AN ASSESSMENT OF TANZANIA LAWS ON NON-INTERNATIONAL ARMED CONFLICT

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Abstract

Traditionally, non-international armed conflicts are perceived to be illegitimate practices that ought to be dealt with internally by the sovereign governments. The practice has caused absence of international humanitarian law (IHL) provisions in domestic legislation of many states. In that regard, this paper assesses the laws of Tanzania in managing legal issues during non-international armed conflict. The assessment discloses that applying laws of Tanzania during non-international armed conflict is likely to prove failure because they provide for matters of general concern (Lex Generalis). On the other hand, it is hard to substantiate whether the courts of Tanzania are able to apply the existing laws without discrimination in the eyes of the Sovereign. Studies have revealed that following the end of a non-international armed conflict States are encouraged to grant the broadest possible amnesty to persons who have participated in the armed conflict. However, in the absence of IHL provisions, there is a possibility for impunity enjoyment against punishment for serious human rights violations on the part of the members of the armed forces. Therefore, it is time for Tanzania to rethink on the existing statutory lacunae and select a more effective and principled basis for IHL applicability.

Key Words*: Assessment of Tanzania laws, Non-International Armed Conflict, Tanzania.*

Research Area: Law.

Paper Type: Doctrinal Legal Research.

1. INTRODUCTION

Non-international Armed Conflicts are traditionally known as 'internal war' or 'civil war'. According to article 1 of Protocol II to Geneva Conventions, the term 'Non-international Armed Conflict' refers to armed conflicts which 'take place within the territory of a single State between its armed forces and dissident armed forces or other organized armed groups, and in which the armed forces of no other State are engaged against the central government'. In *Prosecutor v. Tadić*, it was suggested that a non-international armed conflict exists whenever there is '…protracted armed violence between governmental authorities and organized armed groups within a State'. Traditionally, sovereign governments have been ignoring the legality of non-international armed conflicts. In that case, they took efforts to enact strict laws to internally suppress the adversaries while believing that non-international armed conflicts are not subject to international law.

However, the time following WW II witnessed a number of treaties governing the conduct of hostilities in which States agreed into, among other things, internationalizing the non-international armed conflicts. The aim was to ensure there are some minimal international humanitarian protections for the victims of internal armed conflicts. Tanzania is a signatory to certain treaties which have explicit provisions of international humanitarian law applicable to non-international armed conflict. According to article 26 of the Vienna Convention on the Law of Treaties, 'Every treaty in force is binding upon the parties to it and must be performed by them in good faith - *Pacta sunt servanda*'. In that regard, implementation of international humanitarian law during non-international armed conflict in Tanzania becomes imperative.

Therefore, this paper attempts to provide an assessment on Tanzania laws in managing legal issues during non-international armed conflict, following the need for implementation of international humanitarian law. In order to achieve the aim, the paper focuses on two main questions: Are the laws of Tanzania effective in managing legal issues during non-international armed conflict? Are the laws of Tanzania impartial in managing legal issues during non-international armed conflict?

2. THE BACKGROUND

In 1947, Tanganyika became a United Nations Trust Territory under British administration. In the late 1950s, Her Majesty Queen Elizabeth, by the Geneva Conventions Act (Colonial

Territories) Order in Council, 1959, ordered the extension of the Geneva Conventions Act, 1957 of the United Kingdom, to specified territories including Tanganyika. Moreover, the United Republic of Tanzania attained her independence from the British Colonial rule on 9th December, 1961.

Currently, the United Republic of Tanzania is a peaceful country in a troubled region. Armed groups do not operate in or from its territory. However, Tanzania has been involved in a situation of armed conflict only once with Uganda in 1979. Otherwise, the armed forces of Tanzania have been participating in peacekeeping operations or enforcement under UN or other auspices. These circumstances raise special issues relating to the application of laws of war where members of the national contingents of peacekeeping forces remain bound by the laws of war binding their respective states. Moreover, on a number of occasions the UN has declared that members of peacekeeping forces must comply with the 'principles and spirit' of the law of war. For instance, section 4 of the UN Secretary General's Bulletin on Observance by UN Forces of international humanitarian law of 1999 provides that 'in cases of violations of international humanitarian law, members of the military personnel of a United Nations force are subject to prosecution in their national courts.'

