

Burundi's regroupment policy a pilot-study on its legality

“War, as it becomes more and more total, annuls the differences which formerly existed between the armies and civilian populations in regard to exposure to injury and danger.”

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Contents

1. INTRODUCTION	3
2. BRIEF FACTUAL OVERVIEW OF MAJOR DEVELOPMENTS IN BURUNDI	4
3. THE NATURE OF THE CONFLICT IN BURUNDI	7
3.1 Guerrilla warfare and functional criminality in time of war	7
3.2 The international law applicable to the armed conflict in Burundi	11
4. DEPORTATION, EVACUATION AND TRANSFER OF CIVILIANS DURING A NON-INTERNATIONAL ARMED CONFLICT.	13
4.1 Terminology	13
4.2 Legal contradictions	14
4.3 The exceptions mentioned in article 17 Protocol II	15
4.3.1 The first exception: security of the civilian population (humanitarian protection)	16
4.3.2 The second exception: military necessity	17
4.3.3 Military necessity: the law in the courts	19
4.3.4 Military necessity: an assessment	21
4.4 A reversal of the burden of proof	22
5. LEGAL OBLIGATIONS OF THE BURUNDIAN GOVERNMENT UNDER INTERNATIONAL HUMANITARIAN LAW TO PROTECT ITS POPULATION	24
5.1 Introduction	24
5.2 Humanitarian centres of relief (camps, hospital and safety zones)	26
6. THE IMPLEMENTATION OF THE REGROUPMENT POLICY AS A VIOLATION OF INTERNATIONAL LAW - CRIMINAL RESPONSIBILITY	27
6.1 Introduction	27
6.2 Implementation of the regroupment policy and command responsibility	28
7. THE STATUS OF HUMANITARIAN ORGANISATIONS - A BRIEF DESCRIPTION	31
7.1 The law: contradictory norms	31
7.2 Ethics: should humanitarian organisations deliver aid to regroupment camps?	32
8. CONCLUSIONS AND RECOMMENDATIONS	35

1. Introduction

Burundian civilians subject to the 'regroupment policy' of their government find themselves in an unenviable position. Like all other internally displaced persons they are fully entitled to every right and protection afforded to them by international law. However, that law is in need of improvement. While article 49(1) of the 1949 Fourth Geneva Convention Relative to the Protection of Civilian Persons in Time of War places a flat ban on deportation, there is no such equivalent under general human rights law. Deportation may be, and usually is, a violation of the right to adequate shelter, the right to choose one's own residence, the right to family honour and privacy, and sometimes the right to life. However, deportation as such is not prohibited by general human rights treaties.

The flat ban of article 49(1) refers to the inhabitants of territories occupied by enemy armed forces during an international armed conflict. When most armed conflicts, like the guerrilla war now occurring in Burundi, are of an internal nature, article 49(1) is of limited value to the internally displaced. As far as internal armed conflicts are concerned, the prohibition on forcible displacement can be found in article 17(1) of the 1977 Second Additional Protocol to the 1949 four Geneva Conventions (hereinafter: Protocol II). Unfortunately, the article is in desperate need of clarification.

The distinction under article 17(1) between evacuation and deportation is not watertight. Evacuation is done for purely humanitarian reasons. Deportation and forcible relocation are usually carried out as security or penal measures. They often have a discriminatory ring to them. Because the distinction is not watertight, a deporting authority can be tempted to present deportation as evacuation. This is in effect, what the government of Burundi has been doing.

While the prohibition on depression under Protocol II is less than clear, Protocol II does prohibit unequivocally "... violence to the life, health and physical or mental well-being of persons," (article 4(2a)), "... acts or threats of violence the primary purpose of which is to spread terror among the civilian population," (article 13(2)), or the "... starvation of civilians as a method of combat," (article 14).

Refugee law is not of much help either. The 1951 UN Convention on the Status of Refugees is inapplicable to the internally displaced of Burundi. The definition of a 'refugee' under the 1951 Refugee Convention does not cover the victims of armed conflict, neither does it cover those who fled, but did not cross an international border. The 1969 OAU Refugee Convention, while maintaining the criterion of the trans-boundary movement, has broadened the refugee definition to include the victims of oppression, occupation, foreign domination or events seriously disturbing public order. Since Burundian civilians subject to the regroupment policy are by definition in Burundi, they do not qualify as refugees in any legal sense of the word.

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In view of the above, the purpose of this study is two-fold. First, to determine the (il)legality of the regroupment policy of the government of Burundi and to clarify the law where necessary. Second, to discuss the policy options open to the humanitarian community to correct

harsh and frequently life-threatening situation in which the regroupees find themselves. This concerns in particular the ethical dilemma faced by humanitarian organisations whether to continue assistance to regroupment camps in the full knowledge that the camps are part of a counter-insurgency strategy of the government.

The current study does not attempt to draw a picture of the violations of humanitarian rights in Burundi in general; consequently it does not discuss violations committed outside the context of the regroupment policy by either the government forces or one of the insurgent forces. Neither was the Humanitarian Law Consultancy commissioned to commence its own fact-finding mission in Burundi; rather it was to draw up a legal analysis of the regroupment policy based on the information provided by others - mostly NGO's and UN bodies. Owing to the climate of fear, terror and reprisals now prevailing in the country, information which we have received from NGO's as well as from several other sources will be used unnamed. Only sources which have been made public or which have been declassified have been mentioned.

2. Brief factual overview of major developments in Burundi

Burundi is a small landlocked country in the Great Lakes region of Central Africa. The country is densely populated with six million people, of whom over ninety percent are peasant farmers. The population is believed to comprise of eighty to eighty-five percent Hutu, fifteen to twenty percent Tutsi and approximately by one percent Twa.

Unlike its neighbours, Burundi cannot be classed as an artificial creation of colonial rule. From the 14 th. century onwards Burundi was an independent kingdom in which Tutsi's ruled. In 1899 Burundi was absorbed by German East Africa. After the First World War the country was governed by Belgium under a mandate given by the League of Nations. Under Belgium administration, ethnic identity was subject to a policy of divide and rule. Burundi became an independent republic on 1 July 1962.

Since independence, Burundi has suffered several cycles of violence and crimes which could be determined as genocide.¹ The first two cycles of violence took place in 1972 and 1987.² Both cycles were a reaction of the government to rebel activity. The third cycle is currently in progress.

Until 1993 Burundi was in a process of transition and moving towards a more democratic political system. Under the eye of the international community free and fair elections were held in 1993. For the first time in history a Hutu became president, Mr. Melchior Ndadaye. President Ndadaye' promised to be a great innovator for Burundian politics. However, his presidency was relatively short as he was assassinated during an attempted coup by the mili-

¹ Filip Reyntjes, "Breaking the cycle of violence," (1995); Report of the International Commission of Inquiry concerning the Assassination of the President of Burundi on 21 October 1993, 22 August 1996, S/1996/682; Helmut Strizek, "Ruanda und Burundi von der Unhabhängigkeit zum Staatszerfall," (1996), pp. 166 and 221.

² The cycle of violence of 1972 was caused by the rebels. The rebels had tried to found their own peoples republic. The government succeeded defeating the rebels by mobilising Tutsi civilians via the radio. The Tutsi set out to kill all Hutus. The second cycle of violence of 1987 was initiated by the killing of two Tutsi villages (Ntega and Marangara) by Hutu rebels. The government in turn slaughtered thousands of Hutu people

tary in October 1993. The coup was aimed at recapturing, political power lost after the elections in June 1993. Both the international community and Burundian civil society rejected the new government. The rejection caused the coup to fail. Nevertheless, the coup caused an increase of ethnic violence.³ Ethnicity in Burundi had always played a role in the political developments. Both the military and the rebels used it as a tool in their struggle to obtain power. By exploiting fears among the people, they were easily mobilised to kill each other. Approximately 150.000 Burundians have died over the years as a result of ethnic violence.

To the international community, especially the United Nations, Burundi did not remain unnoticed. The United Nations have condemned the situation, but remain reluctant to act decisively. Both the rebels⁴ and the government refused permission for the deployment of United Nations-troops.⁵ Moreover, the Security Council was unable to raise troops to form a peace-keeping unit. Ultimately it was decided that the problems in Burundi should be solved through negotiations.⁶

On 25 July, 1996 a second military coup overthrew the existing government of Burundi. The coup was led by Major Buyoya.⁷ After proclaiming himself as president,⁸ he abrogated the 1992 constitution and replaced it with a decree promulgated on September 13 1996.⁹ Under this decree, the National Assembly does not have the power to remove the president. Hence the president is inviolable. Major Buyoya consolidated his position by ruling in conjunction with the Tutsi-dominated military. Now the Burundian society is again under the control of the Tutsi minority. The Tutsi minority is considered to be biased towards other ethnic groups.

The international community has rejected the new government. The Organisation of African Unity¹⁰ imposed sanctions on Burundi on July 31, 1996. By imposing sanctions the OAU tried to:

- * force the government to end its illegal regime;
- * restore the constitution;
- * un-ban the political parties;
- * have unconditional negotiations.

The objectives of the sanctions are only partly met by the Burundian government. The National Assembly convenes but the constitution has not yet been fully restored.

The politically unstable climate and the imposed sanctions have had a negative impact on Burundian society. Due to the constant fighting many people have fled. In Burundian political

³ Reyntjes, op. cit.

⁴ The rebels are predominantly Hutu. They are mainly centred in the rural areas of Burundi.

⁵ Jane's Defence Weekly, vol 25, no. 3, 1996, p. 14.

⁶ Jane's Defence Weekly, idem. After the second coup on July 1996 the overthrown government did ask other African countries to form a pan African force which could be deployed as a buffer between the Hutu's and the Tutsi's.

⁷ Major Buyoya came to power in 1987 by a coup, but as a result of international pressure, he was forced to organise new elections in 1993, which he lost.

⁸ The current *de jure* president Sylvestre Ntibantunganya fled to the American embassy, where he stayed until June 1997.

⁹ Amnesty International, "Burundi - Refugees forced back to danger," AI Index: AFR 16/34/96, 20 November 1996, p. 2.

¹⁰ The Organisation for African Unity has three-tier mechanism: one is the adoption of resolutions, the second is the adoption of sanctions, the third is conflict prevention. Its initial strategy was deterrence through a presence on the ground.

parlance a distinction is made between the different groups of people who have fled. On the one hand there are internally displaced people: the *dispersés*, *displacés* and *regroupés*. On the other hand there are *rapatriés* and *refugiés*:

- a) Refugees are people who fled from other countries to Burundi.
- b) Repartees are Burundian people who have fled to other countries but later have been sent back, sometimes contrary to the principle of non-refoulement.
- c) Disperses are people who have fled their homes as a result of the hostilities, but who are not living in camps.
- d) Displaces are people who have been scattered around the country. The government has chosen to channel these people toward certain sites, which are known as displacement camps.
- e) Regroupees are the result of the governments' regroupment policy. The definition that applies best to regroupment is that it is a population transfer, consisting of compulsory movement of people from one area to another within the same state (*infra*, § 4.1).

The Burundian government began its regroupment policy late February 1996 in areas where the level of insecurity was high. The province of Karuzi was used as a pilot-project. The government then gradually spread its policy to the neighbouring provinces: Kayanza, Cibitoke, Muramvya, Bubanza and Bujumbura. Now it is believed that almost all provinces of Burundi are affected by the policy.

Uncertain of the real motive behind the policy, some believe that it is a reaction of the government to ethnic violence directed to Tutsi civilians after the assassination of the Hutu president in 1993 by the Tutsi dominated army. Although the government claims not to be biased in the implementation of the regroupment policy, regroupees are mainly Hutu.¹¹ Officially, the government states that the regroupment is necessary to:

- * avoid the perishing of innocent civilians;
- * protect civilians from the rebels;
- * protect the civilians from extortion by the rebels;
- * deprive the rebels of a supply base by destroying their hideouts;
- * prevent the recruitment of new rebels.

The arguments demonstrate that the government does not deny that regroupment is a part of a counter-insurgency strategy; it only places the emphasis on the humanitarian necessity of the regroupment. Moreover, regroupment is seen by the government as a preventive measure being voluntary and temporary. It is true that people are being 'asked'¹² whether they want to regroup. However, if they refuse they are regarded as rebels and executed on the spot. Whether regroupment is temporarily is a question of interpretation. The government stated that regroupment would only last up to 3 to 6 months. If the policy started in February 1996 in the province of Karuzi the government should have closed the camps by July 1996. Evidence shows that camps still exist in Karuzi province and elsewhere. There are even indications that some regroupment camps are becoming a permanent feature (the "villageisation" process). Recently, the government has told some regroupees that they can return to their homes.¹³ This decision is overshadowed by the fact that many people do not have a home to return to: the military often burn and loot homes prior to, or following the eviction of in-

¹¹ Amnesty International, "Burundi - Forced relocation; new patterns of human rights abuses," AI Index: AFR 16/19/67, 15 July 1997.

