

The Responsibility to Protect: From Doctrine to Practice
‘R2P’ and Protection of Civilians

Case Study: DRC

By

Françoise Joly
School of Law and Government
Faculty of Law

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Declaration

I hereby certify that this material, which I now submit for assessment on the programme of study leading to the award of a degree of Doctor of Philosophy is entirely my own work, and that I have exercised reasonable care to ensure that the work is original, and does not to the best of my knowledge breach any law of copyright, and has not been taken from the work of others save and to the extent that such work has been cited and acknowledged within the text of my work.

Signed: Françoise Joly

ID No.: 57210374

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Abstract

This thesis aims to evaluate the effectiveness of the 'Responsibility to Protect' (R2P) framework to protect civilians against mass atrocities. To test the efficacy and workability of the emerging norm and its added value to the current legal and normative framework in relation with the protection of civilians, the thesis investigates the ways in which R2P was applied or should have applied in practice to the Democratic Republic of Congo's conflict. Despite considerable efforts made to address the situation of civilians embroiled in armed conflict, the international legal and normative framework has shown itself to be inadequate due to the changing nature of conflicts and the lack of implementation of existing legal instruments. This has led to the situation in which civilians are continuously facing mass atrocities. While R2P sought to strengthen international responses to conflicts characterized by the commission of war crimes, ethnic cleansing, crimes against humanity and genocide, it is notable that the emerging norm has yet to be invoked in the DRC conflict. However, through an assessment of the application of the R2P to the conflict, the study finds that the international community's initiative to address the conflict situation in eastern DRC came at a time when the need to find a common solution as to how to develop the R2P framework within the United Nations system became crucial. Nevertheless, the international response to the crisis did not prevent mass killing and the abuse of civilians, particularly the widespread sexual violence against women and young girls and the use of children as child soldiers. This thesis argues that the current United Nations strategy designed to address such a situation needs to be revised. It concludes with several suggestions and recommendations on how to improve the international responses to conflicts characterized by atrocity crimes in order to turn R2P framework into a reality on the ground.

List of Abbreviations

AU	African Union
CEDAW Women	Convention on the Elimination of All Forms of Discrimination Against Women
CRC	Convention on the Rights of the Child
DPKO	UN Department of Peace Keeping Operations
DRC	Democratic Republic of the Congo
ECOWAS	Economic Community of West African States
EU	European Union
FARDC	Armed Forces of the Democratic Republic of Congo
FDLR	Democratic Forces for the Liberation of Rwanda
HRW	Human Rights Watch
IC	International Court of Justice
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights
ICISS	International Commission on Intervention and State Sovereignty
ICGLR	International Conference for the Great Lakes Region
ICRC	International Committee of the Red Cross
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDPs	Internally Displaced Persons
IHL	International Humanitarian Law
IHRL	International Human Rights Law
ILC	International Law Commission
MLC	Mouvement de Libération du Congo
MONUC Congo	United Nations Organization Mission in the Democratic Republic of Congo
MONUSCO	United Nations Organization Stabilization Mission in the Democratic
M23	Mouvement du 23 Mars

NATO	North Atlantic Treaty Organisation
NGO	Non-Governmental Organization
OCHA	UN Office for the Coordination of Humanitarian Affairs
OAU	Organization of African Unity
OHCHR	UN Office of the High Commissioner on Human Rights
P5	United Nations Security Council five Permanent Members
RCD	Rassemblement Congolais Pour La Democratie
R2P	Responsibility to Protect
SADEC	Southern African Development Community
SG	UN Secretary-General
UN	United Nations
UNSC	UN Security Council
UNHCR	UN High Commissioner for Refugees
USG	Under Secretary-General
GA	UN General Assembly

Chapter 1: Purpose and Structure of the Thesis

1.0 Introduction

The evolution of R2P has been hailed as a significant step in the protection of civilians against mass atrocities.¹ At the 2005 World Summit, the heads of states and governments declared that individual states have the responsibility to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity, and from incitement to these crimes; that there is a collective responsibility to assist states in meeting their obligations; and that member states are prepared to respond in a timely and decisive manner when a state manifestly fails to provide such protection to their populations².

Two Nobel Prize winners, Vaclav Havel and Desmond Tutu, supported R2P noting that the norm is 'the most significant development in the defense of human rights since

1 See for example Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Massachusetts: Brookings Institution Press, 2008; Ramesh Thakur and Thomas G. Weiss, 'RTP: From idea to Norm—and Action?' in *Global Responsibility to Protect Journal*, vol.1, no. 1, 2009, pp. 22-53; Thomas G. Weiss, 'The Sunset of Humanitarian Intervention? The Responsibility to protect in a Unipolar Era', *35 Security Dialogue*, vol. 35, no.2, 2004, pp.135-153; Alex J. Bellamy, 'The Responsibility to Protect-Five Years On', *Ethics & International Affairs*, vol. 24 no 2(2010) pp 143-169; Jennifer M. Welsh and Maria Banda, 'International Law and the Responsibility to Protect: Clarifying or Expanding States' Responsibilities?' *Global Responsibility to Protect*, vol 2, No. 3, 2010, pp. 213-231; Carsten Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm', *The American Journal of International Law*, vol. 101, no. 1, 2007, pp. 99-120; Edward C. Luck, *Building a Norm: The Responsibility to protect, Mass Atrocity Crimes: Preventing Future Outrages*, Washington D.C.: Robert I. Rotberg, 2010 pp, 108-115; 2005 World Summit Document, UN A/ RES/ 60/1 Oct. 2005; UN Secretary-General, *High-Level Panel on Threats, Challenges and Change, A More Secure World: Our Shared Responsibility*, A/59/565, Dec. 2, 2004; UN Secretary-General, *In larger Freedom: Towards Security, Development and Human Rights for All*, A/59/2005, Mar. 21, 2005; UN Secretary-General, *Implementing the Responsibility to protect*, A/63/677, Jan. 12, 2009; UN Secretary-General, *Early Warning Assessment, and the Responsibility to Protect*, A/64/864, Jul. 14, 2010, UN Secretary-General, *The Role of Regional and Sub-regional Arrangements in Implementing the Responsibility to Protect*, A/65/877, Jun. 27, 2011.

2 UN GA Res. 60/1, 'World Summit Outcome', UN Doc. A/60/1, Oct. 24, 2005 at paras pp. 138-40.

the codification of those rights enshrined in the Universal Declaration of Human Rights in the aftermath of World War II and the Holocaust³.

Even though R2P is impacting on political discourses and generating pressure⁴ to apply the existing legal obligations to prevent and to halt mass atrocities, the norm has not been enshrined in a legal instrument whose applicability is subject to both theoretical discussions and practical application. According to the 2001 International Commission on Intervention and State Sovereignty (ICISS), R2P implies the state's responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity, and the obligation of the United Nations to act where a state proves to be unable or unwilling to discharge its duty or when the state itself is the perpetrator⁵, all these are happening in the DRC conflict while the R2P norm is in place.

This thesis seeks to make a contribution to the discourse and applicability of Responsibility to Protect (R2P) by exploring its effectiveness as an international norm to address mass atrocities. In order to ascertain the efficacy and workability of the R2P principles and its added value to the current legal and normative framework in relation with the protection of civilians, the study investigates whether the doctrine was applied or should apply in practice to the Democratic Republic of the Congo's conflict which is characterized by the commission of mass atrocities against the civilian populations.

3 See Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in our Time*, Oxford: Oxford University Press, 2012.

4 See for example J. Bellamy, 'The Responsibility to Protect—Five Years On,' *Ethics and International Affairs*, vol. 24, no. 2, Summer 2010, pp. 143–69; Eduard C. Luck, 'The Responsibility to Protect: Growing Pains and Early Promise?' *Ethics and International Affairs* vol. 24, No. 4, Winter 2010.

5 ICISS, *The Responsibility to Protect: Report of the International Commission on Intervention and States Sovereignty*, Ottawa: IDRC, 2001.

Thus, by analysing the DRC conflict, this thesis assesses whether the international community's strategies to address conflicts characterized by commission of mass atrocities have changed since the adoption of the R2P in 2005.

1.1 Purpose of the research

Although the R2P concept is now widely accepted as an international norm to address mass atrocity crimes, its implementation still presents several challenges. Edward Luck, Special Advisor to Secretary-General on R2P, in Remarks to the General Assembly on R2P, has expressed the need for more research in this area. As he comments: 'we are pleased to see wide academic interest in 'Responsibility to Protect', because we believe that rigorous scholarship can be an important ally in our common quest for better means of preventing the commission of mass atrocities. There is much that we do not know. We need carefully documented case studies, particularly about good/best practices in different points of the World'.⁶ This thesis is a natural extension of that process; to find a way to better respond to the kind of conflict situations for which the R2P doctrine was designed to address. Although there is emerging literature on different aspects of R2P since its introduction in 2001⁷, the issues of implementation of R2P have mainly been studied in the field of international relations and politics.⁸ This dissertation specifically aims at making a contribution to the existing

6 UN, Edward C. Luck, 'Remarks to the General Assembly on the Responsibility to Protect', New York, 23 July, 2009.

7 For more details see International Coalition for the Responsibility to Protect, available at <http://www.responsibilitytoprotect.org/index.php/component/content/article/628>, accessed on 16/10/2013.

8 See Foreexample Alex Bellamy, *Global Politics and the Responsibility to Protect: From Words to Deeds*, New York, Routledge, 2011; Ramesh Thakur, *The Responsibility to protect: Laws and the Use of Force in International Politics*, London, Routledge, 2011; Robert. I. Rotberg, *Mass Atrocity Crimes, Preventing Future Outrages*, Washington, DC: World peace Foundation, 2010.

literature focussing on the development of R2P within the international legal framework in relation to the protection of civilians.

Furthermore, most of the case studies on the subject matter were based on conflicts with high media coverage throughout the World such as the conflict in Darfur⁹, Libya¹⁰, Kenya¹¹ and Côte d'Ivoire, in which reported and documented potential massacres have drawn attention to the moral and legal duty to protect. Yet, very little work has been conducted on the application of R2P to continual conflicts which began before the development of the new norm. Therefore, an analysis and exploration of the conflict in the DRC, particularly in the eastern region which has lasted more than a decade involving several foreign armed groups and the presence of the United Nations peacekeeping mission under a Chapter VII mandate to protect civilians since 1999¹², contributes to the idea that research should be undertaken to generate a workable framework which could compel states to adequately respond to long lasting conflicts characterized by continued commission of mass atrocity crimes.

Moreover, while a considerable amount of literature exists on R2P and protection of civilians, there has been limited use of victim and survivor insights as a source of

9 See Walter Lotze, *Interventionist Norm development in International Society: The Responsibility to Protect A Norm Too Far?* PhD Thesis Submitted at the University of St. Andrews in 2011.

10 See for example J. Bellamy, 'The Responsibility to Protect—Five Years On', *Ethics and International Affairs*, vol. 24, no. 2, Summer 2010.

11 Ibid. For more details on the conflict see Human Rights Watch, *Ballots to Bullet: Organized Political Violence and Kenya's Crisis of Governance*, March 16, 2008; Kenya Human Rights Commission, *On the Brink of the Precipice: a Human Rights Account of the Post-Election Violence in Kenya*, 2008.

12 See for example John F. Clark, *The African Stakes of the Congo War*, New York: Palgrave Macmillan, 2004; Michael Nest, François Grignon and Emizet F. Kisangani, *The Democratic Republic of Congo: Economic Dimensions of War and Peace* Boulder, CO and London: Lynne Rienner Publishers, 2006; Georges Nzongola-Ntalaja, 'Civil War, Peacekeeping, and the Great Lakes Region,' in Ricardo René Laremont (ed.), *The Causes of War and the Consequences of Peacekeeping in Africa*. Portsmouth, NH: Heinemann, 2002; Dennis M. Tull, *The Reconfiguration of Political Order in Postcolonial Africa: A Case Study from North Kivu (DR Congo)*, Hamburg, Germany; Institut für Afrika-Kunde, 2004; Thomas Turner, *The Congo Wars: Conflict, Myth and Reality*, London, New York: Zed Books, 2007.

knowledge about mass atrocity crimes and the impact of the new norm on the individual's daily life.

In addition, since R2P was designed to prevent or to respond promptly to conflicts characterized by mass atrocity crimes against the civilian population, in practice, such a principle seems perfectly adaptable to specific and urgent situations. Thus exploring whether the Security Council has referred to the new norm or whether its response to the DRC conflict was only based on the traditional protection of civilians (POC) framework will provide deeper insight into how R2P is developing toward a legal binding norm and whether international community's responses to humanitarian tragedies have improved since the adoption of R2P.

1.2 Methodology

This study was undertaken using two methods: secondary source-based research and interviews. The secondary source-based research included a review of reports provided by the United Nations, governments, International Criminal Court, internal and external reports of NGOs, academic studies related to the topic and other forms of documentation. These secondary sources were supplemented by primary information gained from interviews which were carried out between 2010 and 2013. During this time, the author conducted interviews in several areas with concentrated meetings in Geneva, The Hague and Paris and in the field in Democratic Republic of the Congo, Rwanda, Burundi and Uganda. Interviews were conducted with eighty victims and survivors who have experienced mass atrocities as consequences of armed conflict in the Democratic Republic of Congo.

Participants were approached and recruited through rehabilitation centers run by NGOs, Hospitals, Good Samaritans and local associations of the victims, such as

Foundation Femme Plus, Action collective pour la Santé et Développement Communautaire, SOS Femmes Violées, SOS SIDA, Women For Women, and Haki na Amani. Through existing contacts with these organizations during the author's previous research in 2007-2008 on Protection of Women and Children in Armed Conflicts, in each organization, the subjects (victims/survivors) were identified and asked to participate in the research after a meeting session where the research issues as the subject were discussed.

In order to explore the added value of the new norm (R2P) and its impact on the daily life of the civilian population who are at risk or are facing mass atrocities, victims/survivors were asked about their experience and opinion on mass atrocities. The primary emphasis in the interviews was on victims'/survivors' knowledge of tactics and strategies which are used by the perpetrators and their characteristics; and victims/survivors perception of what should be done to prevent or to halt mass atrocities. Participants were therefore asked questions about the attack and the alleged perpetrators, the perceived role of the DRC government, and their expectations of the international community actions. A semi-structured interview protocol was chosen with open answers to allow the victims to express their opinion in detail and in depth as most of them have only a limited knowledge of the subject.¹³

During the interviews, great care was taken to avoid potential risks to participants, trauma and anonymity issues. Bearing in mind that interviewing victims of atrocity crimes is a sensitive and challenging task, as there could be a risk of reliving traumatic experiences when men and women who have witnessed barbarities of war recount their personal histories, interviews were conducted in safe conditions. Thus, all the

¹³ See Annex.

interviews were prepared and conducted with the assistance of psycho-therapists from the NGOs who work with survivors to ensure that emotional flare-ups are contained. All participants took part in the interviews voluntarily without any compensation and a consent form was signed before the interview. The proposal for this project was approved and ethical permission was granted by the Dublin City University Research Ethics Committee. Interviewing victims and survivors was crucial in this study as such data on the characteristics of the crimes and the perpetrators allows an evaluation of whether civilians were systematically and deliberately targeted and whether the attacks were widespread.¹⁴ It further allows one to identify the strategies and tactics used by the perpetrators and to explore how these elements can help policy makers to take concrete measures that directly affect the victims of mass atrocities. The research also draws on statements made during the interviews by government officials, military officials, armed groups officials, staff of international agencies, local Non-governmental organisations and other policy makers involved in national and international response to conflicts in eastern DRC. During the interviews, the issues of confidentiality and anonymity were taken into account to ensure the security of any sensitive information that had been supplied for the purpose of the research. Thus, face-to-face interview was used as a method to reassure participants about confidentiality and none of the interviews could be recorded. Written assurance about confidentiality and anonymity was also provided to each participant in a plain language statement and informed consent process.¹⁵ Due to the presence of some sensitive data in this research, some statements made during the interview are attributed to an anonymous source and participants are not named or identified by their real names in

14 Under the Rome Statute of the International Criminal Court adopted on 17 July 1998, any deliberate, systematic or widespread attack against a civilian population is considered a crime against humanity as well as a war crime. Rome Statute, Article 8.2 b, xxii.

15 See Annex.

my recording and documentation. Furthermore, given the political sensitivities related to the eastern DRC conflict, some places where the interviews have taken place are not mentioned.

In summation, by looking at both policymakers' and victims'/survivors' perspectives, this thesis explores whether there is a correlation between R2P discourses and what is happening in DRC in terms of protection of civilians as victims or potential victims of mass atrocities.

1.3 Structure of the thesis

Following Chapter 1, which is an introductory chapter, chapter 2 reviews the history and development of protection of non-combatants. It discusses the evolution and development of non-combatant immunity from the earliest instances. It then charts the emergence of states' duty to intervene to end inhuman practices and demonstrates that the principle of non-combatant immunity has both religious and secular roots.

This is followed by a discussion of the efforts made during the early 20th century to protect the civilian population through legal instruments. The chapter concludes with an analysis of the protection of civilians in the United Nations (UN) Charter. Two important themes focused on throughout this chapter are, first, the development of the norms of warfare, because the origin of the protection of civilians is usually connected to the evolution of the norms that developed over centuries, to limit the effects of war; and second, a state's right to use force for humanitarian purposes, as this issue has been and continues to be controversial in both international law and international relations.

Chapter 3 investigates how the issue of tension between the principle of state sovereignty and the duty to intervene to halt mass violation of human rights has been

dealt within the UN framework. It begins with an analysis of the status of humanitarian intervention in international law. This is followed by a review of state practice on the issue of intervention for humanitarian purposes and an examination of the Security Council response to these interventions. The chapter concludes with an analysis of the development of R2P as a new norm of international conduct while responding to conflicts where mass atrocity crimes are committed.

The fourth chapter focusses on the legal obligations to protect civilians from mass atrocities as enshrined in international law. It emphasizes that states have both an individual and a collective duty to prevent and to protect their populations from harm. After a brief introductory look at how genocide, war crimes and crimes against humanity were recognized as international crimes under international law, it focuses on states' obligations with respect to protecting civilians against atrocity crimes. It looks firstly at the rules that are found in international humanitarian law and human rights treaties, and then at those that arise from the 1948 Genocide Convention and international customary law. The chapter concludes with an analysis of international justice mechanisms to protect civilians from mass atrocities and an overview of the rights afforded to victims of serious violation of human rights.

On the basis of the findings generated, Part II of the thesis begins with an introduction to the case study in Chapter 5. This chapter examines the DRC as a state in which a continuing conflict characterized by mass atrocities against the civilian population has lasted for more than a decade to see the practical application of R2P framework with regard to such conflicts. The DRC has been the epicentre of a continuing conflict for almost two decades; the struggle for power and access to resources between Congolese and foreign armed groups has kept the region in a state of conflict. Armed groups and the Congolese security forces continue to commit violations of

international human rights and humanitarian law. In order to fully appreciate whether the DRC conflict is a situation which calls for R2P framework, the history of the DRC conflict is examined in this chapter, together with the effects of the conflict on the civilian population as well as the DRC response to the conflict.

Chapter 6 explores the international community response to the recent spate of violence which has raged in the eastern region of the DRC since 2008 and analyses how the R2P framework should have been applied to this conflict.

The thesis concludes with an analysis of the international normative and legal framework in relation to the protection of civilians from mass atrocities and a discussion of how this framework has been unsuccessful in protecting civilians in eastern DRC. A number of recommendations regarding the need for the implementation of R2P framework in order to strengthen the current legal framework are also proffered in this chapter, along with proposals for future research.

Chapter 2: Historical Development of Protection of Non- Combatant

*'The battle for civilian immunity is perpetual and should be waged everywhere that the norm is challenged. There is simply no room for complacency'*¹⁶(A. Bellamy)

2.0 Introduction

In order to address the fundamental question of this thesis—the potential of R2P to strengthen the existing legal and normative framework with regard to protection of civilians from mass atrocities—an exploration into the history and development of the protection of civilians from atrocities is undertaken in this chapter. The origin of the protection of civilians is usually connected to the evolution of the norms of war that developed over centuries to limit the effects of war on civilians and other non-combatants. As pointed out by Chris Jochnick and Roger Normand, 'for thousands of years, attempts have been made to regulate the conduct of hostilities searching how to limit the suffering of non-combatants often referred to as unarmed civilians during conflict.'¹⁷

This chapter will explore some aspects of the history and the roots of the evolution of key measures governing the protection of civilians from harm prior to the emergence of the R2P doctrine. The chapter is divided into four parts. Section 1 of this discussion provides a brief overview of how civilians have been targeted in armed conflict. Section 2 explores how the idea of non-combatants' immunity emerged from the Antiquity,

16 Quoted in Alex J. Bellamy, *Massacre and Morality: Mass Atrocities in the Age of Civilians Imminuty*, Oxford: Oxford Univeristy Press, 2012, p. 14.

17 See Chris Jochnick and Roger Normand, 'The Legitimation of Violence: A Critical History of the Law of War', *Harvard International Law Journal*, winter ,vol 35 no. 49, Winter, 1994 See also H.J. Muller, *Freedom in the Ancient World*, 1961, pp.58-59 Harper & Bros , New Jersey ; James T. Shotwell, *The Long Way to Freedom*, Indian- apolis, The Bobbs-Merrill Company, Inc, 1960.

Medieval period and throughout the Catholic Church laws. This section examines the early attempts to spare civilians from the effects of hostilities throughout the Christian tradition and the medieval periods. Section 3 describes the development of the idea of non-combatant immunity by early modern theorists such as Grotius and Vitoria¹⁸ and, lastly, Section 4 focuses on protection of civilians under UN Charter.

2.1 Brief historical background of targeting civilians in armed conflict

The targeting of the civilian population during warfare is not a new phenomenon. War has always involved large-scale destruction and suffering of non-combatants.¹⁹ From the early Middle Ages, it has been observed that in many conflicts belligerents do not distinguish between combatants and non-combatants when fighting their enemy. The Sack of Jerusalem and other cities in the Crusades saw the slaughtering of the inhabitants; men, women and children, without any distinction. As one chronicler comments:

Some of our men cut off the heads of our enemies; others shot them with arrows, so that they fell from the towers; others tortured them longer by casting them into flames. Piles of heads, hands, and feet were to be seen in the streets of the city. It was necessary to pick one's way over the bodies of men and horses. But these were small matters compared to what happened at the temple of Solomon ...If I tell the truth, it will exceed your powers of belief... men rode in blood ...Indeed, it was a just and splendid

¹⁸ See Grotius, *De Jure Belli ac Pacis Libri Tres*, English trans. By Kelsey in Scott (ed.), *The Classics of International Law*, Oxford: Oxford University Press, 1925, Book III and Vattel, *Droit des Gens*, English trans. Of the ed. of 1758 in Scott (ed.), *Classics of International Law*, Washington: Carnegie Institute of Washington, 1916, Book III.

¹⁹ See Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in Age of Civilian Immunity*, Oxford: Oxford University Press, 2012.

judgment of God, that his place should be filled with the blood of the unbelievers, when it had suffered so long from their blasphemies.²⁰

In fact, unarmed civilians were always targeted and affected by warfare. Civilians could become casualties of war by being caught in the middle of a battle. But the lack of discipline of troops was also a cause of their suffering in wartime. Unfortunately, the setting up of national armies, with well equipped, regularly paid and disciplined soldiers has not been a quick process. The sources of military history are full of stories recounting soldiers' misconduct and abuses due to lack of control. In 1669, for instance, a famous French gazette reports recounted the rape of a Turkish woman by Hussars attacking her wedding ceremony in Hungary and the suicide of her husband who had witnessed the scene.²¹ Nearly 20 years later, direct sources recount how at the capitulation of the Lipovà fortress during the great Ottoman war following the siege of Vienna (1683), unruly Austrian soldiers viciously attacked and looted surrendering unarmed Turkish soldiers and their families despite being ordered by their commanders to leave the city.²² Even before this period, the problem of ill-disciplined troops and gangs dominated large areas of Medieval Europe. In the first early Middle Ages, the military power of sovereigns was mainly based on lower vassals who were supposed to mobilize troops in case of aggression. Thus, mainly reduced to local fights, medieval warfare was rarely in need of big, well-organized armies. The Hundred Years War, however, altered this pattern; the war continued over a long period of time

20 See Morris Bishop, *The Middle Ages*, New York, American Heritage Inc, quoting the twelfth century Chronicler Raymond of Agiles, 1968.

21 Charles Robinet de Saint-Jean, « Lettre du 12 janvier 1669 », in *Les Continueurs de Loret, 1668-1669*, éd. Baron Nathan-James-Edouard de Rothschild et Emile Picot, 1881-1883, Paris, D. Morgand et C. Fatout éditeurs, pp. 423-424 : « Mais l'Epousée, en ce conflit,/La chère Fleur d'Hymen perdit,/A la barbe de son pauvre Homme,/Lequel s'en alla pendre, en somme,/Par un furieux crève-cœur...»

22 See Osman Aga de Temesvar, *Prisonnier des infidèles. Un soldat ottoman dans l'empire des Habsbourg*, Frederic Hitzel éd., Arles : Sindbad, 1998, p.39.

with great conflict between the two main kingdoms of European Christendom, England and France. Consequently, deploying larger numbers of troops in a more controllable way than deploying groups of quick tempered noblemen mounted on armored horses, became an important goal for belligerents²³. The hiring of men as, in most cases, infantry soldiers became common in order to launch or resist invasion waves. However, as maintenance costs of such troops were too high, the soldiers only served during battle time and were then dismissed²⁴.

In fact, despite this amelioration, the soldiers were still bearing arms without any regulation or discipline. They looted the countryside for years, calling themselves 'free companies', 'Ecorcheurs', or 'Routiers' until the kings or rich landlords decided to send platoons of heavy cavalry to defeat them.²⁵ Nevertheless, the Hundred Years War was marked by the involvement of the civilian population in hostilities. Thus, the targeting of non-combatants became a legitimate and pressing military strategy involving planned devastation and terrible massacres.

23 The French knights' lack of discipline is supposed to have been among the reasons that lead to the main defeats against the English. According to Marilyn Livingstone and Morgen Witzel, in Crécy for example : 'The grands seigneurs, eager for battle, began to hurry towards the enemy without thought of the march order, each determined to get to grips with the enemy as soon as possible. Analysing events afterwards, the chronicler Jean le Bel concluded that the French army was ruled that day by pride and envy rather than military discipline, and it is hard to disagree with him' (The Road to Crécy :The English Invasion of France, 1346, Pearson Harlow: Education Limited, 2005, p. 282). Evoking this battle as well as the one fought in Poitiers in his Reign of Chivalry, Woodbridge: The Boydell Press, 2005, (first ed. 1980, David and Charles Newton Abbot), pp.32-33, Richard W. Barber concludes that the chivalric sense for personal glory was at the basis of this lack of discipline (p.34): 'In essence, The English victories were due to the fact that they made best possible use of their resources, while the French squandered theirs. Yet the French had the reputation of being the best knights in Europe. The paradox points to a fundamental failure in knightly training. Discipline played a relatively minor part in the knight's ideals, while individual glory was the essence of existence. The French army was a group of individuals, while the English knights subordinated their chivalric ideals to military needs'.

24 'The majority of troops in service to either the French or the English crown were employed on short-term contracts, indentures and lettres de retenue, and therefore lost their source of income at the end of a military campaign.' Craig Taylor, Chivalry and the Ideals of Knighthood in France during the Hundred Years War, Cambridge, Cambridge University Press, 2013, p.24.

25 Michael Howard, War in European History, Oxford, London; New York: Oxford University Press, 1977, p.18.

In the early fifteenth century, attacking civilians became an explicit part of military strategy. Jacques Heers, for example, in reference to 'Gast'²⁶ points out that French armies under the command of the King's son were using this strategy to rid France of the last English garrisons that settled in the middle of the country around the 1430's. By devastating the countryside, ravaging the meadows and the harvest and burning farms, the main goal was to prevent the enemy from getting supplies and hence enforce departure. Unfortunately, victims of such attacks were primarily the rural population who starved to death if not killed during the raids.²⁷ Apparently this form of warfare was common, as Heers demonstrates, in that similar actions were launched by either the English or their allies, the Burgundians.²⁸

Also in the seventeenth century, the Thirty Years War (1618-48) showed how religious conflict coupled with the development of European warfare allowed participants to justify massive assaults on civilians, whose religious identity became their death-defining label. Nevertheless, to see the past or ancient times as more cruel than our modern era would be erroneous. In nineteenth and twentieth century wars, the widespread killing, systematic rape and suffering of hundreds of millions of civilians needs no introduction. Bellamy in *Massacres and Morality: Mass Atrocities in an Age of Civilians Immunity* demonstrates concisely how over the last two hundred years, government and other groups have managed to slaughter civilians while ignoring the

26 Gast is an old medieval French term which designates a tactic used by the armies during the Hundred Years War and which could be translated today under the expression of 'scorched earth policy'.

27 See Jacques Heers, *Louis XI*, p. 293.

Ibid. The Hundred Years War is famous for the Black Prince's chevauchées which occurred mainly during the first part of the war. As M. Bennett states: 'The chevauchée is explained in terms of 'Fabian tactics', which is to say: policy of defeating an opponent without the risks of battle. But the chevauchée (literally a 'ride') was a raiding strategy, inflicting economic damage and so weakening an enemy's political and moral authority in the ravaged region.' 'The Development of Battle Tactics in the Hundred Years War', in *Arms, armies and Fortifications in the Hundred Years War*, Anne Curry and Michael Hughes (eds.), Woodbridge: The Boydell Press, 1999, (first ed. 1994), p. 3.

embedding norm of civilian's immunity from attack.²⁹ Surveying the intentional killing of civilians since the nineteenth century, he pointed out the fact that the norm of civilian immunity has been regularly challenged by the widespread killing of civilians. He further comments:

A mass killing has been portrayed as, variously, a rational tool employed to accomplish radical social transformations or eliminate perceived enemies, a useful strategy for defeating certain types of insurgencies, a means by which governments unable to prevail over their enemies with conventional military means might succeed.³⁰

The systematic and widespread killing of civilians in Rwanda, Bosnia, Darfur, Sierra Leone, Somalia, DRC, Syria and many other parts of the World continues the long history of conflicts characterized by the commission of mass atrocities against the civilian population.

2.2 Early attempts to protect civilians from mass atrocities

2.2.1 Civilian immunity in ancient societies

While the origin of the principle of non-combatant immunity is usually traced to the Middle Ages, attempts to protect innocent civilians during conflicts can also be identified in ancient civilizations³¹. Indeed in ancient Greek city-states and old Republican Rome, citizens were at the center of the preoccupation of states, in other words, states had an obligation to provide justice and peace to the population or community. Thus, liberty was constantly identified with the protection of the laws. This

29 See Alex J. Bellamy, *Massacres and Morality: Mass Atrocities in Age of Civilian Immunity*, Oxford: Oxford University Press, 2012.

30 Ibid.

31 See for example Walter D. Reed, 'International Humanitarian Law: An Introduction to its Concepts, Historical Background and Recent Developments' *Revista Juridica de la Universidad de Puerto Rico*, vol. 49, 1980 pp. 279-285.

can be illustrated by Cicero's belief that a People is definable as one 'bound by an agreed body of law and shared interests, and Law itself as the bond of civil society'.³²

Though ancient societies were characterized by a certain ethnocentrism – Greeks *versus* 'Barbaros' or Roman citizen *versus* non-Roman citizens –,³³ the concern for the state led them to develop what can now be considered a concept of justice in the practice of war. This emergence of the concept of justice in war was seen as a means to defend the political structures and to protect it against outside attacks. Cicero defends this conception, arguing that there was no acceptable reason for war outside of just vengeance, self-defense or the honor of the state.³⁴ He further argued that for a war to be considered as legitimate or just, it has to be publicly declared by a competent authority and effort has to be made in order to minimize the potential of a conflict to culminate into civil war.³⁵

In accordance with Aristotle,³⁶ Cicero emphasized that a war has to be limited strictly to what is necessary for peace. According to him, war should only be fought to protect the safety or for revenge in cases of dishonour calling for military discipline and rule of law in combat.³⁷ Thus, having recourse to war is justifiable when the aim is to defend the honor of the state as well as of peace and justice. While this can be seen as an early attempt to spare innocent civilians from the effects of war, Cicero's statement 'in times of war, the laws fall silent' has led some writers to conclude that at this time,

32 Elaine Fantham, 'Liberty and the People in Republican Rome', *Transactions of the American Philological Association* (1974) Vol. 135, No. 2, Autumn, 2005, p. 215.

33 For more details on that point see Benjamin Isaac, 'Proto-Racism in Greco-Roman Antiquity', *World Archeology*, Vol. 38, No. 1, Race, Racism and Archeology, March, 2006, pp. 32-46.

34 Alex J. Bellamy, *Just Wars: From Cicero to Iraq*, Cambridge: Polity Press, 2006, pp. 18-20. See also Alan Watson, *International Law and Archaic Rome*, Baltimore, London: The Johns Hopkins University Press, 1993, p.29.

35 *Ibid.*

36 See Aristotle (E. Barker (ed.), *The Politics*, Oxford and New York: Oxford University Press, 1998.

37 Alex J. Bellamy, *Just Wars: From Cicero to Iraq*, op. cit.

unlike the *jus ad bellum*, the *jus in bello* was not the major concern.³⁸ Nevertheless, Christian authors such as St Augustine and St Thomas Aquinas rejected the idea of revenge, advocating for leniency towards the enemy, emphasizing that defense and restoration of peace should be the only reasons for going to war.³⁹ While Cicero's just society is ruled by natural law and reason, the Christian concept of justice is pervaded by a virtue of love, even for one's enemies.

2.2.2 Christian Just War Doctrine and civilian immunity: St Augustine and St Thomas Aquinas

Recourse to war has always been a subject of controversy among Christians who find themselves in a dilemma; that of reconciling the respect of a human being with the necessity to restore peace. There was something of a contradiction between the Christian ethic and its practice. Christian teaching was promoting pacifism, whilst some Christians were serving as soldiers or fighters in the Roman army. The main question was whether it was just for a Christian to participate in war. As Tertullian's *De Corona*⁴⁰ pointed out:

Shall it be held lawful to make an occupation of the sword, when the Lord proclaims that he who uses the sword shall perish by the sword? And shall the son of peace take part in the battle when it does not become him even to sue at law? And shall he apply the chain, and the prison, and the torture, and the punishment, who is not the avenger even of his own wrongs? ...There is no agreement between the divine and the human sacrament, the standard of Christ and the standard of the devil, the camp of light and the camp of darkness. One soul cannot be due to two masters—God and

38 See for example Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation - The Need for a New Regime*, (PhD Thesis 2007) p.11.

39 See Joachim von Elbe, 'The Evolution of the Concept of the Just war in International Law', *American Journal of International Law*, vol. 33, 1939, p.665-688.

40 Tertullian was a convert to Christianity who became a Presbyterian and the founder of Latin Christian literature.

Caesar...how will a Christian man war, nay, how will he serve even in peace, without a sword, which the Lord hath taken away?...The Lord...in disarming Peter, unbelted every soldier.⁴¹

This quest for harmony catalysed the 'just war' doctrine which attempted to justify the use of force for peaceful purpose. By adopting the position according to which recourse to war could be justified in certain circumstances, the Church opened a serious debate concerning war and divine justification. One of the explanations was that one may go to war only to vindicate justice or to restore peace. This idea was first initiated by St Augustine in the fifth century, whose writings were used by St Thomas Aquinas in the thirteenth century to develop the Just War Theory.⁴²

The Catholic Church's teaching on just war was first developed by St Augustine who is one of the benchmark figures of the literature on Just War⁴³. His position concerning war derived from the Holy Bible which advocates the merciful treatment of the enemies and the sixth commandment⁴⁴ which forbids taking human life. His understanding of war was connected with John the Baptist's recommendation asking soldiers not to terrorize people and to never search happiness in war but always to use war as a means to reach peace.⁴⁵ For St Augustine, the only exception to this rule is the moral obligation that every human being should defend the weak such as, children, women, etc. Consequently, when peace and security seem to be jeopardized, Christian leaders have an obligation to protect their peoples, especially the weak, using all available

41 De Corona 11 ANF 3.99 quoted in Philip Schaff, Latin Christianity: Its Founder – Tertullian.

42 Saint Augustine, City of God, vol. VI, Book xix, translated by W.C. Greene, Great Britain, William Heinemann Ltd., 1969.

43 See for example William R. Stevenson, Christian Love and Just war, US: Macon-Georgia, Mercer University Press, 1987.

44 See Exodus 20:13; Deuteronomy 5:17.

45 Augustine, letter 189 to Boniface, and against Faustus the Manichaean, in Augustine: Political Writings, ed. and trans. M. Tkaez and D. Kries, Indianapolis: Hackett, pp.218-29.

means, including war.⁴⁶ According to him, a war is justified only if it is waged by legitimate authority, to respond to the injustice of the aggressor and for peaceful purpose⁴⁷.

St Augustine's thoughts have significantly contributed to the debate of what makes warfare justifiable. However, since his main concern was to address the justness of waging war, he did not specifically address the issue of making a distinction between innocents and combatants. Thus, some writers such as Richard Hartigan⁴⁸ believe that there was a lack of determination and consistency on this question since his view was mostly connected with the matter of the evil of war rather than the protection of non-combatants. For example, on the spoliation of Egyptians and the wars of the Israelites, he did not criticize the use of violence in the Israelites' war of liberation led by Moses, rather he focused mostly on motivation and justification, trying to explain what the evil of war is.⁴⁹ As Langan comments:

I would argue, crucial to our understanding of Augustine's approach to the just war that he is really interested in the preservation of a moral order which is fundamentally a right internal order of dispositions and desires and in which the question of whether action is violent or not fundamental; The restoration of that order constitutes a sufficient justification for resort to violence.

Nevertheless, his just war doctrine was the departure point of the idea of a legitimate intervention for humanitarian purposes. St Thomas Aquinas in the thirteenth century

46 Saint Augustine, *City of God*, vol. VI, Book xix, translated by W.C. Greene, Great Britain William Heinemann Ltd., 1969.

47 Ibid.

48 Richard Hartigan has argued (1968, 203) that 'Augustine presented no clear-cut argument for the protection of the innocent, especially for the civilian innocent or noncombatant, in time of war'. This has also been pointed out by John Langan.

49 See John Langan, 'The Elements of St. Augustine's Just War Theory', *The Journal of Religious Ethics*, Vol. 12, No. 1, Spring, 1984, p. 21.

in his *Summa Theologiae*⁵⁰ revised St Augustine's version of just war. He described three conditions under which a war could be waged justly: The first is the authority of the sovereign who has the duty of preserving the common good; second, the recourse to hostilities is allowed if it is for a just cause; finally, a war may be waged justly if initiated with a pure intention on the part of the belligerents. Reiterating St Augustine about criteria justifying war, St Thomas Aquinas praised not only justice but also the virtue of charity in war. As he noted 'True religion looks upon as peaceful those wars that are waged not for motives of aggrandizement or cruelty, but with the object of securing peace and punishing evil-doers, and of uplifting the good'.⁵¹ It is interesting to note that while St Thomas Aquinas supports Augustine's concept, reiterating the three valid reasons for going to war, he also emphasized the idea that an authority has a duty to protect his people. Unlike St Augustine, St Thomas Aquinas' position on the distinction between civilian and combatant was without ambiguities. He for example clearly mentioned that the killing of innocents was not permissible unless in case of self-defense. As he stated: 'It is permissible to kill in self-defense because of the principle of double effect: one is responsible for what one intends to bring about, not what happens as a result of unintended, even foreseeable actions. One should never intend to kill innocents, but if innocents die as a result of some action that one did not intend, that is morally permissible'.⁵² Therefore, according to the Christian tradition, recourse to war is justifiable only in two cases: to defend innocents and in self-defense and noncombatant civilians must not be slaughtered intentionally. It should be noted however that the Church's just war doctrine dealt primarily with the conduct of the just

50 See Thomas Aquinas, edited by A.P. d'Entrèves, translated by J.G. Dawson, *Selected Political Writings*, Oxford: Basil Blackwell, 1948, p. 159.

51 Ibid.

52 See Herbert Butterfield, *Christianity, Diplomacy and War*, 3rd ed., London: Epworth Press, Wyvern Books, 1962, p.27.

war, *Jus ad bellum* (just cause, right authority and proper intention), and only few references was made with regard to *jus in bello* including the obligations of warriors to non-combatants. Nevertheless, along with the evolution of theories on the regulation of warfare, by Christian writers, the Medieval era saw the emergence of the idea of non-combatants' immunity in various actions, commonly referred to as 'Peace of God' movement.⁵³

2. 2. 3 Middle Ages warfare practice and protection of civilians

The years following the death of Charlemagne⁵⁴ sanctioned the beginning of an inner destabilization of Western Europe. Certainly, the division of the Empire between his three sons did contribute to the weakening of the political structures established by the old emperor. Modern historians evoke the rising military power of small landlords surrounded by men-at-arms willing to seize the richness of their rivals. Among them stands the Church which was regularly targeted by warlords of the Early Middle Ages.⁵⁵ 'The castle, place of refuge, is also sometimes a resort of thieves and the land around it is transformed in an economic exploitation area'.⁵⁶ From here we can date the origins of the regulation of military operation by the Church. This military strength had to be controlled by and integrated into Christian ideology.

The establishment of rules by religious philosophers of that time represents the materialization of efforts to hinder the Early Middle Ages military anarchy. Originating

53 See James Turner Johnson, 'Maintaining the Protection of Non-Combatants', *Journal of Peace Research*, vol. 37, no. 4, 2000, pp 421-448.

54 Charlemagne was the Emperor of the whole of Western Europe after the collapse of the Roman Empire.

55 Jean Flori, *Le Temps des chevaliers*, Editions Tallandier, 1999, 18 : « les potentats locaux, les seigneurs, entourés de leur sbires en armes (les milites qu'on nommera bientôt Chevaliers) contestent d'anciennes donations, spolient les terres des églises, les pillent à l'occasion, menacent terrorisent, incendient, enlèvent contre rançon, font peser sur les populations et les églises qu'ils sont sensés protéger des exactions diverses. » See also Flori's *Croisades et chevalerie : XI-XIIe siècles*, Bibliothèque du Moyen-Âge, De Boeck Université, Bruxelles, 1998, p. 8-9.

56 Jean Flori, *Le Temps des chevaliers*, 18.

in southern France, the Peace of God movement's main goal was to redirect war only towards the professionals of soldiery by instilling some discrimination between real warriors and non-combatants.⁵⁷ This saw the development of categories of persons who were to be protected from the effects of warfare. For instance, persons associated with the church were protected from looting and violence by armed groups.⁵⁸ The religious councils tried to obtain the respect of these rules by using extreme sanctions against the offenders, such as excommunication.

In fact, the Church developed categories of persons who were immune from the effects of war. For example Clerics, Monks and friars had special protection through canonical doctrine. Later on, the distinction between combatants and non-combatants as principle was firmly recognized in canon law which is the law of the Roman Catholic Church. However, the immunities seems to be mainly based on the protection of the institutions of the Church. As stated by Johnson, the main motivation of protection at that time was more connected with protection of the institutions of the Catholic Church than the humanitarian consideration.⁵⁹

2. 2.4 Chivalry tradition and protection of civilians

The idea of distinguishing between categories of persons and their treatment in warfare was progressively integrated by the code of chivalry under the influence of the Church.⁶⁰ Quoting Jean Flori: 'The Church attempted, under Feudalism and when state power was in decline, to assign to kings and princes, then to landlords and knights altogether, what was at the origins, the monarch's main duty : protect the

57 Ibid., 19.

58 See Johnson, Just War Tradition and the Restraint of War, Princeton: Princeton University Press , 1981, p.127.

59 Ibid.

60 See Johnson, Just War Tradition and the Restraint of War, op. cit. at p.132.

country and its inhabitants, particularly the churches and weak populations.⁶¹ In fact, the idea of non-combatant immunity was clearly mentioned in the framework of chivalric code. Therefore, knights could only fight other knights and could not use arms against women, children, the elderly, the ill, infirm, or people who were mentally deficient. Thus, the rules were drawn on the basis of distinction between enemy and innocents. For example, one of the rules provided that 'only people who actually take part in war are to be treated as combatants; others, regardless of status, are non-combatants'. Contrary to the innocents, the enemies were those carrying arms. With those principles, the chivalric ideal was one of the first steps toward a protection of people who were not taking part in the hostilities.⁶²

It has been argued however that, the idea of distinguishing combatants and non-combatant was based on the fact that those protected persons were excluded from combat because they were not strong enough to fight. Some writers believe that the principle was mostly based on the socio-economic conditions of medieval warfare. In this regard, Johnson comments:

In the Middle Ages, again, knightly protection of non-combatants derived from two considerations: the desire to gain honor in combat and the need to protect the economic base of the knight of his feudal lord. The former tended to protect those persons not under arms, while the latter tended to keep both land and peasantry safe from attacking and looting. The latter consideration is exactly the same as that of the eighteenth century sovereign's wars: to keep the economy that sustained the sovereign as undisturbed by the war as possible. If the focus of the former reason is shifted slightly away from the desire for honor in combat, a corollary

'L'Eglise a en effet tenté, à l'époque de la féodalité et du déclin du pouvoir central, de faire glisser des rois aux princes, puis aux châtelains et enfin aux chevaliers dans leur ensemble, la fonction qui jadis incombait au monarque : protéger le pays et ses habitants, en particulier les églises et les populations sans défense ; [...]' see Jean Flori, *Les Temps des Chevaliers*, op. cit. p. 25.

⁶² Ibid.

appears: the need to employ force available against the enemy most likely to do one harm. The principle of economy of force is thus inseparably linked to the desire for honor: both require the knight to use his arms against other men in arms, not against the populace of a territory generally. Efficiency in use of available force and keeping intact the economic base of lands possessed or coveted—two considerations central to the limited war idea as it emerges in the eighteenth century—thus appear already in the Middle Ages as factors leading the knightly class to grant noncombatants a measure of immunity from the destructiveness of war.⁶³

Nevertheless, the chivalric tradition was one of the first steps to codify the protection of people who were not taking part in the hostilities.⁶⁴ As Stroble comments:

The notion of non-combatant immunity seems to have its source not in religious or moral sensitivity but in a code of chivalry from the Middle Ages. Knights were professional soldiers; ‘there was no glory in armed combat with a nonknight’. Besides, ‘noncombatant serfs, peasants, artisans, and merchants were the source of wealth of members of the knightly class’. It was cowardly to attack an enemy through his non-combatant subjects rather than directly, and knights had a vested interest in protecting and supporting the non-combatants who were the source of their own wealth.⁶⁵

2.3. The Early Modern Theorists and protection of civilians

While Christian writers and the Church as an Institution have made a significant contribution to the notion of Just War during the Medieval period, the sixteenth and seventeenth centuries saw the emergence of secular writers who began to explore the

63 James Turner Johnson, *Just War Tradition and the Restraint of War*, (Princeton, New Jersey: Princeton University Press, 1981, p. 225.

64 See Mona Fixdal and Dan Smith, ‘Humanitarian Intervention and Just War’, *Mershon International Studies Review*, Vol. 42, No. 2, Nov., 1998, pp. 283-312.

65 James A. Stroble, *The Ethics of War and the Uses of War*, referring to James Turner Johnson, *Can Modern War Be Just?*, Yale University Press, 1986. p.5.

idea of Just War and its place in international environment.⁶⁶ In fact, at this time the Church gradually lost its moral weight in Europe and its power to limit the effect of war diminished as national states took up the question of sovereignty. The peace treaty, the Treaty of Westphalia, signed in 1648 between the Holy Roman Emperor and the King of France and their respective allies, which ended the Thirty Years War had strongly entrenched the idea of secularization of Just War. This secularization facilitated the introduction of the concept of war into the framework of international law.⁶⁷ With the rise of the European nation-states came the consideration of just war since the priority was the maintenance of order among nations by peaceful means. Thus, the law of nature replaces the religious idea of charity in war as international lawyers progressively began to consider the question of justice in war. Nevertheless, there was a continuity in the tradition of just war from canon law to secular law of nations.⁶⁸ Aquinas's philosophy was the basis for later formulations by scholars and jurists. The most important of early legal theorists in this period are: Francisco Suarez,⁶⁹ Francisco de Vitoria,⁷⁰ Hugo Grotius,⁷¹ Samuel Pufendorf,⁷² Christian Wolff⁷³ and Emmerich de Vattel.⁷⁴ The contribution of those founders of modern International Law was of great significance in that they introduced the notion of

66 See Yoram Dinstein, *War, Aggression and Self-Defence*, 3rd ed., Cambridge: Cambridge University Press, 2001, p. 62.

'As the notion of war and indeed the idea of a Just War progressively began to come inside the remit of the first great thinkers in the area of international law, the Just War theory began to become 'absorbed into the mainstream of international law. As Jochnick and Normand comment: The laws of war remained tied to religious particularism until the Enlightenment, when a prominent group of jurists and theologians, the 'publicists', helped shift the source of legal authority from God to reason.' Noelle Higgins, *Regulating the use of Force in Wars of National Liberation - The Need for a New Regime, A Study of the South Moluccas and Aceh*, p.15.

