

**THE UNIVERSITY OF THE WESTERN CAPE**

**FACULTY OF LAW**

**LEGAL PROTECTION OF HUMANITARIAN WORKERS DURING A NON-  
INTERNATIONAL ARMED CONFLICT**

(A research paper submitted in partial fulfilment of the requirement for the LL.M Degree,  
University of the Western Cape)



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## DEDICATION

To my family, I dedicate this work.



## **Acknowledgment**

This work could have not been successfully completed without the assistance, dedication, advice, guidance of my supervisor Prof. Letetia Van Der Poll to whom I would like to address my appreciation and gratitude.

In addition, I would like to extend my thanks to Mrs Marina Talliard and Mrs Denise Snyders of the Law faculty for their assistance in resolving all the administrative matters that I encountered during my curriculum.

A special thanks to my best friend Miss-Bern Bangala for her support and motivation.



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## **ABBREVIATIONS**

<b>DRC</b>	Democratic Republic of Congo
<b>ICRC</b>	International Committee of the Red Cross
<b>ICTR</b>	International Criminal Tribunal for Rwanda
<b>IHL</b>	International Humanitarian Law
<b>MSF</b>	Medecin Sans Frontieres
<b>NGO</b>	Non-governmental Organization
<b>UN</b>	United Nations
<b>US</b>	United States



# CHAPTER I: INTRODUCTION AND BACKGROUND TO THE STUDY

## 1.1 Introduction

Many changes have occurred at the international level following the end of the Cold War.<sup>1</sup> Conflicts no longer take place between States, but rather occur within a territory. From the 1990s, the African continent has known great political and economic change.<sup>2</sup> The wind of democracy has crossed through most African States, but the democratic process has been slow due to governments always looking out for their own interest above the interest of the population, which resulted in diverse operations of mutiny and the formation of rebellion to seize power in the country.<sup>3</sup>

Africa has been undermined by civil wars, which have caused massive and successive violations of Human Rights Law (HRL) and International Humanitarian Law (IHL).<sup>4</sup> These conflicts have created new actors, notably civilians who henceforth do not passively suffer wars, but take part in them. In this context it becomes difficult to respect the regulations relative to the management of conflicts.<sup>5</sup> We therefore have to question the implementation of the rules of IHL in these new types of conflicts.

Conceived and established to limit suffering during an armed conflict, IHL has created different forms of obligations. It provides rules, which in the presence of armed conflict

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<sup>1</sup> For forty-three years, although no war between the superpowers of the United States and the Soviet Union was ever officially declared, the leaders of the democratic West and the Communist East faced off against each other in what is known as the Cold War. The war was not considered “hot” because neither superpower directly attacked the other. These two nations fought overt and covert battles to expand their influence across the globe.

Cold War scholars have devised two conflicting theories to explain what motivated the superpowers to act as they did during the Cold War. One group of scholars argues that the United States and the Soviet Union, along with China, were primarily interested in protecting and advancing their political systems—that is, democracy and communism, respectively. In other words, these scholars postulate that the Cold War was a battle over ideology. Another camp of scholars contends that the superpowers were mainly acting to protect their homelands from aggressors and to defend their interests abroad. These theorists maintain that the Cold War was fought over national self-interest. These opposing theorists have in large measure determined how people understand the Cold War, a conflict that had been a long time in the making.

See Graebner, N. A., *The cold war: ideological conflict or power struggle?* 1963.

<sup>2</sup> Alley, R., *Internal conflict and the international community, Wars Without End?* 2004.

<sup>3</sup> *Ibidem* p. 16.

<sup>4</sup> International humanitarian law: its relevance in contemporary conflict, Annual lecture, SOAS, University of London, address by Angelo Gnaedinger, Director-General of the International Committee of the Red Cross, 2008 on [www.icrc.org](http://www.icrc.org) [accessed on 5 November 2009].

<sup>5</sup> *Ibidem*.



aim to protect persons who do not take part in the conflict,<sup>6</sup> or those who are no longer actively involved in the conflict.<sup>7</sup> Furthermore, it determines both methods and means of making war and allows specific military acts,<sup>8</sup> while providing a safeguard to civilians.<sup>9</sup> However, many parties to the conflicts usually do not act in accordance with IHL provisions. As a consequence, the damage caused is huge in terms of human lives and materials. In this situation, the intervention of humanitarian workers can only be possible in conditions which fall under IHL as it applies to civilians. These workers are confronted by various constraints and difficulties, ranging from verbal threats to physical elimination. Recent reports<sup>10</sup> state that a significant number of humanitarian staff has been killed during both international and non-international armed conflicts. Taking into consideration existing legal instruments granting protection to humanitarian workers, it appears relevant to examine issues related to the legal protection of humanitarian workers in the context of non-international armed conflict.

This research paper focuses on the legal protection of humanitarian workers. It refers to the experience of governmental organizations with a humanitarian vocation, and international humanitarian organizations, such as, the International Committee of the Red Cross (ICRC), active in more than 80 countries. The ICRC was created in order provide assistance and protection to wounded combatants,<sup>11</sup> but its activity has gradually extended to include prisoners of war and civilians,<sup>12</sup> in particular those of occupied

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<sup>6</sup> Such as civilians as well as medical and religious military personnel.

<sup>7</sup> Such as wounded, sick combatant, shipwrecked, and prisoners of war.

<sup>8</sup> See Hampson, F., Military Necessity on [www.crimesofwar.org/thebook/book.html](http://www.crimesofwar.org/thebook/book.html) [accessed on 11 December 2009]

<sup>9</sup> Geneva Convention IV, for the protection of civilian in time of war is one of the four Geneva Conventions adopted in 1949. The Geneva Convention IV defines protection for civilian in a war zone.

<sup>10</sup> See Fatal insecurity attacks on aid workers and rights defenders in Somalia on <http://www.amnesty.org/en/news-and-updates/report/millions-risk-somalia-attacks-aid-workers-escalate> [accessed on 26 January 2009].

<sup>11</sup> The publication in 1862 of "A Memory of Solferino", an eye-witness account of the horrific consequences of a battle between French and Austrian armies in northern Italy three years earlier. The author, a Swiss businessman named Henri Dunant, had been travelling in the region and was shocked by the lack of medical care for the wounded soldiers.

His book, which appeal for the formation of national societies to care for war wounded, led to the creation of the International Committee for the Aid to the Wounded, which later became the [International Committee of the Red Cross](http://www.icrc.org). That in turn led to a diplomatic conference in Geneva in 1864, which adopted the First Geneva Convention for the Amelioration of the Condition of the Wounded in Armies in the Field.

<sup>12</sup> See Geneva Convention III of 1949 relative to the treatment of Prisoners of War and Geneva Convention IV of 1949 relative to the Protection of Civilian in Time of War.

territories.<sup>13</sup> Also Medecin Sans Frontiere (MSF), functioning in more than 70 countries, was established to provide medical assistance to victims of conflicts or natural and other disasters.<sup>14</sup>

## 1.2 Significance of research

The following concepts will help to clarify the topic.

In terms of Additional Protocol II to the Geneva Conventions of 1949,<sup>15</sup> a non-international armed conflict is a conflict in a territory between its armed forces and dissident or organized armed groups under responsible command and controlling a part of the territory.<sup>16</sup>

This distinction between international armed conflict and non-international armed conflict has a consequence for the applicable law. Thus, the applicable rules of IHL will differ according to whether it is an international armed conflict or a non-international armed conflict. The legal protection concerns all measures for the benefit of the person in danger, derived from the applicable international agreements.

The term “humanitarian staff” refers to persons exclusively allocated in a temporary or a permanent way to humanitarian tasks.<sup>17</sup> In practice, they can be found working under the tutelage of a non-governmental organization (NGO), of an international organization, or as civil servants of the United Nations (UN).<sup>18</sup> Humanitarian aid, in the context of armed conflict, is implemented by UN staff, whose legal status varies.<sup>19</sup>

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<sup>13</sup> See Arsever, S., "En 1914, le CICR apprend à protéger les civils" About the ICRC, history on [www.icrc.org](http://www.icrc.org) [accessed on 3 February 2009].

<sup>14</sup> [www.msf.org](http://www.msf.org) [accessed on 20 January 2009].

<sup>15</sup> Additional Protocol II to the Geneva Conventions of 12 August 1949, related to the Protection of Victims of Non-International Armed Conflicts. See ICRC Advisory Service on IHL Additional Protocols to the Geneva Conventions of 1949 (2001) ICRC (Geneva).

<sup>16</sup> Art 1 of 1977 Additional Protocol II.

<sup>17</sup> See Report of the task force on protection from sexual exploitation and abuse in humanitarian crises on [www.reliefweb.int/library/documents/2002/iasc-report-2002.doc](http://www.reliefweb.int/library/documents/2002/iasc-report-2002.doc) [accessed on 10 December 2009]

<sup>18</sup> Here it is about humanitarian organs specialized the UN, local humanitarian NGO, international humanitarian organizations and humanitarian organization of the European Union (ECHO).

<sup>19</sup>See ST/SGB/2009/6 Secretary-General's Bulletin Staff regulations, New York 27 May 2009

The legal protection of humanitarian staff is established in international law on the fundamental principle according to which it is always necessary to establish a distinction between combatants and non-combatants. The former are defined by Additional Protocol I to the Geneva Conventions of 1949 as being “the members of the armed forces of a party to a conflict.”<sup>20</sup> The non-combatants, on the other hand, constitute a category called “the protected persons.”<sup>21</sup> These include civilians as well as wounded combatants who, for whatever reason<sup>22</sup>, no longer actively participate in the hostilities.

Substantial efforts are made to guarantee the protection of humanitarian workers or related staff. The main instruments, which constitute the core of IHL, are the four Geneva Conventions of 1949, the two Additional Protocols of 1977 and the Additional Protocol relating to the ICRC emblem of 2005. In addition, another useful instrument for the protection of humanitarian workers is the Convention of the UN of 1994.<sup>23</sup> Apart from these instruments, it is necessary to mention that there are other methods of protection in existence, such as, humanitarian zones,<sup>24</sup> but there is also a possibility for prosecution and for compensation, as stipulated in national and international texts.<sup>25</sup>

Despite these measures of protection, humanitarian workers are continuously targeted during non-international armed conflicts. Recent information<sup>26</sup> shows that the last few years have been particularly fatal for all active humanitarian workers involved in different regions subjected to armed conflicts. Humanitarian staff are regularly kidnapped

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<sup>20</sup> Art 43(2) Protocol Additional I of 1977.

