

**AN ANALYSIS OF THE DOMESTIC IMPLEMENTATION OF THE REPRESSION OF
VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW**

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ABSTRACT

This dissertation analyses the domestic implementation of the repression of violations of International Humanitarian Law. Through this analysis it seeks to clarify the obligations placed on States under International Humanitarian Law to ensure an effective and workable system for the repression of violations. In assessing these obligations, this dissertation attempts to highlight the importance of an effective system that is properly implemented in a timely manner. It is shown that the obligations placed on States are not burdensome and are outweighed by the advantages of proper implementation. This dissertation demonstrates these advantages through a case study of Uganda where the consequences of the failure to implement an effective system of repressions of violations of International Humanitarian Law are documented. Practical solutions that may assist in remedying the defective system to repress violations in Uganda are provided. It is argued not only for the need to properly implement an effective system of repression of violations, as required under International Humanitarian Law, but for the need to implement a system that goes beyond that which States are legally obliged to do.

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CHAPTER 1: RESEARCH METHODOLOGY

1. BACKGROUND TO THE STUDY

In the heat of battle, when the wagers of war and their victims are prey to mistrust and hostility, compliance with the rules does not come easily. Passions are unleashed and hatred and the desire for revenge give rise to all manner of depredations, sweeping aside calls to preserve a modicum of humanity even in the most extreme situations. Yet to make such a call is the very purpose of International Humanitarian Law.¹

Armed conflicts have existed for as long as humanity itself and inevitably result in immeasurable suffering among people and in severe damage to property. Yet States and groups alike still take up weapons and continue to wage wars.² The brutality of armed conflicts, at times more severe in Non-International Armed Conflicts³ is widely documented.⁴

International Humanitarian Law ('IHL') aims to mitigate the effects of war.⁵ In the broadest sense IHL achieves this firstly, by limiting the belligerent parties choice in means and methods of warfare to the amount necessary to achieve the aim of the conflict, and secondly, through the obligations placed upon the belligerents to spare those persons who do not or no longer participate in active hostilities.⁶ It will be shown that the body of law that is IHL and the protection it affords is not inadequate. Instead the "main cause of suffering caused during armed conflicts and of violations of IHL remains the failure to implement existing norms – whether owing to an absence of political will or for another reason – rather than a lack of rules or their inadequacy."⁷ In addition hereto, "[t]he general mechanisms foreseen by international law to ensure its respect and to sanction its violations are even less satisfactory and efficient regarding IHL than they are for the implementation of other branches of international law. In

¹ Pfanner (2009) 91 IRRC 279 at 280.

² Gasser (2009) 4.

³ Also known as an 'internal armed conflict' or 'civil war'. For more on the distinction between International Armed Conflicts and Non-International Armed Conflicts see Gasser (2009) 21, 66 & Pfanner (eds) (2009) 91 IRRC.

⁴ See Greenberg Research Inc / ICRC (1999) & Akhavan (2005) 99 Am. J. Intl. L. 403 at 407.

⁵ Gasser (2009) 3.

⁶ As Above.

⁷ Pfanner (2009) 91 IRRC 279 at 280.

armed conflicts, they are inherently insufficient and some of them even counter-productive.”⁸

Thus the importance of the domestic implementation of a system to repress violations of IHL, as one of the means to ensure respect for IHL, becomes clear. This dissertation will both document and illustrate through the recent practical difficulties experienced in Uganda how important this measure is.

The reasons and basic motivation for a system to repress violations of IHL speak for themselves. The consequences of armed conflicts generally and the failure to apply the body of rules embodied in IHL are criminal and infringe basic human rights. These same consequences experienced today were documented a century and a half ago by one of the five founders of the International Committee of the Red Cross (‘ICRC’) in 1862.⁹ Jean Henry Dunant, also known as the father of the Red Cross, while on business in Italy by chance came across the Battle of Solferino in June 1859. In the years following from 1859 to 1862 he wrote the book *A Memory of Solferino*¹⁰ wherein he captured his experience of the aftermath of Solferino.¹¹ After reading Dunant’s account of Solferino, the Honourable General Dufour, another of the five founders of the ICRC, wrote to Dunant in 1862 that:

*People must be made to see, by the kind of vivid examples which you report, the cost in torments and in tears of the glory of the battlefield. It is only too easy to see only the dazzling side of war and to close ones eyes to its sorrowful consequences.*¹²

These sorrowful consequences are seen in all forms of warfare and extend beyond the cessation of hostilities. The ICRC stresses the importance of States incorporating IHL Conventions into domestic law and particularly so for providing sanctions for serious breaches of their provisions.¹³ When properly implemented, these sanctions will assist in ensuring more humane conduct during armed conflicts.¹⁴ Proper implementation in

⁸ Sassòli & Bouvier (1999) 219.

⁹ Dunant (1986) 2.

¹⁰ Available at <http://www.icrc.org/eng/resources/documents/publication/p0361.htm> (accessed 09 May 2012).

¹¹ Dunant (1986) 3.

¹² Dunant (1986) 128.

¹³ ICRC (2010) 20.

¹⁴ As above.

this sense thus serves a dual purpose, firstly having a deterrent effect on perpetrators of war crimes and secondly, diminishing impunity when the provisions are properly applied. Ultimately this contributes to greater respect for IHL during armed conflict.¹⁵

It is against this background therefore that this study seeks to make a case for the effective domestic implementation of the provisions relating to the repression of violations of IHL. This will be done through an analysis of States' treaty obligations and the difficulties that arise either where measures taken by States are insufficient or are not taken at all.

1.1 Thesis Statement

The lack of effective national legislation repressing war crimes has severe adverse consequences on the lives and dignity of the participants in and victims of an armed conflict, both during the hostilities and once all hostilities have ceased. This can be remedied during times of peace through the efficacious national implementation of IHL, as one of the most important branches of Public International Law to implement on a national level.

1.2 Research Questions

In this study the author seeks to address the following questions:

- i. What is IHL?
- ii. What does 'the repression of war crimes' mean and what obligations are imposed on States in this regard?
- iii. How is IHL implemented during times of peace?
- iv. Why does the lack of effective national legislation during times of armed conflict have adverse consequences on the lives and dignity of the participants and victims of an armed conflict, both during the hostilities and once all hostilities have ceased? Practical examples will be provided.
- v. What are States legally required to do under IHL and what do States 'need to do anyway' to ensure the effective implementation of IHL?

¹⁵ ICRC (2010) 20.

- vi. Why is IHL one of the most important branches of Public International Law to implement on a national level?

1.3 Limitations of the study

The implementation of IHL is a very broad field and includes taking measures other than the national implementation. This study will focus only on the national implementation of IHL. Furthermore, the national implementation of IHL itself is a vast field that would require extensive research and analysis that could not be undertaken due to the length limitations of this study. For this reason, this study will focus on an analysis of the obligations imposed on States in the repression of war crimes. This study shall also be limited in that it is not intended to constitute an in-depth analysis of all obligations placed on States by IHL, but rather to highlight the more important obligations. In this respect only select international instruments will be analysed. The conventions that deal specifically with the protection of the lives and dignity of participants in and victims of armed conflicts will be analysed. Excluded from this study are all weapons conventions and those conventions dealing with the protection of property and the environment during an armed conflict.¹⁶ This study will examine Uganda as a case study of the failure effectively to implement conventional IHL obligations into national law.

1.4 Significance of the study

Armed conflicts are experienced throughout the world today and have both direct and indirect adverse effects on their victims. IHL aims to minimize these adverse effects and to provide certain protections. Adherence to the international conventions is but the first step. Respecting IHL requires that:

¹⁶ Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), of 8 December 2005; Declaration of St. Petersburg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime; Declaration concerning the prohibition of using bullets which expand or flatten easily in the human body (International Peace Conference, The Hague, 1899); Regulations respecting the laws and customs of war on land, annexed to the Hague Convention of 18 October 1907 respecting the Laws and Customs of War on Land (Convention No. IV); Geneva Protocol of 17 June 1925 for the prohibition of the use in war of asphyxiating, poisonous or other gases and of bacteriological methods of warfare; Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 14 May 1954; United Nations Convention on the Rights of the Child, of 20 November 1989; Optional Protocol to the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict, of 26 March 1999; Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict The Hague, 26 March 1999. For a full database on all IHL treaties and documents see <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (accessed 15 May 2012).

[A] number of concrete measures be taken at the domestic level, even in peacetime, to create a legal framework that will ensure that national authorities, international organisations, the armed forces and other bearers of weapons understand and respect the rules, that the relevant practical measures are undertaken and that violations of humanitarian law are prevented, and punished when they do occur. Such measures are essential to ensure that the law works when needed.¹⁷

This study is significant in that it illustrates the need for States to implement measures required for the repression of violations of IHL as an important basis to safeguard the lives and dignity of victims of armed conflicts. Throughout the study, select IHL Conventions will be analysed and the obligations on States determined. The study will further discuss the causes and consequences of failure to implement and will conclude with recommendations on how to overcome these obstacles. Recent practical examples will be utilised in the study to demonstrate the need for an effective repressions system on the domestic level.

1.5 Methodology

The proposed methodology consists of a multi-layered approach encompassing the following research designs: An extended literature review; survey-based research; evaluative research; secondary data analysis and a case study. Both primary and secondary sources of information will be utilised.

1.6 Literature review

The subject of the domestic implementation of IHL has been researched and published by many authors in different contexts. Due to the limitations of this study not all of the available literature is relevant. The work undertaken and guidelines provided by the ICRC, especially the ICRCs Advisory Service on IHL, will largely be relied upon throughout this study. The Advisory Service provides various tools and guidelines for the implementation of IHL, *inter alia* model law(s) and publications such as *The Domestic Implementation of International Humanitarian Law: A Manual*. These

¹⁷ ICRC (2010) 5.

publications are useful as they are aimed at providing specialist legal advice to governments on the national implementation of IHL. Furthermore the publications of the ICRC are updated and are considered leading in the field of IHL, as the exclusive humanitarian mission of the ICRC is to protect the lives and dignity of victims of war and internal violence and to provide them with assistance.

The case study of Uganda incorporates various sources including Ugandan laws relative to implementation of the repression of violations of IHL, reports of studies conducted by NGOs working in Uganda, and interviews conducted with a broad range of key stakeholders. Together these sources provide an analysis of the conflict in Uganda, the problems experienced in the repression and prosecution of violations of IHL and the reasons underlying such problems.

2. OVERVIEW OF CHAPTERS

Chapter Two contains an overview of what IHL is, what the aims of IHL are, and what the importance of IHL is. It also illustrates how the lack of any effective domestic implementation of IHL has adverse consequences, which serves as an introduction to the rest of the study.

Chapter Three comprises of an analysis of States' obligations to repress violations of IHL. The concept of 'repression of war crimes' is explained as well as the actions required to be taken by States through law and those that States should undertake regardless of the absence of legal obligations to do so. The Chapter is divided according to the various conventions to be analysed in this study. Furthermore the work of the ICRCs Advisory Service is incorporated throughout the analysis.

Chapter Four draws upon the chapters preceding it to highlight the importance of proper and effective domestication of the repression of violations of IHL. This will be undertaken through an analysis of the situation in Uganda as the case study for this dissertation. The Chapter will conclude with observations and practical recommendations to assist Uganda in effectively repressing breaches of IHL and ending the cycle of impunity.

Chapter Five consists of a conclusion and recommendations based upon the full study undertaken.

CHAPTER 2: AN INTRODUCTION TO INTERNATIONAL HUMANITARIAN LAW

1. INTRODUCTION

Imagine a huge theatre: outside, posters indicate that the play “International Affairs” is being performed. It is a very successful play and has been running in the same theatre for years [...]. Once inside, our newcomer is overwhelmed by the sheer immensity of the stage and the complexity of the spectacle. He observes a great turmoil of actors of all shapes, sizes and colours, who are moving about in all directions; some of them are shouting, gesticulating wildly, brandishing weapons in the face of apparent opponents, or even engaging them in outright combat; others can be seen crouching in dark corners where they whisper conspiratorially, whilst others again sit immaculately dressed at highly polished round tables, with a microphone and a little flag in front of each of them. [...] [T]he longer one observes the spectacle, the more certain more or less constant patterns of behavior are discerned, apparently in application of generally accepted standards; and at other moments one notes how formal arrangements are being drawn up among groups of actors, apparently designed to regulate their conduct with respect to particular situations.¹⁸

The analogy used by Kalshoven in his description illustrates the complexity of International Humanitarian Law (‘IHL’). The principle of state sovereignty has and will always determine interactions between States and more so when dealing with armed conflicts, constituting the very essence of the threat to sovereignty. Yet the body of law that constitutes IHL is immense and its importance is illustrated when Kalshoven states, “it is events of this type which more than anything else result in large numbers of the public in the theatre losing their status as peaceful onlookers and finding themselves dragged onto the stage as participants in the deadly game called war.”¹⁹ IHL as an ever-expanding body of law, created by States, has as its aim the protection of persons and prevention of unnecessary suffering.