68 See J.R. Hale's *Judgment in New Cambridge Modern History*, I, Cambridge: Cambridge University Press, 1957, p.291.

69 Suarez (1548-1627)

70 Francisco de Vitoria (1580-1546)

71 Hugo Grotius (1583-1645)

72 Samuel Pufendorf (1632-1694)

73 Christian Wolff (1679-1754)

74 Emmeric de Vattel (1714-1767)

justness of war and the law of nature emphasizing that the cause of a belligerent had no impact on the duty to observe the law of war.⁷⁵ Hugo Grotius⁷⁶ and Vitoria have considerably contributed to the development of the law of warfare, including the development of non-combatant immunity in this period.⁷⁷ In fact the origins of the modern principle of non-combatant immunity is generally attributed to Francisco de Vitoria who remarkably maintained that war against the South American Indians peoples was not justifiable unless there was a just cause.⁷⁸

In his famous *De Jure Belli Ac Pacis Libri Tres*, Grotius rejects the idea that law of war was a divine law. For him, the law of war was based on Natural Law. He emphasizes the need to distinguish between combatant and non-combatant observing that the latter should be spared as much as possible.⁷⁹ Grotius, who was scarred by the horrors that he witnessed in various wars of religion, emphasized the prevention of the death of innocent people even by accident.⁸⁰ He stated: 'I observed a lack of restraint in relation to war, such as even barbarous races would be ashamed of ... in accordance with a general decree, frenzy had openly been let loose for the committing of all crimes'.⁸¹ Similar lines of thought are apparent in the writings of others legal theorists.

75 See James Turner Johnson, *Just War tradition and the Restraint of War*, Princeton, New Jersey: Princeton University Press, 1981, p. 147.

76 See Cornelis Van Vollenhoven, 'Grotius and the Study of Law', *American Journal of International Law*, vol. 19, 1925, pp. 1-11; Joachim von Elbe, 'The Evolution of the Concept of the Just War in International Law', *The American Journal of International Law*, vol. 33, no. 4, 1939, pp. 678-79; J.L. Brierly, *The Law of Nations*, 6th ed. By H.M. Waldock, Oxford: Clarendon Press, 1963, pp. 15-35; Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, p.13; David J. Bederman, 'Reception of the Classical Tradition in international Law: Grotius "De Jure Belli ac Pacis"', *Emory International Law Review*, vol. 10, 1996, pp.1-39.

77 See Grotius, *De Jure Belli ac Pacis Libri Tres*, English trans., by Kelsey in Scott (ed.), *The Classics of International Law*, Oxford: Oxford University Press, 1925, Book III and Vattel, *Droit des Gens*, English trans. off the ed. of 1758 in Scott (ed.), *Classics of International Law*, Washington: Carnegie Institute of Washington, 1916, Book III.

78 Francisco de Vitoria, *De Indis et de Jure Belli Relectiones*, *Classics of International Law*, Washington, DC: 1917.

79 Rosalyn Higgins, *Grotius and the Development of International Law in the United Nations Period*, in *Hugo Grotius and International Relations*, 1990, 267, 275.

80 Grotius, Book III, Chapter XI, para.VIII at p.733.

81 Ibid.

Rousseau for example, in his *Contrat Social*,⁸² developed the theory that war is a matter of a nation's against another. He emphasized the idea that individuals are not part of that consent and consequently, they should be protected from the effects of war. This was a great contribution on setting the basis for the principle of non-combatant immunity.⁸³ Rousseau wrote:

War is constituted by a relation between things, not between persons... War then is a relation not between man and man, but between State and State, in war individuals are enemies only accidentally, not as men, not even as citizens, but only as soldiers, not as members of their country, but as its defenders.⁸⁴ .

However, despite the development of Just War theory by theologians and philosophers, no valid legal rule regulating the use of force and non-combatant immunity existed in the Early Modern period.

2.4 Genesis of legal protection of non-combatants

2.4.1 From Lieber Code to Hague Conferences

The Instructions for the Government of Armies of the United States in the Field conceived by Dr. Francis Lieber in 1863 is considered to be a crucial step in the development of positive legal efforts to control the methods and means of warfare.⁸⁵

The lack of regulation of the conduct of hostilities and cruel devastation during the

82 Jean Jacques Rousseau, *The Social Contract and Discourses*, English trans. By Dent Cole, London, 1973; G.I.A.D Draper, 'The Geneva Convention of 1949', 114 *Recueil des Cours*, 59 1965, p.64. See also Judith Gardam op. cit.

83 Geoffrey Best, *Humanity in Warfare*, London, Weidenfeld and Nicolson 1980, at pp.55-59.

84 Jean Jacques Rousseau, op. cit., Book 1, Chapter IV, pp.170-171.

85 During the American Civil War, President Lincoln asked a jurist and political philosopher Dr Francis Lieber to draft a new code of war to regulate the conflict. Approved by a board of Union Army officers, and promulgated by the President Lincoln, Lieber Code was incorporated into the Union Army's General Orders in 1863.

Instructions for the Government of Armies of the United States in the Field, Lieber Code of 24 April 1863. Available at: <http://www.icrc.org/ihl>.

American Civil War compelled President Abraham Lincoln to consider the issue of humanitarian consideration in armed conflict. Although the rules contained in the Lieber Code were only binding upon the US Union soldiers, it had a great influence worldwide and has served as a basis for the law of war.⁸⁶ Lieber's consideration of distinction between combatants and non-combatants is significant, particularly that the distinction must be made between civilians and combatant before an attack can be carried out. The rule is clearly underlined in Article 155 which states that:

All enemies in regular war are divided into two general classes—that is to say, into combatants and non-combatants, or unarmed citizens of the hostile government. The military commander of the legitimate government, in a war of rebellion, distinguish between the loyal citizen in the revolted portion of the country and the disloyal citizen. The disloyal citizens may further be classified into those citizens known to sympathize with the rebellion without aiding it, and those who, without taking up arms, give positive aid and comfort to the rebellious enemy without being bodily forced thereto.⁸⁷

Article 22 guarantees the protection of civilians and their property stating that:

As civilization has advance during the last centuries, so has likewise steadily advanced, especially in war on land, the distinction between the private individual belonging to a hostile country itself, with its men in arms. The principle has been more and more acknowledge that unarmed citizen is to be spared in person, property, and honor as much as the exigencies of war will admit.⁸⁸

Concerning precautionary measures that should be taken to spare innocents from harm in the conduct of war, Article 19 outlines that: 'Commanders, whenever

⁸⁶ See for example Judith Gardam, *Necessity, Proportionality and the Use of Force by States*, Cambridge: Cambridge University Press, 2004.

⁸⁷ *Ibid.*, Article 155.

⁸⁸ Lieber Code, Article 22.

admissible, inform the enemy of their intention to bombard a place, so that the non-combatants, and especially the women and children, may be removed before the bombardment commences...⁸⁹ This was certainly the foundation of the establishment of balance between military necessity and human dignity. Furthermore, Article 44 states that: 'All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking a place by main force, all rape, wounding maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.'⁹⁰ However despite having great influence abroad following the Civil War, the Lieber Code has generally been viewed as having had almost no effect on the conduct of the combatants during Civil War itself.

Nevertheless, The Lieber Code is considered as the cornerstone of codification of the laws and customs of war.⁹¹ This attempt to gather the laws of war into one document strongly influenced the 1874 Brussels Conference and the Hague Conventions on land warfare of 1899 and 1907. A set of provisions of the Lieber Code were annexed to the Hague Convention of 1899, making it a part of international law.⁹² Since the aim of the code was an attempt to incorporate an humanitarian aspect in the conduct of war, there is no doubt that it has inspired the drafters of the laws regulating the conduct of hostilities and has had an important impact on the rules regarding the protection of civilians and special protection granted to women and children.

89 Lieber Code, Article 19.

90 Ibid., Article 44.

91 See Adam Roberts and Richard Guelff, Documents on the Laws of War, 3rd ed. Oxford: Oxford University Press, 2004, p.13.

92 Geoffrey Best, War and Law since 1945, Oxford: Clarendon Press, 2002. p.41.

Significant steps in the development of principles of humanity in warfare can be also attributed to Henry Dunant, citizen of Geneva, who in his '*A Memory of Solferino*' had alerted readers to the appalling suffering that he had witnessed in the murderous battle of Solferino in 1859 between the French and the Italians.⁹³ This culminated in the creation of the International Committee for Aid to the Wounded whose role was to find a way of improving conditions of warfare and which later became the International Committee of the Red Cross. Shortly afterwards, the first Geneva Convention of 1864 for the Amelioration for the Condition of the Wounded in Armies in the Field was adopted. Notwithstanding that the 1864 Convention was designed to protect wounded soldiers, it was also significant in terms of protection of civilians since it gave birth to the principles that would come to guide legal protection for persons playing no part in hostilities.⁹⁴ This treaty was followed by the 1868 St Petersburg Declaration which was an attempt to formally forbid belligerents from targeting civilians in their military operations.⁹⁵ This period was crucial for the development of principles of humanity in warfare. As Bellamy comments: 'The period between 1860s and the outbreak of the First World war was something of a 'golden era' for international treaty-making on the subject'.⁹⁶ However, these treaties did not specifically address the protection of civilians.

See Dunant, *A Memory of Solferino*, Washington: Am. Nat. Red Cross, 1959. See also Judith G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law* op. cit.; Fris Kalshoven and Liesbeth Zegveld, *Constraints on the Waging of War*, 3rd ed. Geneva: International Committee of the Red Cross, 2001; François Bugnion, 'The International Committee of the Red Cross and the Development of International Humanitarian Law', *Chicago Journal of International Law*, vol. 5, 2004-2005, pp. 191-215.

⁹⁴ The full text of this instrument available at <http://www.icrc.org/ihl/52d68d14de6160e0c12563da005fdb1b/87a3bb58c1c44f0dc125641a005a06e0>, last accessed 22/08/2013.

⁹⁵ The text of this instrument is available at: <http://www.icrc.org/applic/ihl/ihl.nsf/Article.xsp?action=openDocument&documentId=568842C2B90F4A29C12563CD0051547C>, last accessed 22/08/2013.

⁹⁶ See Alex J. Bellamy, *Massacres and Mortality: Mass Atrocities in an Age of Civilian Immunity*, Oxford: Oxford University Press, 2012, p. 19-20.

2.4.2 The Martens Clause

The Martens Clause is regarded as the first major international agreement regulating the protection of civilians from the effects of hostilities.⁹⁷ Proposed by Fyodor Martens, the legal adviser of the Russian Tsar, the so-called Martens was originally designed to remedy the failure of delegates at the Peace Conference to agree on the issue of protection of the population of occupied territories. The Clause read that:

Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity and the requirements of the public conscience.⁹⁸

The clause was incorporated into the preamble of the Hague Conventions of 1899 and 1907 designed to restrict tactics and technologies and consequently, to protect civilians against the effects of hostilities.⁹⁹ Under the Hague Regulations, civilians were protected not directly but to a certain extent. For example Article 46 of the Hague Convention of 1899 reads: 'Family honor and rights, individual lives and private property, as well as religious convictions and liberty, must be respected. Private property cannot be confiscated'. Furthermore, unless surprise was necessary, warning was required before bombardment and sieges of defended cities and towns so that civilians could evacuate. Also, scientific, cultural, religious and educational objects

97 See Theodor Meron, 'The Martens Clause Principles of Humanities, and Dictates of Public Conscience', *The American Journal of International Law*, Vol. 94, No. 1, Jan., 2000, 78-89.

98 This Martens Clause was developed and reaffirmed in subsequent treaties; e.g. in Article 1 paragraph 2 of Additional Protocol of 1977 and introductory paragraph 4 of Additional Protocol II of 1977.

99 Adam Roberts and Richard Guelff, 'Document on the Laws of War', 3rd ed. Oxford: Oxford University Press, 2000, p. 482.

were not to be attacked, therefore precaution was needed in bombarding defended towns.¹⁰⁰

Cassese observes that the Martens Clause has the merit of being the first instrument which proclaimed the existence of principles resulting from the laws of humanity and the dictates of public conscience. He argues that the clause has been frequently relied upon in international dealings such as treaties and courts decisions and in this case it should be incontestably considered as one of the 'legal myths' of the international community which has had a considerable impact on international law, in particular the law of armed conflict.¹⁰¹ It is to be noted however that only some basic provisions in these instruments provided protection to civilians. However, the ravages and horrors of the Second World War led to the need to establish a specific legal framework in order to improve the situation of civilians affected by armed conflict.¹⁰²

2.4.3 Post-Second World War legal development of protection of civilians

As noted above, since the earlier conventions on the law of warfare dealt primarily with the issues of combatants, civilians were not particularly targeted. In fact, attention was mostly given to wounded, sick, shipwrecked and captured combatants rather than to the civilians who were caught up in hostilities.¹⁰³ Therefore, the question of civilians in

100 See Hague Regulations, arts pp. 25-28.

101 See Antonio Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?', EJIL 2000, 'The Conseil de guerre de Bruxelles in the K.W. case, judgement of 8 February 1950. The defendant, a police officer, had been accused of violations of the laws and customs of war, in that he had caused serious injury to a number of civilians detained after fighting against the German occupiers in occupied Belgium. The Court pointed out that Article 46 of the Regulations annexed to the IVth Hague Convention on the Laws and Customs of War on Land imposed upon the occupying power the duty to respect 'the lives of persons'. However, no provision of the Regulations expressly prohibited acts of violence and ill treatment against the inhabitants of occupied territories. The Court thus referred to the Martens Clause'.

102 See Helen Durham and Timothy L.H. McCormack, 'The Changing Face of Conflict and the Efficacy of International Humanitarian Law', The Hague, London and Boston, Kluwer Law International, 1999.

103 See 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III relative to the Treatment of Prisoners of War.

hostilities was reopened in the 1949 Diplomatic Conference of Geneva which seeks to protect civilians in times of war.¹⁰⁴ The development of warfare technology and devastation which had resulted from the First World War, followed by the more sophisticated methods of warfare in the Second World War, led to a common sentiment that the situation of civilians who were exposed to the effects of hostilities should be improved. In this context, the distinction between combatant and non-combatant became a matter of major international concern. There was an urge to make new law for the protection of civilians. This can be illustrated by a statement made by the Greek Professor Michel Pasmazoglu, one of the delegates to the Diplomatic Conference. Emphasizing the need for an international agreement for a more specific protection of civilians in war time, he stated:

War has been transformed into butchery and belligerents strike army and civilian population alike without any distinction between the two. However, all abuses lead to a reaction... International conscience demands the condemnation of all these barbarous proceedings. The world is amazed and stunned before these rivers of blood, these hillocks of bones, these mountain of ruins...A new crusade is being gathered together against these abuses.... We are conscious of the will of all those whose lives, either as hostages, deportees, or on the field of battle, were scarified to the madness of men who believed that the protection of human beings was merely a figment of the brains of intellectuals...All these martyrs do not demand revenge but they cry out that their sacrifice shall not have been in vain. They ask to be the last victims of these theories according to which man exists only for the State and not the State for the happiness of its citizen.¹⁰⁵

104 Adam Roberts and Richard Guelff, *Documents on the Laws of War*, 3rd ed., Oxford: Oxford University Press, 2004, p. 301.

105 See Geoffrey Best, *War and Law Since 1945*, Oxford: Oxford University Press, 2002, p. 95. See also Prelim. Conf., 1946.

Thus, specific legal protection of persons who do not, or no longer, take part in hostilities appeared with the adoption of the Geneva Conventions of 12 August 1949¹⁰⁶ and was later reinforced in the two Additional Protocols of 1977.¹⁰⁷ However, the adoption of the fourth 1949 Geneva Convention relative to the protection of the civilian population and the 1977 additional protocols to the four Geneva Conventions was a particular advancement since it introduced the most specific humanitarian protection to civilians.¹⁰⁸ This marked the establishment of the principle of civilian immunity as an international legal norm.

The period following World War II was also notable for the development of legal norms and standards in terms of prosecuting and punishing crimes having an international dimension. This can be illustrated by the following statement:

The soldier, be he friend or foe, is charged with the protection of the weak and unarmed. It is the very essence and reason of his being. When he violates this sacred trust, he not only profanes his entire cult but threatens the fabric of international society.¹⁰⁹

In response to the horrors of the Holocaust in Europe and the Japanese crimes perpetrated during World War II, the allied powers¹¹⁰ sought to prosecute and to punish the major war criminals for war crimes, crimes against humanity, crimes against

106 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

107 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, hereafter Additional Protocol I, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict, hereafter Additional Protocol II.

108 See Adam Roberts and Richard Guelff, Documents on the Laws of War, Oxford: Oxford University Press, 3rd ed., 2004, p. 299.

109 General MacArthur confirming the death sentence for Japanese General Yamashita.

110 After the defeat of Germany in 1945, The United Kingdom, France, the United States and the Soviet Union convened at the London Conference to decide the sort which should be reserved for the high-ranking Nazi criminals.

peace and conspiracy.¹¹¹ The International Military Tribunal (IMT) known as the 'Nuremberg Tribunal' and The International Military Tribunal for the Far East (IMTFE)¹¹² were established to prosecute individuals for those crimes.¹¹³ The setting up of these international tribunals was of great importance as until that time states had a monopoly over criminal jurisdiction concerning international crimes.¹¹⁴ This will be discussed in depth in Chapter 4.

It is important to note that along with the development of the idea of sparing civilians from harm, there was also the evolution of the idea that states have the obligation to protect their populations and foreign states have a legitimacy to intervene in a sovereign state for motives of humanity. A great deal of literature exists¹¹⁵ on legal assessments of this concept and its practice, particularly in the nineteenth century as demonstrated in the following discussion.

2.5 Evolution of international protection - humanitarian intervention

2.5.1 History and evolution of military intervention for humanitarian purposes

The doctrine of humanitarian intervention is not new.¹¹⁶ The practice of using force in a foreign state for the purpose of protecting life can be traced back to ancient times. For example in the Greek city-state system and in the Roman Empire, intervention in

111 IMT's Charter, Article 6.

112 The International Military Tribunal for the Far East Charter was approved on 19 January 1946. The Tokyo trial had started on 3 May 1946 and lasted almost two and a half years.

113 The International Military Tribunal was established in the summer of 1945 and met from 14 November 1945 to 1 October 1946.

114 Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, p.323.

115 For an in-depth discussion of the origins and evolution of the concept of humanitarian intervention, see Francis .K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Hague: Kluwer Law International, 1999. See also Jennifer M. Welsh, *Humanitarian Intervention and International Relations*, New York: Oxford University Press, 2004; J.L. Holzgrefe and Robert O.Keohan, *Humanitarian Intervention: Ethical, Legal and Political Dilemmas*, Cambridge: Cambridge University Press, 2003.

116 See for example Antoine Rougier, *La Theorie de l'intervention de l'humanité*, 17 RGDIP, 1910, pp. 486-526.

the interest of humanity was common. The concept of humanitarian intervention can also be identified in Aquinas' reflections which emphasized the right of a state to intervene in the internal affairs of another when it mistreats its subjects, and was later developed by early legal philosophers like Vitoria and Grotius.¹¹⁷ For example, on the discussion raised by Vitoria about the justness of Spanish war against the Indians who were practicing cannibalism and human sacrifice, Grotius raised the principle of humanity which legitimises undertaking war to protect the population from wrong arguing that 'sovereign have a right to punish acts that excessively violate the law of nature or of nations in regard to any person whatsoever'.¹¹⁸ Consequently, for him, intervention is lawful when responding to a breach of the rights of humanity.

Many other solidarity theorists of international society such as Vattel, Francisco Suarez and Alberico Gentili followed this line of thought emphasizing that humanitarian intervention was in conformity with natural law. As Vattel states: 'if the prince, attacking the fundamental laws, gives his people legitimate reason to resist him, if tyranny becomes so unbearable as to cause the Nation to rise, any foreign power is entitled to help an oppressed people that has requested assistance'.¹¹⁹ Accordingly, there is a right to use force against a tyrant who mistreats their people and states have the obligation to help citizens of other states.¹²⁰ However, the principle of humanitarian intervention as it is recognized today is generally traced back to the nineteenth century as illustrated by various instances of state intervention in internal affairs in the name

117 For more discussion see Alex J. Bellamy, 'Ethics and Interventions: The 'Humanitarian Exception and the Problem of Abuse in the Case of Iraq', *Journal of Peace Research*, Vol. 41. No. 2, 2004, pp.131-147.

118 Ibid.

119 Emmeich de Vattel, *2 Le Droit Des Gens*, Pradier-Fodéré, ed., 1863, quoted in Francis Kofi Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, Hague: Kluwer law International, 1999.

120 See Theodor Meron, 'Common Rights of Mankind in Gentili, Grotius and Suarez', *American Journal of International Law*, vol. 85, no. 1, January 1991, p. 115.

of humanity.¹²¹ During this time, there was considerable acceptance of the theory that a state or group of states has the right to intervene in the name of the principle of humanity when another state is involved in egregious breaches of the rights of its citizens.¹²² This ascendancy of humanitarian intervention is obvious in Arntz's statement:

When a government, even acting within the limits of its rights of sovereignty, violates the rights of humanity, either by measures contrary to the interests of other states, or by excessive injustices or brutality which seriously injure our morals and civilizations, the right of intervention is legitimate. For, however worthy of respect the rights of sovereignty and independence of states may be, there is something even more worthy of respect, namely the law of humanity, or of human society, that must be violated. In the same way as within state freedom of the individual is and must be restricted by the law and the morals of society, the individual freedom of the states must be limited by the law of human society.¹²³

Therefore, the joint intervention of Great Britain, France and Russia in Greece in 1827 is cited by many writers as the earliest case of humanitarian intervention.¹²⁴ Indeed, to justify the intervention, intervening states invoked the protection of Christian minorities who were subject to Ottoman Empire oppression claiming that they were

121 See Gary Bass, *Freedom's Battle: Origins of Humanitarian Interventionism*, New York: Alfred Knops, 2008; Davide Rodogno, *Humanitarian Interventions during the Nineteenth Century: British and French Forcible Interventions in the Ottoman Empire (1820-1909)*, Rome: Laterza, 2011.

122 Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Oxford University Press, 1963, p.338.

123 Quoted in F. Abiew.

124 See for example William Vernom Harcourt, *Letters by Historicus on Some Question of International Law: Reprinted from 'The times' with Considerable Additions*, London: Macmillan, 1863, p. 6. See also Simon Chesterman, *Just War or Just Peace?: Humanitarian Intervention and International Law*, Oxford: Oxford University Press, 2002, p .28. For further details on these cases, see Gary Bass, *Freedom's Battle: Origins of Humanitarian Interventionism*, New York: Alfred Knops, 2008; Davide Rodogno, *Humanitarian Interventions during the Nineteenth Century: British and French Forcible Interventions in the Ottoman Empire (1820-1909)*, op.cit.

motivated by the sentiment of humanity as stated in the London Treaty¹²⁵. Intervention in response to humanitarian tragedy fuelled several other interventions in the nineteenth century. The French invasion of Syria in 1860 to stop the slaughter perpetrated by the Ottoman troops is also cited as one of the earliest instance of humanitarian intervention. Chesterman considers that this was a possible instance of humanitarian intervention due to the fact that acting states had not any gainful interests. As he comments: 'despite its occurrence within the context of French colonialism in the region, the occupying force did arrive under the mandate of five European Powers and departed when that mandate concluded...The humanitarian concerns of the Powers –albeit only for the well-being of fellow Christians—appear to have been genuine.'¹²⁶

Russia's incursion into the former Yugoslavia in 1877 with support from a number of other European states was also founded on abuse perpetrated by the Ottoman Empire.¹²⁷ These cases are good examples of humanitarian intervention as interveners invoked either the protection of a minority who were being persecuted or the rescue of their citizens abroad. As Bettati neatly summarizes with regard to the French invasion of Syria in 1860:

La caractéristique principale de cette forme d'ingérence purement altruiste réside dans sa motivation désintéressée que l'on trouve exprimé par le protocole adopté à la Conférence de de Paris le 03 Août 1860. Aux termes

125 The London Treaty was adopted on 6 July 1827 between Great Britain, France and Russia. This states: 'Being animated with the desire of putting a stop to the effusion of blood, and of preventing the evils of every kind which the continuance of such a state of affairs may produce, they have resolved to combine their efforts, and to regulate the operation thereof, by a formal Treaty, for the object of re-establishing peace between the contending parties, by means of an arrangement called for, no less by sentiments of humanity, than by interests for the tranquillity of Europe'. See Edward Hertslet, *The Map of Europe by Treaty*, vol 1, London: Butterworths, 1875, pp. 769-770.

126 Chesterman, above 7.

127 Dzovinar Kévonian, *Réfugiés et diplomatie humanitaire. Les acteurs européens et la scène proche-orientale pendant l'entre-deux guerre*, Paris: Publications de la Sorbonne, 2004, p.276. See R. Kolb, 'Note on Humanitarian Intervention', *International Review of the Red Cross* 119, 2003, p. 849.

de ce texte, les puissances 'n'entendent pas poursuivre dans l'exécution de leurs engagements aucun avantage territorial, aucune influence exclusive, ni aucune concession touchant le commerce de leurs sujets.¹²⁸

Nevertheless, the concept of humanitarian intervention was suspicious in the eyes of legal theorists. Some writers do not accept the idea that these interventions were purely motivated by the concept of humanity, arguing that the interveners have failed to prove that their interventions were conducted exclusively for the concern of human rights of the population in the relevant country. As Kochler rightly comments:

This early doctrine of 'limited sovereignty' claimed to be inspired by purely humanitarian motives, while in reality the European powers of the time had their own 'imperial' agenda vis-à-vis Ottoman Empire. Far from qualifying as disinterested *actio popularis*, humanitarian intervention in its actual practice in the nineteenth century was dictated by the geopolitical interests of the then European powers. Those powers, in the course of their own colonial rule, violated each and every humanitarian principle they proclaimed to uphold and resolved to enforce vis-à-vis the Sublime Porte. While respect for the rights of the Christian minorities was emphasized for the territories under Turkish rule, and the acts of sovereignty of the Turkish Sultan were effectively put under foreign control in the name of 'humanity', the European colonial powers accepted no such standards of humanity in their treatment of the population they considered as 'barbarian' at the time.¹²⁹

Similarly, Brownlie rejects the idea that state practice in the nineteenth century was a humanitarian intervention arguing that there was no reference to a legal justification for intervention.¹³⁰ In fact, although the intervening powers declared themselves as

128" Mario Bettati, *Le Droit d'ingérence. Mutation de l'ordre international*, Paris: Odile Jacob, 1996, p.206.

129 See Hans Kochler, 'Humanitarian Intervention in the Context of Modern Power Politics: Is the Revival of the Doctrine of the 'Just War' Compatible with the International Rule of Law?', *International Progress Organization*, 2001.

130 Ian Brownlie, 'Humanitarian Intervention', in John N. Moore (ed), *Law and Civil War in the Modern World*, Baltimore, Maryland: Johns Hopkins University Press, 1974 p. 217, 221.

guardians of humanity, they failed to provide a legal basis to their interventions. Given that it is no surprise that while military intervention in the name of humanity has been part of the evolution of international society, its justness has been and remains contentious in both law and international relations. As Abiew points out 'the classical concept of the right of Humanitarian Intervention can be traced back to ancient times, but opinion of scholars, politicians, diplomats, and state practice still disagree whether the right exists, and if it exists, what its precise normative scope is'. Given that, the beginning of the 20th century was particularly marked by debates and discussions over the principle of humanitarian intervention.

2.5.2. Humanitarian intervention in the twentieth century

In the past, in the name of sovereignty, states were the only masters of the treatment of their citizens and individuals were believed not to be subject of international law.¹³¹ However, the catastrophe of the First World War which saw the collapse of the old European order of the nineteenth century brought about significant change in international public opinion on the destructive effects of war.¹³² In this context, notwithstanding that the major purpose of the League of Nations in the aftermath of the war was to prevent state's recourse to the use of force through international cooperation,¹³³ the Covenant of the League of Nations briefly referred to the protection

131 See for example Robert W. Carlyle, 'A History of Medieval Political Theory in the West', Edimburg: Blackwood, 1950, pp.16-17.

132 See Hans Kochler op. cit.

133 With regard to the purpose of the League of Nations, Noelle Higgins comments: 'The war made it more obvious than before that state's recourse to the use of force should be limited and regulated. This was one of the major concerns of the delegates at the Paris Peace Conference in 1919, held in the Palace of Versailles, which had as its objective, to ensure that war such as had been seen in the previous years could not occur in future. The main aim of the League as set out in the Covenant of the League of Nations was "to promote international co-operation and to achieve international peace"'. See Noelle Higgins, *Regulating the Use of Force in Wars of National Liberation - The Need for a New Regime: A Study of the South Moluccas and Aceh*, PhD thesis, Galway, 2007, p. 67.

of individuals. For example the Covenant of the League of the Nations set various principles which sought to prohibit human rights abuses.¹³⁴

The most relevant provision in relation to the protection of individuals is Article 23, which required members of the League to secure and maintain fair and human conditions of labour for men, women and children and secure just treatment of the native inhabitants of territories under their control.¹³⁵ It is obvious therefore that there was at least an attempt to recognize individuals as objects of international law. As Gomez and Koen de Feyter state regarding the contributions from the League of Nations to the development of legal protection of individuals, 'In any case, the most important factor in the creation of conditions which made a progressive internationalisation of human rights possible was the foundation of the League of Nations, an international organisations which performed a task which was crucial in the generalisation of the protection of the rights of the person'.¹³⁶

It is important to note that, inspired by the League of Nations initiative, some organizations began to raise the issue of international protection of the rights and freedom of human beings.¹³⁷ It is in this context that the Institute of International Law, in a meeting held in New York on the 12th of October 1929, adopted the Declaration of the International Rights of Man which in Article 1 provides that 'It is the duty of every State to recognize for every individual the equal right to life, liberty and property and to accord to everyone on its territory the full and complete protection of the law without

134 League of Nations, Covenant of the League of Nations, 28 April 1919, available at: <http://www.refworld.org/docid/3dd8b9854.html>, accessed 21 October 2013.

135 Article 23 of the Covenant of the League of Nations.

136 Felipe Gomez Isa and Koen de Feyter, *International Protection of Human Rights: Achievements and Challenges*, Bilbao, Felipe Gomez Isa and Koen de Feyster, 2006.

137 *Ibid.*

distinction of nationality, sex, race, language or religion'.¹³⁸ It can be argued that this was a significant step in terms of the protection of individuals.

However, it was not until the horrors of the Second World War that the international community became aware of the need to consider the individual as a full object of international law.¹³⁹ As Henkin observed: 'The war against Hitler identified violations of human rights as a major threat to international peace, and they were linked in the rhetoric of the war and in plans for the peace. Human rights were prominent in the constitutions of the new nations that began to emerge in the post-war years'.¹⁴⁰ It is undeniable that the cruelty of the Nazi regime has made the allied countries conscious of the fact that protection of human rights should be one of the major objectives of the allies, as illustrated in the following declaration made by the allied countries in the United Nations Declaration: 'Complete victory over their enemies is essential to defend life, liberty, independence and religious freedom, and to preserve human rights and justice'.¹⁴¹ In consequence, the obligation to take precautionary measures to protect individuals and the consequences for those who violated the duty of protection became a matter for the whole community. In this context, in 1945, the leaders of the world's nations have decided to include in the preamble of the UN Charter their determination to protect human rights.

138 Declaration of the International Rights of Man adopted in New York on 12 October 1929.

139 See Johannes Morsink, 'World War Two and the Universal Declaration', *Human Rights Quarterly*, Vol. 15, 1993, p. 360.

140 Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd ed., New York, Columbia University Press, 1979.

141 Quoted in Felipe Gomez Isa and Koen de Feyter, *International Protection of Human Rights: Achievements and Challenges*, op.cit.

2.6. The UN Charter and protection of civilians from mass atrocities

Maintaining peace and security and promoting respect for human rights is one of the fundamental purposes of the United Nations.¹⁴² Despite the fact that a declaration of human rights was not incorporated in the UN Charter, in its preamble, the Charter lays out the aims of the Organization which include saving succeeding generations from the scourge of war, to reaffirm faith in fundamental human rights, to establish conditions under which justice and respect for the obligations arising from treaties and other sources of law can be maintained and to promote better standards of life.¹⁴³ Thus, important references to human rights were included in the Charter which in Articles 1(2), 1(3), 13(1), 55 and 56 lay down the UN commitment to protect human rights. In order to meet these challenges, since its creation in 1945, the United Nations has been developing the means and standards for human rights protection. Thus, different mechanisms were established by the United Nations to make sure that states fulfil their duty to protect individuals from mass violations of human rights.¹⁴⁴ Thus, the concretization of human rights and their protection was the Universal Declaration of Human Rights adopted by the General assembly on 10 December 1948. Although the 1948 Universal Declaration of Human Rights was not recognized as creating legal obligations when it was adopted, it nonetheless constitutes a milestone of international human rights protection. Its adoption was a benchmark for the creation of a legal framework for international human rights which apply in both times of war and peace.

142 United Nations Charter signed on 26 June 1945 and entered into force on 24 October 1945. UN Charter, Article 1 (3).

143 The UN Charter, Preamble.

144 The United Nations has establish different mechanisms which aim to monitor and to publish reports on human rights situations in specific countries such as the Human Rights Committee or the Committee on Economic, Social and Cultural Rights.

However, while this seems to paint a fairly clear picture of the United Nations' duty to promote and to protect human rights, this concept often conflicts with the fundamental principles of state sovereignty enshrined in Article 2(7) and non-intervention in internal affairs enshrined in Article 2 (4) of the UN Charter. In this regard, it is clear that the Charter does not address the dilemma posed by the responsibility to react in face of massive violation of human rights and the principle of state sovereignty.

2.6.1 The prohibition of the use of force and principle of non-intervention

The principle of non-intervention, at the heart of international relations since the Peace of Westphalia in 1648 which initiated a new concept of state sovereignty,¹⁴⁵ was firmly established in the UN Charter as a fundamental legal principle of the United Nations. Since, the overwhelming objective of the creation of the UN in 1945 was to regulate *jus ad bellum* and to 'save succeeding generations from the scourge of war', the Charter clearly provides that states shall not intervene in the internal matter of a state.

Therefore, the prohibition of the use of force enshrined in Article 2(4) of the UN Charter was certainly a means to achieve that aim. This provision states:

All Members shall refrain in their international relations from threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.¹⁴⁶

145 Committee on Economic, Social and Cultural Rights.

For instance, the matter of foreign intervention in internal affairs of a sovereign state was raised during the Spanish Civil War. Initiated by France, a non-intervention agreement was signed on 8 August 1936 by seventeen countries including France and Britain according to which they assumed to refrain from all direct or indirect interference in the Spanish internal turmoil. The representative of France explained that his country was motivated by the doctrine and sentiment of humanity. This however was a utopia as the majority of the countries were involved in the conflict. See Charles Zorgbibe, *Le Droit d'Ingérence*, Paris, Presse Universitaires de France, 1994, pp.12-13.

146 Article 2(4) of the UN Charter.

This principle was described by Bruno Simma as 'the corner stone of peace in the Charter, the heart of the United Nations Charter or the basic rule of contemporary public international law'.¹⁴⁷ Nonetheless, there is an exception to this rule. The Charter allows recourse to armed force in inter-state relations only in two situations; the first is the inherent right of individual and collective self-defense under Article 51¹⁴⁸ and the second is when the Security Council authorizes the use of force to maintain or restore international peace and security under Chapter VII of the Charter. Any other threat or use of force beyond the two exceptions must be regarded as a violation of the Charter of the United Nations.

The prohibition of the use of force was further emphasized by the UN General Assembly in the 1965 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States which states that:

No state has the right to intervene, directly or indirectly, for any reason whatsoever, in the internal or external affairs of any other state. Consequently, armed intervention and all other forms of interference or attempted threats against the personality of the state or against its political, economic and cultural elements, are condemned.¹⁴⁹

Similarly, the 1969 Vienna Convention on the law of treaties provides that prohibition to recourse to force as enunciated in Article 2 (4) constitutes a *jus cogens* meaning

147 See Bruno Simma, *The Charter of the United Nations: A Commentary*, 2nd ed., Oxford: Oxford University Press, 2002, pp. 114-115.

148 Article 51 of the Charter states: 'Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by members in the exercise of this right of self-defense shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such actions as it deems necessary in order to maintain or restore international peace and security'.

149 GA Res. 2131 (XX).

that the principle is accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted.¹⁵⁰

It is undeniable that the Charter has upheld the Westphalia principle which provides the right of sovereign states to act freely within their borders since the sovereign equality of states was proclaimed as one of the major principles of the UN. Based on this understanding, the Charter confirms that no state or group of states has the right to intervene, directly or indirectly for any reason whatever, in internal or external affairs of any other state. Article 2(7) of the UN Charter reads:

Nothing contained in the UN Charter shall authorize the UN to intervene in matters which are essentially within domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.¹⁵¹

Given that, if no state has the right to intervene in the internal or external affairs of another state for any reason whatsoever the question is then as follows: can one conclude that the use of force to address humanitarian concerns such as genocide and other mass atrocities is prohibited since the Charter does not expressly recognize the right to use force for the protection of the populations from humanitarian crisis? The International Court of Justice, in its 1986 judgment concerning military and

150 The 1969 Vienna Convention on the Law of Treaties, in its preamble states: 'Having in mind the principles of international law embodied in the Charter of the United Nations, such as the principles of the equal rights and self-determination of peoples, of the sovereign equality and independence of all States, of non-interference in the domestic affairs of States, of the prohibition of the threat or use of force and of universal respect for, and observance of, human rights and fundamental freedoms for all.' In Articles 53 and 64 those principles are recognized as jus cogens. Article 53 reads: 'A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.' See Bruno Simma, 'NATO, the UN and the Use of Force: Legal Aspects', *European Journal of International Law*, vol. 10, 1999, pp. 1-22.

151 UN Charter, art 2(7).

paramilitary activities in Nicaragua,¹⁵² reaffirmed the legal prohibition on recourse to force under both treaty and customary international law emphasizing that intervention could not be consistent with international law. In this case the court declared the intervention illegal and a violation of Nicaragua's territorial sovereignty maintaining that the use of force does not constitute an appropriate method to monitor or to ensure the respect for human rights. Nevertheless, despite the fact that the UN Charter does not recognize the right to use force in face of serious violations of human right as an exception to the prohibition of the use of force, under Chapter VII of the Charter, the Security Council is entitled to take action in situations where international peace and security are at risk.

2.6.2 The role of the Security Council

Since under the Charter the UN Security Council has primary responsibility for maintenance of international peace and security,¹⁵³ it is required to take necessary measures to restore international peace and security. Article 39 outlines that:

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

The Charter further under Chapter VII permits the Security Council to impose several measures, such as non-forceful measures under article 41 and air, sea or land action in order to maintain or restore international peace and security pursuant to Article 42 which states:

152 ICJ Report (1986), at para. 268.

153 UN Charter, art 24.

Should the Security Council consider that measures provided for in article 41¹⁵⁴ would be inadequate or have proved to be inadequate; it may take such action by air, sea or land forces as may be necessary to maintain or to restore international peace and security. Such action may include demonstrations, blockade and other operations by air, sea, or land forces of members of the United Nations.

As mentioned earlier, one of the core purposes of the United Nations is to promote and to encourage respect for human rights and for fundamental freedoms for all without distinction of race, sex, language or religion.¹⁵⁵ This commitment is expressed in Article 55 which states:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote: universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.¹⁵⁶

Although the UN Charter prohibits the use of force against the territorial integrity or political independence of any state, in the situation of humanitarian emergencies inside a sovereign state, the United Nations may consider that this constitutes a threat to international peace and security.¹⁵⁷ Accordingly, if the Security Council determines

154 The Security Council may decide that measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations.

155 UN Charter, art 1 (3).

156 UN Charter, art 55.

157 For example in Resolution 688 (1991) in connection with the situation in Iraq, the Security Council considered that the repression of Iraqi people in Northern and Southern Iraq was a threat to international peace and security. This states that 'the repression of the Iraqi civilian population in many parts of Iraq, including most recently in Kurdish-populated areas, which led to a massive flow of refugees towards and across international frontiers and to cross-border incursions which threaten international peace and security in the region'.

that large-scale violations of human rights are a threat to international peace and security, it has the power to authorize military response.

It should be noted however that for decades, tensions between the principle of state sovereignty and the duty to intervene to halt mass violation of human rights have been palpable in international society. Some countries, particularly in the western world, stress the enforcement powers laid down by chapter VII of the UN Charter while others maintain that state sovereignty always trumps, even in humanitarian emergencies.¹⁵⁸ However, since the end of the Cold War, due to the proliferation of intrastate conflicts in different parts of the world marked by the deliberate targeting of the civilian population, human security has become an issue of international concern.¹⁵⁹ Thus, over the last two decades, the UN has been increasingly involved in a number of conflicts to halt or to prevent mass atrocities.¹⁶⁰ Today the duty to intervene in the face of mass atrocities has gained international acceptance and state practice supports the view that the duty to protect is well accepted in theory. The international community practice has, however, illustrated that the responsibility to protect is not easily implemented. This is the subject of Chapter 3.

2.7 Chapter conclusions

The preceding discussion has attempted to demonstrate that throughout history, there has been a desire to spare civilians from harm. It has emphasized that the idea of the

158 See Duke Simon, 'The State and Human Rights: Sovereignty Versus Humanitarian Intervention' *International relations*, vol. XII, no. 2, 1994.

159 See Jon Western and Joshua S. Goldstein, 'Humanitarian Intervention Comes of Age: Lessons From Somalia to Libya' *Foreign Affairs*, vol. 90, no. 6, 2011.

160 Ibid.

protection of the civilian population has deep historical roots which can be traced from earlier centuries.

With the emergence of nation-states in Europe, the doctrine of just war began to change. It became linked with the sovereignty of states and faced the paradox of wars between Christian states, each side being convinced of the justice of its cause. This situation tended to modify the approach to the just war. Thus, the emphasis in legal doctrine moved from the application of force to suppress wrongdoers to a concern to maintain the order by peaceful means. Nevertheless, natural law theorists emphasized the legitimacy of using force against those who violate the laws of humanity.

The history of the protection of civilians therefore illustrates that despite the considerable attention given to preventing civilians from harm throughout history, civilians have increasingly become the predominant victims of armed conflict. The targeting of civilian populations has emerged, whether it is as a strategic mechanism to obtain further war objectives or as a war objective itself. Nevertheless, against this rising targeting of civilians is the development of the international protection principles including R2P. The increase in conflicts characterized by grave violations of human rights on a massive scale has led to the issue of whether international law permits states and the international community to react to such cases, including the use of force where governments fail to protect their own people. This issue has become a central theme in the United Nations agenda. It has become apparent from this that a new debate is needed in relation to what can be done to help people who are facing mass atrocities, including the need for a strong and relevant UN strategy to address challenges in modern conflicts.

However, despite current developments and the antiquity of the idea that its the state's duty to intervene to end inhuman practices, the legality of intervention to halt massive violations of human rights has been and continues to be controversial in both international law and international relations, as discussed in the following chapters of this thesis.

Chapter 3: Protection of Civilians and the UN Framework

The UN Charter was issued in the name of the peoples, not the government of the United Nations. The Charter protects the sovereign of peoples. It was never meant as a license for governments to trample on human rights and human dignity. Sovereignty implies responsibility not just power.¹⁶¹

3.0 Introduction

Although the Charter bans unauthorized military intervention in a sovereign state, the principle of state sovereignty enshrined in article 2(7) of the Charter does not mean that states are free to treat their own population as they wish. Indeed, states are legally obliged to respect the human rights of their citizens. However, the correct response of the international community in case of massive human rights abuses within a state has always been a subject of controversy. Although the legality of military action for protecting populations at risk has fuelled academic and political debates for centuries, there was no agreed framework to address situations of gross violations of human rights within a sovereign state. Nevertheless, state practices in the post-Charter as well as the Security Council has shown that no state holds an unlimited power to do what it wants to its own people. Indeed, the traditional principle of sovereignty was challenged by the end of the Cold War which was marked by the emergence of

¹⁶¹ Report of the Secretary-General on the Work of the Organization, General Assembly Official Records, Fifty-fourth session, Suppl. No. 1, (A/54/1).

balance between states and people as the source of legitimacy and authority. The development of intrastate conflict and civil war in the 1990s, characterized by perpetration of violence against civilians on a massive scale, generated the issue of coercive action against a state to protect people within its borders from suffering grave harm. However, it was not until the shock from the inadequate UN response to the genocide in Rwanda in 1994 and the failure to prevent ethnic cleansing in Srebrenica in 1995 that debate about intervention for human protection purposes was brought to a very public head and became an issue of international agenda.

Thus, the *Responsibility to Protect* report issued by the International Commission on Intervention and State Sovereignty (ICISS) in 2001¹⁶² marked an important moment as the international community finally took steps to lay the foundations of an operational framework when faced with situations of catastrophic human rights violations within states. This was a point of departure from a process that led to the endorsement of the R2P as a new international norm to address humanitarian tragedies in September 2005 by the Heads of State and Government. Since then, it is widely accepted that states have both individual and collective responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity.

This chapter aims to analyze the United Nations strategies in face of massive violations of human rights. In order to fully understand the UN framework on protection of civilians from atrocity crimes, an overview of how the principle of humanitarian intervention was accepted within states and Security Council practice is undertaken in section 1. Section 2 discusses the development of human rights protection under the Security Council agenda on situations of armed conflict. Section 3 considers the

162 Report of the International Commission on Intervention and State Sovereignty, *The Responsibility to Protect*, International Development Research Centre, Ottawa, 2001.

emergence of R2P as a possible response to prevent mass atrocities while respecting the principle of state sovereignty. The fourth section discusses the evolution of R2P within the UN agenda. Section 5 analyses the status of R2P within international legal framework. The operationalization of R2P is discussed in Section 6 and, finally, Section 7 looks at the applicability of R2P.

3.1 Analysis of acceptance of intervention for humanitarian purposes

The concept of humanitarian intervention which is generally referred to as a trans-boundary use of military force in order to halt or avert gross human suffering on large-scale has been a key subject of discussion in recent decades.¹⁶³ As mentioned in the previous chapter, there has been a normative shift, not only within scholars but also in states practice as well as within the Security Council. One of the major problems raised is whether a military intervention in a sovereign state to stop human suffering is compatible with the principle of non-intervention. The central question is whether international law permits states to intervene militarily to prevent or to stop gross violations of human rights. Legal views expressed on this point differ considerably.¹⁶⁴ One part of the doctrine consider that the UN Charter allows the use of force to prevent or to halt the most serious international crimes, such as genocide, since Article 2(4) prohibits the use of force only against the territorial integrity or political independence of any state or in any other manner inconsistent with the purposes of the UN.¹⁶⁵ Téson

163 See Alex J. Bellamy and Nicholas J. Wheeler, 'Humanitarian Intervention in World Politics'.op.cit.

164 See for example Christine Gray, *International law and the use of Force*, 49 2nd. ed., 2004;; Bruno Simma, 'NATO, the UN and the use of Force: legal Aspects', 10 Simmon Chesterman, 'Just war or Just Peace?' *Humanitarian Intervention and International Law*, Oxford, Oxford University Press, 2001, pp. 45-87; Adam Roberts, 'The So-called 'Right' of Humanitarian Intervention', *Year Book of International Humanitarian Law*, vol. 3, 2000, pp. 3-51.