Therefore, in the effort to demonstrate commitment to international humanitarian laws related to armed conflicts, the United Republic of Tanzania acceded to or ratified the Geneva Conventions of 1949 on 12 December, 1962 and the Additional Protocol (II) to Geneva Conventions, 1977 on 15 February, 1983. Surprisingly, the times following ratification of such international legal instruments has not witnessed further efforts taken by the United Republic of Tanzania to incorporate, in domestic legislation, the provisions on non-international armed conflicts.

3. APPROACHES ON NON-INTERNATIONAL ARMED CONFLICT

This part provides for international approaches on non-international armed conflict while covering traditional and modern approaches respectively. The traditional approach puts clear the root cause for the ongoing defence of state sovereignty on compliance with principles of international humanitarian law applicable in non-international armed conflicts. On the contrary, the modern approach puts clear the need for the public conscience of humanity during non-international armed conflicts. The modern approach further insists on sovereign states

compliance with international humanitarian law applicable in non-international armed conflicts.

3.1 Traditional Approach on Non-international Armed Conflict

Traditionally, non-international armed conflicts are considered illegitimate by governments due to the controversy emanated from the foundational distinction between 'interstate wars' and 'intrastate or internal wars'. In the Republic, Socrates (the voice of Plato) makes an important distinction between wars fought amongst Greeks, and wars fought between Greeks and barbarians (non- Hellenes).This idea creates two distinct categories of conflict as the 'war proper'- which is natural and the 'faction' - which is unnatural. Furthermore, Aristotle (384 – 322 B.C.) followed Plato in stating that intra-Hellenic warfare was a disease, while the wars fought against barbarians were natural and therefore legitimate and virtuous. On the same ides, Thomas Hobbes (1585 – 1679) believed that if anyone attempts to depose his Sovereign, he will be killed, or punished by the Sovereign for such attempt, because he is author of his own punishment. That the Right of making War and Peace with other Nations is annexed to the Sovereign. He strictly believed that it is impossible for the disorders of State, and change of Governments by Civil War.

Moreover, traditional attitude behind non-international armed conflicts and the status of internal laws regulating them being in the hands of the sovereign concerned has been evidenced by various authors, among others, David Graham who once noted that States resist the application of international law to their struggles with rebels. In particular, they resist according status to rebels by applying the law of armed conflict (LOAC) to them. Rather, they prefer to deal with rebels under their own national criminal laws, free from any constraints that might be imposed by the law of armed conflict. Also, Edwin Borchard joins him by saying that '…the attempt of various countries on occasion to escape the restraints of international law persuades them to find a justifying theory in supposed limited scope and in a compensating emphasis upon state sovereignty'. Regarding this practice, Crawford points out the fact that "… Governments will not willingly grant a protected status to persons seeking to overthrow them. By granting (protected status) governments effectively suspend the operation of domestic criminal laws and treason laws."

Therefore, a series of evidence on the traditional approach to non-international armed conflicts gives a very comprehensive picture regarding the reluctance to incorporate international

humanitarian law in domestic legislation. The facts are substantial in putting clear the root cause for the ongoing defence of state sovereignty in compliance with the principles of international humanitarian law applicable in non-international armed conflicts

3.2 Modern Approach on Non-international Armed Conflict

The increased scope of international humanitarian law by providing protection to those caught up in non-international armed conflict has brought a great challenge to sovereign authorities in recognizing the status and rights of the captives. The reason behind is that the majority of wars in the post-World War II have failed to fall neatly into the category of "international armed conflict"- the only category of war to which the main body of the IHL is formally applicable. Since 1945 most conflicts have been civil wars or at least have contained a major element of civil war. In that case, after WW II, the need was perceived to define the role of governments more accurately by assigning to them the task of respecting and ensuring certain basic rights of the individual in all circumstances. The intent was to ensure that the exigencies of military engagement did not leave room for States to arbitrarily determine courses of action without some consideration given to the existing rules of international law.

