

**RWANDAN REFUGEES IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND  
THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW DURING THE  
CONGO WARS**

By

RUTAGENGWA Oswald

A dissertation

Submitted in fulfillment of the requirements for the degree  
of Masters of International Law (LLM)

at the

University of Pretoria, South Africa

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Prepared at the Faculty of Law, University of Pretoria

under promoter ship of Mr Gus Waschefort

## DECLARATION

I hereby declare that this dissertation is my original work and that it has not been submitted for the award of a degree at any other University or institution

Signed: -----

RUTAGENGWA Oswald

Date: -----

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I acknowledge with thanks the enormous support I received from the following people while undertaking this study: my family especially MUKANDENGO Claudine, adorable wife for the time you spent without me; (2) My work Institution for sponsorship. Deserving special mention is Mr Gus Washfort who supervised this work.

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## ABREVIATIONS

DR	Doctor
DRC	Democratic Republic of the Congo
FAR	<i>Forces Armées Rwandaise</i>
FAZ	<i>Forces Armées Zairoise</i>
FDLR	<i>Force Démocratiques pour la Libération du Rwanda</i>
FIDH	International Federation of Human Rights
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for former Yugoslavia
OUA	Organisation of African Unity
RDF	Rwanda Defence Forces
RPA	Rwanda Patriotic Army
RPF	Rwanda Patriotic Front
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees



## SUMMARY

### **RWANDAN REFUGEES IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE APPLICATION OF HUMANITARIAN LAW DURING THE CONGO WARS**

In this study, a legal analysis is presented of the responsibility of the RPA,<sup>1</sup> FDLR,<sup>2</sup> and FAZ<sup>3</sup> for military operations conducted by them during the two Congo Wars (Congo War I and II) in the Democratic Republic of the Congo.<sup>4</sup> In particular, an enquiry will be undertaken into the lawfulness of the killing of Rwandan refugees during these military operations.

This will be achieved by looking at the requisite International Humanitarian Law and International Human Rights Law governing the protection of refugees in relation to the conduct of hostilities. Specific emphasis will be placed on the prevailing facts and circumstances relevant to the killing of refugees during the wars, and evidence provided by key witnesses will be relied upon to shed light on the situation on the ground.

The study will examine the legal implications of the actions of the parties involved. It will look at who should be held accountable for the violations of Human Rights and Humanitarian Law in relation to the killing of refugees. Finally, certain recommendations will be made to address the deficiencies in the law in relation to the protection of civilian, especially refugees during armed conflict.

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<sup>1</sup> RPA (Rwanda Patriotic Army) was the name of the Army forces of Rwanda before and during its intervention in the DRC. However, they are now called the Rwandan Defence Forces (RDF).

<sup>2</sup> FDLR (*Forces Démocratiques pour la Libération du Rwanda*) was the initial Armed Force of Rwanda (FAR), the Armed Forces of the overthrown genocidal government which later became known as the FDRL.

<sup>3</sup> FAZ (*Forces Armées Zairoises*), this was the name of the Armed Forces of the Mobutu regime.

<sup>4</sup> Congo War I began when the Rwandan Government sent its troops to The DRC in November 1996, and Congo War II began when the Rwandan Government sent its troops for the second time in August 1998. See the UN Mapping Report on Congo (June 2010) 13-14.

# RWANDAN REFUGEES IN THE DEMOCRATIC REPUBLIC OF THE CONGO AND THE APPLICATION OF INTERNATIONAL HUMANITARIAN LAW DURING THE CONGO WARS

## 1. Background to the Study

### 1.1 Motivation for the Research

During my participation in the International Conference on the 1948 UN Convention Under Siege,<sup>5</sup> different national and international speakers, predominantly eye witnesses, shared and explained how and why the Rwandan Military Forces went to the Democratic Republic of Congo (DRC).<sup>6</sup> It also brought to light the facts of what was happening on the ground during Congo War Congo War II and I.<sup>7</sup> During this conference, I gained a better understanding of how hostile the environment was for the parties involved; the Rwanda Defence Forces (RDF),<sup>8</sup> and the former Government of Rwanda, known as the “*Forces Démocratiques de Libération du Rwanda*” (FDRL).<sup>9</sup> I also gained insight into how refugees were affected by the conflict. Moreover, the different scholars’ books, as well as different official and unofficial reports from different organisations appear to contradict each other in terms of this legal issue, thus forming the basis for this study.

The speakers at the aforementioned conference presented facts and explained how many refugees died on the frontline. This built on the foundation of the study, as it

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<sup>5</sup> The conference was for the case of UN Mapping Report on the DRC and Darfur, Laico Hotel, Kigali, Rwanda, on December 9<sup>th</sup>-10<sup>th</sup>, 2010.

<sup>6</sup> Please note that Zaire was the former name for current Democratic Republic of the Congo (DRC) and that these names will be used interchangeably.

<sup>7</sup> Congo War I began when the Rwandan Government sent its troops to The DRC in November 1996 and Congo War II began when the Rwandan Government sent its troops for the second time in August 1998. See the Comments of the Government of Rwanda on the DRC Mapping Report, p.10, par 13. See also UN Mapping Report on Congo: UN Investigators team exercise documenting the most serious violations of human rights and International Humanitarian Law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003; (June 2010).

<sup>8</sup> The Rwandan Army was known as the Rwanda Patriotic Army (APR) before and during the intervention in the DRC. However, they are now called the Rwandan Defence Forces (RDF) after incorporating some members of ex-FAR.

<sup>9</sup> FAR and *Interahamwe* was the forces of the genocidal government fled to neighbouring DRC and then re-grouped and renamed their army *Forces Démocratiques pour la Libération du Rwanda* (FDRL). I will use FDRL for consistency to mean both ex-FAR and *Interahamwe*.

expounded upon the existing contradictions found in previous national and international conferences and reports, for example, the UN Mapping Report on the Congo<sup>10</sup> and other scholars' documentation, on who is to be held liable for the death of refugees.

The UN Mapping Report created confusion, firstly because it stated that people had been killed before the Congo wars had started, and later it went on to say in the same report that they claimed people were actually killed during the wars. This has created a problem in the process, because the RDF are blamed for deaths for which it was not responsible, if it is in fact true that these were deaths that had been reported even before the wars started. To add to this confusion, according to corroborate testimonies, ex-FAR and armed militia were responsible for at least one large-scale killing of Congolese civilians during their trek across the DRC<sup>11</sup> in June and July 1994. Furthermore, the same issue that of the innocent civilian Tutsi killed in early 1996<sup>12</sup> by the *ex-Forces Armées Rwandaise* (FAR)<sup>13</sup> and Interahamwe<sup>14</sup> in the DRC has been reported by some organisations. This confusion led me to question these findings, especially those by the UN Report team, as to how they were able to distinguish between these deaths before, during, and after the wars.

It was said that the FDLR went to battle with a great number of civilian refugees, some of whom were supplied with weapons, while others were sent out into the battlefield without weapons.<sup>15</sup> This was done to strengthen their front line against the Rwandan army. It has also been stated that a lot of civilian refugees were used as human shields<sup>16</sup> and that the FDLR used some perfidy tactics, for example, pretending to be civilians while they launched attacks on the Rwanda Patriotic Army (RPA), as they did during the Rwanda-Northwest Insurrection.<sup>17</sup> Neither regular combatants nor civilian

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<sup>10</sup> See footnote 3 (UN Mapping Report on Congo)

<sup>11</sup> See Human Rights Watch/FIDH interviews in Goma, Congo and Nairobi, Kenya July and August 1997.

<sup>12</sup> Human Rights Watch/Africa, Vol. 9, No. 5 (A), pg. 9.

<sup>13</sup> This was the initial Armed Force of the genocidal government which later became known as FDRL.

<sup>14</sup> This is a militia group created by President Habyalimana's Regime.

<sup>15</sup> See footnote 8 pg. 13.

<sup>16</sup> See footnote 1 above. See also footnote 11.pgs 3 and 10

<sup>17</sup> See footnote 12 above. See also African Rights, Rwanda the Insurgency in The Northwest, September 1998. See also Amnesty International, Rwanda Civilians Trapped in armed conflict: the dead can no longer be counted, AI Index: AFR 47/43/97, 19 December 1997, pg. 3.

refugees were dressed in military uniform.<sup>18</sup> Hence, from the conference, the presenters concluded that the deaths of most refugees were connected with FDLR tactics of conducting hostilities.

The above conclusion from the conference has been challenged by various scholarly circles, including the UN Mapping Report<sup>19</sup> and other international organisations, such as Amnesty International and Human Rights Watch/Africa,<sup>20</sup> that Rwandan troops were responsible for the killings of civilian refugees.

In this dissertation, I will raise the facts drawn from the ground and circumstances from which the death of civilian refugees occurred, and apply International Law in order to provide a legal solution.

## **2. Objectives**

This study aims to:

- investigate whether the FDLR armed the civilian refugees and used them as human shields;
- investigate whether the Rwandan army killed refugees deliberately (as a breach of International Law) during military operations;
- analyze the legal question in the light of International Law (International Human Rights Law in general, the Rome Statute and Humanitarian Law, in particular) from the facts and circumstances on the ground;
- establish and draw a conclusion from the investigation conducted, as to who was legally responsible for the killing of the innocent civilians;
- make suggestions and recommendations based on the study.

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<sup>18</sup> See footnote 12 above (Human Rights Watch/Africa)

<sup>19</sup> See footnote 3 above (UN Mapping Report on Congo), pg. 2, and 61-65.

<sup>20</sup> Amnesty International "Rwanda Civilians trapped in Armed Conflict" (December 1997), pg. 2.

### **3. Research Problem**

*“The civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations.”*<sup>21</sup> Even though the Additional Protocol 1 to the Geneva Conventions does not create crimes, the result of breaking this rule is prosecution. Then, one may wonder if the death of person automatically means that a crime has been committed and who should be held liable. The general rule, states, “the criminal law does not usually apply to a person who has acted with absence of mental fault.”<sup>22</sup> Katz who said “the action does not make a person guilty unless the mind is guilty” confirmed this.<sup>23</sup> This is in the same line of thinking as provisions of Article 30 of the Rome Statute. These statements give rise to the following question:

Do The Geneva Conventions and its ensuing Protocols protect the Rwandan refugees who died in the DRC Wars? Another question that will be looked at is who is culpable or responsible for those deaths under International Law?