165 For further details see for example Bartram S. Brown, 'Humanitarian Intervention at a Crossroads', vol. 41, *William and Mary Law Review*, 2000 pp.1683-74, see also Julius Stone, *Aggression and World Order: A Critique of United Nations Theories of Aggression*, Berkeley, University of California Press, 1958, p.95.

for example disagrees with the idea that humanitarian intervention is prohibited by article 2(4) of the Charter. As he states:

Since a humanitarian intervention seeks neither a territorial change nor a challenge to the political independence of the state involved and is not only not inconsistent with the purposes of the United Nations but is rather in conformity with the most fundamental peremptory norms of the Charter, it is a distortion to argue that it is precluded by Article 2(4).¹⁶⁶

This approach assumes that in case of widespread violations of human rights, military intervention may be the only way to prevent the continuing slaughter of innocents, arguing that the prohibition of crime of genocide and crimes against humanity is a peremptory norm from which no derogation is permitted.¹⁶⁷

Other scholars, however, maintain that since there is no formal provisions for intervention on humanitarian grounds in the language of the UN Charter, any recourse to force except under the two strictly prescribed circumstances is prohibited under international law. Wolf for example opposes the idea of intervention for humanitarian purposes arguing that there is in the UN Charter framework a clear intent to assure that there would be no exception to the prohibition to recourse to force other than for self-defense.¹⁶⁸ Oscar Schachter goes even further in demonstrating that it is impossible to reconcile humanitarian intervention with the UN's *jus ad bellum* arguing that 'the idea that wars waged in a good cause such democracy and human rights

166 See Fernando Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, 2nd ed., Irvington-On-Hudson, N.Y. : Transnational Transnational Publisher Inc., 1997, p.151.

167 See Ian Brownlie, *Principles of Public International Law*, 515 5th ed., 1998, See also Julie Mertus, 'The Legality of Humanitarian Intervention: Lessons from Kosovo', vol. 41 *William and Mary Law Review*, 2000, p. 1773.

168 Daniel Wolf, 'Humanitarian Intervention', *Michigan Year Book International Legal Studies*, vol. 9, 1988, pp. 333.

would not involve a violation of territorial integrity or political independence demands an Orwellian construction of those terms'.¹⁶⁹

Legal realists, however, consider that where the Security Council has failed to react in face of massive violations of human rights, then humanitarian intervention is legal since it is undertaken within the purposes of the United Nations.¹⁷⁰ According to this view, even an unauthorized humanitarian intervention is legal; however, the legal status depends on the Security Council's inaction to halt massive human rights violations.

It is important to note that controversy over the legality of use of force for humanitarian purposes and the debate of whether humanitarian intervention can be legal without the Security Council's authorization has acquired greater importance in the wake of military interventions in Kosovo when NATO leaders decided to invade Yugoslavia outside the UN Charter framework.¹⁷¹ In addition to the legality of the concept under international law, the issue at the heart of the debate was whether humanitarian intervention can be justified outside of the international legal framework where there is a mass violation of human rights? This operation was criticized as unacceptable and lacking legal justification. As Brown comments: 'Military action to aid the Kosovar Albanians was the right thing to do, but it is unacceptable that no clear legal justification

169 Oscar Scharter, 'Legality of Pro-democratic Invasion' quoted in JL. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention, Ethical, Legal, and Political Dilemmas*, Cambridge: Cambridge University Press, 2003, p. 37-38.

170 See Michael Reisman, 'Criteria for the Lawful Use of Force in International Law', 10 *Yale Journal of International Law*, 1985, 279-80. See also W. Friedmann, *The Changing Structure of International Law*, New York: Columbia University Press, 1964, p. 259.

171 In light of the inability of the Security Council to reach a consensus on an effective response to massive human rights violations perpetrated by Serbian on Albanian Kosovars, NATO decided to intervene outside UN Charter framework. Thus, the 1999 NATO bombardment of Yugoslavia was not authorized by the Security Council.

for that operation has been offered'.¹⁷² While state practices can be invoked to justify military intervention for humanitarian purposes,¹⁷³ the doctrine shows that without clear legal standards, the practice of humanitarian intervention could have an adverse impact on international relations. Thus, for the opponents to the right of humanitarian intervention, aggressive states may use humanitarian exception as a pretext to launch war for other motives.¹⁷⁴

3.1.1 State practice during the Cold War: A customary law?

Although the practice of states during the nineteenth century with regard to humanitarian intervention remains controversial, a certain body of the doctrine considers that the principle has been accepted to the extent that it can be argued that it has gained international custom status. Those who take this view argue that state practice in the nineteenth and early twentieth centuries had certainly established humanitarian intervention as a customary right.¹⁷⁵ Indeed, their arguments are founded on the idea that intervention in response to humanitarian tragedy has fuelled several interventions in the nineteenth century and that this practice has survived the creation of the United Nations.¹⁷⁶ As noted in chapter 2, the joint intervention of Great Britain, France and Russia in Greece in 1827, the French invasion of Syria in 1860 to stop the slaughter perpetrated by the Ottoman troops, and Russia's incursion into the

172 Bartram S. Brown, 'Humanitarian Intervention at a Crossroads', 41 William and Mary Law Review, 2000, p. 1683.

173 The Belgium intervention in Congo in 1964, the US intervention in the Dominican Republic in 1965, The Tanzania intervention in Uganda in 1979, the India intervention in Pakistan in 1971 and the Vietnam invasion of Cambodia in 1978, the US intervention in Grenada in 1983 and in Panama in 1989 and 1990 are good examples of intervention with an humanitarian basis.

174 See Adam Robert, 'The So-Called "Right" of Humanitarian Intervention', Year Book International Humanitarian Law, vol. 3, no. 23, 2000.

175 See Richard B. Lillich, 'Forcible Self-help by States to Protect Human Rights,' 53 Iowa Law Review, vol. 53, 1967, p. 334 ; Jean-Pierre L. Fonteyne, 'The Customary International Law Doctrine of Humanitarian Intervention: Its Current under the UN Charter', 4 California Western International Law Journal, 1974, pp. 203-70.

176 See J.L Holzrefe and Robert O. Keohane , Humanitarian Intervention, op. cit, p. 45.

former Yugoslavia in 1877 with support from a number of European states were cited as the earliest instances of humanitarian intervention.¹⁷⁷ Some scholars, however, reject the idea that these interventions were humanitarian interventions arguing that there was no reference to a legal justification for intervention.¹⁷⁸ For them it is clear that state practice in the nineteenth century did not establish a customary right of humanitarian intervention.¹⁷⁹

However, although the practice of state in the nineteenth century did not permit to establish humanitarian intervention as a norm in customary international law, one may point to a number of state interventions during the Cold War era to maintain that the principle was gaining acceptance as a norm in customary international law. Brownlie for example maintains that the concept was already accepted, asserting that the twentieth century was marked by a wide acceptance of the right of humanitarian intervention within a non-intervention doctrine.¹⁸⁰ It can be therefore argued that humanitarian intervention has been sufficiently accepted in cases of mass violation of human rights. For example, the 1971 Indian intervention to end civil war in East Pakistan, the 1978 Vietnam intervention in Cambodia which put an end to the genocidal rule of Khmer Rouge, and the 1979 Tanzanian intervention to overthrow Idi Amin in Uganda were widely accepted despite the fact that intervening states had no mandate to act as they did¹⁸¹.

177 See Thomas M. Franck and Nigel S. Rodley, 'After Bangladesh: The Law of Humanitarian Intervention by Military Force', 67 *American Journal of International Law*, 1973, pp. 279-85.

178 Ian Brownlie, 'Humanitarian Intervention' in John N Moore (ed.), *Law and Civil War in the Modern World*, Baltimore, Maryland: Johns Hopkins University Press, 1974, p. 217 - 221.

179 *Ibid.*

180 Ian Brownlie, *International Law and the Use of Force by States*, Oxford: Clarendon Press, 1963, p. 338.

181 For a brief history of these cases see for example Clark Arend and Robert Beck, *International Law and the Use of Force: Beyond the UN Paradigm*, Routledge, op. cit, pp. 122-125.

It is important to note that despite the fact that the three military interventions aimed at stopping extreme violations of human rights, the intervening states chose to justify their actions by self-defense instead of invoking a customary right of humanitarian intervention.¹⁸² Indeed, none of the intervening states chose to justify their intervention on a humanitarian basis. In the case of the Indian intervention in Vietnam, while the unilateral intervention could have been justified on humanitarian grounds, India decided to cite self-defense as the reason for its intervention. Indeed, India's decision to send its troops into Pakistan was taken after massacres, systematic torture, mass rape, assassination and arbitrary executions perpetrated by Pakistan's army had been reported, and the United Nations Security Council blockage to declare the situation in Pakistan as a threat to international peace and security. In its military intervention, India succeeded in stopping the systematic killings of civilians. Similarly, in 1978 Cambodia was invaded by Vietnam which succeeded in driving out the Khmer Rouge who were perpetrating crimes against humanity causing a death of almost three million Cambodians. As to the Tanzania invasion of Uganda, intervention followed the slaughter of hundreds of thousands of innocent Ugandans under the Idi Amin regime. In fact, the tyrannical regime was marked by serious violations of human rights; the intervention halted the systematic killing of people from certain tribal and ethnic groups and led to the overthrow of Idi Amin Dada. However, Tanzania's ostensible justification of its invasion was self-defense in response to the occupation and annexation of the Kagera salient.¹⁸³

182 Ibid.

183 Ibid.

Commentators believe that India, Tanzania and Vietnam have failed to make those cases to develop customary rule of international law on humanitarian intervention.¹⁸⁴ Nevertheless, despite the fact that the motives of intervention were not purely humanitarian, these interventions could have been labelled humanitarian interventions as they were responses to humanitarian tragedies. In light of those cases, Kofi Annan comments:

What justified their action in the eyes of the world was the internal character of the regimes they acted against. And history has by and large ratified that verdict. Few would now deny that in those cases intervention was a lesser evil than allowing massacre and extreme oppression to continue. Yet at the time, in all three cases, the international community was divided and disturbed. Why? Because these interventions were unilateral.¹⁸⁵

It is nevertheless a fact that disagreement continues about the status and legality of intervention for humanitarian purposes. Some scholars for example point out the fact that the right of humanitarian intervention has been applied in a selective manner arguing that 'this alleged right lacks the two recognized attributes of a binding international norm: general observance and widespread acceptance that it is lawful'.¹⁸⁶ Others, however, reject this argument, maintaining that the fact that the principle of humanitarian intervention is a permissive rather than a mandatory norm make it an element of selectivity in its exercise.¹⁸⁷ The core challenge was to reconcile

184 See for example Lyal S. Sunga 'Is humanitarian intervention legal?' In *E-International Relations Online Journal*, October 13, 2008, article is at <http://www.e-ir.info/2008/10/13/is-humanitarian-intervention-legal/> accessed 02/05/2013.

185 Secretary-General Reflects on 'Intervention' in Thirty-Fifth Annual Ditchley Foundation Lecture, SG/SM/6613, 26 June 1998.

186 Highlighting the selective exercise of humanitarian intervention, classicists mentioned that no state or regional organization had intervened to prevent or end the massacre of several hundred thousand ethnic Chinese in Indonesia in mid-1960s; the killing and forced starvation of almost half a million Ibos in Nigeria; the slaughter and forced starvation of well over a million black Christians by the Sudanese government in the 1960s, etc. See J.L. Holzgrefe and Robert O. Keohane, *Humanitarian Intervention*, op.cit p.47.

187 See Dino Kritsiotis, 'Reappraising Policy Objections to Humanitarian Intervention', 19 *Michigan Journal of International Law*, 1998, p. 1027.

humanitarian intervention with the principle of sovereignty as well as the rules set forth in Article 2(4) of the UN Charter.¹⁸⁸ As Murphy observes:

A central challenge for the next century rests in reconciling existing construction on the use of armed forces with the increasing desire to protect civilians and combatants from widespread and severe deprivations of human rights that arise from internal conflicts due to civil war or to the persecution of groups by autocratic governments. Should states allowed to intervene in the affairs of other states to prevent deprivation of human rights, an act commonly referred to as ‘humanitarian intervention’?¹⁸⁹

3.1.2 The Security Council and military intervention to save human lives

Since the 1990s, the Security Council has developed a normative and operational practice which includes authorizing under Chapter VII of the Charter the UN peacekeeping missions or regional organizations to use military force to provide protection to particular categories of persons in armed conflicts including civilians, children and women.¹⁹⁰ The United Nations resolution 940 adopted on 31 July 1994¹⁹¹ – which authorized a United States-led multinational force and recognized that mass violation of human rights were a threat to international peace and security – was an important step. In fact, the Council recognized that in some circumstances, saving human lives might override the principle of sovereignty.

188 See Ian Brownlie, ‘Humanitarian Intervention’ in *Law and Civil War in the Modern World*, p. 217.

189 See Sean D. Murphy, ‘Criminalizing Humanitarian Intervention’, *Case Western Reserve Journal of International Law*, vol. 41, 2009, pp 341.

190 See for example UNSC Resolution 1325 (2000) on women, peace and Security; UNSC Resolution 1612 2005; UNSC Resolution 188 (2008) on sexual and gender based violence; UNSC Resolution 1882 (2009) on children and armed conflict, UNSC Resolution 1265; UNSC Res 1296; UNSC Res. 1674; UNSC Res 1706; UNSC Res 1738; UNSC Res1814.

191 Security Council Resolution adopted on 31 July 1994, S/RES/940, 1994.

Looking at the recent Security Council practice, it can be argued that humanitarian exception to the Charter's general prohibition of intervention in internal matters of sovereign states may be gaining acceptance, as illustrated in some writings¹⁹² subsequent to ECOWAS interventions in Liberia¹⁹³ and Sierra Leone.¹⁹⁴ In fact, the ECOWAS intervention in Liberia had been taken beyond the United Nation framework without Security Council authorization. Rather than condemning this action as a dangerous precedent, the UN praised ECOWAS's intervention in Security Council resolution 788.¹⁹⁵ In this resolution, the Security Council explicitly expressed its approval of the initiative undertaken by ECOWAS, recognizing that the deterioration of the situation in Liberia constituted a threat to international peace and security.¹⁹⁶ It is however important to note that while the Council welcomed the ECOWAS effort to restore peace and security and stability in Liberia and called upon the sub-regional organization to continue in assisting the peaceful implementation action, it did not expressly legitimate the use of force.¹⁹⁷

192 See for example Christine Gray, *International Law and the Use of Force*, 2nd ed, Oxford, Oxford University Press, 2004, p.99.

193 On 6 July 1990, ECOWAS decided to send a multinational peacekeeping force into Monrovia with mandate to keep peace, to restore law and to monitor the implementation of the cease-fire signed between the fighting factions in Liberia. On 25 August 1990, the Economic Community of West African States Monitoring Group (ECOMOG) composed by troops from Nigeria, Ghana, Guinea, Sierra Leone and Gambia was deployed in Monrovia, officially on humanitarian basis. Their tasks included: imposition of a cease-fire, disarmament of the warring parties, ending the carnage of civilians, imposition of an embargo on the acquisition and importation of arms, establishment of an interim government and evacuation of foreign nationals. In short, the ECOMOG official mission was to end the killing of the civilian population and to restore peace and stability.

194 See Ryan Goodman, 'Humanitarian Intervention and Pretexts for War', *American Journal of International Law*, vol, 100, 2006, pp.107-141

195 See J. Allain, 'The True Challenge to the United Nations System of the Use of Force: the Failures of Kosovo and Iraq and the Emergence of the African Union', 2004, 8 *Max Planck Yearbook of the United Nations Law* 237 at 261. See also Jeremy Sarkin, 'The Role of the United Nations, the African Union and Africa's Sub-Regional Organizations in Dealing with Africa's Human Rights Problems: Connecting Humanitarian Intervention and the Responsibility to Protect', *Journal of African Law*, vol 53, no. 1, 2009, pp 1-33

196 UN Doc S/RES/788 (1992) adopted by the United Nations Security Council on 19 November 1992.

197 See Christine Gray, 'The Use of Force and the International Legal Order', in Malcom Evans. (ed.) *International Law*, 3rd. ed., Oxford, Oxford University Press , 2010, p. 615.

Furthermore, in its resolution 866,¹⁹⁸ the Security Council decided to establish the United Nations Observer Mission in Liberia (UNOMIL) in cooperation with ECOMOG. In this resolution, the Security Council recognized that the deployment of UNOMIL constituted a significant contribution of the United Nations to the effective implementation of the peace agreement undertaken by ECOWAS in Liberia. Given the fact that the Security Council had never criticized the use of force by ECOMOG, it can be argued that ECOWAS's intervention without the Security Council authorization was fully approved by the United Nations. As the then United Nations Secretary-General Boutros Boutros-Ghali argued: 'the situation in Liberia represented a good example of systematic cooperation between the United Nations and regional organizations, as envisaged in Chapter VII of the Charter'.¹⁹⁹ This case highlights that the theory based on the primacy of the role of the United Nations Security Council under the provisions of the Charter as the only body to authorize the use of force is not strictly followed even by the Security Council itself.

This sequence had been rarely followed and, given the situation on the ground, the Security Council found itself in situations when the intervention could be considered an exception. As was the case in Liberia; the situation was chaotic and the conflict has been characterized by the involvement of thousands of children in fighting. Child soldiers under the age of 15 were estimated at 6,000 by Amnesty International. Furthermore, civilian populations were frequently targeted, as demonstrated by the Lutheran church massacre in which almost 6,000 civilians were murdered, and the Harbel massacre in which many civilians were slaughtered in extreme violence.²⁰⁰

198 UN DOC S/RES/866 (1993) adopted by the United Nations Security Council on 22 September 1993.

199 See Cindy Shiner, 'The Authority Vacuum', Africa Report, vol. 39, no. 6, 1994.

200 See Lois Whitman and Janet Fleischman, 'The Child Soldiers', Africa Report, 1994, p 65-6.

However, while it can be argued that humanitarian intervention has gained acceptance in international relations, it is clear that unilateral humanitarian intervention continues to be controversial. Nevertheless, one may conclude that the prevailing idea of humanitarian intervention is that there exists at least a moral duty to safeguard human rights when a state is unwilling or unable to protect the lives of its citizens. As Holzgrefe aptly observes: 'The justice of humanitarian intervention thus seems to turn on how one answers the following question: What should the breadth and weight of one's moral concern be? Should it extend beyond one's family, friends, and fellow citizens? Should it extend to those nameless strangers in distant lands facing genocide, massacre, or enslavement? Should the needs of these strangers weigh as much as the needs of family, friends, and fellow citizens?'.²⁰¹ However, unsurprisingly the challenge remains to find a balance between the moral duty to safeguard lives and the principle of state sovereignty. As Henkin writes:

Unilateral intervention, even for what the intervening state deems to be important humanitarian ends, is and should remain unlawful. But the principles of law, and the interpretations of the Charter, that prohibit unilateral humanitarian intervention do not reflect a conclusion that the sovereignty of the target state stands higher in the scale of values of contemporary international society than the human rights of its inhabitants to be protected from genocide and massive crimes against humanity. The law that prohibits unilateral humanitarian intervention rather reflects the judgment of the community that the justification for humanitarian intervention is often ambiguous, involving uncertainties of fact and motive, and difficult questions of degree and balancing of need and costs. The law against unilateral intervention may reflect, above all, the moral-political

201 See J.L. Holzgrefe *Humanitarian Intervention*, op. cit. p.53.

conclusion that no individual state can be trusted with authority to judge and determine wisely.²⁰²

Yet, as noted above, there is considerable controversy over the legality of unauthorized humanitarian intervention. However, there is a wide acceptance that the UN Security Council can authorize humanitarian interventions. Indeed in the 1990s the United Nations was involved in different conflicts such as Former Yugoslavia,²⁰³ Somalia²⁰⁴, Rwanda²⁰⁵ and the Democratic Republic of Congo.²⁰⁶ This was an important development in the evolution of the duty to protect civilians from mass atrocities since the issue of intervention for human protection purposes became one

202 See Louis Henkin, 'Editorial Comments: NATO's Kosovo Intervention: Kosovo and the Law of "Humanitarian Intervention"', *American Journal International Law*, vol. 93, 1999, pp. 824-825.

203 The UN Security Council, by its Resolution 743 unanimously adopted on 21 February 1992 created the United Nations Protection Force (UNPROFOR). A peacekeeping force composed by contingents from Argentina, Bangladesh, Belgium, Canada, Colombia, Czechoslovakia, Denmark, Egypt, Finland, France, Ghana, Ireland, Kenya, Luxembourg, Nepal, Netherlands, New Zealand, Nigeria, Norway, Poland, Portugal, Russia Federation, Sweden, Switzerland and the United Kingdom of Great Britain and Northern Ireland. See www.daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/011/02/IMG/NR001102.pdf?OpenElement, last accessed on 20 August 2011.

204 By Resolution 751, the United Nations Security Council authorized the deployment of peacekeeping force in Somalia to monitor the ceasefire and to assist the humanitarian relief. Known as the United Nations Operation in Somalia (UNOSOM), this mission appeared unsuccessful as the ceasefire was ignored and total chaos swept the country putting aid agencies and civilians at great risk. The situation got worse and parties to conflict began to be actively opposed to the UN intervention; peacekeepers were shot, ships attacked and cargo aircraft fired. Thousands of civilians were forced to flee their homes and many starved to death. On 28 August 1992, the UN Security Council adopted resolution 775 authorizing the reinforcement of UNOSOM. Despite this effort, the situation in Somalia continued to deteriorate. On 9 December 1992, the United States deployed the Unified Task Force (UNITAF) in Mogadishu with the aim of providing secure environment to aid agencies. UNITAF included military from the United States, Australia, Belgium, Botswana, Canada, Egypt, France, Germany, Greece, India, Kuwait, Morocco, New Zealand, Nigeria, Norway, Pakistan, Saudi Arabia, Sweden, Tunisia, Turkey, United Arab Emirates, United Kingdom and Zimbabwe. On 26 March 1993, the Security Council by its resolution 814 adopted the expansion of the mandate of UNOSOM. Despite political and humanitarian chaos, UNOSOM was withdrawn in March 1995. See <http://www.un.org/en/peacekeeping/misions/past/unosom1backgr2.html>, last accessed on 20 August 2011.

205 Established by the UN Security Council Resolution 872 adopted on 5 October 1993, the United Nations Assistance Mission for Rwanda (UNAMIR) is regarded as one of the major failures in the history of United Nations interventions. The Resolution can be found at www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N93/540/63/PDF/N9354063.pdf?OpenElement, last accessed on 20 August 2011.

206 The United Nations Mission in the Democratic Republic of the Congo (MONUC) was established by the UN Security Council Resolution 1279 voted on 30 November 1999 to observe the ceasefire and to supervise its implementation. S/RES/1279 (1999), available at [http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N\(\(/368/17/PDF/N9936817.pdf?OpenElement](http://www.daccess-dds-ny.un.org/doc/UNDOC/GEN/N((/368/17/PDF/N9936817.pdf?OpenElement), last accessed on 20 August 2011.

of the central themes of international debates.²⁰⁷ Nevertheless, advocates of state sovereignty and a strict principle of non-intervention into the internal affairs of a sovereign state were rigorously opposed to those supporting the right of humanitarian intervention in cases of humanitarian crisis.²⁰⁸ As Evans comments: 'External military intervention for humanitarian protection purposes has been controversial both when it has happened –as in Somalia, Bosnia and Herzegovina and Kosovo – and when it has failed to happen, as in Rwanda.'²⁰⁹ It should be noted that the post-Cold War era, which was marked by the escalation of intrastate conflicts, has been crucial in developing the UN protection framework as the international community was faced with humanitarian tragedies, including genocide, ethnic cleansing, mass killing, war crimes and crime against humanity.²¹⁰

3.2 Normative and operational developments of protection

The issue of how the international community could better respond to widespread and systematic abuses of human rights, including genocide, war crimes and crimes against humanity, have been raised following the most tragic failures of the United Nations in Rwanda and Srebrenica. Indeed in Rwanda the United Nations did little while approximately 800,000 Tutsis and moderate Hutus were slaughtered by Hutu

207 Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect', 24 *International Law Journal*, vol. 703, no. 703, 2006. See also Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Cambridge: Polity, pp. 19-32.

208 Responsibility to Protect, International Crisis Group, available at <http://www.crisisgroup.org/home/index/cfm>.

209 Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, D.C.: Brookings Institute. Press, 2008.

210 See for example Adam Roberts, 'The So-Called "Right" of Humanitarian Intervention', *Yearbook of International Humanitarian Law*, ' , no..3, 2000, pp. 3-51 Thomas G. Weiss, *Humanitarian Intervention*, Cambridge: Polity, 2007, pp. 59-61; Jennifer Welsh, 'Introduction', in Jennifer Walsh (ed.), *Humanitarian Intervention and International Relations*, Oxford: Oxford University Press, 2004, 1-7, pp. 2-3.

militias.²¹¹ The UN's failure to avert mass atrocity crimes against the civilian population was further highlighted by its peacekeeping mission in Bosnia which was unable to provide protection to the population in the safe zone.²¹² The shock that accompanied these two failures led to the debate over the effectiveness of the fundamental principles and the United Nations framework to provide protection to the civilian population in conflict zones. The varying responses of the United Nations to these conflicts led to the reaffirmation of the need to undertake new strategies in face of mass atrocities. The issue raised was whether states and the international community should be exclusively focussed on the security of states rather than to the safety of its people,²¹³ and how to reconcile the international community's responsibility to react to massive violations of human rights and the inviolable principle of state sovereignty.²¹⁴ This dilemma has captured the attention of the United Nations, political leaders and scholars. Given that, there were calls for clearer policies for the protection of the civilian population.

3.2.1 The 1999 UN Secretary-General report on the Protection of Civilians in Armed Conflict

The roadmap of the Security Council action to improve legal protection of people civilians was first laid out in the 1999 Report on Protection of Civilians in Armed Conflict.²¹⁵ In this Report, the UN Secretary-General Kofi Annan emphasized that

211 See Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda, 15 December 1999. Available at <http://www.securitycouncilreport.org/atf/cf/%7B65BFCF9B-6D27-4E9C-8CD3-CF6E4FF96FF9%7D/POC%20S19991257.pdf>, accessed on 21 October 2013.

212 See the Judgement of the Supreme Court of the Netherlands, 6 September 2013. Available at <http://www.rechtspraak.nl/Organisatie/Hoge-Raad/OverDeHogeRaad/publicaties/Documents/12%2003324.pdf>, accessed on 21 October 2013.

213 See Report of the Secretary-General, 'Implementing The Responsibility to protect', 2009, A/63/677.

214 Francis K. Abiew, *The Evolution Of The Doctrine And Practice Of Humanitarian Intervention*, The Hague: Kluwer Law International, 1999, p.16-17.

215 UN Security Council, Report of the Secretary-General to the Security Council on the protection of civilians in armed conflict, 8 September 1999, S/1999/957.

protection of civilians is fundamental to the mandate of the United Nations. The report points out the destructive effect of conflict on civilians stating that:

Despite the adoption of the various conventions on international humanitarian and human rights law over the past 50 years, hardly a day goes by where we are not presented with evidence of the intimidation, brutalization, torture and killing of helpless civilians in situations of armed conflict. Whether it is mutilations in Sierra Leone, genocide in Rwanda, ethnic cleansing in the Balkans or disappearances in Latin America, the parties to conflicts have acted with deliberate indifference to those conventions. Rebel factions, opposition fighters and Government forces continue to target innocent civilian with alarming frequency.²¹⁶

The report further highlights the connection between systematic and widespread violations of the rights of civilians and the breakdown of international peace and security. Moreover, in order to adequately address any forms of widespread and systematic armed violence against civilians, the Report proposed a very wide array of responses including political and diplomatic measures as well as peacekeeping or enforcement measures under Chapters VI, VII or VIII of the Charter.²¹⁷ This states:

It is now generally recognized that the maintenance of international peace and security requires action by the Security Council at all stages of a conflict or potential conflict. Whenever possible, action must be taken to address the root causes of conflict and to prevent disputes from escalating into violence. Where, for whatever reason, these preventive approaches cannot be effectively implemented or have failed, the main thrust of policy must be to minimize the consequences of the violence for civilian populations and to seek to bring hostilities to a close. In the aftermath of war, all efforts must be directed at peacekeeping and peace-building, including reconciliation

216 Ibid.

217 Responses can include: 'sanctions, arms embargoes, separation of civilians and combatants, ensuring access for humanitarian aid, establishing safe zone, protections of refugees, monitoring and reporting, and counteracting hate media.'

amongst groups pulled apart by the conflict, and the administration of justice to those who have violated international humanitarian or human rights law.²¹⁸

It is important to note that in this report, the Secretary-General repeatedly attributes responsibility to state members and to the international community as a whole. He also points out the weaknesses of UN mechanisms when confronted with mass atrocities against civilians. A few months later, in his report to the General-Assembly on the fall of Srebrenica, the Secretary-General explicitly invokes the international community responsibility stating that:

The international community as a whole must accept its share of responsibility for allowing this tragic course of events by its refusal to use force in the early stages of war... we tried to keep the peace and apply the rules of peacekeeping when there was no peace to keep. Knowing that any other course of action would jeopardize the lives of troops, we tried to create –or imagine- an environment in which the tenets of peacekeeping-agreement between the parties, deployment by consent, and impartiality-could be upheld. We tried to stabilize the situation on the ground through ceasefire agreements, which brought us close to the Serbs, who controlled the larger proportion of land. We tried to eschew the use of force except in self-defense, which brought us into conflict with the defenders of the safe areas, whose safety depended on our use of force.²¹⁹

Since then, protection of civilians has been an issue to be dealt with by the Security Council as observed in a series of resolutions on protection of civilians.²²⁰ In its first

218 Ibid.

219 Report of the Secretary-General Pursuant to General Assembly Resolution 53/35: The Fall of Srebrenica, 15 November 1999, A/54/549.

220 'In its resolution 688 (1991), of 5 April 1991, on Iraq, the Security Council recognized that the repression of the civilian population led to consequences that threatened peace and security in the region. In resolution 941(1994), of 23 September 1994 on Bosnia and Herzegovina, the Council recognized that ethnic cleansing constituted a clear violation of international humanitarian law and posed a threat to the peace effort. In resolution 955 (1994), of 8 November 1994, on Rwanda, the Council indicated that genocide and other

Resolution 1265 (1999) on the issue of protection of civilians, the Security Council expressed its willingness to respond to situations of armed conflict where civilians are being targeted.²²¹ In this resolution, the Security Council also acknowledged that deliberate targeting of civilians and serious violations of international humanitarian and human rights law in situations of armed conflict could constitute a threat to international peace and security.²²² Once again, as in the case of Haiti in 1994, the Security Council clearly invoked the link between protection of civilians and potential threat to international peace and security.²²³

The link between systematic and widespread violations of international humanitarian and human rights law and threat to international peace and security was further reiterated in resolution 1296 (2000).²²⁴ This explicitly noted that: 'deliberate targeting of civilian populations or other protected persons and the committing of systematic, flagrant and widespread violations of international humanitarian and human rights law in situations of armed conflict may constitute a threat to international peace and security'.²²⁵ In addition, the Security Council affirmed 'its readiness to consider such situations, and, where necessary, to adopt appropriate steps'.

systematic widespread and flagrant violations of international humanitarian law constituted a threat to international peace and security. In resolution 1203 (1998), of 24 October 1998, on Kosovo, Federal Republic of Yugoslavia, the Security Council affirmed that the situation within the country's borders constituted a continuing threat to peace and security in the region. Finally, and most recently, resolution 1244 (1999), of 10 June 1999, on Kosovo, Federal Republic of Yugoslavia, reaffirmed respect for sovereignty and territorial integrity but also mandated a United Nations mission to restore and maintain security within the territory of the province' quoted in S/1999/957. See also Alex J. Bellamy, 'Responsibility to protect or Trojan Horse? The Crisis in Darfur and Humanitarian Intervention After Iraq', *Ethics & International Affairs* (2005)

221 UN Security Council Resolution 1265 (1999), 17 September 1999, S/RES/1265 (1999).

222 UN Security Council S/PRST/1999/6, 12 February 1999.

223 See Hugh Breakey Institute for Ethics, Governance and Law at Griffith University, May 2011, 'The Responsibility to Protect and the Protection of Civilians in Armed Conflicts', Review and analysis posted at http://www.griffith.edu.au/__data/assets/pdf_file/0007/333844/Responsibility-to-Protect-and-the-Protection-of-Civilians-in-Armed-Conflict-Review-and-Analysis.pdf accessed 14/07/2012

224 UN Security Council Resolution 1296 (2000) on protection of civilians in armed conflicts, 19 April 2000, S/RES/1269 (2000).

225 *Ibid.*

It is important to note, however, that while the Security Council agreed on using military operations under Chapter VII to afford protection to civilians under imminent threat of physical violence,²²⁶ it also affirmed the importance of preventive measures that may be undertaken by the United Nations such as dispute resolution, preventive military and civilian deployment, et cetera. Indeed, since 1999 the mandates of the Peace Operations progressively included the protection of civilians and authorization to use force under Chapter VII of the Charter. For example, in a resolution adopted unanimously on the establishment of the UN Mission in Sierra Leone (UNASMIL), the Security Council underlined that ‘in the discharge of its mandate, UNASMIL may take the necessary action to ensure the security and freedom of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under imminent threat of physical violence’.²²⁷ This resolution is significant with regards to the Security Council’s willingness to explicitly mandate a Peace Operation to provide protection to civilians under imminent threat of physical violence. In relation to this, a recent study on UN peacekeeping missions to protect civilians jointly commissioned by the UN Office for the Coordination of Humanitarian Affairs (OCHA) and the UN Department of Peacekeeping Operation (DPKO) has found that over the last few decades, the UN peacekeeping mandates have changed as the Council has shifted peacekeeping beyond its traditional role of monitoring the implementation of peace agreements and that by 2009 the majority of 100,000 peacekeepers deployed worldwide were mandated to protect civilians under imminent threat of physical violence.²²⁸

226 UN Security Council Resolution 1270 (1999) on establishment of the UN Mission in Sierra Leone (UNAMSIL), 22 October 1999, S/RES/1270 (1999).

227 Ibid.

228 UN Office for the Coordination of Humanitarian Affairs ‘Protecting Civilians in the Context of UN Peacekeeping Operations: Successes, Setbacks and Remaining Challenges’, United Nations, New York, 2009.

However, despite the extension of Security Council scope and the inclusion of civilian protection in peace operations mandate, there was no clear determination regarding the Security Council's own responsibility to protect civilians. The language used in its resolutions in relation to protection of civilians in armed conflict was more apparent to intention rather than to responsibility. As Breakey points out:

The Security Council is straightforward regarding its own responsibility for the maintenance of peace and security, and imputes responsibilities to states to police and prosecute genocide, crimes against humanity and the like. Notwithstanding these imputations, SC language regarding its own protection agenda is often 'concern', 'willingness' and 'intentions' rather than obligation.²²⁹

In addition to the confusion about the Security Council's intent regarding its protection agenda, it is interesting to note that there was also a lack of policy guidance and operational mechanisms in relation to the physical protection of civilians. It is in this context that the Secretary-General Kofi Annan appointed the Panel on United Nations Peace Operations and asked Mr. Lakhdar Brahimi, the former Foreign Minister of Algeria, to chair the panel.²³⁰ The challenge of the panel was to look more closely how the United Nations could do better in the future in the area of international peace and security.

229

230 Panel members included eminent personalities from around the world, with a wide range of experience in the fields of peacekeeping, peace-building, development and humanitarian assistance: Mr. J. Brian Atwood, Ambassador Colin Granderson, Dame Ann Hercus, Mr. Richard Monk, General Klaus Nauman, Ms. Hisako Shimura, Ambassador Vladimir Shustov, General Philip Sibanda and Dr. Cornelio Sommaruga.

3.2.2 The Brahimi Report

Issued in August 2000, the report made a number of recommendations designed to improve the effectiveness of the UN peacekeeping missions and their capability to protect civilians.²³¹ The panel's conclusion was that there was an urgent necessity to improve the ways that the UN addresses situations of conflict. The panel further highlighted the relevant obligations of the UN troops when faced with violence, emphasizing that 'when the United Nations does send its forces to uphold the peace, they must be prepared to confront the lingering forces of war and violence, with the ability and determination to defeat them'.

One of the central tenets of the report was that UN peacekeeping operations should move away from its traditional role of monitoring the implementation of peace agreements to become robust. In other words, the report recommends that the mandate of peacekeeping missions should put greater spotlight on the capacity to promote and to protect human rights.²³² Without doubt, the Brahimi Report has greatly contributed to the development of the UN protection framework. As the Secretary-General Ban Ki-Moon comments:

Thanks to the reform proposed by the Panel, UN Peacekeeping has been able to grow, incorporate the lessons learned from those experiences, and continue to serve as a cost-effective and flexible tool – a flagship United Nations activity, a mission of hope for people caught in armed conflict.²³³

231 UN General Assembly and Security Council, Report of the Panel on United Nations Peace Operations, A/55/305-S/2000/809, 21 August 2000. The Report bears the name of UN Under Secretary-General Lakhdar Brahimi who chaired the panel.

232 See for example William J. Durch, Victoria K. Holf and Mora K. Slunder, *The Brahimi Report and the Future of UN Peace Operation*, The Henry L. Stimson Center, 2001. See also Christine Gray, 'Peacekeeping after the Brahimi Report: Is there a Crisis of Credibility for the UN?' *Journal of Conflict and Security Law*, vol. 6 no. 2, 2001, 267-288.

233 Secretary General, SG/SM/12966, 22 June 2010.

One of the remarkable aspects of the post-Brahimi Report is the increasing roles of regional and sub-regional organizations within the UN peace and security framework. For example, following the release of the report in 2001 a Rapid Expert Assistance Team (REACT) was created within the Organization for Security and Cooperation in Europe (OSCE) to support timely deployment of police. Similarly, NATO decided to establish a NATO Response Force (NRF).²³⁴ This was an important step in that the post-2000 peacekeeping missions were characterized by the increasing involvement of regional organization in UN peacekeeping missions.²³⁵

3.3 Towards a responsibility to protect

One of the things that arose from the inaction of the Security Council and the United Nations in Rwanda and Srebrenica tragedies is that the world acknowledged the urgent need to review the collective security under the United Nations system. In this context, the United Nations Secretary-General Kofi Annan, in his Millennium Report, issued the challenge to find consensus on the matter of humanitarian intervention and to identify possible remedies to prevent massive violations of human rights. He explicitly invoked the issue of legal and policy dilemmas of humanitarian intervention, focusing on the relationship between sovereignty and principles of humanity.²³⁶ He stated:

[I]f humanitarian intervention is, indeed, an unacceptable assault on sovereignty, how should we respond to a Rwanda, to a Srebrenica ---to

234 See for example William J. Durch, Victoria K. Holf and Mora K. Slunder, *The Brahimi Report and the Future of UN Peace Operation*, op. cit.

235 Ibid.

236 See Adam Roberts, 'The United Nations and Humanitarian Intervention', in Jennifer Welsh (ed.), *Humanitarian Intervention and International Relations*, Oxford: Oxford University Press, 2004.

gross and systematic violations of human rights that offend every precept of our common humanity.²³⁷

The Government of Canada responded to this challenge by announcing the creation of an independent commission constituted by eminent scholars and practitioners from all around the world, charged to initiate a study on the issue of non-interference regarding the principle of state sovereignty and the responsibility of international community to respond to massive human rights violations. Named the International Commission on Intervention and State Responsibility (ICISS), the commission was co-chaired by Gareth Evans, former Foreign Minister of Australia, and Mohamed Sahnoun, Special Advisor to the UN Secretary-General. The 10 additional members of the commission were distinguished people from diverse national and professional backgrounds, bringing a wide range of expertise and perspective to the debate.²³⁸

In December 2001, the commission issued a report entitled 'Responsibility to Protect' which set a new and operational framework to address mass atrocities.²³⁹ In this report, the commission identified a responsibility to prevent, responsibility to react and responsibility to rebuild. Furthermore, it concluded that the principle of non-intervention should yield to the duty to protect when civilians are threatened with killings, genocide or ethnic cleansing on a large scale, stating that:

237 The Secretary-General, 'We The Peoples: The Role of the United Nations in the Twenty-First Century', chap 4, at 48, delivered to the General Assembly, 3 April 2000, UN Doc No A/54/2000, available at <http://www.un.org/millennium/sg/report/full.htm>, see also Julie A. Mertus, 'The United Nations and Human Rights: A guide for a new era' Routledge, New York 2005 Also available at www.ilo.org/public/english/standards/ipecc/publ/download/factsheets/fs_monotoring_0303.pdf.

238 The 10 other commission members are Gisele Cote-Happer, (Canada), Lee Hamilton (United States), Michael Ignatieff (Canada), Vladimir Lukin (Russia), Klaus Naumann (Germany), Cyril Ramaphosa (South Africa), Fidel Ramos (Philippines), Cornelio Sommaruga (Switzerland), Eduardo Stein (Guatemala) and Ramesh Thakur (India). 'International Commission on Intervention and State Sovereignty, The Responsibility to Protect' available at <http://www.iciss.ca/pdf/Commission-Report.pdf>.

239 'International Commission on Intervention and State Sovereignty (ICISS): The Responsibility to Protect: Report of The International Commission on Intervention and State Sovereignty', Ottawa: International Development Research Centre, 2001, available at <http://www.iciss.ca/report-en.asp>.

Sovereign states have a responsibility to protect their own citizens from avoiding catastrophe - from mass murder and rape, from starvation - but that when they are unwilling or unable to do so, that responsibility must be borne by the broader community of states.²⁴⁰

This was a point of departure for a process that led to the endorsement of the 'Responsibility to Protect' (R2P)²⁴¹ as a new international norm to address humanitarian tragedies. In September 2005, the Heads of State and Government unanimously adopted the 'responsibility to protect' and since then it is widely accepted that states have both individual and collective responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This was certainly a significant step in terms of protection of civilians as the international community showed its determination in finding new ways of solving the perpetual tension between state sovereignty and human rights protection.²⁴²

3.4 The ICISS Report (R2P framework)

The Outcome of the ICISS report was that it attempted to shift the emphasis away from the rights of states to intervene towards the rights of population at risk of mass atrocities. It therefore underlines that both individual states and the international community as a whole do indeed have a legal and moral responsibility to intervene in the face of mass atrocities. Thus, the premise of R2P is based on two central principles. The first is that a duty to protect lies first and foremost with the sovereign states themselves as sovereignty implies responsibility. Consequently, each individual sovereign state has the responsibility to protect its populations from genocide, war

240 Ibid.

241 The abbreviation 'R2P' will be used to represent the concept.

242 Jennifer Welsh, 'From Right to Responsibility: Humanitarian Intervention and International Society', *Global Governance*, 2002, Vol. 8 Issue 4, p503

crimes, ethnic cleansing and crimes against humanity.²⁴³ The message here was that state sovereignty implies state responsibility for the protection of the population. The second element of R2P is that the international community's role should be to help states to fulfil their duty to protect civilians from gross and systematic violations of human rights and to bear responsibility when the state proves unable or unwilling to discharge its duty or when the state itself is the perpetrator.²⁴⁴ The report further outlines possible responses to avoid mass atrocities while respecting the principle of state sovereignty enshrined in Article 2 (7) of the UN Charter. In this context, it identifies three elements of the R2P which are; responsibilities to prevent, to react and to rebuild, emphasizing that prevention is a core dimension of the protection framework and that military intervention is to be used as a last resort to protect the population at risk. The ICISS report is significant with regard to the academic and political view on human security because it shifts debate away from the controversial humanitarian intervention. In the 2011 Libya case, for example, all commentators agreed that the main issue in the debate within the United Nations was not whether the international community should intervene to protect the population from mass atrocities but how to best protect the Libyan population.²⁴⁵

3.4.1 Shift away from sovereignty as control: States' R2P

The ICISS Report provides that state sovereignty implies twofold responsibility: first, a state is internally responsible to protect its citizen; second, is externally responsible to the international community through the United Nations.²⁴⁶ The report further

243 Ibid. p.126.

244 ICISS, the Responsibility to Protect: Report of the International Commission on Intervention and State Sovereignty, December 2001, available at <http://www.iciss.ca/pdf/commission-Report.pdf>.

245 This issue has been confirmed by the UN officials during interview with this author.

246 Ibid.

maintains that state sovereignty implies the obligation to guarantee the equal protection of the civilian population from harm, emphasizing that the power of the state must yield to a principle of extreme urgency, the need for a minimum protection of human rights. Thus, the report had put an emphasis on the re-characterization of state sovereignty, and it is now commonly accepted that sovereignty implies the duty to respect the dignity and rights of all the people within a state.²⁴⁷ However, it is important to note that the notion of sovereignty as responsibility did not arise in the ICISS Report. The concept was first developed by Francis Deng, the former UN's Special Representative on Internally Displaced Persons (IDPs), and Roberta Cohen in the context of internally displaced people.²⁴⁸ The idea was also invoked by the then UN Secretary-General Boutros Boutros-Ghali in the *Agenda for Peace*,²⁴⁹ and later by Kofi Annan. His principal challenge was how to persuade governments to improve protection for IDPs. From there, the idea of sovereignty as responsibility was taken into account by the international community to fit this purpose.²⁵⁰ The starting point was the recognition that the primary responsibility for protecting and assisting IDPs lay with the host government and when a state is unable to fulfil its responsibilities, it should invite and welcome international assistance.²⁵¹ Such assistance helped the state by enabling it to discharge its sovereign responsibilities and take its place as a

247 See Gareth Evans and Mohamed Sahnoun, 'The Responsibility to Protect', *Foreign Affairs*, Vol. 81, No. 6, Nov.–Dec. 2002, pp. 99-110.

248 See Francis Deng, *Protecting the Dispossessed: A Challenge for the International Community*, Washington: Brookings Institution, 1993; Francis Deng, Donald Rothchild and William Zartmann, 'Sovereignty as Responsibility', Thomas.G. Weiss, *Humanitarian Intervention: Ideas in Action*, Cambridge and Maiden, Polity Press, 2007, 89-98; Francis Deng et al, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington DC, Brookings Institution, 1996.

249 Boutros Boutros –Ghali, *An Agenda for Peace*, A/47/277 –S/2411, June 17, 1992. See Also Alex Bellamy, 'The responsibility to Protect and the Problem of Military Intervention', *International Affairs*, vol. 84, no. 4, 2008, pp. 615-39.

250 See Francis Deng, 'Frontiers of sovereignty', *Leiden Journal of International Law*, vol. 8, no. 2, 1995, p. 249.

251 Roberta Cohen and Francis M. Deng, *Masses in Flight: The Global Crisis of Internal Displacement*, Washington DC: The Brookings Institution, 1998, p. 275.

legitimate member of international society.²⁵² The debate raised the issue of what should be the international community response when a state refused to request assistance or itself committed genocide and mass atrocities, claiming a sovereign right to non-interference enshrined in Articles 2 (4) and 2 (7) of the United Nations Charter.

As mentioned above, Kofi Annan's challenge to international society to develop a way of reconciling the principle of sovereignty and fundamental human rights aimed to answer this problem. Referencing sovereignty as responsibility, Kofi Annan emphasized that sovereignty includes the obligation of all governments to protect their citizens, and that the goal of international action should be the protection of civilians from gross and systematic abuse when a state is unable or unwilling to end harm or is itself the perpetrator.²⁵³ In this regard, he completely adheres to the idea that in the case of mass atrocities against the civilian population, the international community has the right to intervene in internal matters of a sovereign state if necessary, and militarily if absolutely necessary, as is illustrated in this statement:

If states bent on criminal behavior know that frontiers are not the absolute defense, if they know that the Security Council will take action to halt crimes against humanity, and then they will not embark on such a course of action in expectation of sovereign impunity.²⁵⁴

Explaining that humanitarian intervention constitutes a principle challenge to the Security Council and the United Nations as a whole in the next century, the Secretary-General underlined that in the context of Rwanda and Kosovo, 'the Member States of the United Nations should have been able to find common ground in upholding the

252 Francis M. Deng, Sadikiel Kimaro, Terrence Lyons, Donald Rothchild and I. William Zartman, *Sovereignty as Responsibility: Conflict Management in Africa*, Washington DC: The Brookings Institution, 1996, p.1.