Furthermore, various post-World War II authors have become critics on the traditional approach towards NIAC. As reported by Gary D. Solis in his 2010 magisterial treatise that 'The framers of the 1949 Conventions determined that there must be some minimal international humanitarian protections for the victims of internal armed conflicts.' Apart from the authors, the modern approach on NIAC has been taken as a matter of concern at the UN diplomatic level. The need for IHL application during NIAC has been viewed as of utmost significance. As noted by David Scheffer, the UN Ambassador at Large for War Crimes, '… if the provisions of the Protocol II were followed by rebel and government forces throughout the world, many of the most horrific human tragedies the world has documented within the past decade could have been avoided.'

Also post-World War II period has witnessed concrete functioning of the International Criminal Court by prosecuting war crimes committed within a State. Since then, individuals have been prosecuted for their conducts in internal conflicts through the United Nations *ad hoc* Tribunals such as the International Criminal Tribunal for Yugoslavia, the International Criminal Tribunal for Rwanda, and the Special Court for Sierra Leone. This practice was

consecrated further by the framers of the Rome Statute. Therefore, it is obvious that traditional approach on non-international armed conflicts has lost value in the contemporary world community.

3.3 Theoretical Justification

An assessment of laws of Tanzania on NIAC is based on the sovereign agency theory of LOAC derived from Jean Jacques Rousseau's "*Le contrat social*" (1712). The sovereign agency theory of LOAC deals with the justification on the fact that a soldier was not viewed as an individual but as an agent of his sovereign until such time as he could no longer fight or laid down his arms. Then, he reverted to his status as an individual and was treated as such. However, the assessment is focused on the need for IHL implementation during NIAC.

In this regard, states grant to militaries a status of agency to act on their behalf during international armed conflicts. One of the most important privileges of being the state's agent was the principle of combatant immunity. Under the developing law, personal acts of violence in the course of armed conflict did not carry individual criminal responsibility. This combatant privilege and its ties to sovereignty are reflected in the US "Instruction for the Government of Armies of the United States in the Field (Lieber Code)," issued under the direction of President Lincoln during the American Civil War. Article 57 of the Lieber Code clearly provides that "So soon as a man is armed by a sovereign government and takes the soldier's oath of fidelity, he is a belligerent; his killing, wounding, or other warlike acts are not individual crimes or offences." The prerequisite to the privilege was being armed by the sovereign and taking the oath of fidelity to the sovereign's wishes.

However, during the twentieth century, the LOAC became bifurcated, with the complete LOAC applying only to armed conflicts between sovereigns and only few provisions of the law applying to armed conflicts that were not between sovereigns. This bifurcation has led to a lack of clarity for the sovereign's agents in LOAC application and given states the ability to manipulate which law applies to application of force through their agents.

Therefore, the significance of the theory is that in applying the sovereign agency theory of LOAC by the states rather than the conflict classification paradigm will avoid the existing debate concerning international armed conflicts and non-international armed conflicts which has spread to various sovereign states causing so much confusion in IHL application. On this

note, it was said in *Tadić* Case that "What is inhumane, and consequently proscribed, in international wars, cannot but be inhumane and inadmissible in civil strife." In addition, studies have revealed that applying the full LOAC every time a state uses its armed forces will mean that the starting point for humanitarian protections is always the most robust possible. It will also provide clarity for armed forces, making them more efficient and effective.

4. INTERNATIONAL LEGAL INSTRUMENTS ON NIAC

There are certain treaties to which Tanzania is a part that have explicit provisions applicable in non-international armed conflict. These treaties are the law of Geneva (Geneva Conventions of 1949 and Protocol II Additional thereto) and the Rome Statue of International Criminal Court. Moreover, the UN Charter 1945, the International Covenant on Civil and Political Rights, and the African Charter on Human and Peoples' Rights (as a regional instrument) are significant in support of this paper. However, this paper reviews the law of Geneva and the Rome Statute of International Criminal Court as substantive documents with regard to non-international armed conflicts.