### **4. Methodology**

This study makes use of the documentary technique,<sup>24</sup> in order to aid the review of available open documents and to collect the necessary data. Testimonies of people who were directly involved in the Congo Wars (soldiers who fought for RPA and FDLR, and refugees) will be taken into consideration. Moreover, testimonies from certain international observers will be considered as well. These testimonies from eyewitnesses will aid the understanding of the tangible and concrete situation of facts and circumstances of refugees' deaths. In order to contextualise and locate the past, and present as well as provide for the future in terms of the parameters of the study, I will employ the historical method, as explained by Garraghan.<sup>25</sup>

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<sup>21</sup> Article 51 of Protocol I the Geneva Conventions of 12 August 1949

<sup>22</sup> L. Katz “Bad Acts and Guilty minds: Conundrums of the Criminal Law”, 1987, pg. 165, 166.

<sup>23</sup> See footnote 18 above.

<sup>24</sup> <http://www.afs.org/AFSl/pdfs/assessment.pdf> (accessed on the 13 May 2011).

<sup>25</sup> J.G. Garraghan, A Guide to Historical Method (1946) 3-4.

Textual primary and secondary sources, such as those found in the library will form the foundation of scholarly investigations and background to this study<sup>26</sup> in terms of International Law, and in particular, Human Rights Law and Humanitarian Law. Thus, I will review the landmark cases<sup>27</sup> of Human Rights violations in the Congo Wars, so as to expose the guilty parties. These critical analyses of the cases will take into account the gender of victims, the type of rights violated and conclusions from the different methodological approaches.

## ***5. Provisional Chapter Outlines***

### **Chapter 1: CONCEPTUAL FRAMEWORK**

This chapter serves as a study of the main concept of the study. It highlights the main focal points of all of the problems addressed in the study, by identifying, defining and, explaining the main subjects governing the work, as well as serving as the precursor of the key problem to be investigated. It outlines the issues, aims and objectives of the study, and serves as a synopsis chapter in terms of formulating the methodology and the commentary on existing literature.

### **Chapter 2: FACTUAL ANALYSIS OF THE CONFRONTATION BETWEEN PARTIES IN THE CONGO WARS: CAUSES AND CONSEQUENCES OF DEATH OF RWANDAN REFUGEES**

While Chapter 1 describes the general concept of the study; chapter 2 gives firstly a factual background to the events leading to the military operations launched by Rwanda in the DRC. This chapter takes into cognisance the events precipitating the movement of people from Rwanda to the DRC as refugees and then looks at the activities of the FDLR and how it affected Rwanda and led to them launching the military operations in the DRC. Secondly, it will examine the modus operandi of both the RPA and FDLR during the conduct of hostilities. The analysis of the modus operandi of these parties will

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<sup>26</sup> <http://www.lib.mq.edu.au/.../library%20Research%20Methods%20Educational.%20Studies.pdf> (accessed 13 May 2011).

<sup>27</sup> The mass graves pointed out by UN Mapping Report: " The discovery by the United Nations Mission in the Democratic Republic of the Congo (MONUC) in late 2005 of three mass graves in North Kivu...", See footnote 3 (UN Mapping Report on Congo), p. 4.

enable me to examine how the activities of both these parties affected the protection of refugees. Finally, it will take into consideration the testimonies of key witnesses and through the analysis of the facts provided by these witnesses, it will set the stage for the legal analysis done in Chapter 3, in order to ascertain who should be held accountable for the Human Rights violations which occurred during this period.

### **Chapter 3: THE LEGAL ANALYSIS OF THE APPLICATION OF INTERNATIONAL LAW IN RELATION TO THE PROTECTION OF RWANDAN REFUGEES DURING THE CONGO WARS**

Chapter 3 will examine the legal implications of the actions of the parties involved. It will look at who is responsible and who should be held accountable for the violations of Human Rights Law and Humanitarian Law against the refugees. This chapter examines in detail the way in which the investigations were conducted in this complex and overlapping situation of hostilities; in terms of how the circumstances were deduced from the facts, and how the facts were found. Furthermore, it will examine how the law should have been applied in protection of innocent civilians during hostilities.

In conclusion, chapter 3 will provide a summation and analysis of the path of this study as a whole, and present a legal position from the contradictions that the situation still presents in light of the status of International Law, with the goal of postulating a legal solution to the problem.

#### **General Conclusions and Recommendations**

This section will give a brief conclusion on liability and make certain recommendations on the applicable laws which are deficient in the protection of civilians especially refugees during armed conflicts.

## **6. Limitations**

For a clear focus, this study has boundaries. It takes the period between 1996 (the period in which the Rwanda army went to the DRC)<sup>28</sup>, and 2002 as the period the Rwanda army withdrew from the DRC.<sup>29</sup> It will be focused on Humanitarian Law, Human Rights Law and International Criminal Law where the response is going to be drawn out.

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<sup>28</sup> As footnote3.

<sup>29</sup> As footnote3.



## CHAPTER 1

### **CONCEPTUAL FRAMEWORK**

This study aims at investigating several concepts in trying to analyse the application of International Humanitarian Law and International Human Rights Law, during the war in the Democratic Republic of Congo, and the protection given to Rwandan refugees during this conflict.

In order to apply the tenets of Humanitarian Law, a prerequisite is that there must be an armed conflict. Therefore, the initial definition of key concepts in terms of this condition of “armed conflict” will be discussed. It is however important to note that, for Human Rights Law, whether there is an armed conflict or not this law is perpetually applicable. During an armed conflict, International Humanitarian Law becomes the *lex specialis*, but it does not negate the existence of Human Rights Law.<sup>30</sup>

The most authoritative definition of an armed conflict can be found in the ICTY Appeals Chamber’s decision on Jurisdiction in the Tadic Case:

“We find that an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state. International Humanitarian Law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. Until that moment, International Humanitarian Law continues to apply in the whole territory of the warring

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<sup>30</sup> ICJ, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (8 July 1996), paras.24–25; see also ICJ, Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (9 July 2004), paras. 102, 105.

States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.”<sup>31</sup>

Therefore, in the legal analysis, International Humanitarian Law will be one of the legal rules used in analysing the conduct of the parties involved. As the Trial Chamber of the International Criminal Tribunal for Rwanda aptly noted in its Akayesu decision, “It should be recalled that the four Geneva Conventions, as well as the two Protocols, were adopted primarily to protect the victims, as well as potential victims, of armed conflicts.”<sup>32</sup> As refugees in the DRC were victims of the War, they are also entitled to protection under the Geneva Conventions and its Protocols.

As there is evidence that there was an armed conflict in the DRC, it is fitting to specify the type of armed conflict. Within International Humanitarian Law, there are two separate legal regimes, one governing international armed conflict, and the other non-international armed conflict.<sup>33</sup> However, there is an emerging regime that scholars refer to as internationalized armed conflicts. As James Stewart states, “The term ‘internationalized armed conflict’ describes internal hostilities that are rendered international. 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.”<sup>34</sup>

In this particular case of the DRC conflict, a part from Rwanda armed forces in attacking ex-FAR and Interahamwe Militia at the beginning of conflict, there was other armed forces of seven countries present in the DRC territory, supporting the different parties in

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<sup>31</sup> ICTY, *Prosecutor v. Dusko Tadic*, Appeals Chamber, decision of 2 October 1995, para. 70.

<sup>32</sup> International Criminal Tribunal for Rwanda (ICTR), *Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4-T, Judgement (Trial Chamber I), 2 September 1998, par. 603.

<sup>33</sup> For international armed conflict see common article 2 to the Geneva Convention. See common article 3 to the Geneva Convention and additional protocol II of 1977 for non-international armed conflicts.

<sup>34</sup> James Stewart, *Towards a single definition of armed conflict in International Humanitarian Law: A critique of international armed conflict*. IRRIC June 2003 vo. 85 No 850 pg313-350.

the conflict.<sup>35</sup> Regarding this complex situation of fighting, it is possible to be either internationalized armed conflict or a new International Armed Conflict with its own identity. I am of view that, regardless of whether it is Internationalized International armed conflict; the rules of International armed conflict will be applicable in terms of protection of victims during an armed conflict. Therefore, it is necessary to distinguish who is a combatant and who is a civilian, as this characterization is imperative for the protection of victims during an armed conflict.

A combatant is defined as a member of the armed forces of a party to a conflict (other than medical personnel and chaplains). That is to say, those that have the right to participate directly in hostilities.<sup>36</sup> Civilians, in contrast, are regarded as those who are not members of an armed force of a party to the conflict, members of militias or volunteer corps forming part of such armed groups or not taking direct part in the hostilities.<sup>37</sup>

This brings out another important aspect in International Humanitarian Law, namely, the use of human beings as shields. Additional Protocol I to the Geneva Conventions expressly provides for the protection of the civilian population and individual civilians against the dangers arising from military operations. One key way of protecting civilians is to ensure that they are not made direct targets of attacks.<sup>38</sup> Thus, the positioning of civilians, by members of armed forces, in such a way as to prevent an armed attack by the other warring faction, thereby gaining some military advantage, creates room for uncertainty. The Additional Protocol I provides for the protection of the civilian population from military attacks,<sup>39</sup> but there is a limitation to this provision.

This limitation is that the presence of civilians in a particular area would not prevent an attack on that area, especially if the civilians are used as shields to impede military operations.<sup>40</sup> The party to the conflict who is responsible for the protection of the

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<sup>35</sup> Anup Shah, the Democratic Republic of Congo Global Issues. 21 August 2010.

<http://www.globalissues.org/article/87/the-democratic-republic-of-congo> last accessed on the 17 of June 2011.

<sup>36</sup> See article 43 of additional protocol I to the Geneva Conventions of 1949.

<sup>37</sup> See article 50 of Protocol I.

<sup>38</sup> Article 51 (2) of Protocol I.

<sup>39</sup> See footnote 34, above.

<sup>40</sup> See footnote 34, above.

civilians is responsible for the treatment accorded to them by its agents, irrespective of any individual responsibility, which may be incurred. Therefore, an armed group will incur liability if they use humans as a shield to prevent an attack on them or for gaining some form of military advantage.<sup>41</sup> However, inasmuch as the human shield would not prevent a military operation, the commanders of the other armed force must take all conceivable precautions when executing an armed military operation in order to minimise civilian casualties.<sup>42</sup>

An armed attack, however, is defined as a massive armed aggression against the territorial integrity and political independence of a state that imperils its life or government.<sup>43</sup> According to the ICJ, “an armed attack justifying self-defence as a response under article 51 need not take the shape of massive military operations”. Low intensity fighting, conducted on a relatively small scale, may also be deemed to be an armed attack. In the Nicaragua Case, the Court ruled that the sending of armed bandits into the territory of another state might count as an armed attack, which may invoke article 51.<sup>44</sup>

The next issue of importance in carrying out this legal study, is the aspect of who is a refugee and what form of protection is given to him/her when he/she is caught up in a conflict in his/her host country? The UN Convention on the Status of Refugees, defines the term “refugee” as “any person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, unwilling to avail himself of the protection of that country.”<sup>45</sup>

There are certain people who, through their actions, have in some way contributed to the conflict, which eventually forces them to flee.<sup>46</sup> These people are known as Activist

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<sup>41</sup> Article 29, Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Geneva Convention IV).