253 December 2001, available at <http://www.iciss.ca/pdf/commission-Report.pdf>.

254 See UN Press Release S/G/SM/7136, Sept. 20, 1999.

principles of the Charter'.²⁵⁵ He further emphasizes that 'The Charter is a living document whose high principles still define the aspirations of peoples everywhere for lives of peace, dignity and development' and that 'nothing in the Charter precludes a recognition that there are rights beyond borders'.²⁵⁶

Similarly, in the OAU summit in 1998, President Nelson Mandela of South Africa embraced this view maintaining that: 'Africa has a right and a duty to intervene to root out tyranny...we must all accept that we cannot abuse the concept of national sovereignty to deny the rest of the continent the right and duty to intervene when behind those sovereign boundaries, people are being slaughtered to protect tyranny'.²⁵⁷

There is no doubt that in re-characterizing sovereignty, the R2P framework has challenged the traditional international relations structures. As Evans and Sahnoun observe, 'the protection of civilians against atrocity crimes has become a priority for international engagement arguing that 'even the strongest supporters of state sovereignty will admit today that no state holds unlimited power to do what it wants to its own peoples'²⁵⁸.

Can this be considered as the end of the Westphalia concept of sovereignty? Are states really ready to move towards sovereignty as accountable responsibility? Only time will tell. No matter how long it takes, the most important point is that from now on the principle of sovereignty cannot be used as a shield behind which abuse could be

255 Ibid.

256 Ibid.

257 Africa's Responsibility to Protect, 2007, Cape Town Centre for Conflict Resolution at 15.

258 Ibid.

inflicted on populations with impunity.²⁵⁹As Kofi Annan comments: 'it cannot be right, when the international community is faced with genocide or massive human rights abuses, for the United Nations to stand by and let them unfold to the end, with disastrous consequences for many thousands of innocent people.'²⁶⁰

It is obvious that the painful historical lessons learnt from the genocide in Rwanda, the mass killing in Srebrenica and other failure of the UN have moved the international community towards the evolution of protection of both legal standards and political imperatives. It is therefore clear that in suggesting that sovereignty as control must give way to sovereignty as responsibility in order to ensure respect for human rights, the central idea of the ICISS was that sovereignty includes the obligation of all governments to protect their citizens, and that the goal of international action should be the protection of civilians from gross and systematic abuse when the state is unable or unwilling to end harm or is itself the perpetrator. However, despite that, the issue of the use of force for human protection purposes did not cease to be controversial in both political and academic debate. In relation to this, Evans and Sahnoun note that 'the debate about intervention for human protection purposes has not gone away. And it will not go away so long as human nature remains as fallible as it is and internal conflict and states failures stay as prevalent as they are'.²⁶¹

3.4.2 Collective R2P to halt human suffering

One of the most controversial aspects of R2P is military intervention for human protection. In this respect, the commission emphasized that military intervention can

259 UN General Assembly, Implementing the Responsibility to Protect: Report of the Secretary-General, 12 January 2009, A/63/677, available at: <http://www.refworld.org/docid/4989924d2.html>, accessed 22 September 2013.

Ibid.

260 Ibid.

261 See Gareth Evans and Mohamed Sahnoun, 'Responsibility to Protect', op. cit.

only be employed if all non-military and feasible diplomatic options have been explored.²⁶² However, to avoid the abuse of the recourse to force for humanitarian purpose, the commission suggests a guideline of six requirements to be met to serve as a guide to examine whether a situation is appropriate for military intervention. Those include: just cause, right intention, right authority, last resort, proportional measures and reasonable prospect of success.²⁶³ Some commentators such as Neff, however, observed that those conditions are not novel as they are a pure reflection of those elaborated upon by the Christian theological tradition of just war. Focarelli admits that these principles are perfectly reasonable but they may cause a problem in interpretation. In this regard, he argues that the same principle may practically lead to very different solutions given the situation of today's world in which homogeneity is not as it was in Medieval Christian Europe.²⁶⁴

However, the most important issue here is that military intervention should be only limited to the most serious and irreparable situations and the question of intervention should arise only when preventive and peaceful measures have failed or prove to be insufficient to halt mass atrocities.²⁶⁵ Thus, the report suggests that military intervention should be considered only when civilians are faced with the threat of serious harm. This includes:

large scale loss of life, actual or apprehended, with genocidal intent or not, which is the product either of deliberate state action, or state neglect or inability to act, or a failed state situation; or large scale 'ethnic cleansing'

262 ICISS Report at para. 1.38.

263 ICISS Report at para. 4.16.

264 See Carlo Focarelli, 'The responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine', *Journal of Conflict and Security Law*, Oxford University Press, vol. 13.no 2, 2008, pp.191-213.

265 ICISS report at para. 4.1 and 4.13.

actual or apprehended, whether carried out by killing, forced expulsion, acts of terror or rape.²⁶⁶

Obviously, military intervention is only justifiable in two extreme and grave situations: large scale killings with genocidal intent or not, and large scale ethnic cleansing. One may argue that in setting the bar so high, the commission's purpose was to make sure that military intervention is used only in extreme cases. However, while the report provides a guideline for the international intervention, it has failed to draw a clear framework of military intervention. As Berry comments 'the Commission report was careful in its formulation of the essential conditions for the international intervention of any kind, conditions which are not quantifiable but provide essential benchmarks for political decision makers'.²⁶⁷ Thus, even the advocates of R2P recognize that there is a grey area that needs to be clarified. As Evans and Sahnoun note: '[...] we do not quantify what is 'large scale' but make clear our belief that military action can be legitimate as an anticipatory measure in response to clear evidence of likely large-scale killing or ethnic cleansing'.²⁶⁸

In addition to the ambiguities surrounding the military intervention framework, some commentators deplore the fact that other massive violations of human rights which do not amount to large-scale killing or ethnic cleansing are not taken into account.²⁶⁹ For example following the natural disaster in Burma in 2008 which caused a humanitarian emergency and the refusal of Burmese authorities to accept international assistance, the French Foreign Minister Bernard Kouchner called for the application of

266 Ibid. at para. 4.19.

267 Glyn Berry, 'Sovereignty as the Responsibility to Prevent, Protect and Rebuild', *The Ploughshares Monitor*, Vol. 25, no. 1, Spring 2004.

268 See Gareth Evans and Mohamed Sahnoun, 'Responsibility to Protect', *op. cit.*

269 See J.I. Levitt, 'The Responsibility to Protect: A Beaver Without a Dam?', *Michigan Journal of International Law*, vol. 25, 2003

responsibility to protect, stating that the United Nations should take forcible action against the Burmese government in order to provide humanitarian assistance to victims.²⁷⁰ This suggestion was rejected by governments given the motive that the case does not warrant the application of the R2P doctrine as outlined in the 2005 World Summit Outcome Document.²⁷¹

It should be noted, however, that while Kouchner seemingly adheres to the idea that the Burmese situation was not an R2P case, he believes that the Security Council should have forced the delivery of humanitarian assistance in such situations.²⁷² There is no surprise since, as will be demonstrated later in this work, the adoption of R2P in 2005 has limited its scope to four crimes, namely genocide, crimes against humanity, war crimes and ethnic cleansing. The restriction of R2P to be applied only to four crimes was reiterated by the UN Secretary-General who maintained that the extension of the concept to others calamities 'would undermine the 2005 consensus and stretch the concept beyond recognition as operational utility'.²⁷³ While the scope of the concept should be kept narrow, he said, the most important thing here is to provide adequate response to the crisis. In relation to this, Evans comments:

If R2P is to be about protecting everybody from everything, it will end up protecting nobody from anything. The whole point of embracing the new language of 'the responsibility to protect' is that it is capable of generating an effective, consensual response to extreme, conscience-shocking cases in a way that 'right to intervene' language simply could not. We need to

270 Communiqué Issued by Bernard Kouchner, French Minister of Foreign Affairs, on 7 May 2008.

271 See Paulo Sergio Pibheiro and Meghan Barron, 'Burma (Myanmar)' in Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2011 p.268.

272 Interview With Bernard Kouchner, Former French Minister of Foreign Affairs, Paris 20 July 2013.

273 The 2009 Report of the Secretary-General on Implementing the Responsibility to Protect, p. 8.

preserve the focus and bite of 'R2P' as a rallying cry in the face of mass atrocities.²⁷⁴

3.4.3 Right authority for military action under R2P

Since military intervention is one of the most sensitive issues of R2P, the ICISS Report provides that the Security Council constitutes the sole arbiter of military intervention. In this regard, the report explicitly emphasizes that Security Council authorization should be sought prior to military intervention.²⁷⁵ In relation to the legitimacy and legality of these criteria under international law framework, Evans comments that the intention of the ICISS was to maximize the possibility of achieving council consensus concerning when it is or is not appropriate to go to war; maximize international support for whatever it decides; and minimize the possibility of individual member states bypassing or ignoring it.²⁷⁶

Therefore, any intervention should be permitted by the UN Security Council and the legitimacy of such action depends on a prior authorization of the United Nations, in particular its Security Council. Concerning this procedure, the commission states:

Security Council authorization must in all cases be sought prior to any military intervention action being carried out. Those calling for an intervention must formally request such authorization, or have the Council raise the matter on its own initiative, or have the Secretary-General raise it under Article 99 of the UN Charter...The Security Council should deal promptly with any request for authority to intervene where allegations of large scale loss of human life or ethnic cleansing are; it should in this

274 Gareth Evans, *Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, p. 65.

275 ICISS Report at para. 6.15.

276 ICISS Report, para. 4.14.

context seek adequate verification of facts or conditions on the ground that might support a military intervention.²⁷⁷

It is clear from this that where there is evidence of large-scale loss of life or ethnic cleansing, the Security Council has an obligation to deal promptly with the matter. The report proceeds with giving reasons why the UN Security Council is the central body which can provide international legitimacy to a military intervention. The Report states:

Article 42 authorizes the Security Council, in the event that non-military measures prove 'to decide upon military measures' as may be necessary 'to maintain or restore international peace and security'. Although these powers were interpreted narrowly during the Cold War, since then the Security Council has almost invariably been universally accepted as conferring international legality on an action.²⁷⁸

However, the commission recognizes that it would not be easy to get the Security Council to vote to authorize military intervention, taking into account these five criteria of legitimacy. There is no doubt that the United Nations Security Council had shown in the past the lack of authority to enforce its legal capacity to deal with international peace and security independently of the dictate of the major powers.²⁷⁹ This dissonance has led to an ambiguous situation which left room for some states to act outside the UN Framework as Chandler outlines:

A series of ambiguous resolutions and conflicting interpretations have arisen over the extent and duration of the authority conferred by the Security Council. These were most notable in the operations against Iraq

277 ICISS Report, 'The Responsibility to Protect', p. 50.

278 Ibid.

279 The 2003 invasion of Iraq by the US and its allies outside the UN framework can be cited as an example of the UN's lack of authority. In addition, the Darfur crisis in which the major powers had a big influence in deciding whether the United Nations should militarily intervene or not.

throughout the 1990s and in the Kosovo war in 1999. The weakening of the formal requirements may have undermined the substantive provisions of the Charter's collective security system and contributed to facilitating actions in advance of Council authorization, or indeed without it.²⁸⁰

As previously mentioned, NATO intervention in Kosovo, for example, was a signal that in case of extreme situations and when a rapid intervention is needed, a moral responsibility to stop humanitarian crises could in some circumstances take advantage over the 'right authority' principle. Unfortunately, this challenge was not taken into account by the commission. Indeed, despite the fact that the Security Council has often failed to stop human catastrophe because of the sacrosanct veto power of the five permanent members (P5), the commission confirmed that the Security Council remains the only authority to authorize military intervention. It should be noted, however, that the commission had expressly underlined the fact that the work of the Security Council is permanently threatened by the veto power which can paralyse its actions, especially when a quick and decisive action is needed to stop mass violation of human rights. According to the report, 'it is unconscionable that one veto can override the rest of humanity on matters of grave humanitarian concern'.²⁸¹ It is clear that the use of veto-power by the P5 members over R2P can be a particular problem in the face of large-scale loss of life. On this point, Thakur comments:

The legitimacy of the Security Council as the authoritative validator of international security action suffers from a quadruple legitimacy deficit: performance, representational, procedural and accountability. Its performance legitimacy suffers from two strikes: an uneven and a selective

280 David Chandler, 'The Responsibility to protect: Imposing the liberal peace?', *International Peacekeeping*, vol.11, no.1, Special issue: Peacekeeping Operation and Global Order, 2004, pp. 59-81.

281 ICISS Report, p. 51.

record. It is unrepresentative from almost any point of view. Its procedural legitimacy is suspect on grounds of a lack of democratization and transparency in decision-making. And it is not answerable to the General Assembly, the World Court, the nations or the peoples of the world.²⁸²

In this regard, the commission proposes an alternative option when the Security Council fails to deal with the issue of intervention in a reasonable time; this includes having recourse to the General Assembly which in Emergency Special Session can authorize the intervention pursuant to the Uniting for Peace procedure under which a two-third majority of the General Assembly can authorize a military intervention.²⁸³ Bearing in mind the past failures of the United Nations Security Council to intervene due to the veto-power of its permanent members, the commission suggests that if there is majority support for a military intervention, the permanent members of the Security Council, when their national interests are not claimed to be involved, should abstain from using their veto-power to block resolutions authorizing military intervention to stop or to avert mass violation of human rights.²⁸⁴ It seems that this recommendation was not appreciated by the permanent members who were not willing to renounce to their veto-power. However, the commission has failed to respond to the dilemma when human beings are slaughtered while the Security Council is paralyzed and unwilling to intervene. Some scholars²⁸⁵ have made criticisms about the omission of the possibility of unilateral military intervention by states in case of genocide, ethnic cleansing, war crimes and crimes against humanity. As one commentator points out:

282 See Thakur, 'Law, Legitimacy and the United Nations', pp. 17-21.

283 ICISS Report at xiii, pp. 53-54.

284 ICISS Report, p. 51.

285 See Raffaello Matarazzo and Emmanuelle Rebast, Report of the International Conference; 'The EU, the US and the Reform of the United Nations: Challenges and Perspectives', EUI Working Paper Law no. 12, 2006.

The United Nations system is a paradoxical system which recognizes the protection and fulfillment of human rights as fundamental values, but whose institutional machinery allows that such fundamental values may be frustrated by the prohibition of force and respect for sovereignty, without providing any other alternative.²⁸⁶

3.4.4 Prevention of mass atrocities: principal dimension of R2P

While acknowledging that military intervention may in some situations be necessary to address conflicts characterized by atrocity crimes, R2P provides that using force should be considered as a last resort after all preventive and other coercive measures have failed.²⁸⁷ In other words, R2P recommends the right for prevention and not the right for intervention. The ICISS Report provides that 'prevention is the single most important dimension of the responsibility to protect'.²⁸⁸ In the 2005 World Summit, the heads of states unanimously recognized that each individual state has the responsibility to prevent atrocity crimes including their incitement through appropriate and necessary means.²⁸⁹ The Secretary-General Ban Ki-Moon in his 2009 report on implementing R2P emphasized that state responsibility to prevent mass atrocities constitutes the bedrock of the doctrine²⁹⁰. The report further emphasizes that the international community should remind states of their obligations to prevent and punish genocide, war crimes, crimes against humanity and ethnic cleansing and that such acts could be referred to the ICC under the Rome Statute²⁹¹.

Under the R2P framework, preventing conflicts from escalating and endangering civilian populations requires: early warning, a preventive action toolbox and political

286 Ibid.

287 See The ICISS Report, para. 2.28-2.33.

288 Ibid.

289 World Summit Outcome Document, para. 138.

290 UN Doc. A/63/677, 12 January 2009.

291 Secretary-General Report, Implementing the Responsibility to Protect, A/63/677, 12 January 2009.

will. The ICISS Report suggests that reports from UN agencies for human rights and from highly respected and impartial non-governmental organizations such as the International Committee of the Red Cross (ICRC) should be considered in order to avoid abuse about the threat of or possible commission of atrocities, and in order to obtain credible evidence about the threat of or possible commission of atrocities amounting to genocide and other atrocity crimes.

The importance of the prevention dimension of R2P has constantly been emphasized in the General Assembly debates on implementation of R2P.²⁹² As Welsh observes: 'after 2005 the General Assembly has become a focal point for discussion about implementation of R2P...more specifically the General Assembly has hosted debates about the potential to improve United Nations early warning capacity for mass atrocity crimes and the creation of a Joint Office on the prevention of genocide and the R2P'.²⁹³ It is clear from these debates that prevention of genocide, war crimes, crimes against humanity and ethnic cleansing should be a key priority of both governments and international community. As reflected in statements made by many governments calling for the increasing of support by the international community for regional institutions, especially those which have existing instruments relevant to the implementation of R2P such as early-warning mechanisms, development and human rights programs, and capacity-building in the areas of conflict prevention.²⁹⁴

292 See <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/2493-general-assembly-debate-on-the-responsibility-to-protect-and-informal-interactive-dialogue->, accessed on 03 November 2013.

293 See Jenifer Welsh, 'Civilian Protection in Libya: Putting Coercion and Controversy Back into R2P' *Ethics and International Affairs*, vol. 25 no 3, 2011, pp.255-262

294 The need to strengthen regional standby forces, such as the African Standby Force, the East African Standby Brigade and the ECOWAS Monitoring Group (ECOMOG), was one of the important proposals made by the governments. See 'International Coalition for the Responsibility to Protect', Report on the General Assembly Plenary Debate on the Responsibility to Protect, 15 September 2009, available at <http://www.>

There is no doubt that relevant preventive mechanisms are a key issue in implementing R2P. As demonstrated earlier in this work, the 1994 Rwandan genocide is a good example of how failure in this area can be devastating. As Jacqueline Murekatete, victim and survivor of the Rwandan genocide has stated, 'in that 100 days more and more women were raped, men were killed and children thrown into trees. There was simply no political will in 1994 to stop what was going on in Rwanda and there were no mechanisms that were in place to prevent the genocide or end it once it has begun'.²⁹⁵ Certainly, by creating the position of Special Adviser of the Secretary-General on the Prevention of Genocide, the UN Secretary-General has provided significant support to prevention prior to the development of the crisis. In fact, the mandate of the Special Adviser includes to act as a liaison mechanism of early warning signals within the United Nations system; to collect information on massive and serious violations of human rights and international humanitarian law; to make practical recommendations on preventing and halting genocide and atrocity crimes.²⁹⁶ This decision was welcomed by world leaders and human rights activists as a strong signal when the world was commemorating the tenth anniversary of the Rwandan genocide, during which it had witnessed the limitations of the United Nations bureaucracies in conflict prevention.

Despite the emphasis that prevention is the major aspect of the R2P, there is nevertheless a widespread perception that military intervention is an essential measure in response to atrocity crimes. As Bellamy comments: 'Sadly, preventive

Responsibilitytoprotect.org/ICRtoPReport-General_Assembly_Debate_on_the_Responsibility_to_ProtectFINAL_9_22_09.pdf accessed on 25 July 2013.

²⁹⁵ Statement made by Jacqueline Murekatete, victim and survivor of the Rwandan genocide in 1994. See 'International Coalition for the Responsibility to Protect, Responsibility to Protect: A Dialogue with Civil Society in Advance of the UN General Assembly Debate', 20 July 2009.

²⁹⁶ UN Doc. S/2004/567, July 13 2004.

efforts will not always succeed. That is why the international community must be prepared to take timely and decisive action, using all the measures placed at its disposal by Chapters VI, VII and VIII of the UN Charter, when it is needed to protect populations from the four crimes.²⁹⁷

It is quite clear that the commission's intention was essentially to solve the legal and political dilemmas of humanitarian intervention. The commission therefore tried to distinguish the concept of responsibility to protect from humanitarian intervention, emphasizing that the relation of the doctrine of R2P to military intervention and the way to address the dilemma of intervention is quite different from humanitarian intervention. Thus, the commission demonstrated that R2P focuses more on the needs of those who need support rather than the interests of the interveners.²⁹⁸ In other words, the R2P is a tool to protect the civilian population from mass violations of human rights.

In fact, while the term humanitarian intervention usually echoes a 'right to intervene' in the territory of a sovereign state, using the words 'responsibility to protect' appears more acceptable for those who are strictly opposed to any external intervention in a sovereign state. In fact, the latter is more viewed as referring to the population which needs protection rather than the state's right to intervene.²⁹⁹

297 Alex Bellamy, Informal Interactive Dialogue on the Responsibility to Protect, New York, 5 September 2012, available at <http://protectiongateway.com/2012/09/06/informal-interactive-dialogue-on-the-responsibility-to-protect-alex-bellamy-remarks/>

298 ICISS Report, para 1.40.

299 G. Evans and M. Sahnoun, 'The Responsibility to Protect', *Foreign Affairs*, vol. 81, no.6, Nov-Dec, 2002, pp. 99-110.

3.5 Development of R2P within the UN framework

3.5.1 The High Level Panel Report

The R2P doctrine became a central theme in 2003, when the United Nations Secretary-General Kofi Annan established the United Nations High-Level Panel on Threats, Challenges and Change.³⁰⁰ The emerging norm was endorsed in the panel's report, *A More Secure World: Our Shared Responsibility*.³⁰¹ The panel recommended the acceptance of R2P as a norm exercisable in the event of genocide and other atrocity crimes or serious violations of international humanitarian law.³⁰² The High-Level Panel endorsed the emerging norm stating that:

The successive humanitarian disasters in Somalia, Bosnia and Herzegovina, Rwanda, Kosovo and now Darfur, Sudan, have concentrated attention not on the immunities of sovereign Governments but their responsibilities, both to their own people and to the wider international community. There is a growing recognition that the issue is not the 'right to intervene' of any State, but the 'responsibility to protect' of every State when it comes to people suffering from avoidable catastrophe - mass murder and rape, ethnic cleansing by forcible expulsion and terror, and deliberate starvation and exposure to disease. And there is a growing acceptance that while sovereign Governments have the primary responsibility to protect their own citizens from such catastrophes, when they are unable or unwilling to do so that responsibility should be taken up by the wider

300 The High Level Panel was constituted of 16 eminent individuals from around the world with various backgrounds who had the task of analysing the threats to peace and security our world faces; to evaluate how well our existing policies and institutions are meeting them; and to recommend changes to those policies and institutions, so as to ensure an effective collective response to those threats. The Panel chaired by Anand Panyarachun, former Prime Minister of Thailand included the following eminent persons: Robert Badinter (France), Joao Baena Soares (Brazil), Gro Harlem Brundtland (Norway), Mary Chinery Hesse (Ghana), Gareth Evans (Australia), David Hannay (United Kingdom of Great Britain and Northern Ireland), Enrique Iglesias (Uruguay), Amre Moussa (Egypt), Satish Nambiar (India), Sadako Ogata (Japan), Yevgeny Primakov (Russian Federation), Qian Qiqian (China), Salim Salim (United Republic of Tanzania), Nafis Sadik (Pakistan) and Brent Scowcroft (United States of America). See Llyod Axworth, 'RtoP and the Evolution of State Sovereignty' in Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2012, p. 13.

301 Report of the Secretary-General's High level panel on Threats, Challenges and change, 2004, available at <http://www.un.org/secureworld>.

302 UNGA, 'A More Secure World: Our Shared Responsibility – Report of the High-level Panel on Threats, Challenges and Change', 2 December 2004, 59th Session, 2004, UN Doc A/59/565, available at www.un.org/secureworld.

international community - with it spanning a continuum involving prevention, response to violence, if necessary, and rebuilding shattered societies... We endorse the emerging norm that there is a collective international responsibility to protect, exercisable by the Security Council authorizing military intervention as a last resort, in the event of genocide or other large-scale killing, ethnic cleansing or serious violations of international humanitarian law which sovereign Governments have proved powerless or unwilling to prevent.³⁰³

The Panel intended to make the R2P concept a central part of the UN reform in which the Security Council should play a key role highlighting that beyond its authority, the Security Council has a duty to take action in case of humanitarian catastrophes.³⁰⁴ It is clear that the High-Level Panel was guided by the ambition that R2P will help to improve and to strengthen the collective security system under the UN Charter. Certainly there was a need to reinforce the UN system after the invasion of Iraq by the United States and its allies which has severely undermined the image of the organization as well as hindered R2P discussion.³⁰⁵ Nevertheless, the US-led invasion of Iraq has permitted the R2P advocates to intensify the debate over R2P and encouraged the dynamic behind it.³⁰⁶ The panel's report later served as a basis for the Secretary-General report in 2005.

3.5.2 The Secretary-General Report: In Larger Freedom

In Larger Freedom report submitted to the United Nations General Assembly at the opening of the 2005 World Summit session, the Secretary-General Kofi Annan strongly agreed with the approach outlined by the High-Level Panel and recommended

303 Ibid.

304 Ibid.

305 For in-depth discussion, see Castern Stahn, 'Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?', *American International Law* vol. 101, 2007, p.99.

306 See Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*. Washington, DC: Brookings Institution Press, 2008; UNGA, *In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General*, 21 March 2005, A/59/2005, available at: www.un.org/largerfreedom.

the international community to embrace the emerging norm.³⁰⁷ It is interesting to note that the Secretary-General practically used the R2P language of the High-Level Panel which demonstrates his determination to truly subscribe to the moral duty of ending mass atrocity crimes. He for example stated that ‘the time has come for governments to be held to account, both to their citizens and to each other, for respect of the dignity of the individual’.³⁰⁸ He further emphasized that strategies based on protection of human rights are vital for both moral standing and the practical effectiveness of the UN actions. The Secretary-General’s decision to discuss the R2P in the ‘freedom to live in dignity’ section rather than in the ‘use of force’ section was perceived as a clear signal of moving away from the right to intervene and towards an emphasis on human rights protection.³⁰⁹ There is no doubt that there was a wish on behalf of the Secretary-General to use the new norm as a strategy to bring all nations to a strong commitment to promote human rights, development and security. As he comments:

Human rights are fundamental to the poor as to rich, and their protection is as important to the security and prosperity of the development world as it is to that of the developing world. It would be a mistake to treat human rights as though there were a trade-off to be made between human rights and such goals as security or development. We only weaken our hand in fighting the horrors of extreme poverty or terrorism if, in our efforts to do so, we deny the very human rights that these scourges take away from citizens³¹⁰.

307 UNGA In Larger Freedom: Towards Development, Security and Human Rights for All – Report of the Secretary-General (21 March 2005) A/59/2005 available at: www.un.org/largerfreedom

308 Ibid.

309 See for example Carlo Focarelli, ‘The Responsibility to Protect Doctrine and Humanitarian Intervention: Too Many Ambiguities for a Working Doctrine’, *Journal of Conflict and Security Law*, Oxford University Press, 2008; Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Cambridge, Polity Press, 2009, p. 76.

310 A/59/2005, para. 40.

3.5. 3 The Outcome Document of the 2005 World Summit

In the 2005 World Summit of Heads of State and Government, the General Assembly solemnly endorsed the R2P norm and affirmed the collective responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity³¹¹.

The policy adopted was that:

Each individual state has the responsibility to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity. This responsibility entails the prevention of such crimes, including their incitement, through appropriate and necessary means. We accept that responsibility and will act in accordance with it. The international community should, as appropriate, encourage and help States to exercise this responsibility and support the United Nations in establishing an early capacity.

The international community, through the United Nations, also has the responsibility to use appropriate diplomatic, humanitarian and other peaceful means, in accordance with Chapters VI and VII of the Charter, to help to protect populations from genocide, war crimes, ethnic cleansing, and crimes against humanity. In this context, we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including chapter VII, on a case-by-case basis and in cooperation with relevant regional organizations as appropriate, should peaceful means be inadequate and national authorities are manifestly failing to protect their population from genocide, war crimes, ethnic cleansing and crimes against humanity. We stress the need for the General Assembly to continue consideration of responsibility to protect populations from genocide, war crimes, ethnic cleansing and crimes

311 GA Res. 60/1 at para 138-40, UN Doc A/60/L.1, ct. 24, 2005.

against humanity and its implications, bearing in mind the principles of the Charter and international law. We also intend to commit ourselves, as necessary and appropriate to helping States build capacity to protect their populations from genocide, war crimes, ethnic cleansing and crimes against humanity and assisting those which are under stress before crises and conflicts break out.³¹²

The inclusion of R2P in paragraphs 138 and 139 of the Outcome Document is widely considered to be one of the most promising steps in establishing R2P since there was a clear commitment on the part of world leaders. In relation with the summit, Evans comments that this was a 'really big step forward in terms of formal acceptance of R2P'.³¹³ Similarly, Bellamy observes that the summit has marked the transformation of R2P from an idea to a principle.³¹⁴ In his 2009 Report,³¹⁵ the Secretary-General Ban Ki-Moon affirmed that the acceptance of the R2P by the assembled Heads of States and Government constitutes the bedrock of the doctrine. He also however noted that while the 2005 Summit was one of the largest gathering of Heads of States and Government in history, 'there were intense and contentious deliberations on a number of issues, including on the responsibility to protect'.

Given that, it can therefore be argued that this commitment about preventing mass atrocity crimes has provided a basis for the recognition of the duty to intervene in a sovereign state to protect potential victims. However, it should be noted that while states recognize that R2P is not an adversary of sovereignty but an ally, they remain reluctant about the international community prospect to use force. This is illustrated by

312 Ibid.

313 Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and for All*, Washington, D.C: Brookings Institution Press, 2008, p. 44.

314 Alex Bellamy, *Responsibility to Protect: The Global Effort to End Mass Atrocities*, Cambridge, Polity Press, 2009, p. 6.

315 Ibid.

the fact that reaching a consensus on adoption of R2P was not an easy task.³¹⁶ Some concessions had to be made as on one hand, in the high-level plenary meeting a small number of states including Algeria, Belarus, China, Cuba, Egypt, the Russian Federation, India, Iran, Jamaica, Libya, Pakistan, and Venezuela were opposed to the inclusion of R2P in the World Summit Outcome Document, and on the other hand, the United States had expressed reservations about restricting military intervention in situations of mass atrocities to the Security Council authorization. Cuba for example maintained that: ‘It would be suicidal to endorse the so-called “right to intervention” which had been invoked recently in circumstances of a unipolar global order, characterized by an economic and military dictatorship by a super-power seeking to impose its own model of society.’³¹⁷ The United States was also vigorously opposed to the idea that the international community has a legal obligation to intervene in accordance with the emerging norm. Thus, the US intention was that in the face of atrocities, action should be taken on a case-by-case basis.³¹⁸ The United States delegation called for R2P to be considered as a moral principle rather than a legal norm. In a letter dated 30 August 2005, the US ambassador John. R. Bolton commented: ‘ [we]The United States would not accept that either the United Nations as a whole, or the Security Council, or individual states, have an obligation to intervene under international law...Accordingly, we should avoid language that focuses on the

316 See for example Alex Bellamy, ‘Whither the Responsibility to Protect?’, *Ethics and International Affairs*, 20th ed., no. 2, 2006, pp. 143-169.

317 See Christine Gray, “A Crisis of Legitimacy for the UN Collective Security System”, *The International and Comparative Law Quarterly*, vol. 56, No. 1, 2007, pp.157-170.

318 See Strauss Ekkhard Strauss, *The Emperor’s New Clothes? The United Nations and the Implementation of the Responsibility to Protect*, Nomos : Verlagsgesellschaft, 2009, pp. 14-16 . Some delegations even doubted that the emerging norm was compatible with the UN Charter stating that there is not a sharing responsibility in international law apart from the existing responsibility of individual states to protect their citizens and the United Nations mandate under the UN Charter to promote international peace and security.

obligation or responsibility of international community and instead assert that we are prepared to take action'³¹⁹

However, it should be noted that despite controversies over intervention-sovereignty in the General Assembly, the unanimous endorsement of the doctrine by the whole international community constitutes a considerable achievement with regard to human protection.³²⁰ In accepting and endorsing the emerging norm, World leaders recognize that they bear at least moral duty to protect the civilian population from mass atrocities. It should be noted however that, five years before the World Summit, the African Union in its Constitutive Act had already agreed upon the duty to intervene in the face of atrocity crimes through diplomatic and peaceful means and recourse to force as a last resort. Article 4 (h) of the African Act provides that it is:

The right of the Union to intervene in a Member State pursuant to a decision of the Assembly in respect of grave circumstances, namely: war crimes, genocide and crimes against humanity.³²¹

This highlights once again the acceptance of the duty to protect by both bigger powers and the South. Some commentators such as Alston and MacDonald see the early victory of the R2P in the 2005 endorsement stating that:

319 Letter of Ambassador John R. Bolton, the Representative of the United States of America to the United Nations, August 30, 2005 available

at http://www.responsibilitytoprotect.org/files/US_Boltonletter_R2P_30Aug05%5B1%5D.pdf

320 Gareth Evans, 'From Humanitarian Intervention to the Responsibility to Protect' Keynote Address by Gareth Evans to Symposium on Humanitarian Intervention, University of Wisconsin, Madison, 31 March 2006. Available at <http://www.crisisgroup.org/en/publication-type/speeches/2006/from-humanitarian-intervention-to-the-responsibility-to-protect.aspx>

321 The Constitutive Act of the African Union. Available at http://www.uneca.org/daweca/conventions_and_resolutions/constitutions.pdf.

The Canadian diplomats and intellectuals and others behind this concept, such as former Australian Foreign Minister Gareth Evans, can be very proud. Few 'norm entrepreneurs' have been able to see one of their ideas, created out of whole cloth, be 'reaffirmed'- as if it was a long-standing principle- by no less a body than the Security Council within a span of five years.³²²

However, the question here is whether this can really be considered as a victory or whether the enthusiasm is justifiable. Indeed the doctrine was endorsed by both powerful states and the Non-Aligned Movement but it is still not clear whether the doctrine is a legal concept or a political one. The conception of scholars differs from that of policymakers, and even scholars amongst themselves are yet to reach a consensus about the R2P doctrine. Different interpretations are given to the doctrine depending on the expectations and self-interest of each one. As noted earlier, President Bush for example, to justify the invasion of Iraq in 2003 raised the duty to protect Iraqi people from tyrannical rule or to bring democracy.³²³ This was considered by the advocates of the emerging norm as a misuse of R2P as the initial reasons of the war was the presumed possession of weapons of mass destruction or the capacity to make them.

As Evans pointed out:

The biggest inhibitor of all the ready acceptance of R2P as an operating principle has been the misuse of that principle in the context of the war on Iraq...the genocidal massacres of the Kurds using chemical weapons in the 1980s and of the Shiites in the early 1990s—to both of which the West had

322 Philip Alston and Euan MacDonald, *Human Rights, Intervention, and the Use of Force*, Oxford University Press, 2009, p.276.

323 Ibid. p.277; See also Jack Straw, 'We are in Iraq to Bring about Democracy', Speech by Foreign Secretary Jack Straw, Labour Party Conference, Brighton, 28 September 2005.

turned a blind eye at the time, but no matter—were surely proof, it was suggested, that this was a suitable case for R2P treatment and of the most coercive kind.³²⁴

No doubt the 2003 invasion of Iraq has raised the issue of preventive military intervention. In this regard, Evans agreed with Slaughter and Feisntein³²⁵ who called for better preventive strategies to build a new edifice upon the foundations of R2P. He, however, had reservations about their argument that military intervention could be used preventively, even when the attack is not imminent.³²⁶ We hope that the real meaning of ‘Responsibility to Protect’ will not be misrepresented and that statesmen will understand that the new doctrine is not the right of powerful states to use their weight using military intervention but a common responsibility of all states to protect their population. As asserted Gareth Evans ‘the core theme is not intervention but protection’.³²⁷

3.6 R2P as an international binding norm

While R2P was qualified by the High-Level Panel Report as an emerging norm, some authors believe that this was a premature and misleading qualification. Stahn for example argued that ‘some of the features of the concept are actually well embedded in contemporary international law, while others are so innovative that it may be premature to speak of a crystallizing practice’.³²⁸

324 Gareth Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’, op.cit.

325 Lee Feinstein and Anne-Marie Slaughter, ‘A Duty to Protect’, *Foreign Affairs*.vol. 83,2004, pp136 - 137, see also Commentary by Gareth Evans, on Lee Feinsten and Anne-Marie Slaughter, “The Duty to Prevent” (*Foreign Affairs*, Jan/Feb 2004), The American Society of International Law Conference, Washington DC, 1 April 2004. Available at <http://www.crisisgroup.org/en/publication-type/speeches/2004/uneasy-bedfellows-the-responsibility-to-protect.aspx>

326 Gareth Evans, ‘From Humanitarian Intervention to the Responsibility to Protect’.

327 Ibid.

328 See Carsten Stahn, *Responsibility to Protect: Political Rhetoric or Emerging Legal Norm?* 101 *AM. J. Int’l L.* 99 (2007)

There is no doubt that states' responsibility to protect the civilian population from mass atrocity crimes is clearly established in the existing norms. Therefore, although states are members of international community and extra-territorial responsibility to protect is much less clear, collective duty to assist and encourage states to fulfill their R2P and to react in cases where a state has manifestly failed in its R2P collective exist in international law. As will be discussed in greater detail in Chapter 4, the principles of R2P are deeply grounded in human rights law, especially the Genocide Convention,³²⁹ international humanitarian law,³³⁰ international criminal law and the UN Charter. Bellamy believes that even though collective positive duty to protect exists, it is challenged by the problem of indeterminacy. He goes on to comment that: 'The indeterminacy of what R2P requires of external actors weakens its compliance-pull, and hence its ability to encourage states to find consensus and commit additional resources to the protection of civilians'³³¹. As demonstrated above, since the endorsement of R2P, many conflicts characterized by mass atrocities have taken place and uncertainties and disagreements about effective response illustrates how indeterminacy can severely obstruct R2P. Nevertheless, there is a general consensus that R2P is an appropriate norm in the face of mass atrocities. Given that, we can consider that R2P is now regarded as generating a legal binding obligation under the classic source of law set forth in Article 38 of the Statute of the International Court of Justice International convention, international custom, as evidence of a general practice accepted as law and general principle of law.

This provision provides:

329 I.C.J, 'The Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)', judgement of February 26, 2007, paras. 428-38

330 Common Article 1 of the Geneva Conventions of 1949

331 Alex J. Bellamy, 'The Responsibility to Protect---Five Years On'.

1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
 - a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
 - b. International custom, as evidence of a general practice accepted as law;
 - c. The general principles of law recognized by civilized nations;
 - d. Subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law³³²

In this context, it can be legitimately questioned whether R2P does not fall within paragraphs (a), (b) and (c) of Article 38 (1) of the ICJ Statute. Can R2P be considered as an international convention as it is contained in the Outcome Document? There is no doubt that the language used by the heads of states and government in paragraphs 138 and 139 of the Outcome Document made the commitment appear more voluntary than mandatory.³³³ For example, they state that:

[...] we are prepared to take collective action, in a timely and decisive manner, through the Security Council, in accordance with the Charter, including Chapter VII, on a case-by-case basis in cooperation with relevant regional organization.

Under the UN Charter, resolutions adopted by the General Assembly are not recognized as authoritative sources of international law.³³⁴ However it is important to recall that despite the declaratory and advisory nature of its resolutions, the General Assembly has played a major role in various international legal principles such as the

332 ICJ Statute art. 38.

333 See The Outcome Document.

334 See UN Charter arts. 10-14.

right of all people to self-determination³³⁵, Women's rights³³⁶ and many other sensitive issues.³³⁷ In this context, it is clear that notwithstanding that the 2005 adoption of R2P did not create a new legal rule, it can be argued that by reiterating existing international instruments, the General Assembly has certainly established a legal foundation of R2P in the future. As Burke-White comments: 'In terms of the process of law creation, the Outcome Document may serve as an example of *opinion juris*³³⁸ for certain elements of Responsibility to Protect that go beyond the existing rule of law'³³⁹. There is no doubt that the legal perspective of the R2P needs to be further developed in its process towards a legal binding norm, which would fully compel states to exercise an extraterritorial duty to protect civilians from mass atrocities. Nevertheless, one important issue is that while R2P remains a political norm, it has a big impact on Security Council debate and state practice as illustrated in the above discussion. However, given the lack of sufficient state practice, it is clear that the new norm has not reached the status as a customary rule.

335 See for example the 1960 Declaration on Granting of Independence to Colonial Countries and Peoples, General Assembly Resolution 1514 (XV), 1960; the 1970 Declaration on Friendly Relations, General Assembly Resolution 2625 (XXV), 1970.

336 See for example Declaration on Elimination of Discrimination against Women, General Assembly Resolution 2263.

337 See for example Declaration on the Protection of All Person from being Subjected to Torture, General Assembly Resolution 3452, UN Doc A/10034, 1977; International Covenant on Civil and Political Rights, General Assembly Resolution 2200 (XXI) (A), UN Doc A/ 6316, 1966. See Gregory J. Kerwin, 'The Role of the United Nations General Assembly Resolutions in Determining Principles of International Law in United States Courts', *Duke Law Journal*, vol. 32, 1983, pp 876-899.

338 'Opinion juris consist of political statements that provide evidence that a state or states believe they are bound by legal obligation'.

339 See William W. Burke-White, 'Adoption of the Responsibility to Protect' in Jared Gebser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2012, p.23.

3.7 Operationalizing R2P: From rhetoric to reality

Since the emergence of R2P, there has been intense debate over how to put the theory into practice. The adoption of resolutions 1674³⁴⁰ and 1706³⁴¹ illustrates the emphasis on turning words into deeds by the United Nations Security Council. This was the first reference to the new doctrine. In its resolution 1674 adopted on 28 April 2006, dealing with the protection of civilian populations in armed conflict, the Security Council reaffirmed paragraphs 138 and 139 of the Outcome Document regarding the responsibility to protect civilians from genocide, war crimes and crimes against humanity. Similarly, in its Resolution 1706 adopted on 31 August 2006 in connection with the situation in Sudan and the establishment of a United Nations – African Union hybrid peacekeeping mission in Darfur, the Security Council made explicit reference to the R2P by reaffirming paragraphs 138 and 139 of the Outcome Document and recalling the previous Resolution 1674. It should be noted however that the reaffirmation of the R2P provisions came after six months of strong debate within the Security Council since some members were vehemently opposed to the idea of implementing R2P, arguing that it was premature for the council to endorse the new principle³⁴². According to Bellamy, this experience has made some of the council's R2P advocates hesitant to use R2P language in order to avoid the possible call for reviewing the 2005 agreement.³⁴³ However, R2P advocates persisted in calling for the implementation of the new principle. The Secretary General Ban Ki-moon has also

340 UNSC Res 1674, 28 April 2006, UN Doc S/RES/1674 UNSC Res 1706, 31 August 2006, UN Doc S/RES/1706.

341 UNSC Res 1706 (31 August 2006) UN Doc S/RES/1706

342 See Alex J. Bellamy, 'The Responsibility to Protect-Five Years On', *Ethics and International Affairs*, vol. 24, no. 2, 2010, pp. 143-169.

343 *Ibid.*

expressed his concern on the matter, emphasizing the need to find a way to implement R2P in a consistent manner. He comments:

[...] no community, society, or culture publicly and officially condones genocide, war crimes, ethnic cleansing or crimes against humanity as acceptable behaviour. On this principle, Member States are united. Although there have been lively debates about how best to implement the responsibility to protect, no Member State has argued against trying to curb abuses of such magnitude or against developing partnerships at the national, regional and global levels to achieve this.³⁴⁴

Since then, the Security Council has referred to R2P in five other resolutions which include: Resolutions 1970³⁴⁵ and 1973³⁴⁶ in connection with the situation in Libya; Resolution 1975³⁴⁷ in connection with the situation in Côte d'Ivoire; Resolution 1996 in connection with the situation in South Sudan; Resolution 2014³⁴⁸ in connection with the situation in Yemen. This was certainly a further step in implementing R2P despite the fact that explicit reference to R2P was only made in the preamble of the 1973 Security Council Resolution authorizing intervention in Libya to protect the civilian population. For R2P advocates such as Gareth Evans, Alex Bellamy, Tom Weiss and Jennifer Welsh, Resolutions 1970 and 1973 constitute a triumph of R2P. They argued that the full R2P framework was utilized as when manifestly Libyan authority failed to protect the civilian population and the regime was threatening its

344 Secretary-General, 2009 UNSG Report: Implementing the Responsibility to Protect.

345 UN Security Council, Security Council Resolution 1970, 26 February 2011, S/RES/1970 2011, available at <http://www.refworld.org/docid/4d6ce9742.html>, accessed 22 September 2013.

346 UN Security Council, Security Council Resolution 1973, on the situation in the Libyan Arab Jamahiriya, 17 March 2011, S/RES/1973, 2011, available at <http://www.refworld.org/docid/4d885fc42.html>, accessed 22 September 2013.

347 UN Security Council, Security Council Resolution 1975, on targeted sanctions against individuals meeting the criteria set out in resolution 1572 (2004) on arms embargo against Côte d'Ivoire, 30 March 2011, S/RES/1975, 2011, available at <http://www.refworld.org/docid/4d9ac4ea2.html>, accessed 22 September 2013.

348 UN Security Council, Security Council Resolution 2014, on the situation in Yemen, 21 October 2011, S/RES/2014, 2011, available at <http://www.refworld.org/docid/4ec4e9742.html>, accessed 22 September 2013.

own population with massacres, the responsibility shifted to the international community and both the UN and the regional organizations used the full scope of measures: negotiations, diplomatic pressure, sanctions and the use of force.³⁴⁹ There is no doubt that resolution 1973 was a significant step for R2P despite the controversies which followed its implementation.

3.8 R2P: From rhetoric to practice

3.8.1 Kenya

While the international community response to the crisis in Darfur has raised concerns about the role played by R2P in addressing mass atrocities, the diplomatic response to the 2007 post-election violence in Kenya, in which more than one thousand people were killed and more than 300,000 fled their homes,³⁵⁰ is generally considered to be a good example of R2P in practice.³⁵¹ In the early days of the ethnic-related violence, the Secretary General Ban Ki Moon³⁵² and his special adviser on the prevention of genocide Francis Deng,³⁵³ referred to the conflict as an R2P case. Many other politicians and scholars called for the international response on the basis of R2P. French Foreign Minister at that time, Bernard Kouchner, for example, called on the Security Council to help the Kenyan population and to take action in the name of

349 In this regard, Evans comments: 'These two resolutions amounted to a textbook example of RtoP working sequentially, exactly as intended in the 2005 UN resolution, with the Security Council taking 'collective action, in a timely and decisive manner' under Chapter VII following evidence of States authorities 'manifestly failing' to protect their own people from mass atrocities crimes'. Quoted in Gareth Evans, 'Lessons and Challenges' in Jared Genser and Irwin Cotler, *The Responsibility to Protect: The promise of Stopping Mass Atrocities in Our Time*, Oxford University Press, 2012, p. 382.

350 For more details on the conflict see Human Rights Watch, *Ballots to Bullet: Organized Political Violence and Kenya's Crisis of Governance*, March 16, 2008; Kenya Human Rights Commission, *On the Brink of the Precipice: a Human Rights Account of the Post-Election Violence in Kenya*, 2008.

351 See Alex J. Bellamy, 'The Responsibility to Protect---Five Years On'. Op. cit.

352 UN, Secretary-General Troubled by the Escalating Kenyan Tensions, Violence, January, 2, 2008.

353 UN Genocide Advisor Urges End to Violence, Sends Staffers There, UN News Centre, January, 28, 2008.

R2P.³⁵⁴ While R2P was not explicitly referenced in the international community agenda to address the conflict, the mediation process led by the former UN Secretary-General Kofi Annan that helped to halt mass atrocities was qualified as the successful application of R2P.³⁵⁵ The early engagement of addressing the conflict is significant in that regional and international response to stop mass atrocities was markedly different from the past.