4.1 The Law of Geneva

The fountain of the law of Geneva 1949 rests on the four Geneva Conventions adopted on 12 August 1949 that make provision for the sick and wounded on land, and at sea, for the treatment of prisoners of war, and for the protection of civilians during armed conflict. Common Article 1 to the four Geneva Conventions directs the High Contracting Parties to respect and to ensure respect for the present Conventions in all circumstances." Also a common article in each of the four 1949 Geneva Conventions (Convention I, Article 63; Convention II, Article 62; Convention III, Article 142; and Convention IV, Article 158) borrows from the very terminology of the Martens Clause in reaffirming that even if a party denounces the Convention, that:

> 'It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfill by virtue of the principles of the law of nations, as they result from the usages established among civilized people, from the laws of humanity and dictates of the public conscience.'

The conventions go further into directing the High Contracting Parties, under Common Articles to the four Geneva Conventions (49 of Convention I, 50 of Convention II, 129 of Convention III and 146 of Convention IV) to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of the Conventions." In dualistic countries like Tanzania, to enact these Conventions into laws requires domestication process, that is, through parliamentary process.

4.1.1 Common Article 3 to Geneva Conventions

Common Article 3 was inserted in each of the Geneva Conventions as a provision introducing minimum humanity. The prohibited acts are violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; Taking of hostages; outrage upon personal dignity, in particular humiliating and degrading treatment; the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

The major observation to make regarding Common Article 3 is that it is a ground breaking, though clearly tentative provision that extends the material scope of humanitarian law beyond its traditional domain. That is to say, Common article 3 has been termed a "miniature convention" regulating non-international armed conflicts within a legal regime aimed at regulating only international armed conflicts. Apart from all these, common article 3 does not attempt to define what is meant by a non- international armed conflict.

4.1.2 Protocol II Additional to Geneva Conventions

According to article 1, the Protocol applies to the classical civil war, being an armed conflict within a state party to the Protocol between its armed forces and dissident armed opposition groups in that territory. However, these armed groups should be "under responsible command," and be able to "exercise such control over a part of its territory as to enable it to carry out sustained and concerted military operations and to implement this Protocol."

Specifically, article 4(2) of the Protocol contains a statement of fundamental guarantees prohibiting at any time and any place whatsoever: violation to life and, physical and mental well-being of persons, in particular murder, as well as cruel treatment such as torture,

mutilation or any form of corporal punishment; Collective punishment; Taking of hostage; Acts of terrorism; Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault; Slavery and the slave trade in all their forms; Pillage; Threats to commit any of the foregoing.

Therefore, the legal quality of Protocol II, as a significant instrument on non-international armed conflict, could be treasured due to the humanitarian element, 'in cases not covered by the law in force, the human remains under the protection of the principles of humanity and the dictate of public conscience' as provided in the preamble. The principle is derived from the 'Martens Clause'- the clause which was intended only as a diplomatic solution to the deadlock of The Hague Peace Conference of 1899.

4.1.3 The Rome Statute of the International Criminal Court 1998

The basis for the criminalization of unlawful conducts during non-international armed conflict is based on the reason that such activities contributed to serious crimes that shock the conscience of humanity, grave crimes that threaten the peace and security and well-being of the world. Ultimately, it could be argued that to some extent, the Rome Statute philosophy provides a basis for the international criminalization of unlawful act during non-international armed conflict. The Statute itself lists a number of crimes against humanity that could encompass the conduct of illegal acts during non-international armed conflict as used in this paper. According to article 7(a) (b) (f) and (g) of the Statute, the crimes against humanity are Murder, Extermination, Torture, and Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity.

Therefore, a very important feature of the Rome Statute legal framework is that it criminalizes on equal terms the commission of listed war crimes in both international armed conflicts and conflicts not of an international character. Although, this legal regime recognizes the distinction between these two kinds of armed conflict, it does not distinguish the nature or elements of the war crimes or differentiate their gravity on the basis of the nature of conflict.