¹² There are instances where people are forced to regroup.

¹³ Report of the Secretary General on the situation in Burundi, 15 July 1997, S/1197/547, § 22.

habitants from their homes. Recent figures estimate that approximately 500.000 people have been regrouped.

Regroupment is accompanied by severe violations of human and humanitarian rights. When people are regrouped they are directed to different communes.¹⁴ In each commune there may be three or four different sites. These sites are often centred around public buildings such as churches or schools. In the vicinity of these public buildings people build their houses or occupy existing buildings. Moreover people are not allowed to leave the camps without permission.¹⁵ This is in marked contrast to displacement camps where people are allowed to leave the camp whenever they want to. If a site is situated near agricultural land, regroupees are allowed to cultivate agricultural products. Trips to the fields are always accompanied by military who monitor their work. If the sites are not situated near agricultural land, people are mainly dependent on humanitarian aid. What little food the government hands out goes to displacement camps, rather than to the regroupment camps. Many regroupees suffer from malnutrition. People live packed together which not only encourages promiscuity, but also causes a lack of hygiene, which, in turn, causes a rapid spread of contagious diseases. As a result, many people have died. The government has not undertaken decisive action to address these problems. Although the OAU has decided to modify the sanctions in permitting limited humanitarian aid, the situation in the regroupment camps does not predict a bright future.

The camps are guarded by armed police or military, who are not always in uniform. The distinction between civilians and military personnel can become blurred. Insurgents are known to raid the camps.

3. The nature of the conflict in Burundi

3.1 Guerrilla warfare and functional criminality in time of war

It is a typical feature of guerrilla warfare that it is a peoples' war, in which the battle is not only fought over territory, but over the hearts and minds of people. Consequently, the civilian population is both an object and a subject of the armed struggle. It is the object in the sense that acquiring popular support, or at the very least effective control over the population, is one of the major stakes: he who controls the majority - in one way or an other - is likely to win the war. The civilian population is the subject of the struggle in the sense that it becomes a prime victim of the hostilities. As conflicts are fought, not between peoples, but within a people, the casualties among the civilian population is likely to rise. With the distinction between combatants and non-combatants blurred, reprisals are easily meted out against individuals of whom it is not always clear whether they are victim, perpetrator or both.

Guerrilla warfare as defined by defined by Army Field Manual FM 31-21, "... comprises combat operations conducted in enemy held territory by predominantly indigenous forces on

¹⁴ Although regroupment camps are a national policy, the treatment of people in these camps differ from province to province. Each province has a slightly different policy.

¹⁵ In order to leave some camps people have to be in the possession of a *laisser-passer*. A *laisser-passer* is a pass which gives regroupees the right to leave the camps. The governments' point of view is that everybody without a pass is a rebel.

a military or para-military basis to reduce the combat effectiveness, industrial capacity, and morale of the enemy.”¹⁶ It continues: “No word describes the nature of guerrilla warfare better than ‘fluid.’ In guerrilla warfare the situation is always fluid. (...) The area of guerrilla activity is never static; the situation changes constantly as the enemy reacts to guerrilla actions.” Military history shows counter-insurgency tactics to include the herding of civilians into farms, special zones, etc. The practice has occurred during the war in Vietnam, the civil war in El Salvador, the Algerian war of independence and the Boer War at the turn of the century in South Africa. It is not uncommon for military authorities imposing such isolationist policies to use euphemisms. Terms as “villages de paix” (senzala de paz), “protected villages,” “evacuation,” “regroupment,” or “resettlement,” are used for what is in effect a forcible mass population transfer.¹⁷ The corollary is the creation of “zones interdites,” “Sperrgebiete,” or “free-fire zones,” empty of the local population and thus free of potential witnesses of military operations. This combination of counter-insurgency measures usually compel any remaining individual, who is not a member of an armed force, to present himself at a camp, since a string of curfews, no-go areas, passes and other impediments make a life independent of relocation camps virtually impossible and extremely hazardous. The measures described have a two-fold effect: first, to deprive the guerrilla-forces of their “eyes and ears” within the civilian population, as well as their reservoir of potential recruits and weapons manufacturers; second, to carry out a positive political action program to elicit the active support of the regroupees.¹⁸

Although there are camps known where the transferred or regrouped individuals have enjoyed a satisfactory level of humanitarian assistance and protection - in Vietnam for instance - it is safe to say that, in the short term, military advantages and considerations vastly outweigh any humanitarian considerations. In the long run, when such counter-insurgency tactics continue over a number of years, the policy of relocation or regroupment may become counter-productive: as more and more individuals are wasting their lives aimlessly in a camp, the struggle for the hearts and minds may shift. It may become more difficult to reduce the sympathies which the population may have for the insurgents - provided of course that the insurgents treat the population properly. As general Beaufre admitted about the Algerian war of independence, which was by all standards a “sale guerre”: “Une quatrième erreur a consisté plus tard a pratiquer une politique de regroupment des populations absolument utopique. On a ainsi déraciné des centaines de milliers des paysans que l’on n’avait pas les moyens de loger et de nourrir et l’on a créé des foyers d’infections. *La mesure s’est le plus souvent retournée contre nous*” (emphasis added - HLC).¹⁹

It cannot be surprising that guerrilla wars are accompanied by large-scale violations of the laws of war. Rüter pointed out that such violations should not be compared to “ordinary” murders, etc. committed during time of peace, but that they have to be seen in their own context. The latter are not crimes of an incidental nature; they take place in the one situation where the killing of a fellow human being is not prohibited, but the norm. Thus, violations of human rights and humanitarian law committed in the context of armed conflict can be seen as

¹⁶ US Department of the Army, “Guerrilla warfare and special forces operations,” Field Manual FM 31-21 (1961), p. 8 and pp. 103-104.

¹⁷ M. Veuthey, “Guérilla et droit humanitaire,” (Geneva, 1983), pp. 272, 283 et. seq.

¹⁸ Field Manual FM 31-21, op. cit, p. 172.

¹⁹ Beaufre, quoted by Veuthey, idem, p. 284.

of a structural or institutional nature.²⁰ Structural or institutional criminality comes into existence where institutions, such as the military or the law enforcement apparatus, fail to do their job in accordance with human rights norms or norms of humanitarian law. The sub-distinction is made between functional criminality and non-functional criminality. Non-functional criminality is of the sort which is *not* wanted by the policy-makers, generals or others in command, because it weakens the military effort to achieve victory. One may think of plunder and rape, which erode both military discipline as well as popular support. Functional criminality on the other hand, is encouraged or condoned by those in command, because it strengthens the chances on the battlefield. An example is torture by the secret police in order to receive vital information, or the burning of houses to deny the approaching enemy shelter.

Since a crime has to be of a systematic and serious nature, condoned or conducted by government authorities to qualify as a crime against humanity, a crime against humanity will almost always be a form of structural criminality. As is known, a crime against humanity does not have to be committed in the context of an international armed conflict; the crime described in article 6(c) of the Charter of the International Military Tribunal at Nuremberg is interpreted broadly to include the context of non-international armed conflicts, including the struggle against apartheid. In the Convention on the non-applicability of statutory limitations to war crimes and crimes against humanity of 1968 of instance, article I(b) specifically includes “eviction by armed attack” in its definition of a crime against humanity.²¹ As opposed to war crimes, crimes against humanity are usually not committed to gain an advantage on the battlefield. The context of a crime against humanity is usually one of a racial or ethnic conflict, and the enemy is of a different nature than in a conflict where the enemy is merely of a different nationality. The enemy is not the enemy because of his chosen religious or political affiliations, but because of what he is by birth. A negotiated settlement or compromise are barely possible, only capitulation is an option. In an ethnic conflict, discriminatory persecution is usually a form of structural, but not functional criminality.

One of the disturbing implications of functional criminality is that a judicial system has only a limited correctional effect. There seem to be three fundamental problems. *First*, judicial authorities cannot bring to bear in their sentencing any general popular feeling that justice must be done. In a society that is at war with itself, there *is* no feeling of what is just. The enemy is likely to see in the crimes under scrutiny a sign of the devil incarnate; the supporters or superiors of the perpetrator will be likely to see the crime as an excusable incident or even as a justifiable act of military necessity. Support from an international judiciary can only be limited. Even setting aside the small quantitative capacity of any international judicial system, the arrest and putting on trial of suspects is likely to cause a grave sense of indignation and injustice on the part of the people on whose side they fought. Defendants can be heroes; in such cases the voluntary co-operation of the local population with international justice will be slow. *Second*, military justice is, on the one hand, part of the military organisation, which is itself party to the conflict. The military judge usually wears a uniform, not a robe. On the other hand, even a military judge remains a judge, and in exercising his jurisdiction he has the

²⁰ C.F. Rüter, “Enkele aspecten van de strafrechtelijke reactie op oorlogsmisdrijven en misdrijven tegen de menselijkheid,” (1973), p. 23.

²¹ Burundi did not ratify this Convention. However, there is no doubt that deportation is prohibited under the prohibition of a crime against humanity.

responsibility of any judge, and that is to see everyone as equal before the law. In time of armed conflict, it is the military rather than the judicial element that tends to prevail. Frequently the military judicial system is seen as one of the many bodies of the military organisation as a whole which has to do its part to promote an effective functioning of the military organisation to achieve victory. Under such circumstances, the prosecution or sentencing of the 'own' troops will be seen as an unfriendly, perhaps even unpatriotic act. Although this is particularly true of the undemocratic state, even the *My Lai* incident (Vietnam, 1968) was only brought to justice after an outcry followed in the press back home in America. By contrast, non-functional structural crimes can usually be prosecuted without much hesitation. *Third*, where governmental authorities commit or condone structural crimes, there can be no case for a general policy of prosecution of each individual perpetrator. Since there is criminal intent at the top, no one can expect a state to put itself on trial: the superior is usually the accomplice of the defendant.

Perhaps these are some of the reasons why so few war crimes and crimes against humanity, including mass deportation and population transfer, are ever brought to justice. One can only guess how many millions have been transferred, relocated, deported from their homes since the Second World War. Cases range from deported Lithuanians under Stalin, via Cambodians under Pol Pot to peasants in Guatemala. In only a single post-World War II conflict, have the deportees sought protection before the courts; this concerns Palestinian deportees from the West Bank and Gaza Strip. Not one of these deportees has ever received an injunction from a deportation order. In all but one case, all Israeli prosecutors and courts refused to implement the Fourth Geneva Convention - even in the case of the mass deportation of over four hundred Palestinians in one drive.²²

There is no particular reason why this general picture of guerrilla warfare and structural criminality would not be applicable to Burundi. Not surprisingly, we have come across not one court case where a Burundian soldier had to stand trial on suspicion of committing a serious violation of humanitarian law or a crime against humanity. This confirms the general climate of impunity described by the Special Rapporteur on the Human Rights Situation in Burundi, Mr. Sérgio Pinheiro.²³ With an estimated 8 % of the population or 500,000 persons transferred or regrouped into camps under doubtful, and at times life-threatening situations, violations of human rights and humanitarian law have become institutionalised. The Burundian counter-insurgency strategy of forced population transfer is a hazy "mix" of functional as well as non-functional criminality. It is functional in the sense that it delivered a military advantage in the short term, but it is non-functional because of its ethnic and discriminatory elements. Consequently, it is likely to become counter-productive in the near future.

²² Th.A. van Baarda, "Is it expedient to let the World Court clarify, in an Advisory Opinion, the applicability of the Fourth Geneva Convention in the Occupied Territories?" *Netherlands Quarterly of Human Rights*, vol 10, 1992, no 1; S/RES/799 (1993); Henckaerts, "Deportation of civilians in time of war," *op. cit.*, p. 514.

²³ E/CN.4/1997/12 of 10 February 1997; §§ 14-15; Note by the Secretary General, A/51/549, 7 October 1996, § 12; see also: International Commission of Inquiry concerning the Assassination of the President of Burundi, report of 22 August 1996, S/1996/682.