¹⁸ Kalshoven (2007) 3.

¹⁹ As above 8.

2. WHAT IS INTERNATIONAL HUMANITARIAN LAW AND WHEN DOES IT APPLY?

The maxim *inter arma silent leges*²⁰ embodies when the body of IHL comes into effect. In times of armed conflict, when laws are suspended,²¹ IHL aims to mitigate the suffering caused. It is a set of rules that limits the effects of armed conflicts, for humanitarian reasons.²² The two main areas that IHL regulates are the protection of those who do not participate or no longer participate in the hostilities and the restriction of the means and methods of warfare used by the parties to the conflict.

IHL is applicable to armed conflicts and situations of occupation.²³ International Armed Conflicts are those, which occur between two or more States regardless of whether a declaration of war has been made, or even whether the state of war is recognised by either of them.²⁴ A situation of partial or total occupation is also regarded as an International Armed Conflict, even if the occupation meets with no armed resistance.²⁵ An armed conflict where peoples are fighting, in the exercise of their right to self-determination, against colonial domination; alien occupation; and racist regimes will also qualify as an International Armed Conflict and will be regulated by the relevant body of IHL.²⁶ The full body of IHL is inclusive of all rules contained in treaties concluded between States²⁷ and the body of customary IHL.²⁸ Together these regulate the conduct of hostilities to, in part, ensure the protection of the victims of armed conflicts; of which the rules contained in the Geneva Conventions of 12 August 1949 ('the Geneva Conventions') and Protocol I Additional to the Geneva Conventions of 12 August 1949, 1977 ('Additional Protocol I') form substantial part.

²⁰ 'Amid armed violence the laws are silent'.

²¹ It is a recognised principle in law and is contained in the *International Covenant on Civil and Political Rights*, 1966 that in certain abnormal circumstances the situation may arise where the need to protect the nation justifies temporary suspension of certain laws as well as the temporary suspension of certain fundamental human rights. These circumstances are known as 'states of emergency' or 'emergency clauses'. The precise scope of what constitutes an emergency differs between States however it has been described as when there is a 'threat to the life of the nation'. See Currie & De Waal (2005) 802. The European Court of Human Rights has provided guidelines and requirements that have to be met before fundamental human rights can be derogated from. See *Lawless Case* ECHR Series A Vol 3 (1961) and *Greek Case* Yearbook XII of the European Convention on Human Rights (1969). Armed conflicts will almost always qualify as a threat to the life of a nation and thus justify a state of emergency.

²² ICRC (2010) 13.

²³ As above.

²⁴ Common art 2 GC I – IV (1949).

²⁵ As above.

²⁶ Art 1(4) AP I (1977).

²⁷ See <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (accessed 15 May 2012).

²⁸ In 1996 the ICRC with renowned experts in the field undertook an international study into State practice in IHL with a view to identify customary law in the area. The study resulted in a double volume publication of customary IHL. The full study is available at <http://www.icrc.org/eng/resources/documents/publications/pcustom.htm> (accessed 09 May 2012) and <http://www.icrc.org/eng/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> (accessed 09 May 2012). See also Henckaerts (2005) 87 IRRC 175.

A Non-International Armed Conflict occurs within the territory of one State.²⁹ Also known as an internal armed conflict or a ‘civil war’, these conflicts occur between the regular armed forces of the State and other armed groups or between other armed groups entirely.³⁰ The principle of state sovereignty has ensured that a more limited body of rules is applicable to Non-International Armed Conflicts, in particular that of Common Article 3 of the Geneva Conventions (‘CA 3’) and Protocol II Additional to the Geneva Conventions of 12 August 1949, 1977 (‘Additional Protocol II’). Customary IHL has expanded the protection afforded to victims of Non-International Armed Conflicts and tends to minimize this distinction.

2.1 The enforcement and implementation of International Humanitarian Law

Public International Law, of which IHL is a branch of, is a body of rules governing relations between States.³¹ The sources of international law are contained in Article 38(1) of the Statute of the International Court of Justice³² and include treaties; customary law and general principles of law. Becoming a party to IHL treaties is important to ensure protection and for providing the “essential juridical basis [for] safeguarding the lives and dignity of victims of armed conflict.”³³ The universal ratification of the Geneva Conventions illustrates this importance and its recognition by States. When States recognise the obligations arising from IHL treaties, “they contribute to solidifying the international framework of fundamental rights and helping to protect the most vulnerable persons in time of armed conflict.”³⁴

Hans-Peter Gasser’s explanation of legal provisions as serving the purpose of influencing human behavior, adds to this concept.³⁵ He states that every norm is an order and that these standards of behavior must be implemented.³⁶ The main difference between international law and domestic law is on the level of implementation; a State has the machinery necessary for implementation of these norms, while the international community’s means of imposing its authority is more limited.³⁷ Here the importance of the domestic implementation of IHL is illustrated in a

²⁹ Gasser (2009) 67.

³⁰ CA 3 GC I – IV (1949) & art 1(1) AP II (1977).

³¹ ICRC (2010) 13.

³² United Nations, *Statute of the International Court of Justice*, 18 April 1946, available at: <http://www.unhcr.org/refworld/docid/3deb4b9c0.html> (accessed 9 May 2012).

³³ ICRC (2010) 20.

³⁴ As above.

³⁵ Gasser (2009) 79.

³⁶ As above.

³⁷ Gasser (2009) 79.

different form. After all, “[t]his is as true for rules of humanitarian law as it is for the national law, [...]. The fact that, in international humanitarian law, the rule applies in the first place to sovereign States does not alter the principle: that rule imposes an obligation.”³⁸

The obligation that is imposed covers the measures that need to be taken to ensure that the rules of IHL are respected. This respect for the rules not only applies during times of armed conflict but is also relevant in peacetime. The ICRC recognises that “the term ‘national implementation’ covers all measures that must be taken to ensure that the rules of IHL are fully respected.”³⁹ This means that measures must be taken to ensure that military personnel and civilians are familiar with the rules of IHL; the structures and personnel required for compliance with the law are in place; and violations of IHL are both prevented and punished.⁴⁰

Generally in order to be binding on the nationals of a State, some form of domestic incorporation of international legal obligations into the domestic legal order is required. States may be bound to international conventions and incur international responsibility, however enforced. It is important that the majority of violations of IHL are committed by individuals of a State against other individuals, and not by States. IHL recognises this in that perpetrators bear individual responsibility for violations of the law and must be prosecuted and punished.

This work will illustrate the importance of the domestic implementation of the repression of violations of IHL through national legislation and will look to the consequences of the failure to do so entirely, or at best inadequately.

3. CONCLUSION

The analogy used by Kalshoven is descriptive of ‘act one’ of the play “International Affairs”. It does not give the audience insight into the return home of the main actors, after the negotiation and conclusion of formal arrangements. What is expected of the actors upon their return? It further does not portray what happens to the individual actors involved in the armed conflict who commit war crimes and other breaches of IHL. What happens to those who return home? Is justice served and impunity

³⁸ As above.

³⁹ ICRC (2010) 19.

⁴⁰ As above.

prevented? Kalshoven himself predicts that “national measures of implementation and enforcement of international humanitarian law prescribed in the Conventions and other international humanitarian law instruments will continue to be insufficiently applied to ensure anything like a satisfactory protection of war victims: in international armed conflicts and *a fortiori* in internal ones.”⁴¹

The stage has been set and the basic reasons for the importance of the domestic implementation of IHL through national legislation have been provided, now to ‘act two’.

⁴¹ Kalshoven (2007) 731.

CHAPTER 3: THE DOMESTIC IMPLEMENTATION OF PROVISIONS FOR THE REPRESSION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

1. INTRODUCTION

“The more you sweat in peacetime, the less you bleed during war.”

- Chinese proverb

States are required to take a wide range of measures to properly implement International Humanitarian Law (‘IHL’) on the national level. One of the main measures required is to “repress all violations of IHL instruments and, in particular, to adopt criminal legislation that punishes war crimes.”⁴² Not only is this seen as one of the primary IHL obligations of States but is also one of the most important elements of national implementation of IHL. As Drzewicki observes, “ ... the absence of proper legislation may essentially reduce the efficiency of humanitarian law and even make its rules a dead letter, particularly when preventive and repressive action against violations is inoperative.”⁴³

1.1 States’ obligations

States bear the primary responsibility for ensuring that IHL is implemented effectively *inter alia* through national legislation. The importance of the prevention and, if necessary, the punishment of violations of IHL is particularly important and lies with the State.⁴⁴ Almost all IHL Conventions contain provisions that require States to adopt appropriate legislation to repress violations of IHL, and to prosecute those that commit violations. Select Conventions will be discussed and a brief analysis of the various obligations in this regard will be provided. Distinction is made between the laws governing an International Armed Conflict and those governing a Non-International Armed Conflict purely on the basis that this distinction exists in IHL and as a result provides for different set of obligations.

1.2 The distinction between International and Non-International Armed Conflicts and the provisions of International Humanitarian Law applied to the classification of conflicts

⁴² ICRC (2010) 23. See also Art 49 GC I; art 50 GC II; art 129 GC III, art 146 GC IV & arts 11 & 85 AP I.

⁴³ Kalshoven & Sandoz (eds) (1989) 111.

⁴⁴ ICRC (2010) 29.

It has been said that IHL “does not contains precise enough criteria to determine which situations fall within its material field of application, as the reality of armed conflict is more complex than the categories anticipated by IHL.”⁴⁵ Although there have been calls for the removal of classification of conflicts as either International or Non-International⁴⁶, supposing that the requirements for either are met, the distinction remains and is thus important in many respects. It is important because different IHL rules apply to an International Armed Conflict than those applicable to a Non-International Armed Conflict.⁴⁷ Non-International Armed Conflicts are further categorised into those falling within the ambit of Common Article 3 (‘CA 3’) as those conflicts “not of an international character occurring in the territory of one of the High Contracting Parties”⁴⁸ and those conflicts reaching the threshold required for the application of Additional Protocol II.⁴⁹ The threshold requirement that distinguishes a “CA 3 Non-International Armed Conflict” and an “Additional Protocol II Non-International Armed Conflict” is substantial and has a bearing on the practical implementation of the law. The respective laws governing International and Non-International Armed Conflicts require different obligations, which in turn affect the domestic implementation by States. This distinction and its consequences manifest in various ways.⁵⁰ The significance of the classification of an armed conflict and the resultant different obligations required of States and the practical difficulties’ created, in relation to this study, will be discussed in Chapter Four.

1.3 The Geneva Conventions of August 12, 1949⁵¹

⁴⁵ Vite (2009) 91 IRRC 69.

⁴⁶ Bartels (2009) 91 IRRC 35. The arguments mooted for the removal of the distinction are interesting however do not form part of this study. Customary IHL bridges this divide in practice.

⁴⁷ For purposes of this study and the Conventions analysed the GC, AP I and Customary IHL apply in the context of an International Armed Conflict. CA 3 GC, AP II and Customary IHL apply in the context of a Non-International Armed Conflict.

⁴⁸ CA 3 of GC I – IV.

⁴⁹ All armed conflicts not covered by AP I which take place in the territory of a State Party between its armed forces and dissident armed forces or other organised armed groups which are under responsible command and exercise control over a part of the State’s territory and enable them to carry out sustained and concerted military operations. See Art 1 AP II.

⁵⁰ See generally Pfanner (eds) (2009) 91 IRRC 1.