5. THE TANZANIA LEGAL POSITION

This part provides for an analysis on the Laws of Tanzanian with regard to non-international armed conflict. The analysis aims at establishing the status of IHL provisions in the laws of Tanzania. The laws to be analyzed include the Constitution of the United Republic of Tanzania,

1977 (as amended), the National Defence Act [Cap 192 R.E. 2002] and the Penal Code [Cap 16 R.E. 2002]. However, there are other laws such as the Tanzania Red Cross Society Act [Cap 66 R.E.] the Emergency Powers Act 1989, and the Prevention of Terrorism Act [Cap22 R.E. 2002] which are generally analyzed. The laws have a link in regulating conduct of key actors during non-international armed conflicts.

5.1. The Constitution of the United Republic of Tanzania, 1977

The Constitution the United Republic of Tanzania, in articles 12 to 29, provides for the basic and such fundamental rights of every person including their protection. In particular, it provides for presumption of innocence (art. 13 (6)(e)), protection against torture or inhuman or degrading punishment or treatment (art. 13 (6)(e)) and right to life (art. 14), just to mention a few. However, something of utmost importance to implementation of international humanitarian law during non-international armed conflict is the provision allowing domestication of treaty laws. On this note, the Constitution empowers the Parliament to enact laws where implementation requires legislation, deliberate upon and ratify all agreements to which the United Republic is a party and the provisions of which require ratification.

Therefore, it is quite possible for the government of Tanzania to ensure that several ratified international legal instruments are domesticated in the legal framework of the United Republic of Tanzania to ensure IHL implementation. This is very substantial fact in analyzing and assessing the effectiveness of Tanzania laws in managing legal issues during non-international armed conflicts.

5.2 The National Defence Act [Cap 192 R.E 2002]

This is the principal legislation as regard matters of 'national defense' and 'armed conflict'. It is an Act to make provision for national defense and for the maintenance, government and discipline of the Armed Forces. Therefore, it is of paramount significance to non-international armed conflict in Tanzania. In principal, the Act provides for the Code of Service Discipline to regulate the conduct of the armed forces in the conduct of their duties. The Code of Service Discipline does not contain explicit IHL provisions to specifically criminalize offences that may happen during non-international armed conflicts. However, there are certain provisions which can generally assist to serve the purpose.

Section C. 30 of the Code provides for an offence against "Cruel or Disgraceful Conduct". Also, NOTES (A) to article 103.24 of the Defence Forces Regulations, clarify that offences involving indecency or unnatural conduct might be charged under this section but, as a general rule, should be charged under Section C. 65 of the Code of Service Discipline (offences punishable by ordinary law); that is to say, the service offences should be the offence prescribed in the penal code.

Furthermore, the Code of Service Discipline provides for an offence resulting from breaching of military standing orders. It is an offence against "Conduct to the Prejudice of Good Order and Discipline" (Section C. 64(1)). It goes further into providing for such acts, disorder, or neglect to include the contravention by any service man of, among others, "any general, garrison, unit, station, standing, local or other orders." (Section C.64 (2) (c)).

On the contrary, Section 64 of the National Defence Act provides for the limitation of proceedings relating to the Code of Service Discipline that:

> "No suit or other civil or criminal proceeding shall lie against any officer or man in respect of anything done or omitted by him in the execution of his duty under the Code of Service Discipline, unless he acted or omitted to act maliciously and without reasonable and probable cause."

This provision may cause difficulties in determining liabilities for an offence on the part of members of armed forces during non-international armed conflict because it needs a fair and impartial justification of an offence. Therefore, the questions "what is good order and discipline?" and "who will be interested in investigating an act or omission conducted maliciously and without reasonable and probable course?" are subject to assessment. Also, the answer to the question whether there are clear provisions in the Penal Code which are intended to regulate non-international armed conflict is subject to analysis of the Code.

5.3 The Penal Code [Cap 16 R.E. 2002]

The Penal Code is a major source of criminal law in Tanzania. To that effect, it is expected that the Code should provide for the clear picture on penal sanctions during non-international armed conflict. Of close relevance to non-international armed conflict section 39 of the Code. In particular, section 39(2)(c) of the Code provides for treason and other offences against the republic that:

> "Any person who, being under allegiance to the United Republic**,** takes up arms within the United Republic in order, by force of constraint, to compel the Government of the United Republic to change its measures or counsels, or in order to put any force or constraint on, or in order to intimidate or overawe, the Government of the United Republic, commits an offence of treason and shall be liable on conviction to suffer death".