This was a clear signal that the international community was well prepared and able to address humanitarian catastrophes and to avoid another situation like that in Rwanda. There is no doubt that the connection between mass atrocities committed on the civilian population in Kenya and the 1994 Rwandan genocide has played a key role, as Kofi Annan recognizes: 'When I got on the ground and saw the ethnic nature killings and the conflict that the responsibility to protect, and the Rwandan and the Yugoslavian stories came to my mind'.³⁵⁶ It should be understood however that some commentators believe that R2P did not play a key role in the 2007 post-election conflict in Kenya since the AU-led mediation was within the traditional peace and security agenda.³⁵⁷ Nonetheless, there was not a serious problem to reach consensus to address mass atrocities in Kenya since it was not a question of military intervention. As Bellamy correctly comments 'Consensus on Kenya was possible because engagement was limited to diplomacy and had host-state consent. There is little

354 Statement made by Bernard Kouchner on Violence in Kenya, January 31, 2008, available at <http://www.responsibilitytoprotect.org/index.php/component/content/article/136-latest-news/1488-06-february-2008-news-update>.

355 See Gareth Evans, 'Response to Reviews by Michael Barnett, Chris Brown and Robert Jackson', *Global Responsibility to Protect*, vol. 2, no. 3, 2010, pp 320-327

356 Prisoner of Peace: An Interview with Kofi Annan, Kofi Annan Foundation and centre for Humanitarian Dialogue Quoted in Meredith Preston-McGhie and Serena Sharma, 'Kenya' in Jared Genser and Irwin Colter, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, p .292.

357 For example, the Chairman of the AU Commission Jean Ping questioned the extent to which R2P has applied to the crisis. See Jean Ping, Round table High-Level Meeting of Experts on 'The Responsibility to Protect in Africa', Addis Ababa, October 23, 2008.

evidence to suggest that the council would have been prepared to adopt a more robust stance had one been required, with African members especially insisting that AU play the primary role'.³⁵⁸ Nevertheless, it can be argued that the Kenyan conflict was a real test case for the implementation of R2P in its preventive aspect.

3.8.2 Libya

NATO intervention in Libya has provided an interesting window through which to test the applicability and the efficacy of R2P to protect the civilian population from mass atrocity crimes. First, the international community response to the massacre was made at time when the risk of massacre appeared to be imminent. Second, the main goal of intervention which constitutes protecting civilians in Benghazi from massacre was achieved in few days. This illustrates once again that the potential of R2P to save lives relies heavily on the political will of the P5. As one analyst reminds us, 'the Libyan vote passed only because non-Western Russia and China withheld their Security Council vetoes: all but unimaginable until recently. Both countries are now getting cold feet, claiming misuse of the resolution's elastic language'.³⁵⁹

It is however important to note that under the R2P framework, if a military intervention is taken, in order to avoid a post-intervention crisis, the international community has a responsibility to provide full assistance in building a durable peace, promoting good governance and sustainable development.³⁶⁰ Disarmament, demobilization and reintegration of armed forces and local population should be the priority in the aftermath of a military intervention in order to ensure the safety of the civilian

358 See Alex J. Bellamy, 'The responsibility to Protect—Five Years On', op cit.

359 See <http://www.responsibilitytoprotect.org/index.php/component/content/article/35-r2pcs-topics/3478-rtop-news-open-debate-on-protection-of-civilians-libya-denial-of-humanitarian-access-continues-icc-issues-warrant-for-arrest-of-qaddafi-other-rtop-situations>, accessed on 14 November 2013.

ICISS Report, para. 5.1.

population.³⁶¹ However, while post-intervention assistance is one of the most important aspects of R2P, this has not always been the priority of the interveners. In relation to this, the ICISS commissioners observe that:

Too often in the past the responsibility to rebuild has been insufficiently recognized, the exit of the interveners has been poorly managed, the commitment to help with reconstruction has been inadequate, and countries have found themselves at the end of the day still wrestling with the underlying problems that produced the original intervention action³⁶².

The NATO intervention in Libya has shown that yet again the international community was unable to manage the post-intervention situation. Indeed, once military intervention was completed and Gaddafi defeated, the priority was other than humanitarian. Undoubtedly, national interests were the main post-crisis concern.³⁶³ Unfortunately, the failure to provide assistance to the new government after the intervention has undermined the success of the international community intervention in the name of the R2P. Nevertheless, a clear and effective post-intervention strategy has been proposed in the ICISS report:

To avoid a return to conflict while laying a solid foundation for development, emphasis must be placed on critical priorities such as encouraging reconciliation and demonstrating respect for human rights, fostering political inclusiveness and providing national unity; ensuring the safe, smooth and early repatriation and resettlement of refugees and displaced persons; reintegrating ex-combatants and other into productive society curtailing the availability of small arms; and mobilizing the domestic and international resources for reconstruction and economic recovery. Each

361 ICISS Report, para. 5.9.

362 ICISS Report, para. 5.2.

363 Interview with a government official, 20 June 2012.

priority is linked to every other and success will require a concerted and coordinated effort on all front.³⁶⁴

While NATO intervention was considered as legitimate, ambiguities surrounding it have become a matter of concern. With regard to this, in the aftermath of the intervention, Brazil has initiated a new concept called 'Responsibility While Protecting' as a complement to R2P. The idea here was to build a mechanism for more control and transparency during and after intervention.³⁶⁵ However, some of the aspects of the strategy adopted during the intervention raise ethical issues. For example, one can question whether providing ammunitions to local rebels was legal or even beneficial for the future of R2P. Nevertheless, NATO intervention in Libya was certainly a good example of the United Nations Security Council's capacity to take timely and decisive action to protect the civilian population from mass atrocities. Given, that one can legitimately support the view expressed by various scholars that the Libyan case has greatly contributed to the consolidation of R2P as an international norm to prevent mass atrocities.

3.8.3 Mali

The recent French intervention in Mali was also labelled by some commentators as an R2P case. Following the coup that deposed Malian president Amadou Toumani Touré, the situation deteriorated in the northern part of the country where rebels and Islamist militants were committing acts of rape, looting and killing the civilian population. In this context, ECOWAS called for military intervention under Chapter VII of the UN

³⁶⁴ ICISS Report at para. 5.6.

³⁶⁵ See Keerthi Sampath Kumar, 'Libya and R2P: A year after UNSCR 1973', Institute for Defence Studies and Analysis, 2012.

Charter arguing that there was ‘flagrant violations of human rights’.³⁶⁶ In this regard, the Security Council unanimously adopted under Chapter VII of the UN Charter Resolution 2056, submitted by France, in which it supported the effort of ECOWAS and the African Union to resolve the crisis in Mali.³⁶⁷ However, it is notable that in this case, the talk focussed more on the threat of terrorism than the issue of protection of civilians from mass atrocities. France, for example, deplored the fact that the Islamist fighters linked to Al Qaeda in the Islamic Maghreb (AQMI) and who are responsible for the kidnapping and the death of several French nationals in the region of Sahel, have managed important territorial gain.³⁶⁸ Nevertheless, the fact that a number of states, France in particular, have recognized that there was a collective duty to halt massive human rights violations in Northern Mali lends support to the belief that R2P is well grounded as an international norm to address mass atrocities.

3.8.4 Syria

The lack of consensus in the UN Security Council as to how to react to mass atrocity crimes in Syria has raised obvious questions about the effectiveness of the Responsibility to Protect doctrine.³⁶⁹ While the Security Council’s timely and decisive response has saved the lives of thousands of civilians in Benghazi, the inability to halt mass atrocities in Syria illustrates that unfortunately R2P is much easier to theorize than to practice. However, it is crucial to note that the Syria case differs significantly from Lybia in many important respects. Whereas Gaddafi was openly calling for the

366 Communique of the ECOWAS Commission on the situation in Mali, June 8, 2012. African Press Organization. Following the coup that deposed Mali’s President Amadou Toumani Touré by military junta leader captain Amadou Sanogo. The decision to send troops to Mali is due to the deteriorating situation in the northern part of the country where separatist armed groups continue to commit acts of rape, looting and killing.

367 UN Security Council Res. 2056 adopted on 5 July 2012.

368 Interview with the French Minister of Foreign Affairs, 27 June 2012.

369 According to the Global Centre for the Responsibility to protect, the ongoing civil war in Syria has claimed the lives of almost 160, 000 . For More details see <http://www.globalr2p.org>

widespread killing of its population, Bashar Al-Assad claims to protect its population from terrorism threats. Many authors believe that Gaddafi's use of alarming rhetoric against civilians in Benghazi has largely contributed to its isolation. In fact, what proved crucial to the intervention in Lybia was the wide consensus against the actions of the Gaddafi's regime.³⁷⁰ While Syria's regime continues to receive support from countries such as Russia, China, Iran and some Arab countries, during the Lybian crisis, all regional organizations including the League of Arab States, the Gulf Cooperation Council, the Organization of the Islamic Council and African Union unanimously condemned the actions of Gadaffi vis-à-vis its population and called upon the UN Security Council to establish a no-fly zone over Libya.³⁷¹ Moreover, the Syria's geostrategic location in the region is also playing a key role in the paralysis of the international community response to the crisis. As Morris neatly comments:

Given the complex array of strategic, religious and political factors that bear on Syria and its immediate neighbours, and the direct interests in the country of China and, more especially, Russia, divisions over how best to react to the violence emanating from Damascus were always destined to be deeper than those over Libya.³⁷²

Given that, one may legitimately argue successful implementation of R2P in conflicts such as Syria, characterized by the perpetration of mass atrocities against the civilian population will always depend on strategic factors including external political influence and regional actors as long as the norm remains political rather than legal.

³⁷⁰ Alex J. Bellamy and Paul D. William, 'The New Politics of Protection? Côte d'Ivoire, Libya and the Responsibility to Protect', *International Affairs*, vol.87, 2011, pp. 839-41.

³⁷¹ See Justin Morris, 'Lybia and Syria : R2P and the Spectre of the Swinging Pendulum, *International affairs*, vol. 89, no. 5, 2013.

³⁷² Ibid.

3.9 Conclusion

Despite controversy surrounding the use of force for humanitarian purposes, since the emergence of R2P there is an international consensus that never again should the international community stand by in the face of mass violation of human rights and that sovereignty cannot be used as a shield behind which abuse could be inflicted on populations. There is a significant move on behalf of the international community towards the evolution of protection of both legal standards and political imperatives. However, despite the solemn endorsement and wide acceptance of the R2P norm as a veritable tool to be used in order to protect civilians who are at risk of gross and systematic violation of human rights, its implementation raises many challenges.

As mentioned earlier, recent tragic conflicts in Ivory Coast, Libya, Sudan and Syria have forced the international community to bring up the issues of R2P and have tested the potential of the new norm with regard to the protection of civilians. While the international community's responses to these crisis has revealed that R2P is a key international tool to address mass atrocities, this has also highlighted two major aspects that affect the implementation of R2P; firstly, the lack of clarity of the Security Council's resolutions and poor management, and secondly, the dependence of the new norm on the political will of states.

The international community's inability to win a consensus around the Syrian conflict demonstrates the gap between the rhetorical promise of 'never again' in the face of mass atrocities and the reality in applying R2P. However, since the adoption of the doctrine in 2005 in the World Summit and its incorporation into the Outcome Document, the new norm has come a long way and there has been a firm

determination on behalf of states to comply with their duty to protect the civilian population. Furthermore, states' legal obligations to protect civilians from mass atrocities is already enshrined in international law. Accordingly, states have both an individual and a collective duty to prevent and to protect their populations from harm. This is the focus of Chapter 4.

Chapter 4: Protection of Civilians from Mass Atrocities by International Law

4.0 Introduction

While the drafting of the UN Charter was a revolutionary step in the international protection of human rights and civilians in general, there has been an increase of human rights violations which has affected civilian populations, particularly in conflict environments due to the changing nature and victims of armed conflict. There were several challenges deriving from the use of state and non-state violence and widespread deprivations of human dignity of every order. As outlined in the previous chapters, attempts to protect individuals from mass atrocities have been made over a long period of time.³⁷³ However, it was not until the ravages and horrors of the Second World War that the international community considered the establishment of a specific legal framework to improve the situation of civilians affected by armed conflict, both in inter-state and civil wars³⁷⁴. This embedded the protection of individuals in the existing body of International Humanitarian Law and International Human Rights Law and other bodies of international law.³⁷⁵

In this context, it is clear that the R2P principles articulated in the 2005 World Summit Outcome Document which emphasizes that each individual state has the duty to protect its population from mass atrocities; specifically, genocide, war crimes, ethnic

373 See for example James Turner Johnson, *Just War Tradition and the Restraint of War: A Moral and Historical Inquiry*, Princeton, N.J. : Princeton University Press, 1981.

374 See ICRC, 'Civilians Protected Under International Humanitarian law', see also Helen Durham and Timothy L.H. McCormack, 'The Changing Face of Conflict and the Efficacy of International Humanitarian Law', 1999.

375 For further details on the goals of international humanitarian law and international human rights law see OHCHR, 'International Legal Protection of Human Rights in Armed Conflict', HR/PUB/11/01 United Nations Publication, 2011.

cleansing³⁷⁶ and crimes against humanity, came to reinforce this legal framework building on existing international law.³⁷⁷

The aim of this chapter is to analyze the legal obligations to protect civilians from mass atrocities as enshrined in international law following the establishment of the United Nations and the Charter of the International Military Tribunal for both Nuremberg and Tokyo tribunals which contributed significantly to the development of international law and practice in the protection and prosecution of atrocity crimes of war, genocide and crimes against humanity.

After a brief introduction about how genocide, war crimes and crimes against humanity were recognized as international crimes under international law, the discussion in this chapter focuses on states' obligations with respect to protecting civilians against crimes of atrocity. It looks firstly at the rules that are found in international humanitarian law and human rights treaties, and then at those that arise from the 1948 Genocide Convention and international customary law.

4.1 Defining war crimes, crimes against humanity and genocide in international law

4.1.1 War crimes, crimes against humanity and genocide after the Second World War

The end of the Second World War led to the establishment of the International Military Tribunal to prosecute Nazis and other individuals involved in atrocity crimes before and during the war. The establishment of IMT provided an

In 2007, the ICJ held that the term ethnic cleansing has no legal significance of its own and that in its view, it could be subordinated to genocide, war crimes or crimes against humanity. International Court of Justice, Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), 26 February 2007, paras. 187-90.
377 World Summit Outcome Document, paras. 138 and 139.

important foundation that crystalized a modern body of international law, which defined and prosecuted war crimes, crimes against humanity and laid the foundation for defining and prosecuting the crime of genocide which came in 1948 with the adoption of the international convention against genocide.

The increase in targeting of civilians in hostilities led to the adoption of the fourth Geneva Convention and additional specific protocols which emphasized the protection of civilians in wartime. Fundamental to this development has been the creation of the two international tribunals which prosecute mass atrocity crimes perpetrated in Rwanda and in the former Yugoslavia.

These developments which further defined and crystalized the international law on war crimes, crimes against humanity and genocide have contributed to more recent development in the international law that is the creation of the International Criminal Court. The International Criminal Court has built on all developments of international law and practice to establish the most modern form of international law on international crimes and protection of human rights, ascertaining the principle of individual state's and community of state's responsibility in the prosecution of atrocity crimes.

4.1.2 War crimes

Under the Charter of the Nuremberg Tribunal, war crimes were defined as 'violations of the laws or customs of war which include, but are not limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war, of persons on the seas,

killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.³⁷⁸

Building on the Charter of the Nuremberg Tribunal and the Geneva conventions, Article 8 (2) of the Rome Statute defines war crimes as the breaches of the four Geneva Conventions and other serious violations of the laws and customs of war.³⁷⁹ Thus, crimes committed against persons not taking part or no longer taking part in armed hostilities, whether in international or in non-international armed conflicts, could constitute war crimes. These acts include wilfully killing, torture or inhuman treatment including biological experiments, wilfully causing great suffering or serious injury to body or health, et cetera.³⁸⁰

4.1.3 Crimes against humanity

The Nuremberg and Tokyo trials were founded on the ideal that atrocities similar to those that took place during WWII would 'never again' recur.³⁸¹ Article 6 of the Nuremberg Charter provided crimes against humanity to include 'murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war; or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of the domestic law of the country where perpetrated'.³⁸² This definition was an important advancement as not only the international dimension was given to the prosecution and punishment of international

378 Article 6 of the Charter of IMT, Principle VI of the Nuremberg Tribunal, 1950 No.82.

379 The Rome Statute of ICC, Article 8 (2) (a) and (b).

380 Ibid.

381 See Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, p.320-321.

382 IMT Charter, Article 6.

crimes, but also such crimes became punishable even when the perpetrators have acted in accordance with the domestic law. As Cassese observed:

[...] in as much as crimes against humanity were made punishable even if perpetrated in accordance with domestic laws, the 1945 Charter showed that in some special circumstances there were limits to the 'omnipotence of the State' ...and that 'the individual human being, the ultimate unit of all law, is not disentitled to the protection of mankind when the State tramples upon his rights in a manner which outrages the conscience of mankind.'³⁸³

In addition, for the first time crimes against humanity became a matter of international customary law prohibitions.³⁸⁴ Furthermore, the Nuremberg excluded head of states immunity for international crimes and crimes against humanity,³⁸⁵ thereby even head of states were subjected to criminal liability. Thus, from this emanates the principle of head of states' responsibility under international law and that they can be held personally accountable for their actions. This principle was adopted and confirmed by the Rome Statute of International Criminal Court in its Article 27 which explicitly provides that:

(1) This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.

383 Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, pp. 104-105.

384 See Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, p.129.

385 Article 7 of the IMT provides that: 'The official position of defendants, whether Heads of States or responsible officials in Government departments, shall not be considered as freeing them from responsibility or mitigating punishment.'

(2) Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.³⁸⁶

It is important to note that the process to consider crimes against humanity in customary international law has taken a long time. This can be illustrated by Cassese's observation, quoting Robert Lansing and James Brown Scott, the two distinguished representatives of the United States to the Versailles Conference who after the First World War were not in agreement that there is a universal law for prosecuting crimes against humanity. They emphasized that 'the laws and principles of humanity are not certain, varying with time, place and circumstance, and accordingly, it may be, to the conscience of the individual judge. There is no fixed and universal standard of humanity'.³⁸⁷ Yet the international principle was affirmed and states acted accordingly; national sovereignty must yield to the safeguarding of international peace and respect for human rights.³⁸⁸ Therefore, states were required to take all necessary measures to prosecute and to punish crimes amounting to crimes against humanity. According to Article 3 of the London Agreement:

Each of the signatories shall take the necessary steps to make available for the investigation of the charges and trial the major war criminals detained by them who are to be tried by the International Military Tribunal. The signatories shall also use their best endeavors to make available for investigation of the charges against and the trial before the International

386 Rome Statute of the ICC, Article 27.

387 Ibid., p.102. See also 'Report presented to the preliminary Peace Conference by the Commission on the Responsibility of the Authors of the War and on the Enforcement of Penalties' in Carnegie Endowment for International Peace, Division of International Law, Pamphlet No.32, Violations of the Laws and Customs of War, Report of Majority and Dissenting Reports of American and Japanese Members of the Commission of Responsibilities, Conference of Paris 1919, Oxford: Clarendon Press, 1919, p. 25-6.

388 'From Nuremberg to the Hague: The Road to the International Criminal Court', Nuremberg Human Rights Centre, available at http://www.iccnw.org/documents/FromNurembergtoHague_07july_eng.pdf, accessed on 16 April 2013.

Military Tribunal such of the major war criminals as are not in the territories of any of the signatories.³⁸⁹

The definition of crimes against humanity was further expanded in the Rome statute which define crimes against humanity as:

any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack: murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity, persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court, enforced disappearance of persons, the crime of apartheid, other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.³⁹⁰

Also the ICTR in the *Akayesu* case has emphasized that crimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal character.³⁹¹

389 London Agreement of 8 August 1945, Agreement of the Government of the United States of America, the provisional Government of the French Republic, the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics for the prosecution and Punishment of the Major War Criminals of the European Axis.

390 Rome Statute of the ICC, Article 7(1).

391 Also the statutes of the International Criminal Tribunal for the Former Yugoslavia and the International Criminal Court exclude the link with wartime.

4.1.4 Crime of genocide

In the wake of the Nuremberg and Tokyo trials, discussion and debate over how to prevent future horrors similar to those that had taken place in the Second World War led to significant changes in international law. There was no international legal protection of civilians against the crime of genocide until the adoption of the Convention on the Prevention and Punishment of the Crime of Genocide in 1948.³⁹² Since the IMT Charter did not envisage genocide as a crime falling under the Nuremberg Tribunal, during the trials, war criminals were charged with crimes against peace and crimes against humanity due to the lack of legal basis of the crime of genocide in international law. As Schabas observes:

While referring to 'evidence of the atrocities, massacres and cold-blooded mass executions' being perpetrated by the Nazis, and warning those responsible that they would be brought to book for their crimes, there was no direct reference to the racist aspect of the offences or an indication that they involved specific national, ethnic and religious groups such as the Jews of Europe.³⁹³

The crime of genocide under international law is modern and the term 'genocide' itself was coined in 1943 by Raphael Lemkin who defined genocide as:³⁹⁴

A co-ordinated plan of different actions aiming at the destruction of essential foundations of the life of national groups, with the aim of annihilating the groups themselves. The objective of such a plan would be disintegration of the political and social institutions of culture, language, national feelings, religion, and the economic existence of national groups and the destruction of the personal security, liberty, health, dignity and even the lives of the

392 GA Res 260 A (II), 9 December 1948.

393 See William A. Schabas, *Genocide in International Law: The Crimes of Crimes*, 1st ed., Cambridge: Cambridge University Press, 2000, p. 496.

394 Raphael Lemkin, *Axis Rule in Occupied Europe. Laws of Occupation, Analysis of Government, Proposals for Redress*, Washington: Carnegie Endowment for World Peace, 1944.

individuals belonging to such groups. Genocide is directed against the national group as an entity, and the actions involved are directed against individuals, not in their individual capacity, but as members of the national group.

William Schabas believes that Lemkin's definition was paradoxically both narrow and broad. It was narrow in the fact that it addressed crimes against national groups rather than groups in general. Nevertheless, it recognized not only physical genocide but also acts aiming at destroying the livelihood of the groups.³⁹⁵

Article 2 of the Genocide Convention defines genocide as:

Any of the following acts committed with intent to destroy in whole or in part, a national, ethnical, racial or religious group as such:

- (a) Killing members of the group
- (b) Causing serious bodily or mental harm to members of the group
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part
- (d) Imposing measures intended to prevent births within the group
- (e) Forcibly transferring children of the group to another group.³⁹⁶

This definition was repeated in Article 6 of the Rome Statute of the International Criminal Court. The two ad hoc tribunals ICTR and ICTY have contributed greatly to the extension of the notion of genocide. The Trial Chamber of the ICTR in the *Akayesu* case had adopted a wide definition of acts that may amount to genocide. The chamber held that acts which may cause serious bodily and mental injury and harm need not to be permanent or irremediable and these include torture, inhuman treatment, rape,

395 See William A. Schabas, *Genocide in International Law: The Crimes of Crimes*, 1st ed., Cambridge: Cambridge University Press, 2000, p. 496.

396 See Article 2 of the Convention on the Prevention and Punishment of the Crime of Genocide 1948.

sexual abuse and deportation.³⁹⁷ The tribunal then decided that rape, when committed with the intent to destroy a protected group, is considered as an act of genocide. The Statute of the ICTR in its Articles 2 and 3 identifies genocide and crimes against humanity as punishable crimes. Article 29 of the Statute of the International Criminal Tribunal for Former Yugoslavia ICTY sets a duty of states to cooperate in investigations and to surrender suspects to the tribunal upon request.

4.2 Protection of civilians under International Humanitarian Law

4.2.1 The Geneva Conventions of 1949 and protection from atrocity crimes

The notion of protection of civilians from mass atrocities is grounded in International Humanitarian law (IHL) which regulates the means and methods of warfare and seeks to limit the effect of armed conflict on people and objects.³⁹⁸ Specific legal protection of persons who do not, or no longer, take part in hostilities appeared with the adoption of the Geneva Conventions of 12 August 1949³⁹⁹ and was later reinforced in the two Additional Protocols of 1977.⁴⁰⁰ However, the adoption of the fourth 1949 Geneva

397 See ICTR Trial Chamber, Prosecutor v Akayesu, case No. ICTR-96-4-T, Judgment of the ICTR, 2 September 1998. This case is important in the protection of civilians as it is the first time an international criminal tribunal has convicted an individual for genocide and international crimes of sexual violence.

398 Regarding international humanitarian law, the International Court of Justice, in its advisory Opinion of 8 July 1996 on the Legality of the Threat or Use of Nuclear Weapons acknowledges that this body of law contains both the rules relating to the conduct of hostilities (so-called 'Hague Law') as well as those protecting victims of war and aims to provide safeguards to persons not taking part in hostilities (so-called 'Geneva Law'). ICJ, Legality of the Threat or Use of Nuclear Weapons, ICJ Reports 1996 p.256, para.75. See also François Bugnion, 'Law of Geneva and Law of the Hague', International Review of the Red Cross, No..844, 2001, pp. 901-922.

399 1949 Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 1949 Geneva Convention II for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 1949 Geneva Convention III Relative to the Treatment of Prisoners of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War, 1949 Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War.

400 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflict, hereafter Additional Protocol I, 1977 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-international Armed Conflict, hereafter Additional Protocol II.

Convention relative to protection of the civilian population and its additional protocols was a particular advancement since it introduced the most specific humanitarian protection to civilians.⁴⁰¹ Thus, in the conduct of hostilities either of international or non-international character, parties to the conflict, whether State or non-state armed groups are required to minimize harm to civilian population resulting from armed conflict.⁴⁰² Persons who are no longer participating in hostilities including civilians, the wounded, the sick and shipwrecked, as well as prisoners of war are entitled to respect for their lives, and parties to conflict must treat them humanely. The provisions of Common Article 3 to the Geneva Conventions of 1949 establish minimum standards that parties to the conflict, including state and non-state armed groups shall respect. Thus, under Common Article 3 warring parties are prohibited from engaging in acts of violence against persons taking no active part in hostilities including members of the armed forces who do not bear arms without any distinction whether the armed conflict is of international or non-international character. This provision reads as follows:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict should be bound to apply, as a minimum the following provisions:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria. To this end, the following acts are and shall remain

401 See Adam Roberts and Richard Guelff, Documents on the Laws of War, Oxford: Oxford University Press, 3rd Ed., 2004, p. 299.

402 Additional protocol I Articles 48, 51 (2), 52 (2); Additional Protocol II, Article 13(2).

prohibited at any time and in any place whatsoever with respect to the above – mentioned persons:

- (a) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) Taking hostage
- (c) Outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) The passing of sentences and the carrying out of executions without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for. An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict. The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention. The application of the preceding provisions shall not affect the legal status of the Parties to the conflict⁴⁰³.

The duty to protect the life, dignity, health and safety of civilians and other non-combatants constitutes a cornerstone of international humanitarian law and is fundamental to protecting civilians from atrocity crimes.⁴⁰⁴ However, some writers have questioned whether the provisions of Common Article 3 do provide effective protection to the civilians during military operations. Gardam, for example, believes that Common Article 3 provides no protection to civilians apart from that it prohibits

403 Common Article 3 to the Geneva Conventions of 1949

404 See Prosecutor v. Furundzija, in this case, the Trial Chamber of the International Criminal Tribunal for the former Yugoslavia held that ‘the general principle of respect for human dignity is the basic underpinning and indeed the very raison d’être of human humanitarian law and international human rights law’. Case N°. IT-95-17/1-T para. 183.

outrages upon personal dignity, in particular violence to life and person as well as cruel treatment and torture. She also recognized that the failure to distinguish between civilians and combatants is contrary to the requirement of Common Article 3.⁴⁰⁵ However, it is important to note that the provisions of the Common Article 3 have been widely accepted as customary international humanitarian law.⁴⁰⁶

4.2.2 Obligation to distinguish between civilians and combatants

In order to ensure the protection of civilian population and civilian property in military operations, parties to the conflict are required to distinguish at all times between the civilian population and combatants, as well as between civilian property and military objectives.⁴⁰⁷ The idea of distinction is one of the important humanitarian aspects of the laws of war. As Best comments in relation to this:

To call it the heart of the subject is no misnomer. This is the affecting and compassionate side of the war tradition, called into existence along with the recognition by those on its prudential and self-interested side that there were categories of nominally 'enemy' human beings whom it was possible and desirable not to hurt, persons whose degree of non-involvement in the struggle or whose irrelevance to it commonly led to their characterisation as 'innocent'.⁴⁰⁸

405 See Judith G. Gardam, *Non-Combatant Immunity as a Norm of International Humanitarian Law*. Dordrecht: Martinus Nijhoff Publishers, 1993.

406 See for example *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, 1986 ICJ Reports 27 June 2014, pp. 218, 255; *Prosecutor v. Tadic*, case No. IT-94-1, Appeals Chamber, Decision on the Defence Motion for Interlocutory Appeals on Jurisdiction, 2 October 1995, paras. 98, 117; *Prosecutor v. Akayesu*, Case N°.ICTR, Trial Chamber, Judgement, 2 September 1998,. See also ICRC, *Customary International Humanitarian Law*, ed. Jean-Marie Henckaerts and Louise Doswald-Beck, Cambridge: CUP/ICRC, 2005.

407 Common Article 3 to the Geneva Conventions; Article 14 Geneva GC IV; and arts. 48, 51(2) and 52(2), Additional Protocol I of 1977.

408 See Geoffrey Best, *War and Law since 1945*, Oxford: Oxford University Press, 1999, p. 257. See also Hugo Slim, 'Why protect Civilians? Innocence, Immunity and Enmity in War', *International Affairs*, vol. 79, no. 3, 2003, pp. 481-501.

Before discussing the principle of distinction, it is first necessary to clarify the definition of civilian under International Humanitarian Law. Civilians are defined as those who never took part in the hostilities and who form part of the normal civilian population and those who were combatants but are, at some stage, *hors de combat* and no longer take part in the hostilities.⁴⁰⁹ Under Article 50 of Additional Protocol I relating to the protection of victims of international armed conflicts civilians are defined in negative as persons who are not combatants. This provision reads:

1. A civilian is any person who does not belong to one of the categories of persons referred to in Article 4 A (1), (2), (3) and (6) of the Third Convention and in Article 43 of the Protocol. In case of doubt whether a person is a civilian, that person shall be considered to be a civilian.
2. The civilian population comprises all persons who are civilians.
3. The presence within the civilian population of individuals who do not come within the definition of civilian does not deprive the population of its civilian character.

Humanitarian international law expressly demands that parties to conflict direct their operations only against military objectives and never against civilians.⁴¹⁰ Thus, acts or threats of violence whose primary purpose is to spread terror among the civilian population are prohibited.⁴¹¹ In the *Nuclear Weapons Case* the International Court of Justice (ICJ) has also emphasized that the principle of distinction was one of the

409 Article 50 of Additional Protocol I. See also Nils Melzer, 'Interpretive Guidance on the Notion of Direct Participation in Hostilities under International Humanitarian Law', ICRC 1 July 2009.

410 Art.35 and Art.48, Additional Protocol I of 1977.

411 Article 51 (2) Additional Protocol I.

fundamental principles of international humanitarian law.⁴¹² As it observed in its advisory opinion:

After sketching the historical development of the body of rules which originally were called 'laws and customs of war' and later came to be termed 'international humanitarian law', the Court observes that the cardinal principles contained in the texts constituting the fabric of humanitarian law are the following. The first is aimed at the protection of the civilian population and civilian objects and established the distinction between combatants and non-combatants; States must never use weapons that are incapable of distinguish between civilian and military targets.⁴¹³

The principle of distinction has been established as a norm of customary international law which must be applicable in both international and non-international armed conflicts and binding on all states and armed groups when they are states parties or not to the Geneva Conventions.⁴¹⁴ The principle of distinction which is regarded as one of the cornerstones of international humanitarian law⁴¹⁵ has also been bolstered by the Rome Statute of the International Criminal Court which provides that 'intentionally directing attacks against the civilian population as such or against individual civilians not taking part in hostilities' are serious violations of the laws and customs applicable in armed conflict not of an international character.⁴¹⁶

Article 4 of the Additional Protocol II also sets out a list of fundamentals guarantees and several acts which are prohibited.

412 ICJ, Nuclear Weapons case, §434.

413 ICJ, Advisory Opinion of 8 July 1996 on Legality of the Threat or Use of Nuclear Weapons, p.257, para. 78.

414 For more details see Jean-Marie Henckaerts and Louise Doswald-Beck, 'Customary International Humanitarian Law', vol 1, Rules ICRC, Cambridge: Cambridge University Press, 2005. See also T. Meron, 'The Geneva Conventions as Customary law', American Journal of International Law, vol. 81, 1987, pp. 348-370.

415 See for example Esbjorn Rosenblad, International Humanitarian Law of Armed Conflict: Some Aspects of the Principle of Distinction and Related Problems, Geneva: Henry Dunant Institute, 1979. p.53.

416 Rome Statute of the ICC, Article 8(2)(e) (i).

This Article reads:

1. All persons who do not take a direct part or who have ceased to take part in hostilities, whether or not their liberty has been restricted, are entitled to respect for their person, honour and convictions and religious practices. They shall in all circumstances be treated humanely, without any adverse distinction. It is prohibited to order that there shall be no survivors.

2. Without prejudice to the generality of the foregoing, the following acts against the persons referred to in paragraph 1 are and shall remain prohibited at any time and in any place whatsoever:

(a) violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment;

(b) collective punishments;

(c) taking of hostages;

(d) acts of terrorism;

(e) outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault;

(f) slavery and the slave trade in all their forms;

(g) pillage;

(h) threats to commit any of the foregoing acts.

3. Children shall be provided with the care and aid they require, and in particular:

(a) they shall receive an education, including religious and moral education, in keeping with the wishes of their parents, or in the absence of parents, of those responsible for their care;

(b) all appropriate steps shall be taken to facilitate the reunion of families temporarily separated;

(c) children who have not attained the age of fifteen years shall neither be recruited in the armed forces or groups nor allowed to take part in hostilities;

(d) the special protection provided by this Article to children who have not attained the age of fifteen years shall remain applicable to them if they take a direct part in hostilities despite the provisions of subparagraph (c) and are captured;

(e) measures shall be taken, if necessary, and whenever possible with the consent of their parents or persons who by law or custom are primarily responsible for their care, to remove children temporarily from the area in which hostilities are taking place to a safer area within the country and ensure that they are accompanied by persons responsible for their safety and well-being.⁴¹⁷

The Fourth Geneva Convention and the additional protocols to the Geneva Conventions not only require the warring parties including states and non-state armed groups to refrain from perpetrating atrocities against civilians, but they are also required to take adequate measures to protect civilians from the effects of hostilities.⁴¹⁸ However, this duty lies first and foremost with states. Therefore, states have both positive and negative obligations to implement the rules of IHL within their territory, including adopting lawful measures to induce the transgressors to comply with the conventions.⁴¹⁹ Consequently, serious violations of the provisions of IHL constitute

417 Article 4 of the Additional protocol II

418 Common Article 3 to the Geneva Conventions; Article 14 Geneva GC IV; and Art.s 48, 51(2) and 52(2), Additional Protocol I of 1977.

419 For a discussion on state's obligations under Common Article 1 see Carlo Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble?', *European Journal of International Law*, vol. 21, no. 1, 2010, pp. 125-171. See also Laurence Boisson de Chazournes and Luigi Condorelli, 'Common Article 1 of the Geneva

war crimes and any person accused of grave breaches can be held criminally responsible.

Although discriminate attacks against civilian population and civilian objects are prohibited,⁴²⁰ the reality of contemporary armed conflicts shows that those rules are violated daily, either by state forces or by non-state armed groups.⁴²¹ Yet violence against civilians is continuing and even worsening in some conflicts. In this context, R2P which clearly emphasizes the duty of protecting vulnerable population lies first and foremost with states, would help to oblige a state to implement IHL rules.

4.2.3 Obligation to respect and to ensure fundamental rights

Under Common Article 1 of the Geneva Conventions of 1949, states are required to 'respect' and 'ensure respect' for the conventions in all circumstances. Accordingly, in addition to its obligation to take all feasible measures to ensure the respect of the provisions of IHL by all parties under its jurisdiction, a state must also take all possible steps to ensure that the rules are respected regardless of whether it is itself party to conflict or not. This obligation which was reiterated in Article 1 of Additional protocol 1 is generally accepted as one of the fundamental principles of humanitarian law which implies both national and universal obligation for states to ensure the implementation of humanitarian principles. This was confirmed by the ICJ in the Nicaragua case in which the court stated:

Conventions Revisited: Protecting Collective Interests', *Revue Internationale de la Croix Rouge/ International Review of the Red Cross*, vol. 82, no. 837, 2000, pp. 67-87.

420 This rule is codified in Articles 48, 51(2) and 52(2) of Additional Protocol I (in international armed conflicts) and Article 13(2) of Additional Protocol II (in non-international armed conflicts).

421 See for example Human Rights Council Resolution 9/9. Protection of the human rights of civilians in armed conflict. In this Resolution the HRC expresses 'its deep concern at the violations of human rights during armed conflicts and of international humanitarian law, which undermines the protection of human rights of civilians in armed conflicts'.

The Court considers that there is an obligation on the United States Government, in the terms of Article 1 of the Geneva Conventions, to 'respect' the Conventions and even 'to ensure respect' for them 'in all circumstances', since such an obligation does not derive only from the Conventions themselves, but from the general principles of humanitarian law to which the Conventions merely give specific expression. The United States is thus under an obligation not to encourage persons or groups engaged in the conflict in Nicaragua to act in violation of the provisions of Article 3 Common to the four 1949 Geneva Conventions.⁴²²

This obligation is considered as imposing on all contracting states an obligation to take a variety of measures in order to induce not only states' organs and private individuals but also other contracting states to comply with the conventions. States' individual and collective obligation to respect and to ensure respect for fundamental human rights was reiterated in Protocol Additional I in Article 89 which states that 'In situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter'. Based on these principles, it is clear that states have extra-territorial positive duty to prevent and to halt mass atrocities and that the international community has the duty to ensure respect for the convention. Thus, under the R2P framework, where IHL prove insufficient to protect populations and states are manifestly failing in their duties to implement the IHL rules, the international community must respond in a timely and effective way to halt mass atrocities. As Bellamy comments, 'when States committed to the R2P concept in 2005, therefore, they were effectively acknowledging the legal obligations that they already had and

⁴²² See *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgements of 27 June 1986, I.C.J. Report 1986, para. 220.

committing themselves to ensuring that this existing law be upheld everywhere, all the time'.⁴²³

However, despite the development of the legal framework for civilian protection in war, it seems that the idea of civilian immunity has not always been embraced in the practice of war. Indeed, attacking the civilian population has become a legitimate and military strategy for belligerents.⁴²⁴ Furthermore, the principle of distinction continues to be challenged by the lack of implementation of IHL rules. As Chesterman has observed, 'the challenge for international community is not so much to develop new international norms and new regimes but to make those global norms relevant to local contexts'⁴²⁵ Furthermore, IHL rules appear to be inadequate to contemporary conflicts which are mainly characterized by the suffering of civilians. Indeed, conflicts not of an international character fought between government forces and non-state armed groups have become more prevalent than between states. According to the 2012 Human Security Report, between 2004 and 2008 the number of state-based armed conflicts rose by 25 percent.⁴²⁶ This study has found that since in such conflicts, civilians are highly exposed to greater danger and abuse related to modern warfare,

423 See Alex J. Bellamy, *The Responsibility to Protect: Towards a Living Reality*, UNA-UK April 2013, p.6.

424 Regarding the rejection of the idea of the civilian in the so-called 'new war', Slim comments: 'The widespread killing and destitution of civilians in Sudan, Somalia, Sri Lanka, East Timor, Bosnia and Angola continued the long history of warfare that rejects the civilian idea. The military strategies of civilian terror in Sierra Leone and Liberia, with their signature atrocities of amputation and cannibalism alongside policies of displacement and enrichment, are infamous. Rejecting the civilian idea by reducing people to their most minimal sexual identity has also been common in all these wars. The massacre of civilian men in Srebrenica was an obvious and terrible example of a rejection of wider ideas of civilian identity. Thousands of men were murdered simply because they were men and because such male massacre is a powerful symbol of conquest and superiority. Similarly, strategies of female rape in Bosnia and many parts of Africa similarly condemn women to atrocities suffering purely because of their sexual identity, and also act as an extremely violent way of sending messages of humiliation and pollution to enemy men'. Hugo Slim, 'Why protect Civilians? Innocence, Immunity and Enmity in War', *International Affairs*, vol. 79, no. 3, 2003, pp. 481-501.

425 Simon Chesterman cited in Hugo Slim, 'Why protect Civilians? Innocence, Immunity and Enmity in War', *International Affairs* vol. 79, no. 3, 2003, pp. 481-501.

426 Human Security Report 2012, available at http://hsrgroup.org/docs/Publications/HSR2012/HSRP2012_Chapter%208.pdf, accessed on 26 April 2013.

the targeting of civilians has increased by over 60 percent between 2008 and 2009.⁴²⁷ Another study has found that in internal conflicts weaker rebels are likely to use violence to coerce support from the civilian population.⁴²⁸ Many other aspects are related to the increasing targeting of civilians in such conflicts. Yet, the characteristics of contemporary armed conflicts has considerably contributed to the problem in terms of distinction between civilians and combatants. For example, notwithstanding that civilians benefit from protection against attack, those who have been enrolled involuntarily in combat such as child soldiers are excluded from the category of protected persons and may become a legitimate object of attack.⁴²⁹

Another challenge is that, notwithstanding that the provisions of the Common Article 3 to the Geneva Conventions and Additional Protocol II apply also in internal armed conflict, serious violation of these rules are not considered as 'grave breaches'. Consequently, state parties to the Geneva Conventions, in the situation of non-international armed conflict, do not have an obligation to exercise universal jurisdiction over the alleged perpetrators nor are they obliged to bring them to trial.⁴³⁰ Thus, serious war crimes against the civilian population or other protected persons are considered as grave breaches only when they are committed within the context of international armed conflict. This was reaffirmed by the Appeals Chamber of the ICTY, in the *Tadic Case* which held that the concept of grave breaches applied only to international armed conflict.⁴³¹ It should be noted that one of the advantages of characterizing a crime as a grave breach is that 'grave breaches' are subject to

427 Ibid.

428 Reed M. Wood, 'Rebel Capability and Strategic Violence against Civilians', *Journal of Peace Research*, vol. 47, no. 5, 2010, pp. 601–614.

429 See for example, Jenny Kuper, 'Child "Soldiers" and Civilians – Some Controversial Issues', *University of Laverne Law Review*, vol 12, 2008, p.12

430 Ibid.

431 ICTY Appeals Chamber, the Prosecutor v. Tadic, IT 94-1 para. 80.

universal jurisdiction of all states parties to the conventions. In other words, any contracting party is required and authorized to bring to trial any person accused of grave breach regardless the location of the crime and the nationality of the perpetrator or the victim.⁴³² Nevertheless, the Rome Statute has a remedy to this failure by emphasizing in its article 5 that the ICC has jurisdiction over war crimes, the crime of genocide, crimes against humanity and crimes of aggression. It is clear that by incorporating the principle of universal jurisdiction into the Rome Statute, states have made possible that any perpetrators of any serious violation of human rights be prosecuted. As the Rome Statute states in its preamble:

Affirming that the most serious crimes of concern to the international community as a whole must not go unpunished and that their effective prosecution must be ensure ...Determined to put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes...Resolved to guarantee lasting respect for and the enforcement of international justice.⁴³³

As noted earlier, states have positive obligations to implement the rules of IHL within their territory, and to make sure that any violation is punished. Therefore, it is clear that individual states have responsibility to prevent, to prosecute and to punish war crimes.

Article 13 of the convention reads: 'The provisions of Part II cover the whole of the populations of the countries in conflict, without any adverse distinction based, in particular, on race, nationality, religion or political opinion, and are intended to alleviate the suffering caused by war.' However, the provisions of the Geneva Conventions of 1949 are restricted and they are applicable only in situations of international or non-

432 Antonio Cassese, *op.cit.* p. 89.

433 Rome Statute Preamble, paras. 4, 5 and 9.

international armed conflict. Therefore, if a conflict such as internal disturbances and tensions such as riots, isolated and sporadic acts of violence occur, then humanitarian law will not apply to the civilian population. The question of protection of victims of such conflicts has frequently been raised as in modern internal warfare, civilians are highly exposed to the effect of hostilities but in this situation they would not be covered by the conventions.

As Gersters & Meyer comment:

The most striking problem of humanitarian law today is its general lack of applicability. In the past fifteen years, several internal and international armed conflicts have occurred. However, in almost every case at least one of the parties to the conflict did not consider international humanitarian law to be applicable.⁴³⁴

While the scope of International Humanitarian Law is limited to situations of armed conflict, International Human Rights Law seeks to protect and promote the human rights of an individual as a human being, regardless of the situation. Therefore, both international humanitarian law and international human rights law are complementary as sources of legal obligations in armed conflict.⁴³⁵ This was confirmed by the ICJ, in its 2004 Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, which held that both international humanitarian law and international human rights law are complementary in situations of armed

434 See Thomas Fleiner- Gester and Michael A. Meyer, 'New Developments in Humanitarian Law: Challenge to the Concept of Sovereignty. *International and Comparative Law Quarterly*, vol. 34, 1985, pp. 267-283; See also Collen C. Maher, 'The Protection of Children in Armed Conflict: A Human Rights Analysis of the Protection Afforded to Children in Warfare', *Boston College Third World Law Journal*, vol. 9 , 1989, p. 297.

435 See OHCHR, 'International Legal Protection of Human Rights in Armed Conflict', op cit.

conflict.⁴³⁶ The ICJ further acknowledged that protection provided by human rights standards does not cease in the event of armed conflict.⁴³⁷

4.3 Protection of civilians and Human Rights Law

In the past, in the name of sovereignty, states had absolute authority over their citizens and individuals were not considered to be subjects of international law.⁴³⁸ Hence, human rights and their protection was a domestic or national issue. However, the experiences of World War II led to the need to promote respect for human beings and to protect individuals from abuse by states.⁴³⁹ In consequence, individuals were recognized as full subjects of international law and the duty to take precautionary measures to ensure their rights and dignity became a matter of the whole international community.⁴⁴⁰ Since then, states' duty to protect their population from mass atrocities is embedded in a range of human rights conventions including the UN Charter, the 1948 Universal Declaration of Human Rights, the two 1966 International Covenant on Civil and Political Rights (ICCPR) the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR) and various other human rights treaties.

ICJ, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J Reports 2004, p.136.

437 Ibid.

438 See for example Robert W. Cartyle and Alexander J. Cartyle, *A History of Medieval Political Theory in the West*, Edinburgh and London: W. Blackwood and Sons, 1950, pp.16-17.

439 Campelli comments: 'the codification processes applied to these two branches of international law [International humanitarian law and human rights law] in the late 1940s were motivated by the desire to overcome the fascist experiments of the first half of the twentieth century that had flouted the rights of several categories of people before and during the Second World War'. Danio Campelli, 'The Law of Military Occupation put to the test of Human Rights Law', *International Review of the Red Cross*, vol. 90, no. 871, September 2008.

440 See Sheri Rosenberg, 'What's Law Got to do with it?: The Bosnia v. Serbia Decision's Impact on Reconciliation', *Rutgers Law Review*, vol. 61, no. 1, 2008, pp.131-159.

4.3.1 Universal Declaration of Human Rights and other human rights treaties

Human rights and their protection have been sanctioned in the Universal Declaration of Human Rights adopted by the General assembly on 10 December 1948.⁴⁴¹ The declaration, in its preamble reminds that grave violation of human rights have resulted in barbarous acts which have outraged the conscience of mankind.⁴⁴² Hence, the declaration emphasizes the protection of human rights through the rule of law and specifies the principle of the dignity and rights of each individual without distinction or discrimination. These principles are clearly spelled out in Articles 2, 3 and 5 of the declaration. Article 2 states:

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction on any kind such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Furthermore, no distinction shall be made on the basis of the political jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

State duty to protect and to promote human rights was therefore built upon the provisions of the declaration. In fact, the right to life, to dignity, to liberty and security of person and the prohibition of slavery or servitude and the prohibition of torture or cruel, inhuman or degrading treatment or punishment constitute the most relevant provisions of human rights law in terms of protection of the civilian population.