⁵¹ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of August 12, 1949 (‘GC I’); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea of August 12, 1949 (‘GC II’); Geneva Convention relative to the Treatment of Prisoners of War of August 12, 1949 (‘GC III’); Geneva Convention relative to the Protection of Civilian Persons in Time of War of August 12, 1949 (‘GC IV’).

Common Article 1 of the four Geneva Conventions places an obligation on States to respect and ensure respect for the Conventions in all circumstances. There are numerous measures set out in the Conventions that States are required to take and / or ensure.⁵² There are two types of national measures that are required to be taken that are particularly important, namely measures relating to dissemination and training, and the adoption of national laws to ensure the application of the Conventions.⁵³ In this study we will analyse the measures required of States to adopt appropriate national laws in ensuring that violations of IHL are repressed.

1.3.1 Grave Breaches

The Geneva Conventions identify particularly serious violations of IHL, known as 'grave breaches' that impose specific obligations on States. Grave breaches are defined as "violations of the law of armed conflict which States are under the obligation to prevent."⁵⁴ The following acts, among others, are listed as grave breaches in the Geneva Conventions: Wilful killing, torture or inhuman treatment, biological experiments, wilfully causing great suffering, and causing serious injury to body or health.⁵⁵ Today grave breaches are regarded as war crimes and remain the only violations of IHL, under the Geneva Conventions, imposing the specific obligation on States to prosecute any violations thereof.⁵⁶

1.3.1.1 Specific obligations required of States under the grave breaches regime

i. Effective penal sanctions for the commission of grave breaches

The Geneva Conventions require that States enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches listed and defined in the Conventions.⁵⁷ This translates into an obligation on States to enact national legislation that both prohibits and punishes grave breaches. The method used by States to give effect to this obligation is left to the State to determine. What is important is that

⁵² See ICRC (2010) 44 - 60.

⁵³ Pfanner (2009) 91 IRRIC 279 at 282.

⁵⁴ Verri (1992) 27.

⁵⁵ Art 50 GC I, art 51 GC II, art 130 GC III, & art 147 GC IV. For the complete list of grave breaches see the preceding provisions and ICRC (2010) 40.

⁵⁶ See Rule 156 'Serious violations of IHL constitute war crimes' in Henckaerts & Doswald-Beck (2009) 568.

⁵⁷ Art 49 GC I; art 50 GC II; art 129 GC III & art 146 GC IV.

the national criminal law of the country incorporates grave breaches as a crime with an appropriate penalty.⁵⁸

ii. Universal jurisdiction

The State is also obliged to ensure that the laws enacted to prohibit and repress grave breaches provide for universal jurisdiction over these offences. Universal jurisdiction goes beyond extraterritorial jurisdiction of a State and is the “assertion of jurisdiction over offences regardless of the place where they were committed or the nationalities of the perpetrator or victims.”⁵⁹ Usually all that is required is that the accused be in the territory of the State before criminal proceedings are instituted.⁶⁰ Although the obligation to recognise universal jurisdiction over grave breaches is not explicitly stated in the Geneva Conventions, they do oblige States to “search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts.”⁶¹ The State is obliged to either prosecute the accused or alternatively to extradite the accused to another State provided that the other State has made out a *prima facie* case against the accused.⁶² Customary International Humanitarian Law recognises the right of States to vest universal jurisdiction over war crimes committed in both International and Non-International Armed Conflicts in their national courts.⁶³

iii. Superior orders, command responsibility and failure to act

The Geneva Conventions specifically make provision for and impose the obligation on States to prosecute those persons who order the commission of any of the grave breaches.⁶⁴ Therefore responsibility for the commission of war crimes will arise even where they were committed pursuant to superior orders and IHL accords to the general principles of criminal law in this respect.⁶⁵ This is

⁵⁸ For the various methods of incorporating international crimes into domestic law see ICRC (2010) 31-33.

⁵⁹ ICRC (2010) 38.

⁶⁰ As above.

⁶¹ Art 49 GC I, art 50 GC II, art 129 GC III, & art 146 GC IV.

⁶² As above.

⁶³ See Rule 157 ‘States have the right to vest universal jurisdiction in their national courts over war crimes’ in Henckaerts & Doswald-Beck (2009) 604.

⁶⁴ Art 49 GC I, art 50 GC II, art 129 GC III, & art 146 GC IV. See Rule 152 ‘Commanders and other superiors are criminally responsible for war crimes committed pursuant to their orders’ in Henckaerts & Doswald-Beck (2009) 556.

⁶⁵ ICRC (2010) 36.

confirmed in Customary International Humanitarian Law applicable in both an International as well as a Non-International Armed Conflict.⁶⁶ It places an obligation on States to prosecute commanders and superiors where war crimes are committed as a result of their superior orders, and in instances where war crimes are committed by subordinates owing to the failure of a superior to prevent and / or punish such conduct of a subordinate. The subordinates who carry out manifestly unlawful orders, under IHL, will be held individually criminally responsible for their conduct and Customary International Humanitarian Law goes as far as to specify that there is a positive duty upon a subordinate to disobey an manifestly unlawful order.⁶⁷

Furthermore persons may be prosecuted where a grave breach occurred as a result of their failure to act. This can occur in one of two ways. Firstly a person will be held liable under the Geneva Conventions for committing a grave breach in the form of an omission, for instance, where the individual wilfully kills another by withholding food or proper care.⁶⁸ In the second instance a superior will be held liable where s/he fails in his/her duty to prevent a subordinate from committing a violation of IHL.⁶⁹ This is known as command responsibility and requires that the superior knew or reasonably should have known about the commission of the crime, had the ability to prevent the unlawful conduct, and failed to take all reasonable and necessary measures to prevent such conduct from occurring.⁷⁰ The Geneva Conventions are silent on command responsibility although it is a recognised principle of Customary International Humanitarian Law.⁷¹ At the very least, the Geneva Conventions require States to ensure in their domestic laws that military commanders prevent, suppress,

⁶⁶ See Rule 154 'Every combatant has a duty to disobey a manifestly unlawful order' and Rule 155 'Obeying a superior order does not relieve a subordinate of criminal responsibility if the subordinate knew that the act ordered was unlawful or should have known because of the manifestly unlawful nature of the act ordered' in Henckaerts & Doswald-Beck (2009) 563 - 567.

⁶⁷ See Rule 154 above.

⁶⁸ ICRC (2003) Information Kit: National Enforcement.

⁶⁹ As above.

⁷⁰ ICRC (2003) Information Kit: National Enforcement.

⁷¹ See Rule 153 'Commanders and other superiors are criminally responsible for war crimes committed by their subordinates if they knew, or had reason to know, that the subordinates were about to commit or were committing such crimes and did not take all necessary and reasonable measures in their power to prevent the commission, or if such crimes had been committed, to punish the persons responsible' in Henckaerts & Doswald-Beck (2009) 558. This principle has been incorporated into art 87 of AP I.

and take necessary action against those who are under their command and commit grave breaches.⁷²

iv. Judicial guarantees

The Geneva Conventions explicitly state that accused persons are entitled to and must benefit from the safeguards of a proper trial and defence, as laid out in Articles 105 to 108 of the Third Geneva Convention.⁷³ These are the minimum safeguards that have to be afforded to an accused person and include, *inter alia*, the right to a defence by qualified counsel, the right of appeal, proper notification of findings and sentence, and a minimum standard of conditions and rights in the execution of any penalty.⁷⁴ Depriving a protected person of these guarantees is a grave breach under Geneva Conventions III and IV.⁷⁵

v. Cooperation and mutual assistance between States

A level of cooperation and judicial assistance between States and other bodies is required and recognised in the Geneva Conventions. Customary International Humanitarian Law further confirms this.⁷⁶

vi. Statutes of limitations

The Geneva Conventions are silent on the subject of the applicability or not of statutes of limitations. In this respect States should refer to Rule 160 of Customary International Humanitarian Law that provides “statutes of limitation may not apply to war crimes.”⁷⁷ The 1982 United Nations Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity⁷⁸ and the 1974 European Convention on the Non-Applicability of

⁷² ICRC (2010) 39.

⁷³ Art 49 GC I, art 50 GC II, art 129 GC III & art 146 GC IV.

⁷⁴ For a complete overview of judicial guarantees see ICRC (2010) 37.

⁷⁵ Art 130 GC III & art 147 GC IV.

⁷⁶ See Rule 161 ‘States must make every effort to cooperate, to the extent possible, with each other in order to facilitate the investigation of war crimes and the prosecution of the suspects’ in Henckaerts & Doswald-Beck (2009) 618.

⁷⁷ Henckaerts & Doswald-Beck (2009) 614.

⁷⁸ Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, adopted by the Un General Assembly, Res. 2391 (XXIII), 26 November 1986.

Statutory Limitations to Crimes Against Humanity and War Crimes⁷⁹ find application here as well and can be used as a guideline for States in this regard.

1.3.2 Other breaches of the Geneva Conventions

Other violations of the Geneva Conventions, not falling within the grave breaches regime, oblige States to “take measures necessary for the suppression of all acts contrary to the [present] Convention other than the grave breaches.”⁸⁰

The meaning of ‘measures necessary for their suppression’ has been interpreted broadly and includes disciplinary correction or other suitable measures, including criminal prosecutions.⁸¹ This provision is an example of an instance where States can, and should, implement measures domestically above and beyond that which is required of them by law. The reasons for, and practical examples illustrating the importance of, additional measures being taken are fully covered in Chapter 4 of this study.

Recommendations on how States can implement measures beyond that which is strictly required of them are provided in the concluding chapter, Chapter 5, of this study.

1.4 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts of 8 June 1977 (Additional Protocol I)

1.4.1 Specific obligations required of States under the grave breaches regime

Additional Protocol I contains similar provisions as the Geneva Conventions on the repression of grave breaches and thus places the same obligations on States. Additional Protocol I significantly adds to and improves upon the system for the repression of grave breaches and other violations.⁸² Therefore in the discussion that follows attention will be drawn to provisions that differ from and

⁷⁹ European Convention on the Non-Applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Strasbourg, 25 January 1974.

⁸⁰ Art 49 GC I, art 50 GC II, art 129 GC III & art 146 GC IV.

⁸¹ Kalshoven & Zegveld (2001) 81.

⁸² Kalshoven & Zegveld (2001) 147.

extend the obligations and principles as contained in the Geneva Conventions.⁸³

i. Grave breaches and universal jurisdiction

Additional Protocol I also provides for a grave breaches regime and imposes the same obligations on States as the Geneva Conventions do. The grave breaches specified in Additional Protocol I include *inter alia* willfully and seriously endangering the physical and mental health and integrity of persons who are in the power of the adverse party or who are otherwise deprived of their liberty, in particular physical mutilations, medical or scientific experiments, and the removal of tissue or organs for transplantation which is not indicated by the state of health of the person.⁸⁴ In addition to the grave breaches specified in Article 11 of Additional Protocol I and those contained in the Geneva Conventions, Article 85 of Additional Protocol I lists additional grave breaches. Such breaches include, when committed wilfully and resulting in death or serious injury, making the civilian population the object of attack; launching an indiscriminate attack affecting civilians; the perfidious use of the distinctive emblem of the red cross and red crescent; and unjustifiable delay in the repatriation of prisoners of war or civilians.⁸⁵ The grave breaches specified in Additional Protocol I extend beyond those contained in the Geneva Conventions and include breaches of the rules relating to the conduct of hostilities.

Similarly Additional Protocol I requires States to enact national legislation prohibiting and punishing grave breaches and makes the application of universal jurisdiction to grave breaches mandatory.⁸⁶ Additional Protocol I goes further than the Geneva Conventions in that it extends the principle of universal jurisdiction to breaches of rules relating to the conduct of hostilities.⁸⁷

ii. Superior orders, command responsibility and failure to act

Additional Protocol I specifically incorporates the principle and resultant liability of command responsibility. Article 86.2 states that a breach committed by a

⁸³ For the sake of limiting unnecessary repetition where the provisions and resultant obligations for repression of war crimes under AP I are the same as the four GC reference must be had to para 3.3 above.

⁸⁴ Art 11 AP I.

⁸⁵ Art 85 AP I.

⁸⁶ Arts 1, 80, 85 & 86 AP I. See also ICRC (2010) 39.

