situations of internal armed conflict.<sup>40</sup>

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<sup>40</sup> L. Moir *The Law of Internal Armed Conflict* (Cambridge University Press, Cambridge, 2002) p. 30 [hereinafter Moir 2002]. The ICRC has taken advantage of a broad



Belligerency can be distinguished from situations of rebellion and insurgencies, which are smaller in scale and intensity of conflict. A situation may escalate from rebellion to insurgency to belligerency. This progression is defined under international law with certain criteria needing to be met before a group could ascend from one category to another.

## 2.1.1 Rebellion

Reference to the categories of rebellion, insurgency and belligerency depended upon the scale and intensity of the conflict. At the lower end of this scale is a rebellion. Wilson defines rebellion as “a sporadic challenge against the legitimate government”.<sup>41</sup> The concept of rebellion refers to a situation of short-lived insurrection against the authority of a State.<sup>42</sup>

The International Criminal Tribunal for the former Yugoslavia<sup>43</sup> considered the absence of provision in international law relating to situations of rebellion to the fact that States preferred to regard it as “coming within the purview of national criminal law and, by the same token, to exclude any possible intrusion by other States into their own domestic jurisdiction”.<sup>44</sup> As such, rebels are not considered to have rights or obligations under international law.<sup>45</sup> How a rebellion is dealt with is the primarily the concern of the incumbent State and is outside the scope of

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interpretation of Common Article 3 in an effort to take action in all situations of civil unrest, particularly with regards access to prisoners and detainees to ensure humane treatment – Moir 2002 p. 33.

<sup>41</sup> H. A. Wilson, *International Law and the Use of Force by National Liberation Movements*, (Clarendon Press, Oxford, 1988) [hereinafter Wilson 1988]. Moir 2002, *supra* note 40, p.4 describes a rebellion as a modest, sporadic challenge by a section of the population intent on attaining control.

<sup>42</sup> A. Cullen, ‘*Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law*’, 183 Mil. L. Rev. pps. 66 – 109 (2005), p. 67-70 [hereinafter Cullen 2005]. See further R. A. Falk, ‘*Janus Tormented: The International Law of Internal War*’, in J. N. Rosenau, *International Aspects of Civil Strife* (Princeton University Press, Princeton, 1964) pps. 197- 99 [hereinafter Falk 1964].

<sup>43</sup> See Statute of the International Criminal Tribunal for the former Yugoslavia annexed to SC Resolution 827, UN SCOR, 48<sup>th</sup> sess, 3217<sup>th</sup> mtg, UN Doc. S/RES/827 (1993) [hereinafter ICTY].

<sup>44</sup> *Prosecutor v. Dusko Tadić*, 2 October 1995 ICTY, Case No. IT-94-1-AR72, para. 96 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) [hereinafter *Tadić Appeal on Jurisdiction* 1995].

<sup>45</sup> A. Clapham, ‘*Human Rights Obligations of Non-State Actors in Conflict Situations*’ IRRC Vol. 88 No. 863, pp. 491 - 523 at p. 492 (2006) [hereinafter Clapham 2006]; Wilson 1988, *supra* note 41, pp. 23-24.

international humanitarian law,<sup>46</sup> but is constrained by the States obligations under international human rights law.<sup>47</sup>

## 2.1.2 Insurgency

The graduation from rebellion to insurgency occurs when the State is unable to repress the situation quickly or effectively, resulting in an increase in intensity and scale. An insurgency is more sustained constituting a more substantial attack than a rebellion.<sup>48</sup> However, the concept of insurgency and criterion for recognition are very ill defined.<sup>49</sup> According to Wilson, the only requirement for recognition of an insurgency would be necessity.<sup>50</sup> Insurgencies are generally considered to be more intense violence than a rebellion, but it is unclear what degree of violence is necessary, leaving the concept open to interpretation. This question is still relevant in conflicts today, such as Uganda, where President Museveni regards the LRA commanders as ‘empty-headed criminals’, despite two decades of intense conflicts.<sup>51</sup>

Once an insurgency had been recognised, Lauterpacht considered this to create “a factual relation in that legal rights and duties as between insurgents and outside states exist only insofar as they are expressly conceded and agreed upon for reasons of convenience, of humanity and of economic interest”.<sup>52</sup> Today, there is no need for such express agreement, as insurgents are under a legal duty to uphold minimum humanitarian

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<sup>46</sup> Moir 2002, *supra* note 40, p. 4.

<sup>47</sup> Note States may derogate from certain provisions under international human rights law in situations of national emergency, but not all. To be discussed *infra*.

<sup>48</sup> Cullen 2005, *supra* note 42, p. 71.

<sup>49</sup> Cariollo-Suarez 1999, *supra* note 14, p. 70.

<sup>50</sup> Wilson 1988, *supra* note 41, p. 24. *C.f.* A. Cassese, *International law*, 2<sup>nd</sup> ed (Oxford University Press, Oxford, 2005) p. 125 arguing that the minimum conditions for recognition of an insurgency are effective control of part of the territory and civil commotion should reach a certain degree of intensity and duration (it may not simply consist of riots or sporadic and short-lived acts of violence) [hereinafter Cassese 2001].

<sup>51</sup> *The Monitor*, 10 October 2003, in M. Ssenyonjo, *Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court*, *Journal of Conflict and Security Law*, No. 10(3), pps. 405-434 (2005), p. 415 [hereinafter Ssenyonjo 2005].

<sup>52</sup> H. Lauterpacht, *Recognition in International Law* (Cambridge, Cambridge University Press, 1947) [hereinafter Lauterpacht 1947].

standards applicable in all situations of insurgency.<sup>53</sup> Beyond this, however, the concept remains as unclear as ever.

### 2.1.3 Recognition of belligerency

Recognising a state of belligerency is a declaration by the recognising party that the conflict has attained such a sustained level that both sides are entitled to be treated in the same way, as belligerents in an international armed conflict. This was not recognition of the insurgent party as any form of legitimate government, but was recognition of the factual existence of war.<sup>54</sup> In terms of intensity and scale, the character of the conflict is similar to that of an international war. The recognition of belligerency demanded that all the laws of war be adhered to in all circumstances.<sup>55</sup> When insurgents are recognised as belligerents, they carry the same rights and duties as parties to an international war.<sup>56</sup>

The recognition of belligerency depended on meeting certain conditions that go beyond the scale of insurgency. Lauterpacht considered there to be four criteria for the recognition of belligerency.<sup>57</sup> The first criterion was the existence within a State of widely spread armed conflict. Second, a substantial portion of the territory should be occupied and administered by the insurgent group. Third, hostilities should be conducted in accordance with the rules of war and by armed forces that are responsible to an identifiable authority. Finally, circumstances should dictate the

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<sup>53</sup> Common Article 3, *supra* note 4. To be discussed *infra*.

<sup>54</sup> J. W. Garner, 'Recognition of Belligerency' 1938, 32 AJIL 106 at 111-112. See Moir 2002, pps. 6 -18 on a history of recognition of belligerency, and pps. 18 – 21 history of the development of international law generally.

<sup>55</sup> Cullen 2005, *supra* note 42, p. 75.

<sup>56</sup> Moir 2002, *supra* note 40, p. 5; Lauterpacht 1947, *supra* note 52, p. 270.

<sup>57</sup> Lauterpacht, *supra* note 52, p. 176. See also the Institute of International Law definition of 'civil war', Article 8 the Institute's Regulations for civil war stated in relevant part as follows: "Third States may not give recognition to the belligerency of the insurgent party: if it has not won for itself a territorial existence by taking possession of a given part of the national territory; it does not fulfill the conditions which must be met to constitute a regular government de facto exercising in that part of the territory the ostensible rights belonging to sovereignty; and if the struggle waged in its name is not conducted by organized forces subject to military discipline and complying with the laws and customs of war" referenced in the Y. Sandoz, Ch. Swinarski, B. Zimmerman (eds.), *Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949* (ICRC, Geneva, 1987), 1321-22 [hereinafter Commentary APII].

necessity for third parties to define their attitude by acknowledging the status of belligerency.<sup>58</sup>

Although certain objective conditions for the recognition of belligerency may be identified making the concept arguably more precise than that of insurgency, there is still a large margin for interpretation. What constitutes “a responsible authority” and what is the nature of the circumstances that would necessitate the act of recognition for third States? Furthermore, once these criteria have been met, there is little consensus whether the recognition of belligerency is a duty or a matter of discretion for State authorities.

The recognition of belligerency was the first step towards regulating non-international armed conflicts under international humanitarian law because theoretically such designation extended all the protections afforded to victims in international armed conflicts to large-scale civil disputes.<sup>59</sup> Once an insurgent group has been recognised as a belligerent party, the obligation to ensure respect for the humanitarian norms was equally binding on both the *de jure* government and the insurgents.<sup>60</sup> Although there was a high threshold in application, recognition of belligerency and the consequential application of the laws of war to internal armed conflict marked a substantial shift in State practice, particularly with regard traditional concepts of State sovereignty.

However, the lack of clear criteria for distinguishing a belligerency from an insurgency has resulted in the distinction losing all practical significance in international relations.<sup>61</sup> It was observed in *Tadić* Appeal on Jurisdiction 1995 that the concept of belligerency created a “dichotomy [that] was clearly sovereignty-oriented and reflected the traditional configuration of the international community, based on the coexistence of sovereign States more inclined to look after their own interests than

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<sup>58</sup> Note similarities to APII, *supra* note 5, article 1(1).

<sup>59</sup> See Commentary APII, *supra* note 57, 1322.

<sup>60</sup> Cullen 2005, *supra* note 42, p. 76.

<sup>61</sup> Cariollo-Suarez 1999, *supra* note 14, p. 71. Moir 2002, *supra* note 40, states “By the time civil war broke out in Spain in 1936, the recognition of belligerency had fallen into such decline that it is difficult to equate the action of any State with the recognition of General Franco’s forces as belligerents, despite the proportions of the struggle”, p. 20.

community concerns or humanitarian demands”.<sup>62</sup> In serving State interests, the doctrine of recognition cannot be seen as an effective mechanism for prioritising adherence to humanitarian norms, which was undoubtedly in the minds of the drafters of Common Article 3.<sup>63</sup> The lack of regulation in internal armed conflicts can be explained in part by the inconsistency in and lack of State practice in recognising belligerents, even since the 19th century.<sup>64</sup>

#### 2.1.4 Common Article 3 and APII

The unwillingness of States to recognise situations as falling within the scope of international humanitarian law resulted in little to no application of humanitarian norms in situations of internal armed conflict. This unsatisfactory position changed with the adoption of the Geneva Conventions 1949,<sup>65</sup> which include Article 3, common to all four Conventions, that is applicable in situations of non-international armed conflicts. Obligations are imposed on parties to a conflict irrespective of any recognition granted by the incumbent State or a third State.<sup>66</sup> The obligations of armed opposition groups under the Geneva Conventions 1949 do not extend beyond Common Article 3. Under Common Article 3(2), the parties to an internal armed conflict “should...endeavour” to bring into force any of the other provisions of the Conventions. The Commentary to the Conventions states this is an obligation to make efforts to bring about the fuller application of the Conventions in good faith,<sup>67</sup> but the obligation does not extend beyond this.<sup>68</sup>

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<sup>62</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, paras. 96.

<sup>63</sup> Cullen 2005, *supra* note 42, p. 107.

<sup>64</sup> Wilson 1988, *supra* note 41, p. 24, states that recognition has hardly occurred since World War I. Moir 2002, *supra* note 40, p. 21.

<sup>65</sup> *Supra* note 3.

<sup>66</sup> Clapham 2006, *supra* note 45, p. 493.

<sup>67</sup> Jean. S. Pictet (ed.), *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, (ICRC, Geneva, 1952), p. 59 [hereinafter Commentary GCI]. See also Jean. S. Pictet (ed.), *Commentary on the Geneva Convention (III) Relative to the Treatment of Prisoners of War*, Commentary (ICRC, Geneva, 1960), p. 60 [hereinafter Commentary GCIII].

<sup>68</sup> Moir 2002, *supra* note 40, p.64.

The adoption of Common Article 3 lowered the threshold for application of international humanitarian law in situations of internal armed conflict, thereby broadening the scope of internal armed conflict.<sup>69</sup> However, as with recognition of belligerency and insurgency, problems of proper implementation of the law by States are still evident in breach of their customary and treaty obligations. States remain reluctant to admit that conditions within their territory warrant the application of international humanitarian law because to do so would be to admit a loss of degree of control.

Despite clear wording to the contrary in Common Article 3,<sup>70</sup> States are concerned that the application of international humanitarian law in such situations amounts to implicit recognition of legal status.<sup>71</sup> As such, the incumbent State may attempt to keep the situation out of the international arena by labelling outbreaks of violence as sporadic acts that have not reached the required intensity or scale to fall within the scope of international humanitarian law. However, under the framework established under the Geneva Conventions 1949 and two Additional Protocols of 1977, the application of international humanitarian law does not depend on explicit acceptance by the government. Internal armed conflicts have been recognised as a concern of the international community as a whole. Therefore, States are answerable to other international bodies for their actions - such as the UN Security Council, human rights bodies, regional organisations and ICRC - thereby adding political pressure on the incumbent State to apply international humanitarian law properly.<sup>72</sup>

Although application of humanitarian law does not depend on explicit acceptance by the government, securing acceptance has huge implications as

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<sup>69</sup> *Nicaragua v United States (Military and Paramilitary Activities in and against Nicaragua case)*, 27 June 1986, ICJ, ICJ Rep 392, para. 218 [hereinafter *Nicaragua Case* 1986].

<sup>70</sup> Common Article 3(2) states “[t]he application of the preceding provisions shall not affect the legal status of the Parties to the conflict”.

<sup>71</sup> J. Somer, ‘*Jungle Justice: Passing Sentence on the Equality of Belligerents in Non-International Armed Conflict*’, IRRC Vol. 89 No. 867 pps. 655-690 (September 2007) p. 656 [hereinafter Somer 2007]. See also L. Hosni, ‘*The ABCs of the Geneva Conventions and their Applicability to Modern Warfare*’, 2007, 14 New Eng. J. Int’l & Comp. L. 135, pps. 140-145.

<sup>72</sup> See *supra* note 6.

to the effectiveness of humanitarian law. In Colombia, the opposition Liberal party and the pro-Uribe coalition parties have voiced their rejection of the FARC-EP as a belligerent force.<sup>73</sup> The FARC-EP, however, is insistent that their military might and territorial control has elevated them to the level of belligerents in the classical sense. This might suggest that it considers itself to be bound by humanitarian law pertaining to international conflicts.<sup>74</sup> However, the FARC-EP has stated categorically that “[w]e have our own humanitarian law statute. We do not accept any other, for the time being [because] we have not been recognised as a belligerent force. We have our own disciplinary rules, our own documents”.<sup>75</sup> The FARC-EP purport to respect (and does respect) international humanitarian law when it is politically or practically convenient, but it has made clear that it does not consider itself bound by either Common Article 3 or APII.<sup>76</sup> This rather contradictory group of statements and practice indicates that the recognition of belligerency is still pertinent today and the status of such recognition can still be a factor to consider in the practical application of international humanitarian law.<sup>77</sup>

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<sup>73</sup> “‘Piedad Cordoba ha sido fundamental para la liberacion de las secuestradas’; Cesar Gaviria”, *El Espectador*, 18 February 2008, in ICG Policy Briefing Colombia 2008, *supra* note 26. This is not to say that the government is not committed to the application of international humanitarian law in Colombia. The government has shown a commitment to adhere to Common Article 3 and APII since the Protocol’s adoption in 1994, M. C. Cardena, ‘Colombia’s Peace Process: the Continuous Search for Peace’, 15 Fla. J. Int’l L. 273 (Fall 2002), p. 291 [hereinafter Cardena 2002].

<sup>74</sup> Cariollo-Suarez 1999, *supra* note 14, p. 58.

<sup>75</sup> See Cese al fuego con las Farc está lejano, *El Espectador*, Jan. 10, 1999, at 5A, quoted in Cariollo-Suarez 1999, *supra* note 14, p. 58.

<sup>76</sup> *Ibid*, p. 59. Note also that in the context of Northern Uganda, the LRA has made no declaration that it considers itself to be bound the IHL. The Uganda’s National Resistent Movement (1980-1986) did integrate the principles of IHL in its military doctrines. C. Ewumbue-Monono, *Respect for International Humanitarian Law by Armed Non-State Actors in Africa*, Vol. 88 No. 864 (December 2006), pps. 920, 907-909 [hereinafter Ewumbue-Monono 2006] for a list of unilateral declarations made by African non-State actors since 1963 and statements of commitments to respect IHL by liberation movements.

<sup>77</sup> E. van Cleef Greenberg, Law and the Conduct of the Algerian Revolution, 11 Harv. Int’l L. J. 37, 70-71 (1970), “In a revolutionary war ... status is the prize for which fighting is waged,” quoted in Moir 2002, *supra* note 40, p. 66.

## 2.2 Conditions of applicability and the definition of non-international armed conflict

Both Common Article 3 and APII established objective criteria for their application, clearly identifiable and defined in comparison to recognition of belligerency and insurgency. The chapter analyses the conditions of applicability of Common Article 3 and APII.

### 2.2.1 Common Article 3

Common Article 3 is applicable, at a minimum, to all situations of non-international armed conflict. Significantly, the minimum set of humanitarian norms must be adhered to in all circumstances, regardless of reciprocity.

The opening paragraph defines conditions for application of Common Article 3:

“In case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions...”

The two identifiable conditions flowing from this paragraph can be broken down as:

1. Armed conflict not of an international character;
2. Occurring in the territory of one of the High Contracting Parties.

The second requirement is unproblematic. The Geneva Conventions 1949 have received universal acceptance in the global community.<sup>78</sup> Given the customary status of Common Article 3 as recognised by the International Court of Justice,<sup>79</sup> it is arguable that Common Article 3 would apply to situations of internal armed conflict whether or not such conflict occurs on

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<sup>78</sup> ICRC, International Humanitarian Law – Treaties and Documents, available at <<http://www.icrc.org/ihl.nsf/CONVPRES?OpenView>> (last visited 24 July 2008).

<sup>79</sup> *Nicaragua Case 1986*, *supra* note 69, para. 218.



the territory of a High Contracting State.<sup>80</sup> The conflict must be limited to the territory of *one* of the High Contracting Parties.<sup>81</sup> To take place in more would place the conflict within the remit of an international armed conflict.

The first requirement of Common Article 3 is negative in nature, so that all armed conflicts that are not international fall within its scope.<sup>82</sup> In comparison to the definition of “international armed conflict”, which involves cross-border use of force between two or more States,<sup>83</sup> the situation of use of force in one State’s own territory is more complicated. Common Article 3 provides no guidance as to how to determine when a situation is to be regarded as an “armed conflict not of an international character” and the provision is silent as to who may determine the existence or otherwise of an armed conflict. States have argued that any opinion in contradiction of its judgement is intervention in its internal affairs.<sup>84</sup> However, given the objective conditions laid down in the Common Article 3, read in line with Common Article 2,<sup>85</sup> the State’s view is not conclusive. The ICRC has stated that “the ascertainment whether there is non-international armed conflict does not depend on the subjective judgement of

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<sup>80</sup> This was confirmed in *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 98.

<sup>81</sup> See Cariollo-Suarez 1999, *supra* note 14, p. 6, stating the “armed conflict not of an international character” referred to in Common Article 3 is broadly interpreted as meaning one in which armed opposition groups operating in the territory of a state have a degree of organization and are able to carry out a minimum of sustained military activity. See also Commentary GCI, *supra* note 67, pps. 49-50.

<sup>82</sup> R. Abi-Saab, ‘*Human Rights and Humanitarian Law in Internal Conflict*’, in D. Warner, (ed.), *Human Rights and Humanitarian Law: The Quest for Universality*, 1<sup>st</sup> ed. (Martinus Nijhoff Publishers, the Hague, 1997), pps. 107-123, p. 113 [hereinafter R. Abi-Saab 1997].

<sup>83</sup> Commentary I, *supra* note 67, p. 32: “Any difference arising between two States and leading to the intervention of armed forces is an armed conflict within the meaning of Article 2 [of the Geneva Conventions], even if one of the Parties denies the existence of a state of war. It makes no difference how long the conflict lasts, or how much slaughter takes place”. See further *Prosecutor v. Kayishema & Ruzindana*, 21 May 1999, ICTR, Case No. ICTR-9-1-A, Judgement, para. 170 in which it was held that international armed conflicts are conflicts conducted by two or more states [hereinafter *Kayishema & Ruzindana* Judgement 1999]. See also *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 84. Note further internal conflict can co-exist with an international conflict (*Nicaragua* Case 1986, *supra* note 69, para. 219; *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 72) and the potential change in character of an armed conflict from internal to international, see further Moir 2002, *supra* note 40, pps. 48-52.

<sup>84</sup> Moir 2002, *supra* note 40, p. 34.

<sup>85</sup> The first sentence of Common Article 2 states “[i]n addition to the provisions which shall be implemented in peacetime, the present Convention shall apply to all cases of declared war or any other armed conflict which may arise between two or more High Contracting Parties, even if the state of war is not recognised by one of them”. Common Article 2 to GCI, GCII, GCIII and GCIV, *supra* note 3.

the parties to the conflict; it must be determined on the basis of objective criteria”.<sup>86</sup>

The ICRC has indicated that international humanitarian law applies within the meaning of Common Article 3 “if the hostile action, directed against the legal government is of a collective character and consists of a minimum amount of organisation”.<sup>87</sup> However, the collective character and level of organisation necessary for the situation to be recognised as an armed conflict is not further elaborated on. Additionally, the requirement that the armed conflict be “directed against the legal government” was not included in the definition adopted by the ICTY in *Tadić* Appeal on Jurisdiction 1995.<sup>88</sup>

The Commentary to the Geneva Conventions includes a non-exhaustive list of criteria to determine whether a situation is a non-international armed conflict.<sup>89</sup> This was relied upon in the *Akayesu* Judgement in the International Criminal Tribunal for Rwanda.<sup>90</sup> The Commentary does include the recognition of the insurgents by the government as a belligerent.<sup>91</sup> It is clear from the *travaux préparatoires* that the scope of Common Article 3 was intended to include situations of civil war where insurgents had been recognised as belligerents.<sup>92</sup> When read together with Common Article 3(2) it becomes clear that in the absence of a special agreement decided between the belligerent parties, at a minimum Common Article 3 would apply. Other criteria listed in the Commentary are strongly reminiscent of the traditional doctrine of recognition of

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<sup>86</sup> See ICRC, Working Paper (29 June 1999), available at <http://www/ocmpw/prg/documents/precom/papersonprecomissues/ICRCWorkPaperArticle8Para2e.pdf>. This was submitted as a reference document to assist the Preparatory Commission in its work to establish the elements of crimes for the International Criminal Court.

<sup>87</sup> ICRC, Commission of Experts for the Study of the Question of Aid to the Victims of Internal Conflicts, Geneva, 25-30 October 1962 (ICRC, Geneva, 1962), p. 3 cited and reproduced in G. Abi-Saab, ‘*Non-International Armed Conflicts*’ in UNESCO, *International Dimensions of Humanitarian Law*, (Henry Dunant Institute/UNESCO/Martinus Nijhoff, Dordrecht, 1988) p. 217 [hereinafter Abi-Saab 1988].

<sup>88</sup> See *infra*. Note difference in definition of APII, *supra* note 5, article 1(1).

<sup>89</sup> Commentary GCI, *supra* note 67, p. 49-50 derived from the deliberations and amendments presented during the Conference with respect to that Article.

<sup>90</sup> [hereinafter ICTR] *Prosecutor v. Akayesu*, 2 September 1998, ICTR, Case No. ICTR-96-4-T, Judgement, para. 619 [hereinafter *Akayesu* Judgement 1998].

<sup>91</sup> Criteria 3(a), Commentary GCI, *supra* note 67, pps. 49-50.

<sup>92</sup> Moir 2002, *supra* note 40, p. 41.

belligerency,<sup>93</sup> such as territorial possession and organisational aspects. This would suggest the intention was that Common Article 3 would apply in situations where the operation of international humanitarian law had been hindered by a State's refusal to recognise the insurgent group as belligerents despite objective criteria for such recognition being met.

Common Article 3 was a leap forward in applying humanitarian norms to situations of internal armed conflict, but some commentators consider the flexibility of the provision to have undermined the protection afforded.<sup>94</sup> Others also see this flexibility as within the drafter's intention not to restrict its application to a listed number of situations and to be universally applicable. Flexibility allows for all possible manifestations of non-international armed conflict to be included and allows for the development of the law in this field. The problem in defining the scope of Common Article 3 is highlighted in the crossover between international humanitarian law and international criminal law. Breaches of Common Article 3 are classified as war crimes under article 8(2)(c) of the Rome Statute 1998.<sup>95</sup> In order to comply with the principle of specificity, a guiding principle in all crimes,<sup>96</sup> the scope of application of Common Article 3 cannot be stretched too far. To do so would exacerbate defining actions as war crimes.<sup>97</sup>

## **2.2.2 The impact of APII on the definition of “non-international armed conflicts”**

APII marked a further step in the regulation of internal armed conflicts by providing precise obligations and concrete provisions. Unlike Common Article 3, it is not universally applicable to all situations of armed

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<sup>93</sup> See discussion *supra* on recognition of belligerency, pps. 19-21.

<sup>94</sup> Cullen 2005, *supra* note 42, p. 83 and fn. 63. See also Moir 2002, *supra* note 40, p. 32, who argues that APII suffers in this respect, pps. 99-109.

<sup>95</sup> Rome Statute 1998, *supra* note 7, article 8(2)(c).

<sup>96</sup> K. Kittichaisaree, *International Criminal Law*, 3<sup>rd</sup> ed. (Oxford, Oxford University Press, 2005) p.16.

<sup>97</sup> Cullen 2005, *supra* note 42, p. 84. See also Report of the Preparatory Committee on the Establishment of the International Criminal Court, Volume I UN Doc. A/51/22 (13 September 1996) at paragraph 55 discussing how to define crimes within the Court's jurisdiction.

conflict, the field of application being strictly defined under article 1(1) APII. For the Protocol to apply, the armed conflict must be conducted between the State and an armed dissident group under responsible command, who have sufficient territorial control to mount sustained and concerted military operations and can implement the provisions of the Protocol.<sup>98</sup> This is a higher more restrictive threshold of application than Common Article 3<sup>99</sup> and therefore has a much narrower scope of application. Even when the wider protection of APII is applicable, the minimum standards contained in Common Article 3 also remain in place. APII explicitly states that it is intended to build on rather than replace the protection of Common Article 3.<sup>100</sup>

Under APII, territorial control is not dependent on the duration or proportion of control, but is only dependent on whether the group can mount concerted and sustained military operations. “Sustained and concerted” implies a level of duration and intensity; article 1(2) APII elaborates on situations not reaching this requisite level. The element of territorial control is important to the conflict in Uganda, in which the LRA does not exercise control over any part of Uganda’s territory,<sup>101</sup> its main base of operations being located in southern Sudan. The LRA claims to represent the views of the Acholi people who are largely based in the northern parts of Uganda,<sup>102</sup> but this is an extremely contentious view, particularly during the 2006-2008 peace process in Juba. Furthermore, when faced with increasing difficulties in attacks against government troops, the LRA has resorted to terror tactics, particularly against vulnerable members of the civilian population such as women and children, and civilian objects, rather than control of territory. Although the conflict would certainly meet the requirements of sustained, concerted military operations after over twenty years of conflict, little apparent effort has been made by the LRA to meet the standards contained in international humanitarian law. The essentially guerrilla nature of the group makes it difficult to implement the provisions of the Protocol. It

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<sup>98</sup> APII, *supra* note 5, article 1(1).

<sup>99</sup> Clapham 2006, *supra* note 45, p. 497.

<sup>100</sup> APII, *supra* note 5, article 1(1).

<sup>101</sup> Ssenyonjo 2005, *supra* note 51, p. 411.

<sup>102</sup> *Also* in southern parts of Sudan.

would therefore appear that the APII does not apply to the conflict in Uganda, and thus the LRA are only bound by Common Article 3.<sup>103</sup>

It is widely accepted that there must be a degree of organisation to the armed opposition group for them to be correctly described as a “party” to the conflict. As stated in the *Akayesu* Judgement, “the term ‘armed conflict’ suggests the existence of hostilities between armed forces organised to a greater or lesser extent”.<sup>104</sup> These requirements are explicit in the application of APII, which requires that armed groups be organised under responsible command and able to implement the Protocol.<sup>105</sup> It is also a factor in the application of Common Article 3. At a minimum, the insurgents must be such capable of carrying out the obligations imposed upon them by Common Article 3,<sup>106</sup> which presupposes a responsible command structure and controlling authority.

Moir argues that the need to be able to implement APII introduces a *de jure* reciprocity, in that the State is required to observe the law only to the same extent as the insurgents.<sup>107</sup> This is controversial given the unilateral obligations which automatically apply, enshrined by the Geneva Conventions 1949 and Additional Protocols thereto. International humanitarian law lays down a set of absolute and unconditional obligations on both parties to the conflict<sup>108</sup> that require States to “respect and ensure respect” for the Conventions “in all circumstances”<sup>109</sup> and thus States cannot side step their obligations under any circumstances.

Intensity of violence is another factor to be taken into consideration when determining the application of APII. States frequently use force in a wide range of activities, including criminal enforcement and larger operations intended to suppress civil disturbances, so a greater intensity of fighting is required for the application of APII than Common Article 3. For Common Article 3 to apply intensity must go beyond civil disturbances or

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<sup>103</sup> Ssenyonjo 2005, *supra* note 51, p. 411.

<sup>104</sup> *Akayesu* Judgement 1998, *supra* note 90, para. 620.

<sup>105</sup> APII, *supra* note 5, article 1(1).

<sup>106</sup> Moir 2002, *supra* note 40, p. 36.

<sup>107</sup> *Ibid*, p. 108.

<sup>108</sup> *Prosecutor v. Kupreskić et al.*, 14 January 2000, ICTY, Case No. IT-95-16-A, Judgement, para. 511 and 517 [hereinafter *Kupreskić et al.* Judgement 2000].

<sup>109</sup> GCI, GCII, GCIII, GCIV, *supra* note 3, Common Article 1.

riots and cannot merely be any instance of violence.<sup>110</sup> Such low-intensity disturbances are excluded from the ambit of the provisions of APII also.<sup>111</sup> Beyond this, APII does not add any further clarification in defining an “armed conflict not of an international character”, but requires that the government be a party to the conflict for the provisions of APII to apply.<sup>112</sup> Common Article 3 does not define internal armed conflict in terms of parties involved, reflected in article 8(2)(f) of the Rome Statute of the International Criminal Court 1998, allowing for wider application than APII.<sup>113</sup>

### **2.2.3 Definition of “non-international armed conflict” under international criminal law**

In regard to the application of Common Article 3 and APII to non-State armed actors, the armed conflict must be of non-international character.<sup>114</sup> However, the definition of “non-international armed conflict” under Common Article 3 and APII is ambiguous in parts, as outlined above. Some of these less clear aspects have been further clarified in the operation of international criminal law. The jurisprudence of ICTY, ICTR, and the Special Court for Sierra Leone has clarified what constitutes a “non-international armed conflict” and the conditions of applicability of Common Article 3 and APII, both generally and as penal instruments.<sup>115</sup>

#### **2.2.3.1 The International Criminal Tribunals**

*Tadić* Appeal on Jurisdiction 1995 held that “an armed conflict exists whenever there is a resort to armed force between States or protracted armed

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<sup>110</sup> Moir 2002, *supra* note 40, p. 37.

<sup>111</sup> APII, *supra* note 5, article 1(2). Note also requirement of “sustained and concerned military operations”.

<sup>112</sup> APII, *supra* note 5, article 1(1).

<sup>113</sup> See Rome Statute 1998, *supra* note 7, article 8(2)(f).

<sup>114</sup> Note Common Article 3 also applies to international armed conflicts.

<sup>115</sup> R. Boed, ‘*Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case of Law of the International Criminal Tribunal for Rwanda*’, *Criminal Law Forum* 13, pps. 293–322 (2002) p. 295.

violence between governmental authorities and organised armed groups or between such groups within a State.”<sup>116</sup>

The definition adopted by the ICTY therefore identifies the criteria as protracted armed violence and involving organised non-governmental armed groups. Protracted armed violence implies a certain level of intensity, although this is expressed in terms of duration, rather than the scale of violence. There are no requirements of territorial control<sup>117</sup> or the ability to meet the obligations contained in Common Article 3. In addition, internal armed conflict is not defined in terms of parties.<sup>118</sup>

This is confirmed in the decisions of the ICTR, which suggest that armed conflict extending only a few months satisfies the ‘protracted’ requirement. Given the intensity of violence in the Rwandan context, the conflict was considered to constitute an “armed conflict” within the meaning of Common Article 3.<sup>119</sup> According to the decision in *Prosecutor v. Rutaganda*, this definition is “termed in the abstract, and whether or not a situation can be described as an ‘armed conflict’, meeting the criteria of Common Article 3, is to be decided upon on a case-by-case basis”.<sup>120</sup>

The ICTR in its decision in the *Akayesu* Judgement focused on the intensity of the conflict and organisation of the parties thereto in deciding whether the Rwandan conflict satisfied Common Article 3.<sup>121</sup> The territorial control, ability to carry out prolonged military operations, controlling authority, structure and discipline of the troops also were factors in this decision.<sup>122</sup> Another factor noted by the Court was the Rwandan Patriotic

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<sup>116</sup> Definition followed in *Prosecutor v. Delalić, Mucić, Delić and Landžo*, 16 November 1998, ICTY, Case IT-96-21-T, Judgement, para. 183 [hereinafter *Delalić et al* Judgement 1998]; *Prosecutor v. Furundžija*, 10 December 1998, ICTY, Case IT-95-17/1-T, Judgement, para. 59 [hereinafter *Furundžija* Judgement 1998]; *Prosecutor v. Tadić* (Case No. IT-94-1-T), Opinion and Judgment, 7 May 1997, paras. 561–568.

<sup>117</sup> *C.f.* D. Jinks, ‘September 11 and the Laws of War’, 28 *Yale J. Int'l L.* 1 Winter 2003 p. 27 [hereinafter Jinks 2003].

<sup>118</sup> Note in this respect no requirement for recognition of belligerency, discussed *supra* pp 19-21.

<sup>119</sup> *Akayesu* Judgement 1998, *supra* note 90, paras. 619 – 627. Jinks 2003, *supra* note 117, p. 29.

<sup>120</sup> *Prosecutor v. Rutaganda*, 6 December 1999, ICTR, Case No. ICTR-96-3-T, Judgement, para. 91 [hereinafter *Rutaganda* Judgement 1999]; *Delalić et al* Judgement 1998, *supra* note 116, para. 183.

<sup>121</sup> *Akayesu* Judgement 1998, *supra* note 90, para. 620.

<sup>122</sup> *Ibid*, paras. 627 and 639.

Front representations to the ICRC that it was bound by international humanitarian law. This decision was endorsed in a number of other cases before the ICTR.<sup>123</sup> Interestingly, the ICTR has found that the definition of internal armed conflict requires that the parties be a State and a non-State entity, distinct from Common Article 3 and article 8(2)(f) of the Rome Statute.<sup>124</sup> It was held in *Prosecutor v. Musema* that “a non-international conflict is distinct from an international armed conflict because of the legal status of the entities opposing each other: the parties to the conflict are not sovereign States, but the government of a single State in conflict with one or more armed factions within its territory”.<sup>125</sup>

The ICTY held in *Tadić* Appeal on Jurisdiction 1995 that:

“International humanitarian law applies from the initiation of such conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory of the warring States, or in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>126</sup>

This confirms the ICJ judgement that Common Article 3 is applicable to “all armed conflicts” and determines that the territorial field of application covers all affected territory, including that no long under State control. The provisions are to be applied as “from the initiation to the cessation of hostilities”, implying again the protracted requirement.<sup>127</sup> In deciding the applicability of Common Article 3, both the ICTY and ICTR have focused on the organisation of the forces and the intensity of the conflict. From this, the applicability of Common Article 3 would therefore depend on organised, as opposed to unorganised, and prolonged, as opposed to short-lived, internal hostilities.<sup>128</sup>

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<sup>123</sup> *Prosecutor v. Musema*, 27 January 2000, ICTR, Case No. ICTR-96-13-T, Judgment and Sentence, paras. 250–251 and 256–258 [hereinafter *Musema* Judgement 2000]; *Rutaganda* Judgment 1999, *supra* note 120, paras. 93 and 436; *Kayishema & Ruzindana* Judgement 1999, *supra* note 82, paras. 172 and 597.

<sup>124</sup> *Kayishema & Ruzindana* Judgment 1999, *supra* note 82, para. 170.

<sup>125</sup> *Musema* Judgement 2000, *supra* note 123, para. 247.

<sup>126</sup> Definition followed in *Delalić et al* Judgement 1998, *supra* note 116, para. 183 and *Furundžija* Judgement 1998, *supra* note 116, para. 59.

<sup>127</sup> Jinks 2003, *supra* note 117, p. 28.

<sup>128</sup> *Ibid*, p. 27.



### 2.2.3.2 The Rome Statute of the International Criminal Court 1998

The Rome Statute 1998 provides a more elaborated definition of internal “armed conflict” than Common Article 3 and identifies several acts as war crimes when committed in internal armed conflict.<sup>129</sup> “Serious violations of Common Article 3”<sup>130</sup> committed in “armed conflicts not of an international character” are criminalised. The provision does “not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other acts of a similar nature”.<sup>131</sup> The criminal prohibitions identified in this provision apply in “armed conflicts that take place in the territory of a State when there is a protracted armed conflict between governmental authorities and organised groups or between such groups” under Article 8(2)(f). Jurisdiction over non-international armed conflicts was one of the most controversial issues dealt with in the negotiations leading up to the adoption of the Rome Statute, its inclusion being opposed by India, China, Turkey, Sudan and the Russian Federation.<sup>132</sup>

The first sentence of Article 8(2)(f) of the Rome Statute 1998 confirms the negative definition found in Common Article 3 of “armed conflicts not of an international character”. This article codifies the ICRC Commentary’s view that internal “armed conflicts” within the meaning of Common Article 3 do not include “situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence”.<sup>133</sup> It goes further by providing a positive definition of an internal armed conflict as “armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organised armed groups or between such groups”. This is a slight variation on the definition provided by *Tadić* Appeal on Jurisdiction 1995, which included “protracted armed violence”. According to Cullen, this does not change the

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<sup>129</sup> Rome Statute 1998, *supra* note 7, article 8(2)(c)-(f).

<sup>130</sup> *Ibid.*, article 8(2)(c).

<sup>131</sup> *Ibid.*

<sup>132</sup> Cullen 2005, *supra* note 42, p. 102.

<sup>133</sup> Jinks 2003, *supra* note 117, p. 29.

scope of internal armed conflict or create a threshold of applicability distinct from that of *Tadić* Appeal on Jurisdiction 1995.<sup>134</sup>

Article 8(2)(f) has abandoned the requirement for the existence of responsible command,<sup>135</sup> sustained and concerted military operations or effective control of any part of the territory. There is no requirement that the organised armed groups have the ability to implement humanitarian law. The parameters of the provision are further broadened in the use of the term “governmental authorities”, which, according to Zimmerman, “has to be understood as including not only regular armed forces of a State but all different kinds of armed personnel provided they participate in protracted armed violence, including, where applicable, units of national guards, the police forces, border police or other armed authorities of a similar natures”.<sup>136</sup> The provision is less restrictive than Article 1(1) of APII, providing for the existence of armed conflict between warring factions without the involvement of a *de jure* governmental authority.

Article 8(2)(f) can be seen as reinforcing the application of Common Article 3, not only in its broader scope of application, but also because Article 8(3) fulfils the dual purpose of minimisation of human suffering and the respect for State sovereignty.<sup>137</sup> Article 8(3) of the Rome Statute is taken from Article 3(1) APII which also emphasises State sovereignty.<sup>138</sup> However, ensuring greater accountability for crimes committed in situations of internal armed conflict contributes to the move from a State-sovereignty approach to a human-being-oriented approach towards international criminal law.<sup>139</sup> Like international humanitarian law, in the application of the provisions of the Rome Statute 1998 determination of a situation of armed conflict not of an international character is more than a simple determination made by the State in question. Such determination can come from a variety of actors seen in the jurisdictional provisions of the Rome Statute 1998, including the UN Security Council and ICC Prosecutor.

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<sup>134</sup> Cullen 2005, *supra* note 42, p. 103.

<sup>135</sup> See further Rome Statute 1998, *supra* note 7, article 25(3)(b) and article 28.