<sup>42</sup> See article 57 of Protocol I to the Geneva Convention.

<sup>43</sup> See Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA) Merits (1986) ICJ Reports 14.

<sup>44</sup> See footnote 38.

<sup>45</sup> The United Nations Convention Relating to the Status of Refugees (entered into force April 22, 1954, hereinafter referred to as the “Refugee Convention”), as amended by the Protocol Relating to the Status of Refugees (entered into force Oct. 4, 1967).

<sup>46</sup> Zolberg *et al*, 1989.

Refugees, Exiles, or Refugee Warriors. In and among this group are political and military leaders, rebels and refugee warriors, who, in some cases, were part of the violence that led to the flight.<sup>47</sup> Their objective is either to seize power by overthrowing their governments, or to set apart their own province and establish their own state unit.<sup>48</sup> These groups of people, however, may cause trouble later on; the 1951 UN Refugee Convention's definition accepts activists and targets as refugees.

### **Conclusion**

This chapter concludes with two findings. Firstly, it looks at the definition of the legal concepts concerning the protection of refugees and international humanitarian law which will help in the legal understanding of the study. However, defining the concepts and contours allows a tidy summation of the facts leading to the response of the Rwandan Government in attacking FDLR within the territory of the DRC. It also undertakes an enquiry into the causes and accountability of the death of refugees during the military operations of Rwanda's Government Forces (RPA) against "*Force démocratique pour la Libération du Rwanda*" (FDLR) together with FAZ.<sup>49</sup>

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<sup>47</sup> Marrus, 1985.

<sup>48</sup> Loescher, 1993.

<sup>49</sup> FAZ means the "*Forces Armées du Zaïre*" (Army Forces of Zaïre under the Mobutu Regime). However, from Laurent Kabila Regime until now, they are called "*Les Force Armées du Congo (FAC)*" and FAZ will be used interchangeably.

## **CHAPTER 2**

### ***FACTUAL ANALYSIS OF THE CONFRONTATION BETWEEN PARTIES IN THE CONGO WARS: PRECURSORS OF THE WARS, CAUSES AND CONSEQUENCES OF DEATH OF RWANDAN REFUGEES***

#### **2.1 Introduction**

This chapter considers the factual situation of the conflict between RPA, FDLR and FAZ in the DRC. It will explore the circumstances, causes and consequences of such military operations in relation to the death of Rwandan refugees. This will be done by analysing the acts of parties involved in the conflict. Furthermore, emphasis will be laid on testimonies of people who were directly involved in the conflict in analysing such facts.

However, it would be difficult to deal with the causes and consequences of the death of Rwandan refugees without first looking at the circumstances leading to the DRC wars. These wars are considered to be the root causes of such deaths. Therefore, this chapter deals also with background information on events leading to the launching of military operations by Rwanda in The Democratic Republic Congo (DRC) as an introduction to this chapter.

#### **2.1.1 Historical Background**

In April 1994, Hutu extremists used the military, administrative and political structures of Rwanda to carry out genocide against the minority Tutsis and to kill moderate Hutu who were seen as Tutsi collaborators. Soldiers of the Rwandan Armed Forces (FAR) and members of militia groups, known as the Interahamwe, took the lead in slaughtering more than 1,000,000 people.<sup>50</sup> In July 1994, the Rwandan Patriotic Front (RPF), movement overthrew this genocidal government.<sup>51</sup> Millions of Rwandans fled during

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<sup>50</sup> See footnote 3 (Rwanda's Comments on the UN Mapping Report on the DRC), p.8.

<sup>51</sup> The RPF was a movement party which used its army branch (RPA) to fight the genocidal government which was

this conflict; an estimated 1.1 million refugees fled into neighbouring DRC.<sup>52</sup> Among these refugees were people who planned, instigated and took part in the genocide. Some were ex-members of FAR who carried machine guns, grenades, mortars and other light weapons into DRC as they fled.<sup>53</sup>

The Government of Rwanda, beginning in late 1994, repeatedly warned the international community as a whole, in particular the Security Council that the FDLR forces were preparing and carrying out attacks on the territory and on the people of Rwanda. In February 1995, the Rwandan Ambassador to the United Nations explicitly warned the Security Council of the events that would ultimately unfold, and encouraged them to engage in preventive measures.<sup>54</sup> These warnings were repeated in December 1995.<sup>55</sup>

It is important to note that other nations shared Rwanda's concern, as it was not only the Government of Rwanda that raised this concern. In fact, many other nations explicitly recognised that attacks were being orchestrated and carried out against Rwanda; Ambassadors from various countries reiterated the point that the attacks on Rwanda originated from the militarised refugee camps in the DRC.<sup>56</sup> Diplomats were not the only people who raised this concern, as Human Rights organisations such as the Human Rights Watch, and the International Federation of Human Rights (FIDH), and humanitarian agencies, including the United Nations High Commissioner for Refugees (UNHCR), demanded that the DRC government and the international community intervene and separate the refugees – many of them women and children – from the armed former soldiers (ex-FAR) and militia members.<sup>57</sup>

Immediately after settling in the refugee camps close to the border, the FDLR regrouped and started recruiting and training new members and bought arms from

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overthrown in July 1994?

<sup>52</sup> See footnote 3 (the UN Mapping Report).

<sup>53</sup> (Human Rights Watch 1995; Amnesty International 1995).

<sup>54</sup> See U.N. Security Council 3604<sup>th</sup> Meeting, UN Doc S/PV. 3504 (27 Feb. 1995), pg. 4.

<sup>55</sup> See U.N. Security Council 3605<sup>th</sup> Meeting, UN Doc S/PV. 3605 (12 Dec. 1995), pg. 15.

<sup>56</sup> See UN Security Council Meetings, 3542, 3566, 3574 and 3605 respectively S/PV.3542 (9 June 1995); S/PV (16 August 1995); S/PV.3574 (7 September 1995); S/PV.3605 (12 December 1995).

<sup>57</sup> See footnote 8.

abroad.<sup>58</sup> They started carrying out armed activities in Rwanda. As the incursions into Rwanda increased in number and impact, the Government of Rwanda signalled its intention to put a stop to the activities being carried out from the camps within DRC if the international community would not intervene.<sup>59</sup>

This was confirmed by Aldo Ayello, the European Special Representative to the Great Lakes from 1996 to 2007.<sup>60</sup> He confirmed that the DRC Government did not disarm the military men and that they did not stop the FDLR from recruiting and training these new recruits. They also allowed incursions into Rwanda from these refugees' camp. He also stated that President Kagame called him personally, asking him to convince members of the international community to intervene, saying that if they did not, he would be forced to react to the activities carried out by the FDLR from within DRC.<sup>61</sup> He stated that the response from the international community especially the UN was a "no".<sup>62</sup> Even the vice-President of the Republic of Rwanda at the time (Paul Kagame, now President) also asked the international community especially the United Nations Security Council requesting that armed FDLR members be separated from civilian refugees.<sup>63</sup> Despite these warnings and pleas, no help was forthcoming from the international community. In 1996, there was an increase in the killings of civilians in border area, and the Rwandan army entered the DRC.<sup>64</sup>

### **2.1.2 The Treatment of Rwandan Refugees by the Congolese Government, FDLR and the Response to such Treatment by the United Nations**

Many authors, and some official State representatives have commented on the entry of the refugees mixed with people who were armed, carrying both heavy weapons and small arms, across the border from Rwanda to the DRC without being checked as has been confirmed, for example, in the Workshop on Mine Personnel and Mining

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<sup>58</sup> See footnote 8 at pg. 3. See also; "A Human Rights Watch Short Report." (New York: May 1995) vol. 7, no. 4. African Rights, Rwanda: The Insurgency in the Northwest, 1998.

<sup>59</sup> See footnote 1.

<sup>60</sup> See footnote 1.

<sup>61</sup> See footnote 1.

<sup>62</sup> See footnote 1. See also footnote 8 at pg 7.

<sup>63</sup> See the presentation of the Vice- President of the Government of Rwanda Paul Kagame in the UN Security Council in 1995

<sup>64</sup> See footnote 3.



Clearance in the DRC<sup>65</sup> and Honoré's interview who was the Mobutu Regime Security Advisor.<sup>66</sup> Refugees were also partly responsible for the small arms problem in the DRC, as refugees moved across borders with their weapons. When remnants of the FDLR poured into the DRC, they brought machine guns, grenades, mortars and other light weapons.<sup>67</sup>

The next issue on the treatment of Rwandan refugees, concerns the proximity of the refugee camps in relation to the border. Aldo Ayello stated that the international community allowed the DRC authorities to set up camps just a few meters from the border rather than a few kilometres away.<sup>68</sup> Furthermore, as regards the Rwandan refugee camps situation, there were reports of "arms, uniforms and munitions being supplied on a daily basis in the camp called Tingi-Tingi."<sup>69</sup> The report also indicated that there was a request by the UN Secretary-General, Kofi Annan, upon the DRC Government to end the militarisation of the Tingi-Tingi camp, which, according to him, was "endangering the lives of refugees."<sup>70</sup> The report shows that the DRC government was actively involved in arming the FDLR.<sup>71</sup> The Rwandan Hutu refugee warriors also purchased arms from the international markets. In October 1994, Habyarimana's widow, Agatha Kazinga, and her brother, Seraphin Rwabukumba, accompanied President Mobutu of Zaire on a trip to China, where she allegedly used the opportunity to purchase arms, including Kalashnikov rifles, grenades and rocket-propelled grenade launchers to a total value of US \$5 million.<sup>72</sup>

Moreover, towards the end of 1995 and the beginning of 1996, political and military officials of Rwanda's former extremist government mounted increasingly aggressive armed incursions in different Rwandan regions.<sup>73</sup> These armed attacks were aimed at

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<sup>65</sup> See the CEREBAC < *Points de vue sur les mines anti personnelles et déminage en RD Congo, Atelier de Bujumbura, du 6 au Décembre 2004.*

<sup>66</sup> See *la chute de Mobutu CD (Honoré N'GBANDA: Conseiller à la Sécurité du Président Mobutu interview )*

<sup>67</sup> See footnote 16 above.

<sup>68</sup> See footnote 1 above.

<sup>69</sup> Lischer, 2001, (UNHCR, 2000, p. 248).Times. 19 February 1997.  
<http://www.nytimes.com/yr/mo/day/news/world/zaire.html>

<sup>70</sup> Howard W. French, Zaire Government is Arming Hutus, Making Human Shields of Refugees, New York Times, 19 February 1997. <http://www.nytimes.com/yr/mo/day/news/world/zaire.html>

<sup>71</sup> See footnote 16 above.