⁸⁷ Art 85 AP I. See also ICRC (2003) Information Kit: National Enforcement.

subordinate does not absolve her/his superiors from responsibility if they knew, or reasonably should have known at the time, that s/he committed or was going to commit a breach, and did not take all feasible measures within their power to prevent or prosecute and appropriately punish the breach. Further Article 87 of Additional Protocol I provides for the duty of commanders in the prevention and suppression of breaches.

iii. Judicial guarantees

Although these provisions have attained the status of Customary International Humanitarian Law, the following judicial guarantees, among others also recognised under the Geneva Conventions, are explicitly recognised in Additional Protocol I: The presumption of innocence; the right of the accused to be present at his/her trial; the right of the accused not to testify or to confess guilt; and the right of the accused to have the judgment pronounced publicly.⁸⁸

iv. Cooperation, mutual legal assistance and responsibilities of States

Mutual assistance in criminal matters between States is provided for in Article 88 of Additional Protocol I. Parties are expected to afford one another the greatest measure of assistance in respect of criminal proceedings brought for grave breaches committed. Although cooperation in extradition is called for and due consideration should be given to requests for extradition, Additional Protocol I and the Geneva Conventions do not address the general exceptions provided for under national law that prevent extradition under certain circumstances.⁸⁹

1.4.2 Other breaches of Additional Protocol I

Article 85.1 of Additional Protocol I states that “the provisions of the [Geneva] Conventions relating to the suppression of breaches and grave breaches, supplemented by this section, shall apply to the repression of breaches and grave breaches of this Protocol.” Therefore Article 85.1 ensures the application of the system for the repression of both grave breaches and other violations of the Geneva Conventions to similar encroachments of Additional Protocol I as well.⁹⁰

⁸⁸ Art 75 AP I.

⁸⁹ ICRC (2010) 41.

⁹⁰ Kalshoven & Zegveld (2001) 147.

1.5 Common Article 3 of the Geneva Conventions

Common Article 3 ('CA 3') of the Geneva Conventions is the only article in the Geneva Conventions written for a Non-International Armed Conflict and has been described as a 'convention within the conventions'.⁹¹ While CA 3 has a broader scope of application and finds application in all conflicts not of an international character, in comparison to Additional Protocol II, the rules contained within CA 3 are 'minimum standards in the most literal sense of the term'.⁹²

1.5.1 Common Article 3 and implementation of repressions of violations of International Humanitarian Law

CA 3 prescribes that the following acts against protected persons are prohibited:

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

Since violations of CA 3 are not considered as grave breaches, they are considered as and fall under 'other breaches' of the Geneva Conventions and States are thus obliged to take the necessary measures for the suppression of these breaches.⁹³ The treaty law contains no obligation on States to repress these violations in the same manner as they are required to repress grave breaches. Customary International Humanitarian Law however recognises violations of CA 3 as serious violations of International Humanitarian Law amounting to war crimes.⁹⁴ The right of States to vest universal jurisdiction in their national courts over war crimes is also a rule recognised by Customary International Humanitarian Law.⁹⁵ These rules, read together with Rule 158

⁹¹ Kalshoven & Zegveld (2001) 69.

⁹² As above.

⁹³ Art 49 GC I, art 50 GC II, art 129 GC III & art 146 GC IV.

⁹⁴ Rule 156 'Serious violations of international humanitarian law constitute war crimes' in Henckaerts & Doswald-Beck (2009) 590.

⁹⁵ Rule 157 'States have the right to vest universal jurisdiction in their national courts over war crimes' in Henckaerts & Doswald-Beck (2009) 604.

requiring States to investigate war crimes allegedly committed by their nationals or armed forces, or on their territory, and to prosecute the suspects if appropriate⁹⁶, provide a suitable guideline for States in the implementation of a system of repressions of violations in a Non-International Armed Conflict.

1.6 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II)

Additional Protocol II supplements CA 3 and finds application in a Non-International Armed Conflict. The scope of Additional Protocol II is more limited than that of Common Article 3.⁹⁷ Although Additional Protocol II contains a range of protective measures in times of conflict, it is silent on measures for implementation and enforcement and provides no grave breaches. The only provision placing an implementing obligation on States is Article 19 that requires that the “Protocol shall be disseminated as widely as possible”. Although this is a less than perfect situation, States are still able to and should implement the law fully to repress breaches of IHL occurring in a Non-International Armed Conflict. The rules of Customary International Humanitarian Law as discussed in 1.5.1 above also find application here. An interesting provision contained in Additional Protocol II is Article 6.5, which requires that at the end of hostilities, the authorities shall endeavour to grant the broadest possible amnesty to persons who have participated in armed conflict. This may seem to conflict with the system of repressions of violations of International Humanitarian Law but must be interpreted to exclude those suspected of or guilty of war crimes. This has emerged into a rule of Customary International Humanitarian Law and is largely reflected by State practice.⁹⁸ The exclusion of those, from amnesties, who have or are suspected of committing war crimes, is also firmly entrenched in State practice.⁹⁹

⁹⁶ Henckaerts & Doswald-Beck (2009) 158.

⁹⁷ See art 1 AP II.

⁹⁸ Rule 159 ‘At the end of hostilities, the authorities in power must endeavor to grant the broadest possible amnesty to persons who have participated in a non-international armed conflict, or those deprived of their liberty for reasons related to the armed conflict, with the exception of persons suspected of, accused of or sentenced for war crimes’ in Henckaerts & Doswald-Beck (2009) 611.

⁹⁹ See Henckaerts & Doswald-Beck (2009) 611.

Although treaty law does not impose as stringent obligations on States to repress breaches of CA 3 and Additional Protocol II as it does for the repression of grave breaches of the Geneva Conventions and Additional Protocol I, the need to do so has developed over time and is reflected in Customary International Humanitarian Law. The fact that Non-International Armed Conflicts are, not only more frequent but also often more severe than International Armed Conflicts strengthens the point that States should apply the principles and obligations under the grave breaches regime to all violations of IHL.

1.7 Rome Statute of the International Criminal Court, 17 July 1998

The Rome Statute of the International Criminal Court ('Rome Statute') was adopted on 17 July 1998 and entered into force on 1 July 2002. The Rome Statute created the world's first permanent criminal court, the International Criminal Court ('ICC'), a concept that was called for and debated for much of the last century.¹⁰⁰ The need for the creation of a permanent international criminal court, according to Kellenberger, began based on "the decision to lay down specific rules on the penal repression of serious violations of international humanitarian law was founded on the conviction that a law which is not backed up by sanctions quickly loses its credibility."¹⁰¹ Kellenberger goes on to explain that "those who drafted the Geneva Conventions and Additional Protocols felt that penal repression could best be ensured on the national level, leaving the primary responsibility of defining and setting up an appropriate system to national authorities."¹⁰²

The importance of States implementing measures above and beyond what is required of them will be illustrated in Chapter 4 through real-time practical examples of the difficulties and injustices that arise when States fail to do so. It needs to be shown to States that it is not only important and imperative but is also in their best interests to do so. Already those measures that States are required to take are neither unreasonable nor burdensome. The measures States should take to repress violations of IHL will prove to be beneficial to all and not only to the participants in and victims of an armed conflict. Time and practice showed that this was not true in many instances. As the ICRC said when the ICC was established:

¹⁰⁰ See Du Plessis (eds) (2008) 2 for an analysis on the rise and creation of the ICC.

¹⁰¹ Dormann (2003) ix.

¹⁰² As above.

*The establishment of the [International Criminal] Court has at last provided international humanitarian law with an instrument that will remedy the shortcomings of the current system of repression, which is inadequate and all too often ignored. Indeed, the obligation to prosecute war criminals already exists, but frequently remains a dead letter. It is therefore to be hoped that this new institution, which is intended to be complementary to national criminal jurisdictions, will encourage States to adopt the legislation necessary to implement international humanitarian law and bring violators before their own courts.*¹⁰³

A full analysis of the Rome Statute and the ICC falls outside the scope of this study however the obligations placed on State Parties under the principle of complementarity and the national prosecution of crimes under the Rome Statute, which includes war crimes committed in violation of IHL applicable during armed conflicts, are relevant.¹⁰⁴ In essence the principle of complementarity makes certain that the ICC “operates a system of international criminal justice that buttresses the national justice systems of States Parties.”¹⁰⁵ The Rome Statute thus encourages domestic prosecutions of international crimes. This will be shown to be both true and to be working well in practice, in the case study of Uganda in Chapter Four of this study. Simultaneously the parallel of the importance of implementing domestic laws allowing for international prosecutions in domestic courts, in both a timely and effective manner, will be illustrated.

¹⁰³ Dormann (2003) 1.

¹⁰⁴ For a full analysis on the ICC see Du Plessis (2008) and Du Plessis in Dugard (2011) 170.

¹⁰⁵ Du Plessis (2008) 9.

CHAPTER 4: FOLLOWING TWO DECADES OF ARMED CONFLICT: THE SYSTEM OF REPRESSIONS IN UGANDA

1. INTRODUCTION

A brutal conflict was carried out across parts of Uganda, mainly in the North of the country, for over two decades. The conflict is known to be one of the most severe conflicts in Africa in the latter half of the twentieth century. The human rights violations and serious crimes committed are widely known, well documented and have been recognised by the Government of Uganda ('GoU'). Although the conflict ended around the time of the negotiation and signing of the Peace Agreements at Juba¹⁰⁶ in early 2008, many of the victims and families of victims exposed to brutal murders, abductions, sexual violence, forced enlisting of children and mutilations have yet to see any justice.

Using Uganda as a case study, this Chapter aims to illustrate the need for timely and effective domestic implementation of the repression of breaches of International Humanitarian Law ('IHL') as an important, yet simple, process for States.

2. BACKGROUND TO THE CONFLICT IN NORTHERN UGANDA

"Violence and conflict have plagued much of Uganda since independence."¹⁰⁷ As with all conflicts, the root causes of the conflict can be traced back to years before they broke out. Uganda is no different and some of the basic reasons for the conflict can be traced back to British colonial administration and the suppressive 'divide and rule' technique employed at the time.¹⁰⁸ Uganda gained independence in 1962 and has since moved through violent revolts and conflicts, from the violent dictatorship of Idi Amin extending 1971 to 1979, followed by the civil war from 1980 to 1986 after the first multi-party elections, to the protracted civil war Northern Uganda endured for over two

¹⁰⁶ See http://www.beyondjuba.org/peace_agreements.php for all peace agreements concluded (accessed 28 January 2012). The negotiations and peace talks between the Government of Uganda and the Lord's Resistance Army (LRA) were held in Juba, South Sudan and were mediated by the Government of Southern Sudan. Although there were a series of negotiations and agreements, the final peace agreement was never signed by the LRA. See Murungu & Biegon (eds) (2011) 207.

¹⁰⁷ Refugee Law Project (2004) 4.

¹⁰⁸ Murungu & Beigon (eds) (2011) 199.

decades that unleashed untold suffering.¹⁰⁹ It is not surprising that Uganda has been described as having a “history of violence and impunity.”¹¹⁰

While an in-depth analysis of the conflict and its causes fall outside the scope of this work, what is important is that Uganda’s post-independence political system has had a strong military character.¹¹¹ The regimes of Idi Amin and Milton Obote I and II were characterised by gross human rights violations, revealed by the large scale torture, rape, disappearances and displacement, extra-judicial executions and mass murders.¹¹²

*The perpetrators of these crimes got away with impunity, and eventually created a trend for successive governments to hunt down and exact extra-judicial revenge on soldiers and civilian populations associated with the ousted regimes. This practice culminated in a cycle of fear, hate, anger, mistrust, and more violent vengeance. [...] Such a culture of impunity also made recourse to violence the ‘easy’ and normal method of retaining or gaining access and control of state power.*¹¹³

This ‘culture of impunity’ allowed Joseph Kony and his Lord’s Resistance Army (‘LRA’) to wage a brutal war in Northern Uganda for more than two decades. While the motives of the LRA are relevant,¹¹⁴ more importantly for the purposes of this study are the crimes committed in carrying out their campaign of terror. The tactics used by the LRA are in blatant disregard for basic human rights and IHL. In 1994 civilians and civilian property became the sole object of attack and a military strategy was utilised that has been described in the following way:

They go for soft targets and traumatise people. The ferocity of the attacks spreads fear into the population. When this happens, they deny the government intelligence, they drive people from their homes and loot, and then they take the goats, cassava, etc from their land. The tools they use are

¹⁰⁹ As above 197.