3.2 *The international law applicable to the armed conflict in Burundi*

From the legal point of view the situation in Burundi can be characterised as: a) one of an armed conflict, which is b) of a non-international nature. In the view of the Appeals Chamber of the International Criminal Tribunal for the former Yugoslavia (ICTY), "... an armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State." It therefore concludes: "International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, international humanitarian law continues to apply in the whole territory under the control of a party, whether or not combat takes place."²⁴

The situation in Burundi meets the basic, albeit informal points of reference of article 3 common to the four Geneva Conventions. The text of the article does not define "armed conflict," but the official ICRC Commentary offers four points: 1) the rebels fighting the government possess an organised military force, with an authority responsible for its acts; 2) the government is obliged to have recourse to regular military forces as opposed to civil police to deal with the uprising; 3) the conflict has been admitted to the agenda of the Security Council of the United Nations under chapter VI or VII of its Charter; 4) the insurgents have an organisation purporting to have the characteristics of a state, including the *de facto* authority of persons within a determinate portion of the national territory.²⁵

Burundi has succeeded to the four Geneva Conventions on 27 December 1971, thus accepting the ratification by the former colonial power, Belgium. It did so without any reservation. Consequently, Burundi is bound by the Geneva Conventions as of 1 July 1962, the date on which it became independent. Common article 3 is therefore applicable to the current conflict.

In addition, Additional Protocol II to the four Geneva Conventions is applicable. Article 1 offers the following, now formal, criteria of an armed conflict which: 1) takes place within the territory of a High Contracting Party, 2) between its armed forces and dissident armed and organised groups, 3) with the latter operating under a command which is responsible for the actions of its troops, and 4) controlling a part of the territory as to carry out sustained and concerted military actions and to implement this Protocol.²⁶ Burundi has acceded to Protocol II on 10 June 1993; under the terms of article 23 thereof, Protocol II entered into force for Burundi six months later: on 10 December 1993. It has made no reservation thereto.

Apart from the documents mentioned above, Burundi has ratified the following:

- Additional Protocol I to the Geneva Conventions of 1949;
- International Covenant on Economic, Social and Cultural Rights;
- International Covenant on Civil and Political Rights;²⁷

²⁴ ICTY, Appeals Chamber, 2 October 1995, *The Prosecutor vs. Dusko Tadic*, § 70.

²⁵ ICRC, Jean Pictet (ed.), "Commentary of IV Geneva Convention," (1958), pp. 35-36.

²⁶ ICRC, Y. Sandoz, C. Swinarski and B. Zimmerman (eds.), "Commentary on the Additional Protocols," pp. 1336 et. seq.

²⁷ The ICCPR contains an number of non-derogable rights: artt. 6; 7; 8(1, 2); 11; 15; 16 and 18, concerning respectively the right to life, the prohibition of torture and cruel or inhumane treatment; the prohibitions of slavery and servitude; the prohibition to imprison someone merely on the ground of the inability to fulfil a contractual obligation; the principle of *nulla crimes sine lege*, the right to be recognised as a person before the law, and, finally, the freedom of thought, conscience and religion.

- International Convention on the Elimination of all forms of racial Discrimination;
- International Convention on the Suppression and Punishment of the Crime of Apartheid;
- Convention against Torture and other cruel, inhuman or degrading Treatment or Punishment,²⁸
- Convention on the Elimination of all forms of Discrimination against Women;
- International Convention on the Rights of the Child;²⁹
- African Charter on Human and Peoples' Rights.³⁰

Burundi has not recognised any complaints procedure under the conventions mentioned. Surprisingly, it has not ratified the Convention on the Prevention and Punishment of the Crime of Genocide. Neither has Burundi ratified the Loom IV Convention between the AEU and the ACP countries.

Apart from the treaty law to which Burundi is bound, it is also bound to international customary law. This includes the Hague Conventions of 1899 and 1907, which are therefore binding on the warring parties regardless of any ratification.

There is a second distinction between customary law and treaty law. In the *Barcelona Traction case* the International Court of Justice pointed out that: “[b]y their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have an interest in their legal protection; they are obligations *erga omnes*. Such obligations derive, for example, in contemporary international law, from outlawing acts of aggression, and of genocide, as also from the principles and rules governing the basic rights of the human person, including the protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (*Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ Reports 1951, p. 23*); others are conferred by instruments of a universal or quasi-universal character.”³¹

The latter can be said for most, if not all material provisions of the four Geneva Conventions of 1949. The Geneva Conventions have the highest number of ratifications of any treaty in the world: 188;³² higher even than the Convention on the Rights of the Child. The prohibition of deportation as defined in article 49(1) Geneva Convention IV has, according to recent doctrine, become a part of customary international law.³³

As Bassiouni points out, there is no doubt that the prohibition of crimes against humanity belongs to this category.³⁴ It was included in article 6 of the Charter of the International Military Tribunal at Nuremberg, as well as, respectively, the articles 5 and 3 of the Statutes of the International Criminal Tribunals for the former Yugoslavia and Rwanda. A great number of United Nations instruments and resolutions confirm the assertion that the prohibition of crimes against humanity now forms part of customary international law, transcending all

²⁸ A derogation from this convention is not permitted under article 2 thereof; the prohibition of torture is clearly of a *ius cogens* character.

²⁹ This convention, which is a mix of human rights provisions and humanitarian provisions, is silent on derogations.

³⁰ As the previous convention, this treaty is silent on derogations.

³¹ International Court of Justice, *Barcelona Traction (second phase)*, ICJ Reports, 1970, para. 33, 34.

³² As of 31 December 1996.

³³ Henckaerts, “The deportation of civilians in time of war,” *op. cit.*, quoting approvingly Th. Meron, p. 482-483.

³⁴ M. Cherif Bassiouni, *op. cit.*, pp. 489 et. seq.

other international obligations of states and from which no derogation is possible. As was noted by the International Military Tribunal, “[t]he Charter is not an arbitrary exercise of power on the part of the victorious nations, but (...) it is the expression of international law existing at the time of its creation; and to that extent itself is a contribution of international law.”³⁵

4. Deportation, evacuation and transfer of civilians during a non-international armed conflict.

4.1 Terminology

The language concerning deportation, population transfer and evacuation is not quite stable. “Deportation” in particular, can be used in meanings not related to the laws of war: a state can deport (expel) an illegal alien or foreign diplomat from its territory, it can also deport (extradite) a criminal to an other state. Bassiouni³⁶ points out: “Deportation is the forced removal of people from one country to an other, while population transfer applies to compulsory movement of people from one area to another within the same state.” Although this distinction is not quite watertight, we will follow this terminology as far as possible. Concerning evacuation, we offer the following definition: evacuation concerns the temporary transfer of individuals solely for the purposes of humanitarian assistance and humanitarian protection.

The main difference between “evacuation” on the one hand, and “deportation” or “population transfer” on the other, lies in its purpose: deportation and population transfer can be security measures, as was the case with the internment behind barbed wire of Japanese-Americans by the United States government following the attack on Pearl Harbour. Deportations can also be of a penal nature, or a measure to maintain public order. It can be a military measure, bent on keeping witnesses away. De Mayas categorises six variations of deportation:

1. deportation of enemy civilians from occupied territory during war;
2. deportation of a minority pursuant to a peace treaty;
3. expulsion of a vanquished people after *debellatio* and subjugation, without a peace treaty;
4. expulsion of a national minority in time of peace;
5. “option” agreements and population exchange treaties;
6. involuntary transfer of a national minority within the territory of a sovereign state, without crossing borders into third states.³⁷

We will focus on the sixth category, albeit that the main body of law refers to the first category, which deals with international armed conflict. Save for one exception, forced relocations of people are prohibited under international law - the sole exception being evacuation.³⁸ Voluntary relocations are, generally speaking, not prohibited by international law. Consequently, in order to show that its regroupment policy is legal, the government of Burundi would have to show: *either* that the regroupment is voluntary, *or* it is involuntary but

³⁵ IMT, 1 October 1946, *In re: Herman Wilhelm Goering and others*, ILR vol 13, p. 207.

³⁶ M. Cherif Bassiouni, “Crimes against Humanity in International Criminal Law,” (Dordrecht, 1992), p. 301.

³⁷ Alfred M. de Zayas, “International Law and Mass Population Transfers”, *Harvard International Law Journal*, Vol 16, 1975, p. 209.

³⁸ Jean-Marie Henckaerts, “Deportation of civilians in time of war,” *Vanderbilt Journal of Transnational Law*, vol 26, 1993-1994.

permitted under the exceptions mentioned in article 17 of Protocol II. Neither of these exceptions is free from difficulty. In any case, the government of Burundi remains bound to all other provisions of Protocol II - in particular the articles 4, 5 and 13 - as well as common article 3 of the Geneva Conventions.

4.2 Legal contradictions

There are two relevant sources of law prohibiting forced population movements. First, there is treaty law, article 17 Protocol II in particular, and to a lesser extent article 49 of Geneva Convention IV. Second, there is customary international law, article 46 of the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land, and article 6(c) of the Charter of the International Military Tribunal on the prohibition of crimes against humanity. Unfortunately, the relationship between article 17 Protocol II and crimes against humanity is quite unclear:

- Under the definition of a crime against humanity, deportation is totally prohibited. It permits no exception, although it may safely be assumed that the prohibition did not include evacuation, since the purpose of the prohibition is the protection of the civilian population. It addresses itself to all concerned, including non-state entities and individuals. The prohibition of crimes against humanity is applicable in both international and non-international armed conflicts.
- Article 46(1) of the 1907 Hague Convention stipulates that “family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.” At the time, the risk of mass deportations was considered obsolete, and was therefore not included. Although article 46 does not place a flat ban on deportations, it is difficult to see how family honour and rights can be respected in the context of mass deportation. The Hague Convention has become part of customary international law.
- Article 49 Geneva Convention IV is applicable only in time of international armed conflict, and is placed under Section III “Occupied Territories.” It addresses itself to the Occupying Power. Article 49(1) places a flat ban on deportations from occupied territories. It does not protect the population from its ‘own’ government. The sole exception to the flat ban of article 49 is evacuation, thus clearly juxtaposing evacuation to deportation. There is no doubt that the ban on deportation has been inspired by the fate of millions of Jews, Slavs, Gypsies and others during the Holocaust.
- Article 17 Protocol II is applicable in non-international armed conflict, and is placed under Part IV “Civilian Population.” It addresses itself to the official government of the state concerned. Consequently, it does not, by it self, protect the local population from acts committed by insurgents, unless there are additional arguments to conclude otherwise.³⁹ Article 17(1) also bans the forced movement of civilians, but is less categorical. Article 17(1) is less articulate, omitting the fundamental juxtaposition between evacuation and deportation. It prohibits the forced movement of civilians for “... reasons related to the

³⁹ In the case of Burundi, such reasons exist. Security Council resolutions S/RES/1012 and 1072 of respectively 28 August 1995 and 30 August 1996 recall that “*all* persons who commit or authorise the commission of serious violations of international humanitarian law are individually responsible for such violations ...” (emphasis added). The Security Council did not specify whether it had Protocol II in mind or the laws and customs of war - probably both.

conflict,” without defining this vague reference.⁴⁰ Forced displacement under article 17 is permitted for two reasons: 1) the security of the population; and 2) imperative military reasons. Both reasons correspond to article 49(2) Fourth Geneva Convention dealing with evacuation.

The contradiction seems evident. A violation against the prohibition of a crime against humanity is in itself criminalised. A violation of article 49 of Geneva Convention IV is criminalised under article 147 thereof. A violation of article 17 Protocol II is not criminalised under the terms of Protocol II.

One of the main questions to be answered is how the categorical ban on deportation under crimes against humanity should be interpreted in view of the less than categorical ban under article 17 Protocol II. At a first glance, there seem to be two inconsistencies in the law. First, article 17(1) does not juxtapose deportation and evacuation, while at the same time allowing for the exception of military necessity.⁴¹ This may seem to weaken the prohibition against deportation. Second, a violation against article 17 is not criminalised. There is little or no literature or jurisprudence specifically addressing the first issue; consequently no doctrine exists.⁴² There are in our view however, specific reasons to interpret the exception of military necessity in article 17 narrowly (see §§ 4.3 and 4.3.2 et. seq).

4.3 *The exceptions mentioned in article 17 Protocol II*

In order to be legal, a population transfer has to meet one of the following criteria: *either* it is carried out voluntarily, *or*, if its is carried out involuntarily, it shall be carried out a) for security reasons concerning the evacuees; b) for imperative military reasons.

