A CRITICAL ANALYSIS OF THE ROLE OF INTERNATIONAL HUMANITARIAN LAW IN PROTECTING CIVILIANS IN INTERNAL ARMED CONFLICTS: A CASE STUDY OF THE DEMOCRATIC REPUBLIC OF CONGO, 1996-2005.

BY

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DECLARATION

This dissertation is my original work and has not been presented for a Degree in any other University.

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This dissertation has been submitted for examination with my approval as a University Supervisor.

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Above all, I glorify God for these modest sheaves, Praise be to GOD!

DEDICATION

I dedicate this dissertation to my parents Peter and Agnes Muinde for their love and care and for believing in me all through. What shall I say? You are incomparable

ABSTRACT

This study analyses the concept of non-combatant immunity in an internal conflict as provided for in International Humanitarian Law and utilizes the Democratic Republic of Congo as the case study.
The study notes that there has been a substantial development in the laws of armed conflict protecting civilians in internal conflicts and especially after the Second World War. This not only includes the Geneva conventions of 1949 and their two additional Protocols, but also through the jurisprudence of the International Criminal Tribunal for Rwanda International Criminal Tribunal for Yugoslavia
The study however, observes that in spite of these normative developments, numerous challenges still exist in the protection of civilians, one of these challenges has been highlited by the case of DRC and this is the internationalization of internal conflict as a result of external actors in the conflict, in pursuit of resources. These actors not only complicated the conflict but also the concept of non-combatant immunity and hence predisposed civilians to grave violations and especially rape. Consequently, the study concludes that the era of absolute non-combatant immunity is not yet here, due to the difficulties in implementing the existing law and gray areas in IHL that need to be addressed.

LIST OF ACRONYMS

ADFL	Democratic Alliance for the liberation of Congo
DRC	Democratic Republic of Congo
CNDP-FDD	*Conseil National Pour la Defense de la Democratie -Forces Del La Defense De la Democratie*
FAC	Congolese Armed Forces
FARDC	Armed Forces of the Democratic Republic of Congo
FDLR	Democratic Forces for the Liberation of Rwanda
FNI	Nationalist and Integrationist Front
ICC	International Criminal Court
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for Yugoslavia
IHL	International Humanitarian Law
IHLR	International Human Rights Law
MLC	Congolese Liberation Movement
MONUC	U.N. Organization Mission in the DRC
PUSIC	Party for Unity and Safeguarding of the Integrity of Congo
RCD	Congolese Rally for Democracy
RCD-ML	Congolese Rally for Democracy – Liberation Movement
RCD-National	Congolese Rally for Democracy – National
U. N.	United Nations
UPC	Union of Congolese Patriots
(ZNDF).	Zimbabwe National Defense Forces

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Chapter 1

Background to the study

Introduction

In May 1996, the Congo war that brought the veteran Lumumbist rebel leader Laurent Kabila into power broke out. Kabila came to power with the help of *banyamulenge* (ethnic Tutsis) and Rwanda, Uganda, Angola and Burundi. The government of Rwanda and Uganda turned against him leading to a second war. Up to his assassination in January 2001, Angola, Namibia and Zimbabwe supported the Congolese government. Rifts emerged between Kagame and Museveni and their forces clashed several times in the occupied parts of eastern Democratic Republic of Congo. In addition, ethnic conflict between locals was also been brought to the fore. This conflict therefore, involved not only several foreign armies, but also a myriad of militias such as mai mai and mercenaries and a number of issues have been highlighted as the causes.

The international community has codified laws to regulate the conduct of hostilities, *jus in bello*, to protect both civilians and wounded and sick in warfare and to limit the means and methods of warfare. However, the implementation of these rules is not always as expected, and as a result civilians have been attacked along with soldiers, or in order to get at soldiers. In most conflicts both international and non-international, civilians are exposed to some risks due to their proximity and sheer brutality of war. Hence, once hostilities break out non-combatants are more likely to be killed and the ones left are likely to suffer numerous atrocities.

In the conflict in DRC, international humanitarian law (IHL) was flouted and genocide and other crimes against humanity were committed both by the government

forces, occupying forces and militia. This chapter gives a background to the study, the statement of the research problem, objectives, hypotheses, justification of the study, theoretical framework, literature review, methodology and the chapter outline.

Statement of the research problem

International Humanitarian Law (IHL) regulates the conduct of hostilities not only in international conflicts but also in internal conflicts, especially through the four Geneva Conventions and the 1977 Additional protocols to the Geneva conventions, among other instruments. Therefore, it is expected that any government armies, belligerents and any other parties to a conflict will respect the rules of war.

In practice, these rules have not necessarily induced compliance. As a result internal conflicts have been occasioned by serious violations of IHL and savagery with appalling consequences, especially to non combatants. The implementation of IHL depends largely on goodwill, as parties to a conflict especially an internal one give numerous arguments for non observance of IHL. Under IHL, civilians have a fundamental right to be protected from attack and violations of their physical and moral integrity. The term humanitarian as used in IHL gives rights to and confers obligations on those concerned by armed conflict that is primarily the parties to the conflict and the victims, but also third states and international organizations. Internal conflicts are widespread and often cause tremendous amounts of human suffering causing serious threats to regional and international security.

When escalation occurs and conflict resolution is endangered, civilians are involved often as targets and sometimes as combatants and many times vengeful combatants undertake reprisals against civilians and in others they are denied

humanitarian relief necessary for their survival, while some belligerents survive off the civilian population. The difficulties inherent in the implementation of IHL in internal conflicts extends to civilian protection, in spite of numerous legal provisions, such as article 3 common to the four Geneva conventions and additional protocol II to protect them. However, the conflict in DRC, bears the hallmarks of impunity in disregard of IHL. Hence, this study examines the extent to which IHL has been effective in protecting civilians in the conflict. It will examine the nature of IHL violations against civilians in DRC, the reasons for these violations and the effectiveness of enforcement measures in protecting civilians.

Objectives of the study

The broad objective of this study is to find out the role of international humanitarian law in protecting civilian victims of internal conflict.

The specific objectives are;

(i) To find out the type of IHL violations against civilians in DRC

(ii) To examine the reasons for violation of IHL in internal conflicts.

(iii) To examine the enforcement measures for IHL in internal conflicts in protecting civilians.

Justification of the study

The two wars of 1996/7 and the one from 1999 have brought about social and humanitarian crises in the DRC. Disregard for IHL has led to grave consequences of war as the conflict exacerbates. This study is justified both on academic and on policy grounds.

The study will add to the study on International Humanitarian Law and hence serve as a reference to scholars and students wishing to undertake studies of a similar nature. At policy level, the findings from this research will help policy makers on the strategies to deal with IHL violations in internal conflicts.

Literature review

Literature on this study is divided into two, literature on the conflict in DRC and literature on international humanitarian law

Literature on the conflict in DRC

Wanyama[1] asserts that the problem of both violent and non-violent conflicts in Africa, compared to any other region of the globe, is on the higher side. These conflicts have taken the form of interstate and intra state disagreement and DRC is an example. He argues that African political institutions are essentially, centralized and authoritarian by nature and it is this character that has caused many of the conflicts on the continent and rendered their resolution impossible. Peter Calvocores looks at the DRC's conflict as starting from the slave trade era, colonial period to Mobutu's regime. He asserts that the Cold War was a period that saw the Congo state turn into a fighting ground for both super powers especially the USA.[2]

Paul Kagame dates the conflicts back to the pre-colonial period. He cites the false start at independence and chronic bad governance as the greatest causes of the Great Lakes conflicts.[3] Gnamo[4] is of the opinion that the Rwanda genocide of 1994 precipitated

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[1]See Fredrick O. Wanyama, 'The Role of The Presidency in Contemporary Africa, in Ogot B. A and Okoth G. P (eds) *Conflict in Contemporary Africa* (Nairobi: Jomo Kenyatta Foundation, 2002), pp 30-43.
[2]See Peter Calvocores; *World Politics since 1945*, (London: Longman, 1991).
[3]See Paul Kagame; *The Great Lakes Conflict, Factors, Actors and Challenges*; an inaugural lecture delivered by his Excellency Paul Kagame President of the Republic of Rwanda at the Nigeria War College, Abuja 16 September 2002

the collapse of Mobutu's regime. This tragedy and its aftermath undermined his shaky authority and legitimacy in the long term. Up to 30,000 Hutus who fled into North and South Kivu were members of the Rwandan army (*ex forces armees rwandaises or ex FAR*) and the *Interehamwe* (Rwandan Hutu Militia) who had been responsible for the massacre of up to 800,000 Rwandan Tutsis and moderate Hutus in the preceding months. These perpetrators of the genocide subsequently rearmed in the refugee camps of eastern Congo and with the support of Mobutu Sese Seko were able to resume the war in 1996 and again in 1998.In response, Rwanda, together with Uganda, Burundi, Angola and Eritrea, entered the DRC in 1996 in Support of a loose alliance of anti –Mobutu rebels calling itself *Alliance des Forces Democratiques pour Liberation du Congo* (ADFL).

This together with a strong desire for change in Zaire itself, combined to bring about a much awaited change - the departure of Mobutu. Lemarchand[5] notes that the collapse of the Zairian state is traceable to the shrinking political bases of state authority. This is rooted in the cumulative effect of economic and financial constraints ranging from the plummeting copper prices in the 1972 and the ineptitudes of Zairinisation, to a growing debt burden and a widening gulf between a soaring supply of money and the availability of basic commodities, leading to runaway inflation.[6] Others are clearly traceable to Mobutu's own and non democratic neo-patrimonial style with the result of the process of political involution centered on a handful of rent-seeking cronies, all positions in the army , security services , offices or state enterprises depended on ones

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[4]See Abbas H. Gnamo, The *Rwandan Genocide and the Collapse of Mobutu 's Kleptocracy* in H. Adelman, and A. Surhuke, *The Path of Genocide from Uganda to Zaire* (New Jersey: Transaction Publishers, 1999)
[5]See Rene Lemarchand, Patterns of State Collapse and Reconstruction in Central Africa: Reflections on the Crisis in the Great Lakes *in African Studies Quarterly* Vol1 No 3, *1997*.
[6]See Young M. Crawford, and Thomas Turner, *The Rise and Decline of the Zairian State.* (Wisconsin: Madison University Press, 1988).

personal relationship with Mobutu. The image of the state as protector receded and that of state as predator came sharply into focus, the state became irrelevant as a provider of jobs, welfare or security; people found their own ways of meeting their needs.[7] Therefore the culture of plunder which he instituted served to consolidate armed opposition against his regime.

In addition, the conflict in DRC is social with political implications. The origins are traceable to the heart of the population especially the Kivu region of Eastern Congo, due to the conflictual relations between the native people of Kivu and immigrants from Rwanda and Burundi due to the unresolved issue of the latter's nationality.[8] The ethnic question among the Hutus and Tutsis who live in the DRC and how they relate with the migrants from Rwanda and Burundi on one hand and the relationship between the Hema and Lendu tribes have come to the fore of the conflict. The International Crisis Group argues that the conflict in the DRC is on a continental scale and contains three discrete conflicts: local, national and regional intertwine perniciously, whereas peace initiatives have not been all inclusive. For example, Ituri District[9] in oriental province has been the theatre of spiralling violence bordering on genocide where the Hema and Lendu communities are both the central actors and victims of ethnic conflict.

These factors seem to add to Martin's, observation that an analysis of African conflicts requires a historical perspective. He further posits that conflicts are part and parcel of the dynamics of society. There is perennial struggle among individuals,

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[7]See Carlo Cornelius, 'The Crippled Bula Matari: the Roots of the Congolese War Economy', *Review of International Social Questions*, www.risq.org/article108.html

[8]See Makonero W. *Background to the Conflict and Instability in the African Great Lakes Region* in Kadima, D and Kabemba, C. *Wither Regional Peace and Security the DRC after the War (*African Institute of South Africa 2000).

[9]See International Crisis Group, *Congo Crisis: Military Intervention in Ituri* Africa Report No. 64 (Nairobi/Brussels: International Crisis Group, 13 June 2003).

families, clans, ethnic groups and nationals for the control over natural, economic and political resources; he adds that their nature and intensity is a result of a complex, dialectical relationship between internal societal factors and the structure of the external environment.[10]

Mwagiru [11] has highlighted the concept of internationalization of conflict which means that the previously "internal conflict" becomes endowed with many international characteristics which render it no longer purely internal. He further asserts that the conflict in DRC has been highly internationalized through the entry of diverse actors. The entry of these other actors gave the conflict a multi level dimension. These contained elements of the original internal conflict and its moorings in the governance patterns in the DRC, international characteristics based on the international relations of the whole region and the relationship between the state actors in that conflict.[12]

This concept is connected with the one of approaching conflict from a systemic perspective, hence the idea of conflict system. The conflict in DRC demonstrates classically the functioning of the Great Lakes conflict system. That conflict displays all the characteristics of a conflict system, it involves all the states in the region and even some extra-systemic ones with interests in the outcomes of the conflict.[13]

In this regard genuine security concerns could have prompted intervention by Uganda and Rwanda, due to the insecurity in the Eastern DRC borders – and the operation of the logic of "the enemy of my enemy is my friend" to cement alliances and

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[10]See Guy Martin, Conflict Resolution in Africa, Paper presented at the Conference; Reversal of a Culture of Violence and Control of Small Arms, University of Western Cape, September 1998. Available at http://129.194.252.80/catfiles/1178.pdf.

[11]See Makumi Mwagiru, Conflict and Peace Management in the Horn of Africa: Theoretical and Practical Perspectives. A Paper Presented at the International Resource Group Conference. (Mombasa, 1998), p 2.

[12]See Makumi Mwagiru, *Conflict:Theory Processes and Institutions of Management* (Nairobi: Watermark Publications 2002), p 69.

[13]Ibid p 82.

hence intervention by these external actors.[14] Clark[15] observes that the epic struggle for control of DRC bears directly on the prospects for peace, freedom and development over a large portion of the continent. The war has brought in at least seven different states on opposite sides and threatens to undermine peace and prosperity in Africa. Rwanda, Uganda and Burundi have supported various insurgent groups while another group, Angola, Zimbabwe, Namibia and Chad have intervened on behalf of President Laurent Kabila. Hence, it pitted groups of African states against one another, and threatens to engulf half of the continent in inter state war.

Orogun[16] asserts that internal and interstate conflicts in sub Saharan countries of Angola, DRC, Liberia and Sierra Leone have been triggered and funded by the economic imperative of capturing and monopolizing territorial control over lucrative mineral producing areas. DRC is coveted both by its neighbors and the western powers because it abounds in economically strategic minerals essential for high-tech industry. The interests of the western powers revolve around the need to control these resources and with the end of Cold War, African countries have also been trying to reposition themselves and access these resources, hence the logic of plunder of Congolese resources is fundamental to the war. As a result the conflict in the Great Lakes has expanded into ever increasing circles, becoming what has been termed the "first African world war".[17]

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[14]See Fillip Reyntjens, The Privatisation and Criminalisation of Public Space in the Geopolitics of the Great Lakes Region, the *Journal of Modern African Studies* Vol. 43. 2005.

[15]See John F. Clark Explaining Ugandan Intervention in Congo Evidences and Interpretations, *The Journal of Modern African Studies* 39 (Cambridge: Cambridge University Press, 2001), p 261-287.

[16]See Paul Orogun, 'Blood Diamonds and Africa's Armed Conflicts in the Post Cold War Era', *World Affairs Winter*, No 3 2004. pp 151-61.

[17] Emeric Rogier, *Cluttered With Predators, God Fathers Predators and Facilitators: The Labyrinth to Peace in the Democratic Republic of Congo*, (Hague: Netherlands Institute of International Relations, 2003), p 5.

In tandem with this, Kisangani looks at the 1998 conflict as a conflict that is motivated by the greed of the external actors and especially Rwanda, Burundi and Uganda.[18] Consequently, its minerals and other natural resources have been illegally exploited by the armies of Zimbabwe, Rwanda and Uganda during their involvement in the Congo war. The western concept of peace has also been blamed for the war in DRC: the economic and peace paradigm where violence and coercion are embedded in the economic structures; modes and relations of production generated in the formation of market forces that reconstituted the conditions of structural violence in the Congolese society.[19] The failure of the African governing classes in the Congo's post-colonial period to create an alternative economic paradigm and subsequent development models, therefore, perpetuated and exacerbated such forces in the crudest forms of war and economic plunder.

According to African Peace Forum[20] DRC remains the epicentre of the Great Lakes Conflict and that Kabila's government has not effectively addressed sensitive issues of nationality and minority rights, in Eastern DRC. He is accused of betraying the ideals of the revolution, nepotism, corruption, mismanagement and human rights violations. It is pointed out that as a result of the Congolese Rally for Democracy split, the DRC is under three zones of occupation by various groups and approximately 60 per cent of the DRC is in rebel held hands. Other scholars have analyzed the effects of the

[18]See F.E Kisangani, 'Conflict in the DRC: A Mosaic of Insurgent Groups', *International Journal of World Peace* Vol. XX No. 3 September 2003, pp 51-80.
[19]See Horace Campbell, *The Lusaka Peace Agreement; The Conceptual Crisis in Understanding Peace in the* DRC; (Nairobi: Nairobi Peace Initiative–Africa, 2002).
[20]See African Peace Forum and International Resource Group, Situation *Analysis of Conflict Situation in the Great Lakes* op. cit.

war, for example, Mungabalemwa and Clark [21]analyze the economic impact of the Congo war. They point out that the war has had frustrating economic consequences for Congo itself, but it has also affected the whole of the Central African region and even some countries not bordering on Congo, notably intervening Zimbabwe and Namibia. There can be no doubt that the economic potential of the entire African continent has been indirectly muted by the war's huge disruptive impact. At the same time, narrow constituents of individuals including smugglers, arms dealers, and corrupt military officials have profited handsomely from the war. Yet such profits are not likely to disguise the overwhelmingly negative economic consequences of the war in general.

On the other hand Philippe Lebillon,[22] posits that one of the consequences of conflicts involving natural resource exploitation is an element of abuse by security forces including forced displacement and heavy-handed law enforcement that constitute specific forms of physical or structural violence. For instance, according to Gor[23] there has been recruitment of child soldiers in DRC, those recruited by president Kabila in Kinshasa are currently referred to as the "*Kidogos*" meaning small or boy soldiers. Many of them have grown very early to become adults who are fearless of death. Other children are orphaned and/or separated from family members and are received into both government and rebel armies as child soldiers. Morrison[24] posits that there were also forced migrations in the DRC during the wars.

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[21]See Mungabalemwe, K and Clark F.J The Economic Impact of the Congo War in John .F Clark, (ed) *The African Stakes in the Congo War* (Kampala: Fountain Publishers, 1997), p 226-

[22]See Philippe Lebillon, *Fuelling War; Natural Resources and Armed Conflicts* (Oxford: Oxford University Press: 2001), p 25.

[23]See S. Gor, "Child Development Concerns and Armed Ethnic Conflicts in the Eastern and Central Africa Regions," in Ogot B. A and Okoth G. P (eds) *Conflict in Contemporary Africa* (Nairobi: Jomo Kenyatta Foundation, 2002), pp 197-207.

[24]See J. Morrison, The Politics of Refugee and Internally Displaced Persons in the Congo War in John F Clark (ed.) *The African Stakes in the Congo War* (Kampala. Fountain Publishers, 1997).

The DRC is one of the world's worst war zones and a survey of literature on the Democratic Republic of Congo shows that there is much that has been written on the conflict. However, most of it has concentrated on the underlying causes, external actors, the peace initiatives and disarmament efforts, although it is clear the war has been fought with grave violations of international humanitarian law especially the concept of civilian immunity.

Literature on International Humanitarian Law

The use of force is prohibited in international law. The contemporary prohibition of use of force is found in the Kellog Briand pact and in article 2(4) of the UN charter; hence wars of aggression have been criminalized though every state has a fundamental right to survival and hence the right to self-defense. Dinstein [25] observes that international law recognizes two disparate types of wars. There are interstate wars waged between two or more states and intrastate wars (conducted between or more parties within a single state). Traditionally, the later have been regulated by international law only to a limited extent. Recently, in view of the frequent incidence and ferocity of internal armed conflicts, the volume of international legal norms opposed to them has been constantly expanding.

Green [26] asserts that the experiences of the Second World War, together with evidence of what has happened in the various armed conflicts that have taken place since 1945 in Korea, Vietnam, Africa and elsewhere suggest that in times of conflict, whether international or non international, human rights are among the earliest casualties. Delupis [27] notes that there are large numbers of internal wars many of them affecting the third

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[25]See Yoram Dinstein, *Aggression and Self Defence* (Cambridge: Cambridge University Press, 2001).
[26]See Green C. Leslie, *Essays on the Modern Law of War* (New York: Trans national Publishers, 1985).
[27]See Ingrid Detter Delupis, *The Law of War* (Cambridge: Cambridge University Press, 1987).

world and the most serious violations of laws of war are often committed in internal not international wars. At least some rules of the law of war enter into effect automatically once there is a civil war or indeed any other form of internal conflict of the relevant type and scale.

Kalshoven[28] argues that war is subject to legal restraints. He notes that a body of law has gradually developed in particular since the 19th century which may be regarded as the humanitarian law of armed conflicts. He questions the value attributable to this body of law in an era like the present, when both technological and ideological factors appear in many ways to be conducive to total war. In this respect it is evident that the civilian population is nowadays often far more directly affected by war than it was in certain other periods of history. Therefore it would be futile to provide the civilian population with total immunity from the effects of war.