¹¹⁰ Refugee Law Project (2004) 7.

¹¹¹ As above.

¹¹² Refugee Law Project (2004) 8.

¹¹³ As above.

¹¹⁴ For a full discussion on the anatomy of the LRA see Refugee Law Project (2004) 13.

*terror, concealment and high mobility, tying the children together with ropes and moving very fast.*¹¹⁵

The lack of an effective system for repressions in Uganda, stemming from past conflicts that saw the commission of serious international crimes with absolute impunity to the present day, is a contributing factor to the conflict seen in Northern Uganda. The lack of an effective system of repressions and thus the lack of any form of justice to date is based in part upon the failure by the GoU to both ratify and implement IHL instruments.¹¹⁶

It will be argued that had such a system been properly in place many of the violations and the disregard of human rights and dignity could have been prevented. In broadening this, today Uganda would be in a better-equipped position and would not be faced with the current obstacles in trying to end the cycle of impunity. In fact the didactic dimension, an important element, of criminal trials for violations of IHL gives rise to the recognition that “trials for genocide, crimes against humanity and war crimes go beyond ‘pure’ criminal trials for ordinary crimes but are inherently political.”¹¹⁷

An effective system to repress violations of IHL assists in ensuring that impunity is ended. Positive impact is felt and seen when those responsible for violations are held accountable, illustrating that non-compliance with the law will not be tolerated. Future violations are prevented when effective systems are in place to repress violations of IHL.

3. UGANDAN LAWS GOVERNING THE REPRESSION OF VIOLATIONS OF INTERNATIONAL HUMANITARIAN LAW

Ugandan law is based on the common law system and the power to institute criminal proceedings is constitutionally vested in the Director of Public Prosecutions (‘DPP’).¹¹⁸ International treaties are ratified by the executive and need to be

¹¹⁵ Refugee Law Project (2004) 22.

¹¹⁶For a full list of IHL treaties signed and ratified by Uganda see <http://www.icrc.org/ihl.nsf/Pays?ReadForm&c=UG> (accessed 15 May 2012).

¹¹⁷ Sriram & Pillay (eds) (2009) 89.

¹¹⁸ Murugngu & Biegon (eds) (2011) 212.

domesticated by parliament, thus following a dualist tradition.¹¹⁹ The Constitution of the Republic of Uganda ('the Constitution') vests judicial power in the courts of judicature, established in a hierarchal manner.¹²⁰

3.1 The Geneva Conventions Act 1964, Chapter 363

Uganda acceded to the Geneva Conventions on 18 May 1964 and to both Additional Protocols on 13 March 1991. The Geneva Conventions were incorporated into domestic law in 1964 through the Geneva Conventions Act. The provisions of the Additional Protocols have, to date, still not been incorporated into Ugandan law. Although due recognition should be afforded to Uganda for the domestication of the Geneva Conventions, the Act is not comprehensive and falls short in material respects. An analysis on the consequences of these shortcomings is explained fully in 4.3 below.

The Geneva Conventions Act criminalizes grave breaches of the Conventions committed by any person whether committed inside or outside of Uganda.¹²¹ The punishment imposed where the wilful killing of a protected person is committed is life imprisonment and all other grave breaches impose a sentence of a maximum of fourteen years.¹²² Criminal proceedings under the Act may not be instituted unless it is by or on behalf of the DPP.¹²³

No other breaches of the Geneva Conventions are made punishable by the Geneva Conventions Act. Breaches of Common Article 3 ('CA 3') are not provided for and it would seem that the intention of the drafters was to exclude any rules or norms regulating the law of a Non-International Armed Conflict. This is apparent from section 2(4) of the Act which provides that "[w]henever in any proceedings under this section in respect of a grave breach of any of the Conventions and any question arises under article 2 of that Convention, that question shall be determined by the Minister; [...]."¹²⁴ The lack of mention of CA 3 in section 2(4) is an obvious omission from the Act.¹²⁵

¹¹⁹ As above 213.

¹²⁰ s. 129 of the Constitution of the Republic of Uganda, 1995.

¹²¹ s. 1 Geneva Conventions Act.

¹²² As above.

¹²³ s. 1(3) Geneva Conventions Act.

¹²⁴ Common Art 2 of the GC contains provisions relating to the application of the Conventions, namely in an International Armed Conflict.

¹²⁵ See ICRC (2010) 162.

Therefore while CA 3 has in theory been incorporated into Uganda's domestic law through the annexing of the Geneva Conventions to the Act as Schedules, it is of no practical force or effect. This means that the Geneva Conventions Act only represses grave breaches occurring in the context of an International Armed Conflict.

3.2 The Penal Code Act 1950, Chapter 120

The Penal Code Act establishes a code of criminal law within Uganda. General principles of criminal law, all crimes as well as the punishment imposed for the various offences are contained within the Act. Importantly the punishment imposed by the Penal Code Act for a person convicted of murder is death.¹²⁶ The implications of this in the context of and relative to international crimes are discussed fully in 4.3 below.

3.3 The Amnesty Act 2000, Chapter 294

The Amnesty Act was adopted with the intention of fostering peace and encouraging negotiations between the parties at a time when the conflict was raging in Northern Uganda.¹²⁷ Through the Act amnesty is granted to all Ugandans who at any time since 26 January 1986 have engaged in war or armed rebellion against the GoU through all modes of criminal participation.¹²⁸

The Act explicitly states that any person granted such amnesty may not be prosecuted or subjected to any form of punishment for their participation.¹²⁹ In order to be granted amnesty all that is required is for the individual (referred to in the Act as a 'reporter') to report to the relevant authority, to renounce and abandon any involvement in the war, surrender any weapons in his/her possession, and be issued with a Certificate of Amnesty.¹³⁰ The Act further provides amnesty for those individuals who have already been charged with or who are in lawful detention for any offence in relation to the conflict. Amnesty will be granted to these detained individuals so long as they comply

¹²⁶ s. 189 Penal Code Act.

¹²⁷ Author interview with senior official from JLOS, Kampala 28 September 2010 & Author interview with senior official in Amnesty Commission Uganda, Kampala 29 September 2010.

¹²⁸ s. 3(1) Amnesty Act. The fact that amnesty is granted to all Ugandans means that it is not restricted to members of the LRA, it includes all rebel movements involved in the conflict for the duration of the conflict.

¹²⁹ s. 3(2) Amnesty Act.

¹³⁰ s. 4(1) and s. 4(2) Amnesty Act.

with the requirements for amnesty under the Act¹³¹ and if the DPP certifies that they have not been charged with or detained for any other offence that falls outside the scope of the Act.¹³² The effect of this is an absolute blanket amnesty to all those who have committed any violation of IHL as well as other international and domestic crimes within the context of the armed conflict.

The Act was amended in 2001 with the insertion of a provision that disallowed the granting of amnesty to the same reporter on more than one occasion.¹³³ This amendment was a result of reporters being granted amnesty, returning to the 'bush' or the rebellion and committing other violations. They would thereafter apply for amnesty again which would be granted.¹³⁴ The amendment further makes the reporter liable to prosecution for the offence committed in connection with the armed conflict after the first amnesty had been granted.¹³⁵

A further amendment was effected in 2006 that allows the Minister of Internal Affairs to declare any individual ineligible to be granted amnesty.¹³⁶ The Minister has to declare such an individual ineligible by statutory instrument and has to obtain the approval of Parliament.¹³⁷ Some reports state that the Minister has failed to utilize this statutory power conferred upon him. However an interview with a senior official of the Amnesty Commission reflected otherwise. It seems that the Minister has tried previously to exclude certain individuals from amnesty however failed to receive the required support from Parliament in doing so. As a result the request and list of names proposed by the Minister was declined in Parliament.¹³⁸

In 2010 the Amnesty Act was once again extended for an additional period of two years from 25 May 2010 and is thus due to expire on 25 May 2012. With all the recent developments in Uganda regarding the sensitivity of amnesty and criminal prosecutions crossing lines, as discussed fully in 4.3 below, it remains to be seen whether the Act is extended once again. At time of writing the only information that

¹³¹ Reporting to the relevant authority, renouncing and abandoning any involvement in the conflict and the surrender of weapons.

¹³² s. 4(2), s. 4(3), s. 4(4) & s. 4(6) Amnesty Act.

¹³³ s. 6A Amnesty Act.

¹³⁴ Author interview with senior official from Amnesty Commission, Kampala 29 September 2010.

¹³⁵ s. 6A Amnesty Act.

¹³⁶ s. 2A Amnesty Act.

¹³⁷ As above.

¹³⁸ Author interview with senior official from Amnesty Commission, Kampala 29 September 2010.

was accessible on an extension of the Act, if any, were reports that the Deputy Speaker of Parliament had announced on 14 April 2012 that the Act would be extended for a further two years.¹³⁹ The extension had not yet been gazetted at time of writing.

3.4 The International Criminal Court Act 11 of 2010

Uganda acceded to the Rome Statute of the International Criminal Court on 14 June 2002. The International Criminal Court Act ('ICC Act') was enacted *inter alia* to make further provision for the punishment of the international crimes of genocide, crimes against humanity and war crimes; and to enable Ugandan courts to try, convict and sentence persons who have committed the crimes referred to in the Statute.¹⁴⁰ The ICC Act came into force on 25 June 2010.¹⁴¹

A comprehensive analysis may be undertaken with regards to the implementation of the Rome Statute into Ugandan law, however such analysis falls outside of the scope of this study. Relevant to this study is the ability of a country to allow the prosecution of crimes under the Rome Statute, in Uganda's case crimes under the ICC Act, which occurred prior to its enactment into law. Therefore the ICC Act may be used as a means to prosecute those responsible for the commission of violations of IHL and international crimes. Based on the fact that the ICC Act fully incorporates crimes against humanity and all war crimes falling under the Rome Statute, whether committed in an International Armed Conflict or in a Non-International Armed Conflict, and not only grave breaches of the Geneva Conventions this would seem to be a promising step to take.¹⁴² The difficulty expressed by various persons interviewed during the course of this research is the fundamental right of an individual to a fair trial.¹⁴³ The Constitution protects an individual's right to a fair trial and included within this right is the right not to be charged with or convicted of a criminal offence which is

¹³⁹ See <http://justiceinconflict.org/2012/04/22/where-to-with-transitional-justice-in-uganda-the-situation-after-the-extension-of-the-amnesty-act/> (accessed 10 May 2012).

¹⁴⁰ s. 2 ICC Act.

¹⁴¹ This means that the ICC Act may not be utilised to prosecute those for war crimes committed in the conflict in Northern Uganda prior to the commencement date. It will be argued that this does not prevent prosecution of war crimes under Customary International Humanitarian Law. It should also be noted that the ICC Act provides for specific retrospective application in s 1. The retrospective application is limited to matters related to cooperation with the ICC.

¹⁴² For a full comparison of war crimes under Rome Statute and their sources in international law see ICRC (2010) 340.

¹⁴³ Author interview with senior ICD officer, Kampala 27 September 2010; Author interview with senior JLOS official, Kampala 28 September 2010; & Author interview with NGO, Kampala 28 September 2010.

founded on an act or omission that did not, at the time it took place, constitute a criminal offence.¹⁴⁴ This ‘dilemma’ is discussed in full in the analysis in 4.3 below.