The drafting history of article 17 Protocol II shows that the article was intended to be directed against counter-insurgency tactics of relocating civilians in “... secure centres in order to deprive guerrilla troops of the logistical, political and intelligence support they derive voluntarily or through duress, from the civilian community.” This includes “... the displacements of ethnic groups in order to facilitate the domination of the area by an other, more favoured group.”⁴³

The drafting history of article 17(1) Protocol II circumscribes, by intent, the phrase ‘military necessity’. In addition, it may be observed that article 49(2) Fourth Geneva Convention - which also contains the term ‘imperative military reasons’ - has been interpreted by the ICRC as follows: “The first stipulation is that evacuation may only be ordered in two cases which are defined in great detail, namely when the safety of the population or imperative military reasons so demand. If therefore an area is in danger as a result of military operations or is liable to be subjected to intense bombing, the Occupying Power has the right, and subject to

⁴⁰ It has been remarked, that this qualifying phrase has been introduced in order to prevent interference with normal extradition procedures. M. Bothe, K.J. Partsh, W.A. Solf, “New rules for victims of armed conflicts,” p. 689.

⁴¹ Throughout this report, the terms ‘military necessity’ and ‘imperative military reasons’ will be used interchangeably.

⁴² As far as the second issue is concerned, the States Parties to the Geneva Conventions and Protocols “... did not want to give other States jurisdiction over serious violations of international humanitarian law committed in their internal armed conflicts - at least not the mandatory jurisdiction of the grave breaches system.” ICTY, Appeals Chamber, 2 October 1995, *The Prosecutor vs. Dusko Tadic*, § 80.

⁴³ Bothe, Partsch and Solf, *op.cit.*, p. 691.

the provisions of Article 5, the duty of evacuating it partially or wholly, by placing the inhabitants in places of refuge. The same applies when the presence of protected persons in an area hampers military operations. Evacuation is only permitted in such cases, however, when overriding military considerations make it imperative; if it is not imperative, evacuation ceases to be legitimate.”⁴⁴ It may be added that the evacuation *operation* may not be more dangerous than the option of remaining at the point of origin; a mass evacuation may block roads, leaving the population vulnerable to attack and hampering manoeuvres of the ‘own’ troops’.

UN General Assembly resolution 2675 XXV (1970) was unanimously adopted and served as a starting point for the drafting of the two Protocols (1977) to the Geneva Conventions. It stipulates in § 4 that civilian populations should not be the object of military operations. In § 7 it adds: “Civilian populations, or individual members thereof, should not be the object of reprisals, forcible transfers or other assaults on their integrity.” The resolution deliberately covers armed conflicts of all kinds. Moreover, the resolution merely affirms customary international law already in existence; an affirmation which was accepted by the International Criminal Tribunal for the former Yugoslavia in the Hague.⁴⁵

It seems consequently safe to conclude that forced population transfers outside the context of evacuation are categorically prohibited, at least when the words “... reasons related to the conflict” of article 17 are taken to mean: the aim of acquiring a political or military advantage over the enemy by means of population transfer. Population transfer is not a means of warfare. With this drafting history as our stepping stone, we will now pay attention to the two exceptions mentioned in article 17 Protocol II.

4.3.1 The first exception: security of the civilian population (humanitarian protection)

Although not defined in the humanitarian treaties themselves, the concept of humanitarian protection is, together with the concept of humanitarian assistance, one of the major centre-pieces of international humanitarian law. As such, it probably predates the Geneva Conventions by centuries. The 1868 St. Petersburg Declaration stated a well-known principle: “... considering that the progress of civilisation should have the effect of alleviating as much as possible the calamities of war; that the *only* legitimate object which States should endeavour to accomplish during war is to weaken the military forces of the enemy ...” (emphasis added - HLC). The 1863 Lieber Code proclaimed by President Lincoln during the American Civil War clearly states that the unarmed civilian shall be spared (artt. 22, 25). More pertinent is art. 23: “ Private citizens are no longer murdered, enslaved, *or carried off to distant parts*, and the inoffensive individual is as little disturbed in his private relations as the commander of hostile troops can afford to grant in the overruling demands of a vigorous war” (emphasis added). Such provisions, though no longer formally in force, have heavily influenced the later development of law.

The Fourth Geneva Convention only briefly broaches the subject of the protection of civilians against the effects of war, but later documents have codified both general principles and specific rules. One of these documents is UN General Assembly resolution 2675 XXV (1970), which we have quoted in the previous paragraph.

⁴⁴ Pictet, ICRC, *idem*, p. 280.

⁴⁵ ICTY, Appeals Chamber, *op. cit.*, §§ 110-112.

Part IV of Protocol II - in which we find article 17 - is specifically devoted to the protection of civilians. The first article of Part IV is article 13. It states without any reservation that civilians: "... shall enjoy general protection against the dangers arising from military operations." Perhaps even more fundamental is article 4(1) from which no derogation is possible either. It prescribes that "... all persons who do not take a direct part (...) in hostilities (...) are entitled to respect for their person, honour and convictions and religious practices. They shall *in all circumstances* be treated humanely, without any adverse distinction" (emphasis added).

From the above, it may be deduced that the concept of humanitarian protection has three elements, the first of which is 'a negative,' an obligation to abstain; the second and third are 'positive,' obligations to act. *First*, there is an absolute prohibition of attack against the civilian population; *second*, there is an obligation to reduce the negative effects of military operations on civilians; *third*, there is an obligation to treat the civilian population "humanely," that is to say with full respect for the existence of the human being and the very qualities which are inseparable from the human being as such, including the physical, moral and intellectual integrity of a person.⁴⁶

A major instrument of humanitarian protection is evacuation, as mentioned in the articles 17, 22-31, 38(4) and 49(2) Fourth Geneva Convention and the articles 4(3), 5(2c,d), 17(1) and 78(1) Protocol II. Evacuation becomes particularly important in case of besieged or encircled areas; the population may have to be evacuated to hospital and safety zones or neutralised zones as described in the articles 14 and 15 Fourth Geneva Convention. It has been remarked⁴⁷ that the first sentence of article 17(1) Protocol II has been derived from article 49(2) Fourth Geneva Convention (concerning evacuation), and that the second sentence has been derived from article 49(3) Fourth Geneva Convention (concerning the treatment of evacuees). The word "shelter" in article 17(1) Protocol II underlines that the measure of relocation of civilians is meant to be a measure of a humanitarian, not military nature. The word "safety" in the same sentence is intended to preclude the location of evacuation camps in the vicinity of military objectives, where they could be subject to attack. Evacuation a temporary measure and remains so under article 5(2c) Protocol II when it concerns persons who have been deprived of their liberty - such as regroupees.⁴⁸

4.3.2 The second exception: military necessity

Although there is considerable uncertainty about the precise definition of military necessity,⁴⁹ one of the most accurate definitions has been offered by the ICRC: "Military necessity is the urgent need, admitting no delay, for the taking by a military commander, of measures which are indispensable for forcing as quickly as possible the complete surrender of the enemy by means of regulated violence, and which are not prohibited by the laws of war."⁵⁰ This refers to the necessity to acquire victory. As we shall demonstrate in § 4.3.3, the defence of 'military necessity' was only partially accepted in the courts, one of the reasons being that the Charter

⁴⁶ Sandoz, ICRC, op. cit, p. 1449, § 4771; Pictet, ICRC, op. cit, pp. 201, 204-205.

⁴⁷ Bothe, Solf, Partsch, op. cit, p. 692.

⁴⁸ Pictet, op.cit, pp. 138-140; Sandoz, ICRC, op. cit, p. 1387, also: p. 1381.

⁴⁹ A.P.V. Rogers, "Law on the battlefield," (1996) pp. 3 et. seq.

⁵⁰ ICRC, Yves Sandoz, op. cit, pp. 392-396, quoting W. Downey. See also, but less accurate: US Department of the Army, Field Manual FM 27-10 (1961) § 3; United States Military Tribunal at Nuremberg, 19 February 1946, *In re: List and others (Hostages trial)*, ILR vol 15, p. 646.

of the International Military Tribunal at Nuremberg included 'military necessity' in article 6(2b) concerning war crimes, but not in article 6(2c) concerning crimes against humanity. Under article 6(2c), crimes against humanity are defined as "... murder, extermination, enslavement, *deportation*, and other inhumane acts committed against *any* civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal ..." (emphases added). The italicised word 'any' implies that the crimes defined need not necessarily be committed against an enemy population under foreign military occupation; the italicised word ensures that the definition also protects the civilian population from atrocities committed by its 'own' armed forces. Contrary to the definition of war crimes, which is applicable only in international armed conflicts, the definition of crimes against humanity can - and is - applicable to non-international armed conflicts as well. Since the terrorisation of the civilian population - through deportation or otherwise - is not a legitimate means of warfare, it has been banned altogether, nowadays by virtue of article 13(2) Protocol II. Hence, the omission of 'military necessity' in the definition of crimes against humanity is logical, since such crimes may not be committed in the context of military operations, that is, not obtain a military advantage.

Viewed from this perspective, the *first* of the two exceptions mentioned in article 17(1) Protocol II leaves us with no serious problem. Evacuation is by definition done with the well-being of the civilian population at heart; and the need to evacuate civilians can certainly arise if they run the risk of getting caught up in the cross-fire. Evacuation is a means of humanitarian protection, which in no way erodes the prohibition on deportation or population transfer.⁵¹ However, the *second* exception mentioned does pose a serious problem. If 'military necessity' refers to the necessity to achieve victory, the insertion of it in article 17(1) Protocol II seems to contradict the flat ban on deportations under the definition of crimes against humanity. It also seems to contradict the prohibition of terrorisation of the local population under article 13 Protocol II. We have therefore cause to look more closely at the concept of military necessity.

Neither the Hague Conventions of 1899 and 1907, nor the Geneva Conventions and Protocols permit deviation from the provisions contained therein unless such deviation is permitted by the provision concerned. The issue is of critical importance, since the logic of international humanitarian law is, on this point at least, the reverse of human rights law: under most human rights treaties, a specific human right is revocable in times of emergency unless this is specifically prohibited,⁵² whereas under international humanitarian law specific rights *cannot* be revoked unless specifically permitted. The justification for this reversal of logic lies in the fact that humanitarian law is in effect that body of human rights which is codified especially for the most extreme case of emergency, *i.e.* armed conflict.

In the *Thiele and Steinert case* for instance, the accused were a lieutenant and a private of the German army, who had killed a captured American officer on 17 April 1944, whom they had taken prisoner of war. Their justification was military necessity, since they were surrounded by hostile troops and had to kill him in order to prevent escape or discovery. This line of defence was not accepted by the court since international humanitarian law does not

⁵¹ Henckaerts, *op. cit.*, p. 473.

⁵² For instance, art. 4 ICCPR.

allow for military necessity as an exemption from the obligation to respect the lives of POW's. The accused were held guilty of a war crime.⁵³

4.3.3 Military necessity: the law in the courts

Very categorical in its prohibition of deportation of the civilian population from occupied territories, is the District Court of Jerusalem in its verdict in the famous *Eichmann case* of 12 December 1961.⁵⁴ Concerning the uprooting of over 530.000 Poles, it refused to accept that this was "... an innocent undertaking of 'resettlement'. It was plain and simple expulsion, accompanied by degradation of the people ..." The Court determined this to be a crime against humanity. Concerning the deportation of Slovenes it stated that "... these too were forced removals, as is evidenced by the use of the word 'evacuation'. (...) *Every act of forced expulsion of a civilian population is in itself a crime against humanity*" (emphasis added).

The decision is not surprising in its determination of mass deportation as a crime against humanity, since the International Military Tribunal of Nuremberg has already done so.⁵⁵ However, District Court was prepared to see through the veil of euphemistic terms like "resettlement" or "evacuation" to make the determination of deportation on its own account. The decision was easy to reach, since it involved crimes outside the context of military operations; they were crimes explicitly committed in the context of the so-called Final Solution.

In the *List and others case (Hostages Trial)* the United States Military Tribunal at Nuremberg passed sentence on ten high-ranking German officers including general Rendulic, who were charged with mass and wanton destruction of villages, etc., as well as the evacuation of the local population of the of thinly populated Norwegian province of Finnmark.⁵⁶ There was no loss of life directly due to the evacuation of the province where the retreating Germans expected a Soviet offensive in 1944, which did not materialise. The Tribunal held: "There is evidence in the record that there was no military necessity for this destruction and devastation. (...) But we are obliged to judge the situation as it appeared to the defendant at the time. If the facts were such as would justify the action by the exercise of judgement, after giving consideration to all the factors and existing possibilities, even though the conclusion reached may have been faulty, it cannot be said to be criminal. (...) We are not called upon to determine whether urgent military necessity for the devastation and destruction in the province of Finnmark actually existed. We are concerned with the question whether the defendant at the time of its occurrence acted within the limits of honest judgement on the basis of the conditions prevailing at the time."