<sup>136</sup> Commentary APII, *supra* note 57, 286.

<sup>137</sup> Jinks 2003, *supra* note 117, p. 29.

<sup>138</sup> APII, *supra* note 5, article 3(1).

<sup>139</sup> Cullen 2005, *supra* note 42, p. 103.

In addition to State parties, the UN Security Council acting under C.VII of the Charter of the United Nations<sup>140</sup> can determine that a situation falls within the jurisdiction of the Court as a non-international armed conflict and make a referral to the Court.<sup>141</sup> The Prosecutor has the right to initiate investigations in respect of such crimes in accordance with Article 15.<sup>142</sup> As such, the initial determination may come from either the Prosecutor or the Security Council. Following referral, in determining if there is a reasonable basis to investigate such situations further and whether the Court has jurisdiction will involve a determination by the Prosecutor as to whether there is an armed conflict not of an international character, which the Pre-Trial Chamber will be required to pronounce on categorically.<sup>143</sup> The framework of the Rome Statute thus provides a clear process to objectively determine if there is a situation of internal armed conflict, which will in turn impact on the application of international humanitarian law.

## **2.3 Applying international humanitarian law to armed opposition groups**

Having established when international humanitarian law applies to non-State armed actors, how it applies must be addressed. Traditionally, States were the primary actors in the international realm and as such international obligations were created by and only addressed to States. Today, the spectrum of actors has grown and international obligations are addressed to other bodies, such as international organisations and individuals. However, States remain the only actors with full legal personality.<sup>144</sup> Furthermore, individuals cannot accede to international treaties and neither can groups.

International humanitarian law directly grants rights and imposes obligations on non-State actors, specifically regulating the conduct of

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<sup>140</sup> Charter of the United Nations 1945, 26 June 1945, U.N.T.S XVI [hereinafter UN Charter].

<sup>141</sup> Rome Statute 1998, *supra* note 7, article 13(b).

<sup>142</sup> *Ibid*, article 13(c) and article 15(1).

<sup>143</sup> *Ibid*, article 15(3) and (4).

<sup>144</sup> I. Brownlie, *Principles of Public International Law*, 5<sup>th</sup> ed, (Oxford University Press, Oxford, 1998) p. 444.

parties to conflicts, and also individuals.<sup>145</sup> Obligations such as those in Common Article 3 are aimed at insurgent groups.<sup>146</sup> The Commentaries of both the Geneva Conventions 1949 and Additional Protocols make clear the intention that obligations are placed not only on States, but also on armed non-State actors:

“[T]he commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State and certain obligations are therefore imposed upon them. The extent of rights and duties of private individuals is therefore the same as that of the rights and duties of the State. Although this argument has occasionally been questioned in legal literature, the validity of the obligation imposed upon insurgents has never been contested.”<sup>147</sup>

The wording of Common Article 3 reiterates this intention, in which the minimum standard of protection contains obligations for “each Party to the conflict”. International practice has further confirmed this intention in various forums, including international jurisprudence.

The ICJ observed in the *Nicaragua* Case 1986 that the acts of the Contras, fighting against the Nicaraguan Government, were governed by the law applicable to armed conflicts not of an international character, that is Common Article 3.<sup>148</sup> In this judgement, it was established that Common Article 3 represents the ‘general principles’ of humanitarian law and thus constitutes the minimum standard applicable in all armed conflicts.<sup>149</sup> In 2004, it was restated in the Appeals Chamber of the SCSL that “it is well settled that all parties to an armed conflict, whether States or non-State actors, are bound by international humanitarian law, even though only States may become parties to international treaties”.<sup>150</sup> The Inter-American

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<sup>145</sup> Note the international rules applicable to individuals is limited to prohibitions on committing a limited number of international crimes - L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge University Press, Cambridge, 2002) p. 17 [hereinafter Zegveld 2002].

<sup>146</sup> Clapham 2005, *supra* note 45, p. 503.

<sup>147</sup> Commentary APII, *supra* note 57, para. 4444. Footnotes omitted.

<sup>148</sup> *Nicaragua* Case 1986, *supra* note 69, para. 119. See also *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Opinion of 8 July 1996, ICJ, 35 ILM 809 para. 79 (1996) [hereinafter *Legality of Nuclear Weapons* Opinion 1996].

<sup>149</sup> *Nicaragua* Case 1986, *supra* note 69, para. 218.

<sup>150</sup> *Prosecutor v. Sam Hinga Norman*, Decision of 31 May 2004, SCSL, Case No. SCSL-2004-14-AR72(E), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment), para. 22. See also *Akaeysu* Judgement 1998, *supra* note 90, para. 611.

Commission held that the mandatory provisions of Common Article expressly bind and apply equally to both parties to internal conflicts, i.e. government and dissident forces. Moreover, “the obligation to apply Common Article 3 is absolutely for both parties and independent of the obligation of the other”.<sup>151</sup>

In the context of Colombia, the Inter-American Commission has held that the non-derogable provisions of Common Article 3 govern conduct with respect to hostilities, and are binding on both the State and dissident armed groups, in all internal armed conflicts.<sup>152</sup> The UN Security Council has also passed a number of resolutions calling upon all parties to the hostilities, namely government armed forces and armed opposition groups, to respect fully the applicable provisions of international humanitarian law, including Common Article 3.<sup>153</sup> For example, in 1998 with regard to Afghanistan, the Security Council reaffirmed that “all parties to the conflict are bound to comply with their obligations under international law and in particular under the Geneva Conventions of 1949”.<sup>154</sup> The resolution went on to state that “persons who commit or order the commission of breaches of the Conventions are individually responsible in respect of such breaches”, confirming at the highest level that individual responsibility attaches to violations of international humanitarian law in internal armed conflicts.<sup>155</sup> Finally, the UN General Assembly has also recognised the need to uphold

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<sup>151</sup> *Tablada Case*, 30 October 1997, IACHR Report No. 55/97, Case No. 11.137

(Argentina), OEA/Ser.L/V/II.97, Doc. 38, para. 174 [hereinafter *Tablada Case* 1997].

<sup>152</sup> *Arturo Ribón Ávila*, 30 September 1997, IACHR Report No. 26/97 Case No. 11.142 (Colombia), OEA/Ser.L/V/II.98, Doc. 7, rev. (1998) para. 131.

<sup>153</sup> SC Res. 1193 (1998) UN Doc. S/RES/1998, adopted in 3921<sup>st</sup> meeting, 28 August 1998, para 12 (Afghanistan) (hereinafter SC Res. 1193]; SC Res. 812 (1993) UN Doc.

S/RES/812, adopted in 3183<sup>rd</sup> meeting, 12 March 1993, para. 8 (Rwanda); SC Res. 794

(1992) UN Doc. S/RES/794, adopted in 3145<sup>th</sup> meeting, 3 December 1992, para. 4

(Somalia). See also UN Commission on Human Rights, Res. 1999/18, UN Doc.

E/CN.4/RES/1999/18, para. 17 (23 April 1999); UN Commission on Human Rights, Res.

1997/59. ESCOR Supp. (No. 3) at 198, U.N. Doc. E/CN.4/1997/59 (1997) para. 7; UN

Commission on Human Rights Res. 1998/67, ESCOR Supp. (No. 3) at 210, U.N. Doc.

E/CN.4/1998/67 (1998). para. 6 (21 April 1998).

<sup>154</sup> SC Res. 1214 (1998), UN Doc. S/RES/1214, adopted in 3952<sup>nd</sup> meeting, 8 December 1998, preambular para. 12.

<sup>155</sup> Clapham 2006, *supra* note 45, p. 500.

basic humanitarian principles in all conflict.<sup>156</sup> The logic of applying humanitarian norms in internal armed conflict was put succinctly by the ICTY:

“Why protect civilians from belligerent violence, or ban rape, torture or the wanton destruction of hospitals, churches, museums or private property, as well as proscribe weapons causing unnecessary suffering when two sovereign States are engaged in war, and yet refrain from enacting the same bans or providing the same protection when armed violence has erupted ‘only’ within the territory or a single State? If international law, while of course duly safeguarding the legitimate interests of States, must gradually turn to the protection of human beings, it is only natural that the aforementioned dichotomy should gradually lose its weight.”<sup>157</sup>

There have been a number of arguments put forward as to how armed opposition groups become bound by international law. Some have argued that insurgents become bound automatically because they are operating on the territory of a State party. Meron argues that their obligations should not depend on the incorporation of duties under national law, but rather “that Article 3 should be construed as imposing direct obligations on the forces fighting the government”.<sup>158</sup> Others argue that where insurgent parties are exercising government-like functions, they are automatically bound as *de facto* authorities and should be held accountable as far as they are exercising *de facto* governmental functions of the State. This goes a step towards recognising the realities in some internal conflicts, but is not applicable to all internal conflicts where insurgents fail to reach the requisite level of organisation or territorial control.

The provisions of Common Article 3 have been recognised as universally applicable in all situations of non-international armed conflict.<sup>159</sup> The position of APII under customary international law is still

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<sup>156</sup> GA Res. 2444 (XXIII), Respect for human rights in armed conflict, U.N. GAOR, 23rd Sess., Supp. No. 18, at 164, U.N. Doc. A/7433 (1968), adopted in 1798th plenary meeting of 19 December 1968 [hereinafter GA Res. 2444 (1968)].

<sup>157</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 82.

<sup>158</sup> T. Meron, *Human Rights in Internal Strife: Their International Protection*, (Grotius, Cambridge, 1987) p. 39.

<sup>159</sup> *Nicaragua* Case 1986, *supra* note 69, para. 218; *Legality of Nuclear Weapons Opinion* 1996, *supra* note 148, para. 79.

highly contentious.<sup>160</sup> As such, in deciding whether insurgents are bound or not a great deal of weight is placed on whether the territorial State is a party to the Protocol.

According to the international law of treaties,<sup>161</sup> for APII to be binding for third parties (that is, armed non-State actors) the High Contracting Party must have intended for the Protocol to bind the armed opposition groups, and the armed opposition groups must accept the rights and obligations thereby conferred on them.<sup>162</sup> In establishing intention to bind such groups, Cassese identifies three points.<sup>163</sup> First, according to article 1(1) of APII, the provisions of the Protocol develop and supplement Common Article 3. It has been clearly established that as Common Article 3 binds parties to internal armed conflicts,<sup>164</sup> so must APII. Second, APII establishes strict conditions in which it is to apply. It would be bizarre if not all rights or duties contained were to flow from this. Third, if the Protocol is to be operational, it is not enough that the dissident armed groups have the capacity to apply its provisions; they must do so in practice. Article 6(5) imposes duties on the 'authorities in power' once the conflict has come to an end, referring both to the government and insurgents. To do otherwise would presume the government was always victorious. Reference to the dissident armed groups at the end of the conflict would stand in contrast in the Protocol if they were not addressed during the progress of the conflict.

Finally, in ascertaining the willingness of the dissident armed groups to comply with the Protocol, it is unclear if the requirement under article 1(1) APII that the dissident armed groups can apply its provisions means

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<sup>160</sup> When APII was drafted, there was a great deal of debate in the Diplomatic Conferences whether regulation should be extended to such conflicts. The intention of States not to be bound further than the treaties they expressly agree to in this area can be seen in the preambular para. 4 which is remarkably similar to the Martens Clause, but differs in that it makes no reference to 'the principles of international law derived from established custom'. Moir 2002, *supra* note 40, p. 133.

<sup>161</sup> See *Federal Republic of Germany v. Denmark, Federal Republic of Germany v. Netherlands*, 1969, ICJ., 3 ICJ Rep. (1969) [hereinafter *North Sea Continental Shelf Case* 1969]. See C. Greenwood, *Essays on War in International Law* (Cameron May Ltd, London 2006) p. 182 [hereinafter Greenwood 2006].

<sup>162</sup> A. Cassese, 'The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts', *Int'l. Comp. L. Quarterly*, Vol. 30, pp. 416-39 (1981), pp. 424-26 [hereinafter Cassese 1981].

<sup>163</sup> *Ibid.*

<sup>164</sup> See *supra* chapter 2.3.

they are in fact obligated to do so.<sup>165</sup> As such, the willingness of the dissident armed groups to comply with the Protocol must be determined in the individual conflict. The most assured sign of willingness is clearly to observe the provisions of the Protocol. A declaration of consent to be bound by the armed opposition group has also been taken into account in this regard.<sup>166</sup> For example, the Inter-American Commission on Human Rights' Third Report on Colombia noted that the ELN had specifically declared that it considered itself to be bound by the 1949 Geneva Conventions and APII.<sup>167</sup> However, the weight of such a declaration is regarded as being of less importance in comparison to whether the State has ratified the relevant treaty and actual practice of the armed opposition group.

Many of the provisions of APII reflect humanitarian principles clearly established in custom. Indeed, article 1(1) recognises that the Protocol is intended to "develop and supplement" the provisions of Common Article 3, which are reflective of customary international law.<sup>168</sup> Part II on 'Humane Treatment' and Part III on 'Wounded, Sick and Shipwrecked' elaborate in more concrete terms and with greater detail the general principles enunciated in Common Article 3. These provisions can therefore be considered to be as an authoritative interpretation of these principles, which must be interpreted in light of their object and purpose and evolving legal nature.<sup>169</sup> It should also be taken into consideration that politically, it would be extremely difficult for a State to justify providing a lower level of protection to civilians and non-combatants than the Protocol requires, especially where the provisions are reflective of human rights obligations.

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<sup>165</sup> Moir 2002, *supra* note 40, p. 97.

<sup>166</sup> See further ICRC, *Increasing Respect for International Humanitarian Law in Non-International Armed Conflicts* (ICRC, Geneva, 2008) pps. 19-21, available at [http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section\\_publications\\_humanitarian\\_law](http://www.icrc.org/Web/eng/siteeng0.nsf/htmlall/section_publications_humanitarian_law) (last visited 24 July 2008) [hereinafter ICRC *Increasing Respect* 2008].

<sup>167</sup> See also in the context of Rwanda *Akayesu* Judgement 1998, *supra* note 90, at 248, para. 627; *Kayishema & Ruzindana* Judgement 1999, *supra* note 82, para. 156.

<sup>168</sup> *Nicaragua* Case 1986, *supra* note 69, para. 218.

<sup>169</sup> *Abi-Saab* 1988, *supra* note 87, p. 237.



In its comprehensive study of customary humanitarian law, the ICRC<sup>170</sup> has stated that a large number of the provisions of APII are reflected in custom, including: prohibition of attacks on civilians; the obligation to respect and protect medical and religious personnel, medical units and transports; the obligation to protect medical duties; the prohibition of starvation; the prohibition on attacks to objects indispensable to the survival of the civilian population; the obligation to respect the fundamental guarantees of civilians and persons *hors de combat*; the obligation to search for and respect and protect wounded, sick and shipwrecked; the obligation to search for and protect the dead; the obligation to protect persons deprived of their liberty; the prohibition of forced movement of civilians; and the specific protections afforded to women and children.<sup>171</sup> The fact that a number of key obligations under APII are reflective of custom is an important development in the protection afforded under international humanitarian law, given the higher standard of applying the Protocol under article 1(1). The ICTY has held that custom and treaty law mutually support and supplement each other.<sup>172</sup> Any agreement concluded by the armed opposition groups were considered to be evidence of custom.<sup>173</sup> This might suggest that the consent of the armed opposition group is relevant for it to be bound under international customary law. This evaluation of customary international law is extremely progressive, the formation of custom traditionally being focused only on consistent State practice and *opinio juris*.<sup>174</sup> As the sphere of international actors evolves, so may too the formation of customary international law, an issue that is beyond the scope of this paper.

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<sup>170</sup> J. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, 2 volumes, Volume I. Rules, Volume II. Practice (2 Parts) (Cambridge University Press, 2005) [hereinafter ICRC study of customary law].

<sup>171</sup> *Ibid.*, Rules 1, 25-30, 53-54, 87-105, 109-113, 117-119, 121, 125, 128 and 134-137. See also Report of the Secretary-General, *Promotion and Protection of Human Rights: Fundamental Standards of Humanity*, 3 March 2006, UN Doc. E/CN.4/2006/87, para. 11 [hereinafter *Fundamental Standards of Humanity* 2006].

<sup>172</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 98. See also *Akaesu* Judgement 1998, *supra* note 90, para. 608.

<sup>173</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 107.

<sup>174</sup> *North Sea Continental Shelf* Case 1969, *supra* note 161.

### 2.3.1 Colombia

The Colombia conflict highlights the various factors that are involved in establishing if Common Article 3 and APII are applicable. Colombia is a party to both the Geneva Conventions 1949 and APII. APII was ratified without reservation. APII has been in force in Colombia since 15 February 1996. The roots of the conflict, however, can be traced as far back as the 1960s.<sup>175</sup>

Both the FARC-EP and ELN possess the organisation and command structure required by article 1(1) APII and are *de facto* authorities in a number of territories under their control.<sup>176</sup> Furthermore, the ELN has specifically declared that it considers itself bound by the 1949 Geneva Conventions and Protocol II.<sup>177</sup> The FARC-EP, however, has stated it only recognises and applies international humanitarian norms “in accordance with the conditions of [their] revolutionary war.”<sup>178</sup>

Notwithstanding denial by both civilian and military authorities to the contrary, many see paramilitary groups as a central component of the Colombian security forces’ anti-insurgency strategy.<sup>179</sup> With regard the paramilitary groups, several official AUC documents emphasise the importance of humanitarian law in regulating the conflict, and even the need to protect the civilian population from its dangers.<sup>180</sup> Like the guerrilla groups, the AUC has a military structure, with a general staff made up of leaders of each regional paramilitary group.<sup>181</sup> Not all paramilitary groups are organised to such an extent as the guerrilla groups, but this does not

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<sup>175</sup> Cariollo-Suarez 1999, *supra* note 14, p. 6.

<sup>176</sup> HRW War Without Quarter 1998, *supra* note 19, p. 131 – 132.

<sup>177</sup> *Ibid.* Third Report on Colombia 1999, *supra* note 24, p. 78 para. 20.

<sup>178</sup> Comisión Internacional de las FARC, *A la población civil*, quoted in Cariollo-Suarez 1999, *supra* note 14, p. 2.

<sup>179</sup> Colombian Human Rights Ombudsman (“Defensor del Pueblo”), speaking before the Colombian Congress “[Have] become the illegal arm of the armed forces and police, for whom they carry out the dirty work, which the armed forces and police cannot do as authorities subject to the rule of law” - Defensoría del Pueblo, IV Informe Anual del Defensor del Pueblo al Congreso de Colombia 59-60 (1997), quoted in Cariollo-Suarez 1999, *supra* note 14, p. 22.

<sup>180</sup> See, for example, Naturaleza Político-Militar del Movimiento, June 26, 1997, pps. 4-5 <[www.colombialibre.org](http://www.colombialibre.org)> (last visited 24 July 2008); see also Planteamientos sobre la solución política negociada al conflicto armado interno, Apr. 13, 1998, at 4 both quoted in Cariollo-Suarez 1999, *supra* note 14, p. 64.

<sup>181</sup> *Ibid.*, pps. 16-18.

affect the application of APII to conflicts arising on the territory of Colombia. Beginning in the 1980s, these groups certainly have demonstrated a capacity to carry out sustained and concentrated military operations. There is evidence that joint actions have been carried out by members of the Colombian security forces and the paramilitaries or direct actions by paramilitaries enjoying the support or acquiescence of the state forces.<sup>182</sup> As such, acts in violation of international humanitarian law committed by the paramilitaries could result in the responsibility of the State of Colombia.

Before the adoption of APII in 1994, the government of Colombia argued that the situation in Colombia had not reached the necessary threshold for APII to apply.<sup>183</sup> This position radically changed with the adoption of the Protocol and an unqualified commitment to adherence with APII, with a revival of international law arguments as part of the peace agenda.<sup>184</sup>

The Inter-American Commission has affirmed that:

“It is not necessary [to] establish if the nature and intensity of the domestic violence in Colombia constitute an internal armed conflict nor identify the specific rules of humanitarian law which govern the conflict. This is because Colombia. . . has openly recognized the factual reality that it is engaged in a conflict of said nature and that common Article 3 . . . , Protocol II . . . , and other customary rules and principles which govern internal armed conflicts are applicable.”<sup>185</sup>

In addition, the ICRC has affirmed that the Protocol applies to the conflict in Colombia by its own terms.<sup>186</sup> Despite these declarations and policy commitments, there has been a great deal of debate as to whether APII

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<sup>182</sup> See Report by the United Nations High Commissioner for Human Rights, U.N. Commission on Human Rights, 54th Sess., Agenda Item 3, at 27, U.N. Doc. E/CN.4/1998/16 (1998).

<sup>183</sup> Cardena 2002, *supra* note 73, p. 291.

<sup>184</sup> *Ibid.*, p. 291; Cariollo-Suarez 1999, *supra* note 14, p. 42. *E.g.* Former President Ernesto Samper (1994-1998) established that Protocol II would apply to all public servants, particularly those in the armed forces and police, as a matter of constitutional law and presidential policy. Under the Samper Administration, the President issued an order in his capacity as Commander-in-Chief stating that public servants would be bound to “unilaterally” apply the rules of APII.

<sup>185</sup> Third Report on Colombia 1999, *supra* note 24, para. 20.

<sup>186</sup> ICRC Special Report, *The Role of a Neutral Intermediary in Colombia 1997-1998*, (ICRC, Geneva, 1998) p. 4.

applies by operation of law. This debate has been at the heart of the struggle for effective implementation of its provisions.

Under the Colombian Constitution, international treaties and conventions ratified by Congress “which recognize human rights . . . will prevail in the internal [legal] order [over ordinary laws]. The rights and duties consecrated in this Charter shall be interpreted in conformity with the international human rights treaties ratified by Colombia.”<sup>187</sup> The Colombian Constitutional Court has held that this covers humanitarian law treaties as well, because they are part of the same generic body of norms as human rights and belong to the same international regime for the protection of all human beings.<sup>188</sup> Furthermore, the Court has expressly held that all international humanitarian law has constitutional rank in Colombia and is therefore the supreme law of the land.<sup>189</sup> The Court held that under the terms of the Constitution:

“...in Colombia international humanitarian law not only is valid at all times but also that it is automatically incorporated into ‘the internal national order’... Consequently, the members of the irregular armed groups as well as all state officials, especially all the members of the security forces who are the natural subjects of humanitarian norms, are obligated to respect the rules of international humanitarian law at all times and in all places. There is a constitutional obligation on the government, as well as on the legislative and judicial authorities, to ensure that humanitarian law is fully integrated into the internal legal order and duly enforced.”<sup>190</sup>

As such, the obligations under Common Article 3 and APII are expressly recognised as binding on all parties to the conflict. Common Article 3 has been applicable throughout the entirety of the conflict and APII since it came into force from 1996 at least. However, there is no specific

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<sup>187</sup> Colombian Constitution 1991 article 93 (translated in Cariollo-Suarez 1999, *supra* note 14, p. 35). Under article 241 of the Colombian Constitution 1991, the Constitutional Court must review the constitutionality of international instrument adopted by Congress and any implementing legislation.

<sup>188</sup> See C-027, 1993, Colombian Constitutional Court Decision, quoted in Cariollo-Suarez, *supra* note 14, p. 35.

<sup>189</sup> See C-225, 1995, Colombian Constitutional Court Decision, pps. 41-42.

<sup>190</sup> *Ibid*, pps. 40.

implementing legislation incorporating humanitarian law violations *per se* into Colombian criminal law.<sup>191</sup>

## **2.4 Obligations beyond international humanitarian law – compliments of human rights law?**

The previous sections establish that international humanitarian law binds armed opposition groups in situations of internal armed conflict which fulfil the requisite conditions of applicability.<sup>192</sup> Beyond the realm of international humanitarian law, there has been a great deal of debate over whether armed opposition groups have additional obligations under international human rights law. As a body of law, human rights has developed in leaps and bounds since the establishment of the United Nations and permeates many other areas of law and regulations on State practice. Human rights law is concurrently applicable in times of internal armed conflict. A number of human rights enforcement mechanisms have been utilised to ensure compliance with international humanitarian law,<sup>193</sup> and human rights law provides a valuable tool for interpretation of international humanitarian obligations because of similarities in their content and protection. However, it is debatable whether non-State actors have direct obligations under international human rights law.

There are distinct parallels in the protections in the two bodies of law, and each has been influenced by the other in its development.<sup>194</sup> The First Geneva Convention of 22 August 1864 was the first multilateral treaty

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<sup>191</sup> Cariollo-Suarez, *supra* note 14, p. 38. Note related crimes such as homicide, kidnapping and torture, among others, are proscribed in the Colombian Penal Code articles 268, 269 (kidnapping), and 323 (homicide) and the new Military Penal Code articles 174-179 which became law in August 1999 (Law 522 of August 12, 1999). Article 195: “When a member of the Security Forces in active service and in relation to this service commits a crime established in the ordinary Penal Code [...], he or she shall be investigated and tried in conformity with the provisions of the Military Penal Code.” (translation by Cariollo-Suarez 1999, *supra* note 14, p. 38).

<sup>192</sup> Clapham 2006, *supra* note 45, p. 498. See *supra* chapter 2.2. regarding conditions of applicability.

<sup>193</sup> See *infra* Chapter 4.5.

<sup>194</sup> T. Meron, *Convergence of International Humanitarian Law and Human Rights Law*, in D. Warner, (ed.) *Human Rights and Humanitarian Law: The Quest for Universality* (Martinus Nijhoff Publishers, the Hague, 1997) pps. 97 – 105, p. 105.

prohibiting discrimination on the grounds of nationality. Today, human rights law has produced a plethora of instruments dedicated to various forms of discrimination, and discrimination on the grounds of nationality is prohibited under the Covenant on Civil and Political Rights, the Convention on the Elimination of All Forms of Racial Discrimination<sup>195</sup> and the International Convention on the Protection of Rights of Migrant Workers and Members of Their Families,<sup>196</sup> in addition to all three regional human rights treaties.<sup>197</sup> During the final ceremony of the conference on the Geneva Conventions 1949, the ICRC representative observed that:

“The Universal Declaration of Human Rights and the Geneva Conventions are both derived from one and the same ideal, which humanity pursues increasingly in spite of passions and political strife and which it must not despair of attaining – namely, that of freeing human beings and nations from the suffering of which they are often at once the authors and the victims.”<sup>198</sup>

Despite parallels, the protection offered under the different bodies of law does vary, such as in the treatment of aliens, and the qualification of military necessity under international humanitarian law.

Generally, human rights obligations address only State parties to the particular treaty, but many human rights protection and corresponding

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<sup>195</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Dec. 21, 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660, U.N.T.S. 195, entered into force Jan. 4, 1969, article 1(1).

<sup>196</sup> International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families, adopted by GA Res. 45/158 of 18 December 1990, entered into force 1 July 2003.

<sup>197</sup> International Covenant on Civil and Political Rights, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171 article 2(1) [hereinafter ICCPR]; Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 UNTS 22, article 14, [hereinafter ECHR]; and ACHR, *supra* note 17, article 1(1). See further J. Symonides (ed.), *The Struggle Against Discrimination: A Collection of International Instruments Adopted by the United Nations System*, (UNESCO, France, 1996), available at <<http://unesdoc.unesco.org/images/0010/001060/106049e.pdf>> (last visited 24 July 2008). See also DADEL Database on anti-discrimination and equality law, available at <[www.pili.org/dadel/Category:Race\\_or\\_ethnicity\\_or\\_colour\\_or\\_nationality\\_or\\_national\\_igin](http://www.pili.org/dadel/Category:Race_or_ethnicity_or_colour_or_nationality_or_national_igin)> (last visited 24 July 2008).

<sup>198</sup> *Final Record of the Diplomatic Conference of Geneva of 1949*, Vol. II, Section B, p. 536, quoted in R. Kolb, ‘*The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions*’, IRRC No. 324, p.409-419 (1998).

obligations have been recognised as custom.<sup>199</sup> Human rights law is seen as regulating the relationship between the State and individuals, placing direct obligations on States to achieve certain standards<sup>200</sup> and prohibiting certain forms of conduct by the State towards the individual.<sup>201</sup> One of the main characteristics of the legal regulations of internal conflict is that essentially it is regulation of the relation between insurgents and the government of the State. Insurgents are (usually) nationals of the State, so this regulation is remarkably similar to the regulation under international human rights law of States towards their own citizens.<sup>202</sup> Before the adoption of human rights instruments following the coming into force of the UN Charter, the relationship between a State and its own citizenry had been considered to be a domestic matter, the regulation of which was solely an internal matter.<sup>203</sup> Human rights standards have subsequently massively eroded this position, with the declared purpose to place limits on what may and may not be done by the State in that relationship. This philosophy can be seen in the adoption of Common Article 3 and APII.<sup>204</sup>

Individuals as well as States are addressed in both international humanitarian<sup>205</sup> and international human rights law. Individuals are responsible for acts in contravention of international humanitarian law

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<sup>199</sup> See for example Human Rights Committee, General Comment No. 24: *Issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 2 November 1994, para. 8.

<sup>200</sup> For example, *International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N.GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 adopted on 16 December 1966 article 12 right to the highest attainable standard of physical and mental health, article 13 right to education [hereinafter ICESCR].

<sup>201</sup> For example, ICCPR, *supra* note 197, article 6(1) right not to be arbitrarily deprived of life, article 7 right not to be subjected to torture.

<sup>202</sup> R. Abi-Saab 1997, *supra* note 82, p. 108.

<sup>203</sup> For example, J. S Pictet (ed), *Commentary on Geneva Convention Relative to the Protection of Civilian Persons in Time of War* (ICRC, Geneva, 1958) p. 47 explains regarding the definition of “protected persons” under article 4: “The definition has been put in a negative form; as it is intended to cover anyone who is ‘not’ a national of the Party to the conflict or Occupying Power in whose hands he is. The Convention thus remains faithful to a recognized principle of international law: it does not interfere in a State's relations with its own nationals” [hereinafter Commentary IV].

<sup>204</sup> See APII, *supra* note 5, preambular para. 2 and Commentary APII, *supra* note 57, pps. 1339-1340, discussed *infra*.

<sup>205</sup> *Furundžija* Judgement 1998, *supra* note 116, para. 140.

provisions.<sup>206</sup> Human rights law also imposes obligations of conduct on individuals, violations of which are punishable under national and international law.<sup>207</sup> Both fields address individual accountability for such breaches, as opposed to group accountability.<sup>208</sup> Crimes under international law create responsibility for individuals and not for the armed opposition groups. While holding leaders and members accountable may be a way of controlling the behaviour of the group, it is different from holding the whole group accountable for breaching obligations.<sup>209</sup>

Various organs of the UN have presumed that there are internationally legally binding human rights obligations on armed opposition groups where such human rights are being flagrantly denied by a party to a conflict.<sup>210</sup> For example, the Security Council has repeatedly called on non-State actors to uphold human rights in situations of armed conflict, obligating them to prevent further violations of human rights and humanitarian norms.<sup>211</sup> Certain specifically prohibited acts and conduct by non-State actors have been addressed in Security Council resolutions, such as Resolution 1540

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<sup>206</sup> GCI, *supra* note 3, article 50; GCII, *supra* note 3, article 51; GCIII, *supra* note 3, article 130; GCIV, *supra* note 3, 147; API, *supra* note 3, article 85. *See also* Rome Statute 1998, *supra* note 7, articles 7 and 8. *See also* *Kadic v. Karadzic*, 1995, United States Court of Appeal for the Second Circuit, 70 F.3d 232 (2d Cir. 1995) (holding that Karadzic may be found liable for genocide, war crimes, and crimes against humanity in his private capacity).

<sup>207</sup> *E.g. Convention against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment* G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), adopted 10 December 1984, entered into force 26 June 1987 (1984), 1465 UNTS 85 [hereinafter CAT]; ICCPR, *supra* note 197, articles 5(1) and 20.

<sup>208</sup> *Furundzija* Judgement 1998, *supra* note 116, para. 140 “The treaty and customary rules referred to above [*inter alia* Common Article 3 and APII] impose obligations upon States and other entities in an armed conflict, but first and foremost address themselves to the acts of individuals....”

<sup>209</sup> Zegveld 2002, *supra* note 145, p. 44.

<sup>210</sup> Clapham, *supra* note 45, p. 504. *Note also* GA Res. 2444 (1968), *supra* note 156; SC Res. 1193, *supra* note 153, and SC Res. 1213 (1998), UN Doc. S/RES/1213, adopted in 3951<sup>st</sup> meeting, 3 December 1998, the latter addressing not only the government of Angola, but also to UNITA [hereinafter SC Res. 1213]. *See also* Report by Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston, Mission in Sri Lanka. *See also* Report of Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, UN Doc. E/CN.4/2006/53/Add.5, 27 March 2006.

<sup>211</sup> SC Res. 1193, *supra* note 153; SC Res. 1213, *supra* note 210; SC Res. 1479 (2003) UN Doc. S/RES/1479, adopted in the 4754<sup>th</sup> meeting, 13 May 2003, para. 8; SC Res. 1261 (1999), UN Doc. S/RES/1261, adopted in 4037<sup>th</sup> meeting, 25 August 1999; SC Res. 1509 (2003), UN Doc. S/RES/1509, adopted in the 4830<sup>th</sup> meeting, 19 September 2003, para. 10; SC Res. 1528 (2004), UN Doc. S/Res/1528, adopted in 4918<sup>th</sup> meeting, 27 February 2004, preambular para. 6.



(2004) on weapons of mass destruction.<sup>212</sup> In Tomuschat's review of the practice of the Security Council with regard to conflicts arising in the former Yugoslavia, Afghanistan, Sudan, Sierra Leone, Ivory Coast, the Democratic Republic of the Congo, Angola, Liberia and Somalia, he concludes that the Security Council was not creating new obligations in these resolutions. Instead, he concludes that they merely draw the attention of the addressees to obligations incumbent upon them under existing international human rights law.<sup>213</sup>

These resolutions are context specific and not addressed generally, so are not conclusive of international practice that recognises human rights obligations applying to all armed opposition groups in internal armed conflicts. However, addressing the specific non-State actor carries a presumption that such non-State actors carry obligations under international humanitarian and human rights law.<sup>214</sup> The language of the resolutions carries the presumption that the non-State actor addressed in the resolution has the capacity to adhere to these standards. Clearly, this capacity cannot be presumed of all instances of internal armed conflict and must be assessed on a case-by-base basis.

It is debatable whether the law of human rights has developed such that obligations are imposed on non-State actors. Zegveld holds that the main feature of human rights law is that people hold rights against the State only.<sup>215</sup> Furthermore, homogeneity between human rights and humanitarian law as to the substance of fundamental rules highlights that human rights law has little to add to international humanitarian law.<sup>216</sup> Moir has also

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<sup>212</sup> SC Res. 1540 (2004), UN Doc. S/RES/1540, adopted 4956<sup>th</sup> meeting, 28 April 2004.

<sup>213</sup> C. Tomuschat, 'The Applicability of Human Rights Law to Insurgent Movements', in H. Fischer, U. Froissart, W. Heintschel von Heinegg, and C. Rapp, (eds.) *Krisensicherung und Humanitärer Schutz – Crisis management and Humanitarian Protection: Festschrift für Dieter Leck*, (Berliner Wissenschafts-Verlag, Berlin, 2004) pp. 573-91, p. 586.

<sup>214</sup> Clapham 2006, *supra* note 45, p. 504.

<sup>215</sup> Zegveld 2002, *supra* note 145, p. 17.

<sup>216</sup> *Ibid*, p. 64, using the example of minimum standard of protection on the prohibition of violence to life and person in internal conflicts under both human rights and humanitarian law, referencing a number of UN Commission on Human Rights documents which refer to both human rights and humanitarian law standards. It is interesting that although human rights may arguably not add anything to the substance of rights under humanitarian law, it was felt necessary to reference both bodies of law. See also SC Res. 1325 (2000), UN Doc. S/RES/1325, adopted in 4213<sup>th</sup> meeting, 31 October 2000 preamble with regard the rights

noted that armed opposition groups are particularly unlikely to have the capacity to ensure certain rights, such as the rights to due process.<sup>217</sup> As will be discussed below, there are differing standards of protection in human rights law compared to humanitarian law. At a minimum, humanitarian law contains obligations in this regard in Common Article 3(1)(d), but this does not include the full range of rights and guarantees conferred on individuals under human rights law.

In practice, the lines between these related bodies of international law are frequently blurred, especially in internal armed conflicts where human rights can be restricted by both State conduct that derogates from treaty provisions in times of emergency threatening the life of the nation<sup>218</sup> and the conduct of armed opposition groups.<sup>219</sup> At a minimum, non-derogable human rights are applicable during times of conflict; where the life of the nation is not at risk, all other human rights are also applicable.<sup>220</sup> Even where derogations from human rights obligations are permissible, they must

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of women and girls, reaffirming the need to implement both international humanitarian and human rights law [hereinafter SC Res 1325].

<sup>217</sup> Moir 2002, *supra* note 40, p. 194. *See infra* chapter 3.3 discussion difference between due process under humanitarian law and human rights law.

<sup>218</sup> ICCPR, *supra* note 197, article 4; ECHR, *supra* note 197, article 15; and ACHR, *supra* note 17, article 27.

<sup>219</sup> Cariollo-Suarez 1999, *supra* note 14, p. 29. The Inter-American Commission has noted that acts of armed opposition groups ‘are detrimental to the exercise of the most important human rights’, IACHR, Second Report on the Situation of Human Rights in Colombia, OEA/Ser.L/V/II.84 at 213 (1993) [hereinafter Second Report on Colombia 1993]. UN Commission on Human Rights, *Report of the Meeting of Special Rapporteurs/Representatives Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and the Advisory Services Programme*, 30 September 1996 E/CN.4/1997/3, para. 44 ‘adverse effects their action [of armed opposition groups] might have on the enjoyment of human rights’.

<sup>220</sup> *Legality of Nuclear Weapons* Opinion 1996, *supra* note 148 at 25; *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136 [hereinafter *Legal Consequence of the Wall* Opinion 2004]. *See also* Human Rights Committee, General Comment No. 31, ‘The nature of the general legal obligation imposed on States parties to the Covenant’, CCPR/C/21/Rev.1/Add.13, 26 May 2004 [hereinafter HRC General Comment No. 31 2004]. *See also* *Isayeva, Yusupova and Bzayeva v. Russia*, 2005, ECtHR, Application Nos. 57947/00, 57948/00 and 57949/00; *Bámaca Velásquez v Guatemala*, 2000, IACtHR, Judgement, (Ser. C) No. 91 (2002); *Commission Nationale des Droits de l’Homme et des Libertés v Chad*, 1995, African Commission on Human and Peoples’ Rights, Comm. No. 74/92 (1995). *See also* GA Res. 2675 (XXV), *Basic Principles for the Protection of Civilian Populations in Armed Conflict*, adopted in the 1922<sup>nd</sup> plenary meeting of 9 December 1979 para. 1, ‘Fundamental Human Rights as accepted in international law and established in international instruments remain manifestly applicable in an armed conflict.’ [hereinafter *Basic Principles for the Protection of Civilian Populations* 1979].

not be ‘inconsistent with other obligations under international law’.<sup>221</sup> Consequently, in situations of armed conflict such derogations must be in line with obligations under international humanitarian law. The African Charter on Human and People’s Rights 1981 does not contain a derogation clause making the protection afforded under that instrument distinct from other regional instruments.<sup>222</sup> This is pertinent to the Ugandan conflict because Uganda is a State party to the African Charter.

The concurrent application of both domains of international law is expressly recognised in the second paragraph of the Preamble of APII, “*Recalling* furthermore that international instruments relating to human rights offer a basic protection to the human person”.<sup>223</sup> The Commentary explains that ‘international instruments relating to human rights’ means:

“the instruments adopted by the United Nations, i.e. on the one hand, the Universal Declaration on Human Rights and the Covenants derived from it, in particular the Covenant on Civil and political Rights, and on the other, instruments concerning specific aspects of the protection of human rights, such as the Convention on Genocide and the Convention on the Elimination of Racial Discrimination, which are often invoked in situations of non-international armed conflict, and also the recent Convention on Torture...Regional instruments relating to human rights also fall under this term.”<sup>224</sup>

In the context of the Colombian armed conflict, the Inter-American Commission has expressed the view that the scope of the ACHR should be limited to States. It noted that the ACHR applied generally only to States while ‘international humanitarian law provides the only legal standard for analysing the activities of armed dissident groups’.<sup>225</sup> Although the Commission has previously addressed a Colombian armed group to respect

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<sup>221</sup> ICCPR, *supra* note 116, article 4(1); ECHR, *supra* note 116, article 15(1); and ACHR, *supra* note 17, article 27(1).