Macalister Smith [29] posits that the regulation of armed conflict law involves a balance between military necessity and humanitarian considerations. This he observes has been seen as the dilemma of the laws of war: how an inhuman activity may be regulated by humanitarian principles. Taubenfeld [30] notes that armed conflicts not of an international character is formally covered; not only by the express provision of Conventions but also by the principles of humane treatment and the prohibition of discrimination, which are to be applied to persons not taking part in the hostilities,

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[28]Frits Kalshoven, *Constraints on the Waging of War*, (Geneva: International Committee of the Red Cross, 1987).

[29]See Peter Macalister Smith, *International Humanitarian Assistance in Disaster Relief Actions in International Organizations* (Martinus Nijhoff Publishers, 1985).

[30]See H. J. Taubenfeld. "The Applicability of the Laws of War in Civil War," in John N. Moore (ed.) *Law and Civil War in the Modern World;* (John Hopkins University Press, 1974), pp 499-517.

including fighting forces who have a laid down their arms and those who are sick, wounded or under detention.

There is no denying, however, that a major defect in the humanitarian law of armed conflicts lies with the weakness of the monitoring system devised for its implementation. Cassese for example[31] notes that this tremendous normative development was not matched by the implementation of relevant rules. Both in time of peace and in the course of the wars which have been waged since 1945, atrocious acts against humanity have been committed in particular acts of genocide. He argues that the world community has remained silent or where time and again public opinion has uttered its indignation and dismay, governments have preferred to hold aloof and not take advantage of their right to demand the discontinuation of the crime and the punishment of the wrong doers, except in very few instances. So long as there is no collective sense of solidarity and no joint interest and respect of fundamental standards of behavior or human dignity, the prospects for a satisfactory implementation of the whole body of law concerning crimes against humanity remain poor indeed.

Sassoli and Bouvier *et al*[32] point out that increasingly civilians have become the overwhelming majority of the victims of armed conflict despite IHL which stipulates that attacks should only be directed at combatants and military objectives and civilians should be respected. However, even if IHL was perfectly respected, civilians could become victims of armed conflicts as attacks and military operations directed at military objectives are not prohibited because they may also affect civilians. Civilians in war on

[31]See Antonia Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1986).
[32]See Marco Sassoli and Antoine Bouvier, etal, *How Does Law Protect in War? Cases Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law* (Geneva: International Committee of the Red Cross, 1999).

one hand need respect by those in whose hands they are who could arrest them, ill treat them, harass them, confiscate their property or not provide them with food or medical assistance necessary for their survival.

Howard [33] is of the opinion that since 1945, the phrase "no peace without justice" has entered the language of the international community. The essential meaning of this phrase goes to the ethical core of the laws of war. Unless persons are punished for committing war crimes, crimes against humanity and/or genocide, the cycle of revenge and hatred will continue, only when those who have suffered the outrages of war crimes have seen the oppressions brought to justice will there be an opportunity for peace.

According to Kellenberger[34] the biggest challenge of all, is improving compliance with the rules of IHL in non-international armed conflict especially by non state armed groups, because the vast majority of contemporary armed conflicts are waged within the boundaries of states and the respect for IHL is particularly poor in these contexts. He points out that it is particularly urgent and important to work on mechanisms and tools that can lead to better respect for IHL in non-international armed conflicts. This includes some serious thinking on how armed groups might be provided with incentives to comply with humanitarian law.

Askin[35] highlights the provisions concerning wartime protection of women which she argues have been ambiguous. In addition, in situations where there have been concrete prohibitions against sexually assaulting women, those charged with enforcement

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[33]See Ball Howard, *War Crimes and Justice: A Reference Handbook* (California: AB-CLIO Inc., 2002).
[34]See Jacob Kellenberger, The Relevance of International Humanitarian Law in Contemporary Armed Conflict Speech Presented to a Committee of Legal Advisors on Public International Law, 13-14 Sep 2004 in Lausanne.
[35]See Kelly Dawn Askin, *War Crimes against Women: Prosecution in International War Tribunals* (Hague: Kluwer Law International, 1997).

have turned a blind eye to the crimes, even when committed against their own citizens, allies or soldiers. Historically, she asserts, preventing, punishing or even acknowledging these crimes against women have been regarded as neither imperative nor important by the military and international community. As a result of this collective guilt, the appalling atrocities committed against females have dramatically escalated in wartime over the years.

Andrepoulous and Paul[36] synthesize the difficulties inherent in protecting civilians in internal conflicts observing that, it is one of the many darker ironies of the twentieth century history that, just as the codification of laws respecting non combatants achieve further refinements a whole surge of revolutionary struggles, civil wars and insurgents made discriminatory warfare more difficult than ever to implement.

Walter[37]analyses the maxim *inter arma silent leges* (in times of war law is silent). War is a world a part where life is at stake, where human nature is reduced to its elemental forms, where self interests prevail, here men and women do what they must to save themselves and their communities and morality and law have no place. Consequently, he defends humanitarian intervention when crimes are being committed to shock the moral conscience of mankind.

Adrian[38]observes that the Rome Statute contains for the first time a detailed list of the various manifestations of crimes against humanity and war crimes in internal and international conflicts. One of the most important qualities of the statute is that it

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[36]See G. J. Andrepoulous and K. Paul, "The Laws of War; Some Concluding Reflections," in H. Michael et al (Ed.) 1994. *The Laws of War Constraints on Warfare in Western World*, Yale University Press, New Haven, pp 214-225.

[37]See Michael Waltzer, *Just and Unjust War: A Moral Argument with Historical Justification* 3rd Ed (New York: Basic Books, 1977).

[38]See Bos Adrian, "The International Criminal Court: a Perspective," in Roy S. Lee, *The International Criminal Court, The Making of the Rome Statue Issues, Negotiations, Result*, (Hague: Kluwer Law International, 1999).

enshrines and elaborates the principle of individual criminal responsibility and lays down principles of criminal law and procedural regulations. Its establishment springs from a universal human desire for justice, and at the same time builds with developments in international law including the creation of international criminal tribunals.

There are however, quite a few possibilities which lie between the two unacceptable extremes of total impunity against the civilian population on the one hand and its absolute immunity on the other. To find and to realize those possibilities, to a feasible extent, precisely at a time like the present when the fate of the civilian population is all too easily jeopardized is a major goal of those who occupy the cause of humanitarian law. The protection of civilians is but one example of out of many; in other words the need is as great as ever to save the world from the absurd savagery of total war. In the conflict in DRC, a United Nations investigation commission to DRC reported blatant breaches of IHL and human rights, which were done systematically, and a product of advanced preparation.

The literature review has revealed that there have been normative developments in IHL; more prominently is the quest for justice in post-conflict situations. This is in tandem with the natural law theory which guides the study. The study holds that the development of international jurisdiction for war crimes is a significant development that ought to be enhanced so that those responsible for IHL violations are held responsible. Ina addition, given the debates highlighted in the literature review, the study holds that non- combatants require special protection not just during the war, but also after the war. Hence, it is not just the duty of commanders and their troops to ensure compliance with the rules in the field, but also the responsibility of the international community to craft

better laws and enforce the appropriately. Furthermore, the study fills lacunae in the analysis of an internal conflict with international dimensions, that is, an internationalized conflict. This kind of analysis has eluded analysts. Most have focused on the application of IHL in an internal conflict or an international conflict; hence, they have not taken into account the changing character of conflicts and the challenges of applying IHL in these kind conflicts.

Theoretical Framework

This study will be guided by natural law theory. The theory emphasizes the dignity of man and the supremacy of reason.[39] In the search for meaning in life or an ethical basis to law, natural law theory has refurbished the chief claims of Thomas Aquinas which can be summed as: there is a set of universally applicable moral rules with principle allowance for variation in circumstances; secondly, people and societies will thrive only if these rules prevail; and thirdly human beings by and large are inclined to heed these rules. Therefore, according to this theory there are moral values more basic than (ordinary) positive laws, which these must express or satisfy. In addition, Aquinas taught that the law of nature was that part of the law of God, which was discoverable by human reason, in contrast with the part that is directly revealed. Hence, when applied to the theory of the relations of states they must be controlled by a higher law (divine law).[40] It is clear that natural law theory was connected with religion in the beginning, but was secularized by Hugo Grotius,[41] who argued that natural law is based on the right reason and gave rise to the law of nations, and would have a degree of validity even if it was conceded that

[39]See Malcolm N. Shaw, *International Law* 5th Ed (Cambridge: Cambridge University Press, 2003), p 52.
[40]See Brierly, J.L *The Law of Nations: an Introduction to the International Law of Peace* (London: Oxford University Press, 1963), p.18.
[41]See S.K. Kapoor, International *Law and Human Rights* (AllahBad: Central Law Agency, 2004), p 50.

there is no God or that the affairs of men are of no concern to him[42].Thus, natural law denotes an ideal law founded on the nature of man as a reasonable being, the body of rules which nature dictates to human reason.

Burchill[43]observes that this theory is behind the idea of universal human rights, whereby human beings are said to be endowed – purely by reason of that humanity – with certain fundamental rights, benefits and protections. These rights are regarded as inherent in the sense that they are the birth right of all and inalienable because they cannot be given up or taken away and are universal since they apply to all regardless of nationality, status, gender or race. Shaw[44] argues that many ideas and principles of international law today are rooted in the notion of natural law, and the relevance of ethical standards to the legal order such as the principles of non-aggression and human rights as its revival came at a time of increasing concern with international justice and the formation of international institutions.

The theory is relevant to this study because humanitarian law is a branch of law which invokes ethics and idealism, and constitutes that considerable portion of international law which owes its inspiration to a feeling for humanity and which is centred on the protection of the individual (which) appears to combine two ideas of a different character, the one legal and the other moral.[45]Both human rights and humanitarian law raise the level of behavior towards individuals and both are concerned with the rights and protection of individuals. Furthermore, according to natural law a

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[42]See Sydney Bailey, *Prohibitions and Restraints in War* (London: Oxford University Press, 1972), p.26.

[43]See Scott Burchill, et al *Theories of International Relations* 2nd Ed (New York: Palgrave Publishers, 2001), p 41.

[44]Malcolm N. Shaw, *International Law* 5th op. cit p 53.

[45]See Ingrid Detter Delupis, *The Law of War* (Cambridge: Cambridge University Press, 1987), p 130.

man is responsible only for his own behavior, [46] hence, entrenching the concept of individual criminal responsibility and justice.

Hypotheses

The study is on the analysis of IHL in protecting civilians a case study of DRC. It investigates the following hypotheses.

(i) IHL is effective in protecting civilians in internal conflicts

(ii) IHL is not effective in protecting civilians in internal conflicts.

(iii)There is no relationship between the plight of civilians and IHL in internal conflicts

Methodology

This research will employ both primary and secondary data collection methods. The primary sources will mainly entail interviews and face to face discussions with persons acquainted with the research problem. The target sample will be selectively chosen. Interviews will be conducted with officials at the DRC embassy in Nairobi and humanitarian organizations such as International Committee of the Red Cross (ICRC) and the International Crisis Group. The information gathered from the primary sources will then be subjected to analysis.

For the purpose of secondary data collection, the research intends to conduct desk research and various sources will be consulted. This will be sourced from published books, theses, research papers seminar and academic, journals (print and electronic), magazines, newspapers and the internet. This form of data will be cited to demonstrate other people's contributions and confirming any change in trends in IHL. The secondary data will be qualitatively analyzed and put in academic perspective in tandem with the proposed research topic. The limitation of these data will be the bias that the writers have,

[46]Macdonald and Johnston (eds) op. cit p 24.

this is because they have written their papers to suit their own intentions, and on the other hand limitation will arise when there arises a need to probe or inquire more about the postulations already published. The combination of primary and secondary forms of data will therefore form a compact basis for critical analyses, academic arguments and policy formulation and hence achieve the objectives of the research.

Limitations of the study

While the researcher made all possible efforts to ensure that the study is thorough, there were financial difficulties and the fact that the DRC was still volatile, hence the researcher could not travel and conduct field interviews in DRC, which would have obviously enhanced the study, however the study was done in spite of this handicap.

Chapter Outline

Chapter One: contains a statement of the research problem, and of how the study will be conducted. Chapter two explores the provisions relating to protecting civilians in internal conflicts. Chapter three will examine IHL violations in DRC. Chapter four will contain a critical analysis of the role of IHL in protecting civilians in internal conflicts and chapter five will contain the conclusion of the study.

Chapter 2

The protection of civilians in internal conflicts

Introduction

The previous chapter was an introduction to the study and laid its background. This chapter explores the provisions relating to protecting civilians in internal conflicts. The chapter traces the development of the concept of non-combatant immunity, the status of civilians in post World War II, and the developments after the creation of international criminal tribunals and ICC.

Historical development of the concept of non-combatant immunity

Since time immemorial attempts have been made to control the horrors of war and to maintain that even in such situations man must comply with certain overriding principles whether they are described as the law of God, chivalry or of humanity. Further, even in classical times there was some measure of recognition that when conflicts occurred there were still some people who might be considered as outside the scope of the military activity and entitled to protection.[1]

Although the international law of armed conflicts is relatively recent in origin in its present shape, it has a long history behind it. Even in the distant past, military leaders sometimes ordered their troops to spare the lives of the captured enemies, to treat them well, spare the enemy civilian population; and often on the termination of hostilities, belligerent parties agreed to exchange the prisoners in their hand.[2] In feudal times when the modern state system was beginning to develop and armed conflict was becoming a type of contest played according to rules, which remained uncodified but were generally

[1] See See Leslie C. Green, *Essays on the Modern Law of War* (New York:Trans National Publishers 1985), p 83.

[2] Frits Kalshoven. *Constraints on the Waging of War* (Geneva, ICRC:1987), p 7

accepted by knights as rules of chivalrous conduct to be observed among themselves. In fact in both England and France there were courts of chivalry to ensure that the rules were observed, and commanders were known to try offenders against these rules, regardless of the nationality of the offenders or of his victim. There was in other words, something similar to a rule of law prevailing among the orders of knighthoods.[3]

For example, in 1474, at Breisch, the allied cities established a tribunal to try Peter of Hagen Bach for offences against the law of God and of man, in that while administering occupied territories he had indulged in looting, pillage, raping, murder, attacks on civilians and against neutral merchants. His plea that he had been complying with the orders of his prince was rejected on the ground that he must have known of the inhuman character of those orders and of his acts and he was executed.[4] Over the course of the next two centuries princes began to lay down rules governing the conduct of their forces and imposing of duties of humanity with regard to the treatment of civilians. These obligations related to the basic need to sustain life in an agricultural society, a provision which did not became generally accepted until the twentieth century.[5] However, there were no clear rules regarding the safety of women, children and other non-combatants, especially if a city had only been taken after a siege, the clergy tended to be respected while many commanders issued orders to their troops to spare the lives of women, the young and the old.

The notion of non-combatant immunity therefore seems to have its source not in religious or moral sensitivity but in a code of chivalry from the middle ages. Knights

[3]Leslie C. Green, *Essays on the Modern Law of War* op .cit p 84
[4]Ibid
[5]Ibid

were professional soldiers; "there was no glory in armed combat with a non knight."[6] Besides, "noncombatant serfs, peasants, artisans, and merchants were the source of wealth of members of the knightly class." It was cowardly to attack an enemy through his non-combatant subjects rather than directly, and knights had a vested interest in protecting and supporting the non-combatants who were the source of their own wealth.[7] Knightly protection of noncombatants derived from two considerations: the desire to gain honor in combat and the need to protect the economic base of the knight or his feudal lord.

Consequently, it could be argued that before the time of Grotius, civilians enjoyed little or no protection and women and children were in no way immune from attack. Although, there were isolated regulations such as that of Henry V of England in 1515 or of the Holy Roman Empire in 1442 and 1570 whereby women, children, priests, monks and nuns were immune from attack. Grotius' contribution to this debate is highlighted by this statement, "it is the bidding of mercy, if not of justice, that, except for reasons that are weighty and will affect the safety of many, no action should be attempted whereby innocent persons may be threatened with destruction."[8]

Delupis[9] observes that civilians who had received some documented protection under the Hague Conventions of 1899 and 1907 benefited from a general clause on prohibition of attacks on undefended locations. By the time of the outbreak of the Second World War, the Geneva Conventions had protected three important categories of non-combatants: wounded soldiers, prisoners of war and shipwrecked sailors. Hence, there

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[6] Ibid
[7] James Turner Johnson, *Can Modern War Be Just?* (New Haven: Yale University Press, 1984), p. 5.
[8] Grotius, *De Jure Belli ac Pacis: Libri Tres*, Trans. Francis W. Kelsey, The Classics of International Law (Oxford: Clarendon Press, 1925), 3.11.8.
[9] Ingrid Detter Delupis. .*The Law of War* (Cambridge: Cambridge University Press, 1987).

was a glaring absence of protection of civilians, but when the ICRC proposed to draft a new Convention covering civilians in 1938 it was vetoed by governments on the grounds that it would limit their military options. The Germans in particular took full advantage of this loophole in the war that followed.[10]

The status of civilians in post World War II

The painful experiences of World War II led to a complete renegotiation of the existing law. In 1949 four Conventions were concluded. The first on wounded and sick on land, the second on wounded sick and shipwrecked at sea, the third on prisoners of war and the fourth on the protection of the civilian population. Therefore it can be argued that civilian protection took a much more comprehensive stature in the post World War II period due to the cruelties of the war which prompted governments to draft a new Convention extending protection to civilians in war zones.

The increased protection of civilians was also attributable to rapid developments in the human rights field after the war. For example, the Universal Declaration of Human Rights insistence on the fundamental rights that persons have against violence, specifically: not to be murdered, tortured, subjected to corporal punishment, or mutilated, and against outrages to their personal dignity.[11] There were also other legislations such as the Convention on the Prevention and Punishment of the Crime of Genocide (1948), which essentially protects certain groups from extermination, the Refugee Convention (1951), which protects victims of war who have crossed international borders and the two International Covenants on (Civil and Political and Economic and Social Rights), These

[10]See Iain Guest and Françoise Bouchet Faulnier, "International Law and Reality; The Protection Gap," in Medicines Sans Frontiers (ed) *World in Crisis; The Politics of Survival in the 20th Century* (London and New York: Routledge, 1997), pp 79-100:85.
[11]See Declaration of Human Rights, especially articles 1, 3, 5, 6, and 12

expand the protection of civilians in conflict beyond the provisions of IHL, by promoting and protecting fundamental human rights.[12]

The attempt to establish the rule of non-combatant immunity in international law, while it aims at amelioration of the suffering of war, is based fundamentally on the application of these rights of humanity, more particularly the right to life and not to be tortured. In general, the law of war in relation to non-combatants holds that civilians are men and women with rights and that they cannot be used for some military purpose, even if it is a legitimate purpose, for example, if the war is justified according to the UN Charter.

The fourth Geneva Convention on the protection of the civilian population in conflict describes the actions that the parties to a conflict must take to protect civilian populations from the worst excesses of war, and spells out in detail those guarantees to which civilian population are entitled to in times of war. Building on the concept developed in the previous three Conventions that certain activities and people, especially civilians can be seen as *hors de combat* which means out of action, out of the fight or disabled.[13] In addition, the Convention defines in great detail the many ways in which civilians must be dealt with to shield them from the direct and indirect effects of conflict between combatant forces.

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[12]See Oscar Schater, "The United Nations and Internal Conflicts," in John Norton Moore (ed) *Law and Civil War in the Modern World* (Baltimore and London: John Hopkins University Press, 1974), pp 401-445.

[13]See See Hutchinson Encyclopeadia.(Helicon Publishers 2006); according to Wikipedia Hors *de combat*, literally meaning "out of the fight," is a term used in diplomacy and international law to refer to soldiers who are incapable of performing their military function. Examples include a downed fighter jet pilot, as well as the sick, wounded, detained, or otherwise disabled. Soldiers *hors de combat* are normally granted special protections according to the laws of war, sometimes including prisoner of war status.

However, the fourth Geneva Convention on the protection of the civilian population applies mainly to international armed conflicts except with regard to article 3 which applies to armed conflicts not of an international character occurring in the territory of one of the parties, it protects persons taking no active part in the hostilities, including members of the armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other course. It prescribes humane treatment and prohibits certain acts against them, such as violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, taking of hostages, outrages on personal dignity, in particular humiliating and degrading treatment.[14]

In a further relevant move in 1968,[15] the UN General Assembly (UNGA) unanimously adopted a resolution concerning respect for human rights in periods of armed conflict, which recognizes the necessity of applying fundamental humanitarian principles in all armed conflicts. It reaffirms the rule that the right of the parties in a conflict to adopt means of injuring the enemy is not unlimited, and states that it is prohibited to launch attacks on the civilian population. Moreover, it also adopted basic principles for the protection of civilian populations in armed conflicts in 1970. Besides, in 1975, UNGA called on all parties in conflict to comply with their obligations under IHL instruments and to observe IHL rules.[16]

The need for civilian protection in internal conflicts

[14]See Common Article Three to the Geneva conventions
[15]See Resolution 2444 of 19th December 1968 and Resolution XXIII of 12th May 1968 and Resolution 2675 of 1970.
[16] See Resolution XXX (15 Dec 1975) concerning respect for human rights in armed conflict.

The 1949 Conventions apply in wars between states and they do not apply primarily in wars within states, be they ethnic, civil or wars of national liberation.[17] As a result between 1974 and 1977 there was a plenipotentiary conference that drafted two additional protocols, the second additional protocol expanded the coverage of the Conventions to internal armed conflicts and also expanded the protection measures afforded to non-combatants.