<sup>72</sup> Africa Confidential 1995.

<sup>73</sup> See footnote 16 above.

the civilian population,<sup>74</sup> with the predominant targets identified as the Tutsi survivors of the genocide and local government officials.<sup>75</sup>

Based on the aforementioned facts, the FDLR's actions can be imputed to the DRC because the government in the DRC showed support for the FDLR. It can be said that an action by a non-state actor can be imputed to a state's through inaction, which is clearly shown by the following: allowing armed refugees and ex-militant members to enter the country without being disarmed; failing to separate armed militant once in the country; permitting them to use refugee camps as bases for recruiting; training; storing of arms and allowing incursions against the Republic of Rwanda from DRC. In brief, the facts show that there was a clear and imminent threat posed by the FDLR on Rwanda.

Furthermore, there is evidence that the United Nations Security Council, which has primacy in the maintenance of global Peace and Security, was alerted about the ongoing atrocities being committed by the FDLR on innocent civilians in Rwanda.<sup>76</sup> The international community did not heed to the Rwandan Government's request to put an end to the atrocities being committed by the FDLR. Due to the above-mentioned facts, the Rwandan military entered the DRC for which there were confrontations between them and members of FDLR, which eventually led to the death of Rwandan refugees in several circumstances that is dealt with in the next section.

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<sup>74</sup> See footnote 16 above.

<sup>75</sup> See footnote 16 above.

<sup>76</sup> See footnotes 50-52 and 59 above.

## 2.2 Factual Analysis of confrontation

### 2.2.1 Analysis of the Conduct of Parties in the Hostilities

The first conduct of hostilities happened when RPA carried out an attack on a military base called Lumangabo Military Camp in the DRC, where some FDLR arms were stored. They formed a protective belt that allowed civilians to flee without being harmed in the direction of Rwanda, as opposed to fleeing into the DRC forest where they would face dangers.<sup>77</sup> The mode of operation was to form a corridor of safe passage into Rwanda for Rwandan refugees.<sup>78</sup> Due to this mode of operation, more than 600 000 refugees returned to Rwanda safely.<sup>79</sup>

There were, however, members of the FDLR and some refugees who did not want to return to Rwanda, and they showed resistance and consequently heavy fighting broke out between members of the RPA and the FDLR. The members of the FDLR were able to penetrate the belt created by the RPA, and fled into the DRC's forest; many people lost their lives during this military campaign,<sup>80</sup> and some refugees were caught up in the crossfire.<sup>81</sup> There is also evidence to show that former camp authorities killed some Rwandan refugees in an effort to prevent their return to Rwanda, or to force them to accompany the FDLR on their retreat westward.<sup>82</sup>

There were several military campaigns conducted by Rwanda against the FDLR, however, after the RPA succeeded in several of these campaigns, the Armed forces of the DRC joined the FDLR in fighting the RPA, and after this, the nature of the conflict changed.<sup>83</sup> As the nature of the conflict changed into that of an internationalised armed conflict, the level of intensity increased on a grand scale and more people lost their lives. DRC civilians, together with Rwandan refugees, were killed by the retreating

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<sup>77</sup> See the testimony of Brigadier-General Rutatina who fought for RPA and Major General Gérome Ngendahimana an ex-FAR who fought for FDLR. He served in different capacity as Commander of Battalion, Commander of Division and Chief of Intelligence). Footnote 1.

<sup>78</sup> See footnote 1 (Aldo Ayelo, Brigadier General Rutatina and Major General Gerome)

<sup>79</sup> Rwanda's comments on the UN Mapping Report on the DRC (June 2010) 11. See also footnote 8 at pg 10.

<sup>80</sup> See testimony of Major-General Gerome (footnote 1).

<sup>81</sup> See footnote 1. See also footnote 8 at pg 10.

<sup>82</sup> See footnote 8 at pg 10.

<sup>83</sup> See testimony of Aldo Ayello (footnote 1).

FDLR,<sup>84</sup> DRC troops and even some Armed Rwandan refugees.<sup>85</sup> Furthermore, according to corroborated testimonies, FDLR was responsible for at least one large-scale killing of DRC civilians during their trek across the DRC.<sup>86</sup> There were also Rwandan refugees carrying weapons, who killed DRC civilians, in their desperate search for food. Civilians were also killed when the town was looted.<sup>87</sup>

There was also evidence to show that mercenaries were also employed by Mobutu's government to fight against the RPA forces, and that these mercenaries bombed towns indiscriminately, leaving many innocent civilians, especially DRC civilians, dead. The Human Right report Watch showed that in mid-February 1997, the FAZ, in collaboration with Serb and other mercenaries, bombarded several cities in eastern DRC, including Bukavu, Shabunda, and Walikale, resulting in dozens of civilian deaths and injuries.<sup>88</sup>

From the above facts it is very difficult to actually pinpoint whom were the parties committing the most atrocities as there were many factions on the ground committing atrocities in their own respect, for instance, the Rwandan refugees were killed, but they in turn also killed civilians. As Human Rights Watch Reported, "the FDLR, RPA and FAZ were all responsible for killing civilian populations; even refugees were involved in killing civilians."<sup>89</sup> Furthermore, it concluded, "there is controversy about the exact number of refugees who perished during the conflict due to massacres, malnutrition, exhaustion or disease and starvation."<sup>90</sup>

### **2.2.2 Consequences of the Military Operations**

Aldo Ayello stated that as a consequence of the military operations many refugees perished as a result of many factors, including collateral damages.<sup>91</sup> It is my opinion that the United Nations Secretary-General's call on the DRC Government to end the

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<sup>84</sup> See footnote 8.

<sup>85</sup> See footnote 8.

<sup>86</sup> See U.S Committee for Refugees World Refugees Survey 1997- Democratic Republic of Congo(formerly Zaire), p.5.

<sup>87</sup> Human Rights Watch/FIDH interview, first village, August 16, 1997.

<sup>88</sup> See Human Rights Watch/Africa, "Zaire: Transition, War and Human Rights."

<sup>89</sup> See footnote 82.

<sup>90</sup> See footnote 8 above, p. 21. See also footnote 82 above, pages. 1, 3, 5.

<sup>91</sup> See footnote 1.

militarisation of refugee camps in order to prevent the endangering of their lives,<sup>92</sup> was in place, because militarisation of the camps meant the camps were valid military targets and if it had to be attacked, even if the other side took precautions, there would still be those who would be sacrificed as collateral damage. Ayello emphasised that Kagame was reluctant in undertaking such military operations, because of the high stakes and high collateral damage that would be involved, which is why he asked the international community to intervene and see if there was a more peaceful way to settle the matter.<sup>93</sup>

Another factor stressed by Ayello, resulting in the death of refugees, is their use as human shields. This concept can be defined according to International Humanitarian Law as follows “it is a civilian positioned before a military objective to ensure that his civilian status deters an attack against this objective.”<sup>94</sup> The use of human shields by the *genocidaire* government was not a new phenomenon in Rwanda. On 28 July 1992 (this was the period when military campaigns were being conducted by RPA against the *genocidaire* regime) the then Prime Minister Dismas Nsengiyaremye, publicly stated that the RPA will be defeated because if they can take a million young men and put them in strategic position, the RPA forces will be hindered because of their presence.<sup>95</sup> Furthermore, Jean Bosco Barayagwiza, a genocidal leader from the refugee camps reiterated this point, asserting, “even if the RPF has won a military victory it still does not have the power. He said we have the population on our side.”<sup>96</sup> That is why when the government was fleeing into the Congo, they took many people with them, who, in my opinion, were held hostage so that in the event that they were attacked, they would be used as human shields. This serves as evidence to show that in most camps, the FDLR were using refugees as human shields to prevent an attack on them.<sup>97</sup> This was corroborated, as, in some cases, the FDLR used the refugees as human shields and if

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<sup>92</sup> See footnote 65 above.

<sup>93</sup> See footnote 1.

<sup>94</sup> See article 51 (7) of additional protocol I of the Geneva Convention Relative to the Protection of Civillian Persons in Time of War, 12 August 1949.

<sup>95</sup> See internet source <http://www.rwandadocumentsproject.net/gsdl/cgi-bin/library?e=d01000-00---off-0mil1docs--00-1-0-10-0---0---0prompt-10---8-----0-11--11-el-1000---50-help---10-3-1-00-0-0-=1=0gbk-00&a=d&c=mil1docs&CL2.5.13&d=HASH01dfd6cced6ec7211a611fa1>.

<sup>96</sup> African Rights (1995), 1097.

<sup>97</sup> See footnote 65 at pgs 1 and 3.

they tried resisting, they were either injured or killed.<sup>98</sup> Major-General Gérome who admitted that the FDLR used refugees as human shields when he was a commander on different positions in the FDLR also confirmed these reports.<sup>99</sup>

The use of human shields which obliged civilians to take part directly in hostilities was not something novel, it was basically the FDLR's *modus operandi*, as can be seen by the statements of top members of this organisation and confirmed by a Major-General Gérome who admitted that such military tactics were used during the conflict. This was a tactic used by FDLR to use civilians on front line in order to use a great number of fighters to compel RPA forces to surrender.<sup>100</sup> The African Rights Report has confirmed these testimonies and reports:<sup>101</sup> "their tactics made it very difficult for soldiers to distinguish civilians from insurgents. Furthermore, the report stressed that the reality was that thousands of peasants, including women and children, were actively supporting the insurgents and taking direct parts in most of the attacks."<sup>102</sup>

There is an ongoing debate about the factors influencing refugees to take direct part in hostilities. Some researchers in this field have acknowledged that refugees can be used as resources for war, and by implication, can lead to arms diffusion; they have also argued that refugees are largely manipulated into participating or supporting armed conflict.<sup>103</sup> This point expresses the involuntariness on the part of refugees to take part in the conflict. However, others have argued that refugee participation in conflict is not necessarily a result of coercion or manipulation. For political, strategic ideological, ethnic and economic reasons, refugees willingly initiate, support or directly participate in armed conflict as combatants.<sup>104</sup> Members of the Rwandan Army confirmed that many civilians took part in direct hostilities and that they did not show signs of reluctance to fight; in fact, reports showed that they fought gallantly side by side with regular armed force members.<sup>105</sup> They were motivated by the fact that as they had participated in the

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<sup>98</sup> See footnote 8 at pg 10.

<sup>99</sup> See footnote 1 (Major General Gerome).

<sup>100</sup> African Rights, Rwanda: The Insurgency in the Northwest, 1998.