Although the responsibility to protect people under their jurisdiction against human rights abuses rests first and foremost on the states, these rights are so fundamental

⁴⁴¹ Universal Declaration of Human Rights adopted by the United Nations General Assembly on 10 December 1948. GA Res. 217 A (III), 1948.

⁴⁴² See Universal Declaration of Human Rights of 1948.

that their violation cannot be ignored by other states. Therefore international human rights standards were chosen by the United Nations as a means to guarantee the rights of individual vis-à-vis their own governmental authorities and other actors who might violate them. Thus, states are legally obliged under human rights conventions that they signed and ratified to protect and promote human rights of their peoples.⁴⁴³

States' obligations to protect all individuals within their territory from atrocities have been further consolidated within a number of international and regional human rights treaties. This duty is contained in the two human rights Covenants of 1966; International Covenant on Civil and Political Rights (ICCPR)⁴⁴⁴ and the International Covenant on Economic, Social and Cultural Rights (ICESCR).⁴⁴⁵ Article 2 (1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁴⁴⁶

Article 2 (1) of the ICESCR states:

443 Those conventions include: Covenant to Suppress the Slave Trade and Slavery (1926); Convention on the Prevention and Punishment of the Crime of Genocide (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); International Convention on the Elimination of All Forms of Racial Discrimination (1965); International Covenant on Economic, Social and Cultural Rights (1966); Optional Protocol to the International Covenant on Civil and Political Rights (1966); International Covenant on Civil and Political Rights (1966); American Convention on Human Rights (1969); Convention on the Elimination of All Forms of Discriminations against Women (1979); African Charter on Human and Peoples' Rights (1981); United Nations Conventions against Torture and Other Cruel, Inhuman or Degrading Treatment (1984); United Nations Convention on the Rights of the Child (1989). See also Vienna Convention on the Law of Treaties, Article 26.

444 International Covenant on Civil and Political Rights was adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) on 16 December 1966 and entered into force from 23 March 1976.

445 International Covenant on Economic, Social, and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200(A) on 16 December 1966 and entered into force on 3 January 1976.

Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁴⁷

One of the important aspects of the international human rights law in connection with protecting civilians is that states have positive obligations to protect individuals within their territory, during peace or war time and to make sure that any violation is punished. While some exceptional derogations are permitted in war times, a number of fundamental rights can never be suspended.⁴⁴⁸ Thus, the right to life,⁴⁴⁹ the prohibition against torture and other inhuman and degrading treatment⁴⁵⁰ and other crimes including genocide, slavery,⁴⁵¹ racial discrimination and crimes against humanity are today established under customary international law as *jus cogens*, meaning that no derogation is admissible under any circumstances.⁴⁵² The Human Rights Council in its resolution on Protection of the human rights of civilians in armed conflict also has emphasized that 'in accordance with article 4 of the International Covenant on Civil and Political Rights, certain rights are recognized as non-derogable in all circumstances and that any measures derogating from the provisions of the Covenant

447 Ibid.

448 Article 4 of ICCPR states: 'In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin (2) no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 15, 16 and 18 may be made under this provision.'

449 Article 6 of ICCPR.

450 Article 7 of the ICCPR.

451 Article 8 of the ICCPR.

452 See draft articles on responsibility of states for internationally wrongful acts, adopted by the International Law Commission at its fifty-third session in 2001, reproduced in Yearbook of the International Law Commission, 2001, vol. II, Part II. See also International Legal Protection of Human Rights in Armed Conflict, United Nations Human Rights, Office of the High Commissioner, New York and Geneva, 2011.

must be in accordance with its article 4 in all cases, and underlining the exceptional and temporary nature of any such derogations'.⁴⁵³

Other relevant treaties are the International Convention on the Elimination of All Forms of Racial Discrimination,⁴⁵⁴ Convention on the Elimination of All Form of Discrimination against Women,⁴⁵⁵ the 1951 Convention Relating to the Status of Refugee,⁴⁵⁶ the 1984 Convention against Torture or Other Cruel, Inhuman or Degrading Treatment or Punishment⁴⁵⁷ and its 2002 Optional Protocol, European Convention of Human Rights and Fundamental Freedoms,⁴⁵⁸ the African Charter on Human and People's Rights,⁴⁵⁹ and the American Convention of Human Rights.⁴⁶⁰ It should be noted however that while in various cases many atrocity crimes are committed by non-state actors or organised groups which have a relationship with the state, there are no express provisions in international law requiring a state to protect individuals from human rights violations committed by private individuals. This was the case in Darfur where many atrocity crimes were committed by a militia group very close to the Sudanese government. In this regard, Rosemberg argues that it is now generally accepted that states have positive obligations under international human rights treaties to prevent, punish, investigate and redress human rights violations in areas ranging from the right to life, to respect for private and family life, and the prohibition on discrimination,

453 Human Rights Council, Resolution 9/9.

454 International Convention on the Elimination of All Forms of Racial Discrimination adopted and opened for signature and ratification by General Assembly Resolution 2106 (XX) of 21 December 1965 and entered into force 4 January 1965.

455 Adopted and opened for signature, ratification and accession by General Assembly Resolution 34/180 of 18 December 1979.

456 The Convention was adopted by the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, held at Geneva from 2 to 25 July 1951.

457 See Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Adopted by General Assembly Resolution 39/46.

458 Treaty opened for signature by the member states of the Council of Europe and for accession by the European Union on 4 November 1950 and entry into force on 3 September 1953.

459 Adopted on 27 June 1981 and entered into force 21 October 1986, OUA Doc. CAB/LEG/67/3.

460 Signed at Inter-America specialized Conference on Human Rights, Costa Rica 22 November 1969.

despite the fact that no express provisions exist in current international law.⁴⁶¹ In this way, it can be argued that R2P reinforces states' legal duty to prevent state and non-state actors from committing human rights abuses by explicitly requiring states to protect their populations from mass atrocities.

4.3.2 Convention on the Prevention and Punishment of the Crime of Genocide in 1948

The Genocide Convention obliges states to prevent and to punish the crime of genocide at all times, whether committed in international, non-international conflicts or in peacetime.⁴⁶² In Article 1 it is stipulated that 'the contracting parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish'.⁴⁶³ Article 3 of the convention imposes upon the contracting parties not only the obligation to punish genocide but also acts connected with the crime including conspiracy, incitement, and complicity and attempt to commit genocide. This Article reads: 'the following acts shall be punishable: genocide, conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide'.⁴⁶⁴ Under the convention, states are required to criminalize genocide and punish the perpetrators. Article 6 stipulates that persons accused of genocide must be prosecuted and tried by judicial authorities of the territory in which the act was committed.

Thus, the convention imposes upon states a dual responsibility to prevent and to punish genocide. This obligation was later extended by the ICJ in the *Bosnia v. Serbia*

461 See Sheri P. Rosenberg, 'Responsibility to Protect: A Framework for Prevention', *Global Responsibility to Protect*, vol. 1, 2009, pp. 442-477.

462 Convention on the Prevention and Punishment of the Crime of Genocide, GA Res 260 A (II), 9 December 1948 Hereinafter, Genocide Convention.

463 Article 1 of Genocide Convention.

457 Article 3 of Genocide Convention.

case in which the court emphasized states' obligation to prevent and to punish genocide stating that Serbia has failed to prevent and to punish genocide in Srebrenica. In fact, in this case, following the wars in the Balkan, Bosnia sued Serbia before the ICJ maintaining that Serbia had violated its obligations under the Genocide Convention by failing to prevent and to punish genocide. Thus, the court was asked to find that Serbia had committed genocide under Article 2 of the Genocide Convention. In determining that Serbia had breached the Genocide Convention while it was not responsible for committing genocide on the motive that it had failed its responsibility to prevent and to punish genocide in Srebrenica, the court highlighted that in addition to the obligation to refrain from engaging in genocide, Genocide Convention imposes upon states an extra-territorial's obligation to prevent and to punish genocide and justiciable obligation vis-à-vis citizens of other countries.⁴⁶⁵ In relation to the legal obligation imposed by the Genocide Convention on a third state, the same court further held that 'under the Convention on the Prevention and Punishment of the Crime of Genocide, States parties have an obligation to arrest persons accused of genocide who are in their territory even if the crime of which they are accused was committed outside it'.⁴⁶⁶

The Genocide Convention was a significant advancement as it clearly defines the crime of genocide as a serious crime of concern to the international community as a whole. As Cassese notes:

The Convention has numerous merits...it sets out a careful definition of the crime, its punishes other acts connected with genocide, it prohibits genocide regardless of whether it is perpetrated in time of war or peace,

465 ICJ , *Bosnia and Herzegovina v. Serbia and Montenegro*, Judgment of 26 February 2007, §162-6. See also Antonio Cassese, *International Criminal Law*, 2nd Ed., Oxford: Oxford University Press, 2008, p. 129.

466 See ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, para. 426.

thanks to the Convention, and it is very broad acceptance by states, at the level of state responsibility it is now widely recognized that customary rules on genocide impose *erga omnes* obligations.⁴⁶⁷

It should be emphasized that Genocide Convention has been internationally accepted as a customary international law. In its Advisory Opinion on *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, the ICJ described the convention as 'principles which are recognized by civilized nations as binding on states, even without any conventional obligation'.⁴⁶⁸ The court highlights the *erga omnes* nature of genocide outlining that:

The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interest of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States, or of the maintenance of a perfect contractual balance between rights and duties. The high ideals which inspired the Convention provide by virtue of the common will of the parties, the foundation and measures of all its provisions.⁴⁶⁹

The collective legal obligation to intervene in a case of genocide is clearly underlined in Article 8 of the Genocide Convention. This states:

467 Antonio Cassese, op. cit., p. 130.

468 See International Court of Justice Reports, 1970, 3, p. 23.

469 Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion, ICJ reports 1951, p. 23.

Any Contracting Party may call upon the competent organs of the United Nations to take such action under the Charter of the United Nations as they consider appropriate for the prevention and suppression of acts of genocide or any other acts enumerated in Article III.⁴⁷⁰

It is therefore clear that the convention contains an explicit extra-territorial state's duty to prevent and to punish genocide. However, the main issue here is to determine when a mass killing amounts to genocide. For instance in the 1994 Rwandan genocide, it was visible that the escalation of violence marked by the extremist propaganda and the well organization of the militias could culminate into genocide.⁴⁷¹ Notwithstanding that a larger number of observers had little doubt that something terrible was underway in the country, the international community has consciously avoided characterising the mass killing as genocide. This is illustrated in the conclusions of the United Nations Special Rapporteur:

The massacres that had already taken place seemed to conform to the Genocide Convention's definition of the genocide: the victims of attacks, Tutsis in the overwhelming majority of cases, have been targeted solely because of their membership in a certain ethnic group and for no other objective reason.⁴⁷²

However, there was an attempt to minimize the extent of the conflict which for a long time was qualified as a civil war. Despite the mass killings, the whole international community was denying that genocide was occurring. The gravity of the events was minimized, as one of the UN Officials comments:

470 Article 3 of the Genocide Convention reads: 'the following acts shall be punishable: genocide, conspiracy to commit genocide; direct and public incitement to commit genocide; attempt to commit genocide; complicity in genocide'

471 See Philip Gourevitch, *We Wish to Inform You That Tomorrow We Will Be Killed With Our Family: Stories From Rwanda*, New York: Farrar, Straus and Giroux, 1998, pp. 104-107.

472 See the Report of the International Commission of Inquiry into Human Rights Abuse in Rwanda, march 1993.

At this time, U.S. officials and others in the Security Council repeatedly stated that there was no basis for intervention because there was no peace to keep in Rwanda, a country devastated by a civil war...The Council's duplicitous way to refuse to call the events by their proper name – genocide—for fear of being compelled to act.⁴⁷³

The disastrously inadequate international community response to the 1994 Rwandan genocide highlights the weaknesses of the Genocide Convention, in particular the resistance that it meets in practice.⁴⁷⁴ Several writers such as Evans⁴⁷⁵ and Focarelli⁴⁷⁶ have made criticisms about the effectiveness of the Convention to protect civilians against genocide. In analysing why the convention has failed to prevent and to stop genocide in Rwanda and to prevent murderous ethnic cleansing in some countries including Cambodia, the former Yugoslavia and Sudan, Evans argues that the major problem with the Genocide Convention is that its definition language is very precise. He notes that this gives a way to endless legal arguments as it demands to demonstrate that there is an intent to destroy in whole or in part a national, ethnic, racial or religious group.⁴⁷⁷ As a result, the killings and mass atrocities continue when the international community is trying to find sufficient evidence of genocidal intent.⁴⁷⁸

473 See Michael Barnett, *Eyewitness to a Genocide: the United Nations and Rwanda*. Ithaca New York: Cornell University Press, 2002.

474 See United Nations, Security Council, Resolution 912, 1994.

475 See Gareth Evans, 'Crimes against Humanity: Overcoming Indifference', *Journal of Genocide Research*, vol. 8, No. 3, 2006, pp. 325-39, 430.

476 See Focarelli, 'Common Article 1 of the 1949 Geneva Conventions: A Soap Bubble', *European Journal of International Law*, vol. 21, pp. 125-171.

477 See Gareth Evans, *op. cit.*

478 Evans comments that: 'This was exactly the problem which confronted the UN Commission of Inquiry on Darfur when it reported in February 2005: while accusing the Khartoum government of multiple abuses of international humanitarian law, saying in so many words that 'massive atrocities were perpetrated on a very large scale and have so far gone unpunished', it was unable to find sufficient evidence that the killing and village-burning and raping that had occurred was actually genocidal in its intent. And the result of course was to give a major propaganda victory to the Sudanese leadership, whose behaviour on any view was, and remains, ugly, indefensible and deserving of the strongest international response'.

In his statement in which he recognized the failure of the United States and the international community to stop genocide in Rwanda, President Bill Clinton recognized that the atrocities perpetrated in Rwanda were not called by their rightful name 'genocide' and that they did not do as much as they could have and should have done.⁴⁷⁹ There is no doubt that states were very reluctant to recognize that genocide was going on in Rwanda due to its implied obligation on the international community to act.

The question has also been raised in the Darfur Conflict whether the atrocities amount to genocide or not. While the United States was the only Security Council member to declare that the abuses committed in Darfur amounted to genocide, the International Commission of Inquiry on Darfur chaired by Antonio Cassese, in its report, concluded that the government of Sudan did not pursue a policy of genocide.⁴⁸⁰ However, the commission recognized that gross violations of human rights and grave breaches of international humanitarian law were committed on the civilian population by the government forces and the militia *Janjaweed* under their control. Nevertheless, the commission underlined that they recognize that in some instances individuals including government officials may have been committed acts with genocidal intent but only a competent court can determine whether or not that was the case in Darfur.⁴⁸¹

It should be noted that, the Prosecutor of the ICC has requested an arrest warrant against Omar Al Bashir, the President of Sudan for genocide, crimes against humanity

479 In March of 1998, on a visit to Rwanda, President Bill Clinton spoke to a crowd of Rwandese assembled on the tarmac at the Airport in Kigali apologizing for the failure to act during genocide stating that: 'We come here today partly in recognition of the fact that we in the United States and the world community did not do as much as we could have and should have done to try to limit what occurred'.

480 See The Report of the International Commission of Inquiry on Darfur to the United Nations Secretary-General in 2004.

481 Ibid.

and war crimes.⁴⁸² This recalls the complexity surrounding the definition of genocide. For example, in order to maintain that genocide has occurred, it must be proved that the atrocities were directed with the intention to destroy in whole or in part one of the protected groups. Unfortunately, as was the case in the 1994 Rwanda genocide, when the Security Council realized that the mass killing of a significant number of men, women and children may amount to genocide, it was too late. This can be illustrated by the report of the United Nations Secretary-General Boutros Boutros Ghali to the Security Council two months after the eruption of genocide in Rwanda. In reporting that an estimated 250,000 to 500,000 Rwandans had already been killed, he highlighted the failure of the international community to respond to the crisis. He then states that:

The magnitude of the human calamity that has engulfed Rwanda might be unimaginable but for its having transpired. On the basis of the evidence that has emerged, there can be little doubt that it constitutes genocide. Since there have been large-scale killings of communities and families belonging to particular ethnic groups. In the meantime, it is unacceptable that, almost two months since this violence exploded, killings still continue.⁴⁸³

Another deficiency of the convention is the ambiguities surrounding its scope. For example it is not clear whether the convention places an obligation upon states to take action in cases of genocide outside of its territory. Some commentators such as Ben Okolo⁴⁸⁴ observe that a legal response to that question is still not relevant but there is at least if not a legal then a moral obligation to act. Glanville also believes that states have only an obligation under Article VII to call upon the competent organs of the

482 The Prosecutor v. Omar Hassan Ahmad Al Bashir, ICC-02/05-01/09.

483 UN Doc SG/SM/5292. For more discussion see Hazel Cameron, *Britain's Hidden Role in the Rwandan Genocide: The Cats Paw*. Oxon: Routledge, 2013.

484 See Simon Ben Okolo, 'Darfur and the Genocide Debate'. *African Journal on Conflict Resolution*, vol.9, no.3, 2009.

United Nations to take appropriate measures. Nevertheless, he observes that due to the consolidation of international human rights regime there is a general belief that Genocide Convention imposed upon states a duty to intervene beyond borders in response to genocide.⁴⁸⁵

It is beyond any doubt that with the emergence of R2P, the world community has reached a consensus that genocide is unacceptable and that states can no longer stand by when faced with genocide and other atrocity crimes whether committed in time of peace or in time of war. As Albright and Cohen comment:

The world agrees that genocide is unacceptable and yet genocide and mass killings continue. Our challenge is to match words to deeds and stop allowing the unacceptable. That task, simple on the surface, is in fact one of the most persistent puzzles of our times. We have a duty to find the answer before the vow of 'never again' is once again betrayed.⁴⁸⁶

While the provisions of the Genocide Convention, particularly Article 2, have been repeatedly reaffirmed and clarified by international courts,⁴⁸⁷ efforts are still needed in order to strengthen international mechanisms to prevent and to end the threats of genocide and other atrocity crimes against the civilian populations. In this regard, R2P is a great advancement in addressing genocide and other atrocity crimes as it emphasizes states' individual and collective obligation to protect populations not only from genocide, but also from war crimes, ethnic cleansing and crimes against humanity as articulated in the 2005 World Summit Outcome Document.⁴⁸⁸ Like the

485 Luke Glanville, 'The Responsibility to Protect Beyond Borders', *Human Rights Law Review*, 2012.

486 See The Genocide Prevention Task Force Report issued on December 8, 2008 available at http://media.usip.org/reports/genocide_taskforce_report.pdf

487 See for example Article 6 of the Statute of the International Criminal Court; Article 2 of the Statute of the International criminal tribunal for Rwanda; Article 9 of the Statute of the Special Court for Cambodia.

488 See Marko Milanovic, 'State Responsibility for Genocide', *European Journal of International Law*, vol. 17, no. 3, 2006, pp. 553-604.

Genocide Convention, R2P intends to prevent crimes that shock the conscience of humankind. As Rosenberg correctly explains:

The Genocide Convention grew out of the horrors of the Holocaust and is intended to prevent genocide. R2P grew out of the mass atrocities committed during the 1990s and is intended to prevent genocide and other mass atrocities. In this sense, R2P is the progeny of the Genocide Convention reflecting the complex social fabric that now makes up today's gruesome tales of crimes that 'shock the conscience' of the world.⁴⁸⁹

4.4 Protection from mass atrocities and international courts and tribunals

Impunity for international crimes and for systematic and widespread violations of fundamental human rights is a betrayal of our human solidarity with the victims of conflicts to whom we owe a duty of justice, remembrance, and compensation. To remember and to bring perpetrators to justice is a duty we also owe to our humanity and to the prevention of future violations of international humanitarian and human rights law⁴⁹⁰.

Ensuring that perpetrators of serious crimes are held accountable at both a domestic level and an international level is one of the fundamental aspects of protecting civilians from mass atrocities. Therefore, when states fail to fulfil their protection obligations, and civilians become victims of mass atrocity crimes, there is a duty to ensure that there is no impunity for those who commit serious violations of international humanitarian and human rights law, including war crimes, crimes against humanity and genocide, and that victims or survivors are given reparation.

489 See Sheri P. Rosenberg, 'A Framework for Prevention', *Global Responsibility to Protect*, vol.1, 2009, pp. 442-477.

490 See Cherif M. Bassiouni, 'Accountability for Violation of International Humanitarian Law and other Serious Violations of Human Rights'. *Op.cit.*

4.4.1 National and international prosecutions

Prosecuting the perpetrators of international crimes was developed and expanded in international law following the gravity of crimes committed in World War II. As previously mentioned, international criminal law was born out of the horrors of the Holocaust which was characterized by the systematic extermination of millions of people. In response to the horrors of the Holocaust in Europe and the Japanese crimes perpetrated during World War II, the allied powers⁴⁹¹ sought to prosecute and to punish the major war criminals for war crimes, crimes against humanity, crimes against peace and conspiracy.⁴⁹² Therefore, the International Military Tribunal (IMT) known as the 'Nuremberg Tribunal' and The International Military Tribunal for the Far East (IMTFE)⁴⁹³ were established to prosecute individuals for those crimes.⁴⁹⁴ The establishment of these international tribunals was of great importance as until that time states had a monopoly over criminal jurisdiction concerning international crimes.⁴⁹⁵

The end of the Cold War was also a crucial moment which has significantly contributed to the effort to create adequate mechanisms for international justice. It is in this context that, shocked by the mass killings in the former Yugoslavia and the genocide in Rwanda, the United Nations Security Council set up two ad hoc tribunals, namely the International Criminal Tribunal for the former Yugoslavia (ICTY),⁴⁹⁶ and the International Criminal Tribunal for Rwanda (ICTR).⁴⁹⁷ As Cassese observes:

491 After the defeat of Germany in 1945, The United Kingdom, France, the United States and the Soviet Union convened at the London Conference to decide the punishment which should be reserved to the High-ranking Nazi criminals.

492 IMT's Charter, Article 6.

493 The International Military Tribunal for the Far East Charter was approved on 19 January 1946. The Tokyo trial started on 3 May 1946 and lasted almost two and a half years.

494 The International Military Tribunal was established in the summer 1945 and met from 14 November 1945 to 1 October 1946.

495 Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, p.323.

496 UNSC Resolution 827 of 25 May 1993.

497 UNSC Resolution 955 of 8 November 1994.

It [the end of the Cold war] a fragmentation of the international community and intense disorder which, coupled with rising nationalism and fundamentalism, resulted in a spiralling of mostly internal armed conflicts, with much bloodshed and cruelty. The ensuing implosion of previously multi-ethnic societies led to gross violations of international humanitarian law on a scale comparable in some respects to those committed during the Second World War...This period is thus characterized by the development of institutions empowered to prosecute and punish serious violation of international humanitarian law.⁴⁹⁸

The ICTY was empowered to exercise jurisdiction over war crimes and human rights violations that constitute international crimes allegedly perpetrated in any part of the former Yugoslavia after 1 January 1991.⁴⁹⁹ The ICTR was also limited to genocide, crimes against humanity and war crimes allegedly committed in Rwanda or in the territory of neighbouring states by Rwandan citizens between 1 January and 31 December 1994.⁵⁰⁰ The establishment of the two ad hoc criminal tribunals was certainly a reaffirmation of the belief that genocide, war crimes, and crimes against humanity are human rights violations of extreme magnitude that invoke legal responsibility. The ICTY and ICTR have significantly contributed to the advancement of legal protection of civilians in armed conflict by bringing to justice those who are responsible for serious violations of international humanitarian law and by rendering justice to victims of massive crimes.⁵⁰¹

498 Cassese, *op. cit.*, p. 325.

499 UNSC Resolution 827.

500 UNSC Resolution 955.

501 See Payam Akhavan, 'Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities?', *The American Journal of International Law*, vol. 95, no. 1, 2001, pp 7-31.

Despite the fact that the two ad-hoc tribunals are limited both temporally and geographically, they have proved to be effective instruments for preventing further ethnic violence and mass violations of human rights.⁵⁰² Nevertheless, there was still the need to render justice to the victims of civil war including in Sierra Leone,⁵⁰³ Cambodia,⁵⁰⁴ East Timor⁵⁰⁵ and Lebanon.⁵⁰⁶ This illustrates how the creation of the International Criminal Court (ICC)⁵⁰⁷ was a result of a long process toward a universal, permanent international criminal court charged with trying crimes against international law.

This was an important advancement and great tool for protecting civilians against mass atrocities. As one commentator correctly observes 'if people responsible for these crimes are actually held to account, others may make different decisions when weighing the costs of their actions'.⁵⁰⁸ There is no doubt that the establishment of a permanent international court was a strong signal that war criminals can no longer count on impunity. Further, as demonstrated earlier, the statutes and jurisprudence of these international tribunals and courts had considerably contributed to promoting the security of individuals. With jurisdiction

502 Ibid.

503 In the late 1990s and early 2000s the UNSC considered the situation in, among other places, Sierra Leone, Cambodia, and East Timor as being suitable for the establishment of ad hoc international courts. The Special Court for Sierra Leone (SCSL) was set up jointly by the Government of Sierra Leone and the United Nations. It has jurisdiction over crimes against humanity, violations of common Article 3 to the Geneva Conventions and the Additional Protocol II, as well as other serious violations of International Humanitarian Law, and some criminal offences under Sierra Leonean law. See Cassese, *op. cit.*, pp. 331-335.

504 The Special Tribunal for Cambodia was created following the killing of more than a million people during the Khmer Rouge four year rule in Cambodia. The tribunal has jurisdiction over crimes committed by the Khmer Rouge between 1975 and 1979.

505 The Ad-Hoc Court for East Timor was set up to investigate and prosecute the crimes committed in East Timor when Indonesia invaded East Timor in 1975.

506 The Special Tribunal for Lebanon has jurisdiction over terrorist attacks committed in Lebanon since 14 February 2005 and only applies Lebanese criminal law.

507 The Rome Statute of the International Criminal Court circulated was adopted on 17 July 1998 by the United Nations Diplomatic Conference of Plenipotentiaries and entered into force on 1 July 2002.

508 See Llyod Axworthy, 'RtoP and the Evolution of State Sovereignty', in Jared Genser and Irwin Cotler (eds.), *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2012, p.10.

over genocide, these courts and tribunals have helped in clarifying the elements of genocide, war crimes and crimes against humanity. It should be noted that states have the duty to persecute all persons who have committed genocide, war crimes, and crimes against humanity while international persecutions is limited to policy makers, the leaders and high ranking executors.⁵⁰⁹

4.5 Victims of mass atrocities' reparation and assistance under international law

As noted above, in the face of mass atrocities states have the obligation to provide protection to their populations including support and redress to victims. Victims' rights to a remedy is well enshrined in international humanitarian law⁵¹⁰ and in a number of international human rights standards including the International Covenant on Civil and Political Rights,⁵¹¹ the International Convention on the Elimination of All Forms of Racial Discrimination,⁵¹² the Convention against Torture,⁵¹³ and the Convention on the Rights of the Child.⁵¹⁴ Therefore, states have a duty to provide remedies to victims under their jurisdiction. As Bassiouni comments:

The provisions of a remedy and reparations for victims of these violations is fundamental component of the process of restorative justice. To this end, states and their national legal systems serve as the primary vehicle for the enforcement of human rights and international humanitarian law. Accordingly, the existence of a state's duty to provide a remedy and

509 For more discussion on national and international prosecution, see Cherif M. Bassiouni, 'Accountability for Violations of International Humanitarian Law and Other Serious Violations of Human Rights'. Op.cit.

510 State's duty to provide reparations to victims of violation of International Humanitarian law is grounded in the Hague Convention Regarding Laws and Customs of Warfare, the Four Geneva Conventions of 12 August 1949 and the Additional Protocols of 1977.

511 ICCPR, Article 2.

512 Article 6.

513 CAT, Article 14.

514 CRC, Article 39. In relation to the victim's rights under international human rights law, see ICRC, 'International Legal Protection of Human Rights in Armed Conflict'.

reparations forms a cornerstone of establishing accountability for violations and achieving justice for victims.⁵¹⁵

While a state's duty with regard to protection of civilians is well grounded in both conventional and customary law, the issue of reparations remains a big challenge. The Permanent Court of International Justice in 1927 recognized in the *Chorzow Factory Case* that states have a duty to provide reparations to victims stating that: 'It is a principle of international law that the breach of an engagement involves an obligation to make reparations in adequate form. Reparation therefore is the indispensable complement of a failure to apply a convention and there is no necessity for this to be stated in the convention itself'.⁵¹⁶

Few efforts have been undertaken by states to provide support and reparation to victims of mass atrocities and this aspect has been considerably neglected. However, the international community has been increasingly concerned with encouraging domestic authorities to punish the perpetrators of the mass atrocity crimes and to provide reparation to the victims of such acts.⁵¹⁷ One of the achievements of the ICC is that its mandate includes holding accountable those responsible for genocide, war crimes and crimes against humanity and providing support and reparation to victims.⁵¹⁸ While the Nuremberg Tribunal and other previous international criminal tribunals were concentrated on perpetrators and their rightful punishment, the ICC gives victims the right to material assistance and reparations.⁵¹⁹ The Rome Statute makes clear that victims' rights include obligation to take protective measures and assistance. Article 43 (6) of the Rome Statute states that:

515 See Cherif M. Bassiouni, *op. cit.*

516 See *Factory at Chorzow*, (Germ. V. Pol), 1927 P.C.I.J (Ser. A) No. 9, July 26, at 4.21.

517 See Cherif M. Bassiouni, *op. cit.*

518 Rome Statute of the ICC, Article 75.

519 See Antonio Cassese, *op. cit.*

The Registrar shall set up a Victims and Witnesses Unit within the Registry. This Unit shall provide, in consultation with the Office of the Prosecutor, protective measures and security arrangements, counselling and other appropriate assistance for witnesses, victims who appear before the Court, and others who are at risk on account of testimony given by such witnesses. The Unit shall include staff with expertise in trauma, including trauma related to crimes of sexual violence.⁵²⁰

The Rome Statute provides that 'The Court shall take appropriate measures to protect the safety, physical and psychological well-being, dignity and privacy of victims and witnesses'.⁵²¹ Under Article 75 the court may determine the scope and extent of any damage, loss and injury to the victims, and can order convicted persons to make appropriate reparations including restitution, compensation and rehabilitation.⁵²² This article states:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.
2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

The statute also provides for the creation of a trust fund for the benefit of victims and their families by decision of the Assembly of States Parties⁵²³. However, the

520 Rome Statute of the ICC, Article 43 (6).

521 Rome Statute of the ICC, Article 68 (1).

522 ICRC, *International Legal Protection of Human Rights in Armed Conflict*, op. cit.

523 Rome Statute of the ICC, Article 79 (1).

operationalization of victim reparations at the ICC faces numerous challenges. For example, in most of the cases which require reparation, states or individuals are unable to provide redress to the victims. Moreover, reparations will only be granted to victims of crimes for which a person has been convicted. Consequently, the victims of crimes that the prosecution has failed to prove are excluded from reparations. According to the ICRC report:

The criminal punishment of war criminal takes places once atrocities have been committed, and other several years after the events, but the victims' needs are immediate and require that mechanisms be used which can prevent violations and/or halt them during the hostilities. Provision must also be made for procedures guaranteeing that the harm that has been suffered will be recognized and that due reparation will be awarded effectively and rapidly.⁵²⁴

In many cases victims of mass atrocities remain helpless given the fact that the ICC's prosecutorial strategy focuses on a limited number of crimes committed by small groups and many victims are ineligible for reparations.⁵²⁵ As Rehn comments:

We cannot and should not expect that the ICC and the Trust Fund take over the responsibility of States to properly look after their own victimized populations. Governments in situation countries maintain the responsibility to ensure reparative, restorative and transformational justice on their own territories. If so desired, the international community can play a supporting role. The Trust Fund for Victims may then serve as a source of experience and expertise.⁵²⁶

524 ICRC Report, op.cit.

525 See Chris Tenove, 'The International Criminal Court: Challenges of Victim Assistance, Participation and Reparations', The Africa Portal, Backgrounder, No. 52, January 2013.

526 Elisabeth Rehn, Speech given on Wednesday 21 march 2012 on the occasion of the 9th Annual Board Meeting, The Trust Fund for Victims.

This statement is logical since the ICC can only exercise its jurisdiction where the state of which the accused is a national, and is unable or unwilling to prosecute according to the principle of complementarity. Nevertheless, the Trust Fund for Victims has provided assistance to several thousand victims in Uganda and the Democratic Republic of the Congo. Some programmes were therefore developed to help victims to rebuild their lives and to regain their dignity.⁵²⁷

However, some writers such as Bassiouni emphasise others mechanisms of reparations which include historical record of the wrongful acts and a public acknowledgement of the violations. As he comments:

Monetary compensation should not, however, be deemed the only available remedy. Non-monetary forms of compensation should also be developed, particularly in societies where the economy is unable to absorb the loss of large monetary sums. The various modalities of reparation do not exclusively involve some form of valuable consideration or social service to redress a past harm. Rather, reparation could also include an accurate historical record of the wrongful acts and a public acknowledgement of the violations.⁵²⁸

While such mechanism may certainly help to redress the harm in the long term, in most of the cases, victims are in actual need of aid to rebuild their life.

4.6 Chapter conclusions

Despite the rules laid down by international humanitarian law and human rights law to protect civilians against the effect of hostilities, thousands of civilians are nevertheless deliberately targeted by armed groups. Civilians continue to be victims of violence

527 See The Trust Fund for Victims, Speech given on Wednesday 21 March 2012 on the occasion of the 9th Annual Board Meeting by Ms Elisabeth Rehn, Chair of the Board of Directors of the Trust Fund for Victims.

528 See Cherif Bassiouni, *op. cit.*

causing serious bodily and mental harm through rape, torture, killing, abduction and forced displacement. Unfortunately, in modern conflicts, civilians being targeted by state and non-state forces has become a rule rather than the exception.⁵²⁹ This has been an increasing and alarming phenomenon. As the preamble of the Rome Statute reminds us 'millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity'. Putting an end to impunity and thus contributing to the prevention of futures crimes was one of the major goals of the ICC.

As indicated throughout this chapter, international humanitarian law, international rights law and international criminal law provide extensive protection to civilians against atrocity crimes. However, numerous challenges impede the implementation of humanitarian and human rights rules. The challenges are summarized best in a recent ICRC report which acknowledged that the inability to respect the fundamental rules of international humanitarian law applicable to protection of civilians against the effect of hostilities continue to be the predominant cause of civilians' suffering during armed conflict.⁵³⁰ The report argued that the perennial problem is not the insufficiency or absence of rules but the lack of adequate infrastructures for the implementation of the law coupled with lack of political will. It further identified several consequences in human terms due to the reality of current armed conflicts which are characterized by commission of atrocity crimes against civilians.

As demonstrated above, the responsibility to prevent and to protect mass atrocities articulated in R2P is firmly grounded in international law. Moreover, there is a

529 See for example Children and Armed Conflict: A Guide to International Humanitarian and Human Rights Law , International Bureau for Children Rights available at http://www.ibcr.org/editor/assets/Conflict_Eng.pdf International Humanitarian and Human Rights Law », International Bureau for Children Rights, p. 5.

530 ICRC, 'Strengthening legal Protection For Victims of Armed Conflicts' 31st International Conference Of the Red Cross and Red Crescent, Geneva October 2011, 31IC/11/5.1.1.

commitment on behalf of the world community to continue to consider the R2P as a developing norm which requires states to prevent and protect populations from mass atrocities. Since prevention of mass human rights atrocities constitutes the main dimension of R2P, both individual states and the international community are required to build capacity to protect population from mass atrocities. Therefore, the R2P framework requires individual states to take adequate measures to prevent the acts that it addresses and the international community to take concrete action to assist states to prevent atrocity crimes. However, in the situation that preventive measures have failed and mass atrocities have occurred, under R2P pillar 3 the international community should react in timely and decisive manner in order to halt mass atrocities and to make sure that the perpetrators are punished. The implementation of these requirements is, as will be seen in the coming chapters, crucial in strengthening the protection of civilians from mass atrocities. While R2P was conceived to address conflicts characterized by the commission of mass atrocities, it remains unclear when and how it should apply to such conflicts. This affirmation will be investigated in the Democratic Republic of Congo case study in the following chapters.

Chapter 5: The Case Study: The Democratic Republic of the Congo Crisis

5.0 Introduction

It is the aim of Part II of this thesis to apply the legal and normative framework, particularly R2P, to the case study with the objective of analysing the efficacy and workability of this framework. The following chapter will therefore apply the legal framework as set out in the theoretical part of this dissertation in relation to protection of civilians from mass atrocities to the case of the civilian population in Eastern DRC. The Democratic Republic of the Congo crisis was chosen as a case study because it stands out as one of the most complex and difficult situations of the protection of civilians. Although the mandate of the United Nations peacekeeping mission in the DRC since 1999 has moved from monitoring a ceasefire agreement to providing direct protection to civilian population under imminent physical threat,⁵³¹ violence against civilians including murder, rape, recruitment and use of child soldiers and forced displacement continue unabated.⁵³²

Fundamentally, the DRC is an appropriate test case to illustrate the enormous difficulties of implementing R2P to address the most atrocious crimes in a long-term conflict. In order to fully appreciate whether R2P does contribute to how the conflict is addressed in that region, an historical overview of the DRC conflict and the origin of the conflict that has gripped the country for 17 years will first be provided. Particular attention is paid to the role that FDLR and other armed groups have played in fomenting tensions in the country. After describing how and why the eastern provinces

531 UN.Doc S/RES/2053, 2012, adopted on 27 June 2012.

532 See Report of the United Nations High Commissioner for Human Rights on the Situation of Human Rights and the Activities of her Office in the DRC, 12 July 2013, A/HRC/24/33.

continue to be the epicentre of the conflict, the chapter describes the effects of the conflict on the civilian population, highlighting that the vast majority of the atrocities are committed against protected persons as defined in the Geneva Conventions. It concludes with an analysis of the Congolese government's response to the conflict and its responsibility to protect its population from mass atrocities.

5.1 Background

The Democratic Republic of the Congo (DRC) is one of the largest countries in Sub-Saharan Africa. It is located in the central part of the continent with a population estimated at 71 million.⁵³³ Its capital is Kinshasa and it has borders with the Republic of Congo, Central African Republic, Zambia, Angola, Rwanda, Burundi, Tanzania, Uganda and Sudan. The major languages spoken are French, Lingala, Swahili, Kikongo and Tshiluba.⁵³⁴ An estimated 80 percent of the population is Christian, 10 percent follow indigenous faiths, and 10 percent are Muslims. Life expectancy for males is 47 years and for females it is 51 years.⁵³⁵ The DRC has a vast mineral wealth including cobalt, copper, diamond, gold, silver, manganese, zinc, tin, tantalum, petroleum, uranium etc.⁵³⁶ Unfortunately, the illicit exploitation and trade of natural resources constitute one of the major factors fuelling the conflict in the DRC.⁵³⁷ Thus, the country has been an epicentre of a continuing conflict for almost two decades; the struggle for power and access to resources between Congolese and foreign armed groups has kept the region in a state of conflict.

533 World Health Organization (WHO), countries' statistics, DRC available at <http://www.who.int/countries/cod/en/>.

534 Ibid.

535 Ibid.

536 Further information available at <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>, accessed on 18 February 2013.

537 UN. Doc. S/RES/2053, 2012, 27 June 2012.

5.2 A Brief political and conflict history⁵³⁸

5.2.1. Political background

The DRC, formerly Zaire, was ruled by Belgium from 1908 until its independence on 30 June 1960. Joseph Kasavubu became President and Patrice Lumumba the first Prime Minister.⁵³⁹ However, a few days after the transfer of power from Belgium to the Congolese government, the army mutinied and numerous attacks were launched against European, Belgians in particular. In response to the crisis, Belgium sent paratroops to Congo to protect its citizen without the consent of the Congolese government. This was considered as an act of aggression as Congo was an independent country. The situation deteriorated when Moïse Tshombé declared the mineral-rich province of Katanga independent of the Republic of Congo. In response, Lumumba requested the intervention of the United Nations in order to re-establish peace and to put down a secessionist movement in Katanga.⁵⁴⁰ In its Resolution 143 adopted on 14 July 1960, the Security Council called upon the Government of Belgium to withdraw its troops from the territory of the Republic of Congo and decided to provide the Government of Congo with military assistance.⁵⁴¹ Meanwhile, Lumumba was abducted and murdered by mercenaries on 17 January 1961. In July 1961, a UN peacekeeping force *OPERATIONS DES NATIONS UNIES AU CONGO (ONUC)* was

538 See Jean-François Hugo, *La République Démocratique du Congo : Une Guerre Inconnue 2006*, <http://www.africanexecutive.com/modules/magazine/articles.php?article=359>, accessed on 23 January 2013.
539 Ibid.

540 In a cable sent to the UN Secretary-General, President Kasavubu and Prime Minister Lumumba accused the Belgian Government of having carefully prepared the secession of Katanga and underlined the fact that the purpose of asking for military assistance was to protect the national territory of the Congo against the external aggression which is a threat to international peace and security. See UN Doc S/4382, 1960.

541 UN Security Council, Resolution 143, 1960 of 14 July 1960, S/RE/143, 1960, available at: <http://www.refworld.org/docid/3b00f00d50.html>, accessed 3 May 2014. This was the first of a series of Security Council resolutions authorizing the deployment of UN-led military forces to assist the Republic of Congo. For example, Security Council Resolution 161, 1961 adopted on 21 February 1961; Resolution 169, 1961.

deployed in Congo with a mandate to oversee the withdrawal of Belgian troops and to assist the Congolese government in restoring law and order. The operation was considered as successful by many people as Dobbins has underlined: ‘Over the next three years, UN troops forced the removal of foreign mercenaries and suppressed the Katanga secession while civil elements of the mission provided a wide range of humanitarian, economic, and civil assistance to the new regime. Measured against the bottom-line requirements of the international community—that decolonization proceed, colonial and mercenary troops depart, and the Congo remain intact—the United Nations was largely successful’.⁵⁴² However, despite the success of the intervention, a number of controversies emerged as to the costs of the operation and the partiality of the United Nations. Some people for example questioned the role of the United Nations in the execution of Patrice Lumumba. According to some authors, these controversies have severely overshadowed the accomplishments of the United Nations in Congo. However, following the United Nations’ departure the new nation was continuously threatened by a vicious civil conflict. In 1965, following the power struggle between Moïse Tshombe and President Kasavubu, Lieutenant General Joseph Désiré Mobutu who was commander in chief of the national army took power. After three decades of misruling the country, Laurent Désiré Kabila who had fought alongside the Lumumbaist forces during the mid-1960s following the assassination of Lumumba, created a base in eastern DRC and looked forward to overthrow Mobutu.⁵⁴³ In May 1997, helped by the Rwandan and Ugandan troops, Kabila marched into the capital Kinshasa and ousted Mobutu from power. Then, the new government decided to change the country’s name from Zaire to Democratic Republic

542 See James Dobbins et al., *The UN’s Role in Nation-Building: From the Congo to Iraq*, Santa Monica : RAND Corporation, 2005, pp 5-27.

543 Ibid.

of the Congo (DRC). On 16 January 2001, President Laurent Kabila was assassinated and his 29 year old son Joseph Kabila was appointed to assume presidency.

5.2.2 Background to the conflicts in the DRC⁵⁴⁴

Following the Hutu genocide against the Tutsi in Rwanda in 1994, over two million of the Hutu fled Rwanda and sought asylum in Eastern Zaire.⁵⁴⁵ Many authors believe that this was the crucial point of the crisis in Zaire. In fact, shelter was provided not only to the civilians who were fleeing the genocide but also to the Rwandan Hutu military and the extremist Guerilla group called *Interahamwe*.⁵⁴⁶ The United Nations, instead of disarming the Rwandan Hutu army when they opened a humanitarian corridor as required by international law, let them enter the Zairian territory with weapons and ammunition, from which they often launched attacks on Rwanda.⁵⁴⁷ This was a critical juncture in the history of the crisis in the Great Lakes.⁵⁴⁸

The relationship between Rwanda and Zaire deteriorated as the former accused the latter of failing to stop *Interahamwe* incursions in Rwanda from refugee camps in Kivu provinces.⁵⁴⁹ In October 1996, supported by Rwanda and Uganda, Laurent Desiré Kabila announced the creation of a rebellion movement led by him called *Alliance des*

544 Information for this short history of the conflict in the DRC has been drawn, in part, from Jean-François Hugo, *La République Démocratique du Congo : Une Guerre Inconnue* 2006, Paris: Michalon, 2006. See also Jacques Morel, *La France au Cœur du Génocide des Tutsis*, Paris: L'Esprit Frappeur, 2010.

545 Jacques Morel, *La France au Cœur du Génocide des Tutsis*, Paris: L'Esprit Frappeur, 2010.

546 For further details see Enough, 'Roots of the Crisis- Congo' available at http://www.enoughproject.org/conflict_areas/eastern_congo/roots-crisis, last accessed 31 August 2013.

547 See John Pomfret, 'Aid Dilemma: Keeping It From the Oppressors; UN, Charities Find Crises Make Them Tools of War', *Washington Post*, 23 Sept. 1997.

548 See for example Jean-François Hugo, *La République Démocratique du Congo : Une guerre Inconnue*, op.cit.; Ephrem Libutu la Mboga, *Espoirs déçus en République Démocratique du Congo*, Paris : Harmattan, 2011.

549 See John Pomfret, 'Aid Dilemma: Keeping it from the Oppressor; UN Charities Find Crises make Them Tools of War', *Washington Post*, Sept. 1997.

Forces Démocratiques pour la Libération du Congo-Zaire (AFDL).⁵⁵⁰ The AFDL along with the Rwandan and Ugandan troops advanced quickly across the country until they marched into the capital Kinshasa and ousted Mobutu from power in May 1997. Then, the new government decided to change the country's name from Zaire to Democratic Republic of the Congo (DRC).⁵⁵¹ According to an Amnesty International report⁵⁵² during a seven-month war, tens of thousands of civilians were killed; women and girls were raped and thousands of children were forced to take active part in hostilities. Indeed, this period was marked by widespread attacks against the Tutsi and Banyamulenge population, principally in the eastern region of the country.⁵⁵³

A new conflict erupted in August 1998, when Laurent Kabila decided to separate with his allies, Rwanda and Uganda. Due to internal pressure from the population, Kabila ordered all foreign troops that brought him to power out of the country.⁵⁵⁴ In fact, when Kabila decided to purge Rwandan personalities from the government, two camps started to develop within the DRC. The locally called 'authentic Congolese' on one side and the Tutsi Rwandan and *Banyamunlenge*⁵⁵⁵ on the other side. This situation triggered the launch of new rebellion against the Kabila regime with the intention of ousting him.⁵⁵⁶ The rebellion movement was mainly composed of the *Rassemblement*

550 See Jean-François Hugo, op. cit.

551 Ibid.

552 See DRC reports entitled 'Deadly alliances in Congolese forests', AI Index: AFR 62/18/98, published on 15 May 1998.

553 See Minorities at Risk Project, Chronology for Tutsis in the Dem. Rep. of the Congo, 2004, available at: <http://www.refworld.org/docid/469f388115.html>

554 See International Crisis Group, Africa's Seven-Nation War, Democratic Republic of Congo, Africa Report No. 4, available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/004-africas-seven-nation-war.aspx>, accessed on 01 February 2013.

555 Banyamulenge are descendants of Rwandan migrants who had settled on the South Kivu Mulenge mountain during the colonial period. They took up arms alongside Kabila in 1996 to vindicate their rights to the Congolese citizenship.

556 See International crisis Group, North Kivu, into the Quagmire? An Overview of the Current Crisis in North Kivu, Africa Report No. 1, available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/001-north-kivu-into-the-quagmire-an-overview-of-the-current-crisis.aspx>, accessed on 01 February 2013.