<sup>21</sup> See definition of protected person Art 4 Geneva Convention IV of 1949.

<sup>22</sup> Because these combatants were wounded, captured, had surrendered or joined permanently the civilian population.

<sup>23</sup> Convention on the Safety of the United Nations and Associated Personnel of 1994

<sup>24</sup> Humanitarian zone can be understood as” a place designed to protect and through which impartiality and non-partisanship govern the whole of humanitarian activities”. See Yamashita, H., Humanitarian space and international politics: the creation of safe areas, 2004.

<sup>25</sup> See Articles 5 and 79 of the Statute of the International Criminal Court of 1998; See United Nation Compensation Commission of 1991; See Eritrea-Ethiopia claims commissions of 2000; Belgian War Crime Law of 1993.

<sup>26</sup> See Safety and Security of Humanitarian Personnel and Protection of United Nations Personnel (A/61/463) UN General Assembly, Sep 2006; see providing aid in insecure environments: trends in policy and operations, ODI Humanitarian Policy Group briefing paper 4, Sep 2006.

and killed. From 1 July 2007 to 30 June 2008, 25 humanitarian workers were killed and 19 were reported as missing from around the world.<sup>27</sup>

A more shocking development regarding these tragedies concerns the deliberate killing of humanitarian workers despite the mandate of various missions and the presence of their staff members. Humanitarian activists are still exposed when they are confronted with wars while the perpetrators are not arrested and punished for their criminal acts. The continued occurrence of these fatal incidents causes anxiety to any potential candidate attracted by a humanitarian career; the question therefore needs to be posed: are the texts protecting humanitarian workers still effective and relevant, taking into consideration the evolution of the nature of the conflicts? Conflicts are no longer between states but within a state; non-international armed conflicts.

Having regard to this question, this research paper will explore whether existing legal instruments are adapted to non-international armed conflicts. Non-international armed conflicts are positioning multiple rival factions against each other, having divergent and contradictory objectives and these are under chains of command. The same question applies to the emergence of new armed faction actors, militia and rebels.

Although Common Article 3 of the four Geneva Conventions of 1949 as well as Additional Protocol II of 1977 require all parties involved in a conflict to comply with the rules of IHL. Yet a question remains unanswered: how could these groups effectively be bound to treaties of which they may not part.<sup>28</sup>

### **1.3 Objectives**

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<sup>27</sup> Safety and security of humanitarian personnel and protection of United Nations personnel - report of the Secretary-General (a/63/305) [www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7JZQEN?OpenDocument](http://www.reliefweb.int/rw/rwb.nsf/db900SID/EGUA-7JZQEN?OpenDocument) [accessed on 20 December 2008].

<sup>28</sup> The Additional Protocol II of 1977 applies to all actors in a non-international armed conflict. The Protocol understates under article 1(1) that the convention applies to group that have a clear organizational hierarchy that unable leader to control subordinates. But often states see the rise of irregular and disorganized combatant which do not have a clearly defined political goal or control of the territory.

The main objective of this research paper is to verify that the legal mechanisms provided for the protection of humanitarian staff are unsuitable, and are not capable of guaranteeing their safety any more in light of the current evolution of the nature of armed conflicts. Secondly, the study seeks to show that new actors to the conflict (i. e. militias)<sup>29</sup> living in miserable conditions have no respect for the core principle of IHL which states that the persons rendering help should not be subject to attack. On a personal level, a critical study of the legal protection of the humanitarian worker is of an unquestionable advantage to those rendering the assistance.

#### **1.4 Scope of research**

The research will delimit its investigation to the African continent, more particularly, to Sub-Saharan Africa. This part of the continent has experienced numerous non-international armed conflicts, which have led to serious violations of the IHL principle which is the distinction between combatants taking part in the conflict and civilians who do not take part in the conflict and are therefore protected. This has been the case in Rwanda and is still the case in the Democratic Republic of Congo.



#### **1.5 Research methodology**

Data for this study was collected by analysing various sources of information from international texts and conventions relating to the legal protection of humanitarian workers. The sources included reports, articles and books published by non-governmental and humanitarian organizations. Also, internet web sites were consulted.

#### **1.6 Structure of the research paper**

This work is organized into two parts: the first part (chapter 2 and chapter 3), presents the various legal instruments, which deal with the protection of humanitarian workers.

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<sup>29</sup> Militias were initially auxiliary or reserve military force trained to protect their country. Now militias emerge to protect and serve a variety of interest, often not established by government or state. Militias lack legal or constitutional mandate, develop on their own taking predatory instinct and government end up not being in control.

The second part (chapter 4 and chapter 5), which is primarily analytical, shows the relative character of the effectiveness of the protection in practice.



## CHAPTER II: STANDARDS AND MODALITIES OF THE PROTECTION

### 2.1. Introduction

The existence of rules on humanitarian worker protection is a known fact. Since the adoption of the four Geneva Conventions of 1949 and the two Additional Protocols of 1977, several other international texts have supported this concern, the violation of which could entail penal liability and victim compensation.<sup>30</sup>

The safety risks to which staff members of the various humanitarian organizations are exposed have increased over the last few years.<sup>31</sup> That is why the question of their protection has become a major concern on a national, as well as at the international level. At the international level treaties have been established with the intend to legalise this protection. In addition to these treaties, some modalities have been laid down to guarantee increased safety to these devoted workers. These will be considered next.

### 2.2. Standards of protection for humanitarian staff

Various international texts determine the protection of humanitarian staff in the context of armed conflict. It is useful to understand that the texts organising legal protection of humanitarian missions have legal force, and as many IHL provisions, these international texts are customary law to which all states are bound.

#### 2.2.1. Principles of International Humanitarian Law (IHL)

A fundamental principle of IHL calls for a distinction between combatants and non-combatants. This distinction constitutes the basis of the legal protection accorded to the staff of humanitarian organizations.<sup>32</sup> This protection is of a general nature by virtue of the four Geneva Conventions of 1949. However, besides the general protection that these

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<sup>30</sup> See supra note 25, p 4.

<sup>31</sup> See report of the Secretary-General (a/63/305) op.cit.; see supra note 26, p 4.

<sup>32</sup> Green C.L., *The contemporary law of armed conflict*, 2000, p 230.

Conventions confer, they also contain specific protective measures defined for certain organizations. These relate to the use of the emblem,<sup>33</sup> as well as the UN ban on, and limitation of the use of, certain weapons.<sup>34</sup>

### **2.2.1.1. The four Geneva Conventions and the two Additional Protocols**

The international fundamental measures of IHL have a universal and compulsory character.<sup>35</sup> The situations of non-international armed conflicts are governed by the application of Common Article 3 to the four Geneva Conventions of 1949. It abounds the minimum of applicable rules in the context of a conflict not of an international character. Persons who do not participate in the conflict and their properties must be respected and protected against the effects of military operations. It is prohibited to attack their life, health, and physical and mental integrity. It is necessary to note that the provisions of this Article establish only the minimum rules that parties to the conflict should observe.

To this end, Common Article 3 stipulates:

*“Each Party in the conflict shall be bound to apply, as a minimum, the following provisions.”*<sup>36</sup>

The same Article furthermore allows humanitarian organs to offer their services to the parties in the conflict. The protection provided by IHL and the Geneva Conventions of 1949 is vast. In a general way, it protects the needs of all civilians not participating in the conflict. The provisions protect numerous humanitarian agencies and NGOs in the context of non-international armed conflicts.

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<sup>33</sup> See ICRC Advisory Service on IHL The Protection of The Red Cross/ Red Crescent Emblems (2001) ICRC (Geneva).

<sup>34</sup> Resolution 22, on follow up regarding prohibitions or restrictions of use of certain conventional weapon adopted by the diplomatic conference on 7 June 1977.

<sup>35</sup> Adopted in 1949, the Four Conventions;

I. Wounded and sick in the field

II. Wounded and sick and shipwrecked at sea

III. Prisoners of War

IV. Civilians, this one is a consequence of the treatment of civilians during World War II

<sup>36</sup> See the first paragraph of Common Article 3 to the Geneva Conventions IV of 1949.



### 2.2.1.2. The use of the particular emblem of certain organizations

The question here concerns the emblem of the ICRC, the emblem used by a certain organization to distinguish it from others, as well as applicable logos.

Originally since the 19<sup>th</sup> century the ICRC used two emblems. In 2005 a third emblem was added and formally incorporated in 2006.<sup>37</sup> Now the ICRC has the Red Cross, Red Crescent and the Red Crystal emblems which all have equal status.<sup>38</sup>

Established by the first and the second Geneva Conventions of 1949, the protection, which an emblem confers, has a limited field of application. It is only reserved for categories clearly defined by these treaties. Included are medical and religious staff,<sup>39</sup> medical units of armed forces,<sup>40</sup> as well as civilian medical means of transportation, such as ambulances.<sup>41</sup> Staff not connected with the ICRC do not benefit from the right of use of the emblem. It is in this sense that Additional Protocol II provides that:

*“Under the direction of the competent authority, the distinctive emblem of the red cross, red crescent or red lion and sun on a white ground shall be displayed by medical and religious personnel and medical units, on medical transports. It shall be respected in all circumstances. It shall not be used improperly.”*<sup>42</sup>

The use of the emblem is subject to a very strict legal regime. It is the very visible sign, which allows the identification of the staff using it.

The use of the emblem without express authorization of the law constitutes an abuse, and at the same time, a war crime in terms of IHL.<sup>43</sup> The reproductions, as well as the

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<sup>37</sup> See Additional Protocol III relating to the adoption of an additional Distinctive Emblem, 8 December 2005.

<sup>38</sup> Article 2(1) of the Additional Protocol III of 2005

<sup>39</sup> Article 40 of the Geneva Convention I of 1949.