4 PROSPECTS, PROBLEMS AND PROPOSALS

4.1 Background

The Agreement on Accountability and Reconciliation between the Government of Uganda and the Lord’s Resistance Army / Movement, Juba, Sudan¹⁴⁵ stresses the parties’ commitment to accountability and reconciliation by providing that the parties shall promote national legal arrangements and measures for ensuring justice and reconciliation.¹⁴⁶ Both formal legal processes as well as traditional justice mechanisms are recognised in the Agreement.¹⁴⁷ Clause 4 provides that formal criminal and civil justice methods will be applied to an individual alleged to have committed serious crimes or human rights violations in the course of the conflict. It further provides that state actors, members of the Ugandan People’s Defence Force (‘UPDF’), are excluded from the special justice processes under the Agreement and instead will be subject to existing criminal justice processes.¹⁴⁸ Formal courts are vested with the jurisdiction over those alleged to bear responsibility for the most serious crimes, especially international crimes, during the course of the conflict.¹⁴⁹ Furthermore formal courts and tribunals are able to adjudicate allegations of gross human rights violations arising from the conflict.¹⁵⁰

The preamble of the Annexure to the Agreement on Accountability and Reconciliation¹⁵¹ signed by the GoU and the LRA, recalls the parties commitment to preventing impunity and promoting redress in accordance with the Constitution and

¹⁴⁴ s. 28(7) Constitution.

¹⁴⁵ Available at

http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_and_Reconciliation.pdf (accessed 30 January 2012).

¹⁴⁶ Clause 2.1 Agreement on Accountability and Reconciliation.

¹⁴⁷ Clauses 3 & 4 Agreement on Accountability and Reconciliation.

¹⁴⁸ The Court Martial, Uganda. The distinction between the justice mechanisms for the UPDF, namely being tried under military laws by the court martial, and the rebel groups under the agreement may be criticized as effectively allowing for unequal treatment of persons responsible for violations of IHL. Furthermore criticism may be leveled that this effectively provides for impunity for the GoU and the UPDF.

¹⁴⁹ Clause 6 Agreement on Accountability and Reconciliation.

¹⁵⁰ As above.

¹⁵¹ Available

http://www.beyondjuba.org/peace_agreements/Agreement_on_Accountability_and_Reconciliation_Annexture_1.pdf (accessed 30 January 2012).

international obligations. The objective of the Annexure is to provide “a framework by which accountability and reconciliation are to be implemented pursuant to the Principal Agreement.”¹⁵² Through this the parties agreed to the establishment of a special division of the High Court to try individuals accused of committing serious crimes during the conflict.¹⁵³ The Annexure further provides for various mechanisms for the implementation of accountability and reconciliation which, although important, fall outside the scope of this study.¹⁵⁴

It is in the wake of the Agreement on Accountability and Recognition and its Annexure that the GoU established the International Crimes Division of the High Court of the Republic of Uganda (previously known as the War Crimes Division). Although the LRA representatives failed to sign the final peace agreement, the GoU committed unilaterally to implement the agreements to the fullest extent possible.¹⁵⁵

4.2 The International Crimes Division

The International Crimes Division (‘ICD’) was established in July 2008 to deal with those accused of committing serious crimes including war crimes, crimes against humanity, genocide, terrorism, piracy, human trafficking, and other serious crimes.¹⁵⁶ The Principal Judge, falling within his administrative functions, set up the ICD under section 141 of the Constitution.¹⁵⁷ The decision to create a new division of the High Court was based upon several factors including the inability in law to create a separate court on the same level as the High Court as well as the seriousness of the nature of the crimes to be tried by the ICD.¹⁵⁸

The mission of the ICD is “to fight impunity and promote human rights, peace and justice.”¹⁵⁹ Further a “strong and independent Judiciary that delivers and is seen by the

¹⁵² Clause 1 Annexure to Agreement on Accountability and Reconciliation.

¹⁵³ Clause 7 Annexure to Agreement on Accountability and Reconciliation.

¹⁵⁴ Included within these measures are the following: Legal and Institutional Framework; Investigations and Prosecutions; Reparations; and Traditional Justice Mechanisms. See Annexure to Agreement on Accountability and Reconciliation.

¹⁵⁵ Author interview conducted with senior JLOS official, Kampala 28 September 2010.

¹⁵⁶ See http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&itemid=154 (accessed 30 January 2012).

¹⁵⁷ Author interview with senior JLOS official, Kampala 28 September 2010.

¹⁵⁸ As above.

¹⁵⁹ http://www.judicature.go.ug/index.php?option=com_content&task=view&id=117&item=154 (accessed 30 January 2012).

people to deliver justice and contribute to the economic, social and political transformation of society based on rule of law” is what is envisioned by the ICD.¹⁶⁰

4.3 The repression of violations of International Humanitarian Law and the International Crimes Division

“Because there are some who are more equal than others”

– Legal Officer and community representative, Kampala 28 September 2010.¹⁶¹

4.3.1 Classification of the conflict in Northern Uganda

The first and, thus far, only accused to be brought before the ICD to be tried for violations of IHL is Thomas Kwoyelo. Kwoyelo was captured in 2009 in Garamba in the Democratic Republic of Congo (‘DRC’) for his involvement in the conflict as a former LRA commander.¹⁶² Kwoyelo was detained from March 2009 until September 2010 when he was brought before a Magistrates Court and formally charged with grave breaches of the Geneva Conventions under section 2 of the Geneva Conventions Act.¹⁶³ Kwoyelo was charged with twelve counts of grave breaches ranging from wilful killing and the taking of hostages to extensive destruction of property.¹⁶⁴ The Magistrates Court committed Kwoyelo for trial before the ICD where he appeared for the first time in July 2011.¹⁶⁵ At this appearance the indictment was amended and he was charged with fifty-three counts of grave breaches and alternative charges under the Penal Code Act were also incorporated. It would appear that the subsequent inclusion of the alternative charges falling under the Penal Code Act is as a result of the complexities arising from the classification of the conflict. In order to successfully prosecute Kwoyelo under the Geneva Conventions Act the prosecution would have to prove that the crimes occurred in the context of an IAC.

The charges thus raise important questions that deserve a closer analysis. While conducting several interviews at the ICD with various senior court personnel it became apparent that the classification of the conflict in Northern Uganda was hardly clear or

¹⁶⁰ As above (accessed 30 January 2012).

¹⁶¹ This was part of reasoning provided by the Legal Officer and community representative in response to a question posed on Uganda’s failure to prosecute any individual thus far in relation to the conflict, and in breach of its obligations under IHL.

¹⁶² JLOS (2011) 1.

¹⁶³ JLOS (2011) 1 & Author interview with senior ICD officer, Kampala 27 September 2010.

¹⁶⁴ Author interview with senior ICD officer, Kampala 27 September 2010.

¹⁶⁵ JLOS (2011) 1.

agreed and would be a contentious issue in the near future. Kwoyelo was charged with grave breaches of the Geneva Conventions, crimes of an International Armed Conflict, and the only international crimes to be implemented into Ugandan law at the time of the conflict.¹⁶⁶ No repression of violations of the laws of a Non-International Armed Conflict had been properly implemented into Ugandan law.¹⁶⁷ It would seem that charging Kwoyelo under the law of an International Armed Conflict is more convenient, but not without serious complexities.

While it is recognised and has been broadly documented that the LRA received support from Sudan during the conflict,¹⁶⁸ the conflict is still broadly viewed as a Non-International Armed Conflict not reaching the threshold required for internationalization of the conflict. This is further supported by the fact that the International Criminal Court ('ICC') has issued warrants of arrest for those most responsible in the conflict, charging them war crimes committed during a Non-International Armed Conflict.¹⁶⁹ It appears from the preliminary proceedings of Kwoyelo before the ICD on 25 July 2011 that the defence raised this factor as a preliminary objection. The defence argued that the particulars of the charge brought against Kwoyelo are vague as they do not provide a factual basis for the allegation that Uganda, Sudan and the DRC were 'at war' during the period of time when Kwoyelo has been charged with committing grave breaches.¹⁷⁰ The defence relied on section 22 of the Trial on Indictments Act¹⁷¹ arguing "statements of specific offences go together with such particulars as may be necessary in order to provide reasonable information as to the nature of the offence charged."¹⁷² The defence alleged that the particulars of the charges are so vague that it impairs the proper preparation of a defence and thus that all charges under the Geneva Conventions Act should be declared defective.¹⁷³ The defence then applied for a constitutional reference on the basis of this and two other preliminary

¹⁶⁶ For an analysis on the ICC Act and its application, see 4.3.3 below.

¹⁶⁷ Uganda ratified AP II on 13 March 1991 and has yet to implement its provisions on the national level. Combined with Uganda's failure to properly implement the GCs and thus CA 3, leave a *lacuna* in Ugandan law in respect of the law of a Non-International Armed Conflict. The only remaining option to secure convictions under the laws of a Non-International Armed Conflict would be to prove that they were recognised as war crimes under Customary International Humanitarian Law and in Uganda.

¹⁶⁸ Refugee Law Project (2004) 13.

¹⁶⁹ See <http://www.icc-cpi.int/menus/icc/situations%20and%20cases/situations/situations%20icc%200204/related%20cases/icc%200204%200105/uganda?lan=en-GB> (accessed 30 January 2012).

¹⁷⁰ Refugee Law Project (2011) 3.

¹⁷¹ The Trial on Indictments Act 1971, Chapter 23.

¹⁷² Refugee Law Project (2011) 3.

¹⁷³ As above.

objections¹⁷⁴ and requested that the ICD refrain from ruling on such objections until the Constitutional Court has reached a decision.¹⁷⁵ The ICD stayed all proceedings pending a decision from the Constitutional Court.¹⁷⁶

The matter of *Thomas Kwoyelo alias Latoni v Uganda*¹⁷⁷ (Kwoyelo v Uganda) was heard by the Constitutional Court on 16 August 2011. The defence initially had requested that the Court make a determination, among others, on:

Whether the act of accusing the accused person under Common Article 2 of the Geneva Conventions and Section 2(1)(d) and (e) of the Geneva Conventions Act for offences allegedly committed in Uganda between 1993 and 2005 is inconsistent with and in contravention of Articles 1, 2, 8(a) and 287 of the Constitution [...].

In essence the defence requested a determination on whether the particulars of the charges as provided by the prosecution were vague and thus unconstitutional, rendering the said charges of no force or effect. However prior to the hearing the defence informed the Registrar of the Constitutional Court that Kwoyelo had abandoned this issue.¹⁷⁸ It thus went undecided by the Court and remains a contentious issue.

4.3.2 Accountability and reconciliation: The ICD and amnesty

“The legislation has failed us”

- Senior ICD official, Kampala 27 September 2010.

Currently the Amnesty Act has full force of law in Uganda and will retain that status at the very least until 25 May 2012, unless it is repealed by Parliament prior to this date.¹⁷⁹ The Amnesty Act was incorporated into Ugandan law with a view to

¹⁷⁴ See 4.3.2 below for a full discussion on the other preliminary objections.

¹⁷⁵ Refugee Law Project (2011) 3.

¹⁷⁶ As above.

¹⁷⁷ Const. Pet. No. 036 of 2011, [2011] UGCC 10 (22 September 2011).

¹⁷⁸ Kwoyelo v Uganda [2011] UGCC 10.

¹⁷⁹ There are indications that the Act will again be extended for a further two-year period. In this regard see para 3.3 above.

fostering peace and through the expressed desire of the people of Uganda to end the armed conflict, reconcile with those who have caused suffering and rebuild their communities.¹⁸⁰ The purpose of the Act is important in gaining a full understanding of the conflict in Uganda and the views of the victims of the conflict. The LRA was made up of a majority of abductees and it has been estimated that more than twenty thousand children were abducted, constituting up to eighty percent of the LRAs membership.¹⁸¹ With this in mind it is not surprising that the amnesty law has received such popular support. When children are abducted and forced to commit heinous crimes they are viewed as victims, not as perpetrators. This was also one of the reasons provided for the fact that a list of names to be excluded from the provisions of the Amnesty Act has never been accepted by Parliament. Some members of Parliament, many from the North, view these perpetrators as members of their communities, their own sons and daughters, as victims who should not be formally prosecuted.¹⁸² When an average of twenty seven thousand people have been granted amnesty, the Amnesty Act has been in operation for over ten years, there have been no active hostilities for approximately four years, and it is said that “we have given more assistance to the perpetrators than we have provided to the victims themselves”¹⁸³, it has to be asked whether the Act has far outlived its purpose?

It was discussed in Chapter Two paragraph 1.6 above that granting of amnesty is a possibility recognised both in Additional Protocol II and Customary International Humanitarian Law. However the form of amnesty recognised in international law is not blanket amnesty applicable to all persons. Amnesty cannot and does not extend to international crimes and war crimes committed by an individual.¹⁸⁴ In this regard, Uganda has failed to account for this important mandatory exclusion in their amnesty law and elsewhere, creating serious obstacles to accountability. This can be shown through the recent constitutional case of *Kwoyelo v Uganda*.¹⁸⁵

¹⁸⁰ Preamble to the Amnesty Act.