Congolais pour la Démocratie (RCD) and *Mouvement pour la Libération du Congo* (MLC) in the eastern region⁵⁵⁷ was supported by Rwanda, Burundi and Uganda.⁵⁵⁸ While Rwandan, Burundian and Ugandan troops fought alongside the rebel groups, Kabila called on Zimbabwe, Namibia and Angola. Acting in the name of the Southern African Development Community (SADC), Angola, Namibia and Zimbabwe sent troops which stopped the rapid advance of rebels toward Kinshasa.⁵⁵⁹ Apparently, Chadian troops were also fighting alongside Congolese troops.⁵⁶⁰ Laurent Kabila also armed militias called *Mai-Mai*⁵⁶¹ and the Hutu *Interahamwe* to fight the rebels.⁵⁶² Given the numerous actors involved in the conflict, this war was referred to as the Congo Second War or the African World War.⁵⁶³ In 1999, the country was divided into three sections; the RCD had control over the eastern part of the country, MLC occupied northern DRC and the rest was controlled by Kinshasa. During this period, civilians were targeted and brutalized by all warrior parties. Amnesty International for example has noted that:

Many unarmed civilians were killed as a result of direct or discriminate attacks. Some of the victims were reportedly killed by government forces who suspected them of supporting armed opposition groups and their allies.

557 The rebellion movement incorporated former Mobutu politicians and army officers, Congolese Tutsis Banyamulenge and former FDLR leaders who had deserted and joined the rebellion.

558 Uganda and Rwanda were playing a key role behind the rebels groups. However, disagreement over the control of natural resources degenerated between Rwanda and Uganda and led to the clashes between Ugandan and Rwandan troops in eastern DRC. See <http://www.crisisgroup.org/en/publication-type/key-issues/research-resources/conflict-histories/dr-congo.aspx>, accessed 01 February 2013.

559 See <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>, accessed on 01 February 2013. This conflict was called 'African World War' by many commentators as it involved almost a dozen African countries.

560 Ibid. It has been argued that Libya and Sudan have also provided considerable support to Kabila.

561 Mai-Mai is a Congolese militia group active in the DRC since 1998. Both their name and origin is derived from anti-colonial uprisings in East Africa at the beginning of the XXth century. 'Mai' or 'Maji' is Swahili word meaning 'water' for these combatants were said to use it along with or other medicines to protect themselves against the enemy's bullets (or to turn the enemy's bullets into water). See James Giblin and Jamie Monson (eds.), *Maji Maji. Lifting the Fog of War*, African Social Studies Series, Leiden and Boston: Brill, 2010.

562 <http://www.hrw.org/reports/2000/drc/Drc005-01.htm>, accessed on 01 February 2013.

563 See <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>, accessed on 01 February 2013.

Many civilians were reportedly killed when government aircraft indiscriminately bombed areas in which there were high concentrations of unarmed civilians. Armed opposition groups and its allied foreign forces also deliberately killed and abducted unarmed civilians including many women.⁵⁶⁴

In fact, the involvement of several government armies and multiple militia groups led to the outbreak of several armed conflicts around the country, characterized by serious violations of international humanitarian law and human rights law.⁵⁶⁵ In this period, civilians who were believed to be Tutsis were persecuted across the whole territory of the country.⁵⁶⁶ In order to put an end to this conflict, a mediation was initiated by the SADC, led by Zambian President Frederick Chiluba, assisted by Tanzania President Benjamin Mkapa and Joaquim Chissano, President of Mozambique. The mediation culminated in a peace agreement in Lusaka (Zambia) on 10 July 1999.⁵⁶⁷ Signed between the major antagonists in the conflict, including the DRC, Rwanda, Burundi, Uganda, Angola, Namibia and Uganda, the agreement called for the immediate cessation of hostilities within, the withdrawal of foreign troops from the DRC, cessation of attacks against the civilian population and disarmament of militia forces. The agreement also contained a proposal for the deployment of a United Nations force in collaboration with the Organization of African Unity (OAU) to oversee the cease-fire.⁵⁶⁸

564 See Amnesty International Report 2000-Congo (Democratic Republic of the), 1 June 2000, available at: <http://www.refworld.org/docid/3ae6aa0e34.html>, accessed 31 August 2013.

565 See United Nations Human Rights, office of the High Commissioner, Report of the Mapping Exercise documenting the most serious violation of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003', August 2010.

566 Ibid.

567 Officially the war ended with the Lusaka Ceasefire Agreement of July 1999, which MONUC was initially designed and deployed to monitor, but widespread fighting continued. Additional agreements were signed, including the Sun City Agreement, the Pretoria Accord, and the Luanda agreement in 2002, which eventually led to the formal withdrawal of most foreign forces by mid-2003.

568 Lusaka ceasefire Agreement, available at <http://www.iss.co.za/a/af/profiles/drcongo/cdreader/bin/2lusaka.pdf>, accessed on 01 February 2013. See also <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/005-democratic-republic-of-congo-an-analysis-of-the-agreement-and-prospects-for-peace.aspx>, accessed on 01 February 2013.

The signing of the Lusaka ceasefire agreement was welcomed as a significant step in the resolution of the conflict in the Great Lakes region, particularly in the DRC. As Kofi Annan noted ‘the success of the Congolese parties and other governments involved in arriving at a peace agreement can be viewed as a major first step toward an eventual recovery...the international community and the United Nations should therefore do everything in their power to assist the Congolese government, parties, and people, as well as the other governments involved, in achieving a peaceful solution’.⁵⁶⁹

In August the agreement was endorsed by the two major rebel groups, namely RCD and MLC after having initially refused to sign.⁵⁷⁰ Despite the fact that the framework of the agreement was considered as complex and ambitious,⁵⁷¹ this was the first time since the beginning of the conflict that all belligerents agreed on the modalities of peaceful resolutions of the crisis. However the Lusaka agreement did not end the hostilities in the DRC, the fighting continued in the eastern provinces in which civilians accounted for the vast majority of casualties; women, children and other vulnerable groups were particularly targeted.⁵⁷²

On 16 January 2001, President Laurent Kabila was assassinated and his 29 year old son Joseph Kabila was appointed to assume presidency.⁵⁷³ Following the

569 UN Doc. S/1999/790, 15 July 1999.

570 International Crisis Group, DRC: An Analysis of the Agreement and Prospects for Peace, Africa Report no. 5, 20 August 1999, available at <http://www.crisisgroup.org/en/regions/africa/central-africa/dr-congo/005-democratic-republic-of-congo-an-analysis-of-the-agreement-and-prospects-for-peace.aspx>, accessed on 01 February 2013.

571 For example Joseph Kabila in his speech at the SADC meeting in 2002 argued that the Lusaka Agreement contained obstacles to its own implementation. See Joseph Kabila, « Allocution du Président de la République Démocratique du Congo au Sommet des Chefs d’Etats de la SADC », Blantyre, Malawi, 14 janvier 2002; Also see H. Weiss, ‘War and Peace in the Democratic Republic of the Congo’, available at http://www.unc.edu/depts/diplomt/AD_issues/amdipl_16/weis/weiss.

572 See UN Doc. S/RES/1265, 1999, 17 September 1999.

573 <https://www.cia.gov/library/publications/the-world-factbook/geos/cg.html>, accessed on 01 February 2013.

assassination of Laurent Kabila, peace talks were re-launched and led to Pretoria agreement signed on 30 July 2002 in South Africa.⁵⁷⁴ The Pretoria accords resulted in Rwandan and Ugandan troops' withdrawal from the DRC in late 2002. Although some progress was reported from both Kigali and Kinshasa,⁵⁷⁵ Kabila government did not manage to disarm the Rwandan Hutu rebels (FDLR) and Rwanda and Uganda continued to keep their influence in eastern DRC.

The new president Joseph Kabila however, agreed to the deployment of the United Nations Peacekeeping Mission to monitor the agreement. The International Congolese Dialogue held in Sun City led to the formation of a government of national unity composed of representatives of the former government's major armed groups, opposition political parties and civil society in July 2003.⁵⁷⁶ The Sun City peace agreement signed in South Africa in 2003 brought a significant security situation in the country which led to the first democratically presidential election in 2006.⁵⁷⁷ However, the agreement focused on stability at national level but failed to address several issues raised by local conflicts.⁵⁷⁸ The most serious consequences of this failure are by far in the eastern part of the country.

574 Ibid.

575 One of the significant actions of the Pretoria agreement signed between Rwanda and DRC to end hostilities was the implementation of the Joint Verification Mechanism signed on 22 September 2004 which aims to deal with the issue of the Interahamwe and the serious threats that they pose to the regional stability. Thus, in term to neutralize those negative forces, a Tripartite Joint Commission was established with the aim of disarming, demobilizing and repatriating foreign armed groups. Both Rwanda and DRC has shown interest in finding a solution on security matters as one writer observed: 'The governments of Rwanda and DRC cooperate on a wide range of issues, including on security matters. Rwanda helped facilitate dialogue between the Kabila government and some political groups in DRC on issues related to the 2006 elections. Moreover, Rwanda agreed to help find a political solution with General Nkunda, as requested by President Kabila'. See Ted Dagne, *The Democratic Republic of Congo: background and Current Developments*, Congressional research Service, 2010.

576 <http://www.crisisgroup.org/en/publication-type/key-issues/research-resources/conflict-histories/dr-congo.aspx>, accessed on 01 February 2013.

577 Ibid.

578 Ibid.

5.3 Conflicts in the eastern provinces

Despite several peace agreements in the DRC and relative stability, the situation remains extremely confused in the eastern region of the country, which has been the epicentre of violence since the conflict began and where numerous armed groups are still operating. While a relative stability prevails in a major part of the DRC, tensions remains very high in this region, particularly in North and South Kivus. This area has been the main theatre for confrontation between local warlords, national and even regional protagonists. This can be considered as an extension of the Rwandan, Burundian and Ugandan civil wars. According to a Human Rights Watch report, eastern DRC has seen a rise in inter-ethnic violence since the beginning of the conflict.⁵⁷⁹ In fact, insecurity stems from several militia groups, mainly in the South and North Kivu and Orientale province, along with the Rwandan Hutu militia of the Democratic Liberation Forces of Rwanda (FDLR), the Ugandan Lord' Resistance Army (LRA), the Burundian rebel group Forces de Defence de la Démocratie (FDD) and the M23 rebellion movement.⁵⁸⁰ However, much of the insecurity is also created by the FARDC itself, not only through military clashes with the militia groups but through harassment of the civilian population.⁵⁸¹

Following the agreement signed in Pretoria on 30 July 2002 in which Rwanda engaged to withdraw its troops from the DRC and Kabila government to disarm the Rwandan

579 See Human Rights Watch, Human Rights in the DRC, available at <http://www.hrw.org/drc>, accessed on 17 October 2013.

580 The leaders of Uganda's Resistance Army (LRA) have established their base in the Oriental province (North-Eastern Congo) where they continue to pose a regional threat to the civilian population. Grave violations against children and women committed by the LRA are frequently reported by many organizations. Despite the arrest warrant issued by the International Criminal Court against its leader Joseph Kony, the rebel groups remains actively operating in the DRC, the central African Republic, and South Sudan. For more information see 'Africa's Most wanted: Uganda, Sudan and Congo', *The Economist*, 3 June 2006.

581 For additional information see for example Monika Thakur, 'Demilitarising Militias in the Kivu (Eastern Democratic Republic of the Congo)', *African Security Review*, vol. 17, no. 1, Institute for Security Studies.

Hutu rebels (FDLR), some progress was reported from both Kigali and Kinshasa. However, despite the withdrawal of foreign troops from the Congolese territory due to the international community pressure, its presence and influence on the ground remained high. According to Human Rights Watch, Kigali has found an alternative to the withdrawal of its army by using a Congolese ally, the *Rassemblement Congolais pour la Democratie* (RCD). While several reports were accusing Kigali of being motivated by the exploitation of mineral resources in the region, Kigali maintained that there was a need to secure its borders as its security was threatened by *interahamwe* militias.⁵⁸² Kinshasa, on the other side continued to give military support to the *Mai Mai* militias in order to weaken Rwandan influence in the Kivus. However, Kinshasa appeared unwilling and incapable of disarming and neutralizing the Rwandan Hutu rebels (FDLR). Therefore, Kigali accused the Congolese government of fuelling the offensive and threatened to redeploy its troops into the eastern DRC to prevent the Rwandan Hutu rebels (FDLR) from infiltrating into Rwanda.

In 2004, rebel soldiers loyal to dissident General Laurent Nkunda, a former military officer of the *Rassemblement Congolais pour la Democratie* (RCD-Goma) and Colonel Jules Mutebusi, clashed with the FARDC in the city of Bukavu South Kivu's capital.⁵⁸³ Nkunda and his troops captured the town on 2 June 2004 after the ill-equipped Congolese troops decided to flee as they could not resist the thousands of rebels leaving the civilians population to defend themselves.⁵⁸⁴ Nkunda claimed he was attempting to prevent genocide against the *Banyamulenge* who were threatened by

582 See Global Issues, 'The Democratic Republic of Congo', available at <http://www.globalissues.org/article/87/the-democratic-republic-of-congo>, last accessed 31 August 2013.

583 See International Crisis Group, Africa Report No. 91, *The Congo's Transition is Failing: Crisis in the Kivus*, 30 March 2005.

584 See Berkman and Holt, 2006, p.164.

FDLR.⁵⁸⁵ He took advantage of the weakness of the state characterized by an ill-disciplined army, a lack of reliable security and total impunity.⁵⁸⁶ In fact, there was an anti-Tutsi sentiment in the eastern population. According to Human Rights Watch, several Tutsi civilians including women and children were killed by the national army and around 3,000 were forced to flee their home.⁵⁸⁷ This was followed by indiscriminate killings and the systematic rape of many women and girls was used as a weapon of war.⁵⁸⁸ The attack against Banyamulenge who had fled to Gatumba refugee camp in Burundi resulted in the killing of 160 civilians. Many of them were burned to death in their sleep. This also hardened General Nkunda's resentment that genocide against Tutsis was occurring.⁵⁸⁹

Under the auspices of Rwanda, an agreement was concluded between Kabila and Nkunda for the progressive integration of Nkunda's troops into the Congolese armed forces known locally as *mixage*.⁵⁹⁰ However, the agreement did not succeed as Nkunda was accused by his counterparts of betrayal and they threatened to stop supporting him.⁵⁹¹ This led to the collapse of the agreement in May 2007. The failure was quite evident since the agreement failed to address the local root causes of the conflict and to outline the modalities needed to neutralize the Rwandan rebel group

585 Interview with a FARDC official, Bukavu, 16 October 2012.

586 Ibid.

587 'DR Congo: War Crimes in Bukavu', Human Rights Watch Briefing Paper, June 2004.

588 See International Crisis Group, Africa Report No. 91, The Congo's Transition is Failing: Crisis in the Kivus, 30 March 2005.

589 Burundi's National Liberation Front (FLN) has claimed the responsibility for the attack. However, Nkunda continue to claim that the massacre was planned by the Congolese government. According to a United Nations Investigation conclusion, there were no sufficient elements that the killings were planned by the Congolese government.

590 International Crisis Group, 'Congo Bringing Peace to North Kivu', Africa Report no. 133, 31 October 2007.

591 Interview with M23 officials, October 2012.

Democratic Forces for the Liberation of Rwanda (FDLR) without putting the civilian population at risk.⁵⁹²

In the second half of 2008, violent fighting broke out between Laurent Nkunda militias called the National Congress for the Defense of the People (CNDP) and the DRC Armed Forces (FARDC) in the province of North Kivu⁵⁹³. Mai-Mai militias and Rwandan Hutu rebels (FDLR) were fighting alongside the Congolese troops. Many small towns were captured by the CNDP and the Congolese forces were defeated in many areas.⁵⁹⁴ The conflict claimed at least 150 civilians. After Mai-Mai militias defeated by the CNDP had retreated from the town of Kiwanja, some civilians who were suspected of being members or collaborators of the militias were systematically executed as they were suspected of supporting the Mai-Mai militias.⁵⁹⁵ The build up to the massacre started on 28-29 October, when the CNDP overcame government forces and took control of Kiwanja, followed by an attack on 4 November 2008 by pro-government Mayi Mayi militia. The CNDP regrouped and counter-attacked without giving prior warning to civilians. At roughly 5am on 5 November, the CNDP started its offensive and by roughly 2pm, had retaken Kiwanja while the Mai Mai fled to position nearby. The CNDP reportedly used weapons such as mortars and rockets during the offensive. Once in control of Kiwanja, the CNDP undertook a systematic reprisal operation against civilians, going from house to house through the Buturande and Mabungo districts in the centre of the town from late afternoon until the following

592 For more information see International Crisis Group, 'Congo Bringing Peace to North Kivu', Africa Report, no. 133, 31 October 2007.

593 International Crisis Group, Congo: Bringing Peace to North Kivu, Africa Report, No. 133, 31 October 2007.

594 For more information see Human Rights Watch report, 'Killing in Kiwanja': UN's inability to protect civilians', December 2008.

595 Ibid.

morning. By 6 November, some 150 people had been killed, most of them Nande and Hutu victims of unlawful killings by the CNDP.

According to the United Nations Commission on Human Rights, most of the killings were perpetrated by CNDP troops under the command of Colonel Sultani Makenga. As the UN High Commissioner for Human Rights Navi Pillay comments:⁵⁹⁶

The actions of the CNDP could well amount to war crimes or crimes against humanity, and are part of a self-perpetuating pattern of brutality in eastern DRC which continues to go largely unpunished. I am deeply concerned that members of the CNDP who may be implicated in these crimes - especially Bosco Ntaganda, against whom there was already an International Criminal Court arrest warrant - are either still at large, or have even been absorbed into the FARDC.

A recent episode of conflict in eastern DRC broke out in April 2012 when a group of soldiers who mutinied from the DRC national army created a rebellion movement called M23.⁵⁹⁷ According to M-23 officials, rather than effectively implementing the 23 March 2009 peace agreement, the Congolese government has instead only feigned the integration of the CNDP into political institutions.⁵⁹⁸ One of its leaders, Col. Makenga Sultani, argued that the mutiny was due to the failure of the Congolese

596 See Joint OHCHR/MONUC Human Rights Office in The DRC, Consolidated Report on Investigation Conducted by UN Joint HRO Into Grave Human Rights Abuses Committed in Kwanza North Kivu, in November 2008, available at http://www.ohchr.org/Documents/Countries/Kwanza_Report_September2009.pdf, accessed on 19 March 2013.

597 M23 refers to the date peace accords were signed 23 March 2009 between the Congolese government and the National Congress for the Defense of the People (CNDP), a rebel group led by Laurent Nkunda. Under the accords, former fighters were supposed to have been integrated into national army. But some of them say they were not treated fairly, and that the peace treaty was never fully put into effect. This was apparently the reason that pushed them to defect from the government army and to form the M23 movement. According to the UN Security Council's Group of Experts, M23 movement is believed to be supported by Rwanda and Uganda by providing it with arms, support and soldiers. However, both countries have strongly denied this allegation rejecting the veracity of the report. It should be also noted that Bosco Ntaganda who is now wanted by the international Criminal Court (ICC) is one of the officials of the M23 movement.

598 Interview with M23 officials.

government to implement the 2009 peace agreement and the grievances of former CNDP members and the Tutsi community into the Congolese army.⁵⁹⁹

Likewise the group appears to have only pretended to integrate into the Congolese army. The Journalist Colette Braeckman states that the former CNDP fighters had created an army within the army and that they refused to be ruled as the other regular FARDC soldiers. For example, they did not want to be removed from their eastern provinces to be sent to other parts of the country as was normally the case for the other battalions. Furthermore, some of their officers, such as Bosco Ntaganda, were suspected of atrocities and mass killings against the civilian populations.⁶⁰⁰

However, some commentators argued that this rebellion was created when, urged by the international community, Joseph Kabila demonstrated his willingness to arrest Bosco Ntaganda, who then decided to leave Goma along with his men and mutinied.⁶⁰¹ After heavy fighting against the Congolese troops the M23 grew in power and seized a part of North Kivu's territory in which it created its own administration and its own financing system. Meanwhile Mai-Mai groups were expanding in rural areas where they also committed atrocities that exacerbated inter-ethnic tensions.⁶⁰²

On 15 November 2012, heavy fighting broke out between the M-23 rebels and the Congolese army which led to the capture of Goma. According to the United Nation's group of experts, M-23 was backed by both Rwanda and Uganda with recruitment and ammunitions.⁶⁰³ However, Kigali and Kampala vehemently rejected the accusations.

599 Interview with the author.

600 See http://www.bbc.co.uk/afrique/region/2012/07/120711_rdc_ntaganda_portrait.shtml, accessed on 23 January 2013.

601 See <http://blog.lesoir.be/colette-braeckman/2012/07/16/limprudence-de-kinshasa-cest-davoir-voulu-demanteler-larmee-dans-larmee/>, accessed on 23 January 2013.

602 Ibid.

603 See UN. Doc. S/2012/348, 27 June 2012; UN.Doc. S/2012/843, 15 November 2012.

It should be noted that there was no consensus among the Security Council members about the alleged support of Rwanda and Uganda to the M-23 rebels. Apparently, the Council was divided due to political, economical and diplomatical interests of its members in the Great Lakes region.⁶⁰⁴

5.4 The effects of the conflict on the civilian population

The continuing DRC crisis which has claimed five million lives has been devastating for the civilian population who are systematically targeted by all protagonists of the conflict.⁶⁰⁵ Widespread and systematic sexual violence against women, abduction, killings, torture, arbitrary detention, extra judiciary executions and other atrocity crimes form part of everyday life of the population, particularly in eastern DRC.⁶⁰⁶ A report produced by a United Nations expert group in 2010 has shown evidence of serious violation of human rights and humanitarian law allegedly committed by all parties in the conflict. In this report, the experts state that armed groups such as the Lord's Resistance Army (LRA) and the Democratic Force for the Liberation of Rwanda (FDLR) had committed atrocities to the civilian population which amount to grave breaches of international humanitarian law and in some instances may constitute crimes against humanity.⁶⁰⁷ They also found that members of the Congolese force (FARDC), the National Police, the National Intelligence and other armed groups are

604 Interview with a French Diplomat, January 2013.

605 See for example, Anna Maeld, 'Rape as Weapon of War in the Eastern DRC? The Victim Perspective', *Human Right Quartely*, vol. 33, No. 1, February 2011, pp. 128-1476; T. Paul Cox, 'Farming the Battlefield: The Meanings of War, Cattle and Soil in South Kivu, DRC'; Jon Lunn, 'The African Great Lakes Region: An End to Conflict?' *International Affairs and Defense Section*; Human Rights Watch, 'You Will be Punished', *Attacks On Civilians In Eastern Congo*, Dec.2009; Jeffrey Gettleman, Congo: 'UN's Crowning Failure'; *Peacekeepers Incapable of Protecting Civilians From Sexual Violence*, *International Herald Tribune*, 5 Oct. 2010.

606 See UN. Doc. S/RES/2053, 2012, 27 June 2012.

607 Second Joint Report of seven United Nations Experts on the Situation in the Democratic republic of Congo, A/HRC/13/63, 8 March 2010.

also responsible for sexual violence, summary execution, torture and ill-treatment, abduction and use of children as soldiers, and pillage.⁶⁰⁸

The conclusions of several other studies on human rights violations in eastern DRC including this author, after research and interviews conducted in North and South Kivus with eyewitnesses, survivors, local authorities, representatives of international and national NGOs follow the same pattern. While crimes under international human rights and humanitarian law have been and continue to be committed on a large scale by armed groups and the Congolese army, this author focuses on specific cases of serious violations that illustrate that this conflict is one of those that R2P was designed to address.

5.4.1 Rape and other forms of sexual violence

Heavy fighting in the DRC occasionally makes the news, but systematic and widespread crimes against humanity simmer below surface. Congolese women and girls in particular bear the vicious brunt of this crisis. Without question, eastern Congo right now is the worst place in the World to be a woman or a girl- perhaps ever. Sexual violence and rape occur on a scale seen nowhere else on earth. Violence against women is intended to mutilate and humiliate. Rape as a weapon of war –defined by the United Nations as a war crime-is causing the near total destruction of women, their family and their communities.⁶⁰⁹

Unfortunately, the above statement made five years ago continues to be the reality today. In recent years, many reports of women and girls who have been raped in eastern DRC have gained attention from the media and the international

608 Ibid.

609 See Enough, 'Congressional Human Rights Caucus Briefings on the Democratic Republic of Congo', March 6, 2008, available at <http://www.enoughproject.org/publications/congressional-human-rights-caucus-briefing-democratic-republic-congo>.

community.⁶¹⁰ In fact, the DRC conflict is particularly characterized by systematic use of rape and sexual assault allegedly by all armed forces. It is in this context that DRC has been described as the 'rape capital of the world'⁶¹¹ and the worst place in the world to be a woman or girl.⁶¹² While some sources reveal the rape of men,⁶¹³ rape forms part of the daily reality for women in eastern DRC, where tens of thousands of women and girls have been raped since the beginning of the conflict.⁶¹⁴ Since armed groups are using rape as a weapon of war,⁶¹⁵ women and girls are paying a heavy price in this conflict in which sexual violence has reached an epidemic level⁶¹⁶ causing the near total destruction of hundreds of thousands of women and girls of all ages.

It should be noted however, that massive sexual violence in the eastern DRC had been documented or reported only to a limited extent and that the existing statistics on sexual violence are far from reflecting the reality. It is indeed difficult, if not impossible, to collect data on the number of victims of widespread sexual and gender-based violence in the DRC.⁶¹⁷ One of the main reasons is that in addition to the fact

610 See Anaia Bewa, Marie-Louise Eagleton, Claudine Lumamba, Lina Piripiri, Marion Pratt and Leah Werchick, *Sexual Terrorism: Rape as a Weapon of War in Eastern Democratic Republic of Congo: An Assessment Of Programmatic Responses to Sexual Violence in North Kivu, South Kivu, Maniema, and Orientale Provinces*, USAID/DCHA assessment report, January 9-16, 2004, see http://pdf.usaid.gov/pdf_docs/PNADK346.pdf, accessed on 18 February 2013.

611 Margo Wallstrom, UN Special Representative on Sexual Violence in Conflict, quoted in *Top UN Official Calls DR Congo 'Rape Capital of the World'*, Agence France Presse, April 27, 2010.

612 Rebecca Feely and Colin Thomas-Jensen, *Getting Serious About Ending Conflict and Sexual Violence in Congo*, Enough Strategy Paper, March, 12, 2008.

613 See for example <http://www.rue89.com/2011/08/02/viols-au-congo-le-jour-ou-ils-ont-fait-de-moi-une-femme-216257>, accessed on 23 January 2013.

614 See Human Rights Watch, *'Soldiers who Rape, Commanders who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo'*, New York, Human Rights Watch, 2009.

615 The Secretary-General, *Report of the Secretary-General on Children and Armed Conflict*, delivered to the Security Council and the General Assembly, U.N. Doc. S/2000/712, A/55/163, 19 July 2000.

616 See for example L. Addario and S. Egan, *'Legacy of War: an Epidemic of Sexual Violence in DRC'*, November 2008, available at <http://www.unfpa.org/public/News/pid/1399>; Wairagala Wakabi, *'Sexual Violence increasing in Democratic Republic of Congo'*, *The Lancet*, vol. 371, no. 9606, January 2008, pp. 15-16; Emily Wax, *'A Brutal Legacy of Congo War; Extent of Violence Against Women Surfaces as Violence Recedes'*, *Washington Post*, October, 25, 2003.

617 According to the United Nations Population Fund statistics, 13, 404 case of sexual violence have been registered in 2006; 13,247 in 2007; between 14,245 and 15,996 in 2008, and 17,507 cases in 2009, see

that victims of sexual violence are profoundly affected by the physical and psychological effects of such inhumane treatment, shame prevents large numbers of them from reporting the attacks.⁶¹⁸ Others live in silence, unable to share their painful memories out of fear that they will be rejected by family members. In many cases, victims have a fear of being stigmatised.⁶¹⁹ As Furaha, a survivor, told the author:

I was raped by five men who took me to the bush where I became their sex-slave. They kept me in the forest fifteen months and raped me every day at any time they wanted. I got pregnant but they kept raping me. One day I lost consciousness after being raped by eleven of them and I miscarried the baby. They abandoned me in the middle of the forest. Since then I feel ashamed and I cannot go back to my family, I remain outside in the street.⁶²⁰

In the DRC, being raped is often considered as a shame for the family.⁶²¹ Victims of sexual violence are subjected to being socially outcast, therefore, girls who have been raped have little prospect of getting married as they are accused of not having resisted enough.⁶²² Women who are raped are frequently rejected by their husbands and families in general, and children who are born as a result from rape are rarely accepted in the society to extent that some of them are slaughtered to stop a new breed in the community.⁶²³ As Rehema told this author:

Delphine Schrank, Democratic Republic of Congo in *The Responsibility to protect: The promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2011, p.331.

618 Interview with NGO staff, Bukavu, 15 October 2012.

619 Women sexually assaulted by members of one rebel organisation are accused of being the wives of that group and raped again as punishment when a new militia take over the area. See also Jocelyn Kelly, *Rape in War: Motives of Militia in DRC*, U.S. Institute of Peace, Special Report 243, June 2010, p. 10.

620 Interview with a victim, Goma, September 2012.

621 Interview with NGO staff, Bukavu 17 October 2012.

622 For example during the interview, one of the victims said that she was raped by 13 armed soldiers after the village was attacked. She was living with her parents and two brothers. One night, people with guns and knives came to her house. They forced open the door. Ten men gang raped her mother after they killed her father and two brothers. She was raped and badly injured as those men inserted knives and bottles into her vagina. She and her mother had no money to go to the hospital. She said that people were disgusted by her smell which was terrible. She felt like she was not a human being as she was destroyed and her femininity was destroyed. She said she prefers death to being in such a situation.

623 Abortion is illegal in the DRC, and the capacity of adoption of these unwanted children is quasi inexistent.

I was coming from the school when a group of men in military uniforms speaking Kinyarwanda forced me to go to the bush with them. After being repeatedly raped, I got pregnant and they left me go after few months as I could not walk a long distance with them. I was praying God that I want to die instead of having this baby. I went back to my village but I was not accepted, by neither my family nor my neighbours. I could not go back to school. Everybody abandoned me saying that I am carrying an evil in my womb. I gave birth to a baby boy but I am stigmatized because I am a mother of a 'Satan'.⁶²⁴

Another factor which contributed to the lack of empirical data on widespread sexual violence committed by armed groups in the DRC is the fact that most of the cases of sexual violence take place in villages far from the city where victims do not have access to medical facilities. Almost half of the victims who were interviewed by this author stated that they were attacked on their way to a farm, collecting firewood or travelling to school or to market.⁶²⁵ However, one thing is clear: almost all of the studies agreed that widespread sexual violence is perpetrated on women in eastern DRC on a large scale.⁶²⁶ In some cases, armed groups raped women in their homes at night in the presence of their children and husbands. One survivor, Safi, told this author:

When the attack occurred, I was with my husband and our seven children. They took me while I was breastfeeding my 2month-old baby. They took away my baby and asked my husband to tie a cord around his neck or he will be killed. My husband told them he would not do that. As he resisted, they stabbed him to death, opened his stomach and they forced us to eat his intestines. As we were crying and screaming they ordered us to shut up and asked us to open the mouth and forced us to eat the intestines.

624 Interview with a victim, Walungu, October 2012.

625 Interview with survivors, Bukavu, 16 October 2012.

626 See for example Kirsten Johnson et al., Association of Sexual Violence and Human Rights Violations with Physical and Mental health in Territories of the Eastern Democratic republic of the Congo, 304(5) JAMA 553-62, 2010; Anna Maedl, 'Rape as Weapon of War in the Eastern DRC?: The Victim's Perspective', Human Rights Quarterly, vol. 33, no. 1, February 2011, pp. 128-147.

Then they took my 12 years old daughter and I and gang-raped us in the presence of my other children, and forced my two sons 16 and 14 year old to hold our legs while they raped us. Following this, we was brought to the hospital where we were re-animated as they left as quasi-dead and my daughter internal genital organs were severely damaged. Today we are alive but destroyed, in addition to the incontinence and the HIV as consequences of this nightmare, I feel ashamed.⁶²⁷

Nevertheless, a study conducted by the United Population Fund reveals that an estimated 160 women are raped every week in North and South Kivu provinces. The same study has found that 15,996 cases of rape had been reported in 2008.⁶²⁸ Another study has found that 50,000 rape cases were registered in 2006 in nearly half of the health centre in the DRC.⁶²⁹

Based on the allegations of the victims of sexual violence,⁶³⁰ all of the attacks are directly linked to the armed conflict and all armed groups operating in eastern DRC are involved. However, most of the cases of rape with extreme sexual violence are attributed to '*Interahamwe*'⁶³¹ and *Mai-Mai* groups. Indeed, many survivors have had foreign objects such as firearms inserted in their vaginas and some have had their sexual organs mutilated by knives or machetes.⁶³² As a result of the trauma, serious complications such as fistula, which can cause uncontrollable mixed urine and faecal materials, are common.⁶³³ Many interviewed women were badly injured to the extent

627 Interview with the author, Bukavu, November 2012.

628 Human Rights Watch, *Soldiers who Rape, Commanders who Condone*, New York, 2009, available at <http://www.hrw.org/reports/2009/07/16/soldiers-who-rape-commanders-who-condone>, last accessed on 18 February 2013.

629 Tara Gingerich (JD, MA) and Jennifer Leaning (MD, SMH), *The use of Rape as a Weapon of War in the Conflict in Darfur, Sudan*, Prepared for USAIDS, 2004, available at <http://www.physiciansforhumanrights.org/library/report-2004-oct-darfurrape.html>.

630 During the interviews, participants were asked in detail about the perpetrators. The questions included their uniform, the language they spoke and their armament. See the Annex.

631 Rwandan Armed Group which fled to the DRC after carrying out the Rwandan Genocide in 1994.

632 Ibid.

633 A girl met at Panzi Hospital in Bukavu, the only hospital specialized in such trauma in south Kivu, told the author that her vagina was totally destroyed and that she will not be able to have children.

that they required reconstructive surgery and many have contracted HIV.⁶³⁴ However, the unavailability of medical services leaves most of the victims without treatment.⁶³⁵

In one such situation, a 45 year old female survivor, who was held in the bush and gang raped for 5 months, described her ordeal to this author. She recounted how she was forced by the armed groups to watch the slaughter of her four daughters and her husband after the latter has refused to rape his own daughters.⁶³⁶ This highlights the fact that in many areas in such situations, armed forces use rape as means of terror to the society. Apparently, most of the attacks during military operations have been motivated by the combatants' desire to terrorise and to humiliate the local population.⁶³⁷ As Major General Partick Cammaert, the former commander of the UN peacekeeping force in eastern DRC, who had personally witnessed the destructive power of the rape on the population, comments: 'It is a very effective weapon, because the communities are totally destroyed. You destroy communities. You punish the men, and you punish the women, doing it in front of the men'.⁶³⁸

In addition to the physical trauma, victims are also psychologically destabilized. According to Dr Mukwege, the renowned gynaecologist at Bukavu Panzi hospital who is taking care of the victims of sexual violence, some parents who witnessed their young children being raped live in extreme suffering as they feel guilty that they were

634 Interview with survivors, Bukavu, 16 October 2012.

635 Most of the victims do not have access to treatment as in Eastern DRC, there are only two referral hospitals which have resources to treat women who are suffering from trauma and infection caused by violent rape. Moreover, many women who have been raped are from the rural areas where health centres have not staff specialised in such trauma.

636 Interview with a Survivor, Bukavu, 16 October 2012.

637 Interview with Women for Women International.

638 Maj. Gen. Patrick Cammaert, former UN Peacekeeper to BBC News, available at <http://www.news.bbc.co.uk/2/hi/7464462.stm>, accessed 02 September 2013.

not able to protect their own children.⁶³⁹ Despite these injuries and psychological trauma, only 20 per cent of victims reported receive medical and psychosocial assistance.

Given the scale and gravity of inhuman acts committed on women and girls in eastern DRC highlighted in this study, it can be argued that sexual violence and rape forms part of a military strategy in the DRC conflict. There is no doubt that these widespread and systematic sexual violence are crimes under international law which R2P was designed to address.⁶⁴⁰ This means that the widespread and systematic attacks against the civilian population in eastern DRC could amount to crimes against humanity, which may trigger the application of R2P.

5.4.2 Characteristics of the crimes and the perpetrators

When analysing the data with a focus on the characteristics of the crimes, we found that sexual violence and rape form part of military strategies in eastern DRC and that they are systematic and widespread. In the interviews, victims were asked about their experiences during the attack. Participants were aged between 18 and 82 years. Of the 80 victims interviewed, 97 per cent reported they were raped and beaten; 80.0 percent were gang raped; 63.7 per cent were raped many times; 28.8 per cent have witnessed killings generally or more specifically of family members and 87.5 per cent were attacked with their relatives. All the perpetrators were described by the participants as being members of an armed group wearing military uniform. 81.3

639 Dr Denis Mukwege is the founder of Panzi Hospital in Bukavu South Kivu. The hospital is known for the treatment of survivors of sexual violence. He left Bukavu in October 2012 after an assassination attempt on him but he has since returned.

640 Rape and other forms of sexual violence during armed conflict are prohibited under the Geneva Conventions and their Additional Protocols.

percent were identified as Swahili and Lingala speakers and 86.4 were described as having a Rwandan background. As to perpetrators strategies, most of the participants' narratives revealed that most of the cases of sexual violence take place in villages far from the city and that women and young girls are attacked and abducted on their way to farm, to school or to market. Participants' accounts also demonstrate that rape is used to terrorise and to humiliate the local population as in many cases, women were raped in their homes in the presence of their children and husbands.

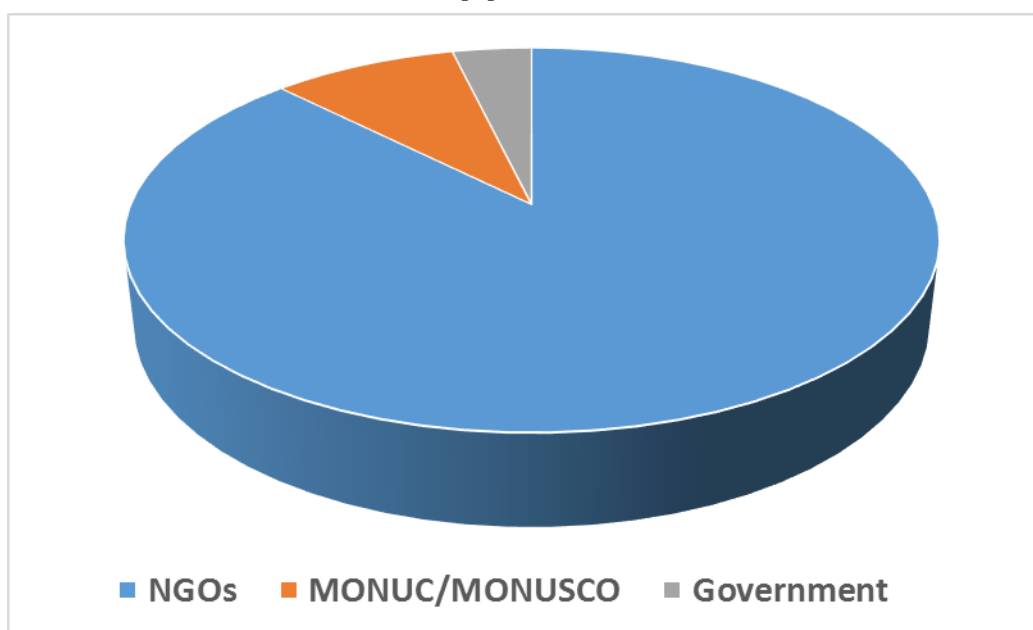
Experiences during the attack	Number of responses (nb)	Percentages (%)
Beaten	78,0	97.5
Raped	79,0	98.7
Witness Killings	23,0	28.8
Raped many times	51,0	63.7
Gang group	64,0	80.0
Military Uniform	80,0	100.0
Civilian clothes	4,0	5.0
Swahili/Lingala	65,0	81.3
Kinyarwanda	69	86.4
Attacked with their relatives	70,0	87.5

5.4.3 Summary

These findings are instructive: it suggests that atrocities committed on the civilian population, particularly women and girls in the DRC, are widespread and may amount to war crimes and crimes against humanity which may trigger the application of R2P. Additionally, victims' accounts revealed that most of the atrocities were committed by different armed groups operating in eastern DRC and provide information about strategies and tactics used by the perpetrators. Furthermore, victims narratives show that most of the attacks occurred between 2008 and 2013. Remarkably, despite the

adoption of R2P in 2005, the civilian population in the DRC continue to face mass atrocities. It is therefore not surprising that from the victims perspective, the international community did not do enough to protect them. Only 10 per cent said the presence of MONUC troops was helpful or very helpful, and 55 per cent said it was not helpful at all. Although, most victims – 85 per cent – were satisfied with the NGOs’ support. However, when asked about the government support after the attack, 80 percent said that the government did not take enough measures to protect them and that the crimes perpetrated against them have gone unpunished. All victims spoke about reparation and compensation. They raised the issue that their lives have been seriously damaged and that the government must acknowledge this. In fact, the obligation to provide reparation and compensation to victims of serious human rights violations has become part of international law. In this regard, the possibility given to victims in terms of reparation under the Rome Statute of the ICC was a considerable innovation in the history of international justice. The issue of compensation and reparation will be discussed in depth in chapter six.

Pie chart: Available support after the attack



5.4.4 Grave violations against children by all parties to the conflict

The worsening plight of children affected directly or indirectly by the conflict is one of the major challenges that the DRC and the international community is facing today. These include; child combatants, displaced children, unaccompanied children, and victims of atrocities.⁶⁴¹ In fact, the endless conflict in eastern DRC has destroyed the lives of thousands of children, forcing them into poverty and onto the streets where they are facing different and difficult situations such as forced prostitution, labour exploitation and prison.⁶⁴² Given the fact that there are only a limited number of IDPs camps in the eastern DRC, the number of street children has increased significantly, particularly in the cities of Goma and Bukavu as a result of continued fighting.⁶⁴³ Therefore, displaced children have no access to basic needs like shelter or food, which makes them more vulnerable to join armed groups.⁶⁴⁴ In this context, children are at risk of violations of their security and rights, particularly forced recruitment into armed forces. Local militias and even official troops are taking advantage of this situation as it is very easy to mobilize children in such precarious situations. One former child soldier told the author that it was a chance for him to be recruited as he could use the power of the gun to get food and improve his living conditions. He said that when his family fled into forests he and his sisters and brothers were suffering from malnutrition, food insecurity, unsanitary living conditions and others problems.⁶⁴⁵

The litany of violations against children's security and rights in eastern DRC is shocking. Typical violations, most often committed with impunity, include systematic

641 See Annual Report of the UN Secretary General on Children and Armed Conflict, Security Council, S/2007/757, 21 December 2007.

642 Civil society reports, Sud- Kivu, 2007-2008.

643 Interview with a WHO staff member, Goma, 4 November 2012.

644 Interview with civil society organisation, Goma, 6 November 2012

645 Interview with a former child soldiers in the DRC.

rape, abduction and recruitment or use of children as soldiers, sexual torture, illegal arrest and detentions, and other extreme forms of torture and cruelty.⁶⁴⁶ For example, some children are obliged to witness the rape or the killing of their parents and young girls are raped in the presence of their family members.⁶⁴⁷ Also, they are forced to kill their close relatives including their parents with the idea that such acts will make them strong to become a brave soldier who cannot think of returning home.⁶⁴⁸ Forcing children to witness crimes against their parents has been reported to be part of the initiation of children as combatants.⁶⁴⁹

The recruitment process in most cases is done through abduction, manipulation or force.⁶⁵⁰ Given the fact that government troops are ill-disciplined and ill-equipped, children are recruited to face heavy attacks launched by armed groups. This was, for example, the case in the Goma crisis where a campaign was initiated by Congolese soldiers to defend the city when threatened by the CNDP rebels in 2008.⁶⁵¹ According to the United Nations, at least 264 civilians, including 83 children, were arbitrarily executed by armed groups in more than 75 attacks between April and September 2012 in Masisi in the North Kivu province.⁶⁵²

As mentioned earlier, the DRC conflict is marked by the widespread use of children as combatants by all protagonists involved in the conflict to the extent that the country has been described as one of the countries in the world where the phenomenon of

646 Interview with a UNICEF staff member, Goma 5 November 2012.

647 Interview with NGO staff, Goma, 4 November 2012.

648 Interview with demobilized child soldiers, Bukavu, October 2012.

649 Interview with local actors, Bukavu, 18 October 2012.

650 Ibid.

651 Interview, with UN staff, Goma, 4 November 2012.

652 Report of the UN Joint Human Rights Office, available at <http://reliefweb.int/report/democratic-republic-congo/report-united-nations-joint-human-rights-office-human-rights>, accessed on 07 February 2013.

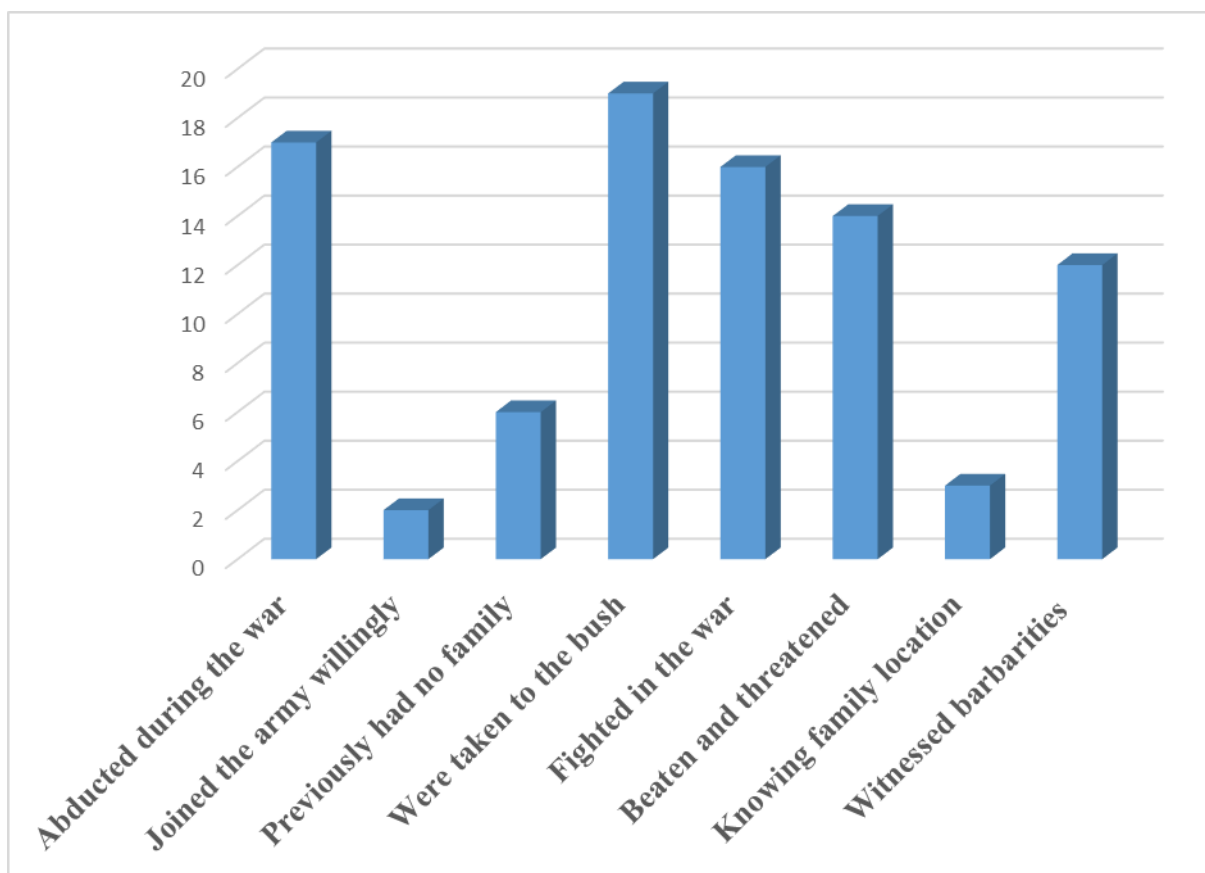
child soldiers is most common.⁶⁵³ Despite the signing of an Action Plan and the commitment of the DRC government to end the recruitment and use of children by Congolese armed forces and the security services, the wave of child recruitment and use by armed groups continue in eastern DRC.⁶⁵⁴ A recent report of the UN Secretary-General on Children and Armed Conflicts highlights the fact that the resurgence of fighting between M23 and the government forces has increased the scale of violations against civilians by a variety of armed groups including systematic recruitment and the use of children.⁶⁵⁵ It further shows that these children are facing indescribable violence including murder, rape, torture, and cruel, inhuman and degrading treatment, and are deprived of all their rights.