<sup>222</sup> African Charter on Human and Peoples’ Rights (the Banjul Charter), OAU Doc. CAB/LEG/67/3 rev. 55, 21 ILM 58 (1982), adopted 27 June 1981, entered into force 21 October 1986 [hereinafter the African Charter]. The Government of Uganda ratified the African Charter in 1986, <http://www.africa-union.org/root/AU/Documents/Treaties/treaties.htm>

<sup>223</sup> APII, *supra* note 5, preambular para. 2.

<sup>224</sup> Commentary APII, *supra* note 57, pp. 1339-1340.

<sup>225</sup> Inter-American Commission on Human Rights, *Consequence of Acts of Violence Perpetrated by Irregular Armed Groups on the Enjoyment of Human Rights*, AG/RES.1043 (XX-0/90) para. 3 reprinted in *Inter-American Yearbook on Human Rights 1990* at 354 – 370. Also *Tablada Case 1997*, *supra* note 151, para. 174.

the life,<sup>226</sup> in its Third Report on Colombia it did not apply human rights law to armed opposition groups.<sup>227</sup>

The specific rules necessitated by the circumstances of internal armed conflict complete the protections afforded under human rights law, which are applicable to all persons in all contexts,<sup>228</sup> including the victims of internal conflicts.<sup>229</sup> Human rights law is not limited to governing intra-state tensions between the government and the governed. As such, protections afforded under international humanitarian law are complementary to those under international human rights law.<sup>230</sup> Insurgents are bound to meet human rights obligations to the extent that these obligations coincide with humanitarian law.<sup>231</sup> This is confirmed by international practice, which has only recognised human rights obligations of armed opposition groups to the extent appropriate in the context. That armed opposition groups are bound by human rights obligations beyond this is a precarious argument. The capacity of armed opposition groups should be taken into consideration. Although international humanitarian law does impose obligations that are similar to those embodied in international human rights law, the extent to which the parties to the conflict are bound under international humanitarian law may not be the same.<sup>232</sup> States' obligations under human rights law will always be far reaching, compared to those of armed opposition groups.

Human rights treaties are valuable during internal armed conflicts because they can be used as an interpretative device to expand upon and clarify the obligations imposed on the parties under international humanitarian law. Additionally, enforcement mechanisms contained in human rights treaties may provide an alternative method of implementing

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<sup>226</sup> Annual Report of the Inter-American Commission on Human Rights 1996, OEA/Ser.L/V/II/95, Doc. 7, rev. (14 March 1997), at 818-819 [hereinafter IACHR Annual Report 1996].

<sup>227</sup> Also Third Report on Colombia 1999, *supra* note 24, ch. IV, 75-76, paras. 13-14;

<sup>228</sup> See *supra* chapter 2.4.

<sup>229</sup> R. Abi-Saab 1997, *supra* note 82, p. 112.

<sup>230</sup> *Legal Consequence of the Wall* Opinion 2004, *supra* note 220, para. 163; HRC General Comment No. 31, *supra* note 220, para. 11 "The nature of the general legal obligation imposed on States parties to the Covenant".

<sup>231</sup> Moir 2002, *supra* note 40, p. 194. See also Rome Statute 1998, *supra* note 7, article 21(3) which declares that the application and interpretation of the relevant law "must be consistent with internationally recognised human rights".

<sup>232</sup> UN Commission on Human Rights Res. 1996/47, ESCOR Supp. (No. 3) at 157, U.N. Doc. E/CN.4/1996/47 (1996).

and ensuring humanitarian law obligations during armed conflicts, for example, in the case of breaches of non-derogable rights that go beyond the rights recognised in Common Article 3. This is particularly relevant in the Inter-American context, which gives a much wider list of non-derogable rights than any other human rights treaty. Further, a trend towards holding private actors to the same standards imposed on States can be discerned.<sup>233</sup> This may in turn influence the development of imposing human rights obligations on armed opposition groups. Whether or not armed opposition groups have obligations under human rights law, ultimate responsibility for the protection and fulfilment of such rights lies with the State. However, the international community is still grappling with the task of ensuring effective protection of human rights, particularly concerning situations of internal conflict, a fact whose impact cannot be overstated in the development of this field.

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<sup>233</sup> See for example *Van Anraal*, 9 May 2007, Court of Appeal, the Hague, Rolnummer: 22-000509, Parketnummer: 09-71003-04, and *Kouwenhoven*, 7 June 2006, District Court of the Hague, Public Prosecutor's Office Number: 09/7500010-05 (official translation of case). See also Zegveld 2002, *supra* note 145, 56-58 on discussion of draft Article 23 of the Rome Statute 1998.

### 3 Substantive obligations of armed opposition groups during hostilities

Both Common Article 3 and APII state they are applicable to both State and non-State actors participating in armed conflict.<sup>234</sup> Common Article 3 is addressed in absolute terms to both parties, while APII does not reference the parties to the conflict beyond the material scope of application.<sup>235</sup> According to the ICRC Commentary to APII:

“All the rules are based on the existence of two or more parties confronting each other. These rules grant the same rights and impose the same duties on both the established government and the insurgent party, and all such rights and duties have a purely humanitarian character.”<sup>236</sup>

As such, the duties flowing from these provisions bind not only States, but also non-State armed groups.<sup>237</sup> However, international practice has rarely indicated which measures groups must take to be in compliance with the wide range of international norms applicable to such armed opposition groups.<sup>238</sup>

Obligations on armed opposition groups can be divided into: 1) Obligations to treat persons in their power humanely, notably obligations to protect civilians; 2) Obligations relevant to detained persons and penal prosecutions of persons; and 3) Limitations on the means and methods of warfare, including the prohibition of starvation and the prohibition on the use of land mines and other indiscriminate weapons.

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<sup>234</sup> Clapham 2006, *supra* note 145, p. 497. *Furundžija* Judgement 1998, *supra* note 116, para. 140.

<sup>235</sup> Specifies parties must be 1) armed forces of a High Contracting Party, and 2) dissident armed forces or other organised groups meeting the further conditions of applicability of APII article 1(1). *See supra* chapter 2.2 discussion on conditions of applicability.

<sup>236</sup> Commentary APII, *supra* note 57, para. 4442.

<sup>237</sup> See *Tablada* Case 1997, *supra* note 151, para. 174.

<sup>238</sup> Zegveld 2002, *supra* note 145, p. 59.

Under these three headings, this Chapter analyses the relevant provisions of Common Article 3 and APII to identify the obligations placed on armed opposition groups. The geographical and temporal fields of application are outlined first. Obligations of providing fundamental guarantees of protection to persons, including detained persons, under the control of a party to the conflict are found not only in international humanitarian law, but also in human rights law.<sup>239</sup> Human rights law therefore provides a valuable tool in identifying the extent of obligations of armed opposition groups under international humanitarian law and when conduct breaches such obligations.<sup>240</sup> Throughout this Chapter, reference will be made to correlating provisions contained in human rights law.

### **3.1 The parameters of obligations - geographical and temporal application**

Armed opposition groups must respect their obligations arising from Common Article 3 throughout the territory in which the conflict is based. This is not just limited to the areas where the conflict is taking place. According to the decisions of the ICTY, the geographical applicability of Common Article 3 extends beyond the scene of military operations.<sup>241</sup> This has been confirmed and specifically applied to the Colombian armed conflict, in which the Inter-American Commission emphasised that:

“...in internal armed conflicts, humanitarian law applies throughout the entirety of national territory, not just within the specific geographical area(s) where the hostilities are underway. Thus, when humanitarian law prohibits the parties to the conflict from directing attacks against civilians or taking hostages in all circumstances, it prohibits these illicit acts everywhere. Thus, such acts of violence committed by the parties in areas devoid of hostilities are no less violative of international

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<sup>239</sup> Zegveld, 2002, *supra* note 145, p. 64; Moir 2002, *supra* note 40, p. 230.

<sup>240</sup> Commentary APII, *supra* note 57, at 1340: “Protocol II contains virtually all the irreducible rights of the Covenant on Civil and Political Rights... These rights are based on rules of universal validity to which States can be held, even in the absence of any treaty obligation or any explicit commitment on their part”.

<sup>241</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, paras. 69-70. See also *Kayishema & Ruzindana* Judgement 1996, *supra* note 82.

humanitarian law than if committed in the most conflictive zone of the country.”<sup>242</sup>

In addressing the ELN, the Commission noted that the ELN had specifically declared itself bound by the 1949 Geneva Conventions and APII.

Not only does the geographical applicability of Common Article 3 extend beyond the conflict zone, the temporal scope extends beyond the exact time of hostilities.<sup>243</sup> Therefore, armed opposition groups must respect their obligations under international humanitarian law at all times and not just during times of actual hostilities. The relevant provisions would then continue to apply after the hostilities have ended.<sup>244</sup>

## **3.2 Obligations to treat persons humanely, notably obligations to protect civilians**

### **3.2.1 Humane treatment**

Common Article 3 and articles 4 and 6 APII oblige armed opposition groups to treat humanely all persons outside combat who have fallen into their hands and to protect them from abuse of power. Common Article 3 outlines the minimum humanitarian standard of fundamental guarantees including prohibition of inhumane treatment and, specifically, violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; the taking of hostages; outrages upon person dignity, in particular humiliating and degrading treatment and fundamental due process guarantees. Based on article 27 GCIV, APII elaborates more widely on the provisions of Common Article 3.<sup>245</sup> Articles 4 and 6 include fundamental guarantees of humane treatment and judicial guarantees. Article 4 deals with the same issues as Common Article 3(1) and additionally prohibits and

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<sup>242</sup> Third Report on Colombia 1999, *supra* note 24, p. 95 para. 83.

<sup>243</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, paras. 67, 69-70.

<sup>244</sup> APII, *supra* note 5, article 2(2).

<sup>245</sup> *Ibid*, article 1(1).



outlaws collective punishments, terrorism, slavery, pillage, rape, enforced prostitution and indecent assault.<sup>246</sup> The provision bears a close resemblance to article 75 API. Specific obligations relating to persons whose liberty has been restricted are outlined in article 5 APII. Similarly to Common Article 3, such obligation under articles 4, 5 and 6 APII must be respected at all times.

Common Article 3 comprises a positive obligation to provide humane treatment and the negative obligation to refrain from committing certain prohibited conduct. This structure is reflected and further elaborated upon in article 4(1) and (2) APII. The Commentary to Common Article 3 suggests that it was not considered necessary to determine any further the extent of the obligation, “humane treatment” having entered sufficiently into everyday language to be understood.<sup>247</sup> However, a list of conduct falling short of the universal standard of humane treatment is provided. These “are and *shall* remain prohibited at any time and in any place whatsoever”,<sup>248</sup> emphasising the absolute nature of the provision. Various factors may influence the determination of “humane treatment” in a specific context, such as ideological, practical, resource and logistical considerations, making it difficult to determine an objective standard.

Under international humanitarian law, humane treatment is seen as essential to those in vulnerable positions, as with human rights law.<sup>249</sup> Unlike human rights law, which addresses humane treatment in a distinct aspect (e.g. rights of detained person), Common Article 3 places a blanket requirement addressed to all persons taking no active part in the hostilities. This includes members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause.<sup>250</sup> Under article 2(1) APII, the protections afforded under the Protocol apply “to all persons affected by an armed conflict as defined in Article 1.” Neither Common Article 3 nor articles 4 and 6 APII employ the

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<sup>246</sup> *Ibid*, articles 4(2)(b), (d), (f), (g), (e) and (h).

<sup>247</sup> Commentary GCI, *supra* note 67, p. 56.

<sup>248</sup> Common Article 3, *supra* note 4, emphasis added.

<sup>249</sup> Note that under the ACHR, *supra* note 17, the duty of humane treatment is non-derogable under article 5(1).

<sup>250</sup> Moir 2002, *supra* note 40, p. 197. *C.f.* ACHR, *supra* note 17, article 5.

term “civilians.” The wording of Common Article 3 and APII implies that they apply to individuals, addressing “those who have laid down their arms”. This implies individuals, rather than bodies of troops. This may be a reflection of the reality of asymmetric warfare where it can be difficult to distinguish between civilians and insurgents, but it is essential to ensure that civilians are protected from inhumane treatment if they fall under the control of the insurgents, and that insurgents are protected against such treatment if they fall into the power of the State. If insurgents cannot be differentiated from civilians, they must cease to be legitimate targets.<sup>251</sup> Article 4 APII differs from Common Article 3 in this respect, in the final sentence of paragraph one which provides that ‘[i]t is prohibited to order that there shall be no survivors’.<sup>252</sup> This clearly addresses those that have not ceased to take part in the hostilities. In this respect, it stands alone from Common Article 3 and the other provisions of APII. Such a prohibition is a precondition governing the application of all rules of protection laid down in the Protocol.<sup>253</sup>

Only those not involved in military operations receive protection under Common Article 3. In determining whether or not the alleged victim was directly taking part in hostilities, the context of which the alleged offences are said to have been committed are relevant.<sup>254</sup> In the *Tablada* Case, the Inter-American Court of Human Rights determined that those who surrendered, were captured or wounded and ceased their hostile acts were absolutely entitled to the non-derogable guarantees of humane treatment of both Common Article 3 and article 5 ACHR.<sup>255</sup>

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<sup>251</sup> *Abella v. Argentina*, 1997, IACtHR, Case 11.137, Report N° 55/97, OEA/Ser.L/V/II.95 Doc. 7 rev. at 271, para. 176 and 189; *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 616; Moir 2002, *supra* note 40, p. 59.

<sup>252</sup> See also article 23(d) of the Hague Convention IV - Laws and Customs of War on Land: 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force Jan. 26, 1910 annexed to GCIV, *supra* note 3, making it forbidden to declare that no quarter will be given and Rome Statute 1998, *supra* note 7, article 8(2)(e)(x).

<sup>253</sup> Moir 2002, *supra* note 40, p. 215; Commentary APII, *supra* note 57, 1371.

<sup>254</sup> *Prosecutor v. Duško Tadić*, 7 May 1997, ICTY, Case No. IT-94-1-T, Judgement, para. 615 [hereinafter *Tadić* Judgement 1997]. See also *Kupreskić et al.* Judgement 2000, *supra* note 108, para. 527.

<sup>255</sup> *Tablada* Case 1997, *supra* note 151, para. 176.

Humane treatment must also be provided “without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria”. The wording is reflective of the Universal Declaration on Human Rights article 2<sup>256</sup> and the International Covenant on Civil and Political Rights article 2(1).<sup>257</sup> As such, human rights law can provide guidance in determining “any other similar criteria”.<sup>258</sup> The non-derogable clauses of the ICCPR, ECHR and ACHR do not allow derogation that involves discrimination solely on the grounds of race, colour, sex, language, religion or social origin. This is a much reduced list from the wider non-discrimination clauses contained in those treaties.<sup>259</sup>

It is unclear, however, if under Common Article 3 the obligation not to make distinctions based on the listed categories extends to an obligation to respect certain rights that flow from such categories, such as freedom of religion, women’s rights and minority rights. Such considerations have been at the forefront of the Colombian conflict, where indigenous and minority communities, recognised as the most vulnerable groups in society, have been targeted in attacks.<sup>260</sup> Minority considerations also play a role in the Ugandan conflict where the Acholi people have endured the worst of the conflict.<sup>261</sup> However, Common Article 3’s prohibition against discrimination is expressed in the negative and does not suggest any further

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<sup>256</sup> Universal Declaration on Human Rights, adopted by GA Res. 217 A(III) of 10 December 1948, UN Doc. A/810 1948 article 2.

<sup>257</sup> ICCPR, *supra* note 197, article 2(1); ECHR, *supra* note 197, article 14; and ACHR, *supra* note 17, article 1(1).

<sup>258</sup> E.g. European jurisprudence on “association with a national minority” not included in ACHR and ICCPR, may be particularly important in determining genocidal activities. Novak lists age, disability, genetic features, intelligence or talent as other personal criteria for distinction that are impossible or difficult to change, M. Novak, *UN Covenant on Civil and Political Rights: CCCPR Commentary*, (2nd ed) (Norbert Pul Engel, Germany, 2005) pps. 45-57 [hereinafter Novak 2005]. See further *Gueye et al v. France*, HRC, No. 196/1985 in which the Committee regarded nationality as falling within the reference of other “status” and *Toonen v. Australia*, HRC, No. 488/1992 para. 87 the Committee noted that the reference to “sex” is to be taken as including sexual orientation. Human rights law provides wider non-discrimination protection generally e.g. language, political or other opinion, national or social origin.

<sup>259</sup> ICCPR, *supra* note 197, articles 2(3) and 4(1).

<sup>260</sup> IACHR Annual Report 2007, *supra* note 25, paras. 56, 63 and 67.

<sup>261</sup> Conciliation Resources, *Rebuilding relationships to end war in northern Uganda and southern Sudan*, available at <[www.c-r.org/our-work/uganda/index.php](http://www.c-r.org/our-work/uganda/index.php)> (last visited 24 April 2008); ICG Uganda Report 2007, *supra* note 36, p. 1. UN High Commissioner for Human Rights, *Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, UN Doc. E/CN.4/2002/86 (2001) para. 14.

positive obligation other than not to make discriminatory distinctions on the listed grounds in providing humane treatment to those who fall within the scope of application of the provision.<sup>262</sup> Conversely, under article 4(1) APII, persons not taking a direct part or who have ceased to take part in hostilities are entitled to respect for their person, honour and convictions and religious practice.<sup>263</sup>

The list found in Common Article 3 does not preclude State action against insurgents,<sup>264</sup> but the Protocol is to be applied without adverse distinction ‘founded on race, colour, sex, language, religion or other belief, political or other opinion, national or social origin, wealth, birth, or other status, or any other similar criteria’.<sup>265</sup> This makes APII more reflective of the wider protection in human rights law and obligations on States under human rights law than Common Article 3.

### **3.2.1.1 Respect for the wounded and sick**

Both Common Article 3 and APII place absolute obligations on armed opposition groups regarding the wounded and sick. Under Common Article 3(2), the wounded and sick shall be collected and cared for. The Commentary notes that this was considered to be “concise and...expresses a categorical obligation which cannot be restricted and needs no explanation”.<sup>266</sup> Articles 7 and 8 APII build on this and provide further that all wounded, sick and shipwrecked shall be respected and protected.<sup>267</sup> Article 8, although limited to “whenever circumstances permit...”, requires that all possible measures shall be taken without delay to search for and collect the wounded, sick and shipwrecked, whether they be military or

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<sup>262</sup> This interpretation would be in line with the structure and interpretation of the ICCPR, *supra* note 197, article 2(1) obligating States to respect and ensure the rights further spelt out in the provisions of the Covenant without distinction based on the listed grounds, and is therefore an accessory prohibition of discrimination, Novak 2005, *supra* note 258, p. 45.

<sup>263</sup> See also ICCPR, *supra* note 197, articles 17 and 18. See further APII, *supra* note 5, article 5(1) which obliges armed opposition groups to allow those whose liberty has been restricted for reasons related to the armed conflict to practise their religion and, if requested and appropriate, to receive spiritual assistance from persons, such as chaplains, performing religious functions.

<sup>264</sup> Moir 2002, *supra* note 40, p. 198.

<sup>265</sup> APII, *supra* note 5, article 2(1).

<sup>266</sup> Commentary GCI, *supra* note 67, p. 54.

<sup>267</sup> See also APII, *supra* note 5, article 5(1)(a).

civilian persons. In the context of Colombia, where there have been numerous reports of enforced disappearances, this is a highly relevant obligation.<sup>268</sup>

### 3.2.1.2 Protection of children

Specific obligations are listed under article 4(3) APII with respect to the protection of children. Children are protected under Common Article 3 by the general application of the provision, but no further specific reference to the protection of children is made. The protection under article 4(3) is very much reflective of articles 24 and 50 GCIV and marks a breakthrough in protection under humanitarian law.<sup>269</sup> Under this provision, parties to the conflict are obligated to provide the “care and aid they [children] particularly require”, including that they should be educated in accordance with the wishes of their parents or those responsible for their care.<sup>270</sup> Article 4(3)(b) expresses a clear obligation for actively facilitating measures to be taken to reunify temporarily separated families.<sup>271</sup> The Commentary highlights the ICRC in this capacity as one of the means by which armed opposition groups might fulfil this obligation,<sup>272</sup> but beyond this, what measures the armed opposition groups must take is rather ambiguous.

Article 4(3)(c) prohibiting the recruitment under the age of 15 into the armed forces has been an issue in Colombia, where the FARC-EP and the ELN have both been accused of recruiting children. A media publication in July 2007 of a report by the Attorney-General’s Office highlighted abuses allegedly committed by members of the FARC-EP against girls in their ranks, such as forced abortions, sexual violence, threats, and cruel and

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<sup>268</sup> Human Rights Council, *Report of the UN Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/4/48, 5 March 2007, para. 46 [hereinafter UNCHR Report 2007]; IACHR Annual Report 2007, *supra* note 25, para. 16 fn. 6.

<sup>269</sup> *See also* Convention on the Rights of the Child G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990 [hereinafter CRC], ICCPR, *supra* note 197, article 24(1) and ACHR, *supra* note 17, article 19.

<sup>270</sup> *See further* ICCPR, *supra* note 197, article 18(4), ICESCR, *supra* note 200, article 13 and CRC, *supra* note 269, article 28 and 29, ECHR, *supra* note 17, First Protocol article 2 and ACHR, *supra* note 17, article 12(4).

<sup>271</sup> Commentary APII, *supra* note 57, p. 1379 para. 4553. *See further* GCIV, *supra* note 3, article 26.

<sup>272</sup> Commentary APII, *supra* note 5, p. 1379 para. 4553.

degrading treatment.<sup>273</sup> In addition, the Colombian Ombudsman's Office reported in 2006 that the demobilised paramilitary groups failed to fulfil their obligation to hand over the children in their ranks and lack records of the children they have recruited.<sup>274</sup> Despite the clear wording of article 4(3)(c), children under the age of fifteen remain targeted by some non-State actors.<sup>275</sup>

APII's high threshold of applicability has resulted in a number of situations in which article 4(3)(c) was not applicable in armed conflicts where children under the age of fifteen were being forced into the ranks of a party to the conflict. Uganda is illustrative of this. As outlined above, APII does not apply to the conflict, but the LRA have allegedly abducted and forcibly recruited 20,000-30,000 children into its ranks, which makes up to 85% of their total numbers.<sup>276</sup> The need to provide more comprehensive protection to children in internal armed conflicts has been addressed by a wide variety of international actors. Reflecting this, the Rome Statute 1998 considers the conscription or enlistment of children under the age of fifteen to be a war crime under article 8(2)(e)(vii).

Additionally, the Security Council has passed a number of resolutions denouncing the use of child soldiers in armed conflict.<sup>277</sup> Under article 38(2) of the Convention on the Rights of the Child 1989, State parties must take all feasible measures to ensure that persons who have not attained the age of fifteen do not take direct part in the hostilities.<sup>278</sup> The Optional

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<sup>273</sup> UNCHR Report 2007, *supra* note 268 p. 17 para. 81.

<sup>274</sup> *Ibid*, p. 18 para. 85.

<sup>275</sup> Allegations of State practice in using children under the age of fifteen in their forces is outside the remit of this paper, however, see P.W. Singer, *Children at War* (New York: Pantheon, 2005) p. 31 for further discussion.

<sup>276</sup> Ssenyonjo 2005, *supra* note 51, pps. 411-412.

<sup>277</sup> See for example SC Res. 1261 (1999), UN Doc. S/RES/1261, adopted at the 4037<sup>th</sup> meeting, 25 August 1999; SC Res. 1314 (2000), UN Doc. S/RES/1314, adopted at the 4185<sup>th</sup> meeting, 11 August 2000; SC Res. 1379 (2001), UN Doc. S/RES/1379, adopted at the 4423<sup>rd</sup> meeting, 20 November 2001; SC Res. 1460 (2003), UN Doc. S/RES/1460, adopted unanimously at the 4695<sup>th</sup> meeting, 30 January 2003; SC Res. 1539 (2004), UN Doc. S/RES/1539, adopted unanimously at the 4948<sup>th</sup> meeting, 22 April 2004; SC Res. 1612 (2005), UN Doc. S/RES/1612, adopted at the 5235<sup>th</sup> meeting, 26 July 2005. See also Report of the Special Representative for Children and armed conflict, Ms. Graça Machel, *Impact of Armed Conflict on Children (A/51/306)* 26 August 1996 and General Assembly Resolution 51/77 of 12 December 1996.

<sup>278</sup> Note criticism that CRC, *supra* note 269, article 38(2) undermines the protection under APII, *supra* note 5, article 4(3)(c), as it only requires "all feasible measures" to be taken, so

Protocol on the Involvement of Children in Armed Conflict to the Convention on the Rights of the Child built on this provision in article 4(1) by specifically addressing armed groups that are distinct from the armed forces of the State. This article prohibits armed groups from recruitment or use of persons under the age of eighteen years during hostilities.<sup>279</sup> Although a step forward in the protection of children in internal armed conflict, it is questionable the extent to which this will impact on armed opposition groups. The wording of article 4(1) of the Optional Protocol is much weaker compared with article 4(3)(c) APII and introduces a difference in age limitations between the two provisions. The age limitation of fifteen years old is reflected in article 8(2)(e)(vii) of the Rome Statute 1998, which marks a significant leap forward in the implementation of article 4(3)(c) APII. In the context of Uganda, this provision of the Rome Statute 1998 has been utilised to indict the leaders of the LRA for counts including the enlisting of children under the age of fifteen years into the armed group.

It would flow from article 4(3)(c) that the prohibition of children under 15 being recruited in the armed forces would include an obligation to take necessary measures to ascertain the age of those in the armed forces, so as not to infringe obligations under article 4 APII.

### **3.2.1.3 Prohibition of violence to life and person**

Violence to life and person are protected under Common Article 3(1)(a) and article 4(2)(a) APII.<sup>280</sup> Practice demonstrates a minimum standard of protection exists regarding the protection from violence to life and person in internal armed conflicts under humanitarian and human rights law that armed opposition groups must meet. The norms protecting life and physical integrity under article 4 APII were very much influenced by the

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is not phrased in absolute terms, and could arguably allow for indirect participation of those under 15 years in the armed forces.

<sup>279</sup> Colombia ratified the Optional Protocol in May 2005, and Uganda since May 2002, ICRC, *International Humanitarian Law – Treaties and Documents*, available at <[www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P](http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=595&ps=P)> (last visited 24 July 2008).

<sup>280</sup> Note also Common Article 3(1)(c) and article 4(2)(e) APII prohibiting outrages upon personal dignity, in particular humiliating and degrading treatment.

ICCPR.<sup>281</sup> In its Annual Report in 1996, the Inter-American Commission noted:

“The extremely difficult conditions caused by the various guerrilla movements in Colombia continued in 1996. These groups committed numerous violent acts, many of which constitute violations of humanitarian law applicable to the internal armed conflict in Colombia. These acts included killings outside the armed conflict, kidnapping for ransom...”<sup>282</sup>

Common Article 3(1)(a) reaffirms that the right not to be arbitrarily deprived of life under human rights law continues during armed conflicts.<sup>283</sup>

“Arbitrary” deprivation of life under international humanitarian law includes conduct prohibited by Common Article 3(1)(a) or article 4 APII, or acts committed in violation of the fundamental principles of distinction and protection of civilians.<sup>284</sup>

#### **3.2.1.4 Prohibition against cruel treatment, torture and mutilation**

Cruel treatment, torture and mutilation are also prohibited under Common Article 3(1)(a) and article 4(2)(a) APII. The prohibition of torture and cruel treatment is one of the clearest examples of the importance of human rights in the interpretation of humanitarian law. It was noted in the *Prosecutor v. Furundžija* that international humanitarian law does not provide a definition of ‘torture’.<sup>285</sup> Instead, it is defined in article 1(1) of the Convention Against Torture 1984,<sup>286</sup> which was held to be reflective of

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<sup>281</sup> Commentary APII, *supra* note 57, p. 1365.

<sup>282</sup> IACHR Annual Report 1996, *supra* note 226, p. 662, para. 53. *See also* Second Report on Colombia 1993, *supra* note 219. *See further* IACHR Annual Report 2007, *supra* note 25, para. 40 noting that human rights violations and violations of international humanitarian law continue to be committed against the civilian population, resulting in violations of the rights to life, personal integrity and personal liberty.

<sup>283</sup> *See* ICCPR, *supra* note 197, article 7; ECHR, *supra* note 197, article 3; and ACHR, *supra* note 17, article 5(2). *See further* CAT, *supra* note 207.

<sup>284</sup> Moir 2002, *supra* note 40, p. 200.

<sup>285</sup> *Furundžija* Judgement 1998, *supra* note 116, para. 159. *See also* *Akayesu* Judgement 1998, *supra* note 90, para. 593.

<sup>286</sup> CAT, *supra* note 207.



customary international law.<sup>287</sup> Case law in regional human rights bodies has further defined the parameters between torture, cruel, inhuman and degrading treatment.<sup>288</sup>

Mutilation is not specifically addressed under human rights law, but instead is subsumed by other provisions. For example, mutilation resulting in death contravenes the right to life, the prohibition of cruel and inhuman treatment and even the prohibition of torture.<sup>289</sup> Medical experimentation is addressed under article 7(2) ICCPR.<sup>290</sup> Extreme acts upon the human body would constitute mutilation, but it is debatable whether this is distinguishable from medical experimentation. Indeed, the minimum obligations imposed on armed opposition groups relevant to persons whose liberty has been restricted under APII do not include the prohibition to subject those detained for reasons relating to the conflict to medical procedures not indicated by the state of health of the person concerned.<sup>291</sup>

### 3.2.2 Protection of the civilian population

The impact of internal conflict on the civilian population is often greater than that of international armed conflicts.<sup>292</sup> Considering their negative potential, it is essential to determine what obligations parties to an internal conflict must afford the civilian population.

Common Article 3(1)(a) protects individual civilians in the power of a party to the conflict, rather than the civilian population as a whole. Zegveld notes that the notion of ‘treatment’ employed in the article presupposes a degree of control over the person in question. Similarly, APII separates humane treatment of individuals from the protection of civilian populations in separate sections, requiring armed opposition groups to distinguish

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<sup>287</sup> *Furundžija* Judgement 1998, *supra* note 116, para. 160, confirming *Delalić et al.* Judgement 1998, *supra* note 116, para. 459. See also *Akayesu* Judgment 1998, *supra* note 90, para. 593.

<sup>288</sup> E.g. *Denmark, Norway, Sweden and Netherlands v. Greece* (1969) Ybk ECtHR at 186; *Republic of Ireland v. United Kingdom* 2 EHRR 25 para. 167.

<sup>289</sup> Note differences under ICCPR, *supra* note 197, article 7 compared to CAT, *supra* note 207, article 1 which requires specific intent to amount to torture.

<sup>290</sup> See also API, *supra* note 3, article 11(2).

<sup>291</sup> APII, *supra* note 5, article 5(2)(e).

<sup>292</sup> Moir 2002, *supra* note 40, p. 118.

civilians and those directly involved in hostilities. Such requirement is not found in Common Article 3.<sup>293</sup>

Article 13 APII appears to be based on article 51 API, which establishes the minimum protection afforded to the civilian population in international conflicts, including the principle of distinction.<sup>294</sup> Indeed, corresponding protections to many of the obligations found in Part II of APII can be found in API.<sup>295</sup> Article 13(1) includes the general principle that the civilian population must be protected. Further elaborations on this general principle, such as prohibition of human shields, or specific protection against disproportionate and indiscriminate attacks, are not included. However, such principles would be prohibited under the general humane treatment provisions of Common Article 3 and article 4 APII, and are considered to be customary international law and therefore prohibited under all circumstances.<sup>296</sup>

The protection afforded under articles 13(1) and 13(2) APII are reflective of General Assembly Resolutions 2444 (1968)<sup>297</sup> and 2675 (1970),<sup>298</sup> which were held to be declaratory of custom by the ICTY.<sup>299</sup> Both resolutions include the principle of distinction<sup>300</sup> and paragraph 3 of Resolution 2675 also requires precautionary measures to be taken to prevent damage to the civilian population during attacks.<sup>301</sup> The Inter-American Commission has stated that this immunity of the civilian population from direct attacks is also codified in Common Article 3, noting the prohibition in all circumstances against “violence to life and person” to persons who “do not or no longer actively participate in hostilities”.<sup>302</sup>

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<sup>293</sup> Zegveld 2002, *supra* note 145, p. 82.

<sup>294</sup> See also API, *supra* note 3, article 48.

<sup>295</sup> Protection under APII, *supra* note 5, article 9 corresponds with API, *supra* note 3, article 15; APII article 10 corresponds to API article 16; APII article 11 corresponds to API articles 12 and 13; and APII article 12 corresponds to API article 18(4) and 38(1), as well as GCI, *supra* note 3, articles 38,39 and 44.

<sup>296</sup> Moir 2002, *supra* note 40, p. 117.

<sup>297</sup> GA Res. 2444 (1968), *supra* note 156.

<sup>298</sup> *Basic Principles for the Protection of Civilian Populations* 1979, *supra* note 220.

<sup>299</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 127.

<sup>300</sup> GA Res. 2444 (1968), *supra* note 156, paragraph 1(c); *Basic Principles for the Protection of Civilian Populations* 1979, *supra* note 220, paragraph 2.

<sup>301</sup> See also API, *supra* note 3, article 57.

<sup>302</sup> Third Report on Colombia 1999, *supra* note 24, at 83, para. 41. See further APII, *supra* note 5, articles 4(2)(a), (d) and (h).

In order to understand the obligations under article 13 APII, whereby the civilian population is to enjoy general protection against the dangers arising from military operations and shall not be the object of attack, it is necessary to apply by analogy the provisions of API, such as article 51(4) and (5) prohibiting indiscriminate attacks.<sup>303</sup> The principles established in API have been relied upon extensively by international bodies in identifying such obligations.<sup>304</sup> Like other parties to the conflict, armed opposition groups are obligated to take due diligence, and abide by principles of proportionality, military necessity and precautionary measures in their actions, thereby offering a level of protection to the civilian population. The Inter-American Commission considered the prohibition against carrying out attacks without the required precautions to be a rule of customary law applicable to armed opposition groups,<sup>305</sup> which includes articles 4(3), 14, 16 and 17 of APII.<sup>306</sup>

The realities of internal armed conflict can make distinguishing civilians from combatants an extremely difficult task for the parties to the conflict, in turn reducing their ability to afford the necessary protection to the civilian population. APII does not offer a definition either of “civilians” or “civilian populations”, although it uses both terms.<sup>307</sup> Article 50 API provides authoritative guidance for a definition and has been relied on by the ICTR<sup>308</sup> and Inter-American Commission.<sup>309</sup> Article 13(3) states that civilians who take direct part in hostilities are not protected under the Protocol, although the Inter-American Commission emphasised that these persons nevertheless retain their status as civilians.<sup>310</sup> Once individuals have ceased their hostile acts, they may no longer be the object of attack.<sup>311</sup>

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<sup>303</sup> See also API, *supra* note 3, articles 49, 50 and 52.

<sup>304</sup> Zegveld 2002, *supra* note 145, p. 82.

<sup>305</sup> Third Report on Colombia 1999, *supra* note 24, p. 108-109, para. 139.

<sup>306</sup> *Ibid.*, p. 82, para. 40.

<sup>307</sup> Zegveld 2002, *supra* note 145, p. 75.

<sup>308</sup> *Kayishema & Ruzindana* Judgement 1999, *supra* note 82, paras. 179-80, *Musema* Judgement 2000, *supra* note 123, para. 280.

<sup>309</sup> Third Report on Colombia 1999, *supra* note 24, at 83-84 paras. 43-46.

<sup>310</sup> *Ibid.*, paras. 53-55.

<sup>311</sup> *Ibid.*

The Commission further held that indirect participation in hostilities does not affect civilian immunity.<sup>312</sup>

### 3.2.2.1 Protection of civilian objects

Armed opposition groups not only must respect civilians and civilian populations, they must also afford specific protection to works and installations containing dangerous forces,<sup>313</sup> as well as cultural objects and places of worship.<sup>314</sup> However, general protection to civilian objects is not explicitly included under APII. The ICTY has found that customary law on the protection of civilian objects had developed to govern internal strife.<sup>315</sup> No further elaboration was given on this point, but the Inter-American Commission has stated that API provides a reference for the protection of civilian objects “inasmuch as certain provisions of Protocol I codify... customary law rules designed to protect... civilian objects from indiscriminate or disproportionate attacks...”<sup>316</sup> Therefore, the definitions of ‘civilian objects’ and ‘military objects’ under article 52 API should also be used for the purpose of APII.<sup>317</sup> Furthermore, article 13(2) APII requires armed opposition groups to take measures to verify whether objects were, at the time, making an effective contribution to military action.

Further obligations on armed opposition groups to protect property can be found in the 1954 Hague Convention on Cultural Property<sup>318</sup> and its Second Protocol of 1999.<sup>319</sup> Article 19 of the Second Protocol extends the application of the 1954 Convention to situations of conflicts not of an international character, whereby each party to the conflict is bound to apply,

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<sup>312</sup> *Ibid.*, paras. 56.

<sup>313</sup> APII, *supra* note 5, article 15. See also API, *supra* note 3, article 56(1).

<sup>314</sup> APII, *supra* note 5, article 16. See also API, *supra* note 3, article 53, and Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, done on 14 May 1954, 249 U.N.T.S. 215 (entered in to force Aug. 7, 1956) article 19 [hereinafter Cultural Property Convention] and ICESCR, *supra* note 200, article 15(1)(a).

<sup>315</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 127.

<sup>316</sup> Third Report on Colombia p. 92, *supra* note 24, para. 75. See also *Basic Principles of Protection for Civilian Populations* 1979, *supra* note 220, paras. 5 and 6.

<sup>317</sup> Third Report on Colombia 1999, *supra* note 24, p. 89-90, paras. 67-68.

<sup>318</sup> Cultural Property Convention, *supra* note 314.

<sup>319</sup> Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, 26 March 1999, 38 I.L.M. 769 [hereinafter Cultural Property Protocol II].

at a minimum, the provisions of the convention relating to respect for cultural property. Article 4(3) of the 1954 Convention details measures that are necessary to ensure respect for cultural property. Article 22 of the Second Protocol likewise extends the application of the Protocol to situations of non-international armed conflict. Although not explicitly referring to non-State armed actors, paragraph 6 of the provision does implicitly address non-State armed actors, by stating that the application of the Protocol to situations of non-international armed conflicts shall not affect the legal status of the parties to the conflict.<sup>320</sup> This implicit application highlights the problems States have with the idea of armed opposition groups as bearer of international obligations.<sup>321</sup> There are only forty-eight State parties to this Protocol, limiting the instances where it is applicable. Although Colombia has not yet ratified the Second Protocol, it signed the document in 31 December 1999.<sup>322</sup> As such, it is therefore obligated not to act in a way which would defeat the object and purpose of the treaty.<sup>323</sup>

In the context of the Colombian armed conflict, the Inter-American Commission has considered the protection of civilians and civilian objects in internal armed conflicts. Armed opposition groups have frequently attacked electrical towers and oil and gas pipelines, a method of warfare particularly attributed to the ELN.<sup>324</sup> In this context, the Commission noted that to be considered a ‘military object’:

“the object must make an effective contribution to military action and its destruction must offer ‘a definite military advantage’. Even in those cases where such objects may be legitimately attacked, international humanitarian law requires the attacker to take precautions to ensure that collateral damage to the civilian population is minimised and to cancel an attack if the collateral damage expected would be excessive in relation to the clear-cut advantage anticipated by the target’s destruction or neutralisation”.<sup>325</sup>

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<sup>320</sup> *Ibid*, article 22(6).

<sup>321</sup> Zegveld 2002, *supra* note 145, p. 28.

<sup>322</sup> ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/WebSign?ReadForm&id=590&ps=S](http://www.icrc.org/ihl.nsf/WebSign?ReadForm&id=590&ps=S)> (last visited 24 July 2008).

<sup>323</sup> Vienna Convention on the Law of Treaties 1969, 1155 U.N.T.S 331, 23 May 1969, article 18(1).

<sup>324</sup> Cariollo-Suarez 1999, *supra* note 14, p. 16.

<sup>325</sup> Third report on Colombia 1999, *supra* note 24, p. 109 para. 140.

The Commission concluded that some of the attacks on oil pipelines did not aim at obtaining a military advantage in violation of international humanitarian law. Instead, they were intended to promote the ELN's ideology of opposition to foreign exploitation of Colombian resources.<sup>326</sup>

Under article 17 APII, armed opposition groups are prohibited from forcibly moving civilians, unless it is for their security or for military reasons corresponding to the protection afforded under article 49 GCIV. In situations unrelated to the conflict, civilians are afforded protection under human rights law, which provides for liberty of movement and freedom to choose residence.<sup>327</sup> These rights are not absolute and may be restricted by the State for reasons including, amongst others, national security, public order and public health.