In general, civilians need protection. From a humanitarian point of view, the most important task of any legislative effort on warfare as such, is the protection of civilians. This is because firstly, such persons include the weakest members of the community most in need of protection such as women, children and the aged. Secondly, they need specific protection because civilians must normally be assumed to have wished to abstain from any involvement in the conflict; thirdly, it is important to consider that the civilian population normally represents a much larger number of people than the combatants. Moreover, without protection civilians become the main casualties of war. In deed, in the 54 years since 1945 civilians have constituted the overwhelming majority of war casualties.[18]

What has evolved now with the waning of the Cold War is a pattern of deliberate war against civilians waged by untrained forces with an unclear chain of command and wielding light arms. The civilian population have come to acquire a strategic importance including, as a cover for the operation of rebel movements, as a target of reprisals, as a shield against air or artillery attack, as a lever for executing pressure on the adverse party

[17]Iain Guest and Françoise Bouchet Faulnier , "International Law and Reality; The Protection Gap", op. cit p 85

[18]See Sivard Ruth Leger, *World Military and Social Expenditures* 1996 (Washington: D C World Priorities, 1996).

by terrorizing and displacing populations or even as a principle target of ethnic cleansing operations and genocides.[19]

This has been exacerbated by new types of armed conflicts – internal conflicts in which guerrilla tactics are the main feature. The philosophy of war itself has evolved as there is less and less direct confrontation between combatants, as armies seek for zero casualties.[20] The fundamental crisis facing civilians arises from the attitudes of combatants, who display contempt for the rules of war.[21] In internal conflicts civilians are caught between insurgents and state forces, and between different armed groups and sometimes occupying forces waging proxy wars as the case has been in the Democratic Republic of Congo. The result is civilian displacement, suffering, injury and death. It is within this context that we shall examine the status of civilians in internal conflicts,

The Events that precipitated the Diplomatic Conference to discuss additional protocols.

A new era in the attempts to update the law of armed conflicts was initiated by resolution XXVIII of the Red Cross conference held in Vienna, 1965, concerning the protection of civilian population against the dangers of indiscriminate warfare.[22] The movement gained further momentum due to the problem of human rights in occupied territories posed by the Middle East conflict.

In May 1967, the International Conference on Human Rights held in Teheran adopted Resolution XXIII on human rights in armed conflict which asked General Assembly of

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[19]See Claude Bruderlein, New Challenges for Humanitarian Protection, *British Medical Journal*, Vol. 7207, 14 August 1999, pp. 430-435 319.
[20]Schenkenberg van Mierop, "Protection of Civilians in Conflict," ," in Medicines Sans Frontiers (ed) *World in Crisis; The Politics of Survival in the 20th Century* op. cit pp 1-15.
[21] Ibid
[22]Michael Bothe et al *New Rules for Victims of Armed Conflict*, p 2.

the UN to instruct the Secretary–General to study this question. – Since then the General Assembly passed a number of resolutions on this matter, thus paving the way for a successful negotiation of new international instruments dealing with humanitarian law.[23] On the basis of a resolution of the XXI Red Cross Conference held in Istanbul 1969 the ICRC convened two conferences of the Red Cross experts and two conferences of government experts to which it submitted its proposals and ideas. The main issues submitted to the conference of government experts were: methods and means of warfare, new methods of warfare especially guerilla warfare, protection of the civilian population against the dangers of hostilities, better protection for the wounded and sick and for medical personnel units and transport, better protection of the victims of non-international armed conflicts and better means of securing the actual observance of humanitarian law. On the basis of the deliberations of the experts conferences, the ICRC submitted in 1973 the text of two draft protocols additional to the Geneva Conventions. Protocol 1 related to international armed conflict and protocol II to non-international armed conflicts.

The status of civilians and the 1977 Additional Protocols

A mere glance at newspapers or a world map reveals that conflicts between states are today the exception rather than the rule. The majority of armed conflicts are waged within the territory of a state: they are conflicts of a non-international character. A common feature of many such internal armed conflicts is the intervention of armed forces of another state supporting the government or the insurgents, as is the case in the DRC conflict, the existence of external actors, poses numerous challenges for civilian protection, because these external actors internationalize the conflict.

[23] Ibid

Additional Protocol II to the Geneva Conventions of 12 August 1949 adopted on 8th June 1977 is a comparatively short text consisting of 28 articles. It extends humanitarian protection in civil wars by elaborating the concise rules of common article 3. However, article 3 remains applicable in its entirety to the parties to the Geneva Conventions, and in particular it is binding on states that have not ratified protocol II.

For the first time in the history of the law relating to internal conflicts protocol II codified the prohibition of attacks on the civilian population and of the use of force against individual civilians.[24] Today, this protocol has been ratified by the majority of states. This should not be taken for granted since its origins were beset with obstacles. During the diplomatic conference held between 1974 and 1977, the carefully negotiated committee draft was opposed in the last plenary sessions as unacceptable and was changed within a few days into a much shorter and weaker text. The conference then adopted that text by consensus.[25]

The main concern by states was the desire to preserve their sovereignty, which obviously triumphed over humanitarian concerns. However, the text adopted has an important advantage in that it withstood fierce political turmoil unscathed, and after heated debate finally won acceptance even from states that had rejected it. Consequently, what Protocol II lost in normative content - due to the reductions of the committee draft - gained in acceptance especially for third world states with their potential for crisis.

Although protocol II is very short in its final truncated form, it contains some important provisions, which represent innovation in the rules of warfare. By virtue of article 1 it applies to all territory of state party to the protocol, between its armed forces

[24]See Hans Peter Gasser *International Humanitarian Law; An introduction* (International Committee of the Red Cross: Geneva, 1993), p 68.
[25] Ibid

and dissident armed forces. The latter have to be under responsible command and exercise such control over a part of its territory to enable them to carry out sustained and concerted military operations and actually implement protocol II. It does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence and other acts of a similar nature, not being armed conflicts.[26]

One of its main innovations is the prohibition of attacks on civilians. Although common article 3 had secured a certain level of treatment of non-combatants, it had not clearly precluded military operations directly against civilians or against civilian targets.[27] Protocol II of 1977 includes such clear prohibition of attacks on non-military targets. The protocol lists a series of fundamental guarantees and other provisions calling for the protection of non-combatants. In particular, the prohibition on violence to the life, health and physical and mental well being of persons, including torture, collective punishment, hostage taking, acts of terrorism, outrages on personal dignity including rape and enforced prostitutions and pillage.[28]

Further provisions cover the protection of children,[29] the protection of civilians including the prohibition of attacks on works or installations containing dangerous forces that might cause severe losses among civilians.[30] The treatment of civilians including their displacement,[31] and the treatment of prisoners and detainees and the wounded and

[26]Malcolm. N. Shaw *International Law* 5th (Cambridge: Cambridge University Press, 2003), p 1073.
[27]The International Court of Justice in the *Nicaragua Case* stated that the rules contained in common article 3 reflected 'elementary considerations of humanity', ICJ Reports, 1986 pp.14, 114; 76ILR, p 349.
[28]See article 4
[29]See article 6
[30]See article 15
[31]See article 17

sick,[32] and the protection of objects indispensable to the survival of the civilian population, for example, starvation as a means of warfare is prohibited.[33]

The status of civilians in post Protocol II era

As far as non-international conflicts are concerned ICRC established general rules, one of them being the distinction between combatants and civilians, and the prohibition of attacks on civilians, hence establishing that all feasible precautions have to be taken to avoid injury, loss or damage to the civilian population.[34]

The post protocol II era has focused on promoting efforts nationally and internationally for enforcing these rules, the primary development has been that breaches of international law in the field of IHL may constitute war crimes for which universal jurisdiction is provided.[35] IHL is seen as essential in determining the illegal character of violence perpetuated against civilians in war. The key focus of these efforts has been to strengthen international judicial institutions. The basic argument has been that the culture of impunity that shelters individuals responsible for violent assaults against civilians is one of the biggest obstacles to civilians in most conflicts. The unwillingness and inability of states to bring these people to justice undermines that effectiveness of the entire legal framework.[36]

The UN Security Council has identified an international remedy for such situations in the in the creation of two *ad hoc* tribunals for the former Yugoslavia and for

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[32]See article 10
[33]See article 14

[34]See International Review of the Red Cross, (Geneva: International Red Cross, Sept.-Oct 1989), p 404. See also Leslie C. Green, *The Contemporary Law of Armed Conflict* 2nd Ed (Manchester: Manchester University Press 2000, pp 355 6.
[35] See Gerald Draper, "*Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols*,"164 Hague Academy of International Law Recuil des cours 1, 1979, p 35.
[36] See Hans Peter Gasser *International Humanitarian Law; An introduction* (International Committee of the Red Cross: Geneva, 1993), p 5.

Rwanda and the establishment of an International Criminal Court which had been under consideration for long.[37] Goldstone[38] points out that the only effective way to thwart criminal conduct and violence is through good policing and the implementation of justice. If would be criminals believe that there is a healthy prospect of their being apprehended and punished for their criminal activities, they will think twice before embracing such criminal conduct. This principle of deterrence is fundamental for domestic systems of law and order and it is no different in the international context. Thus, if political and military leaders believe that they will likely be brought to account by the international community for committing war crimes, that belief in many cases will have a deterrent effect.

Consequently, the concept of individual criminal responsibility has been confirmed with regard to grave breaches of the Geneva Conventions and additional Protocol I and II. Any individual, regardless of rank or governmental status, would be personally liable, for any war crimes or grave breaches committed. The principle of command (or superior) responsibility means that any person in a position of authority ordering the commissioning of a war crime or grave breach would be as accountable as the subordinate committing it . This would also cover the situation where a commander fails to exercise sufficient control over forces that commit such offences.[39] In this case

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[37]See Benjamin B. Ferencz, 'An International Criminal Code and Court; Where They Stand and Where They Are Going,' *Columbia Journal of Transitional Law Vol.* 30 No 2, 1992, pp 375- 399: 375.

[38]See Richard J. Goldstone, "Bringing War Criminals to Justice During an Ongoing War," in *Moral Dilemmas in Humanitarian Intervention* pp 19-210: 201.

[39] See Kriangsak Kittichaisare, *International Criminal Law*, (Oxford: Oxford University Press, 2001), 251.See also Cherif M. Bassiouni, *Crimes against Humanity in international Criminal Law*, (Dordrecht: Martinus Nijhoff Publishers, 1992) chapter 5. See also Ilias Banteks, '*The Contemporary Law of Superior Responsibility*,_'*American Journal of International Law*, Vol 93, No.3 July 1999, pp 573-595.
See also article 87 of Additional Protocol I 1977; article 7(3) of the Statute of the International Criminal Tribunal for the Former Yugoslavia., 1993: article 6(3) of the Statute of the Criminal Tribunal for Rwanda,

military necessity may not be pleaded as a defense, and the claim of superior orders will not provide a defense, although it may be taken in mitigation depending on the circumstances.[40] The International Law Commission notes that the fact that an individual may be responsible for the crimes in question is deemed not to affect the issue of state responsibility.[41] Hence, for example, the Security Council, reaffirmed Iraq's liability under the fourth Geneva Conventions, of 1949 dealing with civilians in occupied areas.[42]

It could be argued that the enforcement of humanitarian law through these *ad hoc* tribunals and the ICC is likely to increase the protection of civilians. This is because military leaders are likely to tread more carefully as far as civilians are concerned. Secondly, the judicial proceedings may help in exposing the institution and practices most responsible for violations. For example, investigations into human rights abuses may reveal systematic and institutional patterns of gross human rights violations; this may in turn refute popular misconceptions about the nature and causes of such massive violation: that they are an arbitrary and sporadic occurrence of blood lust or the like - this makes it easy to dismantle such institutions in the future.

An overview of article 4 of the statute of the ICTR

Article 4 of the statute of the ICTR is the first binding international provision that criminalizes violations of IHL committed in an internal armed conflict. It authorizes the

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1994 and article 28 of the Statute of the International Criminal Court, 1998. Note the *Celebeci Case*, 1998, ICTY, paras, 370 ff.

[40]See Leslie C. Green, *Superior Orders in National and International Law*, (Leiden: A. W Sijthoff, 1976). See also Yoram Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* (Leiden, A. W. Sijthoff, 1965). See also article 8 of the Nuremberg Charter, 39 *American Journal of International Law*, 1945, Supp., p 259, *YearBook* of the International Law Commission, 1950 Vol II, p. 195; article 7(4) of the Statute of the International Criminal Tribunal for The Former Yugoslavia., 1993: article 6(4) of the Statute of the Criminal Tribunal for Rwanda, 1994 and article 33 of the Statute of the International Criminal Court, 1998.

[41]See Draft Code of Crimes against the Peace and Security of Mankind A/46/10 and 30 International Law Commission, 1991, p. 1584. Article 4.

[42]See Security Council Resolution 674 (1990) concerning Iraq's occupation of Kuwait.

tribunal to prosecute persons who committed serious violations of common article 3 and additional protocol 11 in the Rwanda internal armed conflict that took place between January 1st and 31st December of 1994. Article 4 of the statute reads,

> "The international tribunal for Rwanda shall have the power to prosecute persons committing or ordering to be committed serious violations of article 3 common to the Geneva Conventions of 12 August 1949 for the protection of war victims, and additional protocol II thereto of 1977."

The violations, shall include but not be limited to: violence to life, health and physical or mental well-being of persons, in particular murder and cruel treatment such as torture, mutilation or any form of corporal punishment, collective punishments, taking of hostages, acts of terrorism outrages on personal dignity, in particularly humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault. The violations also include pillage the passing of sentences and the carrying out of execution without previous judgment pronounces by a regulatory constituted court affording all the judicial guarantees which are recognized as indispensable by civilized people and threats to commit any of the foregoing acts.

Contributions of ICTR to civilian protection in internal conflicts

The ICTR is the first international criminal tribunal with the mandate to adjudicate violations of humanitarian law committed in a non-international armed conflict.[43] It is therefore innovative in that by covering the massacres in Rwanda, it is explicitly covering an internal conflict. Consequently, its jurisprudence has contributed to the concept of non-combatant immunity. Firstly, it defined a civilian population broadly as comprising all persons who are civilians "people who are not taking any active part in the hostilities, including members of armed forces who lay down their arms and those placed *hors de*

[43]See Wang Mariann Meir, "The International Tribunal for Rwanda: Opportunities for Clarification, Opportunities for Impact," *Columbia Human Rights Law Review*, Vol 27, Fall 1995, pp177-226.

combat by sickness, wounds, detention or any other cause.[44] Hence a civilian population is made up of persons placed *hors de combat.* If civilians take a direct part in the hostilities, then they lose their right to protection as civilians, hence falling into the class of combatants. This broad definition enables a court to determine on a case to case basis whether a victim has the status of a civilian. It is highlighted in *Prosecutor vs. Rutaganda.*[45] This is an important contribution of the ICTR, since Protocol II does not define what a civilian population is, does not foresee combatant status, and does not define combatants and does not prescribe specific obligations for them. Its provisions do not even use the term 'combatant' this distinction is however necessary so as to allow the proper application of the principle of distinction and the explicit prohibitions to attack the civilian population, individual civilians and certain civilian objects.[46]

In 1996 the ICTR handed down a land mark judgment in the *Prosecutor Vs Jean Paul Akayesu* by delivering the first judgment for genocide and rape by an international court. Moreover it defined rape, and held that it was an act of genocide in the manner it was conducted against Tutsi women, hence setting a precedent in international criminal law.[47] Considering the scope of crimes against humanity, the trial chamber noted that certain inhumane acts must be committed as part of a systematic attack against the civilian population. It acknowledged that the concept of crimes against humanity protects the civilian population from persecution. Hence the idea of article three common to the Geneva Conventions and of additional Protocol II is to protect non-combatants and

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[44]See Kelly Askin, *Legal Precedents in Rwandan Criminal Tribunal The Tribunal* May (Magazine Issue) 2001.
[45]See *Prosecutor vs. Rutaganda*, case No ICTR 96-3,Trial chamber of 6th December 1999.
[46]See art 13 and 14 Protocol II.
[47] Press briefing by the spokesman for the ICTR Kingsley Chiedu Moghalu, the Hague 19 October 2000ICTR / IINFO -9-13-018. http://.53/english/pressbrief/200/brief/91000.htm retrieved on 18 September 2006. Akayesu ICTR 96 14 was sentenced to 15 years for rape and it was upheld on appeal. See *prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998.

persons *hors de combat.* The trial chamber focused on customary international law as the source of this obligation rather than treaty law. With regards to *Common Article 3* specifically, the trial chamber held that the "norms of common article *3* had acquired the status of customary law in that most states, by their domestic penal codes, have criminalized acts which if committed during internal armed conflict, would constitute violations of common article *3.* In *Kayishema & Ruzindana*, for example, the trial chamber first noted that common article 3 and Protocol II were indisputably in force in Rwanda at the time, as Rwanda became a party to the Conventions of 1949 on 5 May 1964 and to Protocol II on 19 November 1984. Thereafter since all offences enumerated in article 4 of the statute also constituted offences under the laws of Rwanda, there was no doubt that persons responsible for the breaches of these international instruments during the events in the Rwanda territories in 1994 could be subject to prosecution.[48]These findings were affirmed in *Prosecutor v. Rutaganda.*[49]

The ICTR jurisprudence is consistent with the view of the ICTY trial Chambers,[50]and the ICTY appeals chambers,[51]stipulating that common article 3 - beyond doubt forms part of customary international law. With respect to Protocol II, the Trial Chamber in *Akayesu* stated that although not all of Protocol II could be said to be customary law, the guarantees contained in article 4(2), which re-affirms and supplements common article 3, form part of existing customary international law.[52]All of

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[48]See *The Prosecutor v Clement Kayishema* and *Obed Ruzindana,* Case No.ICTR-95-I-T, Decision of 21 May 1999.

[49]*Prosecutor v. Rutaganda, op.cit*
[50]See *Dusko Tadic,prosecuter vs judgment of 7 May 1997*
[51]The *Tadic* Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction of 2 October 1995.
[52]*Prosecutor v. Jean Paul Akayesu.*

the norms reproduced in article 4 of the statute are also covered by article 4(2) of Protocol II.

War crimes in internal conflicts in the ICC charter

In article 8, the ICC Charter states that in the case of an armed conflict of a non-international character, serious violations of article 3 common to the four Geneva conventions of 12 August 1949. Namely, any of the following acts committed against persons taking no active part in the hostilities including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention or any other cause; violence to life and person. In particular, murder of all kinds, mutilation, cruel treatment and torture, committing outrages upon personal dignity in particular humiliating and degrading treatment taking of hostages, the passing of sentences and the carrying of executions without previous judgment pronounced by a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable.

In addition, article 8(d) states that paragraph 2(c) applies to armed conflicts not of an international character. It thus does no apply to situations of internal disturbances and tensions such as: riots isolated and sporadic acts of violence or the acts of a similar nature, other serious violations of the laws of war and customs applicable in armed conflicts not of an international character, within the established framework of international law namely any of the following acts: intentionally directing attacks against the civilian population or against individual civilians not directly taking part in hostilities, intentionally directing attacks against building, medical units and transport and personnel using the distinctive emblems of the Geneva Conventions in conformity with

international law. Additionally, it bans intentionally directing attacks against personnel installations, medical units or vehicles involved in humanitarian assistance or peacekeeping mission in accordance with the charter of the United Nations as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict. Furthermore, it also outlaws: intentionally directing attacks against buildings dedicated to religion, education, art, science or charitable purposes, historic monuments, hospitals and places where the sick and wounded are collected, provided they are not military objectives, pillaging a town or place even when taken be assault, committing rape, sexual slavery, enforced prostitution, forced pregnancy as defined in article 7 part 2 (f).

Similarly, it proscribes enforced sterilization and any other form of sexual violence also constituting a serious violation of article 3 common to the four Geneva conventions, conscripting or enlisting children under the age of fifteen years into armed forces or groups arousing them to participate actively in hostilities, ordering the displacement of the civilian population for reasons related to conflict unless the security of the civilians involve or imperative military reasons so demand, killing or wounding treacherously a combatant adversary, declaring that no quarter will be given.

It also prohibits subjecting persons who are in the power of another party to the conflict to physical mutilation or to medical or scientific experiments of any kind which are neither justified by the medical, dental or hospital treatment of the person concerned nor carried out in his or her interest and which cause death to or seriously endanger the health of such persons or person, destroying or seizing the property of an adversary

unless such destruction or seizure is imperatively demanded by the necessities of the conflict.

Moreover, paragraph 2 (e) applies to armed conflicts not of an international character and this does not apply to situations of internal disturbances and tensions, such as riots, isolated and sporadic acts of violence or other conflicts that takes place in the territory of a state when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups. Nothing however affects the responsibility of a government to maintain or re-establish law and order in the state or defend the unity and territorial integrity of the state, by all legitimate means.[53]

An important contribution of the Rome Statute is that it contains for the first time a long and detailed list of the various manifestations of the types of crimes against humanity and war crimes in international and internal armed conflicts. In addition, it enshrines and elaborates the principles of individual criminal responsibility and lays down general principles of criminal law and procedural regulations. The establishment of the court springs from a universal human desire for justice and at the same time builds on trends in the internal arena and international law – its adoption means that as regards the most serious crimes that exist, international society has evolved into an international community that no longer accepts impunity for such crimes and that holds the perpetrators individually liable for their actions. In the field of IHL the court has a place equivalent to that of the ICJ the two will hence complement each other.[54] Lastly, the

[53] See paragraph 2 (c) and (e)

[54]See Bos Adrian, "The International Criminal Court; a Perspective," in. S. L. Roy, *The International Criminal Court, The Making of the Rome Statue Issues, Negotiations, Results*, (Hague, Kluwer Law International), p 470.

implementation of justice is vital to ridding society of the root causes, the very evils-responsible for human rights atrocities.[55]

[55]Richard J. Goldstone, "Bringing War Criminals to Justice During an Ongoing War op. , cit p 204

Chapter 3

A Case study of international humanitarian violations in the DRC

Introduction

The previous chapter traced the development of the concept of non-combatant immunity, the status of civilians in post World War II, and the developments after the creation of international criminal tribunals and ICC. This chapter is on the case study; it provides a 0background to the conflict, the types of violations against civilians, actors responsible and the factors that underlay the violations. The chapter observes that civilian suffering was exacerbated by the presence of external actors whose interest was the abundant natural resources available in the DRC.