¹⁸¹ Moy (2006) 19 *Harv. Hum. Rts. J.* 267 at 268.

¹⁸² Author interview conducted with senior official of Amnesty Commission, Kampala 29 September 2010.

¹⁸³ As above.

¹⁸⁴ According to the commentary on AP II, the object of the amnesty sub-paragraph is “to encourage gestures of reconciliation which can contribute to reestablishing normal relations in the life of a nation which has been divided.” See Commentary on AP II available at <http://www.icrc.org/ihl.nsf/COM/475-760010?OpenDocument> (accessed 15 May 2012). This was indeed the case in Uganda.

¹⁸⁵ [2011] UGCC 10.

On 22 September 2011 the Ugandan Constitutional Court decided on the question of whether the failure by the DPP and the Amnesty Commission to grant Kwoyelo a certificate of amnesty, where certificates had previously been issued to other persons of similar circumstances to Kwoyelo, is in contravention of, and inconsistent with the Constitution.¹⁸⁶ The Applicants argument was based mainly on the alleged discrimination and deprivation of equal protection of the law suffered as a result of the refusal to issue him with an amnesty certificate. In response, the Principal State Attorney on behalf of Uganda requested the Court to determine whether certain material provisions of the Amnesty Act are inconsistent with the Constitution and thus invalid. The argument was based *inter alia* on inconsistency with section 287 of the Constitution¹⁸⁷ and the violation of Uganda's international law obligations by granting blanket amnesty for both war crimes and international crimes.

The Court held that the purpose of the Amnesty Act was to be a means to bring the rebellion in Uganda to an end through the granting of amnesty and that there is nothing unconstitutional in this purpose. The Court further held that the concern over Uganda's international obligations not to grant blanket amnesty for war crimes and international crimes was cured by the fact that the Minister of Internal Affairs had the power to declare individuals ineligible for amnesty. While the Court accepted that individuals might be tried for crimes against humanity and genocide, they also concluded that they had not come across any uniform international standards or practices that prohibit States from granting amnesty. The Court concluded, by looking at the ICC arrest warrants for Joseph Kony and others, that Uganda is in fact aware of their international obligations while at the same time may use the amnesty law to solve a domestic problem. The Court held the Amnesty Act to be Constitutional. The Court held that the DPP had failed to show any reasonable or objective explanation why the Applicant should be denied equal treatment under the Amnesty Act. The Court thus found that the Applicant's right to equality and freedom from discrimination had been infringed, and the actions of the DPP and the Amnesty Commission to be inconsistent with the Constitution and thus null and void. The file was ordered to be returned to the ICD with a direction to cease the criminal prosecution of the Applicant immediately. At time of writing, the State had lodged an appeal against the decision of the Constitutional Court to the Supreme

¹⁸⁶ Kwoyelo v Uganda [2011] UGCC 10.

¹⁸⁷ s. 287 of the Constitution recognises the validity of ratified treaties under Ugandan law.

Court and all proceedings had been stayed pending finalization of the appeal. Kwoyelo remains in detention.

On 25 January 2012 the High Court, Kampala ordered the DPP and the Amnesty Commission to issue an amnesty certificate to Kwoyelo.¹⁸⁸ At time of writing the DPP had refused to grant Kwoyelo with an amnesty certificate stating that they “maintain the position that under the principles of international law, no amnesty can be granted to persons accused of committing war crimes under the Geneva Convention.”¹⁸⁹ Further the DPP has lodged an appeal against the decision on the basis that amnesty cannot be granted to an individual accused of international crimes.¹⁹⁰

Another senior commander of the LRA, Caesar Acellam, was captured on the border of the Democratic Republic of the Congo and Central African Republic on 13 May 2012.¹⁹¹ Speculation has arisen whether Acellam will be eligible for amnesty or not. To date Acellam is yet to be charged and is, under Ugandan law, eligible to apply for amnesty.¹⁹²

This no doubt raises a series of complex questions and alternate solutions. Moving forward it will be imperative for Uganda to demonstrate that they are not condoning impunity and are serious about prosecuting those responsible for violations of IHL, as they had undertaken to do when ratifying the international conventions they are party to. A final decision on the amnesty and the appropriate way forward in similar cases is required as a matter of urgency.

4.3.3 The International Crimes Division and the ICC Act

“For the sake of ending impunity - justice must go on”

- NGO representative, Kampala 29 September 2010.

¹⁸⁸ See <http://www.newvision.co.ug/news/628591-issue-ex-lra-commander-kwoyelo-amnesty-certificate-court-rules.html>. (accessed 4 February 2012).

¹⁸⁹ <http://www.newvision.co.ug/news/628800-dpp-rejects-kwoyelo-amnesty.html> (accessed 5 February 2012).

¹⁹⁰ Institute for War and Peace Reporting (2012) available at <http://allafrica.com/stories/201205161274.html> (accessed 16 May 2012).

¹⁹¹ As above. Also see Reuters (2012) available at <http://www.trust.org/alertnet/news/captured-lra-commander-eligible-for-amnesty-adviser> (accessed 16 May 2012) and The Monitor (2012) available at <http://www.afrika.no/Detailed/21704.html> (accessed 16 May 2012).

¹⁹² Reuters (2012) available at <http://www.trust.org/alertnet/news/captured-lra-commander-eligible-for-amnesty-adviser> (accessed 16 May 2012).

As of 25 June 2010 genocide, crimes against humanity and war crimes committed in both an International Armed Conflict and a Non-International Armed Conflict form part of Ugandan law.¹⁹³ Although a positive step in the right direction must be said whether this step in relation to the conflict in Northern Uganda was too little too late.

All crimes falling under the ICC Act are crimes within the jurisdiction of the ICD. The ICC Act has no retrospective force, with the exception of certain parts of the Act relating to cooperation and related matters with the ICC.¹⁹⁴ In the incorporation of general principles of criminal law, the ICC Act provides *inter alia* that Article 22(2) and Article 24(2) of the Rome Statute find application in Ugandan law. Article 22(1) of the Rome Statute is the incorporation of the principle *nullum crimen sine lege* and provides that a person will not be criminally responsible unless the conduct in question constitutes, at the time it takes place, a crime within the jurisdiction of the Court. Interestingly enough, this provision has not been specifically incorporated into Ugandan law in section 19 of the ICC Act. Article 24(1) of the Rome Statute further provides that no person shall be criminally responsible for conduct prior to the entry into force of the Statute. This is in line with Article 11 of the Rome Statute providing for temporal jurisdiction in that the ICC only has jurisdiction in respect of crimes committed after the entry into force of the Rome Statute.¹⁹⁵

It may be that these two provisions of the Rome Statute have not been specifically included due to the fact that the Ugandan Constitution recognises these principles already, as forming part of fundamental rights and general principles of Ugandan law. Section 28(7) of the Constitution, as a part of the right to a fair trial, guarantees that no person shall be charged with or convicted with a criminal offence which is founded on an act or omission that did not, at the time it took place, constitute a criminal offence. Herein lies the reason many people have used for the reasoning that the ICD will not hear cases of individuals charged with crimes falling under the ICC Act, for the past conflict in Northern Uganda.¹⁹⁶ In fact the impression is that the

¹⁹³ Part II ICC Act, 2010.

¹⁹⁴ See Part I ICC Act.

¹⁹⁵ The Rome Statute entered into force on 1 July 2002 and thus the ICC can only hear cases for crimes that were committed after its entry into force. Uganda ratified the Statute on 14 June 2002. Although Uganda was a State Party to the Rome Statute when it came into effect, Uganda legislated that their ICC Act specifically entered into force in Ugandan law on 25 June 2010. Thus removing any retrospective application of the Act for the period 1 July 2002 to 25 June 2010.

¹⁹⁶ Author interview with senior ICD official, Kampala 27 September 2010 & Author interview with NGO, Kampala 29 September 2010.

Constitution would have to be amended to allow individuals to be tried by the ICD for crimes under the ICC Act.¹⁹⁷ This is in stark contrast to what some learned individuals have argued. According to Mbazira, the ICC Act has retrospective effect over events in Uganda, which could be extended to crimes committed prior to the entry into force of the Act.¹⁹⁸ It is the author's respectful submission that parts of the ICC Act do in fact have explicit retrospective application¹⁹⁹ but not those substantive parts regarding the incorporation of the international crimes into Ugandan law. To hold otherwise would violate the principle of legality unless, as discussed above, it can be proved that the crimes were already crimes under Customary International Humanitarian Law. In any event even if the ICC Act did have full retrospective force in Uganda it will still only be relevant to those crimes committed from 1 July 2002 onwards.

Although many breathed sighs of relief with the passing of the long overdue ICC Act, it soon became obvious that difficulties being experienced were not resolved, or even simplified. As a good indication of Uganda's willingness to try those responsible for serious violations, this measure may have come too late. Further Uganda had the option of allowing full retrospective application of the Act and seems not to have chosen to do so. Although unfortunate and complicating matters to a degree, it is not without a solution - a solution that will be discussed fully in 5.2 below.

4.3.4 Imbalance of penalties

"There is a disconnect in Uganda ... Between the population and the law ... and between the laws and different justice mechanisms"

- Academic, Kampala 29 September 2010.

The Geneva Conventions Act as well as the ICC Act both impose a maximum penalty for those convicted with grave breaches or any of the other international crimes, with life imprisonment.²⁰⁰ The death penalty is still imposed in Uganda and

¹⁹⁷ Author interview with senior JLOS official, Kampala 28 September 2010.

¹⁹⁸ Murugngu & Biegon (eds) (2011) 217.

¹⁹⁹ See Part I ICC Act. The Act is retrospective regarding the methods of cooperation with the ICC by Uganda.

²⁰⁰ See s. 2(1) GC Act and s. 7(3), 8(3) & 9(3) ICC Act.

is imposed for crimes such as murder and rape.²⁰¹ Therefore if an individual committed a grave breach of the Geneva Conventions through the wilful killing of another, or committed mass rapes as a means to commit genocide under the ICC Act, the maximum penalty to be imposed on the individual, if found guilty, would be life imprisonment. However should an individual be found guilty of murder or rape under Ugandan law, outside or within the context of an armed conflict, they will be liable on conviction to the penalty of death under the Penal Code Act.

This is interesting in the context of the only, currently stayed, case before the ICD. Kwoyelo was charged with grave breaches and, in the alternative, with domestic criminal crimes like murder and kidnapping. In the unlikely event that his trial proceeds, and he is found guilty of an alternate charge and not the main charges, his sentence will be death - more severe than the punishment prescribed for the main charges. The practical and legal difficulties with this situation are obvious.²⁰² These difficulties are illustrated in the constitutional petition of *Jowad Kezaala v Attorney General*.²⁰³ The petitioner in this case is arguing among others, that the ICC Act is unconstitutional as it inconsistent with the right to equality and freedom from discrimination, as recognised in the Constitution²⁰⁴, by imposing lesser sentences for the same or similar crimes, in different contexts. It remains to be seen how the Court responds to this petition considering the apparent conflict between Uganda's international law obligations and its Constitutional framework.

5. CONCLUSIONS, OBSERVATIONS AND PRACTICAL RECOMMENDATIONS TO ASSIST UGANDA IN THE DOMESTIC PROSECUTION OF VIOLATIONS OF IHL AND OTHER INTERNATIONAL CRIMES

5.1 Conclusion

What was born as a means to fulfill an obligation under a peace agreement has grown into a permanent structure that will work towards ending impunity, prosecuting violations of IHL and thus ensuring compliance with international law

²⁰¹ See s. 124 & 189 Penal Code Act.

²⁰² See *inter alia* s. 28(8) Constitution 'No penalty shall be imposed for a criminal offence that is severer in degree or description than the maximum penalty that could have been imposed for that offence at the time when it was committed'.

²⁰³ Constitutional Petition 24 of 2010.

²⁰⁴ s. 21 Constitution.

obligations while upholding the dignity of the victims of the armed conflict. The ICD can set an example both regionally and internationally, an African example demonstrating that violations of IHL and impunity will no longer be tolerated on the national level.