<sup>40</sup> Article 42 of the Geneva Convention II of 1949.

<sup>41</sup> See Chapter VII, Geneva Convention I.; see Chapter VI Geneva Convention II

<sup>42</sup> Article 12 of the Additional Protocol II of 1977.

<sup>43</sup> Green C.L., op. cit. p 227; see Article 44 of the Geneva Convention I of 1949; see Article 44 of the Geneva Convention II of 1949, see Article 12 of the Additional Protocol II of 1977; see Article 6 of the Additional Protocol III of 2005.

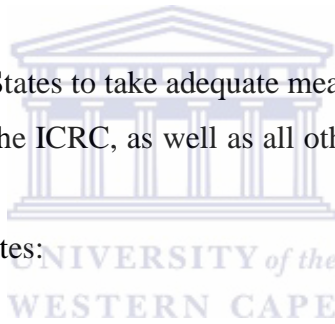
dubious use of the emblem, also constitute an abuse. For that purpose, the parties to the Geneva Conventions of 1949 in the implementation of IHL made a commitment to adopt in their national legislation measures prohibiting the excessive use of the emblem, both in peacetime as well as in a situation of armed conflict.<sup>44</sup>

Besides the emblems of the Red Cross, Red Crescent and Red Crystal, another emblem whose use is also regulated is the emblem or logo of the staff of the UN.<sup>45</sup> Certainly it is not as strongly regulated as the three discussed above, but the fact remains that it is exclusively reserved for use only by staff of the UN.

### **2.2.1.3. Protocol II of the UN Convention of 10 October 1980 on the Prohibition or Restriction on the use of Certain Conventional Weapons<sup>46</sup>**

Article 8 of this Protocol asks States to take adequate measures to assure the protection of humanitarian staff of the UN, the ICRC, as well as all other humanitarian bodies, against the effects of mines.<sup>47</sup>

To this end, Article 8(2) stipulates:



*“When a United Nations fact-finding mission performs functions in any area, any party to the conflict concerned shall provide protection to that mission”<sup>48</sup>*

This stipulation distances itself from the conventional standards of the four Geneva Conventions. Contrary to the four Geneva Conventions in term of which staff of

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<sup>44</sup> Article 45 of the Geneva Convention II of 1949.

<sup>45</sup>The UN emblem consists on “a map of the world representing an azimuthal equidistant projection centred on the North Pole, inscribed in a wreath consisting of crossed conventionalized branches of the olive tree, in gold on a field of smoke-blue with all water areas in white. The projection of the map extends to 60 degrees south latitude, and includes five concentric circles.”

UN emblem was approved on 7 December 1946

<sup>46</sup> Protocol II on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices revised on 3 May 1996, prohibits the use of non-detectable anti-personnel mines and their transfer; prohibits the use of non-self-destructing and non-self-deactivating mines outside fenced, monitored and marked areas.

<sup>47</sup> Article 8 of Protocol II of 1980 related to the UN Convention on Certain Conventional Weapons.

<sup>48</sup> Ibidem Article 8(2).

humanitarian organization enjoys the general protection due to civilians, this agreement grants explicit protection.<sup>49</sup>

Thus every party to a non-international armed conflict has the obligation to protect humanitarian staff, in any zone placed under its control, against the effects of mines, traps and other devices.<sup>50</sup> The importance of this text is the fact that it protects humanitarian organization staff due to their status as humanitarian workers and not as member of a civil population not directly participating in the hostilities.

Besides the four Geneva Conventions and the UN Convention, which provide for the protection of humanitarian staff, there are also other measures to strengthen this protection.

### **2.2.2. Other protective measures**

Besides the protection conferred by the provisions of the Geneva Conventions of 1949 and the UN Convention of 1980, humanitarian staff also benefit from protective measures in terms of, the statute of the International Criminal Court of 1998<sup>51</sup>; Convention on the Safety of United Nation and Associated Personnel of 1994<sup>52</sup>; and Resolutions adopted by the Security Council and the General Assembly of the UN.<sup>53</sup>

#### **2.2.2.1. The Statute of the International Criminal Court**

On 17 July 1998, the Rome Statute of the International Criminal Court declared the following to constitute a war crime and be liable to punishment by the International Criminal Court:

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<sup>49</sup> Kalshoven F. and Zegveld L., *Constraints on the waging of war, an introduction to International Humanitarian Law*, 2001, p162, see also ICRC Advisory Service on IHL , Adherence to the 1980 UN Convention on Certain Conventional Weapons (2001) ICRC(Geneva).

<sup>50</sup> Kalshoven, Ibidem.

<sup>51</sup> Rome Statute of the International Criminal Court of 17 July 1998, the Statute entered into force on 1 July 2002.

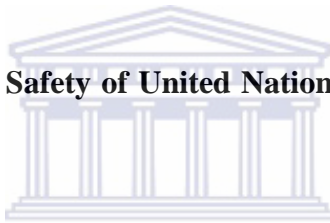
<sup>52</sup> See para 2.2.2.2.

<sup>53</sup> See para 2.2.2.3.

*“Intentionally directing attacks against personnel, installations, material, unit or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the charter of the United Nations.”*<sup>54</sup> This provision specifically mentions *“as long as they are entitled to the protection given to civilians or civilian object under the international law of armed conflict.”*<sup>55</sup>

The Statute of the International Criminal Court protects humanitarian staff as well as their properties in a clear and explicit way in the context of armed conflict, international and non-international alike. Such is the sense of paragraph 2(f) of the same Article which provides that it applies to protracted armed conflicts within the territory of a State between the government of this State and organized armed groups or organized armed groups between themselves.<sup>56</sup>

#### **2.2.2.2. Convention on the Safety of United Nations and Associated Personnel of 1994**



Adopted on 9 December 1994 by the General Assembly of the UN, this Convention is a response to the complex problems connected with the question of the safety of the staff of the UN in a war context. It specifies as an offence all acts of violence committed against the staff of the UN<sup>57</sup> and establishes a legal framework, giving to States the power to punish any attack committed against the staff of the UN or against associated staff. This Convention speaks explicitly about crimes, such as, murder,<sup>58</sup> kidnapping,<sup>59</sup> and attacks against official buildings,<sup>60</sup> and it expresses the appropriate penalties.<sup>61</sup>

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<sup>54</sup> Art 8(2)(e)(iii) of the Statute of the International Criminal Court of 1998.

<sup>55</sup> Ibidem.

<sup>56</sup> Art 8(2)(f) of the Statute of the International Criminal Court of 1998. See Roberts A. and Guelff R., *Document on the laws of war*, 2000, p675-680.

<sup>57</sup> Art 2 of the Convention on the Safety of United Nations and Associated Personnel of 1994.

<sup>58</sup> Art 9(1)(a) of the Convention on Safety of United Nations and Associated Personnel of 1994.

<sup>59</sup> Ibidem.

<sup>60</sup> Art 9(1)(b) of the Convention on Safety of United Nations and Associated Personnel of 1994.

<sup>61</sup> Art 9(2) of the Convention on Safety of United Nations and Associated Personnel of 1994.

The associated personnel in terms of this Convention are the personnel allocated to a UN mission. Its application remains limited only to the staff acting under the aegis of the UN, as well as to the organs associated with a UN mission.<sup>62</sup> Similar to the Geneva Conventions of 1949 as well as the Additional Protocols of 1977, the agreement on the protection of UN staff engages all States, which ratified it. This Convention does not, however, apply to all intervention operations of UN staff.<sup>63</sup> That is why New Zealand and Canada supported the recommendation of the Secretary General concerning the inclusion of a Protocol in the Convention, which would provide for an automatic mechanism of implementation and which would include a vaster range of UN operations than those covered under present provisions.<sup>64</sup>

### **2.2.2.3. Resolutions of the Security Council and the General Assembly of the United Nations**

The question relating to the safety of humanitarian staff as well as the staff of the UN and associates has been at the centre of several Resolutions<sup>65</sup> of the UN. Here I will limit myself to commenting on some Resolutions, which I consider particularly relevant to the framework of my research paper. Of particular interest is Resolution 1502 adopted by the Security Council of the UN in its 481st session on 26 August 2003,<sup>66</sup> in which the question of the protection of the staff of humanitarian organizations was raised. In this Resolution the Security Council calls on the responsibility of States regarding the question of the safety of these organizations. It is the duty of States to provide for the safety of the humanitarian staff in a war context. Similarly States have the obligation to pursue and to punish the authors of attacks that have targeted humanitarian staff of the UN or any other organization with a humanitarian vocation.

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<sup>62</sup> Roberts, op. cit. p625.

<sup>63</sup> Ibidem p. 625-626.

<sup>64</sup> 58<sup>th</sup> session of the General Assembly, on the legal protection offered by the Convention on the Safety of United Nations and Associated Personnel, New York, on October 23rd, 2000.

<sup>65</sup> Grapiditzky, T., "La responsabilité pénale individuelle pour violation du droit international humanitaire", in *RICR*, mars 1998, n°829, pp.29-57.

<sup>66</sup> Security Council Resolution 1502 on protection of humanitarian personnel and the UN and its associated personnel in conflict zones of 26 August 2003.

Several other Resolutions were adopted on the question of the safety of humanitarian staff, but contrary to the previous ones, those were adopted within the framework of the General Assembly. One of these is Resolution 57/28,<sup>67</sup> that acknowledges that the staff of the UN more than ever are the object of targeted attacks during their missions. The Resolution thus calls for more commitment on the part of the international community to ensure the safety of these workers and to punish the perpetrators of such acts. It repeats the responsibility of States as regards the safety of the humanitarian staff. That is why this Resolution requires greater participation by them as well as a real commitment in terms of the security aspect of humanitarian missions.

The same applies in respect of Resolution 57/155 adopted by the General Assembly,<sup>68</sup> which prescribes that it is the duty of the Security Council to watch over the safety of the humanitarian staff and all those who participate directly or indirectly to the execution of an operation decided by the Security Council.