Background

In 1996 Rwanda and Uganda forces invaded Congo, ousted long – time ruler Mobutu Sese Seko and installed Laurent Desire Kabila in power. In July 1998 Kabila tried to expel the Rwanda troops but they and the Ugandan forces instead engaged Kabila's government in the second Congo war, one that eventually drew in Zimbabwe, Angola, Namibia (supporting Kabila) and Burundi (allied with the Rwandans and Ugandans). Often termed as Africa's First World War, the conflict resulted in the death of 3.5 million people, the great majority in Eastern DRC. Many victims were displaced and people died from exposure hunger or lack of medical assistance.[1]

A first peace agreement signed in Lusaka in 1999, aimed at stopping violence against civilians, facilitating assistance though opening the corridor doors, halting the

[1]See International Rescue Committee and Burnet Institute, *Mortality Rates in the DRC: Results from a Nationwide Survey Conducted April-July 2004* (New York: International Rescue Committee December 2004).

war, calling for Inter-Congolese Dialogue (ICD), stopping any attempt to overthrow the regime and coordinating efforts through the creation of a joint military commission.[2]

The agreement highlighted that major international actors have focused on ending combat between rival governments' troops and largely ignored the local conflicts and suffering aggravated by the presence of those troops. Viewed from a conflict research perspective, it is impossible to attain any meaningful intervention in DRC conflict by engaging state level actors only. Crafted to meet the needs of the major governmental parties, it provided that combatants from armed opposition groups suspected of genocide or other crimes against humanity should be delivered to the International Criminal Tribunal for Rwanda or to national courts for prosecution, but it made no provision for accountability for grave abuses committed by troops of Uganda the other six governments involved in the conflict.[3]

Through continued international pressure the national government and major rebel movements eventually signed a power–sharing agreement at Sun City in April 2002 that allowed the establishment of the Global and all inclusive peace agreement, which set up the transitional government in June 2003. Despite this agreement and other bilateral and regional security agreements insecurity continued in large parts of eastern Congo. At the heart of the conflict was a struggle for DRC's vast reserves of gold, diamonds and other natural resources including coltan. Military and political leaders have used their position to exploit these resources and large-scale human rights violations such as the mass killing of civilians, rape and other forms of torture have been committed by

[2]The Lusaka Peace Accord was signed in July 1999 by six warring countries (Rwanda, DRC, Uganda, Namibia, Angola and Zimbabwe) and rebel groups in an attempt to stop the civil war. It called for a ceasefire, deployment of UN peace keepers and the disarmament and repatriation of foreign groups
[3]See Human Rights Watch, *Uganda in DRC* (New York: Human Rights Watch), March 2001

government forces, armed opposition factions and foreign troops in the war for profit. Child soldiers have also been extensively recruited, and make up at least 40 per cent of some forces, including those fighting in the eastern region of Ituri. The main focus of the conflict in the Democratic Republic of Congo is eastern DRC. It is estimated that over three quarters of the killings have taken place there and that approximately 90 per cent of DRC's internally displaced population have fled violence in that region.[4]

The war in Eastern Congo, specifically in Ituri, sprang from the larger Congo war and became a complex web of local, national and regional conflicts. It developed after a local land dispute in 1999 between Hema and Lendu ethnic groups and was exacerbated by the Ugandan army who occupied the area and by national rebel groups keen on expanding their power base. The availability of political and military support from external actors notably Uganda and Rwanda encouraged local leaders in Ituri to form more structured movements. Armed groups were born generally based on ethnic loyalties including the predominantly northern Hema group the Union of Congolese Patriots (UPC)[5] the predominantly Lendu FNI[6] the southern Hema pusic and the more mixed FAPC. Each of these groups received military and political support from either the DRC,[7] Uganda or Rwanda governments at different times turning Ituri into battle ground for war between them.[8]

Between 2003 and 2004 these Ituri armed groups attempted to gain recognition on the national scene hoping for positions in the Kinshasa based transitional government and

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[4]See Amnesty International, *Democratic Republic of Congo: "Our brothers who help kill us"*, Amnesty International, 22 October 2002 (AI Index: AFR)
[5]The Northern Hema Group is Often Referred to as Gegere, a sub clan of the Hema.
[6]This included temporarily the southern lendu group known as the ngiti, who had formed the FRPI militia.
[7]Assistance was received from the pre transition Kinshasa Government before mid 2003, though support allegedly continued from certain elements of the Transitional Government.
[8]Human Rights Watch *"Ituri Covered in Blood" Ethnically Targeted Violence* a Short Report July 2003.

in the newly integrated army. In this scramble local military leaders frequently switched alliances between themselves and other backers as their interests dictated. They attempted to control huge swathes of territory and strategic sites including gold mines and lucrative customs posts in order to enhance the importance of their movements. Strategic sites also provided much needed finance for the armed groups and favour with their backers.

A UN special report on the events in Ituri published in July 2004 underlined that the competition for natural resources particularly gold by these armed groups was a major factor in prolonging the crisis in Ituri.[9] In general, the Congo war was preceded by and occurred simultaneously with other local conflicts especially in eastern DRC where there were outright conflicts as early as 1993.[10] The civil and international conflicts centred on the DRC from August 1998, from the very beginning neighboring governments were involved in the Congo conflicts which drew in a half dozen more countries and involved wide spread predatory and criminal behavior by all combatants (including the state) and was directly and indirectly responsible for over 3 million deaths.[11]

Types of violations against civilians

Forced labour

Combatants imposed and organized forced labor. One of this is a kind of forced community labor referred as *"Salongo"*. Nationalist and Integrationist Front (FNI) representatives resorted to arbitrary arrests, beatings and other forms of cruel and degrading treatment to obtain the maximum service from the civilians.

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[9]See Letter From the UN Secretary General to the President of the Security Council, "*Special Report on Events in Ituri*" January 2002-December 2003, July 16 2004, p 5. See also UN Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC: hereafter the panel of experts.

[10]See Michael Nest, *The DRC Economic Dimensions of War and Peace*; in Michael Nest et al International Peace Academy Occasional paper Series, (Boulder and London; Lynne Rienner Publishers, 2006), p 12

[11]International Rescue Committee and Burnet Institute, *Mortality Rate in the DRC*; Results from a Nationwide Survey op. cit.

Salongo was enforced to fix roads, collect firewood for the military, and clean up the military camp or even burn bodies. At some time *Salongo* was required for as much as two full days a week, although by late 2004 it had decreased to once a week for three hours. Participants received a piece of paper showing that they had done the required labour. Persons who could not present such proof were subjected to beatings, arrest, fines or even death.[12]

Rape

Women are likely to be among the primary victims of direct attacks on the civilian population, as they usually constitute the majority of the non-combatant population.[13] The use of rape as a weapon of war is perhaps the most notorious and brutal way in which conflict impacts on women. As rape and sexual violence are so pervasive in situations of conflict, the "rape victim" has become an emblematic image of women's experience of war. As a weapon of war, rape is used strategically and tactically to advance specific objectives in many forms of conflict. It is used to conquer, expel or control women and their communities in times of war or internal conflict. As a form of gender-based torture it is used to extract information, punish, intimidate and humiliate. It is the universal weapon employed to strip women of their dignity and destroy their sense of self. It is also used to terrorize and destroy entire communities. The physical consequences of sexual assault include the effects of injuries sustained during the attack, pregnancies and sexually transmitted infections. Sexual violence against women has been understood as illegal in armed conflict for many centuries, but was previously couched in terms of "assaults against women's honour" which "presents women as male and family

[12]Human Rights Watch, "*The Curse of Gold*" (New York: Human Rights Watch, 2005), p 48.
[13]See UN Security Council Resolution 1325 (2000) on Women and Peace and Security.

property" rather than as a crime against women's physical and mental integrity.[14] Securing justice for women during and after armed conflict through national legal systems has been and remains extremely difficult. Many countries have discriminatory laws that make it difficult for women to access justice; conflict and its aftermath exacerbate the problems. Often women face difficulties because the laws in their country are inadequate to deal with sexual violence in conflict, or because laws are interpreted in ways that facilitate impunity. For example, national courts may have no jurisdiction over soldiers who are foreign nationals or it may be impossible to seek their extradition. The code of military law may not expressly address violence against women; and the crimes committed may not be crimes under national law. Even where a military code includes crimes of violence against women, military investigations and prosecutions may not allow civilians the legal standing to bring complaints. Military investigation processes are often not independent and some allow military personnel to commit crimes with impunity.

The four 1949 Geneva Conventions, three of which focus primarily on the protection of combatants, explicitly prohibit rape, indecent assault, other crimes against women, and "any adverse distinction founded on... sex" in the treatment of "persons taking no active part in the hostilities". The adoption of two Additional Protocols to the Geneva Conventions in 1977 reflected an increasing recognition of the need to strengthen the protection of civilians in time of conflict. Differentiation in the level of protection on the basis of sex is only permissible when it favors women - women are accorded special protection in their capacity as mothers and prisoners with particular requirements.

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[14]See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis*, (Manchester: Manchester University Press, 2000), pp.314-5.

Apart from as outlining rules for the protection of civilians and others who are not taking part in hostilities (such as prisoners of war), international humanitarian law recognizes some acts as crimes. For example, the Geneva Conventions identify some crimes, such as torture and inhuman treatment, as "grave breaches" which require all states to seek out and prosecute perpetrators. Acts of violence against women, such as rape, were not expressly identified as "grave breaches". In the 1990s, in response to the mass abuses of human rights which took place in former Yugoslavia and Rwanda, the international community examined crimes committed in conflict with renewed impetus. *Ad hoc* international criminal tribunals were established by the UN Security Council to look into crimes perpetrated during the conflicts in former Yugoslavia and Rwanda, and to bring to justice those responsible for war crimes, crimes against humanity and genocide.

The statutes establishing the *ad hoc* tribunals defined rape when part of an attack on a civilian population as a crime against humanity. However, they followed the Geneva Conventions and (in the case of the International Criminal Tribunal for Rwanda) Additional Protocol II, and consequently failed to define it expressly as a war crime. However, the tribunals did convict defendants of rape as a war crime - a violation of the laws and customs of war.

In the cases of *Akayesu*[15] and *Èelebiœi*,[16] rape was identified specifically as an act of torture when perpetrated by or at the instigation of a public official, and in the case of *Furundzija*, when it takes place during interrogation. In the case of *Kunaraœ* et al the defendants were convicted of rape as a crime against humanity and rape as a violation of

[15] See *prosecutor v. Jean-Paul Akayesu*, Case No. ICTR-96-4-T, Judgment of 2 September 1998.
[16] See *Prosecutor v. Kunaraœ et al*, Case No. IT-96-23 and IT-96-23/1, Trial Chamber II, Judgment of 22 February 2001.

the laws and customs of war (under article 3 common to the Geneva Conventions). In the case of *Akayesu*, rape was identified, in the circumstances, as an act of genocide. The tribunals convicted men of acts such as sexual enslavement, forced nudity and sexual humiliation - in addition to rape and sexual assault - thus recognizing such acts as serious international crimes. The *ad hoc* tribunals addressed the impunity of members of armed forces and also of civilians. The tribunals confirmed that breaches of common article 3 of the Geneva Conventions are war crimes. This means that members of armed groups, and members of official armies, can be held criminally responsible for their acts. The rules of procedure and evidence of the tribunals, particularly of the International Criminal Tribunal for the former Yugoslavia, also made advances in addressing violence against women. To protect those willing to testify from the shame and stigma so often associated with rape, and from being targeted for new attacks by their assailants or others, the rules permitted the use of pseudonyms; allowed voices and photographic images to be electronically disguised; and agreed that transcripts could be edited to remove any reference to victims' identities. However, thirteen years on from the genocide in Rwanda, where violence against women was a central element of the strategy to eliminate a particular ethnic group, little or nothing seems to have been learned about how to prevent such horrors, for instance, various criticisms have been leveled against the tribunal; central among them being that its justice is too slow leading to frustration, indignation and resignation that exacerbates the suffering of rape victims. This emanates from lack of political will, prosecution of rape offenders as an after thought and poor quality or inadequate evidence.[17]

[17]For more on this See Binaifer Nowrojee *"Your Justice is too slow": Will the ICTR fail Rwanda's Rape Victims?* (Geneva: United Nations Research Institute for Social Development, 2005).

Over the last decade, there has been significant progress in documenting and publicizing what has happened to women caught in conflict. This is also largely as a result of the determined and courageous work of women's rights activists and advocates. Significant progress has also been made in recognizing acts of violence against women as gross violations or abuses not only of international humanitarian law, but also international human rights and which the international community as a whole has an obligation to address, as international crimes. For all the commitments at the international level, effective tools for ending violence against women seem sorely lacking in practice hence a recurrence of rape in other conflicts.

Women have been disproportionally affected by the conflict in DRC. Sexual violence is regarded as the most wide spread form of criminality in Congo, and there are indications it has increased during the period since the 2002 Sun City Peace Agreement.[18]A senior U.N official Jan Egeland, the U.N. emergency relief coordinator called sexual abuse a "cancer" in the Democratic Republic of the Congo and told military and civilian leaders that they had to condemn it publicly and prosecute offenders.[19] International experts agree that sexual assault is the most common form of violence.[20] In research in south Kivu and Maniama provinces Goma and Kalemie between 1998 and 2003 the US Agency for International Development (USAID) cited more than 51,000 rapes.[21] Even these numbers are believed to be grossly under estimated. The stigma attached to rape means that it is severely under reported.

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[18]See International Crisis Group " *Beyond Victimhood:Women's Peace Building in Sudan , Congo and Uganda*" Africa Report No 112-28 June 2006, (Nairobi and Brussels: International Crisis Group,2006), p 8

[19]Evelyn Leopold, *Sexual abuse 'a cancer' in Congo* - UN official, Reuters 15 Sep 2006.

[20]Ibid

[21]M. Pratt and L. Weirchich, *Sexual Terrorism as a Strategy of War in Eastern DRC: An Assessment of Programmatic Responses to Sexual Violence in North Kivu, South Kivu, Maniema and Orientale Provinces*,USAIDAssessment Report, 18 March 2004.

Disruption of objects critical to the survival of the civilian population

Some rebel groups prevented villagers from cultivating food and gathering wood in the forest or limited the times when they could do so in an attempt to impede collaboration between them and other rebel groups.[22]Women in particular have refused to fend for food for fear of rape and other kinds of attacks by soldiers.[23] These fears have been deliberately encouraged by military actors and validated by the sexual violence exerted on women and girls by soldiers. The conflict has consequently reduced goods and services that were produced and consumed on a shared basis by the same household or extended family without a process of exchange. Since women made up a disproportionate size of the work force in the subsistence sector, their absence has had a negative impact on food production and has increased food shortages in rebel zones and in government controlled areas along the Congo river that were dependent on food from upstream sources in rebel held Eastern and Northern DRC.

Massacres of civilians

In the course of the conflict civilians were massacred and arbitrarily executed. The UN in Resolution 55/117 noted in particular attacks occurring on the Lisenda 8- road and at Katogata, Kamanyola, Lubarika, Liuberezi, Ngenye, Kalehe, Kilambo, Cidaho, Uvira, Shabunda and Lusenda-Lumumba and in the fighting between Ugandan and Rwandan forces in May 2000 which resulted in many civilian victims – and in the conflicts between Hema and Lendu ethnic groups in the Eastern province, where thousands of Congolese have already been killed.

Available at http:wwwpeacewomen.org/resourcesDRC/USAIDDCHADRC.pdf

[22]See Human Rights Watch, *Eastern Congo Ravaged* (New York: Human Rights Watch, 2001), p 17.

[23]See Joanne Cosete, *The War Within the War: Sexual Violence against Women and Girls in Eastern Congo* (New York: Human Rights Watch, 2002), p 49.

The Secretary General's report of 12 June 2000 stated that the persistent outbreak of heavy fighting between the belligerents, the RPA and Uganda Peoples Defense (UPPD) in Kisangani had caused an estimated 110 civilian deaths and more than 1000 casualties and severe property damage. Following the visit of a Security Council mission in May, the fighting ceased briefly with the signing of a MONUC– brokered agreement, but resumed in 5 June with heavy fighting resulting in serious damage to the power station, the hydro-electric dam and a hospital and disruption of electric and water supplies.

Ethnic cleansing

In various attempts to identify, describe and analyze the root causes of African conflicts a number of approaches have been taken. Some students of African conflicts have emphasized socio-anthropological factors such as ethnicity.[24]Many conflicts have a strong ethnic component—for instance, pitting Hutus against Tutsis as in the Rwandan genocide of 1994[25]and the continuing crisis in Burundi, and with reverberations in the DRC conflict. However, it would be dangerous to label all conflicts "ethnic" and to assume that their resolution should always be found in the form of ethnic or territorial autonomy, or secession. Many conflicts are "ethicized" rather than genuinely ethnic, as conflicting factions play "the ethnic card" to enlist support for other political projects.[26]

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[24]See Mwesiga Baregu, Resources, Interests and Conflicts in the Great Lakes Region Paper Prepared for CODESRIA's 10th General Assembly on "Africa in the New Millennium", Kampala, Uganda, 8-12 December 2002.

[25]See Christian Jennings, *Across the Red River. Rwanda, Burundi and the Heart of Darkness* (London: Phoenix, 2000); Philip Gourevitch, *We Wish to Inform You that Tomorrow We Will Be Killed with Our Families: Stories from Rwanda* (London: Picador, 2000); Gérard Prunier, *The Rwanda Crisis: History of a Genocide.* 2nd Edition with a new chapter (Kampala: Fountain Publishers, 1999); Linda R. Melyern, *A People Betrayed: The Role of the West in Rwanda's Genocide* (London: Zed Books, 2000).

[26]Bjørn Møller, *Conflict Prevention and Peace-Building in Africa,* (Copenhagen Peace Research Institute and Danish Ministry of Foreign Affairs).

Besides, ethnicity is capable of constructive application if perceived positively.[27] For instance it can be an organizing concept in the process of nation building and sustainable political and socio-economic development from within.

A local conflict between Hema and Lendu ethnic groups took genocidal proportions. For example, UPC combatants under the leadership of Lubanga slaughtered at least 800 civilians on the basis of their ethnicity in the gold mining region of Mongbwalu between November 2002 and June 2003. In another incident in August 2002, the UPC conducted a "man hunt" for persons of Lendu ethnicity and other political opponents, detaining them in two notorious prison areas where scores were tortured and summarily executed.[28] The price that has been paid by the civilian population, particularly women, is very high. They are used by armed groups often operating along ethnic lines for economic and political reasons. However, many observers are still wondering whether the conflict is still one of rival factions fighting to further their own economic interests, and those of their sponsors, or whether it has become a deliberate attempt by the leaders of the armed groups to wipe out civilian populations with the aim of "ethnic cleansing".[29] The impact of ethnic strife was intensified by the meddling of some Ugandan troops who clearly took sides with the Hema. Local commanders, apparently acting on their own initiative, assigned soldiers to defend the Hema and carry out attacks, sometimes in return for cash payments. Other soldiers tried to provide security for all local residents, but their conduct

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[27]Mike Oquaye, *Lessons From Intra-State Conflict Management and Prevention in Africa* (George Mason University, Institute for Conflict Analysis and Resolution Working Paper No. 19 2001).

[28]See Human Rights Watch, *D.R. Congo: ICC Arrest First Step to Justice Prosecutor Says First Accused Sent to Hague* Human Rights Watch, (New York, March 17, 2006).

[29] This concern was voiced by an Alur intellectual in July 2003 in Beni. The Alur are the main ethnic group in Ituri.

did not make up for the partisan support given by their fellows who supported the Hema cause.[30] The introduction of Ugandan troops, with their superior firepower and military training, also helped to increase the death toll of a conflict which would otherwise have been fought with traditional arms and tactics.

The Convention on the Prevention and Punishment of the Crime of Genocide (1948)[31] reaffirmed that genocide, whether committed in time of war or peace was a crime under international law. Genocide was defined as any of the following acts committed with, intent to destroy, in whole or in part, a national, ethnical racial or religious group as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; and forcibly transferring children of the group to another group.

However, the Convention does not have an implementation system; it provides that persons charged with genocide shall be tried by a competent tribunal of the state in the territory of which the act was committed or by an international penal tribunal. The ICTY and ICTR have provided for the prosecution of individuals for the crime of genocide. A significant case law has hence developed through these tribunals. For instance, in *Akayesu* the trial chamber of the ICTR leaned towards the objective definition of

[30]Interview with Congolese Refugees in Kenya on 15 December 2006.