Uganda has taken many positive steps to attempt to repress violations of IHL during the LRA war and has gone further than many other States in its willingness to do so. Due recognition must be given to Uganda for its efforts made in an attempt to fulfill its obligations under international law.

The fact remains however that the Ugandan system is in many respects flawed. This is as a result of improper implementation of their international obligations to repress violations of IHL, implementing repressions of IHL too late and incompletely, and failure to implement any repression above and beyond that which is required of States. The possibility remains that Uganda will be able to work through and remedy many of the identified problems but the situation as it stands currently does not look positive in ending the cycle of impunity. As Mbazira said:

*The Uganda experience also illustrates how perpetrators of international crimes can elude both international and domestic judicial processes. In spite of the ICCs warrants, the international community has failed to arrest and surrender Kony and his accomplices to the ICC. In the same way, the War Crimes Division of the High Court of Uganda, established in anticipation of signing peace agreements, in the absence of accused persons remains idle.*²⁰⁵

The protection of the victims of an armed conflict and the upholding of their dignity is what is important and matters. Although a process that cannot be removed from nor viewed in isolation to the political landscape, the repression of violations of IHL is a fundamental aspect of the protection afforded to the victims of an armed conflict. At the very least a State needs to consider and act to prevent the ramifications of being unable to prosecute those responsible for violations of IHL - whether it is seeing those most responsible prosecuted in the Hague, in other

²⁰⁵ Murugngu & Biegon (eds) (2011) 220.

jurisdictions or even the prevention of the embarrassment of experiences similar to what Uganda is currently faced with - and properly act to implement a full system of repressions, above that which is required by law. Some recommendations have been made with a view to preventing impunity and assisting in the repression of violations carried out in the conflict in Northern Uganda. There is no guarantee that any of these will be considered or utilised to amend the situation. They are made with the victims of the conflict in mind.

5.2 Practical recommendations to assist Uganda in the prosecution of violations of International Humanitarian Law and other international crimes²⁰⁶

- i. The amnesty law needs to receive urgent attention. This may take two forms. Firstly it may be in the form of legislative intervention. There are a few options in this regard, one being the in the form of a repeal of the Amnesty Act in its entirety as having served its purpose and functions well with no need for it to remain in force. This may not be the best solution however as reports reflect that the amnesty is still viewed favourably by many Ugandans.²⁰⁷ Furthermore the Ugandan Parliament appears to be acting in accordance with the view of many citizens of Uganda when they announced that the Act will be extended for an additional two years.²⁰⁸ Based upon this, at the very least, an amendment to the Amnesty Act is required on an urgent basis to allow for the prosecutions of those most responsible, who have committed violations of IHL, and who have not yet applied for amnesty. Requirements for the granting of amnesty could further be amended to provide that amnesty will not be granted to those who do not surrender and are subsequently captured and charged. In all instances, the law needs to provide in explicit terms the conditions under which amnesty will be refused and / or granted, to eliminate any room for auto-interpretation and resultant injustices. This comes down to bringing the amnesty law in line with international standards allowing for amnesty but not extending amnesty to international crimes committed, something that should have been done during the enactment of the law and would have prevented the current problems.

²⁰⁶ For recommendations and jurisprudence in the Latin American experience, which was similar to Uganda, see <http://www.dplf.org/uploads/1190403828.pdf> (accessed 16 May 2012).

²⁰⁷ Author interview with senior JLOS official, Kampala 28 September 2010 & Author interview with NGO, Kampala 28 September 2010.

²⁰⁸ See para 3.3 above.

- ii. Should the prosecution of the ICD decide to charge those responsible for crimes committed in the context of an International Armed Conflict, they will have to be prepared to establish sufficient evidence of the fact that the conflict constituted an International Armed Conflict. It will not be an easy task to do based upon the fact that the conflict is largely viewed as a Non-International Armed Conflict and further that the ICC is charging those most responsible with war crimes committed in the context of a Non-International Armed Conflict. Therefore the recommendation is made that the prosecution charge persons responsible with crimes committed in the context of a Non-International Armed Conflict.²⁰⁹ Although Uganda has failed, until the commencement of the ICC Act, to properly implement a system of repressions for breaches of IHL committed in the context of a Non-International Armed Conflict, it is not impossible to prosecute on this basis. The prosecution has a few options available to them. Firstly they may charge those responsible on the basis of the ICC Act for those crimes committed prior to its entry into force. Although the Act does not specifically provide for retroactive application of the crimes, it may be argued that the crimes already constituted international crimes under Customary International Humanitarian Law and thus crimes under Ugandan law. This is possible and although not explicitly provided for in the Constitution is recognised under the law of Uganda. Common law countries recognise that Customary International Law finds application domestically so long the law is not in conflict with statute. In this manner the prosecution may use both the ICC Act as well as principles of Customary International Humanitarian Law in the prosecution of those responsible. This should allow for prosecution of individuals for close to the entire duration of the conflict in Northern Uganda and will not be limited to certain later periods of the conflict. With reference to the ICRC study on Customary International Humanitarian Law;²¹⁰ case law of national, international and hybrid courts; and state practice, they can adduce sufficient evidence to prove that the crimes committed were in fact crimes under Customary International Humanitarian Law at the time. In addition CA 3 of the Geneva Conventions and as incorporated into the Geneva Conventions Act may also be

²⁰⁹ This would mean charging accused persons with violations of CA 3 and AP II and not with grave breaches under the GCs and AP I regime. Based on Uganda's lack of implementation of both CA 3 and AP II, a strong case may be argued that violations of CA 3 both form part of and are considered grave breaches under Customary IHL.

²¹⁰ Henckaerts & Doswald-Beck (2009) 1.

utilised to charge individuals responsible for the commission of breaches of IHL. Regarding the choice of an appropriate penalty precedents of state practice, Customary International Humanitarian Law, and the penalties as provided in the ICC Act may be utilised.

Although there are recommendations that may cure the current defects holding prosecutions at bay in Uganda it must be mentioned that these will prove a lot more difficult to utilise efficiently and will leave a lot of room for the defence to try maneuver around. Proper preparation and adducing of evidence will be required to secure any prosecutions and convictions. Thus the investigative teams as well as the prosecution must be adequately trained and provided with sufficient support, both financially and in the form of personnel, to allow them to do so.

- iii. The problems around the death penalty in Uganda and its unequal relationship to international and domestic crimes needs to be finally determined in the appropriate forum. It needs to be clarified either through judicial precedent or through an Act of Parliament so that it cannot be utilised to hinder prosecutions for war crimes any further.
- iv. Lastly and most importantly, Uganda must ensure that they enact the laws to implement its treaty obligations as required, to provide full effect and force of law to all repressions required in IHL. In fact the above has illustrated that not only does a State have to do what is minimally necessary and legally required but should go above and beyond what is required to ensure that the victims of an armed conflict are protected and impunity is prevented.

After all “ ... no man can say with certainty that he is forever safe from the possibility of war.”²¹¹

²¹¹Dunant (1986) 125.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

1. CONCLUSION

“Never think that war, no matter how necessary, nor how justified, is not a crime.”

- Ernest Hemingway

The victims to the conflict that was waged in Uganda for more than two decades are yet to see justice done. “There are women who have been sexually assaulted and raped who see their attackers driving around, living normal lives ... Even the amnesty has not resolved this ...”²¹²

This is one of the problems currently facing Uganda in ensuring that justice is served for crimes committed during the conflict. The difficulties extend from the views and everyday experiences of the victims of the conflict to an inability currently to prosecute those responsible. This has been demonstrated and is a practical real-time example of the potential ramifications of the lack of effective implementation of a system of repressions in a State. While Uganda did undertake to implement some obligations required of them under the Geneva Conventions, they failed to do anymore than that. Now, two decades later, the possibility of effective prosecutions of those responsible hangs in the balance. And so too does the dignity of the victims of the armed conflict.

An effective system of repressions ensures not only that the dignity of victims is protected but also provides a measure of protection for the lives of victims of armed conflicts. When an effective system to repress violations is in place it acts as a deterrent to those actively participating in the armed conflict. Knowing that such behaviour will not be tolerated and that effective prosecutions will follow provides additional protection to all parties involved.

More so, when prosecutions are able to be initiated and take place during the course of an armed conflict, they themselves may act as a measure to end the conflict. In Uganda should such a system have been in place and prosecutions already be carried out, the amnesty law may have played a lesser role in ending the conflict. Instead the

²¹² Author interview conducted with NGO and community representative, Kampala 28 September 2010.

deterrent of possible prosecution may have acted as the means necessary to bring all parties together with a view to bringing an end to the conflict and negotiations for peace.

The ratification or accession to international conventions by States without the national incorporation of their provisions is similar to providing an individual who cannot write with pen and paper. It has the outward appearance of value yet fails miserably in practical implementation. There is no excuse for States' failure to properly implement a system of repression for violations of International Humanitarian Law ('IHL'). The International Committee of the Red Cross' ('ICRC') Legal Advisory Service is fully equipped and willing to provide any and all legal and technical assistance States may require in implementing IHL on the national level. In addition non-governmental and civil society organisations are continually offering assistance to States, assistance that frequently falls upon 'deaf' ears. Political will is lacking.

The importance of the protection of the lives and dignity of all victims of an armed conflict, as an aim of IHL and the repression of breaches of IHL, cannot be lost nor caught up in the politics of a State. As has been seen in the example provided in this study, impunity breeds impunity. It is only an effective system in place to end this cycle of impunity and repress violations of IHL that can ensure change is effected for good and for the good of all, as one of the most important branches of Public International Law to implement at the national level.

2. RECOMMENDATIONS

- i. States need to ratify IHL instruments and accede to those they are not yet a party to. This is the first step in ensuring that the full body of IHL can be applied domestically and that the victims of an armed conflict can benefit from the full body of protections afforded in times of armed conflicts.
- ii. States need to ensure that all obligations placed upon them under the respective IHL instruments are taken seriously and are fully implemented on the national level. This is inclusive of all IHL instruments regulating the protection of

civilians, property, and the environment; the use of weapons during times of armed conflicts; and all related matters.²¹³

- iii. States need to ensure that they effectively implement provisions of IHL relating to protection of victims of an armed conflict even when they are not under a strict legal obligation to do so. This in essence requires States to go above and beyond that ordinarily required of them and implementing, for example, a system of repressions for violations of IHL occurring in the context of a Non-International Armed Conflicts. As has been illustrated in this study this is imperative for States to do even though it is not legally required. Without doing so, States will find themselves in difficult situations where only a portion of a required body of law has been implemented. IHL exists in part to protect their citizens.
- iv. States must fully implement a system for repressions of IHL occurring in the context of an International Armed Conflict and a Non-International Armed Conflict. The importance of this step has been fully illustrated in this study and needs no further explanation here. However it will be mentioned that States while implementing the system for grave breaches, as they are legally required to do, may as well implement a full system providing them with maximum protection in the event of an armed conflict.
- v. States must actively engage with the ICRCs Legal Advisory Service to ensure that the system of repressions for violations of IHL is fully and correctly implemented. The ICRC is in a position to and will provide assistance to States in ensuring that there is no conflict with national laws of the State and will advise the State of this as well as other measures to reconcile the different bodies of law, in an acceptable and appropriate manner.

The above recommendations are not many in number. Further illustrating the few and relatively simple procedures States must undertake, simple procedures with countless benefits. Had these measures been taken by Uganda at the time

²¹³ For the full list of IHL Conventions see <http://www.icrc.org/ihl.nsf/TOPICS?OpenView> (accessed 16 May 2012).

they should have been, a simple process would have rendered the difficult, complex and expensive process facing Uganda today unnecessary.

This was affirmed by various key stakeholders in Uganda, in answer to a simple yet difficult question - “Would Uganda be in this compromising and complex situation today, had the full body of repression for breaches of IHL been implemented correctly when it should have been?”²¹⁴

[18 301 words]

²¹⁴ Author interview with senior ICD official, Kampala 27 September 2010; Author interview with senior JLOS official, Kampala 28 September 2010; Author interview with senior amnesty commission official, Kampala 29 September 2010; Author interview with NGO and community representative, Kampala 29 September 2010.

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