Three points are of interest here. First, the decision has been severely criticised by the government of Norway for being far too lenient: it may have been true that the German generals initially erred in their assessments, but as the months dragged on without the Soviet offensive arriving, the German argument of military necessity was wearing thin.⁵⁷ Second, it is not so much the actual military necessity that is decisive, but the honest perception thereof in

⁵³ United States Military Commission, 13 June 1945, at Ausburg, ILR. vol 13, pp. 305-306, quoted by rear-admiral G.L. Coolen (ret.), "Humanitaire oorlogsrecht," in: *Marineblad*, February 1996, p. 59.

⁵⁴ District Court of Jerusalem, 12 December 1961, ILR vol 15, pp. 244, 248.

⁵⁵ International Military Tribunal at Nuremberg, 1 October 1946, ILR vol 13, pp. 203 et. seq.

⁵⁶ United States Military Tribunal at Nuremberg, 19 February 1946, ILR vol 15, pp. 648-649.

⁵⁷ G. Best, "War & law since 1945," (1994), p. 328-330.

the context of military operations occurring at the time. This criterion is also accepted by the British Military Court in the judgement quoted below. Third, the acts under scrutiny were committed before the Fourth Geneva Convention came into being. Hence, the leniency of the Tribunal as to the "... 'scorched earth' policy as a precautionary measure against an attack by superior forces," would now be more difficult to maintain, because under modern humanitarian law it is prohibited to destroy objects which are essential to the survival of the civilian population. As a general rule, major ports, railway stations, etc. may still be destroyed, but not the destruction of dwellings.

The *Von Lewinski* (called *Von Manstein*) case the British Military Court at Hamburg had to judge the evacuation and deportation of the population from parts of the heavily populated Ukraine in the summer of 1944.⁵⁸ The defence argued that to leave the population behind, was to invite espionage, and thus the "evacuation" was a military necessity: "... it was necessary to deprive the enemy of labour potential as the enemy put every able-bodied man into the army and utilised women and even small children." The summing up of the Judge Advocate was more strict than in the *Hostages* case. He pointed out that the "... requirement is 'necessity' not 'advantage.'" The second is that necessity must be an imperative one. For a retreating army to leave devastation in its wake may afford obvious advantages to the enemy and corresponding advantages to those in retreat. That fact alone, if the words in this article [meant is article 23(g) of the Hague Convention IV of 1907 - HLC] mean anything at all, cannot afford a justification. Were it to do so, the article would become meaningless." As regards to the mass deportation, it was correctly remarked that article 23(g) was not applicable. However, the Judge Advocate continued: "... if it is to be defended at all, it must be on some *other* ground than military necessity. It was argued that once it was established that devastation was justified then the deportation followed of necessity. To leave them in a devastated region would, it was suggested, be far worse than to move them out, although once any suggestion that the deportation was on humanitarian grounds was expressly repudiated" (emphasis added). The defendant was held guilty and sentenced to eighteen years. Unfortunately, the Judge Advocate forgets to point out that the defence puts the cart before the horse: as if it were theoretically possible to evacuate on humanitarian grounds after deliberately creating an urgent humanitarian situation by destructing civilian dwellings.

One of the most interesting pronouncements was made in the concurring opinion of Judge Phillips in the *Milch* case before the United States Military Tribunal:⁵⁹ "... international law has enunciated certain conditions under which the fact of deportation of civilians from one nation to another during time of war becomes a crime. If the transfer is carried out without legal title, as in the case where people are deported from a country occupied by an invader while the occupied enemy still has an army in the field and is still resisting, the deportation is contrary to international law. (...) The second condition under which deportation becomes a crime occurs when the purpose of the displacement is illegal, such as deportation for the purpose of compelling the deportees to manufacture weapons for use against their homeland or to be assimilated in the working economy of the occupying country. (...) The third and final condition under which deportation becomes illegal occurs when generally recognised standards of decency and humanity are disregarded. This follows from the established principle of

⁵⁸ British Military Court at Hamburg, 19 December 1949, ILR vol 16, pp. 512-523.

⁵⁹ United States Military Tribunal, 17 April 1947, ILR, vol 14, p. 302.

law that an otherwise permissible act becomes a crime when carried out in a criminal manner.” The concurring opinion of Judge Phillips was quoted and adopted in the *Krupp case*.⁶⁰

Other judicial decisions are far less specific;⁶¹ it is clear that the courts have difficulty in dealing with the concept of military necessity.

4.3.4 Military necessity: an assessment

The main reason for discussing the concept of military necessity at length was mentioned in § 4.2: given the flat ban of deportation under customary international law, there rose a need to compare it with the exemption of military necessity under article 17 Protocol II.

Without exception, the court cases quoted in the previous paragraph refer to the Second World War. This has two draw-backs. *First*, it was an international armed conflict, whereas the situation in Burundi is of a non-international nature. *Second*, the Geneva Conventions and Protocols were not yet in existence. However, the doctrine that military necessity could only be successfully invoked if it was allowed for under the law of the time, existed both prior and after the Second World War, and that is where the quotes have their emphasis. In practice, the courts seem to read the (then unwritten) requirement of humanitarian protection in connection with the requirement of military necessity.

On the basis of the *Hostages* and *Von Manstein* cases, De Zayas concludes that the defence of military necessity is restricted to “... situations where the army commanders judge that the safety of the civilian population requires that they be removed from the battle zone, and not when the same army commanders decide that military advantage would be gained by removing the population and scorching the earth behind them.”⁶² We agree with this assessment, which seems to be in line with the interpretation of the ICRC of ‘imperative military reasons’ (*supra*, p. 15-16). We wish to add the following:

Only two *grounds* serve as an exception to the prohibition of forcible transfers, *i.e.* the security of the civilians or imperative military reasons. A close analysis shows that the two grounds are not quite of the same status. The first ground seems to be a justification in its own right, whereas the second ground can only be legitimately called upon once the first ground has been fulfilled. Although this is not quite borne out by the subsequent wording of either article 49(2) Fourth Geneva Convention or article 17(1) Protocol II - which both use “or” when mentioning the two permissible grounds for evacuation - it is difficult to read the requirement of military necessity independently from the requirement of security of the civilians: as if it were possible to have a situation where there is an imperative military necessity to evacuate the population *without* the security of that population being a point of concern. *In the context of article 49(2) Fourth Geneva Convention and article 17(1) Protocol II*, the requirement of military necessity cannot relate to the necessity to achieve victory, but hinges on the requirement of the security and well-being of the civilian population. The reader is referred to article 5(2c) Protocol II, protecting all individuals whose liberty has been re-

⁶⁰ United States Military Tribunal, 30 June 1948, ILR, vol 15, p. 620 et. seq.

⁶¹ General Tribunal at Rastadt of the Military Government for the French Zone of Occupation of Germany, 30 June 1948, ILR vol 15, *Roechlin and others*, p. 406; United States Military Tribunal, 22 December 1947, ILR vol 14, p. 270 the *Flick case*; United States Military Tribunal, 28 October 1948, ILR vol 15, p. 394, the *Von Leeb (German High Command) case*.

⁶² Alfred M. de Zayas, “International Law and Mass Population Transfers,” *Harvard International Law Journal*, vol 16, 1975, p. 219.

stricted for reasons related to the conflict. It not only authorises but even prescribes evacuation once the interned or detained "... become particularly exposed to danger arising out of the armed conflict ...". We submit that article 5 Protocol II is relevant to regroupees. Since regroupees are forcibly relocated into designated centres, with only limited or no possibility to leave, it is not unreasonable to apply article 5 to them. There is no need to be formally arrested or apprehended before article 5 becomes relevant. Commenting on this provision, the Appeals Chamber of the ICTY noted: "The nexus required is only a relationship between the conflict and the deprivation of liberty, not that the deportation occurred in the midst of battle."⁶³

The first exemption under article 49(2) Fourth Geneva Convention and article 17(1) Protocol II - that of security of the civilian population - can easily be read independently of the second. An evacuation can be required for reasons of health or safety, which are not the *direct* consequence of the hostilities. This is the case in an epidemic, a potential volcano eruption (Goma) or the potential bursting of a hydro-electric dam (in Croatia).

Military necessity is a factual term, which describes the tactical situation at a particular location and at a particular time. The interpretation of what the relevant facts for assessing whether military necessity exists, will be highly influenced by military developments and political loyalties. What may seem as military necessity to one military commander, may be seen as a gross violation to his enemy counter-part. Military necessity by definition refers to the necessity of *one* of the warring parties in view of the (real or genuinely perceived) military pressure applied by its enemy. The term is highly fluid: when the situation on the battlefield changes, military necessity may shift or cease to exist. Enemy advances and retreats have a heavy bearing on whether military necessity actually exists.

4.4 A reversal of the burden of proof

When one reads the articles 49 of the Fourth Geneva Convention and 17 of Protocol II as penal provisions and not only as humanitarian provisions, it becomes transparent that the requirements of military necessity and of security of the civilian population are, in fact, justification clauses. An act which is normally criminal and punishable becomes legitimate if a justification clause can be justifiably invoked. Once a balanced and carefully prepared charge of a criminal act has been submitted, the burden of proof falls on the accused to establish that the act under scrutiny, although normally prohibited, is justified under the specific circumstances defined by the justification clause. That is in effect what happened in the court cases cited: all defendants strenuously tried to show that a legitimate ground for military necessity did exist. The former Prosecutor to the ICTY, Richard Goldstone, applied the same doctrine when he indicted Radovan Karadic and Ratko Mladic: "These deportations and others were not conducted as evacuations for safety, military necessity or for any other lawful purpose and have, in conjunction with other actions directed against Bosnian Muslim and Bosnian Croat civilians, resulted in a significant reduction or elimination of Bosnian Muslims and Bosnian Croats in certain occupied regions."⁶⁴ The indictment has subsequently been confirmed and international arrest warrants have been issued.

⁶³ ICTY, Appeals Chamber, *op. cit.*, § 69.

⁶⁴ ICTY, 24 July 1995, *The Prosecutor vs. Radovan Karadic and Ratko Mladic*, § 25.

In view of the above, we conclude that the exemption of 'imperative military reasons' cannot have significance independent of the exemption of 'security of the civilian population.' There may be a strong military advantage in removing the local population from certain area; however such removal is only legitimate under international humanitarian law if it meets the criterion of 'security of the civilian population' as well. Once that criterion has been met, it will have to be shown that the military reasons were *imperative*, not simply *advantageous*. The International Military Tribunal at Nuremberg determined that the absence of any provision on the punishment of violations of treaty provisions does not preclude international criminal responsibility. The ICTY in the Hague has accepted this finding as relevant to any armed conflict - both internal and international.⁶⁵ In other words, a violation by Burundian soldiers of article 17 of Protocol II is likely to incur international criminal responsibility on the part of those individuals who have carried out such violations.

It is to the governmental authorities that the provisions of international humanitarian law address themselves and it is they who are primarily responsible for upholding the law. Consequently, it is the deporting or evacuating authority which has to meet the requirements mentioned.

Applying this penal doctrine to Burundi the following can be observed, notwithstanding the fact that the current report is not a preparation for a criminal prosecution: once a charge of mass population transfer has been authoritatively made, there is a presumption of guilt on the part of the Burundi government officials who are executing the regroupment policy. It is up to them to show that their actions were legitimate under the justification clauses mentioned. In order to justify their actions, the following will have to be satisfactorily answered. The regroupment policy was:

- 1) legal under Burundi law, which implies a basis in a Burundi law which itself is permissible under its Constitution;
- 2) unrelated to the reasons of political bias, such as ethnic rivalries;⁶⁶
- 3) humanitarian protection of the population could not be secured by any less far reaching measure.⁶⁷
- 4) the military necessity invoked by the defendant refers to the necessity to protect the population by removing them from the combat zone, not the necessity to secure an advantage for the defending troops (given the fact that military necessity is not a ground for justification in its own right);
- 5) the evacuation is a temporary measure, conducted in accordance within the standards of "shelter, hygiene, health, safety and nutrition."⁶⁸
- 6) as the conflict drags on, and perhaps moves to an other area, it falls upon the defendant to show that the continuance of the evacuation project remains legitimate under the conditions mentioned.⁶⁹

The doctrine of the reversal of the burden of proof can not only be found under the heading of criminal responsibility under the laws of war, but also within the ambit of human

⁶⁵ ICTY, Appeals Chamber, 2 October 1995, *The Prosecutor vs. Dusko Tadic*, §§ 128-129.

⁶⁶ The second condition of Judge Phillips.

⁶⁷ The concept of proportionality as mentioned in the *Roehlin case*. L.G Green, "The contemporary law of armed conflict," (1996) pp. 328, 330 et seq.