[31]For more on this see Convention on the Prevention and Punishment of the Crime of Genocide Adopted by Resolution 260 (III) A of the United Nations General Assembly on 9 December 1948. See also William A. Shabas, *Genocide in International Law*, (Cambridge: Cambridge University Press, 2000). See also Nehemiah Robinson, the *Genocide Convention*, (London: Institute of Jewish Affairs, 1960) and Malcolm N. Shaw, "*Genocide and International Law at a Time of Perplexity* Yoram Dinstein (ed) (Dordrecht: Martinus Nijhoff Publishers, 1989), p 797.

membership of groups, but this has been mitigated by other cases emphasizing the importance of subjective elements.[32] The ICTR has also held that genocide may be committed by omission and commission.[33]

Use of child soldiers

The use of child soldiers is prohibited by both international human rights law and IHL. The United Nations Convention on the Rights of the Child, art. 38, (1989) proclaimed: "state parties shall take all feasible measures to ensure that persons who have not attained the age of 15 years do not take a direct part in hostilities." The optional protocol on the involvement of children in armed conflict to the Convention that came into force in 2002 stipulates that parties shall take all feasible measures to ensure that persons below the age of 18 do not take a direct part in hostilities and that they are not compulsorily recruited into their armed forces." The UN Security Council Resolution 1261 "strongly condemns... recruitment and use of children in armed conflict in violation of international law."

According to the Additional Protocol I and Protocol II to the Geneva Conventions, adopted in 1977, children who have not attained the age of 15 years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities. For persons older than 15 but younger than 18 years, the parties to the Geneva Conventions shall give priority to those who are oldest. [34]Moreover under the Rome

[32]See e. g. *Kayishema* and *Ruzindana*, ICTR-95-1-Tpara.67 and *Rutaganda*, ICTR-96-3-T, para 55. See also in general Guglielmo Verdirame, "The Genocide Definition in the Jurisprudence of the Ad Hoc Tribunals', *International and Comparative Law Quarterly* Vol. 49, and No.3 pp 578-598.
[33] See *Prosecuter* v. *Kambanda* , ICTR-97-23-S, para.39.
[34] See Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, art. 77; Protocol Additional to the Geneva

Statute of the International Criminal Court, the recruitment of soldiers under the age of 15 is considered a war crime. The governments of DRC, Rwanda and Uganda have all ratified the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict setting the minimum voluntary recruitment age as 18.

Tens of thousands of children, girls as and boys, some younger than 10 years' old, are serving with the Democratic Republic of Congo (DRC)'s warring armed forces and militia groups. From the moment of recruitment, these children face a catalogue of abuses, including torture, rape and killing. Many of the children were forcibly recruited, abducted at gunpoint from their homes or schools, often as their parents or teachers looked helplessly on, or while playing in their neighbourhoods.[35] Others enlisted voluntarily, in search of a dubious protection and as a way of surviving among the ruins of a country decimated by years of almost continuous warfare. Many of those voluntarily recruited report that they joined up after their families were killed or displaced. Once recruited, children are usually sent to training camps to undergo military training and indoctrination. In the camps they face harsh conditions and extraordinary abuse, including routine beatings, killing, rape and other forms of sexual violence. Hundreds of children are believed to have died during their training.

After training, many of the children were forced to fight on the frontlines, where they are frequently regarded as little more than cannon fodder by their commanders, who push them forward to draw the fire of enemy forces. Girl soldiers were routinely sexually

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Conventions of 12 August 1949 and relating to the Protection of Victims of Non-International Armed Conflicts, June 8, 1977, art. 4; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, art. 28

[35] See Amnesty International, Democratic Republic of Congo: *Child Soldiers Being Recruited Once Again* 31 March 2006.

exploited or raped by their commanders or other adult soldiers. Child soldiers have also been forced to commit human rights abuses, including murder and rape, against civilians and enemy soldiers. Some have been made to kill their own family members.[36]

Actors responsible for IHL violations

The term 'actors' in conflict refer to all participants in the conflict, be they mediators or the warring parties. Mediators are all those groups who help the conflicting parties by bringing them together gaining trust, setting the agenda, clarifying issues and formulating agreements.[37] All actors have certain interests in the conflict which makes them become involved in the first place.[38] Attempts to resolve any conflicts are bound to fail if the actors are not identified.[39]

A combination of economic and political interests transformed the DRC conflict, resulting in a predatory, exploitative and multi war "complex".[40] These Congo wars merged interstate conflict and civil war between the RPA and *interhamwe*– with local disputes that became integrated into the strategies and campaigns of more powerful military actors. Congolese actors were an integral and essential part of the networks that were of the Congo war. They were not always equal partners in their relationship with foreigners, especially military actors. However, Congolese actors were not merely

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[36]See Amnesty International, Democratic Republic of Congo: *Child soldiers being recruited once again* 31 op. cit. See also Amnesty International, Rise *in recruitment of child soldiers in DRC* June 2006 Vol. 36. No. 05

[37]Hugh O. Ramsbotham et al., *Contemporary Conflict Resolution: The Prevention, Management and Transformation of Deadly Conflicts* (Cambridge: Polity Press, 1990, pp.158-159.

[38]Makumi Mwagiru, *Community Based Approaches to Conflict in Kenya: Crisis Prevention and Conflict Management* (Nairobi: GTZ, Kenya, 2001).

[39]Ochieng Kamudhayi, "The Somali Peace Process" in Makumi Mwagiru (ed.) *African Regional Security in the Age of Globalisation* (Nairobi: Heinrich Boll Foundation, 2004), pp 107-123:116.

[40] Michael Nest, "The Political Economy of The Congo War," in Michael Nest et al, *the Democratic Republic of Congo : Economic Dimensions of War and Peace* (London: Lynne Rienner Publishers, 2006), pp 31-62:32.

manipulated or coerced by foreigners; they sometimes manipulated foreigners,[41] in order, to achieve their own interests in the conflict, including weapons and resources. In addition, there was no commitment to accountability and the rule of law by the actors in the conflict.[42] There was not in the region any tribunal competent to prosecute soldiers responsible for crimes against the civilian population. Victims were thus led to complain to civil authorities of the rebellion, which in turn complained to the officers of the armies, the implication being that the army reacted even more forcefully against civilians, to coerce them into silence and submission.[43]

Government forces

These are referred to as Congolese Armed Forces (FAC), which under Kabila included members of ADFL the coalition that installed him. Human Rights Watch researchers have documented continued widespread human rights abuses in significant pockets of eastern DRC, including war crimes carried out by pro-government soldiers under the command of General Mabe and those carried out by forces under General Nkunda and Colonel Mutebutsi in Bukavu.[44] In addition, in November 2005, the Congolese army launched a military operation to quell an insurgency in Katanga led by the *mai mai.* Government soldiers rounded up hundreds of civilians suspected of being *mai mai,* and deliberately killed or tortured to death dozens of them. They gang-raped scores of women alleged to have supported the *mai mai.*[45] Jan Egeland, the U.N. emergency relief

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[41] Ibid
[42] Interviews with Congolese Refugees in Kenya on 16 December 2006.
[43] This insight was gained in my interviews with Congolese refugees in Nairobi.
[44] Human Rights Watch, D.R. Congo: *War Crimes in Bukavu* op. cit.

[45] See Human Rights Watch, D.R. *Congo: As Vote Nears, Abuses Go Unpunished in Katanga Congolese Army and Mai Mai Commanders Should Be Charged with War Crimes* (New York, Human Rights Watch July 21, 2006).

coordinator, said soldiers from the national army had raped thousands of women and girls.[46] Besides, military and civilian authorities were virtually unaccountable for crimes against civilians[47] While leaders of armed insurgent groups in Democratic Republic of Congo (DRC) must be held to account for serious human rights abuses committed by their forces, the DRC government is equally responsible for the lack of protection for civilians in these areas.[48]

***Mai Mai* militias[49]**

The *mai mai* of Katanga were launched in 1998 as a popular resistance force against the invading foreign armies of Uganda and Rwanda, but later turned against the central government and local communities.[50] These militias had to organize commercial activities in order to sustain military campaigns. Eye witness accounts documented by non-governmental organizations (NGOs) early in the war, report that both collectively and individually some *mai mai* militias extorted food, supplies and money from civilians and waged military campaigns over the control of mineral deposits and roads on which they could erect road blocks.[51] The *Mai mai* was the greatest security threat in Katanga and the main cause of the displacement of 310,000 people. In the province more than 19

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[46]Evelyn Leopold, *Sexual abuse 'a cancer' in Congo* – (United Nations)
[47]Interview with Dr Kithure Kindiki, lecturer faculty of law University of Nairobi.

[48]See Amnesty International, Democratic Republic of Congo (DRC): ***Kinshasa must meet its responsibility to protect civilians*** AI Index: AFR 62/003/2006 (Public) 8 February 2006.

[49]These are a local defence forces recruited and organized along tribal lines primarily motivated by the desire to resist "foreigners" a term the applied equally to Rwandans, Ugandans, Banyamulenge and Banya rwanda.
[50] The *Mai Mai* in Katanga is a local defence force that was supported by the Congolese government when it was engaged in an armed conflict with Rwanda., Uganda and other belligerents. After the war, the national government sought to integrate the *Mai Mai* into the national army but failed. Increasingly hostile to the government, *Mai Mai* leaders took control of huge swathes of central Katanga and started to fight their former allies, the Congolese army.
[51]See Human Rights Watch, *Casualties of War: Rule of Law and Democratic Freedoms* (New York: Human Rights Watch, 1999), p 15.

warlords in the northern and central territories command bands–estimated by the UN to total to 5,000 to 8000 who regularly abuse the local population.[52] *Mai mai* combatants under the command of Kyungu Mutanga, known as Gédéon, and another *mai mai* leader, Makabe Kalenga Ngwele, have also killed, raped and otherwise abused civilians since 2002. In some cases, the *mai mai* publicly tortured victims before killing and cannibalizing them in public ceremonies intended to terrorize the local population.[53] The *mai mai* were also present in Kivus where they were used by chiefs to enforce their decisions regarding the distribution of customary lands and by business people in North Kivu to intimidate Tusti rivals.[54] The *mai mai* militias from the Kivu's were treated as independent actors in the inter-Congolese dialogue and hence were considered as part of the transition. However, the ones in Katanga were not given the same treatment as a result by the end of 2002 the *mai mai* had become a serious threat to the local population and a threat in the side of some of the local officials who had armed them but seem unable to control them. For instance, in November 2002 *mai mai* under the command of Mukalag Jean "Deux Metres" fell out with army troops in Ankoro, Laurent Kabila's home town. Both sides went on a rampage and attacked the local population. According to human rights organizations over 100 civilians were killed and 75,000 were displaced.[55] Moreover, Union of Congolese Patriots (UPC) a predominately Hema militia group, carried out ethnic massacres, murder, torture, rape and mutilation, and the recruitment of

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[52]See International Crisis Group, *Katanga: Congo's Forgotten Crisis* Africa Report No 103, (Nairobi and Brussels: International Crisis Group, 2006,), p 2.
[53]See Human Rights Watch, Democratic Republic. *Congo: As Vote Nears, Abuses Go Unpunished in Katanga Congolese Army and Mai Mai Commanders Should Be Charged with War Crimes*
[54]Human Rights Watch, *Casualties of War: Rule of Law and Democratic Freedoms* op. cit
[55]See Mark Dummet, "*Congo Government, Troops Kill 1000 Civilians*" Reuters 21 November 2002. A MONUC Investigation Several Months Later confirmed at least 20 deaths and said there may have been more.

child soldiers and the Nationalist and Integrationist Front (FNI), a Lendu militia led by Floribert Njabu.[56]

Other local armed groups

The divorce between Kabila on one hand and Rwanda and Uganda on the other, not only led to the second Congo war but also developed various armed rebel groups and factions to oust Kabila, due to disillusionment with his leadership and the fact that they viewed him as an impediment to peace and stability and other diverse motives and interests.[57] The anti kabila alliance was plagued with divisions and infighting, leading to splits as the war progressed. However, the emergence of self proclaimed rebel groups can be traced to the collapse of the state system that created a culture of impunity and disorder and led to the creation of criminal economic and social networks which exploited it for personal gain. This group claims to champion Congolese democracy while in actual fact are merely perpetuating the chaotic situation for their personal gain, hence they continue to flourish due to lack to organizational capacity to govern a modern state by the new regime.[58]

Key among the local armed groups are: *Reassemblement Congolaise pour la Democratie* (RCD) led by Wamba dia Wamba and Mouvement *de liberation du Congo*

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[56]Human Rights Watch, D.R. Congo: ICC Arrest First Step to Justice *Prosecutor Says First Accused Sent to Hague* op. cit.

[57] For an analysis of rebel factions and their motivations see Osita Afoaku, "Congo's Rebels Their Origins Motivations and Strategies" in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp 110-128. See also "Political Declaration of The Congolese Rally for Democracy (RCD/CRD)" Goma August 12, 1998, in *The 1998 Rebellion in the Democratic Republic of Congo*, Association of Concerned Africanists, 3-5. See also " the removal of kabila and the alternative: the position of the *Reassemblement Congolaise pour la Democratie* (RCD), "RCD Headquaters, Goma, 17 august 1998, in *The 1998 Rebellion in The Democratic Republic Of Congo* , Association of Concerned Africanists, 6-8.

[58]See Georges Nzongola–Ntalaja, *The Congo from Leopold to Kabila: A Peoples History* (London and New York: Zed Books,2002), p 243.

(MLC) formed in 1998 with extensive Ugandan backing led by Jean-Pierre Bemba. Headquartered in the northern, DRC's Equateur Province. Another group is the RCD-Goma based in Goma which controlled most of north and south Kivu, parts of Maniema, Orientale, and Katanga, and a large part of Kasai Orientale provinces. It is widely described as proxy of the Rwandan government and dominated by forces of the Rwandan army which occupies this territory.[59]

The others are: RCD-Kisangani; Wamba dia Wamba formed this party when he was ousted from the original RCD in May 1999. It was short lived and became the RCD-ML in September 1999. In addition, there was RCD-National - led by Roger Lumbala, formed during the splintering of the RCD-ML in mid-2000. Furthermore, a merger between MLC, RCD-ML and RCD-N resulted in FLC under Ugandan tutelage in November 2000.[60]

External actors

The DRC conflict challenges the internalist or statist, analysis which defines conflict primarily by territorial boundaries even when such conflicts clearly transcend and indeed defy national boundaries.[61] Thus to refer to a DRC conflict does not quite portray the scope and magnitude of the conflict, which may be temporarily concentrated in the DRC but is spatially and dynamically more expansive taking on regional and international dimensions in the globalized struggle for strategic resources. By the same token, the superficial distinction between internal and external actors is not analytically helpful once the focus is on actor/ interests and their strategies rather than processes and paces of

[59]See Human Rights Watch, *The War Within The War Sexual Violence Against Women and Girls in Eastern Congo* (New York: Human Rights Watch, 2002)
[60]IRIN Web Special on Ituri in Eastern DRC *Who's Who-Parties, Armed Groups and Factions* http://www.irinnews.org/webspecials/Ituri/whoswho.asp *retrieved on 11 October 2006*
[61]Mwesiga Baregu, Resources, *Interests and Conflicts In The Great Lakes Region* op. cit

negotiating the termination of conflicts between 'internal parties'. This narrow approach to defining parties to the conflict in the form of political parties, for example, leads to the fallacy that in order to reach a stable and sustainable agreement all self appointed political groups have to be included in any negotiations with all parties carrying roughly the same weight. The outcome, as was witnessed in the Lusaka Accord process and later in the Sun City process, is that the result is a protracted stalemate either at the point of reaching the agreement or at the point of implementation. It is at these points that powerful interests intervene to arm-twist the parties to an agreement that is consistent with their interests. One of the fundamental flaws of this approach, is that the less visible but quite powerful actors with interests in the conflicts are left out of the open negotiation process. Even worse, some actors may present themselves as and become regarded as impartial mediators or arbitrators in the conflict on the basis of their claims while, in reality, they are acting in the defense and pursuit of their particular interests.

Armed conflict can be exacerbated by the intervention of third party governments seeking to profit from their resource rich neighbors.[62] Natural resources play a key role in triggering, prolonging and financing conflicts. The natural resources that cause these problems are largely oil and hard rock minerals, including coltan, gold, diamonds and other gemstones. Looting and violent enterprise are not new features of warfare. What is new about many recent conflicts, especially in Africa, is the extent to which economic interests appear to predominate, crowding out political programmes and ideological agendas of combatants. This development is explained in scholarly work as a triumph of greed over grievance, that abundant natural resources are independent variables that

[62]See Arvind Ganesan and Alex Vines, *Engine of Wa: Resources, Greed and the Predatory State* World Report, January 2004, available at http://hrw.org/wr2k4/14.htm.

cause conflict because they create opportunities for individuals to maximize personal economic gains through predation.[63] Foreign governments provide political, material, financial or military support to rebel groups or governments in furtherance of their own economic interests.

The way Uganda and Rwanda intervened in the DRC highlights that the conflict was impelled by competition for natural resources. Rwanda, Uganda, Zimbabwe and the DRC government have all succeeded in their attempts to use diamonds as a means to finance the war. The degree to which diamonds in particular and DRC natural resources in general, have perpetuated their military activities is still variable.[64] Evidence affirms that for these three countries the war, officially fought for other reasons, has allowed substantial inflows of natural resources and foreign currency; without the armed conflict, these would not have been forthcoming. But have DRC economic activities gone beyond financing the parties' warfare, and provided a net benefit to the three countries? Rwandan, Ugandan and Zimbabwean armies drew economic advantages in the DRC from exchanging appropriated natural resources for military equipment, from imposing taxes on economic activity in areas under their control, and from re-exporting appropriated goods.[65] Key natural resources, diamonds in particular, contributed to prolonging the war in the Democratic Republic of Congo. The motivation and feasibility of resource exploitation largely explains why external military contingents remained active in the country since August 1998. Driving forces of war can be identified among

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[63]See Paul Collier, "Economic Causes of Civil Conflict and Their Implications for Policy," in Chester Crocker and F. O Hampson (Eds.) *Managing Global Chaos,* (Washington DC: United States Institute for Peace, Forthcoming). See also Paul Collier "Doing Well out War: An Economic Perspective," *Greed and Grievance: Economic Agendas in Civil Wars*, (Boulder: Lynne Rienner Publishers, 2000), pp 91-111.
[64]See Ingrid Samset, "Conflict of Interests or Interests in Conflict? Diamonds & War in the DRC" *Review of African Political Economy* No.93/94, pp 463-480, 2002.
[65] Ibid

elites of Rwanda, Uganda and Zimbabwe, for whom DRC resources have proven decisive to sustain positions of power. Although most exploitation has been carried out at gunpoint, the use of existing networks suggests that withdrawal of forces would not necessarily stop the massive resource diversion. A lasting resolution to the crisis needed to ensure due benefits to the local population from their resources, it also required that stakeholders see peace as a more attractive option than continued war. However, political and economic interests also often coexist, with one or the other becoming temporarily important.[66]

Besides, most conflicts in Africa have been intra-state, even though several have been partly internationalized as guerillas (and genocidal militias such as the Rwandan *interahamwe*) often operated from bases in neighboring states such as the Congo, thereby providing motives for cross-border military operations by one state into the territory of another—as with the Ugandan and Rwandese incursions into the DRC.[67]

Human rights watch observed that the conflict in Ituri and others in eastern DRC highlighted the participation of non-Congolese forces. Ituri in particular became a battleground between the governments of Uganda, Rwanda and the DRC. These governments have provided political and military support to Congolese armed groups despite abundant evidence of their widespread violations of international humanitarian law.[68] A local conflict between Hema and Lendu ethnic groups that began in 1999 was exacerbated by Ugandan military forces and aggravated by a broader international armed

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[66]See Karen Ballentine and Jake Sherman, (eds.) *The Political Economy of Armed Conflict: Beyond Greed and Grievance* (Boulder, Colorado: Lynne Rienner Publishers, 2003), especially the introduction.
[67]See Shearer David: "Africa's Great War", *Survival*, Vol. 41, No. 2, summer 1999, pp. 89-106.

[68]Human Rights Watch, D.R. Congo: ICC Arrest First Step to Justice, op. cit.

conflict in the DRC. As the conflict spiraled and armed groups multiplied, more than 60,000 civilians were slaughtered in Ituri, according to the United Nations.

The involvement of Uganda in the DRC conflict

Uganda was involved in the second Congo war. Museveni's regime proved to be extremely valuable to Kabila's ascension to power. He provided military assistance in large part to deny the Allied Democratic Forces (ADF) the Lords Resistant army (LRA) and the West Bank Nile Front (WBNF) the use of Zairian territories as a rear base for the destabilization of Uganda.[69]

However, commercial considerations seem to have gained primacy. For example, in August 1998,[70] shortly after the start of the second Congolese war, Ugandan troops occupied gold-rich areas of Haut Ue'le', including the town of Durba, (Watsa territory, Haut uele District, Orientale province), site of three important gold mines: Garumbwa, Durba and Agbaro. According to the International Crisis Group (ICG) there was a remarkable increase in Uganda's gold experts since 1998. Official figures by the bank of Uganda show that her gold experts shot up from $124 million in 1994 – 95 to $110 million in 1996.[71]According to the estimates of engineers and geologists familiar with the area nearly one ton of gold was extracted from this region during the four year period of Ugandan occupation. Based on prices at the time, this would have been valued at some 9 million dollars.[72]

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[69]See Kevin C. Dunn "A Survival Guide to Kinshasa," Lessons of the Father Passed Down to the Son in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp 53-74:57

[70]For more on Uganda's reasons for intervention See John F. Clark, Museveni's Adventure in the Congo War, Ugandas' Vietnam?" in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit chapter nine. See also William Reno, "Stealing like a Bandit, Stealing like a State, (Paper Presented to the Department of Political Science, Makerere University April, 2000).

[71]See International Crisis Group, *Scramble for the Congo: Anatomy of an Ugly War*, Africa Report No 26 20th December 2000 (Nairobi and Brussels: International Crisis Group, 2000),

[72]Human Rights Watch, "*The Curse of Gold*" (New York: Human Rights Watch), p 15.