### **3.2.2.2 Provision of relief**

Under article 18 APII, relief societies located in the territory of the incumbent State party may offer their services.<sup>328</sup> The focus is very much on domestic entities, rather than the ICRC, the traditional relief organisation. However, there is no explicit duty to accept the help of relief services under article 18 APII.

Article 18(2) APII provides that where the civilian population is suffering from undue hardship, relief actions shall be taken only with the consent of the High Contracting Party. Consent is a necessary factor for the

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<sup>326</sup> *Ibid*, p. 109-110 paras. 143.

<sup>327</sup> ICCPR, *supra* note 197, article 12(1), ECHR, *supra* note 197, Protocol 4 article 2(1); ACHR, *supra* note 17, article 22(1).

<sup>328</sup> See for example the Lomé Ceasefire Agreement on Liberia of 13 February 1991, which urged the warring parties to “cooperate with all humanitarian agencies in their efforts to provide relief and assistance to the people of Liberia; and also to agree to respect the Red Cross (Geneva) Conventions”; the Ceasefire Agreement of 1 November 1998 between the government of Guinea Bissau and the self-proclaimed military junta in Abuja, which guaranteed “the free access to humanitarian organisations and agencies to reach the affected civilian population”; and the Lomé Peace Agreement on Sierra Leone of 7 July 1999, which pledged “the enforcement of humanitarian law” and guaranteed the “safe and unhindered access by humanitarian organisations to all people in need” and the establishment of “safe corridors for the provisions of food and medical supplies to the Economic Community for West Africa Monitoring Group (ECOMOG) soldiers behind the Revolutionary United Forces (RUF) lines and to RUF combatants behind ECOMOG lines, referenced in Ewumbue-Monono 2006, *supra* note 76, p. 915.

operation of humanitarian organisations.<sup>329</sup> The requirement of consent under APII is worded differently to article 70(1) API, which requires the consent of the “party concerned”. States often view relief from outside its own territory as foreign intervention, and, as such, this provision can be seen as bowing to traditional State sovereignty concerns.<sup>330</sup> The reality of internal armed conflict does not always reflect this consent requirement, for example where aid is being distributed in insurgent-held areas. Furthermore, denying relief would be difficult, as to do so arbitrarily or capriciously would go against the purpose of the Protocol.<sup>331</sup>

It is questionable whether armed opposition groups have a legal duty to allow humanitarian deliveries to areas under their control.<sup>332</sup> However, where the State has consented to deliveries of humanitarian aid, armed opposition groups have the duty to allow distributions into areas under their control.<sup>333</sup>

Further efforts have been made by the international community to extend the duty to provide relief in internal armed conflicts. Under General Assembly Resolution 2675, the ICRC Resolution of 1969 Declarations of Principles for International Humanitarian Relief of the Civilian Populations in Disaster Situations<sup>334</sup> is extended to all situations of armed conflict, including internal armed conflicts, and to all parties to the conflict.<sup>335</sup> This has been considered declaratory of customary international law.<sup>336</sup> The Security Council has also viewed the refusal by armed opposition groups to permit access to humanitarian organisations to territory under their control as a violation of international humanitarian law.<sup>337</sup> Consequently, there

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<sup>329</sup> *Fundamental Standards of Humanity* 2006, *supra* note 171, p. 7 para. 12.

<sup>330</sup> Moir 2002, *supra* note 40, p. 118.

<sup>331</sup> *Ibid.*, p. 119.

<sup>332</sup> Zegveld 2002, *supra* note 145, p. 86.

<sup>333</sup> See Commentary APII, *supra* note 57, para. 4885 and para. 2805; *Fundamental Standards of Humanity* 2006, *supra* note 171, p. 7 para. 12; Zegveld 2002, *supra* note 145, p. 89.

<sup>334</sup> ICRC, Resolution XXVI, XXIst International Conference of the Red Cross (ICRC< Istanbul 1969).

<sup>335</sup> *Basic Principles for the Protection of the Civilian Population* 1979, *supra* note 220, para. 8.

<sup>336</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 127.

<sup>337</sup> SC Res. 851 (1993), UN Doc. S/RES/891, adopted in 3254th meeting, 15 July 1993, para. 19; SC Res. 794 (1992), UN Doc. S/RES/793, adopted in 3145th meeting, 3

seems to exist a positive duty under customary law to accept humanitarian relief where offered and to facilitate distribution of relief. A variety of agencies has also pushed forward with this to ensure that civilian populations receive some relief in the difficult situations of armed conflict. For example, the ICRC has opened offices in a number of areas in Uganda, including Kampala, Kasese, Arua, Kitgum, Gulu and Koboko.<sup>338</sup>

### **3.3 Obligations relevant to detained persons and penal prosecutions of persons**

Neither Common Article 3 nor APII directly prohibit armed opposition groups from restricting the liberty of persons or prescribe reasons for which persons may be detained or interned. However, in practice, parties to an armed conflict have been limited by the procedures and rules laid down in GCIV and human rights law.<sup>339</sup> Articles 42 and 43 of GCIV only permit internment of persons when the party to the conflict considers a person dangerous to its security. With regard to detentions carried out by the Colombian armed opposition groups, the Inter-American Commission stated that ‘international humanitarian law also prohibits the detention or internment of civilians except where necessary for imperative reasons of security’.<sup>340</sup> Similarly, the UN Commission on Human Rights appealed to armed opposition groups in Sudan to refrain from ‘arbitrary’ detention of civilians,<sup>341</sup> and the UN Commission on Human Rights and the UN Security Council have stated that armed opposition groups must permit the

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December 1992, para. 5; SC Res. 733 (1992), UN Doc. S/RES/733, adopted in 3039th meeting, 23 January 1992, para. 7.

<sup>338</sup> Ewumbue-Monono 2006, *supra* note 76, p. 920.

<sup>339</sup> Zegveld 2002, *supra* note 145, p. 66.

<sup>340</sup> Third Report on Colombia 199, *supra* note 24, p. 105, para. 122.

<sup>341</sup> UN Commission on Human Rights Res. 1995/77 ESCOR Supp. (No. 4) at 225, U.N. Doc. E/CN.4/1995/77 (1995) para. 15. *See further* ICCPR, *supra* note 197, article 9(1) where the Committee Human Rights has taken the view that the requirement of court review over the lawfulness of detention forms a non-derogable element in Art. 9, General Comment 29/72, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 p. 186 (2003) para. 16. Novak 2005, *supra* note 258, p.212.



International Committee of the Red Cross to go to places of internment and detention held by these groups.<sup>342</sup> In addition, Common Article 3(1)(d) and article 6 A<sup>II</sup> provide procedural guarantees that must be complied with when carrying out prosecutions. The following subsections analyse these guarantees, as well as the duty of care owed to detained persons and duty of States to prosecute violators of international humanitarian law.

### **3.3.1 Penal prosecutions - Common Article 3(1)(d)**

Common Article 3(1)(d) forbids States and armed opposition groups from passing sentences and carrying out executions without previous judgement pronounced by a regularly constituted court that affords to the accused all the judicial guarantees that are recognised as indispensable by civilised peoples. What constitutes those guarantees as “indispensable” under Common Article 3(1)(d) is vague, leaving unclear what is specifically expected of armed opposition groups. Human rights law provides a broader protection of due process rights than humanitarian law, but most guarantees under human rights related to a fair trial are derogable during internal armed conflicts.<sup>343</sup> Further elaboration of the precise guarantees under Common Article 3(1)(d) can be found in the 1949 Geneva Conventions<sup>344</sup> and

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<sup>342</sup> SC Res 968 (1994), UN Doc. S/RES/968, adopted in 3842<sup>nd</sup> meeting, 16 December 1994, para. 10; UN Commission on Human Rights, Statement of the Chairman, 24 April 1996, E/CN.4/1996/177, para. 371.

<sup>343</sup> Moir 2002, *supra* note 40, p. 207. Fair trial rights are not included in the non-derogable rights of ICCPR, *supra* note 197, and ECHR, *supra* note 197. Under article 27(2) of the ACHR, *supra* note 17, the judicial guarantees essential for the protection of the non-derogable rights listed cannot be derogated from in times of war, public danger, or other emergency that threatens the independence or security of a State party, however, article 8 right to a fair trial is not included in the list of non-derogable rights.

<sup>344</sup> GCIII, *supra* note 3, articles 82-108, GCIV articles 43, 65, 67, 71-76, 78, 117 and 126, *supra* note 3. *See also* API, *supra* note 3, article 75(4); The Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions has proposed that A<sup>II</sup> and the GCIII provide adequate points of reference in this regards, Commission on Human Rights, E/CN.4/1983/16, at 13, para. 56 (Report by the Special Rapporteur, S. Amos Wako, 31 January 1983). *See also Hamden v. Rumsfeld*, 2006, United States of America Supreme Court, 548 U.S (2006) p. 69, in assessing courts established by a State party, noted that “regularly constituted court” was not specifically defined in either Common Article 3 or its accompanying commentary. Thus, the majority looked to the Commentary on Article 66 of GCIV, which associates the “properly constituted courts” of an occupying powers with its own “ordinary military courts”.

particular reference can be made to article 6 APII as to what constitutes the “indispensable” guarantees.<sup>345</sup> Article 6 APII provides a list of essential judicial guarantees but does not mention a “regularly constituted court”. Instead, it prescribes “a court offering the essential guarantees of independence and impartiality”, reflected in article 84 GCIII.<sup>346</sup> By referencing the essential guarantees of independence and impartiality, the implication is that even insurgents may set up such a court, addressing the asymmetry between the established judicial infrastructure of States and non-State actors.<sup>347</sup> Such minimum guarantees are essential, particularly in offering guarantees to those detained by armed groups and their own members who may be punished for war crimes.<sup>348</sup> The punishment of the latter may encourage respect for international humanitarian law and in addition may be the duty of a superior officer who wishes to avoid command responsibility.<sup>349</sup> The judicial guarantees under article 6 APII clarify what is essential to the operation of any trial and are thus a step closer to ensuring a fair trial than Common Article 3(1)(d) which places emphasis on the legal basis of the court as “regularly constituted court”.<sup>350</sup> Interestingly, in the Elements of Crime of the Statute of the ICC,<sup>351</sup> Element 4 of Article 8(2)(c)(iv) employs the language of article 6(2) APII in defining a “regularly constituted court”. According to this provision, a court that is “not regularly constituted” fails to provide independence and impartiality or

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<sup>345</sup> Moir 2002, *supra* note 40, p. 207.

<sup>346</sup> According to GCIII, *supra* note 3, article 84 prisoners of war must be tried by military courts, unless existing laws of the Detaining Power expressly permit the civil courts to try a member of the Detaining Power in respect of the particular offence alleged to have been committed by a prisoner of war.

<sup>347</sup> Commentary APII, *supra* note 57, p. 142. *See further* Somer 2007, *supra* note 71, p. 670.

<sup>348</sup> Sassòli 2003, *supra* note 10, p. 12.

<sup>349</sup> See API, *supra* note 3, articles. 86 (2), 87 (3) and Rome Statute 1998, *supra* note 7, article 28 (1) (b). *See further* *Prosecutor v. Hadzihasanovic et al.*, 2003, ICTY, Case No. IT-01-47, Decision On Interlocutory Appeal Challenging Jurisdiction In Relation To Command Responsibility (Appeals Chamber).

<sup>350</sup> Somer 2007, *supra* note 71, p. 671.

<sup>351</sup> Rome Statute 1998, *supra* note 7, article 9; the Elements of Crime are not definitive, but “assist the Court in the interpretation of articles 6, 7 and 8”.

other judicial guarantees “generally recognised as indispensable under international law”.<sup>352</sup>

The ICRC study of customary international law concluded that in both international armed conflict and non-international armed conflict, the customary standard for passing sentence is a “fair trial offering all the essential guarantees”.<sup>353</sup> However, the specific duties of armed opposition groups under Common Article 3(1)(d) remain imprecise.

Article 105 GCIII provides a corollary to the “rights and means of defence” referred to in article 6 APII, which include the right to defence by an advocate, who must have appropriate time and facilities to conduct the defence. Furthermore, the article provides for the right to call witnesses and a competent interpreter. Due process rights of fair trial are enumerated in article 15 ICCPR, article 7 ECHR and article 9 ACHR, which include the prohibition of *ex post facto* application of law. This prohibition is non-derogable in all three instruments, so arguably comes within the ambit of Common Article 3(1)(d).<sup>354</sup> Such rules on fair trial do limit the capacity of armed opposition groups to prosecute and punish persons under their control.<sup>355</sup> For example, in applying Common Article 3(1)(d), international bodies have denounced the practice of summary executions carried out by these groups,<sup>356</sup> such as the UN Commission for Human Rights in the context of the Colombian conflict, following a substantial increase in reports in recent years of extrajudicial executions of civilians by Colombia’s army.<sup>357</sup>

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<sup>352</sup> K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, (Cambridge University Press, Cambridge, 2002) p. 409.

<sup>353</sup> ICRC study of customary law, *supra* note 170, Vol. 1 p. 353, Rule 100.

<sup>354</sup> Moir 2002, *supra* note 40, p. 204.

<sup>355</sup> Zegveld 2002, *supra* note 145, p. 69. *E.g.* IACHR Annual Report 1996, *supra* note 226, p. 662 para. 53; Second Report on Colombia 1993, *supra* note 219, at 219.

<sup>356</sup> *E.g.* Second Report of United Nations Observer in El Salvador (“ONUSAL”), A/46/658, S/23222 paras. 62-63 (Human Rights Division, 15 November 1991).

<sup>357</sup> HRW World Report: Colombia 2007, *supra* note 16. *See also* IACHR Annual Report 2007, *supra* note 25, para. 42-48. *See also* UNCHR Report 2007, *supra* note 268, para. 43 highlighting extrajudicial executions perpetrated by paramilitaries.

### 3.3.2 Penal prosecutions - article 6 APII

Article 6 APII only applies to the prosecution and punishment of criminal offences related to an armed conflict. In all other circumstances, only Common Article 3(1)(d) will apply.<sup>358</sup> Article 6 APII was influenced by article 75(4) API and the provisions under GCIII.<sup>359</sup> It establishes a general requirement and exception. Guarantees of independence and impartiality of the court are specifically spelt out, followed by rights that must be provided “in particular”, suggesting that this is a non-exhaustive list of essential guarantees. First, article 6(2)(a) requires that the accused must be informed without delay of the offence alleged and be provided with all the necessary rights and means of a defence. The Commentary to this article lists the essential rights and means of a defence, reiterating rights set out in the ICCPR, ECHR and ACHR.<sup>360</sup>

The majority of this provision follows guarantees established in international human rights law.<sup>361</sup> Arguably, these provisions constitute the absolute minimum that must be respected during a criminal proceeding.<sup>362</sup> Article 6(2)(d) obliges penal prosecution to be in accordance with “law”. Zegveld suggests that this may not refer only to the laws of the State, but also to laws that may have been adopted by armed opposition groups.<sup>363</sup>

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<sup>358</sup> This now seems to be rather a circular argument, however, as it is generally taken that the parameters of Common Article 3(1)(d) may be determined with reference to APII, *supra* note 5, article 6.

<sup>359</sup> Chapter III GCIII and Chapter IX GCIV, *supra* note 3. Moir 2002, *supra* note 40, p. 114

<sup>360</sup> ICCPR, *supra* note 197, article 14(3)(a), (b), (d), (e), and (f); ECHR, *supra* note 197, article 6(3)(a)-(e); and ACHR, *supra* note 17, article 8(2)(a)-(f). Commentary APII, *supra* note 57, at 1398 lists the essential rights to a defence as ‘The right to be heard, and, if necessary, the right to call on the services of an interpreter, the right to call witness for the defence and produce evidence’. The accused must be in a ‘position to exercise [such rights] and be afforded the rights and means of a defence...at every stage of the procedure’.

<sup>361</sup> APII, *supra* note 5, article 6(2)(c) restates ICCPR, *supra* note 197, article 15(1); APII article 6(2)(d) correlates with ICCPR, article 14(2), ECHR, *supra* note 197, article 6(2) and ACHR, *supra* note 17, article 8(2). APII Article 6(2)(e) reflects ICCPR article 14(3)(d), and APII article 6(2)(f) reflects ICCPR article 14(3)(g) and ACHR article 8(3)(g). APII article 6(3) is similar to the right to appeal in ICCPR article 14(5), ECHR article 2 of Protocol 7 and ACHR article 8(3)(h), but is not a guarantee of the right, only to be advised on conviction of judicial and other remedies, and of times limits within which they may be exercised.

<sup>362</sup> Moir 2002, *supra* note 40, p. 225.

<sup>363</sup> Zegveld 2002, *supra* note 145, p. 70. See for example ‘Principos, Normativos y Medidas Dispuestas por el FMLN en el Transcurso de la Guerra’, in Third Report of ONUSAL, A/46/876, S/23580 at 29, para. 113 and accompanying footnotes (Human Rights Division, 19 February 1992). In the ONUSAL examination of the document

There are clearly problems associated where there are two authorities on one territory and balancing between the principle of continuity of the national legal system. Article 64 GCIV regulates the relationship between domestic legislation and the legislation of the occupying authorities and may be applied by analogy to situations of internal armed conflicts. Armed opposition groups must respect the domestic laws in force in the territory under their control, and therefore only in exceptional situations involving their own security are permitted to adopt their own laws.<sup>364</sup>

Interestingly, article 6 APII does not contain the principle *non bis in idem*,<sup>365</sup> unlike article 75(4)(h) API. This may be important in times of internal conflict, during which different parties often promulgate different laws.

### **3.3.3 Treatment of detained persons - article 5 APII**

Armed opposition groups are limited in relation to how they may treat those whose liberty has been restricted by reasons related to the armed conflict under article 5 APII. Many of these standards in article 5 APII are based on the provisions found in GCIII and GCIV.<sup>366</sup> Such obligations do not extend explicitly under the Protocol to those whose liberty has been restricted for any other reason.<sup>367</sup> The provision is split in two: article 5(1) comprises the minimum obligations that must be respected at all times, and further obligations in article 5(2) offered “within the limits of capabilities”. Although there is a distinction between minimum obligations and rights included under article 5(2) APII, armed opposition groups cannot arbitrarily

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produced by the non-State actor as to whether it conformed with international humanitarian law, there appeared to be acceptance that the group had the competence to issue laws. *See further* Somer 2007, *supra* note 71, pps. 679-681.

<sup>364</sup> Zegveld 2002, *supra* note 145, p. 71.

<sup>365</sup> I.e. that nobody shall be liable to be prosecuted or punished for an offence for which he has already been finally acquitted or convicted.

<sup>366</sup> Moir 2002, *supra* note 40, p. 112.

<sup>367</sup> Persons detained not for reasons relating to the conflict would be covered by the general provisions and Common Article 3 on humane treatment, however.

deny persons who fall under its protection.<sup>368</sup> The level of organisation required of armed dissident groups necessary to trigger application of APII should ascertain that both parties - the State and non-State actors - can ensure at least some of these measures.<sup>369</sup> Recognising the inability to fulfil some measures does not permit armed opposition groups to disregard the minimum requirements imposed by the Protocol.<sup>370</sup>

Many of the obligations under article 5(2) APII can be seen as facets of humane treatment: the freedom of correspondence,<sup>371</sup> locating detainees away from the conflict zone<sup>372</sup> and that detainees shall have the benefit of medical examinations.<sup>373</sup> The segregation of men and women under article 5(2)(a) APII reflects human rights provisions that require respect for the dignity of detainees<sup>374</sup> and the prohibition of degrading and humiliating treatment.<sup>375</sup> Unlike human rights law<sup>376</sup> and article 77(4) API, there is no requirement under article 5(2) APII for the segregation of juveniles.

As an aspect of humane treatment, armed opposition groups are obligated to provide food and drinking water and to afford safeguards as regards health hygiene. They must afford protection against the rigours of the climate and dangers of the armed conflict.<sup>377</sup> This reflects human rights law protections, such as the right to food, clothing and housing and right to highest possible standards of health.<sup>378</sup> However, such measures need only be offered to detainees at the same level as the local population. Given the conflict context, this could potentially remove the significance of such an important obligation because these rights may be restricted by the government, for difficulties in obtaining supplies may exist or the resources

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<sup>368</sup> Moir 2002, *supra* note 40, p. 112.

<sup>369</sup> APII, *supra* note 5, article 1(1).

<sup>370</sup> Hilaire McCoubrey, *International Humanitarian Law: Modern Developments in the Limitation of Warfare*, 2<sup>nd</sup> ed., (Dartmouth Publishing Company, England, 1998), p. 261. *See further* APII, *supra* note 5, article 7(2).

<sup>371</sup> APII, *supra* note 5, article 5(2)(b). *See also* ICCPR, *supra* note 197, article 17(1), ECHR, *supra* note 197, article 8(1), ACHR, *supra* note 17, article 11(2).

<sup>372</sup> APII, *supra* note 5, article 5(2)(c).

<sup>373</sup> *See further* APII, *supra* note 5, articles 4(2)(a) and 5(2)(e), Common Article 3(1)(a) and ICCPR, *supra* note 197, article 7.

<sup>374</sup> ICCPR, *supra* note 197, article 10(1); ACHR, *supra* note 17, article 5(2).

<sup>375</sup> *See also* GCIII article 14 and GCIV article 27, *supra* note 3.

<sup>376</sup> ICCPR, *supra* note 197, article 10.

<sup>377</sup> APII, *supra* note 5, article 5(1)(b).

<sup>378</sup> ICCPR, *supra* note 197, article 10; ICESCR, *supra* note 200, 11(1) and 11(2).

for the entire population may be strained. This obligation can be seen as requiring nothing more of the armed opposition group than the government is already doing, which may be the reason why the conflict began. Furthermore, local populations are able to act on their own initiative to improve their conditions, which detainees have considerably less opportunity to do. This link to the conditions of the local population is an effort to ensure that suffering should be minimised.<sup>379</sup> As such, it is unclear from the wording of article 5(1)(c) APII what precise measures are required of the insurgent groups.

Similarly, under article 5(1)(e) APII, if detainees are made to work, armed opposition groups must provide them with the same safeguards that are enjoyed by the local population. This renders the provision weaker than the absolute rights expressed elsewhere in the Protocol and commonly contained in human rights treaties. Human rights treaties provide clear guidance as to what work is not considered as forced or compulsory labour, including that which is normally required of a person under lawful detention, or conditional release from such detention<sup>380</sup>

Unlike article 126 GCIII, no provision for visits by an impartial body exists under APII to ensure that these standards are upheld and maintained. This is left to each party to the conflict to ensure. The right to humanitarian initiative remains operative under Common Article 3, and other international bodies may take an interest in detainees, such as the UN Human Rights Commission.<sup>381</sup> However, the work of the ICRC in ensuring protection for detainees in situations of international armed conflict speaks for itself. Adherence to articles 5 and 6 APII would be better upheld if an impartial body were specifically permitted to ensure that humanitarian standards were maintained in non-international armed conflict.

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<sup>379</sup> Moir 2002, *supra* note 40, p. 113.

<sup>380</sup> ICCPR, *supra* note 40, article 8(3)(c)(i).

<sup>381</sup> See for example the Cotonou Agreement on Liberia of 25 July 1993 which stipulated that “ all prisoners of war and detainees shall be immediately released to the Red Cross authority” available at <[www.usip.org/library/pa/liberia/liberia\\_07251993\\_toc.html](http://www.usip.org/library/pa/liberia/liberia_07251993_toc.html)> (last visited 24 July 2004).

### 3.3.4 Obligation to prosecute those who violate international humanitarian law?

Although Common Article 3 and APII establish the obligations of armed opposition groups, neither party to the conflict is expressly obligated to prosecute violations of those provisions committed by members of their groups or people under their control.<sup>382</sup> Little support can be found in international practice to support such an obligation of armed opposition groups. For example, the Security Council in Resolution 1325 on women and peace and security calls on “all parties to armed conflict”, but emphasises only “the responsibility of all States to put an end to impunity and to prosecute those responsible for genocide, crimes against humanity and war crimes”.<sup>383</sup> Some practice can be found where armed opposition groups have been recognised as being obligated not only to respect the applicable norms themselves, but also to enforce compliance with the norms by those under their control. In the report by the UN Commission’s Special Rapporteur for Sudan, the Special Rapporteur stated the senior leadership of the conflict’s two opposition groups should “take the necessary measures without delay to prevent future violations by investigating the cases brought to their attention and holding the perpetrators responsible with special regard to the Ganyiel incident”.<sup>384</sup> However, such practice is limited and context specific, but may reflect a wider development in the obligations of armed opposition groups under international humanitarian law.<sup>385</sup>

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<sup>382</sup> Zegveld 2002, *supra* note 145, p. 67.

<sup>383</sup> SC Res. 1325, *supra* note 217, paras. 10 and 11 (31 October 2000). *See also* ICRC study of customary law, *supra* note 170, Vol. 1, pp. 607-11, Rule 158 which recognises only the obligation on States to prosecute war crimes in non-international armed conflict, while no similar obligation is extended to armed opposition groups.

<sup>384</sup> UN Commission on Human Rights, Report of the Special Rapporteur for Sudan, Gáspár Bíró, ESCOR Supp. (No. 3) at 206, U.N. Doc. E/CN.4/1996/62 (1996) at 24, paras 73 and 87. *Note* the Special Rapporteur highlighted the commitment made by the two opposition groups addressed in a special agreement concluded by the leaders of the South Sudan Independence Army (SSIA) and the Sudan People’s Liberation Army (SPLA) to support the Convention on the Rights of the Child, the 1949 Geneva Conventions and the Additional Protocols 1977.

<sup>385</sup> Somer 2007, *supra* note 71, building on examples in the context of conflicts in El Salvador and Nepal notes that there may be a new trend emerging whereby armed opposition groups are showing an increasing ability not just to mimic the functions of the State, but deliver the services, including the administration of justice. p. 686.



States must ensure respect for international humanitarian law. State Parties to the Geneva Conventions 1949 are obligated under Common Article 1 “to ensure respect” for the Conventions “in all circumstances”. In ensuring respect of Common Article 3, the obligation on the territorial State to prosecute and punish violations of international humanitarian law by armed opposition groups is widely accepted<sup>386</sup> and has now been enshrined in the Rome Statute 1998.<sup>387</sup>

Armed opposition groups are bound only by Common Article 3 and APII, where applicable. However, although no reference is made in Common Article 3 or APII to the duty to ensure respect for established norms of international humanitarian law, Common Article 1 is applicable whenever international humanitarian law is applicable. Pursuant to Common Articles 2 and 3, this includes both international and internal armed conflicts. The ICJ has also determined that the obligation to ensure respect for norms of international humanitarian law under Common Article 1 extends to the norms contained in Common Article 3 applicable to international armed conflicts. The *Nicaragua* Case held that:

“The Court considers that there is an obligation on the United States Government in the terms of Article 1 of the Geneva Conventions, to ‘respect’ the Conventions and even ‘to ensure respect’ for the norms ‘in all circumstances’, since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is under an obligation not to encourage persons or groups in the conflict in Nicaragua to act in violation of the provisions of Article 3 common to the four 1949 Geneva Conventions.”<sup>388</sup>

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<sup>386</sup> See UN Commission on Human Rights, UN Doc. E/CN.4/1997/60/Add.1, (Report of the Special Rapporteur, 23 December 1996) para. 460. See also UN Commission on Human Rights, ESCOR Supp. (No. 4) at 185 UN. Doc. E/CN.4/1995/61 (1995), para. 49 (Report of Special Rapporteur, 14 December 1994) (Algeria); International Law Commission’s Draft Code of Crimes Against the Peace and Security of Mankind, UN Doc. A/51/10, Supp. No. 10, article 9.

<sup>387</sup> Rome State 1998, *supra* note 7, preambular paras. 4 and 6, article 1(1).

<sup>388</sup> *Nicaragua* Case 1986, *supra* note 69, at 114, para. 220. See also Zegveld 2002, *supra* note 145, at p. 174. Note that even towards the end of the eighteenth century, there had been a move towards the application of the laws of warfare to internal as well as international armed conflicts, see Emmerich de Vattel in *The Law of Nations* London, 1760, book III, chapter 18, pp. 109-110, quoted in Moir 2002, *supra* note 40 p. 3, “...it is very evident that the common laws of war, those maxims of humanity, moderation and probity...are in civil wars to be observed by both sides.’ Moir comments that this was based exclusively on the character of the conflicts and the fact that both were often of a similar magnitude, rather than any overriding humanitarian concern to treat the victims of both equally.

The ICRC has also stated that Common Article 1 is applicable in internal conflicts.<sup>389</sup>

Zegveld argues it may be inferred that the obligation to ensure respect applies equally to armed opposition groups in these conflicts.<sup>390</sup> In ensuring the physical and mental health and integrity of interned or detained persons, both acts and omissions are referred under article 5(2)(e), as well as unjustified acts. This would suggest that, in the particular circumstances prescribed by the provision, armed opposition groups must take measures to guarantee the objective of the article.<sup>391</sup>

As with human rights treaties, the substance of an obligation “to ensure respect” is dependent on the material norms and object of the treaties in question.<sup>392</sup> One of the key objectives of the Geneva Conventions 1949 noted in the Commentary to Common Article 1 was to implement humanitarian principles during a civil war by the entire population,<sup>393</sup> including insurgents. However, the fact that Common Article 3 binds each party to the conflict, while Common Article 1 refers distinctly to the High Contracting Parties indicates that the obligations of armed opposition groups are limited to those contained in Common Article 3 and APII where applicable.<sup>394</sup> As such, it appears that the obligation “to ensure respect” is an obligation only on State actors.

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<sup>389</sup> See ICRC, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document for the First Periodical Meeting on International Humanitarian Law*, (ICRC, Geneva, 19-23 January 1998), p. 16. See further ICRC study of customary law, *supra* note 170, Vol. I, pp. 495-8, Rule 139.

<sup>390</sup> Zegveld 2002, *supra* note 145, p. 67. See also *ibid*, p. 173 regarding equivalent obligation to “ensure respect” under human rights treaties, such as the ICCPR and ECHR.

<sup>391</sup> See also APII, *supra* note 5, article 1(1) whereby armed dissident groups must be able to implement the provisions of the Protocol.

<sup>392</sup> See for example *Velásquez Rodríguez v. Honduras*, 1988, IACtHR, (Ser. C) No. 4, the Inter-American Court stated with regard Article 1 of the American Convention: ‘This article specifies the obligation assumed by the States Parties in relation to each of the rights protected. Each claim alleging that one of those rights has been infringed necessarily implies that Article 1(1) of the Convention has also been violated’, para. 162.

<sup>393</sup> See Zegveld 2002, *supra* note 145, p. 174. See also T. Meron, ‘*International Criminalisation of Internal Atrocities*’ (1995) 89 AJIL 554, pps. 569-570. *C.f.* Commentary IV, *supra* note 203, p. 16.

<sup>394</sup> Somer 2007, *supra* note 71, p. 684.

## **3.4 Limitations on means and methods of warfare**

The obligations on armed opposition groups regarding the means and methods of warfare are distinctly less detailed than those relating to the protection of individuals and civilian populations. Common Article 3 sets out a rudimentary framework of minimum standards but does not contain limitations or regulations concerning the means and methods of warfare by which parties to the conflict must conduct themselves. Similarly, the provisions of APII are distinctly less detailed concerning means and methods of warfare than those regulations contained in the Geneva Conventions 1949 and API.

### **3.4.1 Prohibition of starvation**

As previously noted, with regard to the protection of civilian populations, armed opposition groups must conduct themselves in accordance with the principles of proportionality and due diligence, not inflicting unnecessary suffering, distinction of civilians and civilian objects, and other regulations found in customary international law. Article 14 APII explicitly prohibits the starvation of the civilian population as a means of combat and protects objects that are indispensable to the survival of the civilian population.<sup>395</sup> The provision provides a non-exhaustive list of foodstuffs, agricultural areas for the production of foodstuff, crops, livestock, drinking water installations and supplies and irrigation works. This provision is reflective of wider protections under human rights law, including the right to adequate food under article 11(1) ICESCR and the right to be free from hunger under article 11(2). The provision is phrased in absolute terms, so appears to apply to armed opposition groups as well as States.

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<sup>395</sup> See also API, *supra* note 3, article 54.

### 3.4.2 Prohibition against the use of land mines and other indiscriminate weapons

Other international instruments oblige armed opposition groups to conduct themselves in line with provisions regarding means and methods of warfare contained therein.<sup>396</sup>

The success of any attempt by the international community to eradicate the use of certain weaponry requires that all actors involved in conflicts be bound by regulations that prohibit them. With the current abundance of internal armed conflicts worldwide, this clearly includes non-State actors. Concern has increased for the further regulation of weapons and methods of war in internal armed conflicts.<sup>397</sup> As was observed in the ICTY, “[w]hat is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife”.<sup>398</sup> The need to include non-State actors within the ambit of these regulatory provisions has been recognised as a necessary part of custom by the ICTY, ICTR and the ICRC’s study of customary law,<sup>399</sup> States are also recognising the need to extend rules to non-international armed conflict.<sup>400</sup>

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<sup>396</sup> See for example Cultural Property Protocol II, *supra* note 319.

<sup>397</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, para. 82. T. Meron, ‘*The Humanisation of Humanitarian Law*’, 94 Am. J. Int’l L. 239, (April 2000) p. 262 [hereinafter Meron *Humanisation of Humanitarian Law* 2000].

<sup>398</sup> *Tadić* Appeal on Jurisdiction 1995, *supra* note, at 516. See D. Turns, ‘*Weapons in the ICRC Study on Customary International Humanitarian Law*’, 11 J. Conflict & Security L. 201 (Summer 2006), p. 209-211 for a critique of the ICTY’s statements in *Tadić* Appeal on Jurisdiction 1995 on the prohibitions of certain weapons [hereinafter Turns 2006].

<sup>399</sup> Y. Dinstein, ‘*Humanitarian Law on the Conflict in Afghanistan*’, 96 Am. Soc’y Int’l Prc. 23 (2002) [hereinafter Dinstein 2002]. See for example African Commission on Human and Peoples’ Rights, Resolution on Anti-Personnel Land Mines (1995), ACHPR/Res.18 (XVII) 95. See also Report of the Secretary-General, *Minimum Humanitarian Standards: Analytical Report*, Submitted pursuant to Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87 (1998), para. 86-87.

<sup>400</sup> Meron *Humanisation of Humanitarian Law* 2000, *supra* note 397, p. 262. See also *Fundamental Standards of Humanity* 2006, *supra* note 171, paras. 23-34. See for example Comprehensive Agreement on Respect for Human Rights and International Humanitarian Law, signed between the Government of the Republic of the Philippines (GRP) and the Communist Party of the Philippines - New People’s Army-National Democratic Front (CPP-NPA-NDF) in March 1998 Part III on Respect for Human Rights, Article 2(15) includes ‘the right not to be subjected to... the use of landmines.’ Referenced in S. M Santos, ‘*The Ottawa Treaty and non-state actors*’, International Campaign to Ban Landmines, Non-State Actors Working Group, p. 4 available at <[www.icbl.org/wg/nsa/library/ottwansa.html](http://www.icbl.org/wg/nsa/library/ottwansa.html)> (last visited 24 July 2008) [hereinafter Santos Ottawa Treaty].

Arguably, customary international law has significantly expanded many of the standards for restraining the means and methods of combat in international armed conflict to non-international armed conflicts, necessarily due to the humanitarian character of such rules.<sup>401</sup> The rules regulating the use of chemical and bacteriological weapons and poison, mines, booby-traps and incendiary weapons are all applicable in non-international conflicts.<sup>402</sup> However, there are still disputes over the extent to which specific rules apply.<sup>403</sup>

The use of land mines has been restricted under treaty law because they are indiscriminate, both in terms of target and time, and are thus incapable of distinguishing between civilians and military targets in violation of the humanitarian law principle of distinction.<sup>404</sup> In the *Legality of Nuclear Weapons* Opinion 1996, the Court based the prohibition of the use of indiscriminate weapons partly on the principle of humanity prescribed in preambular paragraph 4 of APII.<sup>405</sup> Such prohibition may be inferred to apply to all parties to an armed conflict.<sup>406</sup>

The use of landmines has plagued both the Colombian conflict and the conflict in Uganda. In Uganda, the LRA was identified as a group that has or currently is using landmines by the International Campaign to Ban Landmines.<sup>407</sup> In Colombia, dissident armed groups, in particular the FARC-EP, have been documented as carrying out indiscriminate bombings and for the widespread use of anti-personnel mines, which has increased

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<sup>401</sup> W. Krutzsch and R. Trapp, *A Commentary on the Chemical Weapons Convention*, (Dordrecht, Nijhoff, 1994) pps. 18-19 [hereinafter Commentary Chemical Weapons Convention]. See also *Fundamental Standards of Humanity* 2006, *supra* note 171, pps. 6-7 para. 12

<sup>402</sup> Dinstein 2002, *supra* note 399, p. 29. See for example Africa Union Council of Ministers, CM/Res. 234 (XV) of August 1970 Resolution on Decolonization, available at [http://www.africa-union.org/root/au/Documents/Decisions/com/uCoM\\_1970b.pdf](http://www.africa-union.org/root/au/Documents/Decisions/com/uCoM_1970b.pdf), p. 28 and Africa Union Council of Ministers, CM/Res. 268 (XIX) of June 1972 Available at [http://www.africa-union.org/root/AU/Documents/Decisions/com/zCoM\\_1972b.pdf](http://www.africa-union.org/root/AU/Documents/Decisions/com/zCoM_1972b.pdf), p. 6.

<sup>403</sup> Dinstein 2002, *supra* note 399, p. 28.

<sup>404</sup> *Legality of Nuclear Weapons* Opinion 1996, *supra* note 148, para. 78.

<sup>405</sup> *Ibid.*

<sup>406</sup> Zegveld 2002, *supra* note 145, p. 85.

<sup>407</sup> See S. Noel, 'Armed non-state actors in Africa and the ban on anti-personnel landmines', African Security Review, Vol. 13, No. 3 (2004) p.7, available at <http://www.iss.co.za/pubs/ASR/13No3/FStott.htm> (last visited 24 July 2008); Ewumbue-Monono 2006, *supra* note 76, p. 914. See also Landmine Monitor, 'Report: Uganda' (2005) available at [www.icbl.org/lm/2005/uganda.html#fnB17](http://www.icbl.org/lm/2005/uganda.html#fnB17) (last visited 24 July 2008).

dramatically in recent years.<sup>408</sup> Efforts to promote the prohibition of landmines resulted in the issuance of a statement on mine use by the ELN, stating that the group would consider limiting the mine use and warning civilians in order to reduce the number of mine victims.<sup>409</sup>

The Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction 1997 does not address armed opposition groups directly, although its provisions do apply to State parties “in all circumstances”, thus during internal armed conflicts.<sup>410</sup> Each State party undertakes “never under any circumstances” to use anti-personnel mines and to destroy or ensure the destruction of all antipersonnel mines whether they were used in international or non-international conflicts.<sup>411</sup> The phrase “undertakes never under any circumstances” has been interpreted as having a universal dimension. As such, the obligation extends to all activities of the State parties and is thus independent of the character of the conflict, be it international, non-international or merely civil-strife.<sup>412</sup>

The preamble to the Landmines Convention states that the provisions contained within are based on the principle of international humanitarian law that the right of parties to an armed conflict to choose methods or means of warfare is limited; the prohibition against the use of weapons, projectiles and materials and methods of war of a nature to cause superfluous injury or unnecessary suffering; and on the principle that distinction must be made

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<sup>408</sup> HRW World Report: Colombia 2007, *supra* note 16. See also L. E. Nagle, ‘Prosecuting the Use of Anti-Personnel Mines by Illegal Armed Groups: The Colombian Situation’, 8 Or. Rev. Int’l L. 23 Summer 2006.

<sup>409</sup> Landmine Monitor, ‘Report: Non-State Actors Working Group’ (2004), available at <[www.icbl.org/lm/2004/icbl/nsa](http://www.icbl.org/lm/2004/icbl/nsa)> (last visited 24 July 2008); IACHR, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*. OEA/Ser.L/V/II.129 Doc. 6, October 2, 2007 [hereinafter IACHR Report on Justice and Peace Law 2007].

<sup>410</sup> Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction, Sept. 18, 1997, 2056 U.N.T.S. 211 36 ILM 1507 (1997) article 1 [hereinafter the Landmine Convention]. Zegveld 2002, *supra* note 145, p. 27. Meron *Humanisation of Humanitarian Law* 2000, *supra* note 397, p. 239. Colombia ratified the Landmine Convention in 2000 and Uganda in 1999, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).