<sup>101</sup> See footnote 96 above.

<sup>102</sup> See footnote 96 above.

<sup>103</sup> Terry, 2002; Stedman and Tanner, 2003.

<sup>104</sup> Loescher, 1992; Zolberg, Suhke and Aguayo, 1989.

<sup>105</sup> See footnote 1 testimonies of Rutatina and Gérome.

genocide of 1994, they saw their action on the battlefield as the only way of escaping justice in the event that they were successful in overthrowing the regime that was then in power, as they did in the Northwest insurgents.<sup>106</sup>

For the purpose of this study, the view is held that most of the refugees who were used as human shields participated on a voluntary basis. There is evidence that the refugees were not only armed, but that they had taken part in killing of innocent civilians in the DRC, and also that, prior to their involvement in these killings, they had taken part in the genocide in Rwanda. This situation also made it very difficult for everyone to prove who was actually responsible for the deaths of civilians as refugees were also involved in killing other civilians. Fighting on behalf of the FDLR was seen as a way of escaping justice, as their actions would eventually lead to the toppling of the regime and the restoration of the old regime. According to the testimonies of many RPA fighters, the death toll of members of the FDLR showed that the fighters were not well trained, thus leading to the assumption that many of them were refugees who had been recruited in the camps that did not receive sufficient training.

Another consequence of Rwanda's military action is the indirect death of refugees. Aldo Ayello stated that many refugees died due to other circumstances, such as diseases, starvation and exhaustion.<sup>107</sup> Human Rights Watch also confirmed Ayello's view that thousands of people died because of starvation, dehydration and diseases.<sup>108</sup>

Relief officials once reported, "between 30 and 50 people died each day in Tingi-Tingi, which experts say, has only been receiving about one third of the 100 tons of food a day needed to feed the population there."<sup>109</sup> In addition, thousands of people died of hunger and disease because the security conditions prevented humanitarian aid workers from assessing these people.<sup>110</sup> This makes it very difficult to conclude that the deaths were caused from breaking the laws of war or were caused by indirect consequences of the war.

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<sup>106</sup> See footnote 96 above.

<sup>107</sup> See footnote 1.

<sup>108</sup> See footnote 8.

<sup>109</sup> See footnote 66 at pg 3.

<sup>110</sup> See footnote 8 at pg 10.

In a conflict situation, there is bound to be civilian casualties and some of these casualties are caused by errors in judgement of circumstances or errors about facts. In every conflict, all warring factions are bound to make errors, and so death caused by flawed judgement will occur and is inevitable, as concluded by Michael Shaff; “for example people died in conflict situations due to errors in judgement, in Canada, in Vietnam, in Somalia and this conflict. It is very difficult for one to prove that the order came from a person in authority, because it is very difficult to supervise the actions of every soldier in the field.”<sup>111</sup> The issue that should be noted is whether the flawed decision could have been avoided had there been more information or precautionary measures taken to verify the facts.

Many refugees disappeared from the camps. It is reported that at least 200 000 Rwandan refugees did not return to Rwanda. They had gone into the forests of the DRC, which was inaccessible to large relief operations.<sup>112</sup> Further reports show that “an estimated 213 000 Rwandans remain either unaccounted for, dead in the period of violence, hidden in the forests or among the people of the DRC”.<sup>113</sup>

### **2.2.3 Witness Testimonies**

The Government of Rwanda took the position that they did not attack refugees in the camps. The Government admitted that civilians died due to the operations they carried out, but stated that they were collateral damage and that it had tried to avoid the death of many people as possible. The Government of Rwanda stated that many of the deaths of civilians were due to the fact that they were being used as human shields, forced to seek refuge in the DRC forest where they died of hunger, dehydration and diseases, and because relief workers could not gain access to them because of security reasons. This stance has been confirmed by testimonies of Brigadier-General Rutatina, who fought on behalf of the Rwandan Government and Major-General G erome Ngendahimana who fought on behalf of the FDRL forces.<sup>114</sup>

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<sup>111</sup> See footnote 1 (Michael Sharff presentation).

<sup>112</sup> See footnote 82 above, p.5.

<sup>113</sup> UNHCR public information fact sheet, July 2, 1997.

<sup>114</sup> See footnote 1 above.



The following analyses are of testimonies of surviving refugees.

One of the surviving refugees, Dr. Paschal who lives in Rwanda, was interviewed (twice) by the BBC on the 9<sup>th</sup> and 16<sup>th</sup> October 2010 on a program called “*Invo n’invano*” which when translated means “interviewing people with first-hand information”. According to Dr. Paschal, “the RPA did not attack refugee camps; the camp authorities destroyed the camps to protect sensitive information about the FDLR’s operations. The camp authorities destroyed the camps on FDLR’s orders.” He continued by saying that the refugees would be asked to move, and once they were on the move, the exhausted people who stopped were killed by the FDLR. Furthermore, they killed those who tried to return to Rwanda. “We only fled because we were asked to by members of the FDLR. Most of the refugee camps were military bases for the FDLR authorities and they received new recruits on a regular basis”.

The next witness was interviewed on the 16<sup>th</sup> of October 2010 called Ignace Kanyamibwa. He was a FDLR helicopter pilot who is now a refugee in Belgium. He spoke about the camps where he lived with his relatives and other refugee families; he stated that “when we (the refugees and myself) in the camp where I was staying were fleeing from the war zone, the camp authorities and DRC authorities refused to let us go through Kisangani, saying that RPA soldiers were already there; and that we had to change direction. I could not forget that a lot of refugees fell into the river and drowned.”

Another refugee also interviewed on the 16<sup>th</sup> October 2010 called Rugumaho who now lives in Sweden, said “there is a place called Rubutu, where there is bridge across the river where a lot of people fell over because the FDLR authority said to keep on moving and not to return even though some people wanted to return.”

Another person interviewed was called Alphonse, who now lives in UK. He stated that he was in the Mugunga Camp, and that the RPA did not attack the refugee camps. He continued by stating that when FDLR were being attacked by RPA soldiers the FDLR would destroy the camps. Furthermore, when the FDLR soldiers were retreating they dressed like civilians.

Another refugee who wished to remain anonymous, but lives in Malawi, was also interviewed on 16 October 2010. He said; “I was in the Kisangani refugee camp. The RPA soldiers surrounded the camp, and, using loud speakers, told us to leave the camp and go to a distance of about 80 kilometres from the camp in order to avoid the ensuing battle that was to take place, some of us obeyed but some were coerced by the FDLR not to obey. Those who refused to follow their instructions not to leave or who were coerced died in the hostilities that ensued.”

Another anonymous witness who now lives in Zambia stated that “a lot of Hutu’s with Congolese nationality killed a lot of the Rwandan refugees whilst trying to flee he stated further that even when they tried to hide, they used sniffer dogs who were able to find us and then more people were killed. I thought it was the RPA who gave them the money to kill us because since they were our Hutu brothers I concluded that the RPA were the ones coercing them to kill us”.

The testimonies of members of the international community also require some examination. The first of which is the testimony given by Aldo Ayello, who was the European Special Representative to the Great Lakes from 1996-2007. His testimony started by saying that the DRC Government did not disarm the military men; it did not stop the FDLR from recruiting and training these new recruits. It also allowed incursions into Rwanda from these refugees’ camp. He also stated that President Kagame called him personally, asking him to convince members of the international community to intervene or he will be forced to react to the activities carried out by the FDLR from within the DRC. His testimony confirmed the *modus operandi* of both factions. His testimony shows that many refugees perished because of the military operations and other factors, such as using refugees as human shields, starvation, dehydration and diseases. He also stated that the *modus operandi* for both parties were different, he said that RPA did not attack the camps but rather they provided a safe corridor for those who did not want to take part in direct hostilities. However, he stated that FDLR used civilian refugees as Human shields.<sup>115</sup>

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<sup>115</sup> See footnote 1 above.

In addition, many humanitarian workers confirmed that the camps were used as military bases and receiving areas for arms and munitions purchased, that the killing methods used by the warring factions against civilian were very brutal. Reports also confirm that some of the refugees were involved directly and voluntarily in the hostilities during this conflict.

### **2.3 Conclusion**

In conclusion, from what has been said above, apart from the deaths that are unavoidable in any conflict (collateral damages), it can be concluded that a lot of people died in this conflict because they were used as human shields and the fact that they participated directly in hostilities without military training. Furthermore, they also died from indirect causes such as starvation, diseases, exhaustion and the fact that many people disappeared in the forest should be considered.

Therefore, as will be shown in the next chapter, International Humanitarian Law precludes the use of civilians in hostilities and makes provision for the protection of civilians during armed conflicts. In addition, during conflicts, Human Rights should still be maintained; as a result, those responsible for the death of civilians must show that their actions were in conformity to International Humanitarian Law and done according to Human Rights Law.

## CHAPTER 3

### ***THE LEGAL ANALYSIS OF THE APPLICATION OF INTERNATIONAL LAW IN RELATION TO THE PROTECTION OF RWANDAN REFUGEES DURING THE CONGO WARS***

#### **3.1 Introduction**

This chapter examines the legal implications of the conduct of the parties concerned in relation to the protection of Rwandan refugees based on the necessary international law provisions. It will take into consideration International Humanitarian Law and International Human Rights Law in order to see who should be held accountable for the violations that occurred leading to the death of the Rwandan refugees.

#### **3.2 Legal Implication of the Use of Civilians as Human Shields**

Michael N. Schmitt states that, “using human shielding involves the use of persons protected by International Humanitarian Law, such as prisoners of war or civilians as tactics, to deter attacks on combatants and military objectives”.<sup>116</sup> In my view this may be true, however; this practice is prohibited by International Law. The prohibition against human shielding is found in the Hague Regulations of 1907, art 23 of Geneva Convention III, art 28 of Geneva Convention IV, arts 37(1), 50(3), 51(7) and 51(8) of Additional Protocol I, customary International Humanitarian Law; and the Rome Statute of the International Criminal Court.