The Ugandan government has always pursued an active "divide and rule" policy in the region, supporting different groups at the same time due to its ambiguous regional policy.[73] In September 2004 the DRC government demanded $16 billion in compensation from the Ugandan government for the plunder of natural resources by its forces while they occupied DRC, in violation of international law.[74] In newspaper reports representatives from the Ugandan government acknowledged some responsibility for the killings, plunder and looting the DRC suffered at the hands of their troops, but made no commitment to pay compensation stating the amount demanded was "colossal".[75] For instance, in August 1999 only a month after signing of the Lusaka Cease Fire Agreement a major battle took place between the Uganda Peoples Defense Forces (UPDF) and Rwanda Patriotic Front (RPF), resulting in the deaths of over 600 troops and civilians.[76]

The involvement of Rwanda in the DRC conflict

Rwanda was involved in the war to remove Mobutu as part of the invading army and in the second rebellion against Laurent Kabila's government. In both cases it justified its intervention on humanitarian and defensive grounds.[77] Continued engagement however point to economic interests, as shown by its increase in exports of coltan and diamond.[78]Rwanda has been the chief supporter of the RCD-Goma since this movement

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[73]See Amnesty International, Democratic Republic of Congo: Ituri *a need for protection, a thirst for justice*, (Amnesty International, 21 October 2003).

[74]See Article 55 of the Hague Regulations, Convention IV.
[75]See David Musoke, and Mutumba A. Lule 'DRC wants $16 Billion for Plunder by Uganda and Rwanda, *The East African* September 27, 2004.
[76]See Osita Afoaku, "Congo's Rebels Their Origins Motivations and Strategies" in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp 110-128:118.
[77] See Timothy Longman, "The Complex Reasons for Rwanda's Engagement in the Congo War, in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp 129-144:129.
[78]See Dena Montague and Frida Berigan, "The Business of War in the DRC: Who Benefits?" *Dollars and Sense* (July 2001):15-19.

began its rebellion against the Congolese government in 1998. For example one of the senior RCD-Goma commanders, General Nkunda, was trained in Rwanda and had close ties with the Rwandans while serving with the RCD-Goma.[79]

Rwanda and Uganda waged a proxy war against Laurent Kabila's government by setting up armed insurgencies. Consequently, they supported separate rebel factions and their armed wings and maintained large training structures in the eastern half of the Congo that fell under their respective occupation in order to train tens of thousands of soldiers for their allies and to form ruthless militias. In October 2002 Rwanda withdrew its troops from DRC, but reports persisted about the continued involvement of Rwandan forces in eastern DRC although it denied the presence of its troops in eastern DRC. Hence, it is implicated in brutality against civilians, and specifically sexual violence, which is an integral part of the war in eastern DRC. As a result, these renegade groups were responsible for the displacement of over 1.8 million people.[80] Furthermore, atrocities against civilians by the Rwandan rebel group Democratic Forces for the Liberation of Rwanda (FDLR) continued with numbing regularity[81]. MONUC was hesitant to use force against the FDLR even though commanders acknowledge that their mandate to protect civilians would allow them to do so.[82] This was because of fear of a backlash in the use of force, such as, reprisals.

The involvement of Zimbabwe in the DRC conflict

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[79]See Human Rights Watch, D.R. Congo: *War Crimes in Bukavu* op. cit.
[80]Figures from United Nations OCHA Regional Support Office in Nairobi see www.internal-displacement.org.
[81]The Democratic Forces for the Liberation of Rwanda (FDLR) are around 8000-10000 strong, some leaders are *interhamwe* and officers from the former Rwanda army who perpetrated the genocide in 1994, many of the officers were recruited out of the Refugee camps.
[82]Crisis Group interview with MONUC commanders in Bukavu and Kinshasa, July and August 2005.

Zimbabwe got involved in the DRC war when Kabila asked for help from SADC from the on coming Uganda, Rwanda and Burundi armies, since DRC had joined SADC.[83] However, the Zimbabwe army was engaged more for commercial reasons than for security reasons. Mugabe had seen DRC as a source of natural resources that would help pull Zimbabwe from the financial crisis it was in by exploiting copper, cobalt and diamond.[84] Protocols for military and economic co-operation between Zimbabwe and DRC pre-dated the outbreak of the war. Since then Kabila has promised Zimbabwe a great deal more in return for its military support. For example, on September 1998 Presidents Kabila and Mugabe signed a deal providing for a self financing intervention by the Zimbabwe National Defense Forces.(ZNDF).[85] Besides, Zimbabwe had adequate military force at its disposal to undertake the mission.[86]

The involvement of Burundi in the DRC conflict

It was drawn into the war because of the Hutu extremists that were in the DRC and using it as a safety haven and to attack the transitional government. Its involvement therefore was a spillover of its own civil war. Soon after the outbreak of the second Congo war, the Burundian army deployed on the DRC side of Lake Tanganyika in order to guarantee the safety of its borders since President Buyoya feared that Kabila would support Burundian rebels *Conseil National Pour la Defense de la Democratie -Forces Del La Defense De la*

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[83]See Article 4 of the Declaration of the Treaty of SADC (1992) Provides for Military Assistance or Obligations to Member States. See Also Michael Nest, 'Ambitions, Profits and Loss: Zimbabwe Economic Involvement in the Democratic Republic of Congo," African *Affairs*, 100 (July 2001):470-73.

[84] See C. Dietrich, *Hard Currency; The Criminalized Diamond Economy By Its Neighbour* (Boulder : Lynne Rienner Publishers, 2006)

[85]See Stockholm International Peace Research Institute, SIPRI Year Book, *Armaments, Disarmaments and International Security*, (Oxford: Oxford University Press, 2002), p 296.

[86]See Martin R. Rupiya, a Political and Military Review of Zimbabwe's' Involvement in the 2nd Congo war in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp 93-105.

Democratie CNDP-FDD under Jean-Bosco Ndayikengurukiye who later agreed with Kabila to support each others war effort.[87]

The involvement of Angola in the DRC conflict

Angola became involved in the Congo war to defend itself against Jonas Savimbi and his Union for the Total Independence of Angola (UNITA).[88] In the first war Angola contributed to the overthrow of Mobutu and in the second Congo war Angola's decisive intervention saved Kabila from defeat at the hands of the RPA in August 1998.[89] The rationale for each intervention was their strategy of encircling UNITA, cutting off rebel lines of communication and denying them secure rear bases. They also sought to protect the Angolan enclave of Cabinda wedged between DRC and Congo Brazzaville.[90] Although it sided with Laurent Desire Kabila, on both occasions sympathy for Kabila and his regime was at best a secondary factor. One of its strategies in the war was to maintain a favorable or compliant regime in Kinshasa. This could either mean supporting the regime in power or replacing it with a more suitable one.

Multinational companies

Primary commodity production was greatly facilitated by private companies, both foreign and domestic. Being in the business of natural resource exploitation, these companies needed to continue production and trade to remain profitable, notwithstanding the conflict. As minerals are site specific, firms dependent on mineral exploitation are: "condemned to developing resources where they can find them and where their

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[87] International Crisis Group, Anatomy of an Ugly War op.cit p.18
[88] See Collete Braeckman, *l'enjeu conglais l'afrique centrole après Mobutu* (Paris: Favard 1999), p 261.
[89] See Thomas Turner, "Angola's Role in the Congo War" in John F. Clark (ed.) *The African Stakes in the Congo War* op. cit pp74-92.
[90] International Crisis Group, *Anatomy of an Ugly War* op.cit p 54.

investments have been made, whether it is in a war zone or not."[91] In addition, they will "maintain or even seek investment opportunities in war torn areas, if those opportunities appear to warrant running the associated risks.[92] Furthermore, the fixed location of minerals also makes mining companies vulnerable to extortion. There was ongoing negotiation between mining companies and combatants that centered on the companies ability to produce resources in return for protection.[93] The involvement of mining companies leads to a concentration of warfare in mineral held areas such as Kisangani and Mbuji Maji which are the two main DRC diamond areas, armed groups fight to control these areas.[94] Secondly, it provides, a means to finance the war from the monies accruing from the rents paid by the companies for protection.[95] Third, they not only add more actors to the conflict but they exacerbate the situation, by raising the stakes in the exploitation of natural resources and thus providing motivation for more local actors to be involved in the conflict and further splinter into smaller armed groups as they seek to benefit from this exploitation.[96] Finally, by making the conflict lucrative, they create a win- win situation for all belligerents, who share a common inters in the continuation of the conflict,[97] and thus become an obstacle to peace.

Although states have primary responsibility for promoting and ensuring respect for human rights, business corporations also carry a number of responsibilities, as is

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[91] International Committee of The Red Cross, *War, Money and Survival* (Geneva: ICRC, 2002), p.45.
[92] Ibid.
[93] Insight gained from Interviews with Congolese refugees in Kenya on 16th December 2006.
[94] Emeric Rogier, *Cluttered With Predators, God Fathers Predators and Facilitators: The Labyrinth to Peace in the Democratic Republic of Congo,* (Hague: Netherlands Institute of International Relations, 2003), p 11.
[95] Ibid
[96] Panel Reports S/2001/357, Para.147.
[97] Panel Reports S/2001/357, Para. 218.

increasing recognized by international law and norms.[98] In August 2003 a group of UN experts adopted the Draft Norms on the Responsibilities of International Corporations and Other Business Enterprises with Regard to Human Rights, The norms are based on a wide range of recognized international instruments including the Universal Declaration of Human Rights, international conventions such as those of torture, genocide, slavery and rights of the child, the Geneva Conventions and the Rome statute of International Criminal Court among others. These UN norms help to clarify the international legal framework for obligation of companies in relation to human rights, specifically they set out that companies have the obligation to promote, secure the fulfillment of, respect, ensure respect of and protect human rights recognized in the international as well as national law.[99] In addition, it stipulates that companies shall not engage in nor benefit from war crimes and crimes against humanity, nor torture, forced disappearances, forced or compulsory labor as defined by international law.[100]

Factors underlying IHL violations against civilians in the DRC

Several reasons explain the brutality and impunity against civilians in the DRC conflict. One of these is the existence of natural resources. The ambition of all the combatant forces to exploit eastern DRC's mineral and economic wealth was the biggest single factor in the continuing violence. These economic interests led to the emergence of a pattern of violence by all forces in the region that is aimed primarily at Congolese civilian communities.[101] Amnesty International, examined the mass human rights abuses

[98]The UN Security Council passed resolution 1493 in July 28 2003 demanding that no direct or indirect assistance, especially military or financial assistance be given to the movements and armed groups present in the DRC.
[99]See Draft Norms on the Responsibilities of Trans-national Corporations and other Business Enterprises with Regard to Human Rights, E (UN.4/sub.2003/12 (20030, Section a General Obligations.
[100]Ibid, Section C Rights to Security of Persons.
[101]Amnesty international, *Democratic Republic of Congo: "Our brothers who help kill us*, op.cit.

committed in the eastern areas that are under the control of armed opposition groups and foreign forces. These abuses were committed to further economic exploitation of the area. Abuses were reported in the diamond fields of Mbuji-Mayi, and also near eastern DRC's abundant reserves of cobalt, coltan, copper, gold, timber uranium and water. Thousands of Congolese civilians were tortured and killed during military operations to secure mineral-rich lands.[102]

In 2002, the UN Security Council expressed concern that Congo's natural resources such as gold, diamond and other minerals were fuelling the deadly war. The UN appointed a panel of experts to look into the matter. [103] It published four separate reports between April 2001 and October 2003.[104] The UN panel of experts reported that Rwanda, Uganda and Zimbabwe army officers and the members of the Congolese elite were growing rich from the wealth of Congo. The reports documented how the minerals of Congo were fed into the networks of international commerce and showed how these resources helped fund armed groups thus fuelling the war, resulting into wide spread abuse of human rights and IHL.

The reports named senior Ugandan and Rwandese armed forces officers and senior government officials and their families, who were accused of being responsible for the illegal exploitation of the area's natural resources and other abuses. The panel proposed measures to be taken against the states, individuals and companies most implicated in the exploitation, including travel ban, financial penalties and reductions in aid disbursements. The panel concluded in its report of October 2002 that the withdrawal

[102]This observation was highlighted by most of the Congolese respondents that were interviewed.
[103]It was known as the UN Panel of Experts on the Illegal Exploitation of Natural Resources and other Forms of Wealth of the DRC: hereafter the panel of experts.
[104] See the Panel of Experts Reports April 12 2001 S (2001/357), May 22, 2002 S (2002/565), October 16 2002) S (/2002/1146) October, 23 2003 S (2003/1027) plus other addendums.

of foreign armies would not end the resource exploitation because the elites had erected a self financing war economy.[105] The war developed a substantial criminal component, a trend that was facilitated by the states weak capacity, the large and illegal informal economy that existed prior to the war, and belligerents' use of coercion as a factor of production. Therefore, the greed among the groups ensured that they had to achieve their wishes by any means possible, besides being an incentive to remain armed and deployed.

Secondly, there was not only a proliferation of small arms but these have been utilized in an illegal way, an example, of legally acquired but illegally used arms is when the regime of Zairian president Mobutu Sese Seko disintegrated in 1994 and his disgruntled soldiers ended up misusing or selling the arms for personal gain.[106] Large quantities of weapons and ammunition from the Balkans and Eastern Europe flowed into Africa's conflict-ridden Great Lakes region. Despite evidence of their use in gross human rights violations, shipments continued to the Democratic Republic of Congo (DRC) despite a peace process initiated in 2002 and a United Nations arms embargo. In a detailed study, Amnesty International reveals the role played by arms dealers, brokers and transporters from many countries including Albania, Bosnia and Herzegovina, Croatia, Czech Republic, Israel, Russia, Serbia, South Africa, the UK and USA. The study traces the supply of weapons and ammunition to the governments of the Democratic Republic of Congo, Rwanda and Uganda and their subsequent distribution to armed groups and militia in the eastern DRC that have been involved in atrocities

[105]Ibid UN Panel of Experts Report (S/2002/1146) October 16 2002.
[106]See Augusta Muchai, "Arms Proliferation and the Congo War," in John F. Clark (ed.) *The African Stakes in the Congo War* pp 185-185:186.

amounting to war crimes and crimes against humanity.[107] The nature of small arms and light weapons contribute heavily to the problem of arms proliferation. They are especially suited to irregular warfare due to their easy concealment, cheapness and ease of use, wide availability and durability.[108] Moreover, they require low maintenance and training to operate. This makes them the weapons of choice for rebel groups, criminals and poorly organized combatants in protracted war and conflict situations, such as DRC. As a result of these, the conflict leads to heavy human suffering.

Another factor is that for the external actors they were stubborn and desired to continue the conflict at all costs,[109] for example, the UPDF has been accused by the UN panel of expert's report of provoking ethnic conflict in Ituri cognizant that the unrest in the region would require the continuing of minimum UPDF personnel. The UN panel of experts received credible evidence that high-ranking officers train local militia to serve as paramilitary both directly and discreetly under UPDF command.[110]

There is also the issue of a dangerous legacy. For years, even decades the army and to a lesser degree, the police did not assist to provide security for the public in any normal sense, but were primarily predatory organs used by politicians and officers to pursue individual political aims and economic goals while perpetrating massive human rights abuses.[111]

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[107]See Amnesty International, *Democratic Republic of Congo: Illegal arms exports fuelling killings, mass rape and torture* AI Index: AFR 62/008/2005 5 July 2005.

[108]See Mike Borne, "Militarization and Conflict in The Great Lakes," in Owen Green et al, *Light Weapons and Peace Building in Central and East Africa* (London: International Alert, 1998), pp 5-15.
[109]This remark was made by one of the Congolese respondents during interviews with Congolese refugees .
[110]See UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the DRC 16th October, 2002. (S/2002/1146).
[111]See International Crisis Group, *Security Sector Reform in the Congo* Africa Report No 104 (Nairobi and Brussels: International Crisis Group, 2006), p 2.

The issue that emasculated the security apparatus in the past, confusion on the army's role, weak police, negligible civilian oversight, tribalism, unequal treatment, and rampant corruption were the same ones that plagued the security forces. Without external help the Congolese forces repeatedly proved ineffective against determined challengers as in the two Shaba wars (1977 and 1978), and against Laurent Kabila's AFDL (1998). The army which suffers from the same ailments was unable to resist on its own the Rally for Congolese Democracy (RCD) in 1998, or take on proxy militias of its own making such as the *mai mai* in Katanga.[112]Moreover, mismanagement contributes directly to violence. The poor and irregular payment of soldiers, for example, made the national army FARDC, arguably the single largest security threat for Congolese civilians.[113] In general, military operations are business opportunities for some commanders. In this context when soldiers are not paid or fed it leads to mass desertions and looting of villages.[114] Left to their own devices soldiers often turn to the local population for survival.

A control mechanism of the military court system in the Congo had its own problems. The high military court lacked a legal library and a courtroom and has not tried a serious crime since its invention in 2003.[115] Court martial in the provinces are mostly no better off; crimes committed by soldiers ranging from embezzlement to rape go unpunished. Commanders such as Jerome Kakwavu from Ituri and Gabriel Amirsis from the former RCD continued to serve although the UN and human rights groups have

[112]See International Crisis Group, *Katanga: Congo's Forgotten Crisis* op. cit quoted in International Crisis Group, *Security Sector Reform in the Congo, p 2.*
[113]International Crisis Group, *Katanga: Congo's Forgotten Crisis* op. cit p 14
[114]See International Crisis Group, *Escaping The Conflict Trap: Promoting Good Governance in The Congo* Africa Report No 114 20 July 2006 (Nairobi and Brussels: International Crisis Group, 2006), p 11.
[115]See Global Rights, "S.O.S Justice" August 2005, p 43.

compiled extensive documentation on their actions.[116] The failure by the DRC government to create a professional, truly unified army therefore contributed in a large measure to the continuing instability in the east and needlessly putting civilian lives at risk. An international gender analyst supported this view and suggested that the army's terrible living conditions including non payment of salaries resulted in increasing violence against civilians generally.[117] Security sector reform has been uneven and the reorganization and professionalisation of the services were not yet sufficient to deal with the broad violence. Moreover, army personnel were not been provided with proper training in their obligations under international law.

This case study has shown that the DRC conflict was fought in disregard to IHL and especially the protection of civilians. As a result, the civilians experienced various forms of abuse by combatants, which should not have been the case, bearing in mind the legal instruments protecting civilians. Although, the conflict was internal it was internationalized by the intervention of external actors, both state and non-state actors, consequently, this not only complicated the issues and dynamics of the conflict but it also complicated the applicable rules of IHL and hence, considerably affected the protection of civilians in DRC.

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[116]International Crisis Group, *Escaping the Conflict Trap: Promoting Good Governance in the Congo* Africa Report No 114 20 July 2006, op. cit *p* 12.
[117]See International Crisis Group "Beyond *Victim hood: Women's Peace Building in Sudan, Congo and Uganda*" op. cit p 9.

Chapter 4

A critical analysis of the role of IHL in protecting civilians in internal conflicts

Introduction

The previous chapter was on the case study; it provided a background to the conflict, the types of violations against civilians, actors responsible and the factors that underlay the violations. This chapter is a critical analysis of the role of IHL in civilian protection, drawing from the case study of DRC. It analyses the challenges of protecting civilians by observing the provisions in regard to this. In addition, it analyses the need for prosecutions and transitional justice in tandem with natural law, and the challenges posed to IHL by internationalized conflicts. Finally, it notes the developments in civilian protection.

Challenges relating to provisions on civilian protection

With respect to the normative ambitions of IHL, it seeks both to prevent and punish breaches of its provisions, and accordingly creates specific rights and responsibilities for all actors in a conflict. Fundamentally, its ambition is to "humanize" war by placing restraints on its legitimate conduct, one among it aims being the protection of victims of such conflicts.[1] The "grave breaches" provisions apply only in international armed conflicts. Common article 3 applies to any armed conflict, international or internal. If however, there is a conflict between a government and dissident armed forces, and the dissident group is organized under responsible command and exercises territorial control, then common article 3 is supplemented by Protocol II protections. This differentiation is less significant now, thanks to a decision by the ICTY: in the *Tadic* case, the appeals

[1]See William J. Fenrick, "Should Crimes Against Humanity Replace War Crimes" *Columbia Journal of Transnational Law* Vol. 37, 1999, pp 767-85:770.

chamber found that leading principles of international humanitarian law apply to both sorts of conflicts. Yet these specific principles and rules for international armed conflict are not transposed word-for-word into the laws of armed conflict. It is unclear whether certain provisions apply to both; generally, however, the more basic a principle is, the more likely it is to apply across the board.

Moreover, the norms that are applicable in the context of internal armed conflict generally apply to state actors only, and therefore have no application to individuals or non state actors such as members of guerilla forces and armed groups such as the ones mentioned in chapter three.[2] Besides, Protocol II is notoriously difficult to apply both because the threshold for material application of Protocol II is considered quite high, and because states that are engaged in internal armed conflicts almost always refuse to accept that the protocol applies to their situation.[3] Thus Protocol II, which was established in order to supplement the very rudimentary protections of common article 3, often proves a very unreliable source of protection for victims of internal armed conflict.

Fortunately, these apparent deficiencies of IHL have largely been overcome as a result of the establishment of the category of crimes against humanity.[4] First, as it is currently defined in both the ICTR Statute and the Rome Statute, the definition of crimes

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[2]Fortunately, this description is becoming less accurate with the passage of time. first , the main provisions of common article 3 and Protocol II now seem to apply to both state and non state actors as a result of the ICTR Statute (Art 4)and the Rome Statute (Art 25) , and as a result of the ICTY Appeal Chamber *Tadic* decision at paras 127 and 134, the Tribunal held that common article 3 and Protocol II, establish individual responsibility as a matter of customary IHL second , the Genocide convention and The Torture Convention already applies both to state and non state actors.