<sup>411</sup> Landmine Convention, *supra* note 410, article 1.

<sup>412</sup> Commentary Chemical Weapons Convention, *supra* note 401, pps. 12-13.

between civilians and those directly involved in hostilities.<sup>413</sup> These principles are not addressed exclusively to international armed conflicts, but applicable in all armed conflicts. Armed opposition groups are also obligated to respect the principle of distinction<sup>414</sup> and must not cause unnecessary suffering. As the use of land mines violates the principle of distinction, the prohibition on their use against civilians is incorporated in the general duty to protect civilians. The language of the Landmines Convention has been criticised as being weak and its application in non-international armed conflicts called into question.<sup>415</sup> The Inter-American Commission, however, clearly considers the ban on land mines to be a general obligation applicable to any group conducting military operations.<sup>416</sup>

The Conventional Weapons Convention 1980 also does not specifically address armed opposition groups; however, its scope of application has been expanded significantly since coming into force. Under the Amended Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices to the Conventional Weapons Convention, of 3 May 1996, article 1 specifies that the Protocol applies to situations referred to in Common Article 3 and that each party to the conflict is bound by the prohibitions and restrictions contained in the Protocol.<sup>417</sup> Article 3(7) prohibits the directing of mines covered by the Protocol against the civilian population, individual civilians or civilian objects.

In 2001, an amendment to article 1 of the 1980 Convention was adopted which expanded the application of the Convention and its annexed Protocols (Protocols I-IV) to situations referred to in Article 3 common to

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<sup>413</sup> Landmine Convention, *supra* note 410, preambular para. 11.

<sup>414</sup> APII, *supra* note 5, article 13; ICRC study customary law, *supra* note 170, Volume I, pp. 244-250, Rule 71.

<sup>415</sup> Santos Ottawa Treaty, *supra* note 400.

<sup>416</sup> Third Report on Colombia 1999, *supra* note 24, p. 100, para. 102-105.

<sup>417</sup> Article 1(2) Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices (Protocol II) Oct. 10, 1980, 1342 U.N.T.S. 168, 19 I.L.M. amended by Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as Amended on 3 May 1996 (Protocol II to the 1980 Convention as amended on 3 May 1996), 1125 U.N.T.S. 609, 19 I.L.M. 1206. Colombia ratified the Protocol in 2000, but Uganda is not a State party, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).

the Geneva Conventions of 1949.<sup>418</sup> Regulations and restrictions pertaining to the use of non-detectable fragments, the use of incendiary weapons and blinding laser weapons are therefore also applicable to non-State actors.<sup>419</sup> Similarly to the text of Rome Statute 1998 article 8(2)(d) and (f) a negative definition of situations which the Convention and Protocols will not apply is given. Article 3 of the 2001 Amendment explicitly binds each party to the conflict to apply the prohibitions and restrictions of this Convention and its annexed Protocol.<sup>420</sup>

Similar to the Landmines Convention, under the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction 1993, State parties “undertake never under any circumstances” to use the weapons defined in the treaty due to their indiscriminate nature.<sup>421</sup> This also reflects the language of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) Weapons.<sup>422</sup> The application of the Chemical Weapons Convention in non-international armed conflict

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<sup>418</sup> Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, Geneva, 10 October 1980, Amendment 21 December 2001, 1342 UNTS 137, article 2 [hereinafter Conventional Weapons Convention]. Neither Colombia nor Uganda are parties to the Protocol, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).

<sup>419</sup> Protocol on Non-Detectable Fragments (Protocol I) Oct. 10, 1980, 1342 U.N.T.S. 168, 19 I.L.M. 1529; Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534; Protocol IV on Blinding Laser Weapons, 1995 35 ILM 1218 (1996) (annexed to the 1980 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effect). Colombia ratified all four Protocols in 2000. Uganda has ratified, Protocols I, II and III, but not Protocol IV, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).

<sup>420</sup> Conventional Weapons Convention, *supra* note 418, article 3.

<sup>421</sup> Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, 13 January 1993, 32 ILM 800 (1993), article 1(b) [hereinafter the Chemical Weapons Convention]. *See further* article 1(a), (c) and (d). Colombia ratified the Chemical Weapons Convention in 2000 and Uganda in 2001, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).

<sup>422</sup> Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction, 10 April 1972, 1015 UNTS 163, Art. 1. *See* T. Meron, ‘*International Criminalization of Internal Atrocities*’, 89 Am. J. Int’l L. 554 (1995) p. 575. *See also* ICRC study of customary law, *supra* note , Vol. I, Rule 73, p. 257. Colombia ratified the Biological Weapons Convention in 1983 and Uganda in 1992, ICRC, International Humanitarian Law – Treaties and Documents, available at <[www.icrc.org/ihl.nsf/TOPICS?OpenView](http://www.icrc.org/ihl.nsf/TOPICS?OpenView)> (last visited 24 July 2008).



closes the gap in the provisions of the 1925 (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare,<sup>423</sup> which addressed their use in international armed conflicts only.<sup>424</sup>

The actual regulations flowing from these conventions that are applicable to non-State armed actors remain unclear. However, insofar as the use of such weapons violates the provisions of Common Article 3 and APII, armed opposition groups are obligated not to use them. Their indiscriminate nature could certainly be classified as violence to life and person against persons taking no active part in the hostilities under Common Article 3(1)(a) and article 4(2)(a) of APII. Their use may also be described as acts of terrorism prohibited by article 4(2)(d) APII and a violation of the protection afforded to civilian populations under article 13(2).

The extension of obligations pertaining to means and methods of warfare is a considerable improvement for the protection of civilians in internal armed conflicts and appears to be a quickly evolving area of international humanitarian law. Difficulties may arise in the application of this body of law to insurgents who are not trained or unwilling to comply with the full body of international law of armed conflict.<sup>425</sup> Greater commitment needs to be made to ensure compliance by non-State actors. The work of Geneva Call, the International Campaign to Ban Landmines and the Non-State Actors Working Group is an excellent example. These entities have succeeded in obtaining adherence to a “Deed of Commitment for Adherence to a Total Ban on Anti-Personnel Mines and for Cooperation in Mine Action” by thirty-five armed groups in Burma, Burundi, India, Iran, Iraq, the Philippines, Somalia, Sudan, Turkey and Western Sahara. Through this effort, it is hoped that non-State actors will adhere to a wider basic humanitarian code of conduct through the landmine issue.<sup>426</sup>

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<sup>423</sup> 1925 (Geneva) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare 17 June 1925, 94 LNTS 65. See further *Tadić* Appeal of Jurisdiction 1995, *supra* note paras. 120-124.

<sup>424</sup> Stockholm International Peace Research Institute, *The Problem of Chemical and Biological Warfare*, (New York: Humanities Press, 1971) 129. See however ICRC study on customary law, *supra* note, Rule 72, p. 251-252.

<sup>425</sup> Dinstein 2002, *supra* note 399, p. 28.

<sup>426</sup> Sassòli 2003 *supra* note 10, p. 11.

Further clarification as to the precise nature of the obligation of non-State actors must be undertaken if the prohibition of such weapons is to be truly universal.<sup>427</sup> Without greater clarity as to customary regulation of weaponry and methods of warfare, the application of a customary prohibition to non-State actors is highly debatable. The uncertainty surrounding this area of law was summed up in the ICRC's study of customary law, where it was observed that '[t]here is insufficient consensus concerning all of these examples to conclude that, under customary international law, they all violate the rule prohibiting unnecessary suffering. However, there is agreement that some of them are prohibited....'<sup>428</sup>

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<sup>427</sup> Turns 2006, *supra* note 398.

<sup>428</sup> ICRC study of customary law, *supra* note 170, Vol. I, pp. 243-244, Rule 70.

## 4 Enforcing international humanitarian obligations and establishing peace and accountability

Having seen what obligations armed opposition groups must uphold during internal armed conflicts, the analysis will now turn to what measures have been taken to ensure this is done. One of the main obstacles in ensuring that humanitarian obligations are upheld is that neither Common Article 3 nor APII contain provisions governing their enforcement.<sup>429</sup> To fill this enforcement void, a variety of mechanisms have been utilised by States and the international community to ensure compliance with international humanitarian standards.

A report by the Centre for Humanitarian Dialogue, on components of peace agreements between 1 January 1980 and 31 August 2006, concluded that 61 out of 77 peace agreements analysed contained either a general reference to international standards, conventions, or principles of human rights, a specific justice mechanism, or granted a limited or general amnesty.<sup>430</sup> The use of justice mechanisms in peace agreements has increased over time and peaked in the mid- to late 1990s.<sup>431</sup> Such mechanisms have included the establishment of government commissions of enquiry and truth commissions; domestic and international prosecutions; domestic and regional or international civil claims; the enactment of legislation specific to the resolution of the conflict such as lustration and

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<sup>429</sup> Moir 2002, *supra* note 40, p. 232.

<sup>430</sup> L. Vinjamur and A. P. Boesenecker, *Accountability and Peace Agreements: Mapping trends from 1980 to 2006*, (Centre for Humanitarian Dialogue, Geneva, September 2007), p. 5, available at <[www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-77MERJ/\\$file/Full\\_Report.pdf?openelement](http://www.reliefweb.int/rw/lib.nsf/db900sid/EVOD-77MERJ/$file/Full_Report.pdf?openelement)> (last visited 24 July 2008) [hereinafter *Accountability and Peace Agreements* 2007]. The 77 peace agreements were analysed among 202 general documents related to peace processes for wars that ended between 1980 and 2006. See also Jennifer L. Balint, 'The Place of Law in Addressing Internal Regime Conflicts', 59-AUT Law & Contemp. Probs 103 (Fall 1996), p. 104, who states that, not including interstate conflicts, of roughly 300 conflicts which have occurred since World War II approximately one quarter of these have had some kind of legal redress [hereinafter Balint 1996].

<sup>431</sup> *Accountability and Peace Agreements* 2007, *supra* note 430, p. 9.

compensation legislation; and the passing of specific limited or general amnesty legislation.<sup>432</sup> These have been used on their own or in combination with other legal mechanisms.<sup>433</sup> The repeated clustering of certain mechanisms, such as amnesty, prisoner release and combatant reintegration,<sup>434</sup> would suggest that certain instruments tend to be seen as mutually reinforcing and critical to ending conflicts.<sup>435</sup> The variety of mechanisms used also highlights that the role of law is not simply limited to that as prosecutor, but also includes law as educator, truth-teller and reconciler, amongst other things.<sup>436</sup>

The evidence is that law is increasingly being called upon as a tool for both the resolution of and progression away from conflicts, towards the creation of a stable post-conflict situation.<sup>437</sup> Legal mechanisms have been employed in both the Colombian and Ugandan. One of the main reasons parties rely on international humanitarian law and international human rights law is because they offer clear standards to which the international community may hold non-State armed groups.<sup>438</sup> In light of the prevalence of internal armed conflict since 1945, it has become increasingly important to respond to abuses by non-State armed groups. The final chapter will critically assess some of the complexities involved in enforcing international humanitarian law obligations on non-State actors and ending conflict, highlighting some of the mechanisms employed in the Colombian and Ugandan contexts.<sup>439</sup>

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<sup>432</sup> Balint 1996, *supra* note 430, p. 103, fn. 6.

<sup>433</sup> *Ibid.*

<sup>434</sup> *Accountability and Peace Agreements* 2007, *supra* note 430, p. 16-23.

<sup>435</sup> *Ibid.*, p. 5.

<sup>436</sup> Balint 1996, *supra* note 430, p. 106.

<sup>437</sup> *Ibid.*, p. 104.

<sup>438</sup> C. L. Sriram, 'Achieving accountability for non-state armed groups—use of domestic mechanisms for international crimes', paper submitted at the at the Armed Groups Conference, Vancouver, 13-15 November 2003, pps. 1 – 2 available at <[www.c-r.org/our-work/accord/engaging-groups/index.php](http://www.c-r.org/our-work/accord/engaging-groups/index.php)> (last visited 24 July 2008) [hereinafter Sriram 2003].

<sup>439</sup> Note the author does not propose the best mechanism for solution of the conflicts, only an analysis of some of the enforcement mechanisms used.

## 4.1 The duty to enforce humanitarian obligations

International humanitarian law has traditionally been characterised as the regulation of recourse to force and governing conduct in hostilities. These characteristics, however, must be seen in the context of the wider international legal system, which, since 1945, has placed peaceful settlement of disputes between States at the forefront of international relations and has limited recourse to force to only extreme limited circumstances.<sup>440</sup> Under article 33 of the UN Charter, the parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, must seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their choice. While this obligation is clearly applicable to disputes between States, it is unclear whether it extends to disputes between States and non-State actors. The reference to endangering the maintenance of international peace and security is unqualified, indicating that this obligation exists for both State and non-State actors in situations where the Security Council has determined that the dispute is a threat to the peace.<sup>441</sup> Further supporting this conclusion, the language of article 33 is broader than that contained in article 2(3) of the UN Charter, which refers only to the settlement of “international” disputes by peaceful means. There is no similar restriction that the dispute to be settled must be “international” under article 33. This interpretation would not be in breach of article 2(7) of the UN Charter protecting undue interference in domestic jurisdiction of the State, as article 2(7) would not apply to any dispute that could endanger international peace and security. The phrasing of article 33 implies a series of events, whereby if the parties to the dispute are unable to resolve the dispute in a peaceful manner, investigation, recommendations and possible intervention by the Security Council would follow to ensure the maintenance of international peace and security. As

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<sup>440</sup> See UN Charter, *supra* note 140, articles 2(3), 2(4), 24, 33-38, 39-42 and 51.

<sup>441</sup> M. A. Rogoff, ‘*The Obligation to Negotiate under International Law: Rules and Realities*’, 16 Mich. J. Int'l L. 141 (1994), p. 156 [hereinafter Rogoff 1994].

such, article 33 can be read to impose the obligation of peaceful settlement on States involved in any serious dispute deemed to constitute a threat to international peace and security.<sup>442</sup>

Under Article 33 of the UN Charter, were a situation of internal armed conflict may endanger the maintenance of international peace and security, the State involved is under an obligation to enforce the obligations flowing from Common Article 3 and APII where applicable and measures should be taken by third parties to ensure that all parties to a conflict respect such obligations. Common Article 1 of the Geneva Conventions 1949 obligates the High Contracting Parties to respect and ensure respect for the Conventions in all circumstances; given this and the customary status of the Conventions, humanitarian obligations can therefore be categorised as obligations *erga omnes*.<sup>443</sup> This includes obligations flowing from both Common Article 3,<sup>444</sup> and APII as it develops and supplements Common Article 3.<sup>445</sup> As such, it is in the interest of the international community as a whole to ensure respect for the fundamental rules of internal armed conflict.<sup>446</sup> This interest, however, is limited to the extent that the provisions of Common Article 3 and APII are obligations *erga omnes*.<sup>447</sup>

The government of Sudan has played a key role in bringing about the recent and most successful round of peace negotiations between the LRA and the government of Uganda, particularly since the signing of the 2005 Comprehensive Peace Agreement in Sudan. These negotiations resulted in the 2006 Juba Agreement and subsequent protocols, which have marked the first substantive hope of the conclusion of hostilities in many years. However, difficulties have subsequently arisen, resulting in the postponement of the final signing of the Juba agreement and hostilities continue to be conducted post February 2008 when the parties finalised

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<sup>442</sup> *Ibid*, p. 156. See further North Sea Continental Shelf Case 1969, *supra* note 161, p. 47.

<sup>443</sup> Moir 2002, *supra* note 40, p. 245.

<sup>444</sup> See *Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ, ICJ Rep (1949) 4 at 22 and *Nicaragua Case* 1986, *supra* note 69, para. 218.

<sup>445</sup> Moir 2002, *supra* note 40 p. 245.

<sup>446</sup> See further *Nicaragua Case* 1986, *supra* note 69, para. 220.

<sup>447</sup> There is no corresponding provision in APII to API, *supra* note 3, article 1(1) and lack of reference in the preamble to principles of international law derived from custom in protection of human persons not covered by the law in force.

agreement on accountability and reconciliation mechanisms,<sup>448</sup> calling into question whether agreement can be reached.<sup>449</sup>

The Colombian conflict has featured involvement by third States in enforcing humanitarian obligations of both armed opposition groups and the State. Venezuela played a large, be it fluctuant, role in the negotiation of hostage for prisoner exchanges with the FARC-EP.<sup>450</sup> The United States has crucially demanded that the Colombian government respect minimum humanitarian conditions. For example, in April 2007, the US Congress froze \$55 million in assistance in response to increasing reports of extrajudicial executions by the military and lack of adequate progress in reducing impunity in major cases involving military-paramilitary links.<sup>451</sup> In addition, in June 2007, the Democratic leadership in the US House of Representatives announced it would not support a free trade agreement with Colombia without concrete evidence of sustained results on the ground with regard to impunity for the role of paramilitaries. In July 2008, the US assisted in sharing information, equipment and training advice in an operation that led to the release of 15 hostages from the FARC-EP, including one of the most high profile hostages held.<sup>452</sup> The Organisation of American States established a Mission to Support the Peace Process in Colombia, which is charged with verifying paramilitary demobilisations, and the Office of the United Nations Human Rights Commissioner for Human Rights is also active in Colombia.<sup>453</sup>

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<sup>448</sup> See *infra*.

<sup>449</sup> Critics have also pointed out that the number of internally-displaced people has trebled from 2002 to 2006, D. Lanz, 'The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice', May 2007, Fletcher School of Law and Diplomacy, p. 14, available at <[http://fletcher.tufts.edu/humansecurity/pdf/paper\\_uganda-ICC\\_lanz.pdf](http://fletcher.tufts.edu/humansecurity/pdf/paper_uganda-ICC_lanz.pdf)> (last visited 24 July 2008) [hereinafter Lanz 2007].

<sup>450</sup> International Crisis Group, *Colombia: Making Military Progress Pay Off*, Policy Briefing, Latin America Briefing No. 17, (ICG, Bogotá/Brussels, 29 April 2008). See also "Uribe and Chavez try to heal rift", *BBC News* (online edition), 11 July 2008, <<http://news.bbc.co.uk/2/hi/americas/7502362.stm>> (last visited 24 July 2008).

<sup>451</sup> HRW World Report: Colombia 2007, *supra* note 16. The United States provides close to \$800 million to the Colombian government, mostly in military aid. Twenty five per cent of United States military assistance is formally subject to human rights conditions.

<sup>452</sup> "Colombia hostage Betancourt freed", *BBC News* (online edition), 3 July 2008, <<http://news.bbc.co.uk/2/hi/americas/7486552.stm>> (last visited 24 July 2008).

<sup>453</sup> HRW World Report: Colombia 2007, *supra* note 16.

Whether third parties have taken sufficient measures to regulate internal armed conflicts has been questioned in the past. As early as 1968, during the Tehran Conference on Human Rights, it was observed “States parties to the Red Cross Geneva Conventions sometimes fail to appreciate their responsibility to take steps to ensure the respect of these humanitarian rules in all circumstances by other States, even if they are not themselves directly involved in an armed conflict”.<sup>454</sup> Since then, there has been an increased involvement in such situations by the international community acting through the UN, particularly as human rights mechanisms have become more sophisticated. The Ugandan government’s decision to refer the situation to the ICC has been pointed out as “an attempt to engage an otherwise aloof international community”.<sup>455</sup> However, as yet no government has been able, and there appears to be a lack of intention, to apprehend those under arrest warrant from the ICC despite their obligation to do so under the Rome Statute.<sup>456</sup>

## **4.2 The interplay and adaptability of enforcement mechanisms as used in Colombia and Uganda**

Common Article 3 does not include in its provisions any regulation of the end of non-international armed conflicts. APII does address the end of armed conflicts to which it is applicable, but only in two instances: first, regards the continuation of protections under the Protocol to those who have been deprived or restricted of their liberty for reasons related to the conflict under Article 2(2) APII;<sup>457</sup> and second, endeavouring to obtain the provision of the broadest possible amnesty for those who participated in the conflict or those deprived of their liberty for reasons related to the armed

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<sup>454</sup> Resolution XXIII, International Conference on Human Rights, Tehran 1968.

<sup>455</sup> P. Akhavan, ‘*The Lord’s Resistance Army Case: Uganda’s Submission of the First State Referral to the International Criminal Court*’, *American Journal of International Law* 99, no. 2 pps. 403-421 (2005), p. 404 [hereinafter Akhavan 2005].

<sup>456</sup> Rome Statute 1998, *supra* note 7, article 59(1).

<sup>457</sup> APII, *supra* note 5, article 2(2).



conflict, whether interned or detained under Article 6(5) APII. It is only in the latter that any notion of restoration to peace is found in the Protocol.

One of the purposes of international humanitarian law is to reinforce the rule of law and respect for human dignity in all circumstances and therefore the focus of implementation methods is on prevention of violations.<sup>458</sup> Implementation mechanisms in international law are almost exclusively State-centred<sup>459</sup> because States are both the creators and subjects of international law and thus are essential to ensure implementation and enforcement of international humanitarian law.<sup>460</sup> National measures adopted to give full domestic effect to international humanitarian law is one of the oldest yet least used mechanisms for enforcing international law.<sup>461</sup> The positive effects of national implementation are highlighted when one compares armed conflicts in which international humanitarian law has been pre-established and guaranteed through domestic mechanisms to those where it has not. The latter usually results in the violations by all sides of essential guarantees and protections of life, physical integrity and due process.<sup>462</sup>

How questions of truth, justice and reconciliation are dealt with in a post-conflict society depends on many factors. The use of law may depend on, amongst other things, the position of law within that society and resources and structural capacities. Whether emphasis is placed on truth, justice or reconciliation can vary between symmetric warfare, involving equivalence in arms between parties to the conflict, and asymmetric warfare, where there is significant imbalance in military capacity in warring parties. Perspectives vary regarding these nebulous concepts, for example, whether justice be retributive or restorative. Such negotiations are not held exclusively between the parties to the conflict and instead involve an array

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<sup>458</sup> M. Sassòli, 'State responsibility for violations of international humanitarian law', IRRC Vol. 84, No. 846, 2002, p. 401.

<sup>459</sup> Sassòli 2003, *supra* note 10, p. 2.

<sup>460</sup> *Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, IACtHR, Series C, No. 94 para. 112.

<sup>461</sup> E. G. Salmón, 'Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience', IRRC Vol. 88 No. 862 (June 2006), p. 329 [hereinafter Salmón 2006].

<sup>462</sup> *Ibid*, p. 330.

of international organisations such as the ICRC, UNHCR and UNICEF. These organisations, among others, will engage with armed opposition groups in an effort to establish ceasefires or safe passage, seek protection for civilian populations, and inform them of their responsibilities under international law.<sup>463</sup> Most justice mechanisms, such as those used in Uganda and Colombia, tend to be negotiated outside a specific peace agreement process.<sup>464</sup> Those government have implemented a wide range of mechanisms have been implemented in order to enforce humanitarian obligations. However, a full discussion of which is beyond the capacity of this paper, and instead focus will be given to the granting of amnesties and individual criminal prosecution. It is interesting that these diametrically different mechanisms have both been used in part to promote compliance with humanitarian obligations. Individual prosecution for violations also follows a larger trend in international relations to combat impunity and also highlights the differing demands of justice, truth and reconciliation.

### **4.3 Colombia – amnesties and prosecution – in the interest of truth justice and reconciliation?**

The commentary to article 6(5) explains the purpose of the provisions as to encourage gestures of reconciliation which can contribute to re-establishing normalcy in the life of a nation which has been divided.<sup>465</sup> Reconciliation is easier to achieve when the parties to the conflict have complied with the rules of international humanitarian law.<sup>466</sup> Importantly, Article 6(5) applies to the “authorities in power” at the end of the conflict, with no assumption it will be the same as the one at the conflict’s beginning. The provision of amnesty is also not an absolute obligation and authorities must only “endeavour” to grant the broadest possible amnesty, leaving the discretion

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<sup>463</sup> Capie and Policzer 2004, *supra* note 2, p. 2.

<sup>464</sup> *Accountability and Peace Agreements* 2007, *supra* note 430, p. 29.

<sup>465</sup> Commentary APII, *supra* note 57, para. 4618. IACHR, *Report on the demobilization process in Colombia*, OAE/Ser.L/V/II.120. Doc. 60. 13 December 2004, para. 25 [hereinafter IACHR Report on Demobilisation in Colombia 2004].

<sup>466</sup> Salmón 2006, *supra* note 461, p. 353.

to the parties involved to utilise other mechanisms that may be more fitting in the circumstances.

The legality of amnesties under international law is greatly debated,<sup>467</sup> particularly in light of recent jurisprudence in both domestic and international courts on the matter. A great number of advocates for international justice have argued that the granting of amnesty constitutes a violation of, rather than a reflection of, international law in this area.<sup>468</sup> The short term difficulties of balancing peace and justice have been well documented,<sup>469</sup> but as aptly put by an anonymous government official “[t]he quest for justice for yesterday’s victims of atrocities should not be pursued in such a manner that it makes today’s living the dead of tomorrow”.<sup>470</sup>

In regards to State practice, amnesty was the most common justice mechanism found in the 77 peace agreements analysed by the Centre for Humanitarian Dialogue, occurring in 30 agreements.<sup>471</sup> Of these 30, 22 granted a general amnesty covering all individuals and all violations or crimes<sup>472</sup> and 8 provided limited amnesty provisions which did not provide amnesty for war crimes, crimes against humanity and genocide.<sup>473</sup> In Cambodia, El Salvador, Haiti, Sierra Leone and South Africa, the UN was involved in negotiations that granted amnesty as a means of restoring peace.<sup>474</sup> Although the inclusion of amnesty provisions has declined since 2000, on the whole the use of amnesty provisions appears to be stable and

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<sup>467</sup> Note the prohibition of granting amnesties for particular crimes is rare in treaty law. See for example GA Res. 47/133, *Declaration on the Protection of all Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, adopted at the 92nd plenary meeting, 18 December 1992, article 18 on expressly prohibits the granting of amnesties.

<sup>468</sup> See, for example, M. Cherif Bassiouni, ‘*International Crimes: Jus Cogens and Obligations Erga Omnes*’, 59 *Law & Contemp. Probs*, 63, 63 (1996).

<sup>469</sup> See L. N. Sadat, ‘*Exile, Amnesty and International Law*’, 81 *Notre Dame L. Rev.* 955 (March 2006) and Michael P. Scharf, ‘*From the Exile Files: An Essay on Trading Justice for Peace*’, 63 *Wash. & Lee. L. Rev.* 339 (Winter 2006) [hereinafter Scharf 2006].

<sup>470</sup> Anonymous, *Human Rights in Peace Negotiations*, (1996) 18 *Hum. Rts. Q.* 249, p. 258.

<sup>471</sup> *Accountability and Peace Agreements 2007*, *supra* note 430, p.16.

<sup>472</sup> For example, the Cotonou Peace Agreement in Liberia, 25 July 1993, Section G article 19, available from the United States Institute of Peace, *Peace Agreements Digital Collection: Liberia*, <[www.usip.org/library/pa/liberia/liberia\\_07251993\\_toc.html](http://www.usip.org/library/pa/liberia/liberia_07251993_toc.html)> (last visited 24 July 2008), referenced in *Accountability and Peace Agreements 2007*, *supra* note 430.

<sup>473</sup> *Ibid*, p. 16.

<sup>474</sup> Scharf 2006, *supra* note 469, p. 343-345. Note all five situations were incidents of internal conflict.

used as part of a larger pack of justice mechanisms.<sup>475</sup> Amnesty has been used in combination with other mechanisms to ensure accountability and achieve the aims of justice in truth and reconciliation commissions, such as in South Africa. Amnesty provisions simultaneously recognise that crimes have been committed, while granting immunity from domestic prosecution for such crimes.<sup>476</sup> Additionally, amnesties have been used to facilitate the start of peace negotiations, by providing a framework for how to carry out peace processes.

International human rights and humanitarian law determine the material scope of a legitimate amnesty.<sup>477</sup> The State is restricted from granted amnesty from all crimes without breaching its obligations under international humanitarian law. It has been argued that amnesties may appropriately cover offences of rebellion and other political crimes and minor common crimes that are not covered by international humanitarian and human rights law.<sup>478</sup> Such an interpretation is in line with the ICRC's interpretation of article 6(5) APII, which holds that article 6(5) APII may not be "invoked in favour of impunity of war criminals, since it only applied to prosecution for the sole participation in hostilities."<sup>479</sup> Amnesties cannot cover acts of war crimes, genocide or crimes against humanity, including torture.<sup>480</sup> States are obligated to extend their criminal jurisdiction over those responsible for the most serious crimes of concern under the Rome Statute.<sup>481</sup> The duty to investigate and prosecute includes offences

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<sup>475</sup> See for example Arusha Peace and Reconciliation Agreement for Burundi, 28 August 2000, Protocol III, article 26(1), available from the United States Institute of Peace, Peace Agreements Digital Collection: Liberia, <[www.usip.org/library/pa/burundi/pa\\_burundi\\_08282000\\_toc.html](http://www.usip.org/library/pa/burundi/pa_burundi_08282000_toc.html)> (last visited 24 July 2008), referenced in *Accountability and Peace Agreements 2007*, *supra* note 430, pps. 9 and 11.

<sup>476</sup> Scharf 2006, *supra* note 469, p. 343; *Accountability and Peace Agreements 2007*, *supra* note 430, p. 18.

<sup>477</sup> Salmón 2006, *supra* note 461, p. 337.

<sup>478</sup> See *Barrios Altos Case* (2001), Inter-Am. Ct. H.R. (ser. C) No. 75 at 14. See further ICRC Increasing Respect 2008, *supra* note 166.

<sup>479</sup> ICRC study of customary law, *supra* note 170, p. 4043.

<sup>480</sup> *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, 8 February 2005, E/CN.4/2005/102/Add.1 principle 24: "the perpetrators of serious crimes under international law cannot benefit from such measures" [hereinafter *Updated Principles 2005*].

<sup>481</sup> Rome Statute 1998, *supra* note 7, preambular paras. 4 and 6, article 1. See also Human Rights Committee, General Comment No. 20: Article 7, (Forty-fourth session, 1992),

committed in non-international armed conflicts under both customary international law and the Rome Statute 1998.<sup>482</sup>

Other factors also influence the validity of an amnesty. The main purpose behind the granting of amnesty is to foster reconciliation, so political and social realities may require authorities to advance a reconciliation process that contours more to demands of truth and justice.<sup>483</sup> As was observed in the UN Secretary-General's Report on the rule of law and transnational justice in conflict and post-conflict societies, lasting peace cannot be maintained unless the population is confident that redress for grievances can be obtained through legitimate structures for the peaceful settlement of disputes and the fair administration of justice.<sup>484</sup> A victim's right to an effective remedy for violations of human rights law is another factor in determining the appropriateness of an amnesty.<sup>485</sup> The Inter-American Commission has recognised the need to balance the need for justice and the attainment of peace in the provision of amnesties and requires that all amnesties be compatible with "the State's obligation to clarify, punish and make reparation for violations of human rights and humanitarian law."<sup>486</sup>

In light of the object and purpose of APII, which includes the protection of civilians during internal armed conflict, amnesties cannot be granted to individuals suspected, accused or convicted of war crimes.<sup>487</sup>

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Compilation of General Comments and General Recommendations Adopted by Human Treaty Bodies, UN Doc. HR1/GEN/1/Rev.1 at 30 (1994) para. 15.

<sup>482</sup> See Rome Statute 1998, *supra* note 7, articles 5, 6, 7 and 8(2)(c) and (e), and Convention on the Prevention and Punishment of the Crime of Genocide, 78 UNTS 277, adopted 9 December 1948, entered into force 12 January 1951 (1948), articles 1-3 [hereinafter Genocide Convention]; *Prosecutor v. Kupreškić et al.*, 14 January 2000, ICTR, Case No. IT-95-16, Judgement, para. 520; *Furundžija* Judgement 1998, *supra* note 116, paras. 153-157, particularly 155. *C.f.* Scharf 2006, *supra* note 469, p. 342. *C.f. Prosecutor v. Kallon & Kamara*, 13 March 2004, SCSL, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, p.71 in which it was observed that although the Lomé amnesty was inapplicable before it, there was "not yet any general obligation for States to refrain from amnesty laws on these crimes...Consequently, if a State passes any such law, it does not breach a customary rule" [hereinafter *Kallon & Kamara* Decision on Challenge to Jurisdiction 2004].

<sup>483</sup> Salmón 2006, *supra* note 461, p. 339.

<sup>484</sup> Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*, S/2004/619, 3 August 2004, p.3.

<sup>485</sup> Salmón 2006, *supra* note 461, p. 340.

<sup>486</sup> IACHR Report on Demobilisation in Colombia 2004, *supra* note 465, para. 11.

<sup>487</sup> Salmón 2006, *supra* note 461, p. 338.

Reflecting this, the Constitutional Court of Colombia recognised that amnesties under article 6(5) do not extend to war crimes.<sup>488</sup> Additionally, jurisprudence from international and domestic courts holds that amnesties are not binding outside the country they were granted, therefore it is not possible to effectively invoke immunity created by national law before an international tribunal.<sup>489</sup>

Impunity has been recognised by the UN Commission on Human Rights and the Sub-Commission on Prevention of Discrimination and Protection of Minorities as one of the main reasons for the continuation of grave violations of human rights throughout the world.<sup>490</sup> In addition, the UN fact-finding reports on Chile and El Salvador highlight that granting amnesties or *de facto* impunity lead to a rise in abuses in those countries.<sup>491</sup> This is evident in the Ugandan peace process, where a blanket amnesty is granted to LRA members who choose to voluntarily lay down their arms under the Amnesty Act 2000.<sup>492</sup> However, these applicants are not required to describe the crimes committed or participate in or any other restorative justice mechanism.<sup>493</sup> Furthermore, the Amnesty Act did not succeed easing the conflict or obtaining the surrender of those indicted by the ICC.<sup>494</sup>

The changing use of amnesties in State practice within conflict societies can be observed in the Colombian context. The short-term stability gained from amnesties granted during the demobilisation process was subsequently adapted to further the demands of justice and reparation in

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<sup>488</sup> Case No. C-225/95 Colombian Constitution Court Decision, paras. 41 and 42.

<sup>489</sup> *Furundžija* Judgement 1998, *supra* note 116; *Kallon & Kamara* Decision on Challenge to Jurisdiction 2004, *supra* note 482. *Arrest Warrant of 11 April 2000 (Democratic Republic Congo v. Belgium)*, 2002, ICJ, I.C.J. Rep. 1 (Feb. 14), p. 61. *See further* L. N. Sadat, 'Exile, Amnesty and International Law', 81 *Notre Dame L. Rev.* 955 (March 2006) for a discussion of case law.

<sup>490</sup> UN Economic and Social Council, Commission on Human Rights, *Working Group on Enforced or Involuntary Disappearances, Report on the Consequences of Impunity*, UN Doc. E/CN.4/1990/13 (24 January 1990) para. 344.

<sup>491</sup> UN Economic and Social Council, *Protection of Human Rights in Chile*, UN Doc. A/38/385 (17 October 1983) para. 341.

<sup>492</sup> Komakech 2001, *supra* note 29, p. 9. Amnesty Act (2000) (Uganda), available at <[www.cr.org/accord/Uganda/accord11/keytext.shtml](http://www.cr.org/accord/Uganda/accord11/keytext.shtml)> (last visited 24 July 2008) [hereinafter Amnesty Act 2000].

<sup>493</sup> Amnesty Act 2000, *supra* note 492, pt. II. Under this law, an amnesty is available to Ugandan citizens only, for all crimes they committed "in the cause of" war against the government after 26 January 1986.

<sup>494</sup> *Ibid.*

Law 975 (2005), “the Justice and Peace Law” (“Ley de Justicia y Paz”).<sup>495</sup> Although provocative both domestically and internationally, this has shifted the disarmament, demobilisation and reintegration process in Colombia, focusing on justice mechanisms to broker peace.<sup>496</sup>

First, the Colombian government concentrated on demobilisation of illegal armed forces in an effort to secure peace. In 2003, the Government of President Alvaro Uribe reached an agreement with the leaders of the AUC to demobilise units of that illegal armed group in various parts of the country. In exchange for demobilisation, a resolution was issued by the Prosecutor General’s office to bar prosecution of demobilised personnel for having simply belonged to an illegal armed group, and the promise to establish alternative penalties for those who had committed crimes as members of such groups.<sup>497</sup> Pursuant to Decree 128 of 2003<sup>498</sup> and Law 782 of 2002,<sup>499</sup> the process of demobilisation, surrender of weapons and reintegration into civilian life was carried out for more than a year and a half. The provisions of Decree of 2003 mostly pertain to social benefits, however legal benefits such as pardon, conditional suspension of sentence, cessation of proceedings, preclusion from investigation or waiver of prosecution can be obtained.<sup>500</sup> These benefits are conditional upon certification of surrender, which in turn requires that the demobilised not be under prosecution and not be convicted for crimes that “are ineligible for this class of benefits” according to the Constitution, the law, or international

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<sup>495</sup> Law No. 975 of July 22, 2005, O.G. No. 45.980, July 25, 2005 (Colombia) [hereinafter Law 975].

<sup>496</sup> Lisa J. Laplante and Kimberly Theidon, ‘*Transitional Justice in Times of Conflict: Colombia’s Ley de Justicia y Paz*’, 28 Mich. J. Int’l L. 49 (Fall 2006) pps. 51-52 [hereinafter Laplante & Theidon 2006].

<sup>497</sup> See the “Agreement of Santa Fe de Ralito” to contribute to peace in Colombia, of July 15, 2003, available <[www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm](http://www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm)> (last visited 24 July 2008).

<sup>498</sup> Decree No. 128 of Jan. 22, 2003, art. 13, O.G. No. 45.073, Jan. 24, 2003 (Colombia) [hereinafter Decree 128].

<sup>499</sup> Law 782 of Dec. 23, 2002, O.G. No. 45.043, Dec. 23, 2002 (Colombia).

<sup>500</sup> Article 13 of Decree 128 referenced in Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*. OEA/Ser.L/V/II.129 Doc. 6, October 2, 2007 para. 39 [hereinafter IACHR Report on the Justice and Peace Law 2007].

treaties signed and ratified by Colombia.<sup>501</sup> The Inter-American Commission on Human Rights has pinioned that this does not hinder the investigation of crimes against humanity or other grave violations, as the procedural benefits are only applicable to the crime of conspiracy, based on the demobilised person's membership in an illegal armed group.<sup>502</sup>

The amnesty successfully facilitated the demobilisation process, leading to the surrender of weapons by 31,671 members of 34 units of the AUC and other illegal armed outlaw groups.<sup>503</sup> However, in light of the extreme violence perpetrated by the paramilitary groups, the granting of amnesty generated a great deal of criticism on the Colombian government, both from domestic and international circles.<sup>504</sup>

Following the completion of this stage, the government then turned to the process of establishing the responsibilities of demobilised persons involved in the commission of crimes and securing reparations for victims. Law 975 was passed in June 2005, which requires that responsibility for crimes committed by demobilized personnel must be established and reparations for victims arranged.<sup>505</sup> The law placed an obligation on the State “to undertake an effective criminal investigation that leads to the identification, capture and punishment of persons responsible for crimes committed by the members of illegal armed groups”, and a duty of the judicial organs and the Procurator-General's Office to adopt measures to organize, systematize and to preserve archives, as well as to guarantee public access to them.<sup>506</sup> In return for having laid down their arms, demobilised personnel who have cooperated with investigations are eligible for procedural benefits, including reduced prison sentences, if found

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<sup>501</sup> Article 21 of Decree 128 referenced in IACHR Report on the Justice and Peace Law 2007, *supra* note 500, para. 39. *See further* Laplante & Theidon 2006, *supra* note 496, for an excellent overview of the demobilisation efforts.

<sup>502</sup> IACHR Report on the Justice and Peace Law 2007, *supra* note 500, para. 41.

<sup>503</sup> *Ibid.*, para. 2 fn. 4.

<sup>504</sup> M. S. Ellis, ‘Combating Impunity and Enforcing Accountability as Way to Promote Peace and Stability – The Role of International War Crimes Tribunals’, 2 J. Nat'l Security L. & Pol'y 111 (2006), pps. 129-133 [hereinafter Ellis 2006]. Laplante & Theidon 2006, *supra* note 406, pps. 62-76.

<sup>505</sup> IACHR Report on the Justice and Peace Law 2007, *supra* note 500, p. 1.