⁶⁸ Updated Turku Declaration, *American Journal of International Law*, vol 89, 1995, p. 221; the third condition of Judge Phillips.

⁶⁹ The criticism of Norway to the *Finnmark case*.

rights. The Human Rights Committee commented on the right of states to take derogatory measures under the International Covenant of Civil and Political Rights, by stating: “Although the substantive right to take derogatory measures may not depend on a formal notification being made pursuant to article 4(3) of the Covenant, the State party concerned is duty-bound to give a sufficiently detailed account of the relevant facts when it invokes article 4(1) in proceedings under the Optional Protocol.”⁷⁰

The conclusion must be that the Government of Burundi is duty-bound to show that the regroupment of over 500.000 individuals over most of its provinces during a period of over twelve months is justified in each particular case. Since the chances are remote that the Government of Burundi will be able to meet this requirement,⁷¹ it must be assumed that the regroupment is in effect, a form of mass deportation prohibited under the laws and customs of war as described in UN General Assembly resolution 2675 XXV, as well as article 17(1) of Protocol II. Given the structural nature of the violations in question, the regroupment policy may be presumed to be a crime against humanity, entailing the legal obligation of the international community to put the crime to an end by all lawful means.⁷²

5. Legal obligations of the Burundian government under international humanitarian law to protect its population

5.1 Introduction

The basic principle that states have the prime responsibility to take care of the victims of armed conflict has been confirmed and reconfirmed on numerous occasions, most recently in UN General Assembly resolution 51/194 of 10 February 1997. This principle emanates from the concept of state sovereignty and non-interference as codified in article 2(7) of the UN Charter and article 3 of Protocol II. Resolution 51/194 is effectively a follow-up of landmark resolution 46/182 of 14 April 1992, which points out that humanitarian assistance should be provided “... with the consent of the affected country the affected state has the primary role in the initiation, organisation, co-ordination, and implementation of humanitarian assistance within its territory.”

Although international humanitarian law does not affect state sovereignty, a delicate balance remains between the principle of non-intervention and the right to humanitarian assistance of the stricken population. It may be admitted that as a consequence on the wide divergence of views among states, international humanitarian law does not give a clear-cut answer to the question how this balance should be struck. The approach maximising state sovereignty will find strong arguments in the articles 3 and 18(2) Protocol II. The latter provision states that “[i]f the civilian population is suffering undue hardship owing to a lack of the supplies essential for its survival, such as foodstuffs and medical supplies, relief actions for the civilian population which are of an exclusively humanitarian and impartial nature and which are conducted without any adverse distinction shall be undertaken *subject to the consent of the High*

⁷⁰ Communication No. R.8/34. Jorge Landinelli Silva v. Uruguay, UN doc. A/36/40 (1981).

⁷¹ Both the UN Commission on Human Rights and the Security Council have declared the coup of 1996 illegal and have called the current situation unconstitutional: HR res. 1997/77 and S/RES/1072.

⁷² Common article 1 of the Geneva Conventions; ICTY, Appeals Chamber, *op. cit.*, § 93.

Contracting party concerned” (emphasis added). The emphasised part of the quotation effectively renders the decision whether, and how humanitarian relief shall be granted to the areas under rebel control to the *de jure* government.

Article 18(2) Protocol II has come in for hard criticism, mainly from Western countries, the NGO community and from international academics. It would, in their view, be too much to expect of a government which is at the same time party to a conflict, that it will permit humanitarian assistance to be extended to the population on the other side of the front-line. Common article 3(2) of the Geneva Conventions seems to be at odds with the quoted paragraph; it stipulates the “right of initiative” by stating that a humanitarian organisation may “offers its services to the Parties to the conflict.” Since the word “Parties” is in the plural, there is no reason to believe why this would not refer to governmental as well as insurgent authorities. Various humanitarian NGO’s follow this line and enter rebel held territory discretely, on the basis of an agreement with rebel authorities.

The International Court of Justice has - in effect - come out in favour of the latter view. In its *Nicaragua* judgement, it has determined common article 3 to be a declaration of customary international law. In the same judgement it stated: “There can be no doubt that the provision of strictly humanitarian aid to persons or forces in an other country, whatever their political affiliations or objectives, cannot be regarded as unlawful intervention, or as in any other way contrary to international law. (...) An essential feature of truly humanitarian aid is that it is given ‘without discrimination’ of any kind. In the view of the Court, if the provision of ‘humanitarian assistance’ is to escape condemnation as intervention in the internal affairs of Nicaragua, it must not only be limited by the purposes hallowed by the Red Cross, namely ‘to prevent and alleviate human suffering,’ and ‘to protect life and health and to ensure respect for the human being’ it must also, and above all, be given without discrimination to all in need in Nicaragua, not merely to the *contra*’s and their dependants.”⁷³ The decision of the World Court has itself come in for criticism, inter alia from professor Kalshoven,⁷⁴ and it has not been decisive. The General Assembly resolutions quoted above were adopted *after* the Nicaragua judgement, and away from the liberal approach taken by the World Court.

Despite this legal uncertainty, it is clear that a state government is not free to decide arbitrarily whether it will render humanitarian aid. From three different angles limitations are brought to bear:

1. The principle of non-discrimination is not controversial. Protocol II mentions the principle no less than five times.⁷⁵ In the context of humanitarian assistance and protection non-discrimination means that *if* a state decides that a situation warrants the distribution of humanitarian services, it *must* be done without distinction as to political, military, ethnic or other affiliation.
2. State sovereignty cannot be used to the effect that it denies humanitarian assistance which is essential to the survival of the stricken population. Such a policy would deny them the right to food as defined in article 14 Protocol II. In addition, article 4(1) of the same Protocol as well common article 3 to the Geneva Conventions stipulate that all persons who do not take part in the hostilities have a right to be treated humanely.

⁷³ ICJ Reports, 1986, op. cit, pp. 14-125, §§ 242-243.

⁷⁴ F. Kalshoven, “Impartiality and neutrality in humanitarian law and practice,” farewell address (1989).

⁷⁵ Artt. 2(1); 4; 7(2); 9(2) and 18(2).

3. The prohibitions of crimes against humanity and genocide imply that no state can maintain a policy denying humanitarian assistance and protection if such a denial would amount to a crime against humanity or genocide.

On the basis of the general remarks we can conclude that, given the fact that the Government of Burundi cannot, by itself, deliver humanitarian assistance and protection to all of its population, it is under an international obligation to co-ordinate and co-operate with the international community in the delivery of such aid. In view of its sovereignty, the government has the right to have the prime responsibility in this field, but such responsibilities are to be carried out in full accordance with international law.

5.2 Humanitarian centres of relief (camps, hospital and safety zones)

Current international humanitarian law has various provisions defining accurately a number of possibilities of humanitarian centres for relief and shelter.⁷⁶ None of these provisions is applicable to non-international armed conflicts. The idea of having such zones however, dates back to the Paris Commune of 1871, when Henri Dunant first proposed to set up such zones. The purpose was to protect the civilian population from the long-range artillery bombardment of Paris by loyalist troops.⁷⁷ The Paris Commune uprising was a non-international armed conflict, and, there is nothing in current international law preventing such zones to be established in conflict areas which are at present governed by Protocol II. In fact, by virtue of common article 3(3) to the Geneva Conventions, the warring parties are explicitly encouraged to enter into special agreements furthering the humanitarian cause.

Although not explicitly recognised by Protocol II, humanitarian centres of relief have frequently been set up in the context of non-international armed conflict on a *sui generis* basis. On occasion, they have received a certain measure of recognition.⁷⁸

Current international humanitarian law recognises:

- A. *Hospital zones and localities*, which are generally of a permanent character and outside the combat zone and which are established for the sick and wounded;
- B. *Safety zones and localities*, which are generally of a permanent character and outside the combat zone and which are established for certain categories of the civilian population, such as the elderly and infirm, children below the age of 15 and mothers with children below the age of 7;
- C. *Hospital and safety zones and localities*, which are a combination of A and B;
- D. *Neutralised zones*, which are generally of a temporary character, and which are established at or near combat zones, to protect civilians and the wounded and sick civilians and military.⁷⁹

The ICRC has prepared an excellent but little known “Draft Agreement relating to hospital and safety zones and localities” which can be concluded by the warring parties.⁸⁰ The draft guarantees humanitarian protection to all those who are legitimately present in the zone concerned.

⁷⁶ Article 23 Geneva Convention I; Artt. 14 and 15 Geneva Convention IV; artt. 59 and 60 Protocol I.

⁷⁷ ICRC, Pictet, “Commentary on Geneva Convention IV (Geneva, 1958), p. 121; Th.A. van Baarda, “De rechtspositie van kinderen in gewapende conflicten; een algemene inleiding,” in: “Rechten van kinderen in de wereld,” E. Verhellen (ed.) (Gent, Belgium, 1996), p. 58.

⁷⁸ Resolution 48 (XXXVIII) of the Executive Committee of UNHCR (1987).

⁷⁹ ICRC, Pictet, *idem*, p. 120.

⁸⁰ *Idem*, p. 627 et. seq.

Given the prevailing confusion about such zones - particularly since the Security Council has established so-called "safe areas" and the like in Bosnia and Rwanda - it may be useful to point out the following general characteristics:

- They are meant purely as a humanitarian measure, not as a military tactic. They cannot be established to block enemy advances; consequently they shall not be established in the neighbourhood of military installations.
- The zones are established by mutual agreement by the warring parties, either before or during the conflict. They cannot be imposed by one side (or the Security Council).
- Only humanitarian activities are to take place in the zones; the zones are no base for military operations. When the enemy approaches, it cannot be prevented from taking over control of the zones.
- Depending on the type of zone, only certain persons are permitted to be present in the camps. Combatants are not permitted in the zones.

Zones fulfilling these conditions have the right to be respected at all times and are no target in military operations. Although it is not stated in as many words, the zones are not conceived as open air prisons; anyone who has a genuine humanitarian interest may enter or leave the zone at his or her own free will.

The regroupment camps of the government of Burundi do not meet the above mentioned criteria. The government has admitted that the camps are part of a counter-insurgency measure; albeit that humanitarian considerations also play a part. The camps are not set up by mutual agreement with the insurgents, and there is a military presence in and around certain, but not all, camps. The enemy is prevented from approaching such camps. The camps are almost exclusively inhabited by Hutu's;⁸¹ Tutsi's usually stay in so-called displacement camps which are of a better standard.

It may be recalled that the compulsion to "evacuate" individuals to a camp on an ethnic or racial basis is of dubious legality since the "evacuation" and internment of Japanese Americans during the Second World War; Americans of German and Italian origin were left alone.⁸²

6. The implementation of the regroupment policy as a violation of international law - criminal responsibility

6.1 Introduction

For the purposes of the current report "... a commander may be defined as a soldier having direct authority over a body of troops or authority over a geographical area in which the troops are stationed."⁸³ Within the concept of command responsibility, a commander can always be held responsible for the direct orders he gives. The responsibility can go 'upwards' to the government minister under whose political control he operates; it includes the respon-

⁸¹ Amnesty International, "Burundi - Forced relocation; new patterns of human rights abuses," AI Index AFR 16/19/97, 15 July 1997.

⁸² M. Grodius, "Americans betrayed - Politics and the Japanese evacuation," (1949).

⁸³ Rogers, *op. cit.*, p. 130; Queen's Regulations for the Army, HMSO (1975), § 2.001.

sibility of non-recognised ministers or heads of state, as became clear in the case of *The Prosecutor vs. Radovan Karadzic*.⁸⁴

Since the Second World War and the *Yamashita case* in particular,⁸⁵ a commander is also responsible for the offences committed by his subordinates of which he knew or ought to have known, or took no action to stop or prevent them. The United States Supreme Court held in the *Yamashita case* that general Yamashita - who was the Japanese military commander of the Philippines - had an affirmative duty to take such measures as were in his power and appropriate in the circumstances to protect prisoners of war and the civilian population. This includes a duty of the commander to enquire, once he has been notified of possible violations. The principle of command responsibility has recently been confirmed by the United Nations Security Council by adopting the Statutes of the International Criminal Tribunals for, respectively, the former Yugoslavia and Rwanda.⁸⁶

To prove the criminal responsibility of a commander, it is not necessary to prove, down to the last detail, the violations committed by his subordinates. That would be practically impossible, since military operations are likely to destroy or contaminate substantial amounts of evidence. What is necessary is to prove that the commander knew, or ought to have known about the violations concerned. Such knowledge may be inferred from the widespread nature and severity of the offences, the prevailing state of discipline, or the fostering of a general climate that the laws of war are not to be taken too seriously, through, inter alia, public appearances or policy statements.⁸⁷ The purpose of the current chapter, therefore, is not to prove any violation in detail. As was stated in the Introduction to the current report as a whole, our legal analysis is based on the information provided by various sources, some of whom, owing to the climate of fear prevailing in Burundi, wish to remain anonymous. However, in the paragraph below we will show - albeit briefly - that the regroupment policy is a matter of command responsibility and that there is a case of dereliction of duty and deliberate neglect on the Burundian High Command and Government to deal with prima facie evidence of violations of human rights and humanitarian law.