[3]For a lucid assessment of the difficulties in establishing when Protocol II applies, See Arturo Carillo, *"Hors de logique*: Contemporary Issues in International Humanitarian Law as Applied in Internal Armed Conflict". *International Review*.Vol 15 No I, pp 66-97.

[4] See Mark Freeman, International Law and Internal Armed Conflicts: Clarifying The Interplay Between Human Rights and Humanitarian Protections. *The Journal of Humanitarian Assistance* available at http://www.jha.ac./articles/a059.htm

against humanity has no nexus to armed conflict at all.[5] Although it is important to note that both statutes nevertheless require a nexus with "a widespread or systematic attack "directed against a civilian population."[6] Second, unlike both International Human Rights Law and IHL, the category of crimes against humanity applies both to state and non-state actors alike. Thus in the result, the protection provided by both International Human Rights Law and IHL, when combined with the supplementary protection afforded by the category of crimes against humanity, offers a substantial level of international legal protection for victims of internal armed conflicts.

Gasser [7] observes that the problem relating to the law of non-international armed conflicts is the almost total absence of institutions and procedures at international level ensuring compliance by the parties to the conflicts. Several obstacles explain this problem. Firstly, states often deny the applicability of IHL out of a reluctance to acknowledge that a situation of violence amounts to an internal armed conflict. This is probably borne out of a desire to preserve national sovereignty and hence being able to deal with internal affairs, which could be a threat to it. Given the choice, most governments will not invite international scrutiny in case this limits their fighting ability. In such situations, the sovereignty of the state makes it difficult to take such measures, which like international supervision are regarded as constituting interference in internal

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[5] The original definition against humanity in the Charter of the International Military Tribunal in Nuremburg contained an important limiting principle viz., that the tribunal could only assert jurisdiction over crimes against humanity committed before or during the war". For a detailed account of the evolution of the concept of crimes against humanity, with particular emphasis on the gradual elimination of the war nexus requirement, see Beth Van Schaak, "*The* Definition of Crimes against Humanity: Resolving the Incoherence *Columbia Journal of Transnational law*" Vol.37 No, 787.

[6] See Article of the Rome Statute and Article 3 of the ICRC Statute. As defined in these statutes, "crimes against humanity" include *inter alia*, the acts of murder, extermination, enslavement, deportation, wrongful imprisonment, torture and persecution.

[7] Hans Peter Gasser *Humanitarian Law; An introduction (*International Committee of the Red Cross: Geneva, 1993), p 75.

affairs and an encroachment on the absolute authority of government in the time of crisis. Consequently, protocol II is silent on the role of third parties in promoting its application.

Secondly, armed groups lack sufficient incentive to abide by IHL given that implementation of their legal obligation under this body of law is usually of little help to them in avoiding punishment under domestic law.[8] Although article 3 common encourages special agreement to bring into force all or part of the other provisions of the Conventions, the fact is that armed groups enjoy no immunity from domestic criminal prosecution from mere participation in hostilities (even if they respect IHL). In addition, the parties involved in these conflicts have changed, with the proliferation of non-state actors with uncertain chains of command, this makes it difficult to implement article 19,- that the Protocol shall be disseminated as widely as possible. As a result the actors become undisciplined easily. Moreover, foreign interference in many internal armed conflicts also creates confusion with respect to the legal qualification and therefore to the body of rules applicable to the conflict. This applied in the DRC conflict, an internationalized conflict. As noted in chapter three, several states intervened in the conflict. Mixed wars of this type pose challenges to international humanitarian law; consequently expediency is involved in deciding which rules are applicable, since the particular relations between various parties to the conflict have to be worked out. Besides, the Protocol does not recognize the existence of combatants and does not define the civilian population and civilian objects with reference to these concepts. The effect of this lack of definition is that provisions on the protection of civilian populations, which

[8]ICRC, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts* (Geneva: ICRC, 2003), 24.

constitutes part IV of Protocol II, hang somewhat in the balance. It is also considerably shorter than comparable provisions in Protocol I.

Finally, only provisions in article 3 common to the Geneva conventions stating that an impartial humanitarian body such as the ICRC may offer its services to the parties to the conflict, is the only IHL supervision mechanism that is expressly mandated to address situations of non-international armed conflict. Consequently, IHL implementation in internal conflicts become difficult and civilians continue to suffer and to be targeted with impunity. Under IHL that governs internal conflicts, civilians enjoy immunity from attack unless and for such a time as they take a direct part in hostilities.[9] This means that civilians should not take part in hostilities. Otherwise, they should reckon with the loss of protection and the use of force against them. However, difficulties emerge in what constitute "direct" participation in hostilities that would leave a civilian outside the realm of protection in internal conflicts.[10] This lack of clarity exposes innocent civilians to attacks and abuses.

Natural law theory and prosecutions of war crimes

This study is guided by natural law theory, which not only protects human dignity and entrenches individual criminal responsibility. As far as natural law is concerned, the victims of all the atrocities committed in DRC are not only entitled to protection but the perpetrators ought to be prosecuted.

A threshold decision in the prosecution of mass crimes is whether prosecutions should be pursued at the national or international level or both. Distinctive difficulties confront national justice systems in the handling of crimes of mass violence. These

[9]See Protocol II Part iv article 13(3)
[10]This problem is also inherent in international conflicts as observed by The 28th International conference of The Red Cross and Red Crescent op .cit p 9.

difficulties often include a paucity of qualified judicial personnel and, not infrequently, some continuing military threat that constrains the prosecution process. Such prosecutions typically require enormous prosecutorial and judicial resources at a time when the country's resources are already overburdened.[11] In addition, bias or the appearance of bias will often be associated with national-level prosecutions, particularly since the prosecuting government often will be a transitional one that has taken power from the regime under which the crimes were committed (as in the cases of Rwanda, Ethiopia, Argentina, and many others). This raises doubt on the value of national prosecutions. One alternative or adjunct to national-level prosecutions is trial before an international tribunal such as the *ad hoc* ICTY/R. As highlighted above the most significant contemporary development in humanitarian law and human rights law has been the establishment of these two tribunals to prosecute war criminals from the former Yugoslavia and Rwanda.

Transitional justice has risen to the forefront of international criminal law as a means by which countries seek accountability for mass atrocities or widespread human rights abuses.[12] IHL is increasingly perceived as part of human rights law applicable in armed conflicts. This trend can be traced back to the United Nations Human Rights Conference held in Tehran in 1968 which not only encouraged the development of humanitarian law itself, but also marked the beginning of a growing use by the United Nations of humanitarian law during its examination of the human rights situation in

[11]Madeline H. Morris, foreword of an international conference entitled "Justice in Cataclysm: Criminal Tribunals in the Wake of Mass Violence held on July 20-21, 1996 in Brussels, Belgium. Madeline H. Morris, The Trials of Concurrent Jurisdiction: The Case of Rwanda, *Duke Journal of Comparative &International Law*. Vol 7 (1997), pp 349-357.

[12]See Eric Stover and Harvey Weinstein. *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*. (New York: Cambridge University Press, 2004)

certain countries or during its thematic studies. The interlinking of human rights and humanitarian law can also be seen in the work of bodies responsible for monitoring and implementing international law. In this connection, it is interesting to note that in recent years the Security Council has been citing humanitarian law more and more frequently in support of its resolutions. The most recent example of this tendency can be found in its Resolution 808 (1993) on the conflict in the former Yugoslavia, in which the Security Council decided to establish an international tribunal[13] "for the prosecution of persons responsible for serious violations of IHL committed in the territory of the former Yugoslavia since 1991". These two bodies have addressed some gaping holes in humanitarian law and the protection of civilians. In the first place, they take legal notions like genocide out of the realm of theory and into the law court. Genocide was defined by the 1948 Convention but the lack of a criminal court meant that it could not be implemented. Both of the tribunals have a mandate to prosecute practitioners of genocide. In the second place, the two tribunals have advanced the notion that that individuals are responsible for their actions and cannot plead that they are acting under orders hence, entrenching the theory of natural law. Thirdly, the tribunals provide the international community with a way of punishing war crimes and crimes against humanity, hence, a significant step forward for the cause of international justice.[14]

Transitional justice and civilian protection

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[13]See W.P. Nagon, "International Criminal Law and the Ad-hoc Tribunal for Former Yugoslavia", *Duke Journal of Comparative & International Law*, vol. 6 (1995), pp. 127-65; William J. Fenrick, "Some International Law Problems Related to Prosecutions Before the International Criminal Tribunal for the Former Yugoslavia", *Duke Journal of Comparative & International Law*, Vol. No. 6 1995, pp. 103-25; See also V.S. Mani "The International Court and the Humanitarian Law of Armed Conflict", *Indian Journal of International Law*, Vol. 39 1999, pp. 32-46.

[14]See Payam Akhavan, "Enforcement of the Genocide Convention: A Challenge to Civilization," *Harvard Human Rights Journal*, spring 1995, Vol 8, pp 229-258.

Following a conflict, crimes that have exceeded the normal parameters of war behavior (*jus in bello)* must be dealt with before a society can begin the peace building process of reconciliation. Consequently, after elections and power sharing arrangements are in place in DRC the crimes committed against individuals and groups as highlighted above must be addressed. War crimes tribunals do not offer the accused a chance for forgiveness as truth and reconciliation commissions do. Tribunals do, however, offer victims and their families the opportunity to confront those responsible for what happened to them, and hopefully to put the horrors of war behind them. A tribunal can be a forum for honouring the memory of those lost, and punishing those responsible.[15] Based on generally agreed international standards of acceptable human behavior, they have introduced a new ethos of liberal legalism for dealing with war crimes.[16]

The international community has lauded large-scale efforts to use international legal structures as a means of "restoring" post-conflict societies. Through the international tribunals, and national trials, the Congolese people may be witness to the truth and thereby exercise themselves from the specters of the past. In summary, it is apt to quote the words of the Rwandan representative before the Security Council who pointed out that "it is impossible to build a state of law and arrive at true national reconciliation" without eradicating "the culture of impunity" which has characterized Rwandan society for so long.[17] Those "who were taught that it was acceptable to kill as

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[15]See Chris McMorran, "What International War Crimes Tribunals Are" in Guy Burgess and Heidi Burgess (eds) *International War Crimes Tribunals* (Colorado: Boulder Conflict Research Consortium, 2003). Available at http://www.beyondintractability.org/essay/int_war_crime_tribunals/

[16]See Gary Jonathan Bass, *Stay the Hand of Vengeance: The Politics of War Crimes Tribunals.* (Princeton: Princeton University Press, 2000).

[17]See The Situation Concerning Rwanda: Establishment of an International Tribunal for the Prosecution of Persons Responsible for Violations of International Humanitarian Law in the Territory of Rwanda and Rwandan Citizens Responsible for Such Violations Committed in the Territory of Neighboring States, U.N. Security Council Resolution, 49th Session., 3453rd mtg., at 14, U.N. Doc.S/PV.3453 (1994).

long as the victim was from different ethnic group or from an opposition party, cannot arrive at national reconciliation unless they learn new values" which can only be achieved "if equitable justice is established and if the survivors are assured that what has happened will never happen again."[18] Through punishment of "those responsible for the Rwandese tragedy," the tribunal "will help national reconciliation and the construction of a new society based on social justice and respect for the fundamental rights of the human person." These comments fit perfectly in the case of DRC and highlight the need for prosecution of those responsible for war crimes in the country.

Secondly, the establishment of a tribunal avoids any suspicion of wanting to organize speedy vengeful justice.[19] Instead of a victor's justice an international presence would ensure an exemplary justice that would be seen to be completely impartial and fair. Thirdly, an international tribunal makes it easier to get those criminals who have found refuge in foreign countries. This is a pragmatic consideration because many of the perpetrators, especially those in positions of leadership had fled DRC.[20] Therefore, consonant with the establishment of the tribunal as a chapter VII measure for the restoration of peace and security the punishment of past human rights abuses is an essential element in post conflict peace building in a society destroyed by division and strife.

The arrest and prosecution of former Rwandan leaders before the International tribunal should send a message to the potential or existing perpetrators of genocide in DRC that they will be held individually accountable for their crimes, irrespective of their

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[18] Ibid
[19] See UN doc S/PV 3435 at 14 (1994)
[20] See Payam Akhavan, The ICTR: the Politics and Pragmatics of Punishment, *American Journal of International Law*, Vol. 90, No. 3 1996 pp 501-510.

official position. It should become clear to all that the international community will diligently and uncompromisingly pursue such genocidal killers. Moreover, war crimes tribunals act as a deterrent to potential war criminals. The ICC prosecutor's probing into crimes committed in the DRC had a deterrent effect on armed groups. In July 2003 Moreno-Ocampo identified Congo as potentially one of the first cases to come before the ICC, after receiving reports describing the carnage in the remote Ituri province, including the mutilation of bodies and cannibalism.[21]

Similarly, War crimes tribunals offer a rare chance for the world's leaders and citizens to scrutinize both the deplorable decisions made by particular leaders, and the atrocities committed by the soldiers and agents of those leaders. Without such a forum, there would be no method for assuring that the masterminds and perpetrators of genocide and other war crimes are justly punished.

Tribunals also give victims and their families an opportunity to regain a sense of power that may have been lost resulting from a war crime.[22] It is empowering for victims to stand up in a court of law and identify those who wronged them. A war crimes tribunal can also force forgotten or hidden atrocities to be retold by survivors. In this way, war criminals living free of judgment are finally forced to accept responsibility for their actions and be judged for what they have done.

For a country attempting to make a transition from a repressive regime to a democracy, war crimes tribunals offer citizens and leaders the opportunity to put their faith in an equitable rule of law. Countries that truly wish to become modern democracies

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[21]See Cherie Booth Blair, The Impact of International Criminal Court in Strengthening Worldwide Respect for Human Rights Speech Given at HEI on July 1 2004 (Geneva: Graduate School of International Studies).
[22]See Chris McMorran, "What International War Crimes Tribunals Are" in Guy Burgess and Heidi Burgess (eds) *International War Crimes Tribunals* op. cit.

must accept the rule of democratic law and apply it to even their most powerful criminals. While this process takes an enormous effort of national will, states that successfully conduct tribunals within the bounds of such laws prove they can function without reverting to the undesirable methods of repression and violence. Thus, war crimes tribunals have the potential to help emerging democracies discover the benefits of a strong legal system while reconciling past atrocities.[23]

Finally, if all members of a society can agree on what is unacceptable by trying its war criminals, then it is easier for the society to agree on what is acceptable. A successful war crimes tribunal allows the past to be laid to rest and a peaceful future forged from its results. The political significance for world order of the linkage between international criminal justice and the maintenance of peace should not be disparaged. In effect, the establishment of the Yugoslav and Rwanda Tribunals is an unprecedented institutional expression of the indivisibility of peace and respect for human rights.[24] It represents a radical departure from the traditional *realpolitik* paradigm that has so often and for so long ignored the victims of mass murder and legitimized the rule of tyrants.

Challenges to transitional justice

Despite the significance of the Yugoslav and Rwanda Tribunals, the path ahead is fraught with obstacles and difficulties. A paradigm shift at the level of policy making does not instantaneously transform everyday reality, especially in a society which has experienced genocide. The question is, therefore, whether and to what extent an *ad hoc* international criminal tribunal can contribute to the reconciliation process in the wake of mass

[23]See Neil J. Kritz, *Transitional Justice: How Emerging Democracies Reckon With Former Regimes.* (Washington: United States Institute of Peace, 1995).
[24]See Payam Akhavan, "Justice and Reconciliation in the Great Lakes Region of Africa: The Contribution of The International Criminal Tribunal For Rwanda" *Duke Journal of Comparative & International Law* Vol. 7:325 p 3.

violence. Many argue that war crimes tribunals offer no deterrent to potential criminals whatsoever. People with strong convictions against a certain religious or ethnic groups will likely not feel any less hatred for that group just because a possible tribunal looms in the future.[25]

In addition, war crimes tribunals do not alleviate the underlying causes of the conflict. In fact, tribunals can escalate conflict, especially in a multi-ethnic society. In cases of genocide, those accused of war crimes are usually all from one ethnic group. To this group, a war crimes tribunal can appear to be a trial against their ethnicity, not just an individual from their group. This is especially true when the judicial system fails to fairly represent the whole society. For example, Rwandan Hutus accused of killing Tutsis would doubt the possibility of a fair trial if only Tutsis were running the tribunal. Other Hutus, including those not accused, would likely feel the same way. Thus the war crimes tribunal could act as a wedge driving the two groups further apart. Within the DRC conflict it was observed in chapter three that ethnic strife between Lendu, Hema and Banyamulenge is vicious, hence, prosecutions are unlikely to address the underlying issues generating conflict between them, for example, issues of land and citizenship.This idea leads to another complaint about war crimes tribunals: that they are ineffective in transforming a fractured society into one of stability and peace War crimes tribunals necessarily demonize individuals and sometimes whole groups, further separating parties, instead of building peace.[26]

Possibly the most powerful argument against war crimes tribunals is that they offer only the victors justice. What was most obviously missing following World War II

[25]See Chris McMorran, "What International War Crimes Tribunals Are" in Guy Burgess and Heidi Burgess (eds) *International War Crimes Tribunals* op. cit.
[26]See Desmond Tutu Mpilo, *No Future without Forgiveness*. (New York: Doubleday, 1999).

was not Hitler at Nuremberg, but a trial for Americans, French, British, and Russian individuals who committed acts that would have been considered war crimes had the allies lost the war. The fire bombing of Dresden and the use of atomic weapons on Hiroshima and Nagasaki are clear examples of acts for which allied leaders would have been tried had the war ended in favor of the Germans and Japanese. While it is easy and satisfying to put the enemy in prison for what he or she has done, it does not seem entirely fair if all those who participate in a war are not held to the same standards. In fact, one of the reasons that the United States has so far failed to support an international war crimes tribunal, the International Criminal Court, is fear that the court would find U.S. officers guilty. The United States also fears that this court could be used for political revenge against the world's only superpower.[27]

Conducting judicial proceedings at the international levels is a more complicated task than at the national level. The cases at the *ad hoc* tribunals are legally and factually complex.[28] Tribunals face unique challenges; hence insufficient evidence, unclear testimony, unsure witnesses, and the inability to directly link crimes with individuals due to chains of command are all factors that can lead to war criminals walking free, with full grace of the court. The Rwanda tribunal as itself been accused of being too expensive and has dragged on for too long, it has already cost over a billion dollars.[29] The Rwandan government has also been blamed for bullying and dragging out the process. For example, the trial of the former commerce minister Justin Mugenzi - facing at least ten

[27]See Chris McMorran, "What International War Crimes Tribunals Are" in Guy Burgess and Heidi Burgess (eds) *International War Crimes Tribunals* op. cit.
[28]See letter to the President of the Security Council from the President of the ICTR dated 5th December 2005 p 14
[29]See Stephanie Nieuwoudt, Slow *Progress at Rwandan Tribunal,* (London: Institute for War and Peace 2006). Dr Kithure Kindiki in an interview with the researcher argued that the ICTR is not only slow but it has also concentrated on the justice of the rich and the powerful and hence more resources and innovations are needed to expedite with the law, interview conducted on 2nd February 2007 in Nairobi.

specific genocide charges and a charge of murder - could not proceed in May 2006 because the government failed to honour its undertaking to transfer Agnes Ntamabyariro, another former minister who is to be a defence witness for Mugenzi, to Arusha. Ntamabyariro is in custody in Rwanda for genocide crimes.[30]

Independent observers and those working within the ICTR are concerned that cases currently on trial will not be finished before the tribunal is due to be wound up at the end of 2008. In an effort to lighten the load, the ICTR has asked several countries - including Norway, South Africa, Botswana and Senegal - if they would accept some cases. However, there are real problems with transferring cases. Norway indicated that it was willing to try Michael Bagaragaza, the former director general of the state-run tea industry regulator who is alleged to have ordered tea agency workers to kill hundreds of Tutsis who were seeking refuge in a church and a factory. But the tribunal ruled that Norway does not have genocide laws, and therefore could not try a person accused of genocide.[31] The tribunal hence ascertained the fact that the laws in which some of the suspects are present may not confer jurisdiction over these suspects or the crimes they allegedly committed suspects

Another stumbling block is that most African countries seem to be reluctant to take cases, because it might jeopardize their diplomatic relations with Rwanda, besides, most of these countries' judicial systems are under strain from the prosecution of their own accused.[32] Despite the already crowded docket and formidable time constraints, there are many more individuals who could face either the tribunal or national courts. The Rwandan government in published a list of 171 people being sought in connection with

[30] Ibid
[31] Ibid
[32] See letter to the President of the Security Council from the president of the ICTR dated op .cit p 11

the killings, many of whom have left the country. These impediments and difficulties have a crucial bearing on the DRC conflict as they could affect the force of law, bearing in mind the large number of victims and perpetrators. This is made even difficult by the size of DRC, which is the size of Western Europe, and by the fragmented armed groups unlike Rwanda that was more of a conflict between two ethnic groups.

Civilian protection in internationalized conflict

Chapter Three highlighted a key feature of the conflict in DRC; the involvement of Rwanda, Uganda, Burundi, Angola and Zimbabwe in the conflict, due to differing strategic reasons, as a result the conflict was not purely internal as external actors brought in international dimension to the conflict, thus they internationalized the conflict. Ultimately, these actors have to be featured not only in peace agreements but also in the application of IHL and hence in the protection of civilians.