<sup>506</sup> Office of the United Nations High Commissioner for Human Rights, *Promotion and Protection of Human Rights: Study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*, UN. Doc. E/CN.4/2006/93, 7 February 2006, para. 38.



guilty.<sup>507</sup> Victims have the right to be present, either personally or through their attorney, for the taking of dispositions, indictment and other proceedings conducted under Law 975 and that pertain to the events that caused the damage.<sup>508</sup> The fundamental purpose behind this law was the establishment of peace in the country and to facilitate individual or collective reincorporation into civilian life of the members of illegal armed groups, guaranteeing the victims' rights to truth, justice and reparation.<sup>509</sup>

The Constitutional Court of Colombia and the Inter-American Commission on Human Rights have both questioned the provisions and implementation of Law 975, the Court observing that:

"the State has the duty to impose and enforce effective sanctions on persons who violate criminal law, and this imperative becomes all the more important in cases of grave criminality. Effective sanctions are those that do not cover up phenomena of impunity, in the sense that they constitute just and adequate State reactions to the crimes perpetrated, taking into account the specific objectives of criminal policy that the law entails."<sup>510</sup>

The Court held that demobilised personnel guilty of crimes committed during armed conflict and who apply for the law's procedural benefits must cooperate with justice so that the victims' rights to truth, justice and reparation can be realised without threat that the crimes will be repeated. The Court ruled that paramilitary commanders and others who have applied for reduced sentences under Law 975 are legally required to confess and turn over illegal assets.<sup>511</sup> Confessions have proved to be a slow process, partly due to a lack of sufficient prosecutors and investigators assigned to the unit of the Attorney General's office charged with interrogating the commanders.

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<sup>507</sup> IACHR Annual Report 2007, *supra* note 25, C.IV, para. 16.

<sup>508</sup> Ministry of the Interior and Justice, Decree Number 315 of 7 February 2007 "Regulating victims' participation in the investigation stage of Justice and Peace Proceedings under Law 975 (2005)" article 1.

<sup>509</sup> C-370/06 (D-6032), 13 July 2007, Constitutional Court Judgement, paras. 6.2.3.3.4.5 – 6.2.3.3.4.6 [hereinafter C-370/06 2007].

<sup>510</sup> *Ibid*, paras. 6.2.3.3.4.1 to 6.2.3.3.4.6.

<sup>511</sup> UNCHR Report 2007, *supra* note 268, p. 9 para. 28. See Laplante & Theidon 2006, *supra* note 496, pps. 80-106 for a comprehensive overview of the provisions of Law 975 and Constitutional Court cases.

The Inter-American Commission noted that the establishment of the Victim and Witness Protection Program in 2007 was an important step by the State towards compliance with its obligation to protect the physical integrity of victims of the armed conflict and safeguard their involvement in the quest for the truth, justice and reparations.<sup>512</sup> The Inter-American Commission noted that a lack of systematic mechanisms to determine criminal responsibility during collective demobilisation was having negative repercussions on Law 975, contributing to impunity for non-confessed crimes or those that are not judicially investigated.<sup>513</sup> An estimated 90 per cent of demobilised persons provided no significant information on illegal acts committed by the paramilitary units to which they belonged, information which is crucial for the enforcement of Law 975 and verifying that armed structures have been dismantled.<sup>514</sup> The process of demobilisation has been criticised for the high percentage of demobilised persons not participating directly in hostilities,<sup>515</sup> calling into question the paramilitaries' commitment to the process. While over 30,000 individuals may have gone through demobilization ceremonies, some may not have been paramilitaries at all, but persons who played the role to access government stipends under the social benefits provisions of Law 975.<sup>516</sup> Of particular concern are the mid-level paramilitary cadres who did not demobilise, or did only to rearm and form new illegal groups.<sup>517</sup> This suggests that a more structured approach is needed to ending paramilitarism.

The problems surrounding the implementation of the law are numerous. Article 10 inadequately defines the eligibility requirements for judicial benefits available to demobilised people.<sup>518</sup> Further, the Commission has highlighted the inadequacies of the law in addressing

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<sup>512</sup> IACHR Annual Report 2007, *supra* note 25, C.IV, para. 12. *See further* Decree 3570 (2007) (Colombia).

<sup>513</sup> IACHR Report on the Justice and Peace Law 2007, *supra* note 500, p. 27 para. 109(2).

<sup>514</sup> IACHR Annual Report 2007, *supra* note 25, C.IV paras. 19 and 20.

<sup>515</sup> UNCHR Report 2007, *supra* note 268, p. 9 para. 29.

<sup>516</sup> *Ibid.* *See also* IACHR Annual Report 2007, *supra* note 25, para. 36.

<sup>517</sup> *Ibid.*

<sup>518</sup> IACHR Report on the Justice and Peace Law 2007, *supra* note 500, p. 27 para. 109(3).

victim's right to reparations.<sup>519</sup> Although the criminal justice system is the only means by which victims may get financial damages, many are either unable to access the court or else do not participate because their security cannot be assured.<sup>520</sup> Also, while the number of demobilised recipients of legal and economic benefits increasingly exceeds the estimated number of AUC members, illegal armed groups continue to persist in the same areas of the country.<sup>521</sup>

Finally, Law 975 does not address the possible responsibility of the government of Colombia and its public servants in relation to crimes committed by armed opposition groups. The Supreme Court of Colombia has made a number of investigations uncovering links between paramilitaries and high-ranking national political figures.<sup>522</sup> However, the progress of this has been threatened to be undermined on several occasions.<sup>523</sup> Furthermore, Law 975 prohibits extradition of members of illegal armed groups accused of “political” offenses such as rebellion and sedition, which includes paramilitary activity, eliminating the threat of extradition.<sup>524</sup>

It is unclear whether the framework established by the demobilisation process and Law 975 will positively impact on the prevention of violations of humanitarian law or hinder the achievement of a negotiated peace, particularly in light of the accusations of extreme cruelty committed by the paramilitaries. The Inter-American Commission highlighted for lasting peace to ensure, crimes must be investigated<sup>525</sup> and reparations made for the consequences of the violence using mechanisms that can establish a truthful account of events, administer justice and compensate the victims of the conflict.<sup>526</sup>

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<sup>519</sup> IACHR Annual Report 2007, *supra* note 25, para. 80.

<sup>520</sup> *Ibid.*, para. 34.

<sup>521</sup> IACHR Report on the Justice and Peace Law 2007, *supra* note 500, p. 27 para. 109(4)

<sup>522</sup> HRW World Report: Colombia 2007, *supra* note 16.

<sup>523</sup> *Ibid.*

<sup>524</sup> Law 975, *supra* note 495, art. 71. Laplante & Theidon 2006, *supra* note 496, p.63 fn. 67.

<sup>525</sup> *See further Case of the Mapiripán Massacre v. Colombia*, 2005 IACtHR, H.R. (ser. C) No. 134, P301 (Sept. 15, 2005) p. 304.

<sup>526</sup> IACHR Annual Report 2007, *supra* note 25, para. 78. In IACHR, Annual Report of the IACHR 2003, ch. IV, p.19, OEA/Ser.L/V/II.118, Doc. 5 rev. 2 (Dec. 29, 2003), the Inter-American Commission referred to the Inter-American Court's “clear and firm

The government of Colombia has made commitments to fight impunity, by strengthening the judiciary and reforming of the military justice system,<sup>527</sup> evidenced by the Ministry of Defence's recent emphasis on the obligation of law enforcement authorities to respect the rights of protected persons.<sup>528</sup> Concrete results have been achieved in the realisation of the framework established by laws to prosecute the crimes committed by the AUC. However, certain key procedural measures must be further defined, to all ensure transparency and lawfulness of the proceedings including strengthening of judicial institutions.<sup>529</sup> A greater commitment to resources is required from the Colombian government.<sup>530</sup> The complexities involved in implementing these laws highlights the tension between the State's political need to promote disarmament and its legal obligations under human rights and humanitarian law.<sup>531</sup> However, the low number of prosecutions and flawed procedural mechanisms under Law 975 exasperates the longstanding impunity in Colombian society.<sup>532</sup>

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jurisprudence" denouncing "enactment of laws that limit the scope of judicial proceedings intended to clarify and redress basic human rights violations committed during a domestic armed conflict . . . ." See M. Kourabas, 'A Vienna Convention Interpretation of the "Interests of Justice" Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements and the Situation in Northern Uganda: A "Great Qualitative Step Forward" or a Normative Retreat?', 14 U.C. Davis J. Int'l L. & Pol'y 59 (Fall 2007), pps. 85-90 for discussion of cases concerning amnesties before the Inter-American Court of Human Rights [hereinafter Kourabas 2007].

<sup>527</sup> UNCHR Report 2007, *supra* note 268, p. 8 para. 21. See also CONPES (Nation Council for Economic and Social Policy) document No. 3411, March 2006 referenced in UNCHR Report 2007, *supra* note 268, p. 8 fn. 4 and para. 21.

<sup>528</sup> Statement by United Nations High Commissioner for Human Rights, Bogotá D.C. 9 September 2007, p. 5 available at

<[www.hchr.org.co/publico/pronunciamientos/ponencias/ponencias.php3?cod=100&cast=2](http://www.hchr.org.co/publico/pronunciamientos/ponencias/ponencias.php3?cod=100&cast=2)> (last visited 24 July 2008).

<sup>529</sup> IACHR Annual Report 2007, *supra* note 25, para. 7.

<sup>530</sup> UNCHR Report 2007, *supra* note 268, p. 9 para. 28.

<sup>531</sup> Laplante & Theidon 2006, *supra* note 496, p. 79.

<sup>532</sup> Ellis 2006, *supra* note 504, pps. 129-133.

## 4.4 Uganda's peace agreement and the ICC arrest warrants

### 4.4.1 The ICC as a means of enforcing international humanitarian law

Enforcement measures against individuals alleged to have violated humanitarian law primarily entail their trial following hostilities.<sup>533</sup> Unlike the Geneva Conventions of 1949 and AP I, no list of grave breaches is included in AP II.<sup>534</sup> The scope of international criminal responsibility has predominately formed with the context of international armed conflict<sup>535</sup> and has changed rapidly as international and hybrid criminal tribunals shifted worldwide focus to non-international armed conflicts.<sup>536</sup>

Since the Nuremberg Tribunal, the definitions of international crimes have expanded under customary international law to include actions of non-State actors and have more clearly defined individual criminal responsibility under international law.<sup>537</sup> As noted, under the Rome Statute 1998 article 8(2)(c), serious violations of Common Article 3 committed during armed conflicts not of an international character fall within the jurisdiction of the Court. Likewise, non-State armed actors may be found guilty of crimes against humanity if such acts were committed as part of an organisation policy and the crime of genocide no longer requires a nexus with the State. As such, the criminal actions of non-State actors fall within the ambit of international prosecution more clearly than ever before.<sup>538</sup> At present, all

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<sup>533</sup> Moir 2002, *supra* note 40, p. 233.

<sup>534</sup> *Supra* notes 3 and 5.

<sup>535</sup> E.g. *A-G of the Government of Israel v. Eichmann*, Nuremberg Trials, 36 ILR 5, and *Fédération Nationale des Déportés et Internés Résistants et patriots and Others v. Barbie*, 1985, Court of Cassation 78 ILR 124.

<sup>536</sup> See also the Special War Crimes Panels for East Timor and the Extraordinary Chambers in Cambodia.

<sup>537</sup> *Prosecutor v. Kunarac et al*, 12 June 2002, ICTY, Case No. IT-96-23/1-A Judgement, para. 98, fn. 114.

<sup>538</sup> H. Gropengiesser and J. Meisner, 'Amnesties and the Rome Statute of the International Criminal Court', Int. Crim. L. R. 5, 267-300 (2005), p. 275. Note jurisdictional limitations included in Rome Statute 1998, *supra* note articles 11 – 13.

ICC arrest warrants to date have been issued solely for crimes committed in internal armed conflicts.

The contemporary conception of international criminal law is often predicated on a preventive or deterrent function. As the Trial Chamber of the ICTY noted, the Security Council hoped that prosecutions under the ICTY would encourage parties to a conflict to “recommit themselves to observing and adhering to” their obligations under international humanitarian law.<sup>539</sup> However, the actual deterrent effect of international criminal prosecutions has been questioned,<sup>540</sup> particularly in light of the massacre at Srebrenica that took place just days after an ICTY Trial Chamber confirmed the indictments against Radovan Karadžić and Ratko Mladić.<sup>541</sup> Additionally, the ICC Prosecutor’s decision to issue an arrest warrant for Sudanese President Omar Hassan al-Bashir has been hotly debated recently because of its potential to escalate the conflict and endanger peacekeepers in the region.<sup>542</sup> The ICC’s lack of enforcement power weakens its deterrent effect.<sup>543</sup> However, it is impossible to measure how many potential perpetrators may have been deterred from not committing a crime.<sup>544</sup> Questions of the ICC’s effectiveness as a deterrent do not detract from the legal obligations of States to hold perpetrators of certain international crimes accountable and provide justice for victims.

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<sup>539</sup> *Prosecutor v. Momir Nikolić*, 2 December 2003, ICTY, Case No. IT-02-60/1-S, Sentencing Judgement, para. 59. See also Report of the High-Level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, (2004) UN Doc. A/59/565 at 6-7 par. 90 [hereinafter *A More Secure World* 2004] and Report of the Secretary-General, *The Rule of Law and Transitional Justice in Conflict Postconflict Societies*, (2004) UN Doc. S/2004/616 para. 39 [hereinafter Report on the Rule of Law 2004].

<sup>540</sup> See, for example, Sriram 2003, *supra* note 438, pps. 16 – 17.

<sup>541</sup> W.A.Schabas, *Preventing Genocide and Mass Killing: The Challenge for the United Nations* (Minority Rights Group International, London, 2006), p. 23 available at [www.minorityrights.org/?lid=1070](http://www.minorityrights.org/?lid=1070) [hereinafter Schabas *Preventing Genocide* 2006]

<sup>542</sup> E. Thomson, ICC prosecutor charges Sudan’s Bashir, Press Release, *Reuters (UK)* (online addition), 14 July 2008 available at <[www.uk.reuters.com/article/worldNews/idUKL1417202620080714?pageNumber=1&virtualBrandChannel=0](http://www.uk.reuters.com/article/worldNews/idUKL1417202620080714?pageNumber=1&virtualBrandChannel=0)> (last visited 24 July 2008); International Criminal Court: Possible Arrest Warrants Against Sudanese Officials, Amnesty International, Press Release, 11 July 2008 available at <[www.amnesty.org/en/for-media/press-releases/international-criminal-court-possible-arrest-warrants-against-sudanese-o](http://www.amnesty.org/en/for-media/press-releases/international-criminal-court-possible-arrest-warrants-against-sudanese-o)> (last visited 24 July 2008); ICC Seeks Bashir War Crimes Arrest, *Financial Times* (online addition), 14 July 2008 available at <[www.ft.com/cms/s/0/b220d482-5196-11dd-a97c-000077b07658.html?ncllick\\_check=1](http://www.ft.com/cms/s/0/b220d482-5196-11dd-a97c-000077b07658.html?ncllick_check=1)> (last visited 24 July 2008).

<sup>543</sup> Lanz 2007, *supra* note 449, p. 14.

<sup>544</sup> Schabas *Preventing Genocide* 2006, *supra* note 541, p. 23

The request for an arrest warrant on the Sudanese president marks a move towards holding those acting under the authority of the State responsible. The investigations by the ICC into the situations in Uganda and the Democratic Republic of Congo are both only into the actions of non-State actors.<sup>545</sup> When the ICC issued the arrest warrant against the members of the LRA, a number of human rights organisations accused the Prosecutor of having neglected atrocities committed by the country's armed forces.<sup>546</sup> Their concern arose from the fact that non-State actors are traditionally subjected to the full force of domestic law if and when government authorities catch them, unlike State actors whose typical impunity in such situations was an impetus for establishing the ICC. Although controversial, the situation in Darfur is a step forward for the ICC in dealing with impunity. To fulfil this purpose, the ICC's attention must necessarily be directed on all parties to a conflict.

Prosecuting crimes on an international level helps to ensure the realisation of the individual victim's right to truth, as well as society's need to establish a truthful record of accounts.<sup>547</sup> A truthful record of account also fosters possibilities of reconciliation between parties in post-conflict societies, where myths on both sides might otherwise hinder the process. Fair criminal trials both establish a credible record and discharge the moral responsibility that authorities owe to the victims and families of violence, thereby achieving justice and combating impunity.<sup>548</sup> Many see meaningful prosecutions of those responsible for the most serious international crimes in accordance with international standards as a crucial to achieving durable

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<sup>545</sup> *Ibid*, p. 24.

<sup>546</sup> See K. P. Apuuli, 'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda', *Journal of International Criminal Justice* 4 (2006), 179-187, at 185-186 and Schabas *Preventing Genocide*, *supra* note , p. 24.

<sup>547</sup> See Updated Principles 2005, *supra* note 480, principle 3. The Inter-American Commission on Human Rights has observed that the "right to truth", as a collective right ensuring access to information and an individual right affording a form of compensation, cannot be considered as separate from the "right to justice", *Ignacio Ellacuria et al case*, IACHR, Report 136/99 of 22 December 1999, para. 224.

<sup>548</sup> See Updated Principles 2005, *supra* not 480, preamble, principle 19. See also Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law, adopted 16 December 2005, GA Res. 60/147, UN Doc. A/RES/60/147, preamble and parts VII and VIII.

peace.<sup>549</sup> Such prosecutions consolidate respect for the rule of law by solidifying society's confidence in judicial institutions, thus contributing to stability.<sup>550</sup>

Others argue that at least for the short term, achieving peace and ending conflict is incompatible with achieving justice because the pursuit of international justice in the context of an ongoing conflict generally compromises efforts for peace.<sup>551</sup> Justice in the midst of conflict inevitably has implications for the security situation.<sup>552</sup> The recent Ugandan peace negotiations have highlighted this classic argument, as the issuance of the ICC arrest warrants has impeded the final conclusion of a peace agreement. In February 2008, the government of Uganda and the LRA signed an annex<sup>553</sup> to a June 2007 agreement that articulated principles on matters of accountability and reconciliation<sup>554</sup> by establishing a domestic system of accountability that includes trials for the most serious crimes, a truth commission, reparations, and traditional justice practices.<sup>555</sup> However, the LRA have refused to sign the final peace agreement until the ICC arrest warrants against the leaders are removed.<sup>556</sup> Supporters of the Rome Statute

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<sup>549</sup> See Report on the Rule of Law 2004, *supra* note 539, para. 2.

<sup>550</sup> Human Rights Watch Memorandum, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA*, May 2007 (New York: Human Rights Watch), available at <[www.hrw.org/backgrounder/ij/icc0507](http://www.hrw.org/backgrounder/ij/icc0507)> (last visited 24 July 2008) [hereinafter HRW Benchmarks Memorandum 2007]. Salmón 2006, *supra* note 461, p. 331 notes that in complying with the rules of international humanitarian law, obligates perpetrators of violations to be punished.

<sup>551</sup> Lanz 2007, *supra* note 449, p. 12.

<sup>552</sup> *Ibid.*, p. 26. Note debates surrounding the ICC Prosecutor's request for an arrest warrant for the current President of Sudan and the security implications for UN peacekeeping forces, 'ICC Prosecutor seeks charges against Sudanese President for Darfur crimes', *UN News Service* (online edition), 14 July 2008 available at <http://www.un.org/apps/news/story.asp?NewsID=27361&Cr=Darfur&Cr1>.

<sup>553</sup> Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (Annex to June 29 Agreement), Juba, Sudan, June 29 2007, February 19 2008 paras. 7, 10-14 available at <[www.monitor.co.ug/artman/publish/news/Details\\_of\\_Government\\_LRA\\_agreement.shtml](http://www.monitor.co.ug/artman/publish/news/Details_of_Government_LRA_agreement.shtml)> (last visited 24 July 2008) [hereinafter 2008 Annex].

<sup>554</sup> Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, June 29, 2007 [hereinafter June 29 Agreement].

<sup>555</sup> Human Rights Watch, 'Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation: Human Rights Watch's Fourth Memorandum on Justice Issues and the Juba Talks', Human Rights Watch, New York, February 2008, p. 1 [hereinafter HRW Analysis of the Annex 2008].

<sup>556</sup> Security Council Report, 'Update Report, Uganda/LRA', No. 6, 16 June 2008 p. 2, available at <[www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-](http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-)



believed it would ensure that international law would restrain the actions of the few to save millions and ultimately help to restore international peace.<sup>557</sup> However, the issuance of arrest warrants against the LRA leaders has resulted in accusations that the ICC is acting as an impediment to peace<sup>558</sup> by complicating the conclusion of the peace agreement.<sup>559</sup>

The prosecution of crimes during an ongoing conflict can provide essential international attention on crimes committed, as was the case with the ICTY. Drawing international attention to and the public denunciation of States providing support for illegal armed opposition groups is an additional means of encouraging enforcement of international humanitarian obligations. This was critical in the situation in Uganda, which following the referral to the ICC pressured Sudan to stop harbouring the LRA which, in turn, weakened the rebel group.<sup>560</sup>

Like the ICC, political and financial support, particularly in the enforcement of arrest warrants, were key to the effectiveness of the ICTY's operations.<sup>561</sup> This effectiveness was part of a larger conflict management strategy. The fact that the LRA have been able to wage war for over twenty years undefeated indicates that a military strategy alone is insufficient to bring about peace.<sup>562</sup> The effectiveness of the ICC referrals as part of a larger strategy is evident in the Ugandan context, where the government has stepped up military operations following the LRA referrals.<sup>563</sup> The complexities in such strategies are also evident in the Colombian context, where the government authorities have engaged in intense military operations in connection with FARC-EP activities whilst simultaneously

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CF6E4FF96FF9%7D/Update%20Report%2016%20June%202008%20Uganda%20LRA.pdf (last visited 24 July 2004) [hereinafter June Security Council Update 2008].

<sup>557</sup> See also SC Res. 808 (1993), UN Doc. S/RES/808, adopted in 3175<sup>th</sup> meeting, 22 February 1993.

<sup>558</sup> M. Cherif Bassiouni, 'The ICC – *Quo Vadis*?' *Journal of International Criminal Justice* 4, 421-427, (2006) at 424.

<sup>559</sup> See, for example, quotes of Bishop Benjamin Ojwang in K. Hanlon, 'Peace or Justice: Now that Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?' *Spring 2007*, 14 *Tulsa J. Comp. & Int'l L.* 295, at 327 [hereinafter Hanlon 2007], p. 331.

<sup>560</sup> Akhavan 2005, *supra* note 455, p. 416. See also *Tadić* Appeal on Jurisdiction 1995, *supra* note 44, paras. 113 and 115.

<sup>561</sup> Lanz 2007, *supra* note 449, pps. 18-19.

<sup>562</sup> *Ibid*, p. 21.

<sup>563</sup> E.g. Operation Iron First II. See Lanz 2007, *supra* note 449, p. 20.

implementing demobilisation and Law 975 and negotiating with regional bodies for the attainment of peace.

International humanitarian law developed around the notion that the legal norms provide actual restraints to guide the conduct of individuals and are not mere theoretical matters between States.<sup>564</sup> Prosecution through the ICC is a chance to demonstrate that the application and enforcement of IHL and that the protection of civilians during armed conflict can be achieved both consistently and effectively.<sup>565</sup> Although the ICC is a step away from the state-centric approach of enforcing humanitarian obligations,<sup>566</sup> in emphasising the primary jurisdiction of domestic courts, the principle of complementarity<sup>567</sup> reinforces the norm that sovereign States are obligated to enforce international humanitarian law.<sup>568</sup> The interrelated customary and conventional international law within which the ICC operates provides a comprehensive basis for domestic enforcement of the crimes covered in the jurisdiction of the Court.

#### **4.4.2 Possible options within the framework of the Rome Statute**

In light of the apparent stalemate in the debate regarding the benefits of the ICC warrants versus national prosecution by the Ugandan authorities, it is necessary to evaluate the possible legal and procedural options within the framework of the ICC. This section outlines complementarity and admissibility issues and evaluates specific provisions of the Rome Statute 1998 that might be utilised by the Ugandan government to defend its right to prosecute perpetrators first.

The principle of complementarity grants States with primary jurisdiction for the prosecution of the crimes included in the Rome Statute

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<sup>564</sup> M. A. Newton, 'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court', 167 *Mil. L. Rev.* 20, (March 2001) p. 36 [hereinafter Newton 2001].

<sup>565</sup> Moir 2002, *supra* note 40, p. 273.

<sup>566</sup> Sassòli 2003, *supra* note 10, p. 2.

<sup>567</sup> Rome Statute 1998, *supra* note 7, article 1.

<sup>568</sup> Newton 2001, *supra* note 564, p. 32; Sririam 2003, *supra* note 438, pps. 1 – 2.

1998.<sup>569</sup> It can be seen as a balance between the sovereign right of a State to prosecute its own nationals without external interference and the ICC's power over States that refuse to prosecute individuals who commit international crimes.<sup>570</sup> The options for deferral and admissibility requirements ensure that this balance must be struck before prosecutions before the ICC may take place, and Uganda's strongest argument is that the ICC's issuance of warrants is premature and therefore a violation of the principle of complementarity.

#### **4.4.2.1 Article 16: Security Council deferral**

Having already referred the situation to the ICC, Uganda cannot unilaterally decide to defer the ICC's investigation; it may request the Security Council to defer the ICC investigation and prosecution for one year pursuant to article 16 of the Rome Statute. Under an additional agreement between the LRA and the Ugandan government concluded on 29 February 2008, the Ugandan government agreed to request a deferral from the Security Council after it initiated national trials. The LRA's current demand that the ICC warrants be dropped entirely before it will sign the final agreement is not consistent with the intentions expressed in the 29 February 2008 agreement,<sup>571</sup> calling into question the commitment of the LRA to fulfil its obligations regarding justice and accountability. In May 2008, the Ugandan

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<sup>569</sup> Rome Statute 1998, *supra* note 7, preamble para. 10, articles 1 and 17. For discussion on the principle of complementarity *see further* S. A. Williams, 'Issues on Admissibility', in O. Triffterer (ed.), *Commentary on the Rome Statute: Observers' Notes, Article by Article*, Baden-Baden: Nomos (1999), 390; W. A. Schabas, (ed). *Introduction to the International Criminal Court*, Cambridge (Cambridge University Press, Cambridge, 2004), p.85 [hereinafter Schabas *Introduction to the ICC* 2004]; J. T. Holmes, 'The Principle of Complementarity', in R. S. Lee (ed), *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results*, Kluwer: The Hague (1999) 41.

<sup>570</sup> Newton 2001, *supra* note 564, p. 28. A Preparatory Committee Report prior to the Rome Conference noted that "taking into account that under international law, exercise of police and penal law is a prerogative of States, the jurisdiction of the Court should be viewed only as an exception to such State prerogative", I Report of the Preparatory Committee on the Establishment of the International Criminal Court, UN GAOR, 51<sup>st</sup> Sess., Supp. No. 22, para. 155, UN Doc. A/51/22 (1996).

<sup>571</sup> Security Council Report, Update Report, Uganda/LRA, No. 1, 11 April 2008 available at [www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4018489/CF6E4FF96FF9%7D/Update%20Report%2016%20June%202008%20Uganda%20LRA.pdf](http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4018489/CF6E4FF96FF9%7D/Update%20Report%2016%20June%202008%20Uganda%20LRA.pdf) (last visited 24 [hereinafter April Security Council Update 2008]).

government took steps to set up a special war crimes division of the High Court envisaged by the 2008 Annex. Uganda argues that this is an act of good faith intended to encourage recommencement of constructive engagement and an effort to build confidence among LRA forces.<sup>572</sup> Specifically, the war crimes court has the mandate to try the leaders of the LRA.<sup>573</sup> Such efforts towards justice and peace would validate the legitimacy of a request for deferral by Uganda in the future.

Were the Security Council to defer Uganda's situation by a resolution under C.VII of the UN Charter, this would be the first time article 16 would be utilised for a State referred case.<sup>574</sup> A number of factors, such as the short and long-term security requirements and prospects for sustainable peace, will influence the value of this precedent and any ultimate decision regarding whether a deferral is in the interests of justice. In addition, the fact that the LRA leaders indicted by the ICC are still at liberty, the nature and gravity of the crimes accused, and the potential for renewed attacks by the LRA following deferral will undoubtedly be taken into consideration. The potential for such a deferral to undermine other investigations by the ICC is also a concern.<sup>575</sup> C.VII mechanisms are only available in response to a threat to the peace, breach of the peace or act of aggression.<sup>576</sup> No progress has been made towards satisfying the Security Council previous demands that the LRA to release all women, children and other non-combatants, and that Uganda bring to justice those responsible for serious violations of human rights and international humanitarian law.<sup>577</sup> No progress seems to have been achieved on either of these demands to date. However, the peace agreement does call for war crimes trials, which should factor into whether

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<sup>572</sup> June Security Council Update 2008, *supra* note 556, p. 2.

<sup>573</sup> Uganda sets up war crimes court, *BBC News* (international online addition) 26 May 2008, <<http://news.bbc.co.uk/2/hi/africa/7420461.stm>> (last visited 24 July 2008).

<sup>574</sup> *See, however*, SC Res. 1422 (2002), UN Doc. S/RES/1422, adopted in 4572<sup>nd</sup> meeting, 12 July 2002, and SC Res. 1487 (2003), UN Doc. S/RES/1487, adopted in 4772<sup>nd</sup> meeting, 12 June 2003.

<sup>575</sup> Hanlon 2007, *supra* note 559, p. 321.

<sup>576</sup> UN Charter, *supra* note 140, article 39 UNC. *See also* article 27(3).

<sup>577</sup> *See* Statement by the President of the Security Council, S/PRST/2006/45, 5566<sup>th</sup> meeting, 16 November 2006 and Statement by the President of the Security Council, S/PRST/2007, 5644<sup>th</sup> meeting, 22 March 2007. *See also* Security Council Press Statement on the Situation in Northern Uganda, SC/9167 (13 November 2007).

the requirements of a deferral resolution are met.<sup>578</sup> The requirement for renewal of the deferment each year under article 16 would be a strong incentive for the LRA not to violate the agreement.<sup>579</sup>

Effectively, action by the Security Council under article 16 would legitimise political interference in the ICC's judicial activities. The inclusion of article 16 in the Rome Statute was very controversial to begin with, considering its potential impact on judicial independence, however, it may also be seen as an attempt by the drafters to balance the necessities of legal certainty in the ICC procedures with the political realities that may make such procedures impossible to carry out. At present, any international interference by the Security Council has been postponed to avoid unintentionally disturbing the tense closing stages of the peace agreement between the LRA and Uganda. However, the situation in Uganda is still very much on the Security Council's agenda<sup>580</sup> and future action may yet be taken.

#### **4.4.2.2 Article 19(2)(b): Admissibility**

Additionally, Uganda could contest admissibility under article 19(2)(b) of the Rome Statute 1998, on the grounds that it is currently investigating or prosecuting the case those people for whom warrants have been issued.<sup>581</sup>

Under the principle of complementarity, a State only loses its primary jurisdiction when the Court makes a determination of admissibility that the State manifests unwillingness or inability to seek out justice.<sup>582</sup>

Admissibility is a case specific assessment that turns on Uganda's ability

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<sup>578</sup> April Security Council Update 2008, *supra* note 571.

<sup>579</sup> Lanz 2007, *supra* note 449, p. 24.

<sup>580</sup> Note SC Res. 1812 (2008), UN Doc. S/RES/1812, adopted in 5882<sup>nd</sup> meeting, 30 April 2008, requesting report on the LRA from the Secretariat.

<sup>581</sup> *See further* Rome Statute 1998, *supra* note 7, article 20 which outlines the substantive requirements for sustaining a claim of prior prosecution, consequently removing that case from ICC jurisdiction.

<sup>582</sup> *Ibid*, articles 17 and 19(1). Note article 18 preliminary rulings of admissibility whereby the Prosecutor shall defer to State's investigation of a situation following notification that the Prosecutor believes there is a reasonable basis to commence investigation or does so further to articles 13(c) and 15. The Prosecutor may apply to the Pre-Trial Chamber to authorise his investigation. As investigation of the situation in Uganda began in 2004, this provision will not be considered further.

and willingness to hold those five included in the ICC warrants accountable for their actions.<sup>583</sup>

Under article 14 of the 2008 Annex, particular focus is to be given to those who have planned or carried out widespread, systematic, or serious attacks directed against civilians or who are alleged to have committed grave breaches of the Geneva Conventions.<sup>584</sup> The jurisdictional emphasis overlaps with that of the ICC, which was established to prosecute the perpetrators of “most serious crimes of concern to the international community.”<sup>585</sup> In order to narrow the scope of this field, the Prosecutor of the ICC has adopted a policy of pursuing “those who bear the greatest responsibility” for crimes under the Statute.<sup>586</sup> In assessing the gravity threshold, the Pre-Trial Chamber identified a number of factors that need to be present: the conduct must be a case systematic or large-scale, giving due consideration to the social alarm caused to the international community by the relevant type of conduct; the position of the relevant person in the State entity, organisation or armed group to which s/he belongs; and whether the person falls within the category of most senior leaders suspected of being most responsible, considering the role they played through acts or omissions when State entities, organisations or armed groups to which he belongs commit systematic or large-scale crimes within the jurisdiction of the Court and the role played by such State entities, organisations or armed groups in

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<sup>583</sup> Third Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593 (2005), 14 June 2006, p. 6 available at <[www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf)> (last visited 24 July 2008) [hereinafter 3rd Report of the Prosecutor 2006]. See also *Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on Prosecutor’s Application for a warrant of arrest, Article 58, 24 February 2006, para. 29 [hereinafter *Thomas Lubanga Dyilo* Decision on warrant 2006]. Note that two LRA leaders, Vincent Otti and Raska Lukwiya are confirmed dead, and there are speculations as to whether Okot Odhiambo was killed in clashes during the week of 14 April 2008. See June Security Council Report 2008, *supra* note 556, pps. 1-2.

<sup>584</sup> 2008 Annex, *supra* note 553. Emphasis is also to be given on the investigation of patterns in the conflict and crimes against women and children under paras. 13(b)-(c).

<sup>585</sup> Rome Statute 1998, *supra* note 7, article 5.

<sup>586</sup> Office of the Prosecutor, ICC, ‘*Paper on some policy issues before the Office of the Prosecutor*’, p. 7 and Office of the Prosecutor, ICC, ‘*Criteria for Selection of Situations and Cases*’, draft policy paper June 2006, p. 13 referenced in Human Rights Watch, *A Summary of the Case Law of the International Criminal Court*, New York: Human Rights Watch, (March 2007) available at <[www.hrw.org/backgrounder/ij/icc0307/](http://www.hrw.org/backgrounder/ij/icc0307/)> (last visited 24 July 2008). Arguably, there is an element of presumption of guilt in assessing who bears “the greatest responsibility”.

the overall commission of crimes within the jurisdiction of the Court in the relevant situation.<sup>587</sup>

Provision is included for traditional justice mechanisms,<sup>588</sup> although no person is to be compelled to undergo any traditional ritual under article 22.<sup>589</sup> It is recognised that effective prosecution of individuals who commit the most serious crimes is ensured when measures at the national level are taken and that States are duty bound to exercise criminal jurisdiction over those responsible for those crimes.<sup>590</sup> Indeed, the parties to the 2008 Annex made pains to emphasise such issues in the preamble to the agreement. It acknowledges the requirements of the Rome Statute, whilst highlighting the principle of complementarity and emphasises the “national consensus in Uganda” that national measures are adequate to try offences. It further holds that the parties believe that the agreement is consistent with national and international aspirations and standards, embodying the necessary principles by which the conflict can be resolve with justice and reconciliation. This emphasis is in line with the ensuring that the most serious crimes of international concern do not go unpunished. The comprehensive approach of the 2008 Annex, which includes justice mechanisms that vary from traditional to prosecution by the special division of the Ugandan High Court, suggests that the parties to the agreement were aware of the need to adhere to international standards in this respect.<sup>591</sup>

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<sup>587</sup> *Thomas Lubanga Dyilo* Decision on warrant 2006, *supra* note 583, para. 63.

<sup>588</sup> 2008 Annex, *supra* note 553, paras. 19-22. In addition, the Annex provides for a multidisciplinary unit to carry out investigations and prosecutions headed by Uganda’s director of public prosecutions (para. 11), a registry with authority to facilitate protection of witness and victims with special attention to women and children (para. 8), the right against self-incrimination by witnesses (para. 15), and staff with necessary expertise, among which there is gender balance (para. 25).

<sup>589</sup> Note Human Rights Watch Memorandum, *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA*, May 2007 (New York: Human Rights Watch), p. 6 available at <[www.hrw.org/background/ij/icc0507](http://www.hrw.org/background/ij/icc0507)> (last visited 24 July 2008) [hereinafter Human Rights Watch Benchmarks Memorandum 2007] stating the Ugandans with whom Human Rights Watch researchers met in March 2007 highlighted that traditional justice measures were not generally regarded as substitutes for prosecution even of ordinary criminal offenses in Uganda.

<sup>590</sup> Rome Statute 1998, *supra* note 7, preamble paras. 4 and 6.

<sup>591</sup> See further ICCPR, *supra* note 197, article 14; ECHR, *supra* note 197, article 6; and ACHR, *supra* note 17, article 8. See also *infra* ch. 3.3.1 discussion regarding minimum standards for fair trials under humanitarian law. Uganda ratified the ICCPR in 1995. See further fair trial guarantees included in the Constitution of the Republic of Uganda 1995,

Determining whether a State is unable or unwilling to prosecute criminals involves assessment of both procedural and substantive aspects, taking into consideration the practical realities as well as promises made on paper. Whether a state is “unable” to prosecute criminals turns on the functioning structure and factual ability of the domestic judicial system to carry out proceedings.<sup>592</sup> Assessing unwillingness takes into consideration whether the proceedings are being undertaken to shield the person from criminal responsibility or conducted in a way inconsistent with the intent to bring a person to justice, in line with the principles of independence and impartiality.<sup>593</sup> The Rules of Procedure permit a State invoking complementarity to provide information showing that its courts meet internationally recognised norms and standards for independent and impartial prosecution of similar conduct.<sup>594</sup> It should be noted that there is nothing precluding States from investigating and prosecuting persons for whom ICC warrants have been issued under article 17.

The ICC alone interprets and applies the complementarity provisions and standards of the Rome Statute, and it will take into consideration the 2008 Annex and any measures implemented by the Ugandan government.<sup>595</sup> To ensure that measures adhere to international standards of fair trial and procedure, any investigation or prosecutions undertaken by the government of Uganda would need to be credible, impartial and independent.<sup>596</sup> Investigations should be prompt and thorough.<sup>597</sup> No reference is made in the 2008 Annex to international fair trial standards.<sup>598</sup> The 29 June 2007 Agreement, which governs where the 2008 Annex is silent, does provide for “the right of the individual to a fair hearing and due process, as guaranteed by the Constitution” and “a fair, speedy and public hearing before an

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articles 24 and 28, available at [www.parliament.go.ug/index.php?option-com\\_wrapper&Itemid=78](http://www.parliament.go.ug/index.php?option=com_wrapper&Itemid=78) [hereinafter Constitution of Uganda].

<sup>592</sup> Rome Statute 1998, *supra* note 7, article 17(3).

<sup>593</sup> *Ibid.*, article 17(2)(a)-(c).

<sup>594</sup> Netwon 2001, *supra* note 564, p. 63.

<sup>595</sup> *Ibid.*, p. 64.

<sup>596</sup> See Updated Principles 2005, *supra* note 480, principle 19. See also Rome Statute 1998, *supra* note 7, article 17(2)(c).

<sup>597</sup> *Ibid.* See also Rome Statute 1998, *supra* note 7, article 17(2)(b).

<sup>598</sup> Note 2008 Annex, *supra* note 553, para. 15.



independent and impartial court or tribunal established by law.”<sup>599</sup> Uganda’s constitution details a range of international fair trial standards<sup>600</sup> and the judiciary has previously been praised for its good record of independence and handling of controversial cases.<sup>601</sup> However, issues of interference with the judiciary, accusations of torture by authorities and sub-standard detention facilities have been raised over recent years, highlighting the inconsistent decrement to international standards.<sup>602</sup> The existing inadequacies in the Ugandan justice system would require a commitment of resources to ensure that fair and credible trials take place. This would ultimately strengthen the rule of law, access justice, and the judicial process in ordinary criminal cases.<sup>603</sup>

It is not clear under the 2008 Annex if the mandate of the special division includes the full range of crimes constituting crimes against humanity. Reference is made to “widespread, systematic, or serious attacks on the civilian population”, but no further detail is given. Uganda has drafted legislation to implement the Rome Statute, but this has as yet not taken place.<sup>604</sup> Similarly, no further detail is given in the 29 June 2007 agreement beyond recognising the need to introduce conforming amendments to Uganda’s existing Amnesty Act. The 2008 Annex does not discuss the Amnesty Act or amendments<sup>605</sup> and neither war crimes nor crimes against humanity are crimes existing under Ugandan domestic law.<sup>606</sup>

In a decision relating to the application for a warrant of arrest by the Prosecutor in the Thomas Lubanga Dyilo Case, Pre-Trial Chamber 1 held that the lack of reference to the alleged criminal responsibility of the

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<sup>599</sup> June 29 Agreement, *supra* note 554, para. 3.3.