Even though the prohibition against human shielding is quite open, it has been evidenced that the weaker parties especially, have embraced shielding as a means of

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<sup>116</sup> See Michael N.Schmitt, Human Shields in International Humanitarian Law. Israel Yearbook on Human Rights pg 17-60.

warfare designed to prevent attacks against which they cannot effectively defend using the weaponry and forces at their disposal.<sup>117</sup>

This approach presumes that the possibility of killing civilian shields may discourage an attacker from striking. The use of Human Shields is a violation of International Humanitarian Law. According to International Humanitarian Law, the presence of combatants within a civilian population does not deprive the population of its civilian character;<sup>118</sup> furthermore, the parties to the conflict shall not direct the movement or presence of civilians in order to prevent military objectives from being attacked or to prevent military operations.<sup>119</sup>

Despite prohibition of these perfidy tactics, throughout the world the situation is alarming. Human shielding has become endemic in contemporary conflict, taking place across the legal spectrum of conflict.<sup>120</sup> For instance, Iraq used human shields in its war with Iran from 1980-1988<sup>121</sup> and those with United States led-coalitions in 1990-1991 (Operation Desert Storm)<sup>122</sup> and 2003 (Operation Iraqi Freedom).<sup>123</sup>

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<sup>117</sup> See footnote 112 above. See also International Commission on Intervention and State Sovereignty (Dec 2001). [www.iciss.ca/pdf/commission-Report.pdf](http://www.iciss.ca/pdf/commission-Report.pdf) (ICISS Report), pg. 17.

<sup>118</sup> See article 50 (3) of additional Protocol I of the Geneva Conventions 1977.

<sup>119</sup> See article 51 (7).

<sup>120</sup> See, e.g., discussion in D.P. Schoenekase, "Targeting Decisions Regarding Human shields", *Mil. Rev.*, Sept.-Oct. 2004, at 26, 26-27.

<sup>121</sup> The Secretary – General, Report: Mission to inspect Civilian Areas in Iran and Iraq which may have been subject to Military Attack, U.N. Doc. S/15834 (June 20, 1983); Letter from Secretary – General to the President of Islamic Republic of Iran and the President of the Republic of Iraq, June 29, 1984, U.N. Doc. S/16663 (July 6, 1984).

<sup>122</sup> The United Nations General Assembly condemned the Iraqi use of shields: G.A. Res. 46/134, U.N.Doc. A/RES/46/134 (Dec. 17, 1991). See also: U.N. Commission on Human Rights, Res. 1992/71, Situation of Human Rights in Iraq, U.N. Doc. E/CN.4/1992/94 (Mar.5, 1992), sec. 2(d); Declaration Following the Extraordinary European Political Cooperation Meeting in the situation of Foreigners in Iraq and Kuwait, Paris (Aug. 21, 1990), communicated to the United Nations in U.N. Doc. A/45/433, S/21590, Aug. 22, 1990; European Council, statement on the situation of Prisoners of War, Annexed to letter dated Jan. 23, 1991 from Luxembourg to the U.N Secretary – General, U.N. Doc. A/45/940- S/22140 (Jan. 23, 1991); European Council, Declaration on the Gulf Crisis, Brussels (Oct. 28, 1990), communicated to the United Nations in U.N. Doc S/21719 (Sept. 6, 1990); Gulf Cooperation Council, Ministerial Council, 36<sup>th</sup> Sess., Jeddah (Sept. 5-6, 1990), Final Communiqué, communicated to United Nations in U.N. Doc. S/21719, Sept. 6, 1990, at 4; League of Arab States, Council Res.5039 (Aug. 31, 1990), at para. 2; Nordic Foreign Ministers, Declaration on Iraq – Kuwait Conflict, Molde (sept. 12, 1990), communicated to the United Nations in U.N. Doc. S/21751, Sept. 13, 1990; Dep't of Defense, Conduct of the Persian Gulf War, Final Report to Congress Pursuant to Title V of the Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991 (Pub. L. 102-25) 607-08, 613, 619 (1992)

It is imperative to note that all parties must follow the obligations established under International Humanitarian Law to a conflict at all times. In the event of a violation, of these rules and regulations the parties will incur certain responsibilities. The Rome Statute expressly outlaws the use of humans as shields during an armed conflict and categorises such actions as war crimes.<sup>124</sup> As it can be shown that, the FDLR perpetrated these acts that constitute the use of civilians as human shields as part of their policy, which amounted to a large-scale loss of life, this action, can be said to be a war crime<sup>125</sup> and individuals responsible for such policies can be prosecuted by the ICC. However, it must be noted that the jurisdiction of the ICC begins with the inception of the court<sup>126</sup> and so the actions of the FDLR fall outside its scope and cannot be prosecuted by the court.

In this situation, the first provision that will be examined is the prohibition of the use of humans as shields during armed conflict.

The provision in article 57 of Additional Protocol I, contains an active and passive connotation in that the civilians may not even realise that they are moving into an area where there might be a military operation and the defending military party does nothing

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[hereinafter: Gulf War Report]. The Iraqis also threatened to use journalists as human shields, although those seized were released before the conflict began. A.L De Saussure, “ The Role of the Law of Armed Conflict During the Persian Gulf War: An Overview”, 37 Air Force L.Rev. 52-53 (1994).

<sup>123</sup> Iraqi soldiers were instructed to “use any means necessary” in resisting the US. Marines, including “ putting women and children in the street”. Among their tactics, they regularly hid near residences in order to use the civilians therein as shields. A human Rights Watch report catalogued numerous eyewitness accounts. For instance: Major M. samarov, a battalion executive officer, encountered civilian shields as his Marines entered Baghdad on Apr. 8. “There were busloads of people driven to our position on Highway 6. When [the Iraqi military advance] wouldn’t work; they threw families in the vehicles. It was a very challenging situation. We made every attempt to minimize casualties, but it was extraordinarily difficulty”, he said. In al-Shatra, a Marine corporal said a caravan of three buses drove toward his unit. Fedayeen had put women and children in the first two to allow the third carrying Fedayeen to advance on the Marines safely. British troops also reported shielding from the southern part of the country. During fighting east of Basra, Colonel Gil Baldwin, commanding officer of the Queen’s Dragoon Guards, said the saw Iraqi forces “held” women and children out of their homes and fire rocket- propelled grenades (RPGs) over their heads. Human Rights Watch, *Off Target: The Conduct of the War and Civilian Casualties in Iraq 67* (2003) [hereinafter: *Off Target*].

<sup>124</sup> See article 8(2) (b) (xxiii) of the Rome Statute, opened for signature July 1998; entered into force 2002.

<sup>125</sup> See article 8(1) of the Rome Statute.

<sup>126</sup> See article 11 of the Rome Statute.

to prevent such movement in the hope that this may prevent an armed attack by the other side.

The actions of a party might be active in that the civilians are directed to go into a particular zone with the intention of preventing a military operation in that area. This issue was also expanded by the International Committee of the Red Cross' (ICRC) study on customary International Humanitarian Law, "the use of human shields requires an intentional co-location of military objectives and civilians or persons '*hors de combat*' with the specific intent of trying to prevent the targeting of those military objectives".<sup>127</sup>

Based on these provisions and looking at the facts stated above, the FDLR can be seen to have intentionally directed civilians in areas of military operations in order to hinder attacks from the RPA. It was reported that the RPA forces, when they conducted their activities, did not attack refugees, but rather that they formed a protective belt that allowed refugees to return safely to Rwanda.<sup>128</sup>

Evidence showed that the FDLR who had control of the refugee camps were using civilians as human shields.<sup>129</sup> The report showed that the FDLR used the refugees as human shields and if they tried resisting, they were either injured or killed.<sup>130</sup> Major-General Gérome, who admitted that the FDLR used refugees as human shields when he was a commander in the FDLR, also confirmed these reports.<sup>131</sup> Members intentionally feigned themselves and in most instances mingled with civilians in order to prevent detection by members of the RPA, a report showed that "their tactics which they used everywhere they were engaged in hostilities which for instance made it very difficult for soldiers to distinguish civilians from fighters".<sup>132</sup>

This evidence proves the *mens rea* required in article 57 and the customary law requirement that the action of the defending party must be intentional. FDLR intentionally, used humans to threaten the RPA forces to surrender due to their large

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<sup>127</sup> Jean-Marie Henckaerts and Louise Doswald-Beck), International Committee of the Red Cross, Customary International Humanitarian Law Volume I: Rules (2005) 337.

<sup>128</sup> See footnote 1.

<sup>129</sup> See footnote 66.

<sup>130</sup> See footnote 8 above

<sup>131</sup> See footnote 1.

<sup>132</sup> African Rights, Rwanda: The Insurgency in the Northwest, 1998.

number, as was stated in the speech by the then Prime Minister in 1992, when he said that “the RPA will be defeated because if we can take 1 million young men and put them in strategic position the RPA forces will be hindered because of their presence.”<sup>133</sup> As the requisite intention is there one can clearly state that the FDLR were in violation of the International Humanitarian Law provision prohibiting the use of humans as shields during armed conflicts.

The civilian immunity from direct attack is found in common article 3 of the Geneva Conventions (the minimum standard of protection for civilians in non-international conflict) and in the provisions of Additional Protocol I (which pertains to international conflict). Parties to a conflict are obliged to apply the principle of distinction differentiating combatants from civilians, and ‘direct their operations only against military objectives’ not civilian objects.<sup>134</sup> Civilians lose their immunity from direct attack, however, when and “for such time as they take a direct part in hostilities”.<sup>135</sup>

The issue of direct participation is very controversial in international law and is still being debated.

The nature of the direct participation, whether in international or non-international armed conflict, is often uncertain when applied to specific cases. It is unclear what activities amount to direct participation in hostilities.<sup>136</sup> A civilian takes a “direct part” in hostilities when he is physically engaged in them or when he plans, decides on, and sends others to be thus engaged. At one end of the spectrum, a civilian bearing arms who is on his way to or from the place where he will use (or had used) them, clearly is taking a direct part in hostilities. On the other hand, there are cases of indirect support, including selling of supplies and financing hostile acts. In between are the hard cases, where the function that the civilian performs determines how direct a part he takes in the hostilities; in this middle area, collecting intelligence, servicing weapons, and functioning as a “human shield” are direct acts of participation.<sup>137</sup>

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<sup>133</sup> See footnote 92 above.

<sup>134</sup> See article 48 of Additional Protocol I to the Geneva Conventions.

<sup>135</sup> See article 13(3) of Additional Protocol II to the Geneva Conventions

<sup>136</sup> Michael N. Schmitt, *Direct Participation in Hostilities and 21st Century Armed Conflict*,

<sup>137</sup> Orna Ben-Naftali and Keren Michaeli, 91 *International Decisions: Legality of Preventive Targeted Killings in*



This was the exact tactics adopted by the FDLR during the conflict. On the issue of human shields, the Israeli High Court once held that:

“Certainly, if they are doing so because they were forced to do so by terrorists, those innocent civilians are not to be seen as taking a direct part in the hostilities. They themselves are victims of terrorism. However, if they do so of their own free will, out of support for the terrorist organisation, they should be seen as persons taking a direct part in the hostilities.”<sup>138</sup>

Schmitt also reiterated that voluntary human shielding is “unquestionably direct participation, resulting in loss of immunity from direct attack ...”<sup>139</sup>

Based on these arguments one may state that those civilians who willingly volunteered as human shields obtained the status of direct participants in hostilities, so lost their protections as civilians, and became military targets. As a consequence of their conduct in taking direct part in the hostilities, civilians who voluntarily offered themselves as human shields lose their immunity from direct attack.<sup>140</sup> This, in certain respects, minimises the obligations of attacking commanders in applying the principle of distinction.<sup>141</sup>

There is, however, a qualification on the responsibility of attacking forces. According to article 51(8), even if the defending party has violated the principle prohibiting the use of humans as shields, the attacking party must take precautionary measures to protect civilians not taking part in the hostilities. This is called the proportionality principle; attacking parties, in the event that there are armed civilians or civilians voluntarily being used as human shields must use all necessary means to mitigate the loss of civilian life in the area.