6.2 Implementation of the regroupment policy and command responsibility

With the establishment of the first so-called regroupment camp in February 1996 in Karuzi province, an official government policy commenced. The legality thereof is questionable, since the current government came to power by unlawful means (a coup), and has subsequently abolished parts of the constitution. However, the official position of the government of Burundi is that the regroupment policy is:

1. for the safety of the regroupees themselves;
2. voluntary;
3. non-discriminatory;
4. a temporary measure;
5. to protect the camp inmates from extortion by the insurgents;
6. to separate innocent civilians from insurgents;

⁸⁴ ICTY, 11 July 1996.

⁸⁵ *In re: Yamashita*, 327 US 1 (1946).

⁸⁶ Statute ICTY, art. 7; Statute ICTR, art. 6.

⁸⁷ ICTY, 11 July 1996, *The Prosecutor vs. Radovan Karadzic and Ratko Mladic*, §§ 20, 39, 46, 52, 73, etc.

7. to deprive the insurgents of recruits, supplies and supply bases;
8. to cut the link between insurgent hideouts and dwelling places in the *collines* (villages).
The arguments 1 to 5 would - if correct - be in themselves valid arguments in favour of humanitarian protection under an arrangement such as the hospital & safety zones and localities. Numerous factual reports on the human rights situation in Burundi, cast serious doubt on the correctness of the first four arguments.⁸⁸ Only very recently, there have been indications that regroupees in Kayanza and Karuzi provinces might be allowed to return home in areas the government considers secure.⁸⁹ The importance of such indications is open to doubt in view of repeated reports that homes have been looted or destroyed in the context of a counter-insurgency strategy. The arguments 6 to 8 however, are at odds with the concept of hospital and safety zones and localities as discussed in the previous chapter; the arguments 6 to 8 compare themselves more easily with the general description of counter-insurgency tactics described in § 3.1. Thus, the government of Burundi has, albeit inadvertently, admitted that its policy is not a humanitarian gesture, and hence not compatible with international humanitarian law.⁹⁰

There can be no doubt that the government is aware, up to the highest levels, of the existence of the regroupment policy and of the international concerns about its legality. We refer to various protestations which have been made against the policy, from quarters including the European Union, the United States government, United Nations bodies and a number of NGO's, either humanitarian or human rights organisations.⁹¹ These protestations went as far as to impose sanctions on Burundi.

The policy of regroupment has not been denied by the government of Burundi but it has suggested that its policy is merely a reflex following 'spontaneous' population movements resulting from the hostilities. It has defended its policy and criticised the criticisms it has received. We give two examples. The *first example* concerns a speech delivered by the prime minister of Burundi on 19 March 1997, when it was stated: "Despite the tangible results which these 'regroupings' are producing in the protection on civilian populations, certain people still believe that the 'regroupings' still consist of operations which have been forcibly imposed on people from one single ethnic group. Some have gone as far as to compare these 'regroupings' to the concentration camps set up by Nazi Germany in the Second World War." Although the Prime Minister does have a point when he suggests that the regroupment camps are not set up with the deliberate intent of exterminating people like in Auschwitz, he made no offer to investigate any alleged violation of humanitarian law by government forces.

The *second example* refers to comments made on March 21, 1997 by Mrs. Christine Ruhaza, Burundi's Minister for Human Rights, Social Action and the Promotion of Women.

⁸⁸ Second Report on the Human Rights Situation in Burundi, 10 February 1997, E/CN.4/1997/12, § 56; Amnesty International, "Burundi - forced relocation; new patterns of human rights abuses," AI Index: AFR 16/19/97, 15 July 1997; ITEKA, Burundian League of Human Rights, "Report of the survey into the 'Regrouping Camps' in Kayanza and Karuzi," March 1997.

⁸⁹ Reliefweb, Great Lakes Complex Emergency Situation Report # 38, 13 June 1997; Report of the Secretary General on the situation in Burundi, 15 July 1997, S/1997/547, § 22.

⁹⁰ E/CN.4/1997/12, § 56.

⁹¹ Security Council resolution 1072 (1996); Security Council Presidential Statements nos. 32 and 34 of 30 May and 19 June 1997; EU Declaration, 5 July 1996; US Department of State, 9 and 21 April 1997; UN Commission on Human Rights resolution 1997/77; Report of the Secretary General on the situation in Burundi, 15 July 1997, S/1997/547, chapter V.

She rejected the latest report of the UN Special Rapporteur on Human Rights, Mr. Sérgio Pinheiro of 10 February 1997 (E/CN.4/1997/12). Talking to AFP, she called the report biased: “The Rapporteur should submit vigorously verified information to the commission and above all visit the terrain himself.”⁹² Although the report of the Special Rapporteur, read in conjunction with other human rights reports, should at least be a *prima facie* indication that serious violations of human rights and humanitarian law have occurred, the Minister for Human Rights did not offer an enquiry either.

Such an offer was neither made at a meeting between the UN Humanitarian Co-ordinator and the Prime Minister, where the UN Co-ordinator presented the serious concerns of UN agencies *vis-à-vis* the regroupment policy. The main result of the meeting was not an enquiry, but an announcement of stricter government control of the international relief effort.⁹³ This is to a certain extent surprising since government soldiers have been known to stand trial for violations of humanitarian law committed outside the context of the regroupment policy.⁹⁴

It cannot be the purpose of this paragraph to list all representations which have been made to the government of Burundi on alleged violations of human rights and humanitarian law. If the government wishes to view *one* given representation as biased, it may have some grounds to do so, depending on the merits of the case. However, it would be difficult to conceive that *all* representations, ranging from UNHCR, via the European Union to the Summit held at Arusha on 17 April 1997,⁹⁵ are *all* biased. In other words, there is a serious *prima facie* case of repeated and structural violations of human rights and humanitarian law brought to the attention of the government of Burundi.

This does not suggest that all alleged violations of international humanitarian law are necessarily part of a plan drafted by the Burundian High Command or Government. The UN Special Rapporteur on Burundi, Mr. Sérgio Pinheiro, has noted a lack of discipline and “... an absence of a coherent chain of command between the army general staff in Bujumbura and the troops in the field. Soldiers operating outside any hierarchical structure often act on their own, causing blunders.”⁹⁶ To the extent that violations take place beyond the control of the Burundian High Command, it is unlikely that command responsibility can be established for them. However, this does not absolve the government from its obligation to investigate them.

It can be concluded that the regroupment policy has been sanctioned at command level. There exists deliberate neglect on the part of the government of Burundi and its High Command to carry out investigations into alleged violations of international human rights and humanitarian law brought to its attention. In the *Yamashita* case, it was stated that there exists, at the command level, a positive duty to stop or prevent any serious violations. The Burundi government has not been willing to adhere to its international obligations in this respect. This implies a breach of international law, incurring state responsibility on the part of the government of Burundi.

⁹² Reliefweb, DHA/Humanitarian Co-ordination Unit, Burundi Humanitarian Situation Report 19-31 March 1997.

⁹³ *idem*.

⁹⁴ UN DHA IRIN Burundi Humanitarian Situation Report, 1 April - 9 April 1997; IRIN Emergency Update no. 214 on the Great Lakes, 18 July 1997.

⁹⁵ Joint Communiqué of the Fourth Arusha Summit, 17 April 1997, § 6.

⁹⁶ A/51/459, 7 October 1996, § 22.

7. The status of humanitarian organisations - a brief description

7.1 *The law: contradictory norms*

The Geneva Conventions and Protocols are not quite up-to-date in comparison to the current practice of humanitarian relief. During the nineteen forties, when the Geneva Conventions were drafted, the “Red Cross family” had a near monopoly on international humanitarian relief. The secessionist war in Biafra, followed by the separation of East from West Pakistan, were perhaps a cause for the emergence of the current size and diversity of the humanitarian community. However, of the hundreds, if not thousands of humanitarian organisations, only the ICRC and national Red Cross Societies are mentioned in the Geneva Conventions and Protocols by name. Only their status, rights and duties can be established with certainty. Other humanitarian organisations are mentioned in passing in the Geneva Conventions. It is curious that the Geneva Conventions overlook the existence of governmental humanitarian organisations: UNICEF was founded in 1946, three years prior to the signing of the Geneva Conventions. The two Protocols of 1977 did not make up for this omission. The main provisions on humanitarian NGO’s can be found in Chapter IV, “Medical personnel,” of Geneva Convention I and in article 9(2) Protocol I, but they do not reflect current practice.

To complicate matters, international humanitarian law gives no definition of a “humanitarian organisation,” despite the fact that genuine humanitarian organisations have rights and duties which other organisations - such as human rights organisations - do not have. It is only by inference that one can more or less find a description of what a humanitarian organisation is supposed to be.

Common article 9/9/9/10 of the four Geneva Conventions puts forward two criteria: (a) the organisation must be humanitarian, that is focused on the needs of victims of armed conflict, independent from considerations of politics, race, ethnicity, etc; (b) the organisation must be impartial, *i.e.* will not take sides in the conflict. In view of article 9(2) Protocol I and the ICRC’s Commentary thereto, the first requirement can be tightened: not only humanitarian *activities* of a humanitarian organisation matter, but “... equally essential [is] that the organisation *itself* has a humanitarian character, and as such, follows only humanitarian aims. This restriction excludes organisations with a political or commercial character.”⁹⁷ It may be noted that the ICRC Commentary does not exclude organisations of a religious denomination, of which there are several with an impressive humanitarian track-record.

On the basis of these considerations, we offer the following (loose) definition: humanitarian organisations - at least in the meaning of the Geneva Conventions and Protocols - are organisations which deliver humanitarian assistance and protection in accordance with the *Nicaragua* judgement of the International Court of Justice,⁹⁸ and which fulfil the criteria mentioned in the common articles 9/9/9/10, article 63 Geneva Convention IV, as well as article 9(2) Protocol I in all types of armed conflict.

We may assume that the organisations which fit this definition may be permitted to bear the rights, privileges and responsibilities which the Geneva Conventions and Protocols, and subject to their specific provisions, place upon them. For our purposes, this relates in

⁹⁷ ICRC, Sandoz, *op. cit.*, p. 143. One may also be referred to the artt. 43 and 142 Geneva Convention IV.

⁹⁸ *Supra*, § 5.1.

particular to common article 3(2) and article 18(2) Protocol II. According to these articles, they may offer their services to the parties to the conflict, but unfortunately, the parties are not duty-bound to accept such offers.

In § 5.1 we have recalled that this freedom to refuse aid is not unlimited. The “Mohonk Criteria for Humanitarian Assistance in Complex Emergencies” (1993) - to which we have contributed - states in Chapter II, § 4: “Where a government or other authority is unable or manifestly unwilling to provide life-sustaining aid, the international community has the right and obligation to protect and provide relief to affected and threatened civilian populations in conformity with the principles of international law.” Paragraph 5 stresses that “... the principles of non-interference and sovereignty should not be used as an obstacle to humanitarian assistance.”

It seems that humanitarian organisations may have a privileged position when, in the context of international sanctions, all regular contacts of the international community with the penalised state are cut off. According to the International Court of Justice in the *Legal consequences case* (1971), such severing of contacts is not obligatory in the case of certain multilateral, “... general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia.”⁹⁹ In other words, treaties such as the Geneva Conventions seem to be exempted, and, as a consequence thereof, the activities taking place under these conventions may be exempted as well.

7.2 Ethics: should humanitarian organisations deliver aid to regroupment camps?

A burning question of the humanitarian community is the dilemma whether to accede to the request of the Government of Burundi for humanitarian assistance to the regroupees. The case against humanitarian assistance centres around the argument that the regroupment policy is in most cases likely to be a violation of both customary and conventional international law. For the humanitarian community, there is no need to become a kitchen for an open air prison; particularly not if that incurs the wrath of the insurgents.