Contrary to Resolutions adopted by the Security Council which have a compulsory value, those adopted within the framework of the General Assembly are mere recommendations which have declarative value. From this point of view, no lawsuit can be instituted against an individual on the basis of a Resolution adopted by the General Assembly, since these are just recommendations in support of the international conventional standards reflected in the four Geneva Conventions of 1949 as well as other texts protecting individuals in a war context.

### **2.3. The modalities of protection**

The environment in which the staff of the humanitarian organizations intervenes exposes them to numerous risks connected to the context in which their missions take place. It

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<sup>67</sup>UN, General Assembly, resolution 55/28, “reach on the legal protection offered by the Convention on the Safety of United Nations and Associated Personnel” adopted on December 19th, 2000 [www.un.org](http://www.un.org) [accessed on January, 15, 2009].

<sup>68</sup> UN, General Assembly, resolution 57/155, “The Safety of the humanitarian staff and the protection of UN staff” adopted on 14 September, 1999.

thus goes without saying that humanitarian aid takes place almost always in contexts that are abnormal and coercive.<sup>69</sup>

### **2.3.1. The humanitarian zone of operations**

The humanitarian workers on the field provide the local populations with a remarkable service, which has costs the lives of many of them.

#### **2.3.1.1. Creation of humanitarian zones**

Considered as a modality of protection, humanitarian corridors were created by the General Assembly of the UN by Resolution 45/100 adopted on 14 December 1990.<sup>70</sup> These corridors are in principle shielded from any military objective. In a practical way, humanitarian corridors are set up to extract the civilian populations from the dangers connected to war. Humanitarian corridors thus also guarantee an increase of security to humanitarian staff. These spaces, bounded and protected by armed forces, allow the missions of humanitarian aid to be shielded from all forms of attack, and are real "humanitarian free zones".<sup>71</sup>

However, it is necessary to realise that the humanitarian corridors in practice paradoxically raise a number of problems connected to the question of security.<sup>72</sup>

#### **2.3.1.2. The paradox of humanitarian zones**

The humanitarian zones, instead of serving as corridors of security, might be increasingly more considered to be corridors of death, as was observed in Goma, in South Kivu,

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<sup>69</sup> Holzgrefe, j.l., *Humanitarian intervention, ethical, legal, and political dilemmas*, 2003, p15-18

He describe the context in which took place the genocide in Rwanda before defining the humanitarian intervention.

<sup>70</sup> Contrary to resolution 688 of the Security Council adopted on 05 April 1994 in which the S.C. asks insistently to Iraq to allow an access of the humanitarian organizations to all those who need assistance in all Iraq.

<sup>71</sup> Report of the Secretary General (a/63/305) op. cit.

<sup>72</sup> See Report of the Secretary General on security in Rwandese camps, Security Council S/1994/1308 of 18 November 1994.

DRC.<sup>73</sup> These zones still are not capable of guaranteeing the safety of humanitarian workers. Indeed, it was noticed that the humanitarian assistance brought into these camps indeed allowed various belligerents to strengthen the influence of their power over the civilians. Similar was the case in Rwanda, where the military harassed humanitarian workers and populations inside these zones.<sup>74</sup> NGO humanitarian workers were blamed for carrying a share of the responsibility for the Rwandan genocide in the sense that, in the name of humanitarian assistance, they actually contributed to the harm suffered by the civilian population.<sup>75</sup>

The realities in the field showed that humanitarian zones at the same time sheltered both the victims of war and their executioners.<sup>76</sup> The cases of the DRC and Rwanda are indeed shocking illustrative examples. In Rwanda in 1994, among the civilians who lived in humanitarian camps were also the instigators of genocide, notably the various armed groups and militias.<sup>77</sup> Then, in the name of the principles of non-discrimination and humanity, humanitarian staff brought aid to these war criminals as well as to the victims of the conflict.<sup>78</sup> So, in a paradoxical and shocking manner, the humanitarian workers found themselves in the middle of, and “thus participating in”, the conflict. The humanitarian zones in Rwanda had in fact become the strategic zones where organized reprisals by armed factions took place. It was also the case with the "operation

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<sup>73</sup> Ibidem.

<sup>74</sup> Brauman, R., “ Les dilemmes de l'action humanitaire dans les camps de réfugiés et les transferts de population” , 1999, pp 233-256.

<sup>75</sup> Brauman, op. cit. p 257.

<sup>76</sup> Report of the Secretary General S/1994/1308 op.cit.

<sup>77</sup> Ibidem,

<sup>78</sup> Holzgrefe, JL.; Keohane, O., *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge University Press, 2003, p 25-28.; see Harris, J., *The Politics of Humanitarian Intervention*, London: Pinter in association with Save the Children Fund and the Centre for Global Governance , 1995, p 57.

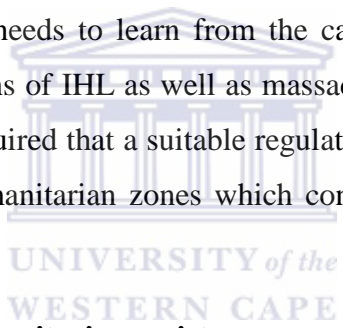


turquoise”<sup>79</sup> which resulted in the creation of the said zones (safe humanitarian zones) within which the massacres of Tutsis and Hutus continued.<sup>80</sup>

As part of its nature and principles, humanitarian assistance certainly must be impartial and may not discriminate.<sup>81</sup> But it would be completely understandable to transcend these principles when this assistance is brought to the militias, which commit atrocities against civilians.

Humanitarian zones in Rwanda have served largely as places of rest for militias as well as the organizers of genocide.<sup>82</sup> These latter took refuge within such zones to better prepare their fighting strategies. It was difficult to establish a distinction between them and the refugee and civilian populations to whom the humanitarian workers were responsible to provide aid.

The international community needs to learn from the cases of Goma in the DRC and Rwanda where severe violations of IHL as well as massacres took place in humanitarian corridors.<sup>83</sup> Therefore, it is required that a suitable regulation be introduced on the access and management of these humanitarian zones which constitute a practical and popular modality of protection.



### **2.3.2 Military support of humanitarian assistance**

The question arises whether professionals trained for war (the military) can be suitable to lead a humanitarian convoy as the notions of humanitarian work and military force are fundamentally opposite.<sup>84</sup> Nobody would, however, dispute the positive effects of a military-humanitarian fusion in the success of the conservation of numerous lives. The

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<sup>79</sup>Turquoise operation was a military operation organised by France in Rwanda at the end of the Rwandan genocide. The turquoise operation was appointed by the Security Council Resolution 929 of 23 June 1994 under chapter VII of the UN Charter and ended on 21 August 1994. Mandate to the protection and security of refugees, displaced persons and civilians in danger in Rwanda. The security zone of the “operation turquoise” was a triangle between Cyanguu, Kibuye and Gikongoro in south-west of Rwanda and served as a shelter to people.

<sup>80</sup> Ryfman, P., *la question humanitaire : histoire, problématique et enjeux de l'aide humanitaire internationale*, 1999, p.17.

<sup>81</sup> Harriss, J., *op.cit.*, p 8.

<sup>82</sup> *Ibidem* Report of the Secretary General S/1994/1308.

<sup>83</sup> MSF report on Events in Kibeho camp, April 1995 in [www.msf.fr](http://www.msf.fr) [accessed on 24 July 2009].

<sup>84</sup> Studer, M., “The ICRC and civil-military relations in armed conflict”, *IRRC* No. 842, p. 367-391.

example of Rwanda is a case in point. Certain NGOs, when overwhelmed by the massive and repeated violations of IHL during a conflict, tend to appeal for military intervention and protection when the context becomes decidedly perilous.<sup>85</sup>

The protection of humanitarian staff in term of various international texts and Resolutions of UN is a reality. These humanitarian workers are specifically protected in non-international armed conflicts. Certainly the conventional texts governing the situations of non-international armed conflict are less elaborate than the texts governing the wars between States, but there are other legal instruments which complete or strengthen existing measures in the situations of non-international armed conflict.

Besides, it is also necessary to underline that, although these humanitarian workers pursue the same objective which is to limit the damage caused by war, they are not all subject to a legal regime of unique protection. It has been established within the framework of this chapter that although humanitarian workers all enjoy general protection by virtue of the four Geneva Conventions of 1949, certain organizations benefit in a particular way from other measures of appropriate protection adopted for their particular institution. But the fact remains that IHL grants appropriate protection to agents devoted to alleviating human suffering and that they are protected by clearly defined international treaties.

It is in this sense that every offender against these measures, who would be engaged in prohibited acts against humanitarian staff, violates long established principles of IHL.

In the next chapter, the protection of humanitarian staff will be considered in closer detail.

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<sup>85</sup> Report of the Secretary General S/1994/1308 op.cit.

## **CHAPTER III: PROTECTION OF HUMANITARIAN STAFF**

### **3.1 Introduction**

The commission of grave crimes committed under Common Article 3 to the four Geneva Conventions of 1949 and Additional Protocol II of 1977 is prosecuted at two level, namely at the international level by means of international jurisdiction and at the national level.

### **3.2 Prosecution of offences**

#### **3.2.1 Conditions for prosecution**

As far as IHL is concerned, every person responsible for the violation of the provisions of the four Geneva Conventions of 1949 must be pursued and punished. One can be prosecuted at either the national or international level, but the rules of criminal law require that certain conditions must be complied with.

##### **3.2.1.1. The material element of the offence**

The material element can be either a commission or an omission, and varies according to the offence. Indeed, the classification and the incrimination in criminal law are based on material mode of execution of every offence.

In terms of Common Article 3 to the four Geneva Conventions of 1949,<sup>86</sup> Article 4 of Additional Protocol II of 1977,<sup>87</sup> as well as article 8(2)(b)(iii) of the Statute of the

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<sup>86</sup> “Common Article 3:

In the 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:

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

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

International Criminal Court of 17 July 1998,<sup>88</sup> it is forbidden to carry out certain acts against humanitarian staff or “protected persons”. Acts of plunder, torture, the infringement of the dignity of a person, such as, humiliating and degrading treatment, and rape constitute war crimes in terms of the four Geneva Conventions of 1949<sup>89</sup> and the statute of the International Criminal Court of 1998.<sup>90</sup>

### 3.2.1.2. The legal element of the offence

Furthermore, Article 8 of the Statute of the International Criminal Court of 1998 qualifies as war crimes deliberate attacks against staff, installations, equipment or vehicles used within the framework of a mission for humanitarian aid or preservation of the peace. In terms of this Article, attacks against humanitarian workers in contravention of this Statute, qualify as war crimes and can be prosecuted in the aforementioned Court. Similarly Common Article 3 to the four Geneva Conventions of 1949 forbids any infringement against humanitarian staff.