Furthermore, the Penal Code provides for punishment against offences such as rape (Section 130), manslaughter (Section 195), murder (Section 196) and arson (Section 319), just to mention a few, which are likely to be committed by the actors during non-international armed conflict.

Therefore, the question here is whether ordinary criminal laws of states can manage legal issues during non-international armed conflicts in the manner directed by the international humanitarian law. This is subject to detailed assessment because there is no explicit reference to Geneva Conventions or IHL throughout the Code.

5.4 Other Laws

The laws which have a link in regulating conduct of key actors during non-international armed conflicts include the Tanzania Red Cross Society [Cap 66 R.E. 2002] which is an Act to establish the Tanganyika Red Cross Society and for matters connected therewith; the Emergency Power Act 1986 which is an Act to repeal the Emergency Powers Orders in Council of 1939 to make better provisions for and confer certain emergency powers upon the President for the purpose of ensuring public safety and maintenance of public order during emergencies and for connected matters; and the Prevention of Terrorism Act [Cap 22 R.E. 2002] which an Act to provide for comprehensive measures of dealing with terrorism, to prevent and to co-operate with other states in the suppression of terrorism and to provide for related matters.

However, no reference to the Geneva Convention or International Humanitarian Law has been provided by these Acts despite the coordinateness of these Acts to the control of key actors during non-international armed conflicts.

6. FINDINGS

Analysis has generally revealed lack of IHL provision in the laws of Tanzania. Therefore, this part summarizes a number of findings and how they can affect actors and the state at large during and in aftermath of non-international armed conflict.

6.1 No Legal Protection for Armed Fighters against the Government

The Penal Code criminalizes all individuals who take up arms against the government to the extent of imposing death penalty, and on that basis no one has the right to "participate in hostilities". As a result the legitimate armed forces of the State may of course fight these individuals under domestic legislation. However, the domestic legislation are subject to amendment during the course of conflict, and as the conflict increases in intensity the state may take greater powers of action through this law. But still, humanitarian law and human rights law are required, in addition to national and military law, to apply in governing the conduct of key actors.

6.2 The Laws Reflect General Application

The laws of Tanzania reflect matters of general application the fact which can pose challenges when managing legal issues during non-international armed conflict. The assessment is based on the legal maxim *"lex specialis derogat legi generali"*. The doctrine states that a law governing a specific subject matter overrides a law that only governs general matters. In that regard, *lex specialis* is a Latin phrase which means "law governing a specific subject matter" Whereas, *lex generalis* is a law of general application as contrasted with one applicable to a particular person.

This concept lies on the fact that international humanitarian laws is, in this case, *lex specialis* on all matters pertaining to non-international armed conflict. This is due to the fact that IHL is the only recognized international law which states are bound to implement in all circumstances of armed conflict. In the Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, the International Court of Justice observed, among other things, that during armed conflict '…the test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. On the other hand, the analyzed body of Tanzania laws could be regarded as *lex generalis* because they provide for matters of general concern which may happen at all the time even in the absence of armed conflict.

6.3 Possible Impunity Enjoyment against Punishment for Serious Violations

The assessment is based on impartiality and independence of the courts exercising such judicial powers over criminal offences during non-international armed conflict. On this note, Article 6 of Additional Protocol II applies to the prosecution and punishment of criminal offences related to the armed conflict. The Protocol further provides that 'No sentence shall be passed and no penalty shall be executed on a person found guilty of an offence except pursuant to a conviction pronounced by court offering the essential guarantees of independence and impartiality'.