<sup>600</sup> See Constitution of Uganda, *supra* note 591, articles 24 and 28.

<sup>601</sup> Human Rights Watch Benchmarks Memorandum 2007, *supra* note 598, p. 7

<sup>602</sup> Human Rights Watch, World Report 2007, (Human Rights Watch, New York, January 2008) pps. 172-177 available at [www.hrw.org/englishwr2k8/docs/2008/01/31/colomb17754.htm](http://www.hrw.org/englishwr2k8/docs/2008/01/31/colomb17754.htm) (Uganda) (last visited 24 July 2008). See also Human Rights Watch, ‘*State of Pain: Torture in Uganda*’, Vol. 16, No. 4(A) (March 2004) available at [www.hrw.org/reports/2004/uganda0404](http://www.hrw.org/reports/2004/uganda0404) (last visited 24 July 2008).

<sup>603</sup> HRW Analysis of the Annex 2008, *supra* note 555, p. 2.

<sup>604</sup> Human Rights Watch Benchmarks Memorandum 2007, *supra* note 598, p. 5.

<sup>605</sup> 2008 Annex, *supra* note 553, para. 14.4

<sup>606</sup> HRW Analysis of the Annex 2008, *supra* note 555, p. 2.

accused for the crimes charged in the Prosecutor's application resulted in the Democratic Republic of Congo not being considered to be acting in relation to the specific case before the Court.<sup>607</sup> It was noted that questions of admissibility encompasses both the person and conduct that is the subject of the case before the Court.<sup>608</sup> As such, it can be concluded that reference to the criminal responsibility, such as command responsibility and individual criminal responsibility, are essential in claims of admissibility. Theories of criminal responsibility are not detailed in the 2008 Annex, nor is it specified whether trials may be conducted in absentia.<sup>609</sup> Any national charge brought by Uganda would need to fully reflect the charges by the ICC in order to satisfy the Court that Uganda was both able and willing to prosecute the accused. Furthermore, serious consideration would need to be given to the penalty in light of the seriousness of the charges brought by the ICC, so as to avoid any suggestion of an intent other than bringing a person to justice.<sup>610</sup> The 2008 Annex does not make reference to penalties in the event of conviction. The 29 June 2007 Agreement does include some provisions on penalties, but these are expressed in vague terms.<sup>611</sup> Under article 77(1) of the Rome Statute, the ICC's primary penalties include either imprisonment for a specified number of years up to thirty years or life imprisonment when justified by the extreme gravity of the crime and

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<sup>607</sup> *Thomas Lubanga Dyilo* Decision on warrant 2006, *supra* note 583, paras. 38-39. Note the ICC Prosecutor in May 2005 indicated to reporters that the ICC was exploring further criminal allegations against the LRA for alleged crimes committed in the months since the failed peace attempts in March and April, W. Rest, *Why Uganda's New War Crimes Court Is a Victory for the ICC*, 29 May 2008, available at <[www.jurist.law.pitt.edu/forumy/2008/05/why-ugandas-new-war-crimes-court-is.php](http://www.jurist.law.pitt.edu/forumy/2008/05/why-ugandas-new-war-crimes-court-is.php)> (last visited 24 July 2008).

<sup>608</sup> *Thomas Lubanga Dyilo* Decision on warrant 2006, *supra* note 583, para. 31.

<sup>609</sup> See Rome Statute 1998, *supra* note 7, article 63.

<sup>610</sup> Human Rights Watch Benchmarks Memorandum 2007, *supra* note 589, p. 8. *C.f.* Newton 2001, *supra* note 564, p. 63.

<sup>611</sup> June 29 Agreement, *supra* note 554, para. 6.3 states that "a regime of alternative penalties and sanctions" shall be introduced and "replace existing penalties" with respect to serious crimes committed by "non-state actors." The Agreement does not indicate what "alternative penalties" may include nor to what extent "alternative penalties" will depart from ordinary criminal penalties under Ugandan law. The Agreement further indicates at para. 6.4 that penalties should address various objectives—including to reflect the gravity of the crime and to promote reconciliation and rehabilitation—but does not indicate what types of penalties will advance such objectives.

individual circumstances.<sup>612</sup> The death penalty is not an option under the Rome Statute, unlike under Ugandan law for serious crimes, such as rape and murder.<sup>613</sup>

The current situation in Sudan is illustrative of the issues surrounding admissibility and complementarity, whereby in reports to the Security Council further to Resolution 1593 (2005), the Prosecutor of the ICC monitors the progress of mechanisms implemented by the government of Sudan to deal with crimes alleged in Darfur.<sup>614</sup> In his seventh report to the Security Council, no national proceedings related to those crimes were found by the Office of the Prosecutor,<sup>615</sup> despite elaborate mechanisms set up to deal with these crimes. Such mechanisms include the Darfur Special Court, established in June 2005, two additional courts created in November 2005, and ad hoc institutions proceeding and supporting the work of those courts (*inter alia* the Judicial Investigations Committee, the Special Prosecutions Commissions, the National Commission of Inquiry, the Committees against Rape, and the Special and Specialised Courts of 2001 and 2003).<sup>616</sup>

Any decision as to the adequacy of such measures is ultimately for determination by the ICC further to article 19(1) and not one that can be made unilaterally by State parties. Uganda may, however, challenge the admissibility and ask the Court to determine whether the various mechanisms proposed and eventually implemented by the 2008 Annex are sufficient as an alternative to ICC jurisdiction through action under article 19(2)(b).<sup>617</sup> If such a challenge is made, the Prosecutor would be bound to

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<sup>612</sup> Note Rome Statute 1998, *supra* note 7, article 77(2) which allows for fines as a penalty, but only in addition to imprisonment.

<sup>613</sup> Human Rights Benchmarks Watch Memorandum 2007, *supra* note 589, p. 8.

<sup>614</sup> See 3<sup>rd</sup> Report of Prosecutor 2006, *supra* note 583, para. 3.

<sup>615</sup> See Prosecutor of the International Criminal Court, 7<sup>th</sup> Report of the Prosecutor of the International Criminal Court to the UN Security Council pursuant to UNSCR 1593, 5 June 2008, paras. 22-26 available at <[www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf](http://www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf)> [hereinafter 7<sup>th</sup> Report of Prosecutor 2008].

<sup>616</sup> *Ibid*, para. 21. See also 3<sup>rd</sup> Report of Prosecutor 2006, *supra* note 583, pps. 3-7.

<sup>617</sup> Rome Statute 1998, *supra* note 7, article 19(2)(b). See further article 19(4). Note also the accused or person whom the arrest warrant or summons to appear has been issued under article 58 may also challenge the admissibility of the case under article 19(2)(a). This will not be considered further, given that none of those under arrest warrant have been apprehended. See also Mohamed M. El Zeidy, *Some Remarks on the Question of the*

suspend investigation pending determination.<sup>618</sup> Action under article 19 is arguably less political than any decision made by the Security Council under article 16.

While the word “case” is used in article 19(1) challenges to admissibility, articles 13, 14, 15 and 18 use the word “situation”. “Case” implies formal proceedings beyond investigation of a situation.<sup>619</sup> Pre-Trial Chamber II made a *prima facie* determination that the Uganda case “appears to be admissible” in its decision concerning the issuance of arrest warrants.<sup>620</sup> However, such a determination is not conclusive of the matter. In a recent decision against Thomas Lubanga Dyilo, Pre-Trial Chamber I referring to its decision concerning Uganda, determined its examination was not confined to the *prima facie* determination.<sup>621</sup> In this decision, Pre-Trial Chamber I made an ‘initial’ detailed ruling on the question of admissibility of the case. Neither the Statute nor the Rules or the Regulations of the Court support the conclusion that an ‘initial’ determination of the question of admissibility of a case during the arrest warrant proceedings prevents the Court from reconsidering the question at a later stages, for example, in response to a challenge made by a State mentioned in article 19(2)(b). Careful consideration would need to be given by all involved whether options under article 16 or article 19 are the best available.

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*Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court*, Leiden Journal of International Law, 19 (2006), pp. 741-751, p.750 discusses some of the implications self-referral under article 14 of the Rome Statute has on the principle of complementarity [hereinafter Zeidy 2006].

<sup>618</sup> Rome Statute, *supra* note 7, article 19(7).

<sup>619</sup> Zeidy 2006, *supra* note 617, 83, pp. 741-751, p. 744. *See further* Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, Case No. ICC-01/04, 17 January 2006, para. 65, defining “situations” “in terms of temporal, territorial and in some cases personal parameters...entail proceedings envisaged in the Statute to determine whether a particular situation should give rise to a criminal investigation”.

<sup>620</sup> Arrest decisions on warrants of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya, ICC documents ICC-02/04-01/05-53, 13 October 2005, para. 38; ICC-02/04-01/05-54, 13 October 2005, para. 38; ICC-02/04-01/05-56, 13 October 2005, para. 28; ICC-02/04-01/05-57, 13 October 2005, para. 26; ICC-02/04-01/05-55, 13 October 2005, para. 26. *Note* the lack of legal reasoning in this decision in comparison with Pre-Trial Chamber I in *Thomas Lubanga Dyilo* Decision on warrant 2006, *supra* note 583, paras. 29-40.

<sup>621</sup> *Thomas Lubanga Dyilo* Decision on warrant 2006, *supra* note 583, paras. 17-18. *See* Zeidy 2006, *supra* note 617, pp. 741-751.

#### 4.4.2.3 Article 53(2)(c): Prosecutor deferral in the “interests of justice”

The Prosecutor of the ICC may decide not to proceed with investigation if the prosecution is not in the interests of justice under article 53(2)(c). However, there is a great deal of debate as to what the “interests of justice” means under the Rome Statute 1998. Successful peace negotiations can be seen as in the interests of justice, in so far as the perpetual injustices present whilst the conflict continues comes to an end.<sup>622</sup> However, if justice is interpreted narrowly as being formal legal accountability, it would be difficult for the ICC to justify withdrawing the investigation.<sup>623</sup> The term “justice” may be interpreted under the Preamble, articles 17(2)(b), 17(2)(c) and 20(3)(b) of the Rome Statute 1998 as implying the necessity of punishment, an interpretation consistent with the object and purpose of the Statute.<sup>624</sup> Many have argued that this does not fit with the concept of justice in Ugandan society.<sup>625</sup> The interests of the international community and the position of genocide, war crimes and crimes against humanity, including torture, in international law are also determining factors in this balancing exercise, many arguing these crimes, being of the gravest concern for the international community, have attained the status as *jus cogens* crimes through treaty law and custom.<sup>626</sup> The Prosecutor would also have to take into consideration the requirements of article 21(3) under which the provisions of the Statute must be interpreted and applied “consistent with

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<sup>622</sup> Lanz 2007, *supra* note 449, p. 24.

<sup>623</sup> Human Rights Watch, ‘*Policy Paper: The Meaning of “The Interests of Justice” in Article 53 of the Rome Statute*’, Human Rights Watch: New York, June 2005.

<sup>624</sup> M. Kourabas, ‘*A Vienna Convention Interpretation of the “Interests of Justice” Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements and the Situation in Northern Uganda: A “Great Qualitative Step Forward” or a Normative Retreat?*’, 14 U.C. Davis J. Int'l L. & Pol'y 59 (Fall 2007), pps. 71-73.

<sup>625</sup> For example, Collins Opoka, an Acholi chief, stated, “In our culture, we don't like to punish people. . . It doesn't really get you anywhere”, quoted in Hanlon 2007, *supra* note 559, p. 332.

<sup>626</sup> M. Cherif Bassiouni, *Introduction to International Criminal Law*, Transnational Publishers Inc, New York, (2003) p. 141. See also International Law Commission, *Draft Articles of the Responsibility of States for Internationally Wrongful Acts* UN GAOR, 56<sup>th</sup> Session, Supp. No. 10, UN Doc. A/56/10 (2001), article 19 Draft Articles of State Responsibility. See further *Kupreškić et al* Judgement 2000, *supra* note, para. 520 ‘most of the norms of international humanitarian law, in particular those prohibiting war crimes [and] crimes against humanity’. Extended to torture in *Furundžija* Judgement 1998, *supra* note 116, paras. 153-157.

internationally recognised international human rights.” The Prosecutor must take into account all the circumstances when weighing whether the interests of justice would be served, including the gravity of the crime and the role of the alleged perpetrator. Again, justification of withdrawal is difficult in light of these considerations and the crimes alleged by the LRA leaders.

The Prosecutor must also take into consideration the interests of the victims.<sup>627</sup> In an effort to ascertain the most appropriate accountability and reconciliation processes to address crimes committed during the conflict in Uganda, the Office of the United Nations High Commissioner for Human Rights conducted a study that explored the perceptions among northern Ugandans on themes of accountability, reconciliation and transitional justice.<sup>628</sup> Ascertaining the interests of the victims is particularly key in the execution of functions of the ICC, which is designed to serve the interests of victims.<sup>629</sup> The report highlights that communities hold both the LRA and the government responsible for the harm, trauma, neglect and violations endured.<sup>630</sup> Both truth and compensation were consistently identified as the principal justice needs of the communities in transition.

Although responses point to widely varying perceptions on which mechanism may best deliver truth and compensation, the desire to hold both the LRA and government (specifically their leaders) accountable and prevent impunity was consistently presented amongst the affected community. In particular, perceptions of the virtues of the ICC and traditional practises – the two broad transitional justice approaches that have dominated recent discussions of the northern Ugandan situation – were greatly mixed. There is no universal “northern Ugandan” view of who is accountable for causing harm to civilians or of what form accountability should take, highlighting the complex nature of the conflict and the victims’

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<sup>627</sup> Schabas *Introduction to the ICC* 2004, *supra* note 569, pps. 172-73; Rome Statute 1998, *supra* note 7, article 54.

<sup>628</sup> Officer of the United Nations High Commissioner for Human Rights, *Making Peace Our Own: Victims’ Perceptions and Accountability, Reconciliation and Justice in Northern Uganda*, UN 2007, available at <<http://www.reliefweb.int/rw/rwb.nsf/db900sid/AMMF-763G7T?OpenDocument>> [hereinafter OHCHR paper 2007]. The study took place from January to July, 2007, and 1,725 victims of the conflict and 39 key informants participated.

<sup>629</sup> K. Southwick, ‘*Investigating War in Northern Uganda: Dilemmas for the International Criminal Court*’, *Yale Journal of International Affairs* 1 105-119 (2005), p. 113.

<sup>630</sup> *Ibid*, p. ii.

characterisations of their experiences and views on necessary redress as particular to individuals and groups.<sup>631</sup> Many see a multi-faceted transitional justice mechanism, combining several processes and institutions addressing different types of harm caused by different levels of perpetrators as necessary for the restoration of peace and reconciliation. A clear difference can be seen between the treatment of low-level perpetrators and leaders of the armed conflict.<sup>632</sup>

Although often depicted otherwise, many Ugandan communities do desire prosecution. The pragmatic advantages to amnesty, particularly to facilitate the return home of low-level perpetrators, was recognised in the responses gathered. Significantly, the victims identified the international community as responsible for ensuring that the ultimate solution regarding accountability and reconciliation cohere with the population's views, and that the victims receive the remedies and reparations they deserve and are entitled to. The results highlight that the combination of international and domestic trials may ensure lasting peace.

Ambiguity regarding whether a prosecution is in the interest of justice under 53(2)(c) lies in what constitutes "justice." Conceptions of "justice" such as whether justice is retributive or restorative, vary throughout different legal systems. In northern Uganda, traditional concepts of justice tend to centre around reconciliation.<sup>633</sup> This reflects the idea that justice need not always take the form of prosecution. Building on the practice in a wide variety of countries coming out of internal conflict,<sup>634</sup> the 2008 Annex includes provisions to establish a commission to hold hearings and to analyse and preserve the history of the conflict, as well as make

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<sup>631</sup> *Ibid.*

<sup>632</sup> See also International Center for Transitional Justice 2005, *supra* note 30, poll results found that sixty-six percent of Ugandans wanted punishment for the top leadership, while twenty-two percent wanted forgiveness. More generally, seventy-six percent of Ugandans want the LRA to be held accountable, while simultaneously sixty-five percent support amnesty for the LRA.

<sup>633</sup> *C.f.* OHCHR paper 2007, *supra* note 628.

<sup>634</sup> For example, Argentina, Chile, Guatemala, Honduras, El Salvador, and South Africa. E. Blumenson, 'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court', 44 Colum. J. Transnat'l L. 801, (2006), p. 814 [hereinafter Blumenson 2006].

recommendations on reparations for victims.<sup>635</sup> Such a commission could make a significant contribution toward meeting the needs of truth and reconciliation not addressed by prosecutions alone.<sup>636</sup> Under further provisions of the 2008 Annex, government must establish appropriate financial arrangement to make reparations to victims of the conflict.<sup>637</sup> A role for traditional justice practices is included as part of accountability,<sup>638</sup> but further consultations will be conducted by the government to determine the most appropriate role.<sup>639</sup> More certainty is required to address the apparent overlap of the different mechanisms, particularly in relation to investigation and witnesses. A number of procedural challenges will also need to be addressed, particular in relation to witness protection, adequate investigation, prosecution and defence capacity, and funding.<sup>640</sup> These additional mechanisms to prosecution are essential in ensuring peace, because they address both the different forms and different levels of justice, creating a balance between the victims' priority on prosecution and the State's need to determine the truth.<sup>641</sup>

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<sup>635</sup> HRW Analysis of the Annex 2008, *supra* note 555, p. 4.

<sup>636</sup> *Ibid.*, p. 4.

<sup>637</sup> 2008 Annex, *supra* note 553, paras. 4(j) and. 16-17. *See further* paras. 4-6.

<sup>638</sup> Other peace agreements that have contained a traditional justice mechanism include the Bougainville Peace Agreement, Section 7, 30 August 2001, available from the United States Institute of Peace, Peace Agreements Digital Collection: Bougainville (Papua New Guinea), <[http://www.usip.org/library/pa/bougainville/bougain\\_20010830.html](http://www.usip.org/library/pa/bougainville/bougain_20010830.html)>; and Lincoln Agreement on Peace, Security and Development on Bougainville, Section F3, 23 January 1998, available from the United States Institute of Peace, Peace Agreements Digital Collection: Bougainville (Papua New Guinea), <[http://www.usip.org/library/pa/bougainville/bougain\\_19980123.html](http://www.usip.org/library/pa/bougainville/bougain_19980123.html)>, which include detailed provisions on the specific role of the village court system in administering justice, as well as including general provisions that recognise the role of traditional/village reconciliation efforts. The 1998 Arusha Peace and Reconciliation Agreement for Burundi, Protocol 2, articles 9-8, Arusha, 28 August 2000, available at [www.usip.org/library/pa/burundi/pa\\_burunid\\_08282000\\_toc.html](http://www.usip.org/library/pa/burundi/pa_burunid_08282000_toc.html) included a very specific role of Ubusingantahe community councils in administering traditional 'conciliatory' justice. In Rwanda, the institution of the *Gacaca* community justice method was used only once it became clear that the ICTR and domestic court system could not handle the large number of individuals accused of crimes as part of the 1993–1994 genocide - *Accountability and Peace Agreements* 2007, pps. 25-26. *See also* L. N. Sadat, 'Exile, Amnesty and International Law', 81 Notre Dame L. Rev. 955 (March 2006) pps. 988-990

<sup>639</sup> *Ibid.*, paras. 19-22.

<sup>640</sup> HRW Analysis of the Annex 2008, *supra* note 555, p. 10.

<sup>641</sup> Balint 1996, *supra* note 430, p. 107, fn. 25 gives the example of the debate surrounding the trial of Adolf Eichmann to demonstrate these differing views of levels of justice. Some consider the trial unjust due to the arrest procedure and the fact that the State of Israel did not exist at the time the crimes were committed, whereas others consider it to have been more unjust not to try him for the crimes committed.



The Prosecutor's discretion under Article 53(2)(c) is a pragmatic tool that allows for the particular situation under investigation to be taken into account. Any decision must be made objectively without political interference. Nonetheless, such decisions will have significant political repercussions,<sup>642</sup> not only in relation to potential peace negotiations, but also the credibility of the ICC as an institution of international criminal justice. Any discretion the Prosecutor may have in deferring jurisdiction to a State is substantially limited by his legal and institutional responsibilities, particularly where a State has permitted perpetrators to act with impunity.<sup>643</sup> In light of the additional investigations by the Office of the Prosecution since February 2008, all indications point to the Prosecutor not exercising any deference under article 53(2)(c) of the Rome Statute.<sup>644</sup>

#### **4.4.3 Implications for the future of ICC investigation in Uganda**

The standards and procedural rules for recognising a State's right to use its domestic forums are complex and interrelated. Similar to the provisions of Common Article 3 and APII, the ICC does not have its own enforcement mechanism and must rely on State Parties to enforce its warrants and sentences. Several external factors complicate the situation in Uganda: it is the first State referral to the Court, there are difficulties in negotiating peace with the LRA, and questions exist surrounding the legitimacy and credibility of the ICC in the face of State sovereignty. Despite these difficulties, a balance can be achieved between all interested parties — the LRA, the Ugandan government, and the international community — if a comprehensive and integrated approach is taken.

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<sup>642</sup> See, for example, M. R. Brubacher, 'Prosecutorial Discretion Within the International Criminal Court: Finding the Balance between Law and Politics', 2 J. Int'l Crim. Just. 71, 79-80 (2004) p. 82 [hereinafter Brubacher 2004] describing how the initial decision of the Trial Chamber of the ICTY that Tadić could not be indicted on eleven counts of war crimes on the grounds that the crimes had not occurred as part of an international armed conflict aided the Serbian proposition that Bosnia was not a unified State [hereinafter Brubacher 2004].

<sup>643</sup> Blumenson 2006, *supra* note 634, p. 859.

<sup>644</sup> June Security Council Update 2008, *supra* note 556.

Similar problems of indicting people during negotiations have been successfully dealt with by the international community in the context of the former Yugoslavia in the indictments of Mladic and Karadžić, and following the indictment of Charles Taylor.<sup>645</sup> The ICC is only focused on the most egregious crimes committed by the LRA during the last five years of the twenty-two year Ugandan civil war. Of the many who have committed crimes on both sides, the ICC is only targeting five senior leaders of one party to the conflict. It represents only one means of justice and with the limited jurisdiction and resources of the ICC, other justice mechanisms will still be required to fill the impunity gap.<sup>646</sup> Room exists within the Rome Statute to include further mechanisms of traditional justice, forgiveness, reconciliation and truth telling.<sup>647</sup> Through the principle of complementarity, the ICC may work alongside the Ugandan government in a wide array of investigative, prosecutorial and administrative activities.<sup>648</sup> As such, whether or not the LRA leaders are ultimately prosecuted in the ICC, the ICC still has a role in the peace process as it stands. Furthermore, if lasting peace is to be guaranteed, more will need to be done beyond the investigation of the five leaders currently under before any impact on group behaviour as a whole can be achieved.<sup>649</sup>

Under the framework of complementarity, States are and remain responsible for the prosecution of the majority of offences.<sup>650</sup> Article 5(1) of the Rome Statute 1998 limits the Court's substantive jurisdiction to the most serious crimes of concern to the international community as a whole, which undoubtedly includes the crimes allegedly committed by the leaders of the LRA.<sup>651</sup> However, their subordinates and the officers in the Ugandan armed forces accused of serious violations of human rights and humanitarian law

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<sup>645</sup> Brubacher 2004, *supra* note 642, p. 82.

<sup>646</sup> Schabas *Preventing Genocide* 2006, *supra* note 541, p. 25.

<sup>647</sup> Although prosecution in the ICC would address forgiveness, reconciliation and truth-telling in its operations.

<sup>648</sup> Newton 2001, *supra* note 564, p. 28. *See also* Rome Statute 1998, *supra* note 7, articles 86-102.

<sup>649</sup> Sririam 2003, *supra* note 438, p. 1.

<sup>650</sup> Newton 2001, *supra* note 564, p. 36 and 38 for examples of domestic prosecutions of for violations of international humanitarian law.

<sup>651</sup> *See also* Rome Statute 1998, *supra* note 7, preamble.

would fall within the jurisdiction of Uganda.<sup>652</sup> The alternative justice mechanisms included in the 2008 Annex would create a different dynamic in Uganda, not only as means to strengthen the judiciary, but also as a means to potentially further equal opportunity talks and bring justice closer to the people. In the fight against impunity, justice must not only be done, but must be seen to be done.

The deferral of the ICC investigation may facilitate the final signing of the peace agreement by the LRA, but whether justice and a sustainable peace consolidation process will follow the signing is a different question. The LRA's commitment to fulfil the terms of the final agreement or submit persons from their ranks accused of war crimes and crimes against humanity to justice has been questioned after reports of rearming and training, and renewed attacks by the LRA.<sup>653</sup> In light of the emphasis placed on international prosecution by the international community generally, and particularly in light of the evolving situation in Sudan, it does not seem likely that the international community would permit the LRA leaders to avoid accountability for their actions in an international arena. Whether or not the Ugandan government wishes to continue its own investigations or allow the ICC to investigate independently, as a signatory to the ICC it must uphold *its* obligation to investigate and prosecute war crimes and crimes against humanity using some method of justice.<sup>654</sup>

## **4.5 Enforcement through human rights mechanisms - Colombia**

Efforts to ensure compliance with humanitarian obligations are not limited to international humanitarian. As demonstrated above, international criminal law has become one of the main means of enforcing humanitarian obligations. Human rights mechanisms, with more developed regional and

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<sup>652</sup> Human Rights Watch Benchmarks Memorandum 2007, *supra* note 550, p. 4.

<sup>653</sup> April Security Council Update 2008 *supra* note 571, p. 3; June Security Council Update 2008 *supra* note 556, p. 3.

<sup>654</sup> Rome Statute 1998, *supra* note 7, article 17.

international enforcement mechanisms have also been utilised.<sup>655</sup> Where the provisions of humanitarian law reflect those of human rights law, the enforcement of human rights law may be equated to the enforcement of humanitarian law.<sup>656</sup> Statements made by Special Rapporteurs investigating human rights situations in internal armed conflicts, directly invoking international humanitarian law, have highlighted the close relationship between these two fields.<sup>657</sup>

The Inter-American Commission considers itself competent to apply international humanitarian law<sup>658</sup> and has monitored the behaviour of armed opposition groups when receiving and reviewing reports by States on their compliance with human rights.<sup>659</sup> The Inter-American Commission, which may hear individual communications,<sup>660</sup> has strengthened and clarified the application of humanitarian law in the conflict in Colombia and its records provide an important account of events.<sup>661</sup> However, the use of human rights mechanisms as a means to enforce humanitarian obligations has been criticised as an inefficient means of protecting people in situations of armed conflicts.<sup>662</sup> Human rights mechanisms tend to be reactionary, often after the fact, and their investigation processes are long. In addition, it is also difficult to enforce human rights mechanisms and both regional and international mechanisms can be selective in ensuring application in a

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<sup>655</sup> Clapham 2006, *supra* note 45, p. 505.

<sup>656</sup> Moir 2002, *supra* note 40, p. 256.

<sup>657</sup> E.g. Report of Special Rapporteur: Situation of Human Rights in Afghanistan, UN Doc. A/49/650, 9 November 1994 at para. 91. *See also* Report of Special Rapporteur: Situation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia UN Doc. A/53/322, 11 September 1998, at para. 86.

<sup>658</sup> *Tablada* Case 1997, *supra* note 151; *Coard et al. v. United States*, Case 10.951, Report N° 109/99, IACHR (29 September 29 1999).

<sup>659</sup> *See for example* Third Report on Colombia, *supra* note 24, para. 6; IACHR Annual Report of 2007, *supra* note 25, para. 40 and 60.

<sup>660</sup> ACHR, *supra* note 17, article 44. *See, for example*, Cases 6717-6720 (El Salvador) in IACHR, *Annual Report of the Inter-American Commission on Human Rights 1983-1984*, OAS Doc. OEA/Ser.L/V/II.63, doc. 10, 24 September 1984 at 35-41 noted in Moir 2002, *supra* note 40, p. 266.

<sup>661</sup> In contrast, the African system is less developed than the systems of the American and European models. The main supervisory mechanism, the Commission, has dealt with a number of communications concerning States in the throes of internal armed conflict, such as Rwanda, Angola and Sudan, but such cases have not tended to centre upon military activity and as such have offered little in terms of explicit treatment of humanitarian norms. Moir 2002, *supra* note 40, pps. 268-270.

<sup>662</sup> *Ibid*, p. 257.

number of given situations.<sup>663</sup> Under the American system, domestic remedies must be exhausted before action can be taken. Access to legal process is often extremely limited in internal armed conflicts and thus does not offer adequate protection.<sup>664</sup> Despite these shortcomings, the use of human rights enforcement mechanisms draws the attention of the international community to a situation, which may provide some relief to war-torn areas. Indeed, the need to utilise human rights law in order to enforce international humanitarian law draws attention to the total lack of efficient and effective enforcement mechanisms in international humanitarian law.

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<sup>663</sup> *Ibid.*

<sup>664</sup> *Ibid.*, p. 271.

## 5 Concluding Remarks

Through Common Article 3 and APII, the international community has attempted to regulate the conduct of internal armed conflict by laying down standards to be ensured and maintained by all parties to the conflict, including non-State actors. The provisions contained in Common Article 3 are mutually reinforcing, while APII gives much needed substance to the broader principles contained in Common Article 3.<sup>665</sup> The obligations contained in these instruments are far reaching and establish the absolute minimum standards that is expected in internal armed conflicts. However, practice gives little support for customary obligations that bind armed opposition groups.

Non-State actors are increasingly being held to the same standards as States by the international community. However, armed opposition groups still remain unaddressed in a number of significant developments in international humanitarian law recently, such as regulation of indiscriminate weapons. In not addressing non-State armed actors, the protection afforded by these international instruments is undermined. Salient to this, the Optional Protocol to the Convention on the Rights of the Child prohibits non-State armed groups from recruiting or using persons under the age of eighteen in hostilities, but State parties remain the principal mechanism for enforcing this provision.<sup>666</sup>

By limiting the duties on armed opposition groups to a duty to abstain, the position of armed opposition groups under international law becomes similar to that of individuals.<sup>667</sup> The obligations outlined in Chapter 3 highlight that a marked difference exists between the number of positive duties imposed on armed opposition groups as compared to negative duties or prohibitions. States are emphasised as the primary enforcer of humanitarian obligations on non-State actors, yet stands in stark contrast to the fact that in their opposition to State authorities, such groups are by

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<sup>665</sup> Greenwood 2006, *supra* note 161, p. 199.

<sup>666</sup> Capie and Policzer 2004, *supra* note 2, p. 2.

<sup>667</sup> Zegveld 2002, *supra* note 145, p. 93.

definition outside the control, and consequently outside the accountability of the State as well.<sup>668</sup>

The international community has, however, moved towards equivalent protection for victims of internal armed conflict whether the aggressor be a State or non-State actor. Yet despite efforts to extend the rules regulating armed conflict to situations of internal armed conflict through the decisions of the international criminal tribunals and regional bodies, regulation and control of non-State armed groups, by comparison, remains relatively underdeveloped.<sup>669</sup> The result is a gap between the obligations and accountability of non-State actors. It has been observed that in the past century those who murdered one person were “more likely to be brought to justice than those who plot genocide against millions”.<sup>670</sup> In light of the fact that non-international conflicts in the twentieth century resulted in more than 170 million deaths, more could certainly be done.<sup>671</sup> Further efforts should be made to identify the most effective tools for ensuring humanitarian obligations are observed and best mechanisms for influencing the behaviour of armed opposition groups. Recognising the limits of law, a comprehensive multi-disciplined approach to enforce the obligations of armed opposition groups is required. Such an approach will be shaped by the place of law in a given society, and will invariably differ in different legal cultures, as will the strength of law in a given situations.<sup>672</sup>

Respect for State sovereignty has been a dominate limiting factor in the implementation of obligations on non-State actors, for example in denying the existence of an “armed conflict” or the applicability of either APII or Common Article 3. However, without effective State mechanisms that force armed opposition groups to comply with the minimum of standards, conflicts are fuelled and can escalate into a threat to international

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<sup>668</sup> G. I. A. D. Draper, ‘*Human Rights and the Law of Armed Conflicts: General Principles of Implementation*’ in M. A. Meyer and H. McCoubrey (eds) *Reflections on Law and Armed Conflicts* (Kluwer Law International, The Hague, 1998).

<sup>669</sup> Sririam 2003, *supra* note 438, p. 4.

<sup>670</sup> Quote of British Foreign Secretary Robin Cook, “New World Court to Prosecute Tyrants”, *BBC Report*, 20 July 1998, available at <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/136084.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/136084.stm)> (last visited 24 July 2008).

<sup>671</sup> M. Cherif Bassiouni, *Post-Conflict Justice*, (Transnational Publishers, New York, 2002) p. 6.

<sup>672</sup> Balint 1996, *supra* note 430, p. 107.

peace and security. States and international bodies alike have done little to make the applicable law effective. The problems of sovereignty can result in the law being meaningless with dire consequences on the civilian population. If the international community and States are to take seriously the responsibility to protect civilians during armed conflict,<sup>673</sup> the facts on the ground need to be recognised and the challenge of addressing armed groups confronted.

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<sup>673</sup> General Comment 6(16), UN Doc. HRI/GEN/1/Rev.6, para. 2; *A More Secure World* 2004 *supra* note 539, 6-7 par. 201 (2004); 2005 World Summit Outcome, GA Res. 60/1, paras. 138-39 (Oct. 24, 2005); SC Res. 1674, para. 4 (28 April 2006).



# Bibliography

## Books

- Abi-Saab, Rosemary *Droit humanitaire et conflits internes. Origines et évolution de la rélementation internationale* Institut Henry Dunant ,Geneva, 1986
- Bassiouni, M. Cherif *Post-Conflict Justice* Transnational Publisher, New York, 2002
- Bassiouni, M. Cherif *Introduction to International Criminal Law* Transnational Publics Inc, New York, 2003
- Bernhardt, Rudolf (ed.), *Encyclopedia of Public International Law, Vol. IV* Elsevier, Amsterdam, 2000
- Brownlie, Ian *Principles of Public International Law* 5<sup>th</sup> ed, Oxford University Press, Oxford, 1998
- Cassese, Antonio *International Law* 2<sup>nd</sup> ed., Oxford University Press, Oxford, 2005
- Delissen, J.M. and Tanja, G.J. (eds) *Humanitarian Law of Armed Conflict, Challenges Ahead: Essays in Honour of Frits Kalshoven* Martinus Nijhoff, 1991
- Detter, Ingrid *The Law of War* 2<sup>nd</sup> ed., Cambridge University Press, Cambridge, 2000
- Dörmann, Knut *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary* Cambridge University Press, Cambridge, 2002

- Fischer, H. / Froissart, U. / Heintschel von Heinegg, W. / and Rapp, C. (eds.) *Krisensicherung und Humanitärer Schutz – Crisis management and Humanitarian Protection: Festerschrift für Dieter Leck*, Berliner Wissenschafts-Verlag, Berlin, 2004
- Greenwood, Christopher *Essays on War in International Law* Cameron May Ltd, London 2006
- Harborn, Lotta and Wallensteen, Peter *Pattern of major armed conflicts, 1990-2006*, SIPRI Yearbook 2007, Oxford, Oxford University Press, 2007
- Henckaerts, Jean-Marie and Doswald-Beck, Louise *Customary International Humanitarian Law* Volume I. Rules, Volume II. Practice Cambridge University Press, 2005.
- Kittichaisaree, Kriangsak *International Criminal Law*, 3<sup>rd</sup> ed. (Oxford, Oxford University Press, 2005)
- Krutzsch, Walter and Trapp, Ralf *A Commentary on the Chemical Weapons Convention* Dordrecht, Nijhoff, 1994
- Lauterpacht, Hersch *Recognition in International Law*, Cambridge, Cambridge University Press, 1947)
- Lee, R. S. (ed.) *The International Criminal Court: The Making of the Rome Statute, Issues, Negotiations, Results* Kluwer, The Hague, 1999
- McCoubrey, Hilaire *International Humanitarian Law: Modern Developments in the Limitation of Warfare* Dartmouth Publishing Company, England, 1998
- Meron, Theodor *Human Rights in Internal Strife: Their International Protection*, Grotius, Cambridge, 1987

- Meyer, M. A. and McCoubrey Hilarie (eds.) *Reflections on Law and Armed Conflicts*  
Kluwer Law International, The Hague, 1998
- Novak, Manfred *UN Covenant on Civil and Political Rights: CCCPR Commentary*  
2<sup>nd</sup> ed., Norbert Pul Engel, Germany, 2005
- Pictet, Jean. S. (ed.) *Commentary on the Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*  
ICRC, Geneva, 1952
- Pictet, Jean. S. (ed.) *Commentary on Geneva Convention Relative to the Protection of Civilian Persons in Time of War*  
ICRC, Geneva, 1958
- Rosenau, James N. *Interntional Aspects of Civil Strife*  
Princeton University Press, Princeton, 1964
- Sandoz, Yves/ Swinarski, Chritophe/ Zimmerman, Bruno (eds.) *Commentary on Additional Protocols of 8 June 1977 to the Geneva Convention of 12 August 1949*  
ICRC, Geneva, 1987
- Schabas, William A. (ed.) *Introduction to the International Criminal Court*  
Cambridge, Cambridge University Press, 2004
- Singer, Peter W. *Children at War*  
Pantheon, New York, 2005
- Stockholm International Peace Research Institute *Armaments, Disarmament and International Security*  
Oxford University Press, Oxford, 1999
- Stockholm International Peace Research Institute, *The Problem of Chemical and Biological Warfare*

- Humanities Press, New York, 1971
- Symonides, Janusz (ed.) *The Struggle Against Discrimination: A Collection of International Instruments Adopted by the United Nations System*, UNESCO, France, 1996 available at <http://unesdoc.unesco.org/images/0010/001060/106049e.pdf>
- Thakur, Ramesh and Malcontent, Peter (eds.), *From Sovereign Impunity to International Accountability: The Search for Justice in a World of States* United Nations University Press, Tokyo, 2004
- Triffterer, O. (ed.), *Commentary on the Rome Statute: Observers' Notes, Article by Article*, Baden-Baden, Nomos, 1999
- Vinjamuir, Dr Leslie and Boesenecker, Aaron P. *Accountability and Peace Agreements: Mapping trends from 1980 to 2006*, (Centre for Humanitarian Dialogue, Geneva, September 2007)
- Waddell, Nicholas and Clark, Phil (eds.) *Courting Conflict? Justice, Peace and the ICC in Africa* Royal African Society, March 2008
- Warner, D. (ed.) *Human Rights and Humanitarian law: The Quest for Universality* Martinus Nijhoff Publishers, the Hague, 1997
- Wilson, Heather A. *International Law and the Use of Force by National Liberation Movements* Clarendon Press, Oxford, 1988
- Zegveld, Louise *The Accountability of Armed Opposition Groups in International Law* Cambridge University Press, Cambridge, 2002

## Articles

- Akhavan, Payam *'The Lord's Resistance Army Case: Uganda's Submission of the First State Referral to the International Criminal Court'*  
American Journal of International Law 99, no. 2 pps. 403-421, 2005
- Anonymous, *Human Rights in Peace Negotiations*  
18 Hum. Rts. Q. 249, 1996
- Apuuli, K. P. *'The ICC Arrest Warrants for the Lord's Resistance Army Leaders and Peace Prospects for Northern Uganda'*,  
Journal of International Criminal Justice 4, pps. 179-187, 2006
- Balint, Jennifer L. *'The Place of Law in Addressing Internal Regime Conflicts'*  
59-AUT Law & Contemp. Probs p. 103, Fall 1996
- Bassiouni, M. Cherif *'International Crimes: Jus Cogens and Obligations Erga Omnes'*  
59 Law & Contemp. Probs, 63, 1996
- Bassiouni, M. Cherif *'The ICC – Quo Vadis?'*  
Journal of International Criminal Justice 4, 421-427, 2006
- Blumenson, Eric *'The Challenge of a Global Standard of Justice: Peace, Pluralism, and Punishment at the International Criminal Court'*,  
44 Colum. J. Transnat'l L. 801, 2006
- Boed, Roman *'Individual Criminal Responsibility for Violations of Article 3 Common to the Geneva Conventions of 1949 and of Additional Protocol II Thereto in the Case of Law of the International Criminal Tribunal for Rwanda'*,