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- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
  - (b) taking of hostages;
  - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
  - (d) the passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

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

An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.

The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.

The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.”

<sup>87</sup> “Article 4 Fundamental guarantees

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors...”

<sup>88</sup> “ (b) Other serious violations of the laws and customs applicable in international armed conflict, within the established framework of international law, namely, any of the following acts:  
(i) Intentionally directing attacks against the civilian population as such or against individual civilians not taking direct part in hostilities;  
(ii) Intentionally directing attacks against civilian objects, that is, objects which are not military objectives;  
(iii) Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict”

<sup>89</sup> See common Article 3(1)(c).

<sup>90</sup> See para 3.2.1.2.

### **3.2.2 Implementation of the prosecution of crimes committed against humanitarian staff**

As is the case for any offence under IHL, crimes against humanitarian staff are also punished in the context of a non-international armed conflict. The Prosecution is assured both at the international level by the International Criminal Court and at the national level by national jurisdiction.<sup>91</sup> I will focus only on the international context in this research paper.

Crimes committed against humanitarian staff constitute grave offences against international law, which applies to the whole of humanity. Crimes incorporated within the framework of international penal justice and integrated into the area of competence of international authorities, including ad hoc tribunals, which can also adjudicate these war crimes in terms of their mandates. It is necessary to note that these authorities have both temporal<sup>92</sup> and territorial competences<sup>93</sup> limited to precise conflicts.<sup>94</sup>

#### **3.2.2.1. Competence of the International Criminal Court**

The International Criminal Court is competent to determine crimes of genocide,<sup>95</sup> crimes against humanity,<sup>96</sup> war crimes<sup>97</sup> and crimes of aggression,<sup>98</sup> provided that these crimes are committed in the territory of a State Party to the Statute or by a national of a State

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<sup>91</sup> National tribunals are better place for the prosecution of war crime in the way that International Criminal Court has a complementary competence towards national jurisdictions. National tribunals have an essential role in the prosecution of war criminals.

<sup>92</sup> It means the jurisdiction of the tribunal is extending to a limit period of time, see ICTR statute Article 7.

<sup>93</sup> The competences of the tribunal are limited to the territory of a State or to the territories of more than one State, see ICTR statute Article 7.

<sup>94</sup> ICTR as an example of ad hoc tribunal was established by the Security Council ICTR S/RES/955 (1994), in 8 November 1994 after the genocide in Rwanda in 1994. Based in Arusha (Tanzania) its competence is strictly limited to acts of genocide, crime against humanity and violation of Common Article III of the 1949 Geneva Conventions and Additional Protocols of 1977 committed in Rwanda during the genocide in 1994.; See ICTR Statute on [www.ictt.org](http://www.ictt.org); See Roberts, op. cit. pp615-621.

<sup>95</sup> Article 6 of the International Criminal Court Statute of 1998.

<sup>96</sup> Ibidem Article 7.

<sup>97</sup> Ibidem Article 8.

<sup>98</sup> Ibidem Article 5(2).

party to the Statute.<sup>99</sup>The Court also has jurisdiction if a State, which had not ratified the Statute, makes a declaration by which it recognises the competence of the Court.<sup>100</sup> Finally, it is competent as regards crimes that constitute a danger to peace and international security.<sup>101</sup>

### **3.2.2.2. Referral to the International Criminal Court**

The International Criminal Court envisages three means of referral of a matter to the Court: (a) by the Security Council<sup>102</sup> of the UN by virtue of Chapter VII of the UN Charter; (b) by the Prosecutor by virtue of Article 15;<sup>103</sup> and (c) by a State party which can seize the prosecutor of the International Criminal Court if it is established that one or some of the crimes aimed at the article 5 have been committed.<sup>104</sup>

#### **a) A referral by the Security Council**

The UN Security Council, according to the purposes and the principles of the UN, can approach the Court for the purposes of opening an investigation into cases of war crimes or of offences carried out against humanitarian staff. This is done by means of a Resolution adopted by the Security Council in term of Chapter VII of the UN Charter.<sup>105</sup>

#### **b) A referral by the Prosecutor proprio motu<sup>106</sup>**

The Statute of the International Criminal Court states that the Prosecutor can personally take the initiative to open an investigation concerning a crime in which the Court has

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<sup>99</sup> Article 12, of the International Criminal Court Statute of 1998.

<sup>100</sup> Ibidem Article 12(3).

<sup>101</sup> See preamble of the International Criminal Court Statute “Recognizing that such grave crimes threaten the peace, security and well-being of the world”

<sup>102</sup> Ibidem Article 13(b).

<sup>103</sup> This article states that, the prosecutor can open an investigation on his own initiative or seek information concerning crimes recovering by competence of the Court.

<sup>104</sup> Article 13 of the Statute of the International Criminal Court 1998.

<sup>105</sup> Ibidem Article 13(b).

<sup>106</sup> Ibidem Article 15(1).

competence.<sup>107</sup> He can independently open an investigation on the basis of information obtained not only from States, or international and intergovernmental organizations, but also from NGOs.<sup>108</sup> To open an investigation the Prosecutor has to first obtain an authorization from the Chamber. This request for an authorization is made in writing and must be motivated.<sup>109</sup> The Prosecutor communicates to the aforementioned Chamber all information relating to the case in his possession. At the end of the investigation the preliminary chamber in audience confirms the charge of the Prosecutor.<sup>110</sup> The audience takes place in the presence of the plaintiff, a victim member of a humanitarian organization, and the prosecutor.

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

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

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

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

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

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

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

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

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

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

### 3.3 Compensation

The right to compensation for the victims of a violation is a well-established principle of international law.<sup>114</sup> Since the end of the Cold War, the obligation to offer compensation to the victims of violations of human rights and international law has been affirmed by a large number of treaties and international declarations.<sup>115</sup>

#### 3.3.1 Conditions for the award of compensation

Compensation presupposes the existence of an act, damage or causality, and imputation of fault. Each will be considered in turn.

##### 3.3.1.1. A harmful act<sup>116</sup>

A harmful act is at the same time the foundation as well as one of the conditions of civil liability. Whether a commission or an omission, it is an unlawful act attributable to its author; these acts have been qualified in IHL as a war crime. War crimes are grave breaches<sup>117</sup> of the four Geneva Conventions of 1949, namely, acts against persons or property protected by the provisions of these Conventions and other international texts.<sup>118</sup>

Violations of IHL are expressed in Additional Protocol II of 1977 as well as in the Statute of the International Criminal Court of 1998 namely, launching targeted attacks against the civilian population generally and against staff bringing help to humanitarian workers

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<sup>114</sup> Since the end of the Eighteenth Century, international law has provided rights of compensation to persons during war against enemy state. Even before World War II, claims commissions awarded compensation to survivors during war and property destroyed.

The International Criminal Tribunal for the Former Yugoslavia stipulates that, after judgments of conviction, the Trial Chamber can hold a special hearing to determine the restitution of property, and the Tribunal's judgments as to criminal responsibility of convicted persons to be final and binding in regard to claims for compensation brought by victims in courts.

<sup>115</sup> As an example see the UN Compensation Commission of 1991," a subsidiary organ of the UN Security Council. Its mandate is to process claims and pay compensation for losses and damages suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait."

<sup>116</sup> I will mention here only the acts which are committed on the humanitarian staff constitute faults. I am not going to mention all the offences such as expressed by the International Humanitarian Law (IHL) but just those that concern humanitarian workers.

<sup>117</sup> This means serious violation of an agreement or a rule.

<sup>118</sup> See Article 50 Geneva Convention I, Article 51 Geneva Convention II, Article 130 Geneva Convention III, Article 147 Geneva Convention IV, Article 11 Additional Protocol I, Article 85 Additional Protocol I.



in particular<sup>119</sup> and against buildings, equipment, medical units, staff using the distinctive emblems of the ICRC, humanitarian aid missions and peacekeepers of the UN.

### **3.3.1.2. Damage**

Unlike the penal prosecution, the civil action is not punishment but compensation or reparation instead. The former differs from the latter in many aspects and it ends in the payment of compensation to the victim. The damage has to be certain, real and current.<sup>120</sup> It would not make sense to ask compensation for damage that will occur in the future, and one cannot obtain compensation for imaginary damage.<sup>121</sup> The reality of the damage must be able to be perceptible. It must be able to be established that the act was really harmful to the plaintiff and deserves to be compensated for.

Thus, the victims of grave breaches of the four Geneva Conventions of 1949 or war crimes will receive compensation due to the harm that a belligerent had caused them.

### **3.3.1.3. Causal link**

The damage must be able to be imputed to its author and establishes the relation between the cause and the damage. Within the framework of an offence against a humanitarian worker, it is necessary to establish the fact of an individual who is the origin of this offence. In order that the responsibility of the author of the damage is engaged, there has to be a direct causal connection between the act and the damage.<sup>122</sup>

### **3.3.1.4. Imputation of fault**

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<sup>119</sup> See Article 8(b)(iii) of the International Criminal Court Statute of 1998, see Article 13 of Additional Protocol II of 1977.

<sup>120</sup> Mazeaud, H., *Lecons de droit civil*, tome II, 1991, 1355p.

<sup>121</sup> Mazeaud, H., *op.cit.* p.332.