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International armed Conflict (2007) 101 *American Journal of International Law* 459.

<sup>138</sup> *PCATI* (2006) HCJ 769/02, [36] (Israel), available in English from; <http://elyon1.court.gov.il/eng/home/index.html> at last accessed 28/06/2011.

<sup>139</sup> Michael N Schmitt, *Precision Attack and International Humanitarian Law*, (2005) 87; *International Review of the Red Cross* at pg 459.

<sup>140</sup> See article 51(7) of additional protocol I to the Geneva Convention.

<sup>141</sup> Jean-François Quéguiner, *Precautions under the Law Governing the Conduct of Hostilities*, (2006) 88 *International Review of the Red Cross* at pg. 815.

In conclusion, the Rwandan Army had used all necessary means to minimise civilian casualty during their military operations as can be seen from the testimonies of witnesses. It made announcements on loud speakers trying to separate the refugees from the armed militia and FDLR members.<sup>142</sup> The RPA forces also used a protective belt tactic in order to allow the refugees to return to Rwanda safely and when the RPA forces discovered that there were still some civilians caught in the crossfire, they adopted special tactical schemes to reduce casualties. An interviewed refugee stated, “I was in Kisangani refugee camp and the RPA came and surrounded the refugee camp and using loud speakers told us to leave the camp to a distance of about 80 kilometers, some of us obeyed but some were coerced by the FDLR not to obey”.

Those who refused to follow the instructions to leave or were coerced, died in the hostilities that ensued. These actions show that they conformed to the provisions in article 57 of Additional Protocol I and took necessary precautions in order to mitigate the loss of civilian lives. Gross argues that: “so long as we accept that there is no absolutist moral prohibition on war per se, the deaths of innocent civilians may be morally and legally justified where it is a by-product which, by virtue of our recognition of the right to life, we act to limit to the greatest extent possible”.<sup>143</sup>

A very important issue that must be discussed is the issue of collateral damage. The obligation to distinguish between civilians and civilian objects on the one hand and military objectives on the other is a central tenet of International Humanitarian Law. Collateral damage is inflicted when a party to the conflict intends to attack a military objective but kills or injures civilians or destroys civilian objects in addition to, or instead of, destroying the military objective.<sup>144</sup> It is settled law that International Humanitarian Law prohibits the intentional targeting of civilians during war;<sup>145</sup> it is acceptable that in certain instances when attacking a military object civilians may die. Part of the reality of

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<sup>142</sup> See footnote 1 the testimony of Brigadier-General Rutatina. See also the interview of an anonymous refugee who stated that in Kisangani refugee camp, the RPA forces surrounded the camp and using loud speakers told them to leave and go to a distance of 80 kilometres.

<sup>143</sup> Emanuel Gross, ‘Use of Civilians as Human Shields: What Legal and Moral Restrictions Pertain to a War Waged by a Democratic State against Terrorism?’ [\(2002\) 16 \*Emory International Law Review\* 445](#), 474–5.

<sup>144</sup> Fenrick William, The Rule of Proportionality and Protocol I in Conventional Warfare, 1982 *Military Law Review*, 91-127, (98).

<sup>145</sup> See Geneva Conventions and additional protocols.

war is that innocent people are killed or injured and their property destroyed.<sup>146</sup> Additional Protocol I makes provision in the instance that innocent civilians die in the process of an armed attack by one faction against the enemy. It is prohibited to launch any attack with expectations that it will cause incidental loss of civilian life, injury to civilians or damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.<sup>147</sup> I must hasten to say that this provision is for international armed conflicts. The law is not so clear on non-international armed conflicts. However, Additional Protocol II comes very close to addressing this issue although it only prohibits intentionally attacking civilians and attacking objects indispensable to the survival of the civilian population, it does not expressly prohibit excessive collateral damage.<sup>148</sup> This means that the death and destruction of innocent civilians and their property that is incidental to an attack on a legitimate military target is prohibited only if it is excessive in relation to the military advantage anticipated from the attack.<sup>149</sup>

In our situation RPA did everything they could to minimise the loss of civilians during their attacks on FDLR forces. In fact, you could see that when they attacked FDLR forces in Lumangabo Military Camp, they formed a protective belt that allowed the Rwandan refugees to flee back into Rwanda where they were safe and they prohibited them from fleeing into the Congolese forest where there was a high possibility that they would be injured or perish.<sup>150</sup> There is further evidence that before they attacked refugee camps they would pass out information through loud speakers asking refugees to vacate the area and go to a particular distance where they would be safe from the violence that would ensue from their attacks. These actions show that RPA tried as best as possible to minimise civilian casualties when undertaking their operations.

On the other hand, FDLR put the refugees at risk. Members of FDLR prevented the refugees from fleeing to areas of safety. In fact, as can be seen from the evidence given

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<sup>146</sup> See footnote 136 at pg 100.

<sup>147</sup> See article 51(5) of Additional Protocol I of 1977.

<sup>148</sup> See article 13(2) of Additional Protocol II of 1977.

<sup>149</sup> D. Jefferson and Reynolds, Collateral Damage on the 21<sup>st</sup> Century Battlefield: Enemy Exploitation of the Law of Armed Conflict and the Struggle for a Moral High Ground. 2005 Air Force Law Review 56, 1-108.

<sup>150</sup> See footnote 1 above.

by witnesses, FDLR killed some of the refugees that intended to return to Rwanda or blocked their paths when the refugees wanted to turn back to safety causing them to fall over a bridge and drown.

Therefore, in analysing liability for collateral damage one has to take into consideration the principle of proportionality. The question here is whether the actions taken by RPA were of proportional value and whether the loss of civilian casualties can be said to be excessive.

Concerning the issue of proportionality, the general rule is that “the military advantage must indeed be one related to the very survival of a State or the avoidance of infliction of vast and severe suffering on its own population and that no other method of eliminating this military target is available”.<sup>151</sup> Therefore, were the military operations by RPA necessary, in my opinion they were as there was no way of eliminating the threats posed by FDLR? Negotiations had failed and the international community failed to respond to the request of the Rwandan government to intervene in the situation.

RPA conducted their activities based on International Humanitarian Law and tried as best as possible to minimise civilian casualties, had FDLR forces also followed the rules of International Humanitarian Law to minimise the risk to civilian populations, there would not have been an excess loss of civilian lives. Rather they put the civilians at risk.

### **3.3 Conclusion**

The Congolese Government is in violation of its obligation to protect refugees in its country. Firstly, it allowed armed men to mingle and enter its borders together with refugees instead of disarming them. It also settled the refugees close to the borders, which enabled armed men to carry out subversive activities against Rwanda. Furthermore, it failed to separate armed men from innocent refugees, which put these refugees in danger. The Congolese government allowed the militarisation of camps and encouraged even participated, in arming these militia groups in order to carry out subversive activities against Rwanda.

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<sup>151</sup> Legality of the threat or use of nuclear weapons, ICJ Advisory Opinion of 8 July 1996, see dissenting opinion of Judge Higgins, para. 21.

The FDLR is in violation of the obligation prohibiting the use of human shields during armed conflicts. It intentionally mingled and in some instances directed the population to areas of prospective attacks leading to their death. To a certain extent, the conduct of some civilians also led to an increase in civilian casualty,<sup>152</sup> they directly participated in the hostilities losing their immunity from attacks.

Due to the actions of the FDLR attacking from the DRC territories and the failure of the international community to come to the aid of Rwandan refugees in the DRC and the citizens of Rwanda, the government decided to embark on military operations against these armed groups as a means of defending itself. In its operations, it used proportional and precautionary measures in preventing civilian casualties. It must be noted that in some situations innocent civilians were killed due to the tactics employed by the FDLR in using human shields. In other instances, errors were made. However, it must be noted that the predominant mode of operation was based on the principle of precautionary measures to minimise civilian casualties as best as possible by RPA.

Therefore, in looking at liability for death of refugees, the FDLR bears the greatest responsibility in that it killed innocent civilians who resisted to be used as human shields, they killed refugees in camps not adhering to their authority, and they put refugees in the frontline as human shields causing their deaths. They were also responsible for the disappearance of many people, as reports have shown about 200, 000 disappeared.<sup>153</sup> Moreover, another report showed that an estimated 213, 000 Rwandans remain either unaccounted for, dead in the period of violence or hidden in the forests or among the people of DRC.<sup>154</sup> Furthermore, they are also responsible for the collateral damage that ensued during the hostilities. Firstly, they did not conduct their activities according to International Humanitarian Law that stipulates that parties to a conflict must use all possible means to safe guard the civilian population. It can be

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<sup>152</sup> See footnote 1 in which it was stated that the level of casualty was evidence that civilians were being used in the conflict because they were not properly trained and had little battle knowledge when they came up against well trained RPA forces they were killed in large numbers.

<sup>153</sup> United States Committee for Refugees and Immigrants, U.S. Committee for Refugees World Refugee Survey 1997 Democratic Republic of Congo (formerly Zaire), 1 January 1997, available at <http://www.unhcr.org/ref/world/docid/3ae6a8a70.html> accessed 21 June 2011.

<sup>154</sup> UNHCR public information fact sheet, July 2, 1997.

seen that rather than undertaking such provisions they blatantly undertook activities that led to the injury and death of civilians.

### **General Conclusions and Recommendations**

This study undertook an enquiry into the cause of the deaths of refugees during the DRC War I and the DRC War II. It also sought to find who was to be held accountable for these deaths by looking at the laws governing the protection of refugees with regard to the violators and their actions.

In concluding this study, it may be imperative to remember certain principles, which seem to be a deciding factor for analysing and concluding this study. The UN Charter prohibits use of force. Exceptions to the prohibition on the use of force have been recognized in response to new types of challenges ranging from imminent attacks,<sup>155</sup> protracted and low-level attacks by non-state actors,<sup>156</sup> and humanitarian catastrophes.<sup>157</sup> During the DRC conflict, these exceptions were exactly the precursors which led Rwanda to launch an attack on DRC.