International humanitarian law applies different rules depending on whether an armed conflict is international or internal. Commentators agree that the distinction is "arbitrary,[33] undesirable,[34] difficult to justify[35] and that it "frustrates the humanitarian purpose of the law of war in most of the instances in which war now occurs".[36] The term "internationalized armed conflict" describes internal hostilities that are rendered

[33]See George H. Aldrich "The Laws of War on land", *American Journal of International law* Vol. 94, No. 1, 2000, 42-63: 62. "Reality can be messy, and armed conflicts in the real world do not always fit neatly into the two categories – international and non-international – into which international humanitarian law is divided.

[34]Ingrid Detter, The *Law of War*, (London: Cambridge University Press, 2002), p. 49. It is difficult to lay down legitimate criteria to distinguish international wars and internal wars and it must be undesirable to have discriminatory regulations of the law of War for the two types of conflict."

[35]See Colin Warbrick and Peter Rowe, "The International Criminal Tribunal for Yugoslavia: The Decision of the Appeals Chamber on the Interlocutory Appeal on Jurisdiction in the *Tadic Case*", *International & Comparative Law Quarterly*. Vol. 45, No. 3, 691-701. Jul., 1996.

[36]Michael Reisman and James Silk, "Which Law Applies to the Afghan conflict?" *American Journal of International law*, Vol. 82, No. 3, 1988, pp 459-486:465.

international.[37] The factual circumstances that can achieve that internationalization are numerous and often complex. The term internationalized armed conflict includes war between two internal factions both of which are backed by different states; direct hostilities between two foreign states that militarily intervene in an internal armed conflict in support of opposing sides; and war involving a foreign intervention in support of an insurgent group fighting against an established government.[38] One of the most transparent internationalized internal conflicts in the recent history includes the intervention undertaken by Rwanda, Angola, Zimbabwe, Uganda, Burundi and others, in support of opposing sides of the internationalized armed conflict in the Democratic Republic of Congo (DRC) since August 1998.[39]

As highlighted in Chapter Three, the conflict in DRC was conducted with the involvement of external actors. Internal conflicts that are not associated in some way with international events are unknown, and a few internal conflicts are conducted "behind closed doors". There is almost invariably some form of foreign state involvement in internal armed conflicts.[40] The influence exercised by third party states takes various forms and may go as far as armed intervention. The international confrontation then becomes a "proxy war" often waged in the interests of outside powers. International law as it is generally interpreted raises no objection to the intervention of a third party state on

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[37]For more on this see Makumi Mwagiru, Conflict and Peace Management in the Horn of Africa: Theoretical and Practical Perspectives. A Paper Presented at the International Resource Group Conference. (Mombasa, 1998).

[38]See D. Schindler, "International Humanitarian Law and Internationalized Internal Armed Conflicts", *International Review of the Red Cross*, No. 230, 1982, pp 255-265.

[39]See Martin Shaw, "From the Rwandan Genocide of 1994 to the Congo Civil War", *African Rights, Rwanda: Death, Despair and Defiance*, London: 1994.
available at http://www.sussex.ac.uk/Users/hafa3/rwanda.htm

[40]According to Ingrid Detter "... most apparently 'internal wars do, in fact, receive some kind of outside support." Detter, *op. cit* p. 40. See also Lindsay Moir, *The Law of internal Armed Conflict* (London: Cambridge University Press, 2000), p. 46: Even in the post-Cold War international order, outside involvement in internal armed conflicts is still far from uncommon.

the side of the government and at its invitation. Intervention on the side of the insurgent however is considered as unwarranted interference in the internal affairs of the state concerned and is thus contrary to international law.[41]

Civil wars that become internationalized non-international armed conflicts pose unusual problems for international humanitarian law.[42] The law developed to determine this "internationalization", has created convoluted tests that in practice are near impossible to apply. The ICRC attempted to have law supplemented with specific rules taking account of this mixed type of war but to no avail. In practice, the law must be satisfied with pragmatic interpretations, on the basis of which rules applicable for the particular relations between the various parties to the conflict have to be worked out. Generally speaking, it is desirable for the law on international conflicts to be applicable, if and for as long as the armed forces of the third party states are involved in the conflict, for the simple reason that humanitarian problems arise in the same way as in an ordinary international conflict and must be resolved accordingly.

The legal position could be summed up as follows: between the government and the insurgents, article 3 and Protocol II appllies; between the government and a third party state intervening on the side of the insurgents, the law relating to international conflicts becomes applicable, between the third-party state intervening on the government side and the insurgents, article 3 and Protocol II appllies and between states intervening on both sides, the law relating to international conflicts must be observed.[43]

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[41]See Michael B. Akehurst, "Civil War", in Bernhardt (Ed): *Encyclopaedia of Public International Law*", Vol. 3, 1982, pp 88-93.
[42]See Hans-Peter Gasser, "Internationalised Non-International Armed Conflict: Case Studies of Afghanistan, Kampuchea and Lebanon, *"The American University Law Review* No. 33, 1983, pp 145-161.
[43]Hans-Peter Gasser *International Humanitarian Law; An introduction (*International Committee of the Red Cross: Geneva, 1993

This solution, worked out from the lessons of experience, seems obvious (with the possible exception of the third-named relationship, which does in fact have an international component). Yet states and parties to civil wars have so far scarcely heeded it.

The difficulty from a humanitarian perspective is that internationalized armed conflicts have special features distinguishing them from both international and internal armed conflicts. Once internationalized, it is difficult to determine the applicable law as relationships and military presence change.[44] Moreover, the international/non-international dichotomy in international humanitarian law has proved susceptible to incredible political manipulation,[45] often at the expense of humanitarian protection. There is absolutely no basis whatsoever for a halfway house between the law applicable in internal armed conflicts and that relevant to international warfare.[46] Therefore, the application of international humanitarian law to internationalized armed conflicts involves characterizing events as either wholly international or wholly non-international according to the various tests espoused in the Geneva Conventions, their Protocols and customary international law.

In the context of internationalized armed conflicts, which by definition contain both international and internal elements, determining which set of rules applies and to what aspect of the conflict is critically important. The substantive legal differences, specifically, the difference between the substantive regulation of international armed

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[44]Hans Peter Gasser, "Internationalized Non-International Armed Conflicts: Case studies of Afghanistan, Kampuchea, and Lebanon", *American University law Review*, op.cit.

[45]See James G. Stewart, Towards A Single Definition of Armed Conflict In International Humanitarian Law: A Critique of Internationalized Armed Conflict, *International Review of the Red Cross* No. 850, pp 313-350.

[46]See Christine Byron, "Armed conflicts: International or Non-International?", *Journal of Conflict and Security law*, Vol. 6, No. 1, June 2001, pp 63–90:87.

conflicts and the laws applicable in non-international armed conflicts is striking. This is a reflection of the historical bias in international humanitarian law towards the regulation of inter-state warfare.[47]

In regard to jurisdiction, in *Prosecutor vs. Furundzija*[48] case in ICTR, the court held that it was provided with jurisdiction over violations of the laws of war regardless of whether they occurred within an internal or an international conflict. In addition, the ICTY appeals chamber in the *Tadic* case confirmed that customary international law had imposed criminal responsibility for serious violations of humanitarian law governing internal and international armed conflicts and observed that a *prima facie* internal conflict becomes international in character when another state intervenes in the conflict through it troops and when some of the participants in the internal armed conflict act on behalf of another state.[49] Moreover, the appeals chamber in the *Tadic* case noted that international legal rules had developed to regulate internal armed conflicts for a number of reasons, including the frequency of civil wars, the increasing cruelty of internal armed conflicts, the large scale nature of civil strife making third party involvement more likely and the growth of international human rights law. Thus the distinction between inter-state and civil wars was losing its value so far as human beings were concerned.[50] Indeed the, one of the major themes of IHL has been the growing move towards the rules of human rights law and vice versa.[51] There is a common foundation in the principle of respect for human

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[47]See for example Antonia Cassese, *International Law in a Divided World* (Oxford: Oxford University Press, 1986), p 280.
[48]*Prosecutor vs. Furundzija* case No . IT -95-17/1 (decision of Trial Chamber II, 10 December, 1998);121 ILR, pp.213,253-4.
[49] See *Prosecutor vs. Tadic* IT -94-1-AR 72,2 October 1995, p 70:105 ILR, and p. 419.
[50]Case No IT-94-1-AR;105 ILR,PP.453,505 ff
[51] See Rene Provost, *International Human Rights and Humanitarian Law* (Cambridge: Cambridge University Press, 2002), See also Lindsay Moir, *The Law of Internal Armed Conflict* (Cambridge, Cambridge University Press: 2002), chapter 5.

dignity in tandem with the theory of natural law.[52] Moreover, article 3 common to the Geneva conventions and Protocol II are seen as a codification of fundamental human rights law in times of conflict.[53] Consequently, the crimes noted in DRC are not only against IHL but also are also abuses against the human rights of the non-combatants.

The inter- American Commission of Human Rights in *Coard v. USA* captures this development eloquently. It noted that there was an integral linkage between the law of human rights and humanitarian law because they share a "common nucleus of non-derogable rights and a common purpose of protecting human life", and there may be a substantial overlap in the application of these bodies of law.[54] Consequently, the well-developed international monitoring procedures and implementation mechanisms of human rights treaties supplement the more "indirect" effects of the law of Geneva. Furthermore, the more visible campaigns for the protection of human rights can facilitate the work of humanitarian organizations in areas of conflict. Although, IHL and human rights have separate existence, in civil war they must complement each other and thus provide better protection for the victims

Developments in civilian protection

The developments in the law of war over the past decade have greatly expanded both the protections accorded to civilians and there is a common foundation in the principle of respect for human dignity and scope of applicability of these regulations, especially in response to highly complex conflicts such as those in Bosnia, Rwanda and Kosovo. In the former Yugoslavia, the ICTY appeals chamber found in the *Tadic* case that "armed conflict exists whenever there is a resort to armed force between states or protracted

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[52] *Prosecuter vs Furundzija*
[53] Hans Peter Gasser *International Humanitarian Law; An introduction* op. cit p 78
[54] See *Coard v. USA* case No .10.951;123ILR, pp.156,169

armed violence between governmental authorities and organized armed groups or between such groups within a state." This definition covers all contemporary uses of force including traditional interstate war, civil wars, insurgencies of all kinds, and both domestic and international acts of terror. In addition, the trial chamber of the International Criminal Tribunal for the Former Yugoslavia (ICTY) held in 1996 that: "The rule that the civilian population as such, as well as individual citizens, shall not be the object of attack is a fundamental rule of international law applicable to all armed conflicts irrespective of their characterization as international or non-international."

In general, the jurisprudence of the *ad hoc* international tribunals has greatly expanded civilian protection law by relaxing the requirement that there be armed conflict and applying these rules to internal and international armed conflicts.[55] By expanding well beyond traditional organized armed violence to a definition of "armed conflict" broad enough to include violence traditionally the province of police rather than soldiers, the law of war lays the foundation for an international legal principle protecting individuals from violence of almost any kind. It can therefore be argued, that the civilians in DRC were entitled to protection by IHL from both the ethnic fighting and the larger a war involving external actors.

Further developments in international criminal law have strengthened the laws of war, expanding this liability to the personal level holding individuals responsible for their own acts and for those they command or supervise. For example, in its 2000 decision in the *Kupreskic case*, which tried *Kupreskic* for acts of ethnic cleansing against Yugoslavian Muslims, the ICTY tribunal described "the protection of civilians" in time

[55]See Tazreena Sajjad, Addressing the Gray Areas of International Humanitarian Law, Swords and Plough Shares, A Journal of International Affairs Vol. XIII No.2, essay 3, Fall 2003 available at http://www.american.edu/sis/students/sword/Current_Issue/essay3.pdf.

of armed conflict as "the bedrock of modern humanitarian law," holding Kupreskic personally accountable for violations.[56] Nearly every judgment of the ICTY to date has found the victims part of a protected civilian population and held the perpetrators criminally responsible for crimes against humanity or war crimes. Similar instances are found in the International Criminal Tribunal for Rwanda (ICTR) where charges have been brought against individual actors for crimes against humanity, war crimes and/or crimes of genocide. This process of the individualization of international law is crucial for the operation of the principle of civilian inviolability. Therefore, all the combatants-whether military leaders or subordinates who committed the grave breaches highlighted in Chapter Three are individually accountable for their crimes.

In addition to international tribunals, national courts have joined in the prosecution of individuals for violations of civilian protection law under the principle of universal jurisdiction. Historically invoked in cases of piracy, national courts are now using universal jurisdiction legal principles to prosecute crimes against civilians for crimes of genocide or crimes against humanity. The Spanish request for the extradition of Augusto Pinochet to stand trial for acts of torture committed while he was president of Chile is one famous example of this trend. Similarly, Belgium has convicted individuals of war crimes against civilian populations in Rwanda, and Germany has prosecuted war crimes against civilians in Bosnia. Most recently, Rwanda has begun the process of setting up a nationwide system of community courts to try more than 100,000 suspects in the genocide. In line with this trend DRC ought to indict individuals responsible for abusing the inviolability of civilians through national courts and hence mitigate the weaknesses of international tribunals highlighted above. However, complexities are

[56] *Prosecutor vs Kupreskic op.cit.*

bound to arise due to the fact that, individuals from state actors involved in the conflict might be protected by their own states from prosecution. As a result, cooperation is needed from these other states to ensure that it not Congolese nationals only who are held accountable, as their armies are equally liable.

The conflict in DRC has underlined once again issues to do with human rights, civilian protection, the rule of law and the nature of justice in war torn countries. These are to be dealt with both as contributory causes of conflict and as problems to be dealt with in any post conflict situations. There should not only be a prior determination of unlawful conduct but also a mechanism for the effective enforcement of law in a systematic manner, so as to avoid a society where life is nasty, brutish and short. The legacy of violence in DRC should be eschewed especially in the post-conflict situation. Unless the rule of law is strengthened so that people feel secure, the process of reconciliation is tricky. But if the rule of law is to be upheld in the transition from conflict to normalcy, the fundamental question is about how it should be done: whether it shall be retributive justice, or total reconciliation that automatically buries all the past. This needs a clear appreciation of the retributory and conciliatory schools of thought regarding justice in transition.[57] However, unless some sense of justice and some practical restorative activities are invoked in the post-war situation, the reality of peace and the arrival of the rule of law will remain illusionary. Yet without the later peace is unreal as Thomas Jefferson once observed "while the laws shall be obeyed all will be safe". In essence mediators in any conflict should not be so desperate to broker peace to the extent of glossing over the issue of accountability. Peace processes should not undermine justice, and those who are responsible for atrocities must pay for their crimes

[57] Interview with Dr Kindiki on 2nd February, 2007.

not only to fulfill the requirements of international law but also heal the wounds of the victims, establish credibility of new rulers, establish standards of protection, act as a deterrent to future violations, break the military power and make a symbolic break with the past.

Chapter five

Conclusions

Reviewing the process of international humanitarian law in the last century, with regard to protection of civilian, in situations of conflict, is a source of hope. That the recognition of individual criminal liability is no longer excused by state immunity is a further indication that in times of conflict, warring groups are and will continue to be held to higher standards of morality. Despite these developments, it is crucial to recognize that full non-combatant protection during conflict through international legal mechanisms has not yet arrived. Conflicts today, as have been illustrated in this study, are constantly changing in character, as are the involved actors. Often, labelling armed violence, as an internal armed conflict is a political decision, which can retard effective responses by the international community to protect civilians caught between factions. The fact that conflicts can no longer be clearly divided into international or internal definitions and made subject to different provisions in international humanitarian law indicates a crucial need for the international community, and for the international legal framework to be even more diligent in recognizing, addressing, and mitigating the concerns of non-combatants. The face of tomorrow's conflict is that of internationalization of disputes within a territory, and the future of human rights can be further compromised if legal norms do not respond accordingly.

Some commentators feel that the ICC represents one of the most important advancements in human rights protection since the adoption of the 1948 Universal Declaration of Human Rights and the most significant step for international justice since the Nuremberg Tribunal, and that the Court will be an effective mechanism for bringing

to justice those responsible for the most serious human rights crimes, genocide, war crimes and crimes against humanity.[1] For example, Thomas Lubanga Dyilo a national of the Democratic Republic of the Congo (DRC) and alleged founder and leader of the *Union des Pastriotes Congolais* (UPC) was arrested and transferred to the International Criminal Court (ICC) on 17 March 2006. He has been charged with committing war crimes under article 8 of the Rome Statute of the International Criminal Court committed in the DRC since July 2002, including, "enlisting and conscripting children under the age of fifteen and using them to participate actively in hostilities". This is a welcome first step towards ending impunity for crimes against humanity and war crimes committed in the DRC on a vast scale in the past decade.[2] The arrest heralds a new chapter in the fight against impunity in Africa and sends a message that those involved in human rights violations will be brought to account.[3]

The International Criminal Court has signed a cooperation agreement with the Congolese government and is focusing on Ituri. The DRC transitional government has referred the serious human rights crimes in DRC to the office of the prosecutor of the International Criminal Court. However, it has a mandate and resources to deal only with those most responsible for atrocity crimes, and so is likely to prosecute only a handful of individuals over the next few years. Many more need to be brought to account, and a new mechanism is needed to complement its efforts and address impunity more

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[1]Rajinder Sachar, International Humanitarian Law With Particular Reference To International Criminal Court, *International Human Rights Law Journal*, 2001.
available at http://www.worldlii.org/int/journals/ISILYBIHRL/2001/1.html
[2]Interviews with Congolese refugees in Nairobi, however most respondents observed that this was still too little as there are many war lords who are still free.
[3]See Amnesty International, Democratic Republic of the Congo: International Criminal Court's first arrest must be followed by others throughout the country. 20 March 2006 AI Index: AFR 62/008/2006

systematically.[4] Widespread abuses of human rights and IHL will not stop as long as those who commit them are not held responsible for their acts.[5] Those who bear the ultimate responsibility for these and other massacres remain in high places - including in the Congolese government in Kinshasa and senior military commanders in neighboring Rwanda and Uganda.[6] A recent report from the UN Secretary General on the protection of civilians in armed conflict stated that societies in conflict expect and deserve the fruits of peace, not merely an end to fighting. It went on to argue that justice is critical to that peace; impunity can be a dangerous recipe for sliding back into conflict.[7]

The Yugoslav and Rwandan tribunals have set the precedence for the protection of civilians through increased individual accountability. This momentum cannot be lost. Instead, it should garner further support to include both state- and non-state actors equally in cases of IHL and International Human rights law. In many cases, the provisions for trying individuals for IHL violations do exist; in others, recent developments have indicated precisely where the shortcomings need to be addressed. A more stringent application of IHL in times of conflict is needed. Ultimately, protecting human life in times of war is a solemn promise today's community should make to the human rights movement of the future.

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[4]International Crisis Group, *Security Sector Reform in the Congo* op. cit p 1
[5]Interview with DR Kindiki on 2nd February 2007

[6] See Steve Crawshaw London *Congo: Bringing Justice to the Heart of Darkness* Human Rights Watch, also Published in *The Independent*.

[7]See Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, S/2004/431, May 28, 2004.

This study has observed that, internal armed conflict in resource-rich countries is a major cause of human rights violations around the world.[8] When unaccountable, resource-rich governments go to war with rebels who often seek control over the same resources, pervasive rights abuse is all but inevitable. Such abuse, in turn, can further destabilize conditions, fueling continued conflict and extreme deprivation. Factoring the greed of governments and systemic rights abuse into the "greed vs. grievance" equation does not minimize the need to hold rebel groups accountable, but it does highlight the need to ensure that governments and mining companies too are transparent and accountable.

The DRC conflict has been prolonged and exacerbated by the presence of natural resources exploited not only armed groups but also foreign companies; civilian suffering was extended in the pursuit of this objective. Fundamentally, proper management of revenues is an economic problem, but it is an economic problem that also has political dimensions and requires political solutions. Thus, requiring political will and pressure, including targeted U.N. sanctions where appropriate, in addition to better guidelines and enforcement measures such as prosecutions for those responsible and reparations for the victims.

International companies are among those benefiting from access to gold rich areas while local people suffer from ethnic slaughter, torture and rape. Corporations need to ensure their activities support peace and respect for human rights in volatile areas such as northeastern Congo, not work against them. They need voluntarily to publish their payments to governments, to enhance transparency.

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[8]Arvind Ganesan and Alex Vines, *Engine of War, Resources, Greed and the Predatory State* op. cit

While the immediate establishment of yet another *ad hoc* international jurisdiction for DRC[9] may be too burdensome for a Security Council experiencing atrocity fatigue, the international community should already put into place a mechanism for the systematic collection of evidence, both as deterrence and a means of expediting prosecutions at a later stage as circumstances require. One possible option would be for the Security Council to establish a Commission of Experts, which, with relative organizational efficiency and cost-effectiveness, could prepare the stage for prosecutions once the moment is opportune. The prosecution of genocidal crimes in DRC however, should not be conditional on any particular political outcome, although it may be necessary to await a propitious political climate. If leaders who have already committed mass killings are allowed to enjoy impunity, it will be extremely difficult to allow the voices of moderation and reconciliation to prevail on the political stage.[10]

The ICC should investigate the links between individuals and armed groups involved in natural resources extraction who may have contributed to war crimes and crimes against humanity in DRC and prosecute those most responsible for the violations. In addition, further considerations of substantive aspects of a single law of armed conflict will be essential in the development of greater humanitarian protection during internationalized armed conflict.

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[9]Dr Kindiki noted that the ICTR has no mandate to prosecute those responsible for war crimes in DRC as it is established by a statute with a specific mandate..

[10]Dr Kindiki is of the opinion that prosecutions should do hand in hand with reconciliation. In an interview conducted by the researcher on 2nd February 2007

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