<sup>122</sup> *Ibidem*

In customary international law it is allowed that the acts of persons, groups or organizations can be imputed to a State when they act as de facto organs or agents of this State.<sup>123</sup>

To this end, Article 4(1) of the International Law Commission, Draft Articles on Responsibility of States for Internationally Wrongful Acts stipulates:

*“The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.”*<sup>124</sup>

It is important to note that these individuals should not just to be considered as acting on behalf of the state so that these acts are attributable to that State. It would have to be established that they have authority and power from the State as well as an actual link of subordination. This is exemplified by the example of the US military and paramilitary intervention in and against Nicaragua.<sup>125</sup> It had been established that the United States of America effectively had control of the military and paramilitary activities, which had led to the violations in question.<sup>126</sup> The effectiveness of this control was thus enough to establish the responsibility of United States of America under international law.

### **3.3.2. Civil liability in the case of an offence against humanitarian staff**

Whether the lawsuit takes place in a national or international jurisdiction, the victim enjoys a right to compensation for the damage or harm suffered.<sup>127</sup> At the national level, this can be established on the basis of individual responsibility where the act was

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<sup>123</sup> Article 7, 2001 International Law Commission , Draft Articles on Responsibility of States for Internationally Wrongful Acts in Sassoli, M., State responsibility for violation of International Humanitarian Law, *IRRC*, n° 846, p 405.

<sup>124</sup> See Article 4(1) 2001 International Law Commission, op.cit. [www.untreaty.un.org/ilc/texts/instruments/english/commentaries/9\\_6\\_2001.pdf](http://www.untreaty.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf) [accessed on 16 July 2009].

<sup>125</sup> See Military and paramilitary activities in and against Nicaragua (*Nicaragua v United States*), June 27th, 1986, I.C.J.

<sup>126</sup> Sassoli, M., op. cit. p407.

<sup>127</sup> Delmas Marty, M., *Le flou du droit*, 1986, p 50.

committed by an isolated individual or the basis of responsibility of a principal for the acts of his employee in cases where the act emanates from a member of the army.<sup>128</sup> In addition, diverse international texts could also support the granting of compensation by the International Criminal Court.<sup>129</sup>

### **3.3.2.1. Statute of the International Criminal Court and the Regulation of Procedure and Evidences**

The Statute of the International Criminal Court envisages compensation to the victims of offences that are within its jurisdiction. A “victim” is defined as:

*“Natural persons who have suffered harm as a result of the commission of any crime within the jurisdiction of the court”.*<sup>130</sup>

It confers on victims the possibility of participating in the process<sup>131</sup> and obtaining compensation, restoration, or rehabilitation.<sup>132</sup> The statute of the Court states that:

*“The court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation.”*<sup>133</sup>

This reparation is granted by taking into account the extent of the damage, loss or injury.<sup>134</sup>

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<sup>128</sup> Delmas Marty, M., op.cit.

<sup>129</sup> Example of the fundamental principles and directives concerning the right for appeal and for repair of victims of violation of international law in relation with Human Rights and of the humanitarian international Right adopted by the Commission of Human Rights of the United Nations in 2000

<sup>130</sup> Rule 85 of the Rules of procedure and evidence.

<sup>131</sup> Article 19(3) of the International Criminal Court Statute.

<sup>132</sup> Rules of Procedure and Evidence op. cit. Rule 94(1).

<sup>133</sup> Article 75(2) of the International Criminal Court Statute.

<sup>134</sup> Rules of Procedure and Evidence op. cit. Rule 97(1).

### **3.3.2.2. The fundamental principles and the directives adopted by the Human Right Commission in April 2000**

These principles concern the right for an appeal and for a repair of the victims of violation of human rights and humanitarian worker rights. These principles impose on States directives regarding internal legislation in the context of international standards and oblige them to insure the compensation of victims for the violations of the IHL. The principles also help the victims to obtain compensation from the authors of grave malpractices against humanitarian worker rights.<sup>135</sup> These principles also insure reparation when the author of the offence cannot indemnify or refuses to do it.

In conclusion, humanitarian workers have an arsenal of international instruments to prosecute offences with regard to them or their property. The means are made available to ensure respect for their rights. On the international level, the International Criminal Court, by means of its procedural modalities elaborated in its Rules of Procedure and Evidence, made the prosecution of offences against humanitarian staff a reality and successful Prosecution can result in the grant of compensation to the victim.

WESTERN CAPE

Although strongly protected by different texts and international treaties and institutions, humanitarian workers, in the exercise of their missions, are nevertheless the objects of targeted attacks. This, on a purely practical level, questions the efficiency of the protection granted to humanitarian workers.

In the next chapter, the limitation of the regime of protection will be examined.

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<sup>135</sup> See para 7 of the fundamental principles and directives concerning the right for appeal and for repair of victims of violation of international law in relation with Human Rights and of the humanitarian international Right adopted by the Commission of Human Rights of the United Nations in 2000.

## CHAPTER IV: LIMITATION OF PROTECTION

### 4.1 Introduction

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

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

### 4.2. Factors connected to the conflicts

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

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

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

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

<sup>138</sup> Ibidem.

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

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

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

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

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

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

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

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

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

<sup>142</sup> Ibidem

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

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

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

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

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

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

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

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<sup>146</sup> Ibidem,

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

<sup>148</sup> Alley ibidem.

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

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

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

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

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

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

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

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

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

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

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

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

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

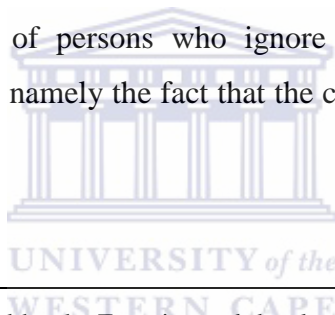


## 4.2.2 Emergence of new actors to the conflicts

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

<sup>182</sup> Ibidem

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

#### 4.2.3.1. Publicity surrounding humanitarian missions

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

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

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

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

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

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

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

<sup>187</sup> Ibidem.

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

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

#### 4.2.3.2. Doubtful conducts

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

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

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

#### 4.3 Procedural order limits

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

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

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

It is unmistakable that the protection of humanitarian staff is effectively dedicated by instruments and their texts. However, these measures are no longer respected in a literal sense. Consequently, in case of a violation of these instruments, humanitarian staff institute an action before the competent jurisdictions so that perpetrators can be punished. The implementation of legal action meets certain obstacles, however, which cannot serve to encourage humanitarian workers to assert their rights. Indeed these obstacles are situated at two levels.

The first concerns external problems in the jurisdictions and the second are internal problems related to the judicial authority. I will limit my discussion to one example of an external problem and one of internal problem respectively.

#### **4.3.1 Refusal by certain States of any judicial cooperation**

The implementation of an effective repression of the grave breaches of the four Geneva Conventions of 1949 requires cooperation between States. The example of Cameroon on this matter is appropriate to examine. Confronted by a demand of extradition emanating from authorities in Kigali and a demand of transfer from the ICTR in Arusha, Tanzania, Cameroon chose by way of a presidential decree to reject the demand of extradition sent by the government of Kigali.<sup>193</sup> This act of the Cameroonian government was remarkable, because it contributed through this decree to the evolution of the international justice and particularly to the fight against the impunity.

Regrettably, all countries are not open to this international judicial cooperation. One of the major causes is no doubt the narrow link that exists between the political power and the functioning of international justice. Furthermore, the question of the independence of the judges and prosecutors in their respective States at this level raises a real concern as to the impartiality of prosecutors. Yet the judicial cooperation between States will allow for better inquiries, the collection of evidence, arrest of suspects and protection of

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<sup>193</sup> *Laurent Semanza v Prosecutor*, ICTR-97-20-A on [www.ictj.org](http://www.ictj.org) [accessed on 5 April 2009].

witnesses. A refusal of cooperation causes international justice to fail.<sup>194</sup> The ratification of the Statute of the International Criminal Court by States is therefore of primary importance.

#### **4.3.2. Corruption and lack of independence of the judicial system**

There are many African countries, such as the DRC, where the judicial systems fail to meet the minimum international standard required for the administration of justice. In 2004 an audit by international experts concluded to the ineffectiveness of judicial systems due to corruption, insufficient independence and lack of resources and qualified and trained judges.<sup>195</sup> Lack of independence arises when the executive continually interfere in nominating, promoting and dismissing judges and prosecutors without the consent of the competent authority.<sup>196</sup> Usually the executive would instruct magistrates on how to treat cases, and as a result the magistrates do not fulfil their obligation to respect the adversarial principle, thus undermining any chance of a fair hearing.<sup>197</sup>

The shortage of personnel in the judiciary causes delays and negligence in the administration of justice. This creates a situation where there is little judicial accountability or discipline. The lack of administration and economic autonomy, resources and infrastructures contribute to the little confidence the public has in the judiciary system in the DRC. Furthermore, the social conditions of magistrates, judges and prosecutors incline them to corruption or the trading of favours, brought about by a very low salary or no salary at all.<sup>198</sup>

The new government program for the judicial system reform in the DRC now includes the promotion of judicial activities and training of magistrates. However, president

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<sup>194</sup> Report on the situation of human rights in Rwanda Op. Cit.

<sup>195</sup> See attacks on justice – Democratic Republic of Congo, 2005, p 2.  
[www.unhcr.org/refworld/pdfid/48a92818d](http://www.unhcr.org/refworld/pdfid/48a92818d) [accessed on 28 July 2009].

<sup>196</sup> Ibidem.

<sup>197</sup> Ibidem.

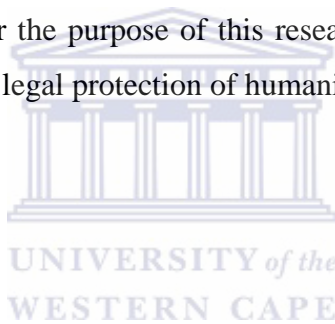
<sup>198</sup> In 2003 DRC magistrates, judges and prosecutors had an increase of salary, they received a minimum salary of US\$100 per month instead of their US\$40 they have been given before. ; See [www.icj.org/IMG/pdf/congo.pdf](http://www.icj.org/IMG/pdf/congo.pdf). [accessed on 7 November 2009].