- Criminal Law Forum 13, pps. 293–322, 2002
- Brubacher, M. R. *‘Prosecutorial Discretion Within the International Criminal Court: Finding the Balance between Law and Politics’*, 2 J. Int'l Crim. Just. 71, 2004
- Capie, David and Policzer, Pablo *‘Keeping the Promise of Protection: Holding Armed Groups to the Same Standard as States’*, A Policy Brief Commissioned for the UN-Secretary-General’s High Level Panel on Global Security The Armed Groups Project University of British Columbia, 15 January 2004
- Cardena, M. C. *‘Colombia’s Peace Process: the Continuous Search for Peace’*, 15 Fla. J. Int'l L. 273, Fall 2002
- Cariollo-Suarez, Arturo *‘Hors de Logique: Contemporary Issues in International Humanitarian Law as Applied to Internal Armed Conflict’*, 15 American University International Law Review 1, 1999
- Cassese, Antonio *‘The Status of Rebels under the 1977 Geneva Protocol on Non-International Armed Conflicts’*, Int'l. Comp. L. Quarterly, Vol. 30, pp. 416-39, 1981
- Clapham, A. *‘Human Rights Obligations of Non-State Actors in Conflict Situations’* IRRC Vol. 88 No. 863, pp. 491 – 523, 2006
- Cullen, A. *‘Key Developments Affecting the Scope of Internal Armed Conflict in International Humanitarian Law’* 183 Mil. L. Rev. pps. 66 – 109 2005
- Dinstein, Yoram *‘Humanitarian Law on the Conflict in Afghanistan’*

- 96 Am. Soc’y Int’l Proc. 23, 2002
- Ellis, Mark S. *‘Combating Impunity and Enforcing Accountability as Way to Promote Peace and Stability – The Role of International War Crimes Tribunals’*  
2 J. Nat’l Security L. & Pol’y 111, 2006
- El Zeidy, Mohamed M. *‘Some Remarks on the Question of the Admissibility of a Case during Arrest Warrant Proceedings before the International Criminal Court’*  
Leiden Journal of International Law, 19, 2006
- Ewumbue-Monono, Churchill *‘Respect for International Humanitarian Law by Armed Non-State Actors in Africa’*  
Vol. 88 No. 864, December 2006
- Garner, James W. *‘Recognition of Belligerency’*  
32 AJIL 106, 1938
- Geiß, Robin *‘Asymmetric conflict structures’*  
IRRC Vol. 88, No. 664 pps. 757-777, December 2006
- Gropengiesser, H. and Meisner, J. *‘Amnesties and the Rome Statute of the International Criminal Court’*  
Int. Crim. L. R. 5, 267-300, 2005
- Hanlon, Kimberly *‘Peace or Justice: Now that Peace is Being Negotiated in Uganda, Will the ICC Still Pursue Justice?’*  
14 Tulsa J. Comp. & Int’l L. 295, Spring 2007
- Hosni, Lori, *‘The ABCs of the Geneva Conventions and their Applicability to Modern Warfare’*  
14 New Eng. J. Int’l & Comp. L. 135, 2007
- Jinks, Derek *‘September 11 and the Laws of War’*  
28 Yale J. Int’l L. 1, Winter 2003

- Kolb, Robert *'The relationship between international humanitarian law and human rights law: A brief history of the 1948 Universal Declaration of Human Rights and the 1949 Geneva Conventions'*  
IRRC No. 324, p.409-419 1998
- Kourabas, Michael *'A Vienna Convention Interpretation of the "Interests of Justice" Provision of the Rome Statute, the Legality of Domestic Amnesty Agreements and the Situation in Northern Uganda: A "Great Qualitative Step Forward" or a Normative Retreat?'*,  
14 U.C. Davis J. Int'l L. & Pol'y 59  
Fall 2007
- Lanz, David *'The ICC's Intervention in Northern Uganda: Beyond the Simplicity of Peace vs. Justice'*,  
Fletcher School of Law and Diplomacy, May 2007,
- Laplante, Lisa J. and Theidon, Kimberly *'Transitional Justice in Times of Conflict: Colombia's Ley de Justicia y Paz'*  
28 Mich. J. Int'l L. 49, Fall 2006
- Meron, Theodor *'International Criminalization of Internal Atrocities'*  
89 Am. J. Int'l L. 554, 1995
- Meron, Theodor *'The Humanisation of Humanitarian Law'*  
94 Am. J. Int'l L. 239, April 2000
- Nagle, Luz. E. *'Prosecuting the Use of Anti-Personnel Mines by Illegal Armed Groups: The Colombian Situation'*  
8 Oregon Review International Law 23, Summer 2006
- Newton, M. A. *'Comparative Complementarity: Domestic Jurisdiction Consistent with the Rome Statute of the International Criminal Court'*  
167 Mil. L. Rev. 20, March 2001



- Noel, Scott *‘Armed non-state actors in Africa and the ban on anti-personnel landmines’*  
African Security Review, Vol. 13, no. 3, 2004
- Rest, W. *‘Why Uganda’s New War Crimes Court Is a Victory for the ICC’*  
available at  
<<http://jurist.law.pitt.edu/forumy/2008/05/why-ugandas-new-war-crimes-court-is.php>>, 29 May 2008,
- Rogoff, Martin A. *‘The Obligation to Negotiate under International Law: Rules and Realities’*  
16 Mich. J. Int’l L. 141, 1994
- Sadat, Leila Nadya *‘Exile, Amnesty and International Law’*  
81 Notre Dame L. Rev. 955, March 2006
- Salmón G, Elizabeth *‘Reflections on international humanitarian law and transitional justice: lessons to be learnt from the Latin American experience’*  
IRRC Vol. 88 No. 862 June 2006
- Sassòli, Marco *‘State responsibility for violations of international humanitarian law’*  
IRRC Vol. 84, No. 846, 2002
- Sassòli, Marco *‘Possible Legal Mechanisms to Improve Compliance by Armed Groups with International Humanitarian Law and International Human Rights Law’*  
paper submitted at the at the Armed Groups Conference, Vancouver, 13-15 November 2003, available at  
<<http://www.c-r.org/our-work/accord/engaging-groups/index.php> p. 11>

- Schabas, William A. *'Preventing Genocide and Mass Killing: The Challenge for the United Nations'*  
 Minority Rights Group International, London, 2006  
 available at  
 <[www.minorityrights.org/?lid=1070](http://www.minorityrights.org/?lid=1070)>
- Scharf, Michael P. *'From the Exile Files: An Essay on Trading Justice for Peace'*  
 63 Wash. & Lee. L. Rev. 339  
 Winter 2006
- Santos, Soliman M. *'The Ottawa Treaty and non-state actors'*  
 International Campaign to Ban Landmines, Non-State Actors Working Group, available at  
 <<http://www.icbl.org/wg/nsa/library/ottwansa.html>>
- Somer, Jonathan *'Jungle Justice: passing sentence on the equality of belligerents in non-international armed conflicts'*  
 IRRC Vol. 89 No. 867, September 2007
- Southwick, K. *'Investigating War in Northern Uganda: Dilemmas for the International Criminal Court'*,  
 Yale Journal of International Affairs 1 105-119, 2005
- Ssenyonjo, Manisuli *'Accountability of Non-State Actors in Uganda for War Crimes and Human Rights Violations: Between Amnesty and the International Criminal Court'*  
 Journal of Conflict and Security Law, No. 10(3), pps. 405-434, 2005
- Turns, David *'Weapons in the ICRC Study on Customary International Humanitarian Law'*  
 11 J. Conflict & Security L. 201, Summer 2006

## International Documents

*African Charter on Human and Peoples' Rights (the Banjul Charter)*, OAU Doc. CAB/LEG/67/3 rev. 55, 21 ILM 58 (1982), adopted 27 June 1981, entered into force 21 October 1986

African Commission on Human and Peoples' Rights, *Resolution on Anti-Personnel Land Mines*, ACHPR/Res.18 (XVII) (1995)

Africa Union Council of Ministers, CM/Res. 234 (XV) of August 1970  
*Resolution on Decolonization*

Africa Union Council of Ministers, CM/Res. 268 (XIX) of June 1972

*American Convention on Human Rights*, OEA/ser. K/XVY1.1, Doc. 65, Rev. 1, Corr. 1 OASTS, No. 36 (1970)

*Convention against Torture and Other Cruel, Inhumane and Degrading Treatment and Punishment* G.A. res. 39/46, annex, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984), adopted 10 December 1984, entered into force 26 June 1987 (1984), 1465 UNTS 85

*Convention on the Prevention and Punishment of the Crime of Genocide*, 78 UNTS 277, adopted 9 December 1948, entered into force 12 January 1951

*Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects*, Geneva, 10 October 1980, Amendment 21 December 2001, 1342 UNTS 137

*Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, 10 April 1972, 1015 UNTS 163

*Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction*, 18 September 1997 2056 U.N.T.S. 211

*Convention on the Rights of the Child*, G.A. res. 44/25, annex, 44 U.N. GAOR Supp. (No. 49) at 167, U.N. Doc. A/44/49 (1989), entered into force 2 September 1990

*European Convention for the Protection of Human Rights and Fundamental Freedoms*, Nov. 4, 1950, 213 UNTS 22

*Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31 (1949)

*Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85

*Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135

*Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287

*Hague Convention IV - Laws and Customs of War on Land*, 18 October 1907, 36 Stat. 2277, 1 Bevans 631, 205 Consol. T.S. 277, 3 Martens Nouveau Recueil (ser. 3) 461, entered into force 26 January 1910 annexed to Geneva Convention IV

*Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict*, done on 14 May 1954, 249 U.N.T.S. 215 (entered in to force Aug. 7, 1956)

*Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, Second Protocol*, March 1999, 38 I.L.M. 769

Human Rights Committee, *General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.6, 2 November 1994,

Human Rights Committee, *General Comment 29/72*, U.N. Doc. CCPR/C/21/Rev.1/Add.11 (2001), reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6 p. 186 (2003)

Human Rights Committee, *General Comment 6(16)*, reprinted in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, U.N. Doc. HRI/GEN/1/Rev.6

International Committee of the Red Cross, *Resolution XXVI*, XXIst International Conference of the Red Cross (ICRC, Istanbul 1969)

*International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, G.A. Res. 2106A (XX), U.N. GAOR, 660, U.N.T.S. 195, entered into force Jan. 4, 1969,

*International Convention on the Protection of the Rights of Migrant Workers and Members of Their Families*, adopted by GA Res. 45/158 of 18 December 1990, entered into force 1 July 2003

International Law Commission, *Draft Articles of the Responsibility of States for Internationally Wrongful Acts* UN GAOR, 56<sup>th</sup> Session, Supp. No. 10, UN Doc. A/56/10 (2001)

International Law Commission, *Draft Code of Crimes Against the Peace and Security of Mankind*, UN Doc. A/51/10, Supp. No. 10, 1996

*International Covenant on Civil and Political Rights*, GA Res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 UNTS 171

*International Covenant on Economic, Social and Cultural Rights*, G.A. res. 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3 adopted on 16 December 1966

*Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare*, 1925 (Geneva) 17 June 1925, 94 LNTS 65.

*Protocol on Blinding Laser Weapons*, (Protocol IV 1995 to the Conventional Weapons Convention 1980), 35 ILM 1218 (1996).

*Protocol on Non-Detectable Fragments* (Protocol I to the Conventional Weapons Convention 1980), 1342 U.N.T.S 168, 19 ILM 1529, entered into force 2 December 1983

Protocol on Prohibitions or Restrictions on the Use of Incendiary Weapons (Protocol III) Oct. 10, 1980, 1342 U.N.T.S. 171, 19 I.L.M. 1534;

*Protocol on Prohibitions or Restrictions on the Use of Mines, Booby Traps and Other Devices* (Protocol II to the Conventional Weapons Convention 1980), 10 October 1980, 1342 U.N.T.S. 168, 19 I.L.M. amended on 3 May 1996 1125 U.N.T.S. 609, 19 I.L.M. 1206.

*Rome Statute of the International Criminal Court*, UN Doc. A/CONF.183/9 (1998)

United Nations Commission on Human Rights, *Resolution 1996/47*, ESCOR Supp. (No. 3) at 157, U.N. Doc. E/CN.4/1996/47, 1996

United Nations Commission on Human Rights, *Statement of the Chairman*, E/CN.4/1996/177, 24 April 1996

United Nations Commission on Human Rights, E/CN.4/1997/60/Add.1, 23 December 1996

United Nations Commission on Human Rights, *Resolution 1997/59*. ESCOR Supp. (No. 3) at 198, U.N. Doc. E/CN.4/1997/59, 1997

United Nations Commission on Human Rights, *Resolution 1998/67*, ESCOR Supp. (No. 3) at 210, U.N. Doc. E/CN.4/1998/67, 21 April 1998

United Nations Commission on Human Rights, *Resolution 1999/18*, UN Doc. E/CN.4/RES/1999/18, 23 April 1999

United Nations, *General Assembly Resolution 2444 (XXIII), Respect for human rights in armed conflict*, U.N. GAOR, 23rd Sess., Supp. No. 18, at 164, U.N. Doc. A/7433 (1968), adopted in 1798th plenary meeting of 19 December 1968

United Nations, *General Assembly Resolution 2675 (XXV), Basic Principles for the Protection of Civilian Populations in Armed Conflict*, adopted in the 1922<sup>nd</sup> plenary meeting of 9 December 1979

United Nations, *General Assembly Resolution 47/133, Declaration on the Protection of all Persons from Enforced Disappearance*, UN Doc. A/RES/47/133, adopted at the 92nd plenary meeting, 18 December 1992

United Nations, *General Assembly Resolution 60/1, 2005 World Summit Outcome*, UN Doc, A/60/L.1, adopted in the 60th session, 24 October 2005

United Nations, *Security Council Resolution 660 (1990)*, UN Doc.S/RES/660, adopted in 2932<sup>nd</sup> meeting, 2 August 1990

United Nations, *Security Council Resolution 733 (1992)*, UN Doc. S/RES/733, adopted in 3039<sup>th</sup> meeting, 23 January 1992.

United Nations, *Security Council Resolution 794 (1992)*, UN Doc. S/RES/79, adopted in 3145<sup>th</sup> meeting, 3 December 1992

United Nations, *Security Council Resolution 808 (1993)*, UN Doc. S/RES/808, adopted in 3175<sup>th</sup> meeting, 22 February 1993

United Nations, *Security Council Resolution 812 (1993)* UN Doc. S/RES/812, adopted in 3183<sup>rd</sup> meeting, 12 March 1993

United Nations, *Security Council Resolution 864 (1993)*, UN Doc. S/RES/864, adopted in 3208<sup>th</sup> meeting, 6 May 1993

United Nations, *Security Council Resolution 851 (1993)*, UN Doc. S/RES/891, adopted in 3254<sup>th</sup> meeting, 15 July 1993

United Nations, *Security Council Resolution 1193 (1998)* UN Doc. S/RES/1998, adopted in 3921<sup>st</sup> meeting, 28 August 1998

United Nations, *Security Council Resolution 1213*, UN Doc. S/RES/1213, adopted in 3951<sup>st</sup> meeting, 3 December 1998

United Nations, *Security Council Resolution* 1214 (1998), UN Doc. S/RES/1214, adopted in 3952<sup>nd</sup> meeting, 8 December 1998

United Nations, *Security Council Resolution* 1261 (1999), UN Doc. S/RES/1261, adopted in 4037<sup>th</sup> meeting, 25 August 1999

United Nations, *Security Council Resolution* 1314 (2000), UN Doc. S/RES/1314, adopted at the 4185<sup>th</sup> meeting, 11 August 2000

United Nations, *Security Council Resolution* 1325 (2000), UN Doc. S/RES/1325, adopted in 4213<sup>th</sup> meeting, 31 October 2000

United Nations, *Security Council Resolution* 1379 (2001), UN Doc. S/Res/1379, adopted at the 4423<sup>rd</sup> meeting, 20 November 2001

United Nations, *Security Council Resolution* 1422 (2002), UN. Doc. S/RES/1422, adopted in 4572<sup>nd</sup> meeting, 12 July 2002

United Nations, *Security Council Resolution* 1460 (2003), UN Doc. S/RES/1460, adopted unanimously at the 4695<sup>th</sup> meeting, 30 January 2003

United Nations, *Security Council Resolution* 1479 (2003) UN Doc. S/RES/1479, adopted in the 4754<sup>th</sup> meeting, 13 May 2003

United Nations, *Security Council Resolution* 1487 (2003), UN Doc. S/RES/1487, adopted in 4772<sup>nd</sup> meeting, 12 June 2003

United Nations, *Security Council Resolution* 1509 (2003), UN Doc. S/RES/1509, adopted in the 4830<sup>th</sup> meeting, 19 September 2003

United Nations, *Security Council Resolution* 1528 (2004), UN Doc. S/Res/1528, adopted in 4918<sup>th</sup> meeting, 27 February 2004

United Nations, *Security Council Resolution* 1539 (2004), UN Doc. S/RES/1539, adopted unanimously at the 4948<sup>th</sup> meeting, 22 April 2004

United Nations, *Security Council Resolution* 1540 (2004), UN Doc. S/RES/1540, adopted 4956<sup>th</sup> meeting, 28 April 2004

United Nations, *Security Council Resolution* 1612 (2005), UN Doc. S/RES/1612, adopted at the 5235<sup>th</sup> meeting, 26 July 2005

United Nations, *Security Council Resolution* 1674 (2006), UN Doc. S/RES/1674, adopted in 5430<sup>th</sup> meeting, 28 April 2006

United Nations, *Security Council Resolution* 1812 (2008), UN Doc. S/RES/1812, adopted in 5882<sup>nd</sup> meeting, 30 April 2008

*Universal Declaration on Human Rights*, adopted by GA Res. 217 A(III) of 10 December 1948, UN Doc. A/810 1948

*Vienna Convention on the Law of Treaties 1969*, 1155 U.N.T.S 331, 23 May 1969

## **Colombian Domestic Instruments**

*Agreement of Santa Fe de Ralito*, of July 15, 2003, available <[www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm](http://www.altocomisionadoparalapaz.gov.co/acuerdos/index.htm)>

Decree No. 128 of Jan. 22, 2003, O.G. No. 45.073, 24 January 2003

Law No. 171 of 1994

Law No. 522 of 12 August 1999

Law No. 782 of Dec. 23, 2002, O.G. No. 45.043, 23 December 2002

Law No. 975 of 22 July 2005, O.G. No. 45.980, 25 July 2005

Ministry of the Interior and Justice, Decree Number 315 of 7 February 2007 '*Regulating victims' participation in the investigation stage of Justice and Peace Proceedings under Law 975 (2005)*'

## **Ugandan Domestic Instruments**

Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement, Juba, Sudan, 29 June 2007

Amnesty Act, pt. II (2000)), available at <http://www.cr.org/accord/Uganda/accord11/keytext.shtml>

Annex to the Agreement on Accountability and Reconciliation between the Government of the Republic of Uganda and the Lord's Resistance Army/Movement (Annex to June 29 Agreement), Juba, Sudan, June 29 2007, February 19 2008 available at <[www.monitor.co.ug/artman/publish/news/Details\\_of\\_Government\\_LRA\\_agreement.shtml](http://www.monitor.co.ug/artman/publish/news/Details_of_Government_LRA_agreement.shtml)>

Constitution of the Republic of Uganda 1995, available at [www.parliament.go.ug/index.php?option-com\\_wrapper&Itemid=78](http://www.parliament.go.ug/index.php?option-com_wrapper&Itemid=78).



## Reports

Human Rights Council, *Report of the UN Commissioner for Human Rights on the situation of human rights in Colombia*, A/HRC/4/48, 5 March 2007

Human Rights Watch, *War Without Quarter: Colombia and International Humanitarian Law* Human Rights Watch, New York, 1998

Human Rights Watch, *State of Pain: Torture in Uganda* Vol. 16, No. 4(A), March 2004 available at <<http://hrw.org/reports/2004/uganda0404>>

Human Rights Watch, *Policy Paper: The Meaning of "The Interests of Justice" in Article 53 of the Rome Statute* Human Rights Watch, New York, June 2005.

Human Rights Watch, *A Summary of the Case Law of the International Criminal Court* Human Rights Watch, New York, March 2007 available at <<http://hrw.org/backgrounder/ij/icc0307>>

Human Rights Watch Memorandum *Benchmarks for Assessing Possible National Alternatives to International Criminal Court Cases Against LRA*, Human Rights Watch, New York, May 2007 available at <<http://hrw.org/backgrounder/ij/icc0507>>

Human Rights Watch, *World Report 2007* Human Rights Watch, New York, January 2008 available at <http://www.hrw.org/wr2k7/>

Human Rights Watch, *Analysis of the Annex to the June 29 Agreement on Accountability and Reconciliation: Human Rights Watch's Fourth Memorandum on Justice Issues and the Juba Talks* Human Rights Watch, New York, February 2008

International Criminal Court, *Report of the Preparatory Committee on the Establishment of the International Criminal Court*, UN GAOR, 51<sup>st</sup> Sess., Supp. No. 22, para. 155, UN Doc. A/51/22 (1996)

International Criminal Court, Prosecutor of the International Criminal Court, *Seventh Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)*, 5 June 2008, available at <[www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf](http://www.iccnw.org/documents/7thUNSCversionsenttoUN29may.pdf)>

International Criminal Court, *Third Report of the Prosecutor of the International Criminal Court to the United Nations Security Council pursuant to UNSCR 1593 (2005)*, 14 June 2006, available at <[http://www.icc-cpi.int/library/cases/OTP\\_ReportUNSC\\_3-Darfur\\_English.pdf](http://www.icc-cpi.int/library/cases/OTP_ReportUNSC_3-Darfur_English.pdf)>

International Committee of the Red Cross, *Armed Conflicts Linked to the Disintegration of State Structures: Preparatory Document for the First Periodical Meeting on International Humanitarian Law*, ICRC, Geneva, 19-23 January 1998

International Committee of the Red Cross, Special Report, *The Role of a Neutral Intermediary in Colombia 1997-1998*, (ICRC, Geneva, 1998)

Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1983-1984*, OAS Doc. OEA/Ser.L/V/II.63, doc. 10, 24 September 1984

Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights 1996*, OEA/Ser.L/V/II/95, Doc. 7, rev. 14 March 1997

Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights*, 2003, ch. IV, p.19, OEA/Ser.L/V/II.118, Doc. 5 rev. 2, 29 December 2003

Inter-American Commission on Human Rights, *Annual Report of the Inter-American Commission on Human Rights*, OEA/Ser.L/V/II.130, Doc. 22, rev. 1, 29 December 2007

Inter-American Commission on Human Rights, *Consequence of Acts of Violence Perpetrated by Irregular Armed Groups on the Enjoyment of Human Rights*, AG/RES.1043 (XX-0/90) para. 3 reprinted in *Inter-American Yearbook on Human Rights 1990*

Inter-American Commission on Human Rights, *Report on the demobilization process in Colombia*, OAE/Ser.L/V/II.120. Doc. 60. 13 December 2004

Inter-American Commission on Human Rights, *Report on the Implementation of the Justice and Peace Law: Initial Stages in the Demobilization of the AUC and First Judicial Proceedings*. OEA/Ser.L/V/II.129 Doc. 6, October 2, 2007.

Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Colombia*, OEA/Ser.I/V/II.84, 1993

Inter-American Commission on Human Rights, *Third Report on the Situation of Human Rights in Colombia*, OEA/Ser.L/V/II.10, Doc. 9 rev. 1, 25 February 1999 Ch. IV paras. 166-233, 1999

International Center for Transitional Justice, *Forgotten Voices: A Population-Based Survey of Attitudes About Peace and Justice in Northern Uganda*, 15 July 2005, available at [www.ictj.org/images/content/1/2/127.pdf](http://www.ictj.org/images/content/1/2/127.pdf)

International Crisis Group, '*Northern Uganda: Seizing the Opportunity for Peace*', Africa Report, No. 124, April 2007

International Crisis Group, Policy Briefing, '*Colombia: Making Military Progress Pay Off*', Latin America Briefing No. 17, International Crisis Group, Bogotá/Brussels, 29 April 2008

International Council on Human Rights Policy, '*Ends & means: human rights approaches to armed groups – Main Report*', ICHRP, Geneva, 2000

Officer of the United Nations High Commissioner for Human Rights, '*Making Peace Our Own: Victims' Perceptions and Accountability, Reconciliation and Justice in Northern Uganda*', UN 2007, available at <<http://www.reliefweb.int/rw/rwb.nsf/db900sid/AMMF-763G7T?OpenDocument>>

Office of the United Nations High Commissioner for Human Rights, '*Promotion and Protection of Human Rights: Study on human rights and transitional justice activities undertaken by the human rights components of the United Nations system*', UN Doc. E/CN.4/2006/93, 7 February 2006, para. 38.

Report of the High-Level Panel on Threats, Challenges and Change, '*A More Secure World: Our Shared Responsibility*', UN Doc. A/59/565, 2004

Report of the Office of the High Commissioner for Human Rights on the Situation in Colombia, UN Doc. A/HRC/4/48, 5 March 2007

Report of the Preparatory Committee on the Establishment of the International Criminal Court, Volume 1 UN Doc. A/51/22, 13 September 1996

Report of the Secretary-General, '*Minimum Humanitarian Standards: Analytical Report of the Secretary-General*', submitted pursuant to United Nations Commission on Human Rights resolution 1997/21, UN Doc. E/CN.4/1998/87, 1998

Report of the Secretary-General, '*Promotion and Protection of Human Rights: Fundamental Standards of Humanity*', UN Doc. E/CN.4/2006/87, 3 March 2006

Report of the Secretary-General, '*The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies*', S/2004/619, 3 August 2004

Report of the Secretary-General, '*Third Report of United Nations Observer in El Salvador ("ONUSAL")*', A/46/876, S/23580, Human Rights Division, 19 February 1992

Report of the Secretary-General, *Second Report of United Nations Observer in El Salvador* (“ONUSAL”), A/46/658, S/23222, Human Rights Division, 15 November 1991

Report of the Special Representative for Children and armed conflict, Ms. Graça Machel, *Impact of Armed Conflict on Children*, UN Doc. A/51/306 26 August 1996

Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions, Philip Alston; Special Rapporteur on the Right of Everyone to the Enjoyment of the Highest Attainable Standard of Physical and Mental Health, Paul Hunt, UN Doc. E/CN.4/2006/53/Add.5, 27 March 2006

Report of the Special Rapporteur, *Situation of Human Rights in Afghanistan*, UN Doc. A/49/650, 9 November 1994

Report of the Special Rapporteur, *Situation of human rights in Bosnia and Herzegovina, Croatia and the Federal Republic of Yugoslavia* UN Doc. A/53/322, 11 September 1998

Security Council Report, ‘*Update Report No. 4: Protection of Civilians in Armed Conflict*’, 16 November 2007, available at <<http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.3588183/>>

Security Council Report, ‘*Update Report, Uganda/LRA*’ No. 1, 11 April 2008 available at <<http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.4018489/CF6E4FF96FF9%7D/Update%20Report%2016%20June%202008%20Uganda%20LRA.pdf>>

United Nations Commission on Human Rights, *Report by the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, S. Amos Wako, UN Doc. E/CN.4/1983/16, 31 January 1983

United Nations Commission on Human Rights, ESCOR Supp. (No. 4) at 185 E/CN.4/1995/61, 1995

United Nations Commission on Human Rights, *Report of the Special Rapporteur for Sudan*, Gáspár Bíró ESCOR Supp. (No. 3) at 206, U.N. Doc. E/CN.4/1996/62, 1996

United Nations Commission on Human Right, *Report of the Meeting of Special Rapporteurs/Representatives Experts and Chairpersons of Working Groups of the Special Procedures of the Commission on Human Rights and the Advisory Services Programme*, 30 September 1996 E/CN.4/1997/3

United Nations Commission on Human Rights, *Report by the United Nations High Commissioner for Human Rights*, 54th Sess., Agenda Item 3, at 27, U.N. Doc. E/CN.4/1998/16, 1998

United Nations Commission on Human Rights, *Updated Set of Principles for the Protection and Promotion of Human Rights through Action to Combat Impunity*, E/CN.4/2005/102/Add.1, 8 February 2005

United Nations Commission on Human Rights, *Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, GA Res. 60/147, UN Doc. A/RES/60/147 adopted 16 December 2005

United Nations Economic and Social Council, Commission on Human Rights, *Working Group on Enforced or Involuntary Disappearances, Report on the Consequences of Impunity*, UN Doc. E/CN.4/1990/13, 24 January 1990.

United Nations Economic and Social Council, *International Dimensions of Humanitarian Law*, Henry Dunant Institute/UNESCO/Martinus Nijhoff, Dordrecht, 1988

United Nations Economic and Social Council, *Protection of Human Rights in Chile*, UN Doc. A/38/385, 17 October 1983

United Nations High Commissioner for Human Rights, *Report on the Mission Undertaken by Her Office, Pursuant to Commission Resolution 2000/60, to Assess the Situation on the Ground with Regard to the Abduction of Children from Northern Uganda*, UN Doc. E/CN.4/2002/86, 2001

## **Press Releases and Newspaper Articles**

Amnesty International, *International Criminal Court: Possible Arrest Warrants Against Sudanese Officials*, Press Release, 11 July 2008, <<http://www.amnesty.org/en/for-media/press-releases/international-criminal-court-possible-arrest-warrants-against-sudanese-o>>

BBC News (online edition) ‘*UK Politics: New world court to prosecute tyrants*’, 20 July 1998, <[http://news.bbc.co.uk/2/hi/uk\\_news/politics/136084.stm](http://news.bbc.co.uk/2/hi/uk_news/politics/136084.stm)>

BBC News (online edition) ‘*Uganda sets up war crimes court*’, 26 May 2008, <<http://news.bbc.co.uk/2/hi/africa/7420461.stm>>

BBC News (online edition), ‘*Colombia hostage Betancourt freed*’, 3 July 2008, <<http://news.bbc.co.uk/2/hi/americas/7486552.stm>>

BBC News (online edition), ‘*Uribe and Chavez try to heal rift*’, 11 July 2008, <<http://news.bbc.co.uk/2/hi/americas/7502362.stm>>

Conciliation Resources, *Rebuilding relationships to end war in northern Uganda and southern Sudan*, available at <[www.c-r.org/our-work/uganda/index.php](http://www.c-r.org/our-work/uganda/index.php)>

E. Thomson, *ICC prosecutor charges Sudan's Bashir*, Press Release, Reuters (UK) (online addition), 14 July 2008  
<<http://uk.reuters.com/article/worldNews/idUKL1417202620080714?pageNumber=1&virtualBrandChannel=0>>

Financial Times (online addition), *ICC Seeks Bashir War Crimes Arrest*, 14 July 2008, <[http://www.ft.com/cms/s/0/b220d482-5196-11dd-a97c-000077b07658.html?nclick\\_check=1](http://www.ft.com/cms/s/0/b220d482-5196-11dd-a97c-000077b07658.html?nclick_check=1)>

Human Rights First, *Background on the Conflict in Northern Uganda*, available at  
<[http://www.humanrightsfirst.org/international\\_justice/regions/uganda/uganda.htm](http://www.humanrightsfirst.org/international_justice/regions/uganda/uganda.htm)>

International Criminal Court, *Press Release: President of Uganda Refers Situation Concerning the Lord's Resistance Army (LRA) to the ICC*, The Hague, 29 January 2004, <[http://www.icc-cpi.int/pressrelease\\_details&id=16.html](http://www.icc-cpi.int/pressrelease_details&id=16.html)>

International Criminal Court, *Statement by Chief Prosecutor Luis Moreno-Ocampo*, 14 October 2005, <[www.icc-cpi.int/library/organs/otp/Uganda-\\_LMO\\_Speech\\_14102005.pdf](http://www.icc-cpi.int/library/organs/otp/Uganda-_LMO_Speech_14102005.pdf)>

Internal Displacement Monitoring Centre, *1.7 Million IDPs in Northern Uganda*, <[http://www.internal-displacement.org/idmc/website/countries.nsf/\(httpEnvelopes\)/2439C2AC21E16365C125719C004177C7?OpenDocument](http://www.internal-displacement.org/idmc/website/countries.nsf/(httpEnvelopes)/2439C2AC21E16365C125719C004177C7?OpenDocument)>

Landmine Monitor, *'Report: Non-State Actors Working Group'* (2004), <<http://www.icbl.org/lm/2004/icbl/nsa>>

Landmine Monitor, *'Report: Uganda'* (2005) available at  
<<http://www.icbl.org/lm/2005/uganda.html#fnB17>>

McDermott, Jeremy, *'Leader's death harsh blow to Farc'*, BBC News Report (online addition), 25 May 2008, available at  
<<http://news.bbc.co.uk/go/em/fr/-/2/hi/americas/7419578.stm>>

United Nations News Service (online edition), *'ICC Prosecutor seeks charges against Sudanese President for Darfur crimes'*, 14 July 2008  
<<http://www.un.org/apps/news/story.asp?NewsID=27361&Cr=Darfur&Cr1>>

# Table of Cases

## International Bodies

### Human Rights Committee

*Gueye et al v. France*, HRC, Communication No. 196/1985, UN Doc. CCPR/C/35/S/196/1985 (1989)

*Toonen v. Australia*, HRC, Communication No. 488/1992, UN Doc, CCPR/C/50/D/488/1992 (1994)

### International Court of Justice

*Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, Opinion of 8 July 1996, ICJ, 35 ILM 809 (1996)

*Arrest Warrant of 11 April 2000 (Democratic Republic Congo v. Belgium.)*, 2002, ICJ, I.C.J. Rep. 1 (Feb. 14), p. 61

*Corfu Channel (United Kingdom of Great Britain and Northern Ireland v. Albania)*, Merits, ICJ, ICJ Rep (1949) 4

*Federal Republic of German v. Denmark, Federal Republic of Germany v. Netherlands*, 1969, ICJ,, 3 ICJ Rep. (1969)

*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, ICJ Reports 2004, p. 136

*Nicaragua v United States (Military and Paramilitary Activities in and against Nicaragua case)* ICJ Rep 392 June 27, 1986

### International Criminal Court

*Prosecutor v. Thomas Lubanga Dyilo*, ICC, Case No. ICC-01/04-01/06, Decision on Prosecutor's Application for a warrant of arrest, Article 58, 24 February 2006, para. 29

*Situation in the Democratic Republic of Congo*, Decision on the Applications for Participation in the Proceedings of VPRS1, VPRS2, VPRS3, VPRS4, VPRS5, and VPRS6, Case No. ICC-01/04, 17 January 2006,

*Situation in Uganda*, Arrest decisions on warrants of arrest for Joseph Kony, Vincent Otti, Okot Odhiambo, Dominic Ongwen, and Raska Lukwiya, ICC documents ICC-02/04-01/05-53, 13 October 2005; ICC-02/04-01/05-54, 13

October 2005; ICC-02/04-01/05-56, 13 October 2005; ICC-02/04-01/05-57, 13 October 2005; ICC-02/04-01/05-55, 13 October 2005

### **International Criminal Tribunal for Rwanda**

*Prosecutor v. Akayesu*, 2 September 1998, ICTR, Case No. ICTR-96-4-T, Judgement

*Prosecutor v. Kayishema & Ruzindana*, 21 May 1999, ICTR, Case No. ICTR-9-1-A, Judgement

*Prosecutor v. Kupreškić et al.*, 14 January 2000, ICTR, Case No. IT-95-16, Judgement

*Prosecutor v. Musema*, 27 January 2000, ICTR, Case No. ICTR-96-13-T, Judgment and Sentence

*Prosecutor v. Rutaganda*, 6 December 1999, ICTR, Case No. ICTR-96-3-T, Judgement

### **International Criminal Tribunal for the former Yugoslavia**

*Prosecutor v. Delalić, Mucić, Delić and Landžo*, 16 November 1998, ICTY, Case IT-96-21-T, Judgement

*Prosecutor v. Furundžija*, 10 December 1998, ICTY, Case IT-95-17/1-T, Judgement

*Prosecutor v. Hadzihasanovic et al.*, 2003, ICTY, Case No. IT-01-47, Decision On Interlocutory Appeal Challenging Jurisdiction In Relation To Command Responsibility (Appeals Chamber)

*Prosecutor v. Momir Nikolić*, 2 December 2003, ICTY, Case No. IT-02-60/1-S, Sentencing Judgement

*Prosecutor v. Kupreskić*, 14 January 2000, ICTY, Case No. IT-95-16-A, Judgement

*Prosecutor v. Kunarac et al.*, 12 June 2002, ICTY, Case No. IT-96-23/1-A Judgement

*Prosecutor v. Duško Tadić*, 2 October 1995 ICTY, Case No. IT-94-1-AR72, para. 96 (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction)

*Prosecutor v. Duško Tadić*, 7 May 1997, ICTY, Case No. IT-94-1-T, Judgement



## **Nuremberg Trials**

*A-G of the Government of Israel v. Eichmann*, Nuremberg Trials, 36 ILR

## **Special Court for Sierra Leone**

*Prosecutor v. Kallon & Kamara*, 13 March 2004, SCSL, Case Nos. SCSL-2004-15-AR72(E), SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty

*Prosecutor v. Sam Hinga Norman*, Decision of 31 May 2004, SCSL, Case No. SCSL-2004-14-AR72(E), Decision on preliminary Motion Based on Lack of Jurisdiction (Child Recruitment)

## **Regional Human Rights Bodies**

### **African Commission on Human and Peoples' Rights**

*Commission Nationale des Droits de l'Homme et des Libertés v Chad*, 1995, African Commission on Human and Peoples' Rights, Comm. No. 74/92 (1995)

### **European Court on Human Rights**

*Isayeva, Yusupova and Bzayeva v. Russia*, 2005, ECtHR, Application Nos. 57947/00, 57948/00 and 57949/00 available at <http://cmiskp.echr.coe.int/tkp197/portal.asp?sessionId=12168554&skin=hudoc-en&action=request>

*Denmark, Norway, Sweden and Netherlands v. Greece* (1969) Ybk ECtHR at 186

*Republic of Ireland v. United Kingdom* 2 EHRR 25

### **Inter-American Commission and Court on Human Rights**

*Abella v. Argentina* Case 11.137, Report N° 55/97, Inter-Am. C.H.R., OEA/Ser.L/V/II.95 Doc. 7 rev. at 271 (1997)

*Arturo Ribón Ávila*, 30 September 1997, IACHR Report No. 26/97 Case No. 11.142 (Colombia), OEA/Ser.L/V/II.98, Doc. 7, rev. (1998)

*Bámaca Velásquez v Guatemala*, 2000, IACtHR, Judgement, (Ser. C) No. 91 (2002)

*Barrios Altos Case*, IACtHR (Ser. C) No. 75, at 14 (Mar. 14 2001)

*Coard et al. v. United States*, Case 10.951, Report N° 109/99, Inter-American Commission of Human Rights (29 September 29 1999)

*Hilaire, Constantine, Benjamin et al. v. Trinidad and Tobago*, Judgment of 21 June 2002, IACtHR, Series C, No. 94

*Ignacio Ellacuría et al case*, IACommissionHR, Report 136/99 of 22 December 1999

*Mapiripán Massacre v. Colombia*, 2005 IACtHR, H.R. (ser. C) No. 134, P301 (Sept. 15, 2005)

*Velásquez Rodríguez v. Honduras*, 1988, IACtHR, (Ser. C) No. 4

## **Domestic Cases**

### **Colombia**

C-027, 1993, Colombian Constitutional Court Decision

C-225, 1995, Colombian Constitutional Court Decision

C-370/06 (D-6032), 13 July 2007, Colombian Constitutional Court Judgement

### **France**

*Fédération Nationale des Déportés et Internés Résistants et patriots and Others v. Barbie*, 1985, Court of Cassation 78 ILR 124

### **The Netherlands**

*Kouwenhoven*, 7 June 2006, District Court of the Hague, Public Prosecutor's Office Number: 09/7500010-05 (official translation of case)

*Van Anraal*, 9 May 2007, Court of Appeal, the Hague, Rolnummer: 22-000509, Parketnummer: 09-71003-04,

### **United States**

*Hamden v. Rumsfeld*, 2006, United States of America Supreme Court, 548 U.S (2006)

*Kadic v. Karadzic*, 1995, United States Court of Appeal for the Second Circuit, 70 F.3d 232 (2d Cir. 1995)