Therefore, studies have revealed that States may exercise sovereignty over persons belonging to a non-State armed group; that is to say, a State may prosecute individuals for participating in hostilities against it. Such conduct frequently constitutes crimes under ordinary criminal law (e.g., murder, assault, illegal destruction of property). On the other hand, the non-State armed group lacks authority to prosecute members of the State armed forces. Also, studies have revealed that following the end of a non-international armed conflict or a state of emergency it is not uncommon for the State to grant an amnesty to military personnel, either generally or by declaring that the acts of the armed forces are deemed to have been committed on duty making them liable to military processes only. In the case of *Prosecutor v. Kondewa,* Justice Robertson had the following separate opinion:

> "Even if the amnesty agreement did not grant immunity to members of its own armed forces there is the possibility that individual soldiers charged before their own military courts may find themselves before a 'show trial', but one in which the accused will suffer no or little penalty. Alternatively, a soldier may be 'pardoned' by the Head of the State (often the Commander – in – Chief of the armed forces, whose security may depend on those armed forces) or short time limits may be impressed for any prosecutions. Those possibilities contribute 'to the impunity which such personnel enjoy against punishment for serious human rights violations"

Therefore, absence of IHL provision (as *lex specialis*) in domestic legislation is likely to welcome partial decisions in the courts. This is due to the fact that using domestic legislation (as *lex generalis*) may cause easy manipulation of laws during non-international armed conflicts.

6.4 Possible Disciplinary Measures under International Law

The increasing involvement of international law in non-international armed conflicts has continued with the creation of a number of international tribunals for the prosecution of criminal acts committed in times of non-international armed conflict. Therefore, lack of such relevant provisions on regulation of non-international armed conflict in the National legislation is likely to cause disciplinary measures to be taken against violators under international law.

In the case of *Prosecutor v. Slobodan Milosevic*, the evidence indicated that Slobodan Milosevic had actual, constructive, and imputed knowledge of the commission or impending commission of war crimes by forces subject to his superior authority. On the other hand, the *Akayesu* judgment is another clear example of the application, during a non-international conflict, of command responsibility extending to a person exercising civil authority, not only on account of his orders to committee genocide or crimes against humanity, or because of his presence when some of these crimes were committed.

6.5 The Use of Military Standing Orders in the Disciplinary Action

The nature of military law in many States is wide, encompassing acts or omissions which would not necessarily be punishable under civilian disciplinary codes or under the criminal law. In many armies it has been the initiative of commanders to incorporate as many relevant provisions as possible for the purpose of which is to enforce a policy or procedure unique to a specific unit's situation which is not otherwise addressed in applicable service regulations, military law, or public law. In most cases the offence could be, as in the case of the Code of Service Discipline, "Conduct to the Prejudice of Good Order and Discipline". The answer as to what is 'good order and discipline'? Is subject to clarification under particulars of the offence.

Although, in the real sense, they serve the purpose during military engagement it is possible to overlook important provisions or it is possible to welcome manipulation of facts so as to fit in other interests which may partial decision.

7. CONCLUSION

The current laws of Tanzania lack IHL provisions on non-international armed conflict. In principal, existing laws criminalize the act of taking up arms to fights against the government. This could obviously be evidenced under the entire philosophy behind state sovereignty. Though this may appear to be a legal determination, history has demonstrated that the decisions of many states has been open to manipulation in order to accomplish policy objectives. In that regard, it is time for Tanzania to rethink the existing statutory lacunae and select a more effective and principled basis for IHL applicability. This is due to the fact that application of the IHL to all activities by state sovereign forces during non-international armed conflict is a much more effective means of protecting the victims of such armed conflict.

8.0 RECOMMENDATIONS

Should full IHL be applied during non-international armed conflicts in Tanzania, the following measures and strategies should be taken by the stakeholders:

a) National laws on non-international armed conflict should be reviewed and IHL provision be incorporated with the aim of striking balance between the protection of national interests and ensuring humanitarian values during non-international armed conflicts.
b) A new Act to implement Geneva Conventions and Protocols additional to those Conventions into law should be enacted in order to ensure prevention and punishment of grave breaches of Conventions and Protocols and to provide for other matters connected therewith.
c) The government, through civil military cooperation, should make more efforts to disseminate, during peace time, knowledge on international humanitarian law. The strategy will increase awareness to the community on the need for conscience of humanity during non-international armed conflicts.

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