Kabila signed Decrees which saw the Supreme Council of Judiciary becoming a specialised service of the Ministry of Justice.<sup>199</sup> These Decrees are in conflict with the Constitution and undermine the independence of the judiciary, which is guaranteed by Article 149 of the Constitution.<sup>200</sup>

It does seem that the protection of humanitarian staff is limited in practice. Factors that contribute to weaken this protection are both connected to the nature of the conflicts and to the procedures in place before competent jurisdictions. In so far as the conflicts are concerned new actors to the conflict, notably militias, are the main cause of the misfortune of humanitarian organizations. Besides the multiple obstacles connected to the legal action, there are also other elements which contribute to call into question the effectiveness of this protection in practice.

That is why it is important for the purpose of this research paper to reflect on ways to strengthen the efficiency of the legal protection of humanitarian staff



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<sup>199</sup> Attacks on justice op.cit.

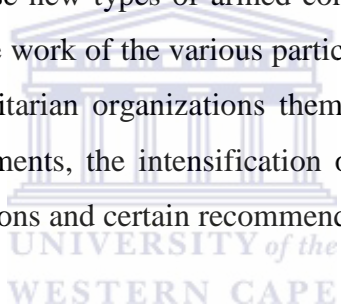
<sup>200</sup> See Article 149 of the Constitution of 2006 of the DRC.

## **CHAPTER V: WAYS OF REFORMATION FOR A PROTECTION STRENGTHENED EFFICIENCY**

### **5.1 Introduction**

Several reasons have been advanced in attempts to explain the deterioration of the conditions of safety of humanitarian aid missions. The real problem is situated at the levels of management of the new types of conflicts, observed in Africa, as well as the actors who participate in these conflicts. The question, which this research paper needs to answer, is how to approach, in a practical manner, the enormous challenges ensuing from these types of disintegrated conflicts.

To meet the challenges of these new types of armed conflict, the measures to be taken will have to be informed by the work of the various participating actors, States, parties to the conflict as well as humanitarian organizations themselves. But at the level of the applicable international instruments, the intensification of this protection can be made possible through some suggestions and certain recommendations.



### **5.2 Suggestions at the level of international instruments**

It would be conceited to assert that international instruments protecting humanitarian staff are either totally effective or not at all. These instruments have a history and were intended to protect humanitarian workers since their consecration by the international community. Yet it has become urgent for these international instruments to adapt to the new forms of armed conflict, which they are now called upon to regulate. A harmonization at the level of the legal regime of protection, is accordingly suggested as it is necessary to strengthen the prosecution of offences committed against humanitarian workers to dissuade possible perpetrators.

### **5.2.1 The legal regime of protection**

The standards of protection of humanitarian staff are varied. Indeed, we find the general protection conferred by IHL, the protection conferred by the use of the emblem as well as the agreement of 1994 on the protection of the staff of the UN. The nature of this protection cannot guarantee to all humanitarian staff an increase in safety in the sense provided for by the ICRC.<sup>201</sup> This situation creates a type of hierarchy in the mind of the civilian populations, which tend to place certain agents above others. This seems to be the case of the humanitarian missions of the UN, which apparently have more consideration in the field due to the fame of the institution on the international plan. Therefore, when a staff member of the UN dies during a humanitarian aid mission, the impact will be quite different compared to had there been a death of a staff member of a humanitarian NGO. This consideration is also visible among belligerent parties in the sense that the convoys of UN inspire more credibility and fear. The same applies to staff enjoying the protection of the use of emblems of the ICRC. I believe that, if this emblem is used for some time in an excessive way by persons who are not entitled to use it, it is certainly because they would have noticed that there were more interests to be protected by this emblem than by other instruments of general protection.

### **5.2.2 Inquiries and penal prosecution**

In a report by the ICRC<sup>202</sup> considering measures to be taken to strengthen the safety of humanitarian staff, it was recommended that following attacks or violations of the integrity of staff of humanitarian organizations, it is crucial that belligerent parties immediately open a detailed investigation and set the necessary measures in place to apprehend the perpetrators responsible for these violations.

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<sup>201</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, Preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law Geneva, 19 - 23 January 1998 on [www.icrc.org](http://www.icrc.org) [accessed on 12 March 2009].

<sup>202</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, Preparatory document drafted by the International Committee of the Red Cross for the first periodical meeting on international humanitarian law Geneva, 19 - 23 January 1998 on [www.icrc.org](http://www.icrc.org) [accessed on 12 March 2009].

It is necessary to point out with regard to this recommendation that the context in which these violations take place, does not allow for implementation of these procedures as long as belligerent parties have a single preoccupation, which consists of winning the conflict. Instead it should rather be indicated that the staff member, victim or agency alert and inform the international community of these violation. For this reason I agree with one of the practical measures suggested by the ICRC, that following an incident on one of the staff, a firm position must be adopted to make use of the internal and external jurisdiction to ensure the prosecution of the persons responsible.<sup>203</sup>

Then, as a matter of suggestion, it would be necessary to encourage humanitarian workers to press charges and to inform competent jurisdictions of all violations. Often the media publicizes cases of humanitarian workers being targeted in the field during armed conflicts. The right cause of action does not just consist in denouncing the violation, but in the prosecution of perpetrators. This also emerged from the 55th session of the General Assembly.<sup>204</sup> State parties to the four Geneva Conventions of 1949, even if they did not participate in an armed conflict, after all agree to respect IHL principles.

The international community has to devote itself to the actual fight against the issue of grave violations of the four Geneva Conventions of 1949, including violations against humanitarian staff. The international community will have to act collectively and separately in cooperation with the UN and in conformity with Article 89 of the Additional Protocol I of 1977. This could, for example, in cases where humanitarian workers have died in a region from targeted shootings, consist of an official announcement that armed forces would be sent to this region to clear up the situation. Such a measure would certainly scarce militias or even regular armies that might have contemplated committing these acts.

It is important for States, as members of the international community, to denounce in the strongest terms any physical or moral violations carried out against staff of humanitarian

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<sup>203</sup> Schmid, F., “Recommandation pour renforcer la sécurité du personnel humanitaire”, in *IRRC* n° 824, pp. 161-164.

<sup>204</sup> Strengthening of the coordination of humanitarian and disaster relief assistance of the United Nations, including special economic assistance ;United Nations, General Assembly, 55th session, New York, 27 November 2000 on [www.un.org](http://www.un.org) [accessed on 5 April 2009].

organizations, or their properties.<sup>205</sup> It is furthermore important for States to set up adequate measures to ensure respect for humanitarian staff from actors to the conflict and to punish them severely in case any of violation.

Of singular importance is that States must refrain from the denunciation of and complaint against competent jurisdictions, because the legal protection which humanitarian workers enjoy must not in any way be weakened.

From this point of view, humanitarian staff and organizations have to know and respect their rights and have to report any violations encountered during their missions.

### **5.2.3 Reconsideration of the ethics as well as major principles governing humanitarian aid**

The respect for the principles governing humanitarian aid is essentially seen to guarantee the safety of humanitarian workers during their missions. As rightly observed by the ICRC, *“the safety of humanitarian workers will be improved if this one respects the principles of humanity, impartiality and neutrality in its behaviour in everyday life.”*<sup>206</sup>

The questioning of but one of these principles by a party to the conflict constitutes a source of insecurity for humanitarian workers which puts their lives in danger. The confusion of mandates and the diversity of behaviour within organizations represent for humanitarian workers a factor of risk.<sup>207</sup> Humanitarian workers do not have to lose sight of the fact that it is these very principles which guarantee their safety in the eyes of the parties in the conflict. They will thus proceed to raise awareness among the civilian populations and explain that they have come to relieve their sufferings. Humanitarian workers have to instil confidence in the civilian populations and, if necessary, select persons at the local level who can escort them in their missions. These local escorts will have to be known in the region and will serve as intermediaries between the foreign

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<sup>205</sup> UN Resolution A/56/L.64 on Safety and security of humanitarian personnel and protection of UN personnel, December 2001.

<sup>206</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, op. cit.

<sup>207</sup> Schmidt, F., op. cit.

humanitarian workers and the local populations, which according to the ICRC, will greatly ease dissension and misunderstanding.<sup>208</sup>

The understanding of these principles and their application within the framework of the operations constitute the best guarantee of safety. Humanitarian workers have to show impartiality in the treatment of the civilian populations and the wounded. These workers will owe, according to the principle of impartiality, which govern their actions, to treat all civilian populations in the same way. Likewise, the civilian populations must avoid any indirect intervention in the conflict. Any movement by humanitarian staff susceptible to be interpreted and likely to establish a climate of justifiable suspicion as to their exclusively humanitarian motivations must be avoided.<sup>209</sup> These workers may maintain no other relationship with parties to the conflict at the risk of attracting harm. Their missions have to be limited to providing humanitarian assistance, including providing treatment to the wounded who no longer participate directly in the hostilities.

The safety of the staff of any humanitarian organization is broadly based on standards of ethics and the profession with which it functions. It is in this sense that the ICRC considers the best guarantee of safety against the targeting of humanitarian agents to lie in an attitude reflecting the principles of humanitarian aid, notably humanity, impartiality, neutrality and independence.<sup>210</sup>

### **5.3. Other elements for strengthened efficiency**

Diverse causes have been suggested to account for the fragility of the legal protection of humanitarian workers in the context of non-international armed conflicts. Certainly some suggestions were made in respect of international instrument, but other factors also

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<sup>208</sup> ICRC, Principles of and Response in International Humanitarian Assistance and Protection Commission II: humanitarian values and response to crises, 26th International Conference of the Red Cross and Red Crescent? August 1995 on [www.icrc.org](http://www.icrc.org) [accessed on 12 March 2009].

<sup>209</sup> Plattner, D., “La neutralité du CICR et la neutralité de l'assistance humanitaire”, in *RICR* n0 818, April 1996 pp. 169-189 on [www.icrc.org](http://www.icrc.org) [accessed on 12 April 2009].

<sup>210</sup> ICRC, Respect for and protection of the personnel of humanitarian organizations, op. cit.

warrant attention. It would be important to raise a greater awareness among civilian populations generally of emerging militias. Finally, it rests with African governments to address the problem of rebellion and militias. The eradication of these phenomena will greatly serve to promote peace and social stability.