However, in terms of *jus in bello* (as is the study focus) it has been evidenced that the Rwandan refugees' death occurred in different circumstances. At the standing point, I hold that the regime of Mobutu and the DRC in particular, should be held responsible in the first instance. It clearly violated its international law obligations to protect refugees in its country according to the UN Convention on Refugees and the African Convention on Refugees. Therefore, based on the principle of State Responsibility, the DRC should be held liable for the violation of its international law obligations to protect refugees within its territory.

In a nut shell FDLR bears, the greatest burden for the loss of civilian lives, however, the Democratic Republic of Congo is also culpable for the loss of civilian lives even though

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<sup>155</sup> W. Michael Reisman, *Criteria for the Lawful Use of Force in International Law*, 10 YALE J. INT'L L. 279 (1985).

<sup>156</sup> W. Michael Reisman, *No Man's Land: International Legal Regulation of Coercive Responses to Protracted and Low Level Conflict*, 11 HOUS. J. INT'L L. 317 (1989).

<sup>157</sup> W. Michael Reisman, *Hollow Victory: Humanitarian Intervention and Protection of Minorities*, 91 AM.SOC'Y INT'L L. PROC. 431 (1997); W. Michael Reisman, *Legal Responses to Genocide and Other Massive Violations of Human Rights*, LAW & CONTEMP. PROBS., Autumn 1996, at 75; W. Michael Reisman, *Unilateral Action and the Transformations of the World Constitutive Process: The Special Problem of Humanitarian Intervention*, 11 EUR. J. INT'L L. 3 (2000).

it did not violate or threaten to violate Rwanda's sovereignty directly, but the fact that it had acquiescence of the fact that FDLR was using its territory as a spring board to launch attacks on Rwanda meant that it incurred some form of liability. According to Walzer, a state is materially non-innocent if it is actively involved in the war in the event that it violates or threatens to imminently violate the rights of another state thus incurring responsibility for causing the wars and should be regarded as a criminal state.<sup>158</sup> Therefore my view is that DRC was actively involved in the war as the reports have shown that the government of DRC was actively involved in arming the FDLR and that the officials of DRC facilitated arms flow into the DRC for FDLR in violation of an international arms embargo.<sup>159</sup>

Secondly, I would like to impute some amount of blame on the international community especially the United Nations. The UN Security Council which has primacy in the maintenance of peace and security in the world failed to protect Rwandan refugees even though there was evidence to show that their rights were clearly being violated. Moreover, there were appeals by the Rwandan government on several occasions calling on them to intervene in the DRC. It is my view that had the United Nations acted differently and had become actively seized of the matter there would have been no need for an intervention by Rwanda.

The international community, in particular the Organisation of African Unity (OAU), also carries some blame because they like the UN had an obligation to collectively protect civilians against mass atrocity crimes. They had failed to intervene during the Genocide and also failed to prevent these wars. The OAU as a regional organisation could have done an important job in mediating and maybe seeing that FDLR members were disarmed and that the sale of arms and munitions were not encourage by authorities in the DRC. The Rwandan Government indicated to the whole world that they had not intended to intervene in DRC but did so as a last resort when all other means had failed.

It is also important to note that, the experience of war shows that in armed conflict situations whatever precautions a "*pater familias*" took, civilians were likely to die. To

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<sup>158</sup> Michael Walzer, *Just and Unjust Wars* (New York, Basic Books, 1977) at pg 55.

<sup>159</sup> See footnote 1.

quote John Schlight, “Human factors can have a significant role in any instance of collateral damage. The uncertainty and confusion inherent in war are factors, which are very conducive to increasing the potential for human errors to occur. In March 1967, two American F-4C fighter-bombers flew an armed reconnaissance mission from Thailand. Their intent was to find North Vietnamese vehicles infiltrating through Laos. After determining their position by reference to radio beacons and landmarks, they dropped their bombs along a road that seemed likely to be a sanctuary for enemy trucks. Unfortunately, they had misinterpreted their position and actually placed their ordinance in the center of the village of Lang Vei, killing 100 South Vietnamese civilians and wounding 250.<sup>160</sup> Similarly, in 1972, during US bombing in Cambodia, the force commander described how “a crewmember made an honest error, forgot to flip a switch and we killed a little over 100 people in one village some 15 miles from where the bombs were intended to fall.”<sup>161</sup>

I concur with the presentation made by Professor Michael Sharf in the aforementioned conference with regard to the DRC conflict, when he stated “It is not possible for any commander to maintain control of every soldier on the battlefield and RPA commanders could not be exception”. Based on that, it is possible that probably some RPA soldiers have individually in some instances committed crimes but without the command or instructions from their commanders. This is because nowhere has evidenced the “Government *animus nocendi* or *mens rea* to commit any crime against refugees. In justifying this fact, it is evident that many of the RPA soldiers were people who had lost their loved ones during the Tutsi genocide. Then, especially when they imagined that some of refugees were part of the perpetrators of Tutsi genocide in 1994 and thus with all these memories, anger and bitterness, they in some instances resorted to taking matters into their own hands to revenge. This is not a fact but a probable justification for some RPA soldiers taking out individual action. In conclusion, as already discussed above, it is evident that the RPA military operations were conducted according to

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<sup>160</sup> John Schlight, *The War in South Vietnam: The Years of the Offensive, 1965-1968* (Washington DC: Office of Air Force History, 1988), 260.

<sup>161</sup> John W. Vogt, Commander in Chief, Pacific Air Forces, in a speech to the Honolulu Rotary Club, 4 December 1973, Air Force Historical Research Agency, K168.06-234, Dobin # 0571583, 13. 85. Edward N. Luttwak, “Toward Post-Heroic Warfare,” *Foreign Affairs*, vol. 74, May-June 95.



International Humanitarian Law in that although the FDLR used refugees as human shields, the RPA took precautions to minimise civilians casualties as best as possible. The blame, however, should be cast on the FDLR members who used the refugees as human shields, which is also a violation of International Humanitarian Law and a war crime. Furthermore, their modus operandi indicated that they blatantly allowed civilians to join them in the fight against RPA despite the fact that these civilians had little or no training, which meant that when they came up against members of RPA who were well-trained soldiers a lot of them were killed. It is my view that those who bear responsibility for such policy be investigated and brought to justice in an international tribunal. It must be noted that many refugees were killed in refugee camps by the FDLR who either refused to pay taxes or those who refused to follow their orders.

In addition, there were also civilians who were killed before the intervention of Rwanda in the conflicts in DRC;<sup>162</sup> furthermore, reports have shown that FDLR and other factions are still killing civilians after the withdrawal of Rwandan forces, which makes it difficult for investigators to distinguish the deaths before, during, and after the RPA – FDLR conflict.

I must conclude by saying that, with the creation of the International Criminal Court violators of mass atrocity crimes, such as those that occurred during the Congo Wars, should not go unpunished and that in situations like the ones that happened in the DRC the investigations must take due care of the time, circumstances and specific facts in order to establish culpability.

It is my opinion that International Humanitarian Law is generally less extensive and less specific when it comes to non-international armed conflicts especially in relation to collateral damages. Humanitarian Law in non-international armed conflicts is governed by Article 3 common to the four 1949 Geneva Conventions (universally accepted by nation states).<sup>163</sup> However, owing to the generality of this article, it appears that the only possible bearing on collateral damage is the duty to treat non-combatants humanely,

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<sup>162</sup> See footnote 8 at pg 10. See also 62 at pgs 3-4.

<sup>163</sup> See ICRC Handbook on International Humanitarian Law

which arguably would be breached by intentionally attacking a target that would cause excessive civilian casualties.<sup>164</sup>

The other treaty, which may apply during non-international armed conflicts, is the 1977 Protocol II Additional to the Geneva Conventions. However, although this prohibits intentionally attacking civilians<sup>165</sup> and attacking objects indispensable to the survival of the civilian population,<sup>166</sup> it does not expressly prohibit excessive collateral damage. The statute of the International Criminal Court also fails to refer to excessive collateral damage in non-international armed conflicts. Therefore, the issue arises as to whether or not customary international law prohibits excessive collateral damage in non-international armed conflicts. The ICRC study proclaimed that the rule prohibiting excessive collateral damage applies in both international and non-international armed conflicts,<sup>167</sup> but the extent to which nation-states accept this finding remains unclear. Therefore, it is my recommendation that nation states adopt a meaning provision dealing with collateral damages during non-international armed conflict, as there has been a proliferation of non-international armed conflict since the latter half of the 20<sup>th</sup> century.

With the emergence of the concept of Responsibility to Protect, for which the UN and the newly created African Union have adopted and have undertaken to implement, there would be timely and decisive actions in preventing such situations in the future. It should be noted that Leaders of the Nations State to the United Nations have made an obligation to undertake the responsibility to protect in the 2005 World Summit Outcome Document.<sup>168</sup> The leaders made an undertaking to protect their citizens against mass atrocities crime and further made an undertaking that in the event that a state is unable or unwilling to perform their obligation to protect their citizens they would collectively act to protect such civilians against such crimes.

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<sup>164</sup> See footnote 141 at pg 94.

<sup>165</sup> See article 13.

<sup>166</sup> See article 14.

<sup>167</sup> See footnote 148.

<sup>168</sup> See paragraphs 138 and 139 of the 2005 World Summit Outcome Document, UN DOC A/RES/601, October 24 2005.

In fact, it must be stated that the failure of the international community to respond to the genocide in Rwanda, was one of the reasons why the African Union was created. Included in its Constitutive Acts is article 4(h) which gives the Union the right to intervene pursuant to a decision by the Assembly to intervene in a country where there is evidence of mass atrocity crimes being committed namely: Genocide, Crimes against Humanity and War Crimes.<sup>169</sup> Furthermore, there is a right to intervene in a member state on request of a member state of the Union where there is evidence of such crimes happening.<sup>170</sup> Therefore had this provision being in existence before the Congo Wars the African Union would have been obliged to intervene and prevent such crimes from happening.

My recommendation to both the United Nations and the African Union, is that they have to muster the political will to carry out such undertakings because before this doctrine the UN Security Council and the OAU Mechanism for Conflict Prevention, Management and Resolution were all in place, but they failed to respond to such needs because they could not conjure up the will from political leaders to help the Rwandan people in their country and as refugees in DRC.<sup>171</sup>

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<sup>169</sup> See article 4(h) of the African Union Constitutive Act adopted 11 July 2000.

<sup>170</sup> See article 4(j)

<sup>171</sup> Adopted by the 29<sup>th</sup> Ordinary Session of the Assembly of Heads of States and Government held in Cairo 1993.(AHG/Decl.3(XXIX)). Available at <http://www.africa-union.org/root/au/Documents/Decisions/hog/3HoG>

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