The argument in favour of extending relief to regroupees is that there is, in the majority of cases, a genuine need for assistance. In addition, “... international human rights law and international humanitarian law contain together a certain set of minimum humanitarian standards, which are applicable in all situations, including internal violence, disturbances, tensions or public emergency, and which cannot be derogated under any circumstances.”¹⁰⁰ The same author adds, correctly, that there is no individual right to humanitarian assistance - in terms of civil law at least - but adds that there may be a moral right thereto. To abandon regroupees as victims of armed conflict would be difficult to reconcile with the principles of universality and humanity. Humanitarian organisations could not expect understanding from the regroupees for their eventual decision to stop relief activities to the camps; a decision which would, in effect, victimise the regroupees a second time.

As such, the dilemma is not new. No armed conflict exists without violations of human rights and humanitarian law. Indeed, if a given society would have respected human rights to

⁹⁹ ICJ Reports 1971, *Legal consequences for States of the continued presence of South Africa in Namibia*, § 122.

¹⁰⁰ C. Flinterman, “Is there a right to humanitarian assistance?” in: Dutch Interchurch Aid, “The right to humanitarian assistance in conflict situations,” Report on the international seminar, Renkum, 24 September 1992 (1993), p. 80.

the full, the armed conflict is unlikely to have commenced in the first place. The dilemma is how to maintain an ethical standard of behaviour and a measure of integrity at a moment in time, when one is more or less compelled by circumstances beyond one's control to accept or participate in unethical behaviour. In other words: to what extent is one prepared to make one's own hands dirty.

The options available do not offer a choice between the morally 'good' and the morally 'bad'; if they did, the dilemma would not exist. Rather, the options available present uncomfortable compromises; the question whether they are 'good' or 'bad,' can usually be answered in the sense: "morally (in)correct, but only to a certain degree."

The question which has to be addressed is *how* cases where there are conflicting, but equally strong ethical considerations can be assessed. We deliberately use the word 'assessed,' and not 'solved,' since a 'solution' is not on the cards: one of the fundamental characteristics of a dilemma is that the individual or organisation involved, in one way or an other, lacks the means, the power or the clout to bring about a fundamental change in the circumstances which are considered to be unacceptable. The problem is particularly acute for humanitarian organisations, since they are not expected to halt the fighting or to facilitate peace negotiations: they deal with the consequences of unethical behaviour, they are not there to end it.

Michael Walzer's well-known criteria for dealing with such dilemma's, can, as adapted, be useful in assessing the case:¹⁰¹

1. *The correct political aim:* The aim of the operation under scrutiny must be both ethically and legally correct according to generally accepted principles, such as those adopted at the XXth International Conference of the Red Cross at Vienna in 1965, or UN General Assembly resolution 2675 XXV (1970).
2. *The direct and foreseeable effect* of the proposed action must be ethically correct. What counts is not only the purpose of the proposal on paper, but also its chances to be actually realised on the ground. If one deliberately commences an operation in the full knowledge that it will fail, the operation is likely to be wasteful and counter-productive. As Rosalyn Higgins put it when she referred to the former Yugoslavia: "We have chosen to respond to major unlawful violence, not by stopping the violence, but by trying to provide relief to the suffering. But our choice of policy allows the suffering to continue."¹⁰²
3. *The correct intent:* There should be a balance between the aim described under 1. and the means to achieve it. The means have to be sufficient, appropriate and essential. Sufficient: there should be an interface between aim and means, and vice versa. It is preferable to achieve a 'small' target correctly, that to fail in achieving a 'large' target. Appropriate: the chosen means will produce maximum efficiency and reduce unavoidable side-effects (such as feeding the combatants) to a minimum. Essential, there is no alternative less drastic, available to achieve the desired aim. What counts is that one cannot remain cynical to the effect of the proposed operation, and this should be reflected in the proficiency with which it is carried out.

¹⁰¹ Michael Walzer, "Just and unjust wars - A moral argument with historical illustrations," (New York, 1977), p. 153; A.H.M. van Iersel and Th.A. van Baarda, "Balanceren op de rand van een scheermes: de rol van ethiek bij vredesoperaties," in: Ted van Baarda, Jan Schoeman (eds.), "Werelden apart? Militairen en burgers: vredeshandhavers en hulpverleners," (The Hague, 1997), pp. 105 - 107.

¹⁰² Rosalyn Higgins, quoted by Larry Minear (ed.), "Humanitarian action in the former Yugoslavia: the UN's role 1991 - 1993," Occasional Paper of the Watson Institute, # 18 (1994), p. 7.

4. *Conscious prioritisation of direct and indirect effects:* Each operation will be prepared carefully. Undesired effects should be assessed in advance, and they should be considerably smaller than the advantages attached to the proposed course of action. In other words, good intentions are not enough. The prioritisation, preparation and execution of the proposed project should reflect proficiency, and one should be able and prepared to answer for the choices made.

The four criteria together elaborate on the moral virtue of 'responsibility.' Responsibility stems from *respondere*, to answer, and to answer is by definition a social, not an individual act. They also elaborate on responsibility in the sense that one is only responsible for the consequences of actions one can reasonably predict and influence. One cannot be held responsible for a situation where one is - without one's own fault - overwhelmed by the circumstances.

As we have mentioned, 'the' correct answer does not exist, and the set of criteria will not provide it. However, the four criteria may be helpful in defining the options or in analysing the options under scrutiny. When applied to the dilemma of humanitarian organisations *vis-à-vis* the regroupment policy in Burundi, it is clear that the need for humanitarian assistance and protection is not open for discussion, but the conditions under which it has to be carried out are. Given the volatile security situation, coupled with the unpredictability of guerrilla warfare, there may be, on occasion, a genuine need for safety and shelter of civilians in most of Burundi's provinces. The security provided for in the current camps is limited: the one-sided, partisan way in which they have been established as a counter-insurgency measure makes them a target for insurgents.

The first option would be to urge the government of Burundi to alter the very nature of the camps radically: whereas regroupment camps are, at best, of dubious legality, hospital and safety zones and localities are clearly legal. This option would offer the consideration of the closure of the current camps in favour of the establishment of genuine hospital and safety zones and localities, established by common agreement between the government and the various insurgent movements. The main arguments in favour of this option when it is presented to the government are that its current regroupment policy is - as military history teaches - counter-productive. The current camps:

- are perceived as partisan and consequently attacked;
- are unsafe for civilians as well as humanitarian operations because of these attacks;
- are unlikely to enlist the support of the regroupees for the government in the long run;
- have caused the OAU to impose sanctions.

Genuine hospital and safety zones and localities do not have these disadvantages, and may therefore be attractive. The zones should however, be established under common article 3(3) of the four Geneva Conventions. One of the advantages of this possibility is that it would provide an answer to the moral dilemma faced by the humanitarian relief community whether to continue assistance in the regroupment camps: once a genuine hospital and safety zone has been established, there should be no hesitation in rendering assistance to the victims legitimately residing in that zone.¹⁰³ It will obviously require a considerable effort, not only to enlist the support of the government of Burundi, but also of the insurgents as well. A concerted effort by an agency such as the ICRC and DHA will also be necessary.

¹⁰³ Depending on the nature of the agreement reached between the warring parties, such assistance might include programs aimed at rehabilitation or reintegration of the victims of the armed conflict back into society at large.

If the government of Burundi is unwilling to entertain the idea, then the policy adopted by DHA seems a reasonable and sensible alternative. Summarised briefly, this policy has as its main elements: the limitation of assistance to the camps to life-sustaining goods & services; no assistance to turn the regroupment camps into permanent structures (villageisation); emphasis on local services and organisations; no assistance to administering the camps; an independent assessment of humanitarian needs.

The policy of DHA would have characteristics of being 'second best': The possible and foreseeable consequence could be that the regroupees will remain at a subsistence level in the camps until the security situation improves. In view of the inability of either side to impose victory on the other, the regroupees may stay in the camps for some time to come.

8. Conclusions and recommendations

1) A clear legal analysis of the regroupment policy in Burundi is severely hampered by inconsistencies in the applicable law. On the one hand, a flat ban exists of both deportation and population transfer under the prohibition of crimes against humanity as a part of customary international law. On the other, the ban on population transfer under article 17(1) Protocol II is not sufficiently clear for two reasons. First, evacuation and deportation are not juxtaposed as is the case with article 49 Fourth Geneva Convention. If evacuation is supposed to be the sole exoneration under the prohibition against deportation, it should be clearly defined. It is not. Consequently, a deportation carried out under the guise of evacuation may be difficult to challenge in legal terms. Second, the terms 'military necessity,' or 'imperative military reasons' are not clear in relationship to the prohibition under article 17(1) Protocol II. If the terms refer to the necessity to avoid defeat or to acquire victory on the battlefield, it is difficult to see what use the phrase has in article 17(1).

These two arguments put together reveal a loophole in the material provisions of international humanitarian law. In addition, Protocol II does not have a supervisory mechanism comparable to article 90 Protocol I. Neither is there a states complaints procedure, nor an individual complaints procedure. When there are no national judicial remedies available to deal with claims or violations concerning deportation or population transfer there may be some recourse available to a treaty based mechanism such as the Human Rights Committee or the Committee on the Elimination of Racial Discrimination. However, neither of their constitutive treaties contains a prohibition of deportation or population transfer, and Burundi has not recognised their competence. For reasons mentioned in § 3.1, national remedies are not known to be an effective protection against deportation or population transfer. Consequently, the population becoming the victim of deportation or transfer is - but for non-treaty based mechanisms such as the UN Special Rapporteurs or the confidential 1503 procedure - left virtually unprotected. Any right of the victims to compensation, indemnities or rehabilitation remains beyond their reach.

In the view of the Humanitarian Law Consultancy, this loophole in the law urgently needs attention, not only *vis-à-vis* Burundi. The issue is pertinent to several armed conflicts where peoples have been evicted, transferred or deported. Both the Sub-Commission on the Prevention of Discrimination and the Protection of Minorities as well as the Commission on Human Rights have recognised that the practice of forced evictions - save for exceptions

mentioned in human rights treaties - are a "gross violation of human rights, in particular the right to adequate housing."¹⁰⁴ We propose that the forthcoming governmental conference celebrating the First Hague Peace Conference of 1899, will have on its agenda the items: a. a clear delineation of evacuation on the one hand and deportation & population transfer on the other; b. an international supervisory mechanism underpinning the protection against deportation and population transfer. This centenary conference, which will take place in the spring of 1999 in the Hague and which will be co-hosted by the Russian and Dutch governments, will be an ideal opportunity to strengthen the law on this issue. We recommend that interested NGO's, in co-operation with qualified lawyers, prepare a common paper to be presented at the conference.

2) Despite the lack of clarity in the law, it can be demonstrated that the regroupment policy of Burundi is not consistent with international humanitarian law. Violations of common article 3 of the Geneva Conventions have occurred as well as violations of the articles 4, 5, 13, 16 and 17 of Protocol II. The prohibition on deportation as a crime against humanity has also been violated.

The implementation of the regroupment policy is such that a sufficient level of health, hygiene, shelter and nutrition cannot be maintained in the regroupment camps in violation of common article 3(1) and the articles 4, 5 and 17(1) Protocol II.

In view of both customary international law prohibiting crimes against humanity and common article 1 of the Geneva Conventions, the international community has a duty to end the violations by all lawful means.

3) Serious doubts can be raised about the purportedly humanitarian nature of the camps, since they are, at least in part, established for strategic reasons. Burundian military personnel, sometimes without wearing a uniform, are present in the camps, thus inviting attacks.

However, given the level of insecurity in several provinces of Burundi, the civilian population may, on occasion, have a genuine wish to seek shelter from the fighting in a equally genuine humanitarian relief centre. In § 7.2 we have therefore proposed the substitution of regroupment camps with hospital and safety zones and localities, which are established in common agreement with the warring parties concerned, and with the assistance of DHA and the ICRC. We have pointed out that common article 3(3) of the Geneva Conventions provides for the necessary legal basis for such an arrangement.

4) Although the current report was specifically limited to the regroupment policy of the government of Burundi, it cannot be overlooked that this policy is only one aspect of a much larger problem. Perhaps that problem can best be described as a climate of fear, intimidation and violence created by many interested Burundian parties and factions. In this context we unreservedly support the position taken by the UN Special Rapporteur, Sérgio Pinheiro, that priority must be given to stopping the impunity.¹⁰⁵ As we have suggested in § 3.1, it is unlikely that the perpetrators of crimes against humanity and other serious violations committed in the context of the armed struggle, can be dealt with adequately by the

¹⁰⁴ Report of the Secretary General, "Guidelines on international events and forced evictions," E/CN.4/Sub.2/1996/11.

¹⁰⁵ E/CN.4/1997/12, §§ 92 et. seq.

Burundian national (civil or military) judicial system. Apart from measures to reinvigorate the national judiciary, it will be necessary to establish an international judicial mechanism to deal with the worst cases of violations against human rights and humanitarian law.