### **5.3.1 Raising awareness of civilian populations to the questions of IHL**

Civilians have to be instructed about the standards and principles of IHL. The humanitarian revolution engaged in the 21st century with fighters in uniforms (i.e. regular armies) civilian today occurs with occasional fighters.<sup>211</sup> Campaigns of general sensitisation of the civilian populations must therefore be led across all social spheres of the community. These campaigns can be made through the organization of seminars, colloquiums, as well as open days on questions and issues relative to IHL. Certainly, the ICRC has already done remarkable work in disseminating the rules of IHL. But these efforts must be increased, and all the more so during peacetime. All non-governmental organizations have to participate in the publicising and popularising of the fundamental rules of IHL in all countries where they are represented.<sup>212</sup> Certainly this sensitisation would not solely guarantee the complete safety of humanitarian aids workers in a situation of conflict, but it is clear that a civilian population that has been sufficiently sensitised to a question acts differently from the one that has never heard about IHL.

The need to raise awareness on IHL does not arise from failure by the military to do so. Once having integrated the armed forces and during their training the principles of IHL and Human Rights law are disseminated.<sup>213</sup> Serious emphasis is placed on the assimilation of these issues. Courses and seminars that include videos on armed conflicts, followed by questions and answers to an agent of the ICRC, during which soldiers are enlightened on

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<sup>211</sup> Domestici-Met, MJ., op. cit.

<sup>212</sup> ICRC, Increasing respect for international humanitarian law in non-international armed conflicts, ICRC publication, 2008, p. 15.

<sup>213</sup> ICRC, Increasing respect for international humanitarian law in non-international armed conflicts, op.cit. p 22.

points they do not understand, would be most effective.<sup>214</sup> For militias, realities are quite different as they are not they are not regular armed forces and are not therefore easily locatable. Since militias generally cannot receive instruction on IHL, a campaign to raise awareness and sensitivity becomes imperative.<sup>215</sup> Besides, States will have to encourage the creation of associations for the defence of human rights, with the aim of promoting the dissemination of the fundamental rules of the IHL during peacetime.<sup>216</sup>

### 5.3.2 Promotion of humanitarian spirit in the society

Militias generally remained ignorant of the principles of IHL. One of the means which could help to effectively fight against the phenomenon of militias, it is to avoid its formation. That is why solutions must emanate from the level of government which must actively promote peace and a humanitarian spirit within the community. This will promote the community's well-being as well, as the setting up of an actual democratic regime will be seen to guarantee the social, civic and political rights of citizens. Moreover, the heads of state collectively, have a responsibility toward the national societies of the Red Cross which, according to the ICRC, are "*to cooperate and to take initiatives to promote tolerance, non violence and the respect for the human dignity within the populations.*"<sup>217</sup>

This is one way to ensure that civilians are shielded from the rebel movements which are, in actual fact, a way to express their political dissatisfactions.<sup>218</sup>

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<sup>214</sup> Ibidem.

<sup>215</sup> Sassoli M. and Bouvier A., *How Does Law Protect in War?*, Vol 1 (2003), p 273.

<sup>216</sup> ICRC, Increasing respect for international humanitarian law in non-international armed conflicts, p 24.

<sup>217</sup> ICRC, Plan of Action for the years 2000-2003 in *International Review of the Red Cross* n°836, p 880-895.

<sup>218</sup> The case of Congo DR on this matter is revealing enough. After decades spent in the grips of a tyrannical regime such as the one of the Marshal MOBUTU, the arrival of the rebellion was welcomed by the populations which saw in this rebellion the divine messengers who came to free them from the hands of a dictator.



Besides, States also have to demonstrate to their nationals how destructive war is. It is in the same sense that the General Assembly of UN invites all the States “*to promote within their countries a climate of respect for the safety of humanitarian staff.*”<sup>219</sup>

The final chapter of this research paper will consist of conclusions and suitable recommendations.



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<sup>219</sup> Resolution A/56/L64 op.cit.

## CHAPTER VI: GENERAL CONCLUSION AND RECOMMENDATIONS

### 6.1. Conclusion

This research paper sought to determine the degree of efficiency of the legal instruments protecting humanitarian workers in situations of non-international armed conflict. The study has analysed legal texts which are relevant for that purpose. Based on this documentary analysis, it has emerged that the legal protection of humanitarian workers is guaranteed by diverse international instruments. These include the protection conferred by the four Geneva Conventions of 1949 and the three Additional Protocols of 1977 and 2005, and Common Article 3 to the four Geneva Conventions of 1949.<sup>220</sup> In addition, the protection conferred by the Statute of the International Criminal Court and the Convention on the Safety of United Nations and Associated Personnel were also considered.<sup>221</sup>

The penalty for the violation of these international instruments is guaranteed at both the international and national levels. On the international levels, the International Criminal Court primarily facilitates prosecution.<sup>222</sup> Its modalities of Court referral are elaborated by the text on the Regulation of Procedure and Evidence of June 2000. According to the provisions of this text, as well as those of the Statute of the International Criminal Court, the referral of the Court can be made by the Security Council, by a State party or by the Prosecutor *landlord motus*.<sup>223</sup>

It was argued that a significant number of limitations make prosecution difficult, including the refusal of States of any judicial cooperation. Instead, States should be more open and trust the international judicial process which would help to render prosecution more efficient. Also, the problem of States refusing to ratify the Statute of the

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<sup>220</sup> See Chapter II, para 2.1.1.

<sup>221</sup> See Chapter II, para 2.1.2.

<sup>222</sup> See Chapter III, para 3.1.2

<sup>223</sup> See Chapter III, para 3.1.2.2.

International Criminal Court, significantly contribute to weakening the court's jurisdiction in the prosecution on crimes that violate IHL principles.<sup>224</sup>

Principles on compensation, which humanitarian staff victims can enjoy, include the provisions of the Statute of the International Criminal Court as well as the text on the Regulation of Procedure and Evidence.<sup>225</sup> These two texts acknowledge compensation for the victims of war crimes and give them the right to participate in the procedures before the Court. The Statement of the Fundamental Principles of Justice Relative to the Victims of the Crime and the Abuse of Power of 1989 recognizes a law for compensation to all the victims of crimes of international law. So too do the Fundamental Principles and the Directives on the Law for Appeal and Compensation of the Victims of Violations of IHL adopted in April 2000.<sup>226</sup> These two texts offer to the victims of international crimes the right to be compensated by the perpetrator of the violations or by the State.

It turns out that in practice, certain factors contribute to the worsening of the legal protection conferred on humanitarian workers. Factors connected to the conflict, notably in the case of non-international armed conflict, create new perpetrators with complex practices.<sup>227</sup> Rebels and militias constitute a real danger for humanitarian staff in the sense that they make them the intended targets.<sup>228</sup>

But it is worthwhile to underline that the main problem is connected to the context in which these provisions are applied. African peoples face alarming living conditions. In such an environment, the question of raising sensitisation to the IHL or Human Rights Law can only ring hollow in the ears of these desperate populations. It would indeed be wishful thinking to hope that people, who battle everyday with poverty, could really care for the theoretical principles that constitute the rules of IHL. This underscores the importance for humanitarian workers to remember the principles of humanitarian assistance which guarantee their safety and the need to put real long-lasting actions,

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<sup>224</sup> See Chapter IV, para 4.2.1.

<sup>225</sup> See Chapter III, para 3.2.2.1.

<sup>226</sup> See Chapter III, para 3.2.2.2.

<sup>227</sup> See Chapter IV, para 4.1.1.

<sup>228</sup> See Chapter IV, para 4.1.3.2.

supported by viable programs, into place so that those living on the African continent can take care of themselves.<sup>229</sup>

## 6.2. Recommendations

The changing reality of conflict call for the law to adapt and these can no longer be relied on the capacity of foreign states to ensure the protection of the civil population. African countries have to reform their judicial systems in order to make them internationally acceptable by, for example, ensuring the training of the judges.<sup>230</sup> Moreover, states have the responsibility to ensure the prosecution of those who violate humanitarian norms.

Following attacks on humanitarian workers, firm and rigorous measure must be taken to use internal and external jurisdiction to ensure the prosecution of the persons responsible of violations and attacks against humanitarian workers.<sup>231</sup>

As a matter of fact, one can assume that the phenomenon of militias is the source of the ineffectiveness of the legal instruments guaranteeing the protection of humanitarian workers. The need to increase the implementation of fundamental rules of IHL within the society is real, yet the changing nature of the conflict make the distinction between combatant and non-combatant difficult.<sup>232</sup> As militias are part of the population, the sensitisation of the population will help to promote the rules of IHL and increase militia's responsibility to comply with IHL.<sup>233</sup>

Humanitarian workers should press charges when they are victim of attacks; it is not enough to merely denounce these violations, but important to prosecute the authors of these violations. The legal frameworks protecting humanitarian workers are there to be utilized by humanitarian workers. Failure to do so will contribute on the weakening of these legal frameworks.<sup>234</sup>

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<sup>229</sup> See Chapter IV, para 4.1.3.1.

<sup>230</sup> See Chapter IV, para 4.2.2.

<sup>231</sup> See Chapter V, para 5.1.2.

<sup>232</sup> See Chapter IV, para 4.1.3.

<sup>233</sup> See Chapter V, para 5.2.1.

<sup>234</sup> Ibidem

Indeed, as indicated in this research paper, the power in Africa is in the hands of a few, to the detriment of the majority who endure severe poverty.<sup>235</sup> Fewer violations of the fundamental principles governing a democratic system and economic autonomy is necessary to keep African countries stable.

It would accordingly not be a demonstration of defeatism if I declared that the African continent indeed presented a severe risk for humanitarian workers.



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<sup>235</sup> See Chapter IV, para 4.1.1.

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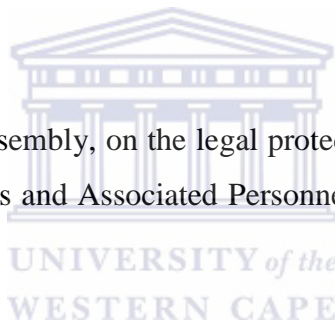
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