653 See Child Soldiers International, *Child Soldiers Global Report 2008 - Congo, Democratic Republic of the*, 20 May 2008, available at: <http://www.refworld.org/docid/486cb0f5c.html>

654 On 4 October 2012, the government of the DRC and the UN officially committed to ending violence against children particularly the recruitment and use by armed groups in armed conflict with reference to sexual violence. See <http://watchlist.org/wordpress/wp-content/uploads/FINAL-Discussion-Paper-Action-Plans.pdf>, accessed on 30 September 2013.

655 See UN Doc. A/67/845.

Graph I. Former child soldiers experiences on the conflict



5.4.5 Summary

This research sheds light on how children in eastern DRC are at risk and are currently facing mass atrocity crimes. While the fact that the ICC has found Thomas Lubanga guilty of the war crime of enlisting and conscripting children under 15 and using them in hostilities is a significant step towards ending impunity for such crimes, the lack of accountability for political and military leaders responsible for grave violations committed against and by the child soldiers under their control remains of concern. Since protecting children from the ravages of war is a legal responsibility and a moral imperative, it is clear that the DRC government bear the primary duty to protect Congolese children not only by affording them adequate security but also to ensure

that perpetrators of violation of human rights and humanitarian law are duly prosecuted.⁶⁵⁶ Therefore, implementing R2P in order to prevent and to address grave violations perpetrated against children in DRC requires the Congolese government to fulfil its protective duty vis-à-vis its population by addressing the issue of: recruitment and use of children as combatants; rape and other forms of sexual violence against them; abduction and killing of children; denial of access to basic needs like shelter, food and school.

Most significantly, this study reveals the challenges that both DRC and the international community have to face in order to shape practical responses to humanitarian crises in Eastern DRC. While R2P discourses put an emphasis on situations where the civilian population are at risk, or are currently facing mass atrocity crimes, its positive effects and outcomes for victims appear to be modest in this case. Thus, when absorbing the findings of this research, they are simultaneously surprising and expected. They are expected because previous studies which have been conducted on the impact of armed conflict on civilians in DRC have reached the same alarming conclusions that the civilian populations are paying the highest price in the conflict.⁶⁵⁷ However, the results of this study are surprising because in most of the studies on R2P, emphasis was put on the role of states in implementing R2P while this research has given voice to those who need protection (victims/survivors) which

656 The legal foundation for protection of children in armed conflict is enshrined in the four Geneva Conventions (1949), Additional Protocols to the Geneva Conventions (1977), Rome Statute of the International Criminal Court (1998), Customary International Humanitarian Law, Convention on the Rights of the Child (1989) and its Optional Protocols (2000), UN Declaration of Human Rights (1948), International Covenant on Civil and Political Rights (1966), Regional Human Rights Instruments, International Jurisprudence (Case-law of the ICTY, ICTR and Special Court for Sierra Leone, case-law of the ICC and ICJ), and UN Security Council Resolutions on children and armed conflict.

657 See for example Harvard Humanitarian Initiative, 'Now, The World Is Without Me': An Investigation of Sexual Violence in Eastern Democratic Republic of Congo, April 2010, available at <http://hhi.harvard.edu/sites/default/files/publications/hhi-oxfam%20drc%20gbv%20report.pdf> ; IPSOS and ICRC, 'Our World; View From the Field, Democratic Republic of the Congo. Opinion Survey and in-Depth Sexual Research', 2009, available at <http://www.icrc.org/eng/assets/files/other/drc.pdf>

allowed to gain insight into the impact of R2P on the day-to day lives of the victims. This may help to persuade policy makers to take concrete measures that directly affect the victims of mass atrocities.

5.5 The DRC government's responsibility to protect its population

The DRC stands as a good example of a situation where the government has failed to give effective protection to its citizens against massive violations of human rights. The protection of civilians is one of the fundamentals of international law. As demonstrated in part I of this work, protection of civilians is based on the assumption that every state has an international obligation to guarantee certain basic rights to their nationals. In fact, DRC is party to the main human rights treaties, including the International Covenant on Civil and Political Rights (ICCPR),⁶⁵⁸ the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW),⁶⁵⁹ and the Convention on the Rights of the Child (CRC).⁶⁶⁰ The Congolese government must therefore comply with the requirements set out in those international legal instruments regarding state obligation to protect human rights. Article 2 (1) of the ICCPR states:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.⁶⁶¹

658 Available at <http://www2.ohchr.org/english/law/ccpr.htm>, accessed on 03 February 2013.

659 Available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>, accessed on 03 February 2013.

660 Available at <http://www2.ohchr.org/english/law/crc.htm>, accessed on 03 February 2013.

661 Article 2(1) of International Covenant on Civil and Political Rights, available at <http://www2.ohchr.org/english/law/ccpr.htm>, accessed on 03 February 2013.

The DRC is also one of the states party to the Geneva Convention and the Rome Statute of the International Criminal Court. Pursuant to Article 7 of the Rome Statute,⁶⁶² a crime against humanity means any of the following acts when committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack:

- (a) Murder;
- (b) Extermination;
- (c) Enslavement;
- (d) Deportation or forcible transfer of population;
- (e) Imprisonment or other severe deprivation of physical liberty in violation of fundamentals rules of international law;
- (f) Torture;
- (g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity;
- (h) Persecution against any identifiable group or collectivity on political, racial, national, ethnic, cultural, religious, gender as defined in paragraph 3, or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court;
- (i) Enforced disappearance of persons;
- (j) The crime of apartheid;
- (k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

Accordingly, rape and other acts of sexual violence committed on women and girls in the eastern DRC are sufficiently widespread and systematic, which amount to war crimes and crimes against humanity as defined under international humanitarian law and the Statute of the International Criminal Court. Furthermore, the statutes of the

⁶⁶² Article 7 of the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm, accessed on 03 February 2013.

ICTR, ICTY and the SCSL explicitly cite rape and sexual abuse as war crimes and crimes against humanity.⁶⁶³ Also in the *Akayesu*⁶⁶⁴ and *Musema*⁶⁶⁵ cases, the International Criminal Tribunal for Rwanda recognized rape to be a crime against humanity. Moreover, describing the deliberate use of rape as a tactic in war, the Security Council in its Resolution 1820 (2008) has emphasized that 'rape and other forms of sexual violence can constitute a war crime, a crime against humanity, or a constitutive act with respect to genocide'.⁶⁶⁶ As demonstrated earlier, the author has identified repeated sexual attacks against women and girls as widespread and systematic in the region, which are deliberately used by armed groups as weapon of war. In this regard it is clear that the eastern DRC case falls within R2P since the norm applies to conflict in which mass atrocities are systematic and widespread.

Furthermore, Common Article 3 of the Geneva Convention applies to non-international conflict and describes minimal protection to persons taking no active part in hostilities.

The provisions of Common Article 3 provide that:

In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each Party to the conflict shall be bound to apply, as a minimum, the following provisions:
(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith, sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

663 See Statute of ICTY, art.2 and Art. 5 (g); ICTR art. 4 (e) and art. 3 (g); SCSL art. 3 (e) and art. 2 (g).

664 Prosecutor v. Jean Paul Akayesu, International Criminal Tribunal for Rwanda, case No. ICTR-96-4-T, 2 September 1998.

665 Prosecutor v. Musema, International Criminal Tribunal for Rwanda, 2000.

666 UN Security Council, Security Council Resolution 1820, 2008 on acts of sexual violence against civilians in armed conflict, 19 June 2008, S/RES/1820, 2008, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N08/391/44/PDF/N0839144.pdf?OpenElement>, accessed 02 September 2013.

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
 - (b) taking of hostages;
 - (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
 - (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.
- (2) The wounded and sick shall be collected and cared for.
 An impartial humanitarian body, such as the International Committee of the Red Cross, may offer its services to the Parties to the conflict.
 The Parties to the conflict should further endeavour to bring into force, by means of special agreements, all or part of the other provisions of the present Convention.
 The application of the preceding provisions shall not affect the legal status of the Parties to the conflict.⁶⁶⁷

As previously mentioned, the principle of discrimination has frequently been violated by both Congolese forces and their allies who did not consider it their obligation to distinguish between civilians and combatants. Several reports⁶⁶⁸ have shown that all warring parties to the conflict in the DRC had violated their obligation under international humanitarian law. In the interviews with the author, FDLR and *Mai-Mai* were described as the main perpetrators of killings and rape.⁶⁶⁹ However, the FARDC, the Congolese army was also cited as a perpetrator of the more frequent abuses including rape, killings and abduction.⁶⁷⁰ Consequently, the DRC must ensure that all individuals within its territory adhere to the provisions of the Common Article 3 to the Geneva Convention.⁶⁷¹ In addition, intentionally directing attacks against the civilian

667 Common Article 3 of the Geneva Convention.

668 For more information see 2010 Country reports on Human Rights practice, available at <http://www.state.gov/documents/organization/160453.pdf>, accessed on 07 February 2013.

669 Interview with survivors, Kabare, 17 October 2012.

670 Interview with civil society agency, Bukavu, 15 October 2012.

671 In the case of armed conflict not of an international character occurring in the territory of one of the High Contracting Parties, each party to the conflict shall be bound to apply, as a minimum, the following provisions: (1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed 'hors de combat' by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, colour, religion or faith,

population or against persons taking no active part in the hostilities are clearly defined as war crimes under Article 8 (2) of the Rome Statute.

The R2P framework implies that sovereign states and international community share the responsibility to protect civilians from war crime, ethnic cleansing, genocide and crimes against humanity. Accordingly, individual states should understand that sovereignty is not anymore a privilege but a responsibility to protect their population. The primary responsibility lies on a state but when a given state fails to do so, the international community has to intervene in order to protect the civilian population.

The situation of civilians in the eastern part of the Democratic Republic of Congo (DRC) highlights the deficiency of the Congolese government in this aspect. As to the responsibility to provide security to its population, the Congolese government has failed since its security institutions are characterized by a lack of control and transparency over weapons, munitions and related equipment. This, in a climate of widespread corruption and impunity, makes theft and diversion of weapons and ammunition easier. Such a situation results in the persistent misuse of such arms by soldiers, police and armed groups to commit and facilitate serious violations of international human rights and humanitarian law. Lack of political will to challenge

sex, birth or wealth, or any other similar criteria.

To this end, the following acts are and shall remain prohibited at any time and in any place whatsoever with respect to the above-mentioned persons:

- (a) violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture;
- (b) taking of hostages;
- (c) outrages upon personal dignity, in particular humiliating and degrading treatment;
- (d) the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples.

(2) The wounded and sick shall be collected and cared for.

those senior army officers and to reform the security sector institutions is a key obstacle to progress, particularly in the field of security sector reform.⁶⁷²

Lack of accountability extends to the lack of information about the identity of individual soldiers. In eastern DRC, militias operate with scant resources, low-tech weaponry and limited access to arms. In this setting, rape is an ideal weapon and one that is difficult to match. Additionally, many armed combatants in Eastern DRC are unpaid and poorly supplied with food and clothing. As a result, they rely on pillaging on local villages to meet these material demands. Rape is also used as a weapon of war because commanders and combatants are poorly trained and have little exposure to or knowledge of international humanitarian law.

Indeed, the links with R2P are clear as the Congolese government has failed to protect its population. Therefore, the international community should intervene under the framework of R2P to stop mass killing and abuses against civilians, particularly the widespread sexual violence against women and young girls and the use of children as child soldiers.

The UN Secretary-General in his 2009 Report on Implementing R2P emphasises that state responsibility to prevent mass atrocities constitutes the bedrock of the doctrine.⁶⁷³ In order to facilitate the protection, the report states that international legal standards of protection of human rights must be embodied in national legislation; consequently, states must ensure that the four specified crimes – crimes against humanity, war crime, genocide and ethnic cleansing – are criminalized under domestic

672 See Amnesty International 'If You resist We'll Shoot You' The Democratic Republic of the Congo and the Case for an Effective Arms Trade Treaty, Amnesty International 2012, available at <http://www.amnesty.org/fr/library/asset/AFR62/007/2012/en/cdd8cdd9-913f-4dc5-8418-71deedbde0/afr620072012en.pdf>, accessed 31 August 2012.

673 UN Doc. A/63/677, 12 January 2009.

law.⁶⁷⁴ The report further highlights that particular attention should be given to prevent sexual and gender-based violence, prosecuting perpetrators and implementing gender-responsive justice and security-sector reform measures.⁶⁷⁵

It is clear that some positive steps were taken by the Congolese government to address the issue of massive human rights violations.⁶⁷⁶ It is in this context that a law which criminalized sexual mutilation and sexual slavery was passed by the parliament in 2006.⁶⁷⁷ In addition, the fight against all forms of violence against women and children, including sexual violence, was explicitly incorporated into the constitution.⁶⁷⁸ It should be noted however that, due to the lack of a strong judiciary system and the culture of corruption, the law did not have the expected effect.⁶⁷⁹ For example, perpetrators of rape who belong to police, army or other armed groups are not prosecuted,⁶⁸⁰ and when they are arrested, they provide bribes and are then released.⁶⁸¹ A coalition of women's organizations in Eastern DRC, in an interview with this author, has revealed that there is a remarkable lack of confidence by victims in the judiciary due to corruption. As an example they explained that some women have had their mouths cut as punishment after having had the courage to publically identify their aggressors who were released.⁶⁸² Notwithstanding some notable efforts made by the Congolese government in taking measures regarding mass violations of human

674 'Implementing the responsibility to protect', Report of the Secretary-General UN Doc. A/63/677, 12 January 2009.

675 Ibid.

676 UN; Doc S/RES/2053, 2013, 27 June 2012.

677 Law number 06/018 passed on 20 July 2006.

678 See Constitution de La République Démocratique du Congo, 18 Février 2006.

679 As UN Special Rapporteur on Violence against Women comments: 'Due to political interference and corruption, perpetrators, especially those who belong to the state security forces, go unpunished. The limited support made available to the overburdened justice system raises questions as to whether there is political will to end impunity'. See also Schranck, *op. cit.*, p. 333.

680 Interview with Civil Society staff, Bukavu, 28 November 2013.

681 Ibid.

682 Interview with Coalition of Women's Organizations in the eastern DRC.

rights as enumerated above, DRC remains the place where civilians are the main target of armed groups and daily exposed to mass atrocities.

As demonstrated earlier, this is due to the weakness of the Congolese state which is openly reflected by the predatory nature of its armed forces coupled with the general state of impunity. Nevertheless, one of the significant efforts made by the Congolese government was the referral of Thomas Lubanga Dyilo⁶⁸³ to the International Criminal Court (ICC) pursuant to Article 14 of the Rome Statute.⁶⁸⁴

In summation, the vast majority of barbarities against civilians listed above may constitute a grave breach of the Geneva Convention and their additional protocols, a violation of customary rules of international law, a violation of international and regional human rights treaties and may constitute war crimes or crimes against humanity under the Rome Statute. Given that, it is clear that the role of the international community is crucial in assisting the DRC government to comply with its responsibilities under international law and to mitigate the risk of mass atrocities in conflict environment.

5.6 Chapter conclusions

The main finding of this chapter is that the vast majority of atrocities committed against the civilian population in eastern DRC fall within the scope of widespread or systematic attacks on a large-scale. From the victims' and survivors' perspective it appears that these inhuman acts of extreme violence directed primarily at women and children are carried out in an organised way by all parties to the conflict including the DRC

683 Thomas Lubanga was the Chief of the Union des Patriotes Congolais (UPC) which was fighting in Ituri. As chief-Commander he was said to be aware of the enlisting of young children under age of fifteen and their active participation in the hostilities. UPC was also accused of the massacre of civilians in Ituri. Lendu tribe were said to be particularly targeted in the conflict.

684 Article 14 of the Rome Statute of the International Criminal Court, available at http://untreaty.un.org/cod/icc/statute/99_corr/cstatute.htm, accessed on 03 February 2013.

government forces. The analysis of the legal framework applicable to protection of civilians from mass atrocities shows that the DRC is party to the vast majority of conventions in respect to human right and humanitarian law. However, there is a lack of implementation of these rules. As consequence, a series of widespread and systematic attacks against the civilian population continue and the inability of the DRC government to deal adequately with continual mass atrocities committed on its territory is obvious.

The R2P framework implies that sovereign states and the international community share the responsibility to protect civilians from war crime, ethnic cleansing, genocide and crimes against humanity. Accordingly, the primary responsibility lies with a state but when a given state fails to act, the international community has to intervene in order to protect the civilian population. In this context, the links with R2P are clear as the Congolese government has failed to protect its population. Therefore, considering the DRC government's inability to protect its population from mass atrocities, the international community should intervene under the framework of R2P to stop mass killing and abuses against civilians, particularly the widespread sexual violence against women and young girls and the use of children as child soldiers. However, R2P doctrine has yet to be openly invoked in the DRC crisis despite numerous Security Council resolutions to increase UN troops, diplomatic efforts, sanctions and unanimous condemnation of the mass atrocity crimes which are committed on the civilian population. Thus, one can argue that while R2P was conceived to address conflicts characterized by the commission of mass atrocities, it remains unclear when and how it should apply to such conflicts. This affirmation will be seen from the analysis of the international responses to the DRC crisis in the following chapter.

Chapter 6. Applying R2P to the Crisis: International Responses

6.0 Introduction

While the international community has been actively involved in the DRC since the beginning of the conflict, the security situation in the eastern provinces, including attacks carried out by armed groups against the civilian population which could constitute crimes against humanity and war crimes, remain a serious challenge.⁶⁸⁵ In fact, since the beginning of the conflict, the international community had responded and continue to respond to the violence in Eastern DRC by taking diplomatic, political and military measures to address mass atrocities against the civilian population. Indeed, the mandate of the United Nations peacekeeping mission in DRC has moved from monitoring a ceasefire agreement to providing direct protection to civilian population under imminent physical threat.⁶⁸⁶

The aim of this chapter is to assess if and how the R2P framework was applied to the conflict. The international community's response to the DRC crisis will be particularly analysed focusing on its efforts to address the conflict by different means, including peacekeeping operations and mediation through the United Nations, European Union, African Union, United States, International Conference on the Great Lakes Region and the International Criminal Court.

⁶⁸⁵ For the nature of serious acts of violence committed by armed groups against the civilians population, see for example The Final Report of the Fact-Findings of the United Nations Joint Human Rights Office on the Mass Rapes and Other Human Rights Violations Committed By a Coalition of Armed Groups along the Kibua-Mpofi Axis in Walikale territory, North Kivu, From 30 July to 2 August 2010, available at http://www.ohchr.org/Documents/Countries/ZR/BCNUDHRapportViolsMassifsKibuaMpofi_en.pdf, accessed on 18 February 2013.

⁶⁸⁶ UN.Doc S/RES/2053, 2012, adopted on 27 June 2012.

6.1 United Nations peacekeeping operation in DRC (MONUC/MONUSCO)

Following the signing of the Lusaka Peace Agreement in 1999, the Security Council authorized the deployment of 90 UN military liaison personnel along with necessary civilian, political and administrative staff in the DRC.⁶⁸⁷ However, the complexity of the situation on the ground including the challenges related to the security environment and the aggravation of widespread human rights violations by all protagonists in the conflict led to the deployment of a robust peacekeeping force.⁶⁸⁸ On 1 November 1999, the Secretary-General recommended an extension of the UN mandate and sought authorization for the establishment of the United Nations Organisation Mission in the Democratic Republic of the Congo (MONUC) and the deployment of 500 military observers.⁶⁸⁹ In response, the Council extended MONUC's mandate and capacity and the operation was authorized under Chapter VII of the UN Charter, which allows peacekeepers to use force, if necessary, to carry out their mandate.⁶⁹⁰ While the mission and mandate of the MONUC forces has been considerably strengthened by the Security Council over the years,⁶⁹¹ their failure to protect civilians under the threat

687 UNSC Resolution 1258, 1999, 6 August 1999, UN Doc. S/RES/1258 1999.

688 MONUC background is available at

<http://www.un.org/en/peacekeeping/missions/monusco/background.shtml> accessed on 17 October 2013.

689 Report of the Secretary-general on the UN Preliminary Deployment in the DRC, UN Doc. S/1999/1116, 1 November 1999, available at http://www.un.org/ga/search/view_doc.asp?symbol=S/1999/1116, accessed on 06/02/2013.

690 UNSC Resolution 1291, 24 February 2000; UNSC Resolution 1445, 4 December 2002; UNSC Resolution 1493, 28 July 2003; UNSC Resolution 1565, 1 October 2004, available at <http://www.un.org/documents/resolutions/index.shtml>.

691 In August 1999, the United Nations Security Council authorized the deployment of 90 United Nations personnel under Chapter VI of the UN Charter. In December 2002, the Security Council authorised a size increase of up to 8,700 military personnel, principally comprised of two task forces to be deployed in succession, when the caseload of the first task force could no longer be met by its capacity. MONUC also included up to 700 military observers supported by specialists in human rights, humanitarian affairs, public information, political affairs, child protection and medical and administrative support. In addition to other duties, MONUC is mandated to facilitate humanitarian assistance and human rights monitoring, with attention to vulnerable groups including women and children. This includes special attention to demobilised child soldiers. UN Security Council Res. 1291/ 2000 which authorizes MONUC to carry out a number of important tasks, including implementation of the cease-fire and support for humanitarian work and human rights

of physical violence especially in North and South Kivus has raised criticisms over their capacity to provide sufficient protection.⁶⁹² In fact, on numerous occasions, MONUC troops have been unable to defend Congolese civilians who were under imminent physical threat. For example, the failure to stop the massacre in Kisangani in 2002, the killings in Ituri in 2003, the inability to protect civilians in the Bukavu offensive in 2004⁶⁹³ and during the Goma crisis in 2008⁶⁹⁴ and 2012.⁶⁹⁵ This was the case in Kiwanja town where an estimated 150 people were massacred near a MONUC compound.⁶⁹⁶ In fact, despite their mandate to use force to defend civilians who were under imminent threat of armed groups at the Bunia Airport in Ituri district,⁶⁹⁷ they did not stop the killings. As Human Rights Watch observes:

At the time of the killing spree at the Kiwanja, the United Nations Peacekeeping Mission in Congo, MONUC, had 120 peacekeepers in Kiwanja, one of its largest field bases in the area. Due to the importance of these two towns as centers for humanitarian assistance, MONUC consider them a priority protection zone. Yet the peacekeepers did not protect the towns from a rebel takeover or halt the destruction of displacement camps.

monitoring. The resolution also provides MONUC the mandate, under Chapter VII of the UN Charter, to protect its personnel, facilities, and civilians under imminent threat of physical violence; UN Security Council Resolution 1565/2004 which increased MONUC personnel, with a primary objective of ensure civilian protection and seize arms, as called in Res. 1493.

692 'This time, the mission was heavily criticized by the international media voicing concerns of the local population about MONUC failure to protect civilians under the threat of physical violence. The lack of a common interpretation of the mandate with regard to the use of force, differences of opinion on the Rules of Engagement (ROE) between contingents and the Mission, internally in the Military Component and the lack of political/military will to take strong action were at the basis of the problems', Major-General Patrick Cammaert, Former UN Military Adviser and Former Division Commander of MONUC in MONUC as a Case Study in Multidimensional Peacekeeping in Complex Emergencies.

693 See International Crisis Group, Africa Report No. 91, The Congo's Transition is Failing: Crisis in the Kivus, 30 March 2005.

694 See Human Rights Watch Report, 'Killing in Kiwanja': UN's inability to protect civilians', December 2008.

695 See Amnesty International, 'DR Congo: Civilian Protection urged as tens of thousands flee escalation in fighting', 12 Nov. 2012.

696 More than 400 people were murdered in two weeks. According to a report, UN forces who were deployed in Bunia had no experience in protecting civilians.

697 Following the withdrawal of the Ugandan troops in Bunia, fighting broke out between Lendu based militias and Hema Union of Congolese Patriots for the control of the town. Atrocities were committed against civilians and there was an outcry about a risk of a new genocide in the region.

Nor did they stop the mass killing of civilians in Kiwanja. MONUC relied on cooperation from the Congolese army. However, Congolese forces proved incapable of protecting the towns and failed to assist MONUC in providing security for the civilian population.⁶⁹⁸

Apparently, the inadequate equipment coupled with the lack of training of peacekeepers strongly contributed to the MONUC inability to respond promptly to protect civilians. According to an internal MONUC report, peacekeepers did not succeed in preventing the killings of Kiwanja as the Uruguayan battalion deployed there had no idea about how to perform their duty to protect civilians, neither were they aware about the authorisation to use force under Chapter VII of the UN Charter.⁶⁹⁹ This highlights the fact that peacekeepers are not adequately trained to their new role to protect civilians. Indeed, protection of civilians is a relatively new role for the UN peacekeepers.⁷⁰⁰ In addition, there was a huge communication gap between the peacekeepers and the local populations and also the local military officers.⁷⁰¹ According to one Congolese official, language is a significant problem since peacekeepers cannot communicate with the population that they are supposed to protect. For him, this has severely undermined the credibility of the mission and explains why the population is so hostile to them.⁷⁰² In fact, in addition to the language and cultural barriers, peacekeepers are also confronted with the lack of

698 Human Rights Watch, Killing in Kiwanja: The UN's inability to protect civilians, December 2008, available at <http://www.hrw.org/sites/default/files/reports/drc1208web.pdf>, accessed on 07 February 2013.

699 MONUC Internal report: 'The Uruguayan peacekeepers were convinced that they were not operating under Chapter VII and therefore assumed they were not allowed to use force. Instead of undertaking action the peacekeepers waited for authorisation from the Uruguayan parliament.'

700 Interview with a UN official, Geneva, 23 March 2010.

701 A large proportion of the UN Peacekeepers in the DRC are non-francophone from India, Bangladesh, Pakistan, etc.

702 Interview with a Congolese army official, Goma, November 2012.

implementation of methods and mechanisms of protection of civilians on the ground.⁷⁰³

As highlighted in the MONUC Joint Human Rights Office report:

It remains unclear whether the military personnel in Kiwanja had the understanding/knowledge or capacity to stop the arbitrary executions: Due to language/cultural barriers and a lack of effective communication with the population, the information flow between peacekeepers and civilians remained limited. Consequently, peacekeepers would not have been aware of the nature and scope of the events taking place in their proximity, making a prompt response to the CNDP attack impossible.⁷⁰⁴

It should however be noted that while MONUC had been severely criticized for its inability to protect civilians from mass atrocities, its action has contributed to a certain level of political stability and improvement of security processes. According to the Global Centre for Responsibility to Protect, MONUC and its successor MONUSCO had facilitated a significant reduction in membership of various armed groups in eastern DRC through its Disarmament, Demobilization, Repatriation, Reintegration and Resettlement (DDRRR) framework.⁷⁰⁵ According to one official, without this UN engagement, the political stability that prevailed in the DRC today could not be possible. Recognizing that MONUC has failed to adequately address the protection of civilians faced with mass atrocities in Eastern DRC, he argued that it is illusory to think that MONUC can succeed to protect every civilian in danger in the DRC given the size of the territory affected by the conflict, coupled with the lack of infrastructure and security challenges.⁷⁰⁶ It is sad to say it, but that is the reality as he saw it.

703 Ibid.

704 See Julie Reynaert, 'MONUC/MONUSCO and Civilian Protection in the Kivus' International Peace Information Service, 2011.

705 See Global Centre for Responsibility to Protect at http://www.globalr2p.org/media/files/r2p_monitor_sept2013.pdf, accessed on 12 October 2013.

706 Interview with the author.

MONUC has also been involved in many other activities with regard to protection of civilians. This includes investigations on human rights violation allegations, stabilisation strategies and military operations against armed groups. Indeed, different FARDC/MONUC joint military operations were established since 2008 to eliminate the Democratic Forces for the Liberation of Rwanda and the demobilisation of all militias operating in the eastern region.⁷⁰⁷ However, human rights activists and some international organizations have severely criticized this operation arguing that the UN forces were cooperating with the Congolese army which is also involved in massive human rights violations.⁷⁰⁸ Another issue raised was that these military operations have caused an additional humanitarian crisis and the killing of many civilians as a reprisal for the attacks.⁷⁰⁹ One may also argue that the integration of former militias into the national army continue to threaten the security of the civilian population given the lack of discipline and training in law of armed conflict.

In response to the issues raised above, noting the deterioration of the situation, on 23 December 2009 the Security Council adopted Resolution 1906 underlining the support of the peacekeeping mission to the DRC government in protecting civilians. In this resolution, the council clearly demands that:

The Government of the Democratic Republic of the Congo, in furtherance of resolution 1888 (2009)⁷¹⁰, immediately take appropriate measures to protect civilians, including women and children, from violations of international humanitarian law and human rights abuses, including all forms of sexual violence; urges the Government of the Democratic Republic of the Congo to ensure the full implementation of its 'zero-tolerance policy

707 The Amani peace process.

708 Interview with human rights activists in Bukavu, October 2012.

709 Interview with a UNICEF staff member in Bukavu, October 2012.

710 See UN Security Council, Security Council Resolution 1888 (2009) [on acts of sexual violence against civilians in armed conflicts], 30 September 2009, S/RES/1888, 2009, available at: <http://www.refworld.org/docid/4ac9aa152.html>, accessed 2 October 2013.

‘with respect to discipline and human rights violations, including sexual and gender-based violence, committed by elements of the Armed Forces of the Democratic Republic of the Congo (FARDC) and further urges that all reports of such violations be thoroughly investigated, with the support of MONUC, and that all those responsible be brought to justice through a robust and independent process⁷¹¹

Unfortunately, due to the lack of progress in security process and difficulties in integrating former rebels into the Congolese army, the civilian population continued to be targeted, as pointed out in the Security Council Resolution 1925 adopted in May 2010. This states:

Stressing the primary responsibility of the Government of the Democratic Republic of the Congo for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights and international humanitarian law, stressing the urgency of implementing comprehensive security sector reform and of achieving as appropriate the disarmament, demobilization, reintegration (DDR) of Congolese armed groups, and the disarmament, demobilization, repatriation, resettlement and reintegration (DDRRR) of foreign armed groups for the long-term stabilization of the Democratic Republic of the Congo, considering the need to create the security conditions for ensuring sustainable economic development, and stressing the importance of the contribution made by international partners in these fields,

Remaining greatly concerned by the humanitarian and human rights situation in areas affected by armed conflicts, condemning in particular the targeted attacks against the civilian population, widespread sexual violence, recruitment and use of child soldiers and extrajudicial executions, and stressing the urgent need for the Government of the Democratic Republic of the Congo, in cooperation with the United Nations and other

711 See UN Security Council, Security Council Resolution 1906 (2009) [on extension of the deployment of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)], 23 December 2009, S/RES/1906, 2009, available at <http://www.refworld.org/docid/4b66c06c0.html>, accessed 2 October 2013.

relevant actors, to end violations of human rights and international humanitarian law, fight impunity and bring the perpetrators to justice and provide medical, humanitarian and other assistance to victims.⁷¹²

It has to be pointed out that while the Security Council had adopted several resolutions in connection with the situation in the DRC in particular with regard to the protection of civilians from mass atrocities,⁷¹³ there was no mention of the R2P. However, it is obvious that the Security Council has recognized that mass atrocities against the civilian population continue in Eastern DRC and that the government has failed to protect its population. It is therefore uncertain as to whether the Security Council considers the DRC crisis as an R2P situation, as there have been numerous opportunities to undertake actions under the R2P framework, particularly in its enforcement aspect. Nevertheless, in extreme crisis when the UN forces were unable to provide security to the civilian population in the eastern Congolese province of Ituri, the UN called upon the EU to address the situation. In fact, the EU has been active with regard to the situation in the DRC since the beginning of the conflict.⁷¹⁴ However, while its action in the crisis involve humanitarian, political and diplomatic actions, its two military operations, ARTEMIS in 2003 and EUFOR RDC in 2006, need to be underlined. It is in this context that it has succeeded to halt mass atrocities in 2003 in the Ituri province.

712 See UN Security Council, Security Council Resolution 1925 (2010) [on extension of the mandate of the UN Organization Mission in the Democratic Republic of the Congo (MONUC)], 28 May 2010, S/RES/1925, 2010, available at <http://www.refworld.org/docid/4c174e522.html>, accessed 2 October 2013.

713 For more information on UN documents on the DRC conflicts see International Coalition for Responsibility to protect, available at <http://www.responsibilitytoprotect.org/index.php/crises/crisis-in-drc>, accessed on 02 October 2013.

714 See for example Hans Hoebeke, Stéphanie Carette and Koen Vlassenroot, 'EU Support to the Democratic Republic of Congo', Centre d'Analyse Stratégique, 2007.

6.3 European Union Operation Artemis to halt mass atrocities in Ituri

Following the UN forces' inability to halt violence and the killing of civilians in the Ituri province in 2003, the UN Secretary-General Kofi Annan called for 'a rapid deployment of a highly trained and well-equipped multinational force under the lead of a member State, to protect the civilian population and to provide security to vital installations in Bunia'.⁷¹⁵ In fact, there was an urgent need to address humanitarian conditions and the ethnic violence between Lendu and Hema which could result in genocide.⁷¹⁶ On 30 May 2003, by Resolution 1484, the Security Council⁷¹⁷ authorized under Chapter VII of the UN Charter the deployment of an Interim Emergency Multinational force led by France to enforce peace in Bunia. Called ARTEMIS, the operation mandate was to put an end to the killing of civilians, to prevent widely mass atrocities in Bunia, to protect civilians under imminent threat of physical violence, to restore security to the town and to increase humanitarian conditions.⁷¹⁸ However, the operation was limited in time and space; it was authorized for three months until 1 September 2003 and the rest of the Ituri district was not covered. Nevertheless, the operation was a success.

As Aldo Ajello commented:

The recent EU-led multinational peace enforcement mission in the Democratic Republic of the Congo, Opération Artemis was a big humanitarian, military and political success, the force fulfilled its mission by

715 A letter of the UN Secretary-General addressed to the President of the Security Council on the situation in Bunia, 15 May 2003, UN Doc. S/2003/574. UN Secretary General Kofi Annan specifically appealed to Javier Solana to build support to promote collective values and shared norms regarding African strategic interests for the EU. At a meeting of the EU defence ministers in May 2003, Solana presented Annan's request on May 19 to the meeting of EU defence ministers and drafted a reaction to Annan from the EU, while he sent his assistant, Aldo Ajello, to initiate diplomatic overtures with Uganda, Rwanda, and the DRC to withdraw, while briefing the UN Security Council. See Hendrickson et al, 'Operation Artemis and Javier Solana: EU Prospects for a Stronger Common Foreign and Security Policy', Canadian Military Journal, 2007.

716 Carla Delponte, the ICC Chief Prosecutor at that time maintained that 'the violence could be a genocide'. See Hendrickson et al, 'Operation Artemis and Javier Solana: EU Prospects for a Stronger Common Foreign and Security Policy', Canadian Military Journal, 2007.

717 UNSC Resolution 1484 of 30 May 2003, UN Doc. S/RES/1484, 2003, available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N03/377/68/PDF/N0337768.pdf?OpenElement>, accessed on 06 February 2013.

718 Ibid.

restoring security, helping people to return home and restart economic activity in Bunia...the determined attitude of the multinational force enable a rapid elimination of the threat posed by aggressive armed groups in Bunia, as well as in the surrounding area.⁷¹⁹

It is clear that the success of the operation was mostly due to the fact that the mission was narrowly defined and the troops were highly skilled and well trained.⁷²⁰ The operation was composed of 1,500 well trained and equipped soldiers but their robust mandate was limited to Bunia.⁷²¹ The Artemis Operation constitutes one of the positive experiences of solidarity and cooperation between the United Nations and the EU in addressing mass atrocities. Indeed, the mission prevented ethnic cleansing in Bunia and stopped the ethnic violence which could have amounted to genocide. However, some commentators consider that the crucial factor which helped in shaping the EU decision to intervene in the DRC was to send a signal to the United States of America after the differences about Iraq. In other words, the political motivation behind the intervention was to show that the EU was united after the debacles of Iraq. As Hendrickson et al. note: 'France's willingness to deploy troops came only two months after Operation Iraqi Freedom, which France, Germany, and a number of other EU member states had opposed vehemently. Such a show of EU cooperation in Operation Artemis may have resulted, in part, as a demonstration of European solidarity after intense differences it has experienced earlier with the United States'.⁷²² Nevertheless, despite the fact that this intervention occurred before the World Summit adoption of

719 Statement by Aldo Ajello, the EU Special representative for Africa's Great Lakes Region, Brussels, 17 September 2003, available at <http://www.irinnews.org/Report/46206/DRC-EU-calls-Artemis-operation-a-big-success>.

720 The Forces deployed included French, Swedish, Canadian, Belgian, South African and British.

721 See UN peacekeeping in the Service of peace, 'Operation ARTEMIS: The Lesson on the Interim Emergency Multinational Force', Peacekeeping, Military Division, October 2004.

722 Hendrickson et al., op.cit.

R2P, it can be argued that this was a strong signal with regard to R2P since at this time the principle was at its early stage and the Iraqi war could undermine its meaning since the invaders were also invoking the emerging norm.⁷²³

The EU's rapid response to halt mass atrocities in Bunia also shows the extent to which an adequately trained and well-equipped force ready to be deployed can save the lives of thousands of people. However, since Artemis was limited in time, there was a risk of escalation of violence and the killing of the civilian population after the withdrawal of Artemis Forces. In response, the Security Council by Resolution 1493 adopted on 28 July 2003 increased the MONUC force to 10,800 personnel and authorized the mission to use all necessary means to fulfil its mission in Ituri.⁷²⁴ However, it is important to note that no EU member state has sent its troops to the DRC in the context of UN force. This demonstrates the EU limitation over the issues pertaining to intervention in the face of serious humanitarian crisis. With regard to the European states' limited willingness to engage their troops in a UN mission, some commentators point out the fact that EU humanitarian protection operations are usually short-term with a clear exit-option involving only limited resources and risks.⁷²⁵ There is no doubt that a well equipped and professional Western army could perhaps help in empowering and strengthening the UN force in eastern DRC. As Schrank observes: 'Artemis was equipped with surveillance devices, air support, an intelligence apparatus, including soldiers who could communicate with the Congolese (in French), a field doctor, a liaison with the civilian aid effort, all organized by a professional

723 The US and the UK invoked R2P to justify the invasion of Iraq. See Nicholas J. Wheeler and Justin Morris, 'Justifying Iraq as a Humanitarian Intervention: The Cure is Worse than the Disease' in W.P.S Sidhu and Ramesh Thakur (eds.), *Structural and Normative Challenges*, Tokyo: United Nations University Press, 2007.

724 S/RES/1493, 2003, 28 July 2003.

725 See Mattias Denibinski and Theresa Runold, 'Libya and the Future of the Responsibility to Protect- African and European perspective' PRIF, 2011.

Western army. These ingredients have been noted as critical to operational success but MONUC, and MONUSCO, have always lacked them'.⁷²⁶ It can therefore be argued that, while the Bunia crisis has demonstrated the EU's capabilities in challenging the crisis, specifically civilian protection from mass atrocities, there is a lack of willingness and interest on behalf of the EU to continue to address the ongoing crisis. Unfortunately, as a former French Minister comments: 'this is certainly due to the tensions which exists between the strategic interests of states and the needs of the populations facing mass atrocities. The Challenge is therefore to gain required commitment and capacity to respond effectively to mass atrocities .' ⁷²⁷ In other words, it can be argued that capacity and willingness are the key factors for the implementation of R2P in addressing mass atrocities. In this regard, as R2P seeks to reinforce global responsibility to respond to crises characterized by mass atrocities, further developments are needed to make states feel morally if not legally compelled to the extraterritorial protection of civilians. As previously mentioned, military intervention to protect civilians is likely to only happen if states which possess the capacity are willing to act. It is important however to note that there is strong support for R2P among the EU states. In fact, all EU officials interviewed by this author underlined that R2P has become an integral part of international protection norms. However, some expressed concerns about the enforcement aspects of the new norm.⁷²⁸

It is in this context that, in view of the continuing instability in the lead-up to the 2006 elections in DRC, the UN once again called upon the EU to support MONUC in ensuring security during the elections. Thus, by Resolution 1671 adopted on 25 April

726 See Delphine Schrank 'Democratic Republic in Congo' in Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Ending Mass Atrocities in Our Time*, Oxford: Oxford University Press, 2012, p. 340.

727 Interview with a former French Minister of Defence, Paris, December.

728 Interview in Paris and Brussels.

2006, the Security Council authorised the deployment of a second European Union Force (EUFOR) in support of the UN mission in the Congo.⁷²⁹ This led to the successful and peaceful presidential and parliamentary election on 30 June 2006. Certainly, protection of civilians is not limited to the use of force; however the mechanisms used by the European Union can serve as a model by the international community in order to take necessary action when a rapid response to stop mass atrocities is needed. This highlights once again the need for a UN rapid reaction force which can be deployed for timely interventions to halt mass atrocities.

6. 4 Diplomatic initiatives to respond to the crisis

6.4.1 Response to the 2008 crisis

In the aftermath of the Kiwanja killings,⁷³⁰ noting the rapid deterioration of the situation, the UN Secretary-General, on 4 November 2008, appointed the former President of Nigeria, Mr Olusegun Obasanjo, his Special Envoy for the Great Lakes region.⁷³¹ The mission given to Special Envoy Obasanjo included assisting the governments of the Great Lakes region to address the challenges to peace and security posed by the presence and activities of armed groups in the Eastern Democratic Republic of the Congo. The UN Secretary-General further requested him to work closely with all protagonists in the sub region in order to reach a comprehensive and durable solution to the crisis and in particular the governments of the Democratic Republic of the Congo and Rwanda.

729 UNSC Resolution 1671 adopted on 25 April 2006, UN.Doc S/RES/1671, 2006.

730 Although MONUC had around 120 peacekeepers stationed in a military camp at approximately three kilometres from the attacks, they did not manage to protect the local population. According to the UN joint Human Rights Office at least 67 persons were killed. See MONUC UNJHRO, September 2009.

731 See UN.Doc SG/A/1166, 9 December 2008.

On 7 November, the UN Secretary-General and his Special Advisor attended a summit in Nairobi with key regional actors including Kabila, President of DRC, Kagame, President of Rwanda and Kikwete, President of AU. The UN Secretary-General highlighted the need for political will among the leaders of the region to deal with the challenge posed by the armed groups. He also expressed the determination of the United Nations to end the crisis in the DRC stating that:

[...] we have had many meetings, we have adopted many communiqués and statements and declarations and based on the will and wishes of the whole international community, not necessarily only the African people, this is the wish of the whole international community to see peace and stability in this region... During the last one decade, in Congo only, five million people have died either from war, hunger, disease and displacement. Therefore, they must think about their own future. Now MONUC has a mandate to keep peace there. They knew that MONUC's mandate has limitations. In fact MONUC has over-stretched. We are now talking about 17,000 people in a land that is almost the size of the whole European continent. In this vast country, we have serious limitations in our resources, in our capacities. Considering this, African leaders have expressed their strong commitment that after such frustrations and appeals, and urged if they are not able to resolve this issue, they expressed their firm determination that they will be ready when and if necessary to resolve this issue once and for all, even through their own peacemaking forces. This is not a threat for the purpose of threat. This time, all these militias must hear such a strong message.⁷³²

In the same month, the Special Advisor of the UN Secretary-General on the Prevention of Genocide, Mr Francis Deng undertook a mission to the Great Lakes region from 23 November to 4 December 2008. The aim of the mission was to examine whether acts

732 Secretary-General's Joint Press Conference with his Special Envoy to the Eastern DRC Olusengun Obasanjo and Special Representative for DRC Alan Doss following the African Union Summit on the DRC, Nairobi, 7 November 2008.

of violence and massive human rights abuses committed on the civilian population in North Kivu could be a signal of 'intent to destroy, in whole or in part a nation, ethnical, racial or religious group as such' according to the provisions of the 1948 Convention on the prevention and the punishment of the crime of the genocide.⁷³³ The conclusions of the Special Adviser were that violation of international human rights and humanitarian law were being committed on the basis of ethnicity and national origin.⁷³⁴

It is interesting to note that the international community initiative to address the crisis in the DRC comes at a time when the need to find a common solution on how to develop the R2P agenda within the United Nations system become crucial.⁷³⁵ In other words, there was a need to find a *modus operandi* for the emerging norm. On 26 November 2008, the Security Council held a meeting on the situation concerning the DRC. The President of the Council, the Representative of Costa Rica, sought to remind the responsibility of the international community to protect, urging that:

The international community, and in particular the Security Council, has the responsibility to protect those who are suffering the consequences of violence in the Democratic Republic of the Congo. The Council has the responsibility to protect women and girls who are victims of the cruellest forms of violence resulting from the climate of impunity that prevails in the Kivus. We also have the responsibility to protect boys and girls who are being forcibly recruited by militias. Finally, we have the responsibility to protect the more than 1.35 million people who have now been displaced. The Council, thus, has clear responsibilities, and we must now discuss the steps that must be taken to meet those responsibilities.⁷³⁶

733 Statement by the Special Adviser of the Secretary-General on the Prevention of Genocide, on the situation in the democratic republic of Congo, 12 December 2008.

734 Ibid.

735 Eduard C. Luck, 'From Promise to Practice: Implementing the Responsibility to Protect' in Jared Genser and Irwin Cotler, *The Responsibility to Protect: The Promise of Stopping Mass Atrocities in Our Time*, Oxford: Oxford University Press 2012, p.99.

736 UN. DOC S/PV.6024, 26 November 2008.

Similarly, the Representative of Burkina Faso warned that there was a risk of carnage and a possibility of expansion of the conflict to the rest of the subregion if nothing was done. He then argued that:

Once again, the human tragedy being played out on the ground calls out to the international community to find, without delay, viable solutions that would take into account the responsibility to protect civilian populations as well as the duty to pursue and punish all those responsible for atrocities committed in the framework of this conflict.⁷³⁷

On 22 December 2008, by Resolution 1856 adopted unanimously, the Security Council condemned the targeted attacks against the civilian population, sexual violence and recruitment of child soldiers and made the protection of civilians the priority of the United Nations peacekeeping forces.⁷³⁸ In this resolution the mandate of MONUC was considerably extended and strengthened. The mandate includes the protection of civilians and humanitarian personnel, monitoring cross-border movements, assisting with protection and promotion of human rights, promoting the political process, supporting the disarmament, demobilization, and reintegration of former combatants, coordinating operations with the Congolese Forces against armed groups, facilitating humanitarian assistance and the return of refugees, training and monitoring the Congolese Forces in human rights and humanitarian law, and deploying and maintaining a presence in volatile areas. The adoption of this resolution was an important step since it clearly states that the protection of civilians is the priority of the peacekeeping mission. However, although R2P was not expressly mentioned, it may have begun to have an impact on the international community's action to this

⁷³⁷ Ibid.

⁷³⁸ UN. DOC S/RES/1856, 2008, 22 December 2008.

crisis. Although the Security Council appeared reluctant to make explicit reference to R2P in connection to the crisis, the resolution adopted by the Human Rights Council was significant in that it underlined both the primary responsibility of the Congolese government vis-à-vis its population and the international community's duty to assist the DRC. This resolution stated:

The Government has the primary responsibility to make every effort to strengthen the protection of the civilian population and to investigate and bring to justice perpetrators of violations of human rights and of international humanitarian law, and calls upon the international community to support the endeavours of the Government of the Democratic Republic of the Congo in its efforts to stabilize the situation in the country.⁷³⁹

It is in this context that under the auspices of the UN Secretary General Envoy, Obasanjo and Benjamin Mkapa, the former President of Tanzania representing the African Union, an agreement on a wide range of issues was concluded between DRC and Rwanda. This led to the reestablishment of diplomatic relations between Kigali and Kinshasa.⁷⁴⁰ The improvement of relationships between the two countries was materialized by the arrest of the CNDP leader Laurent Nkunda⁷⁴¹ and the launch of a joint military offensive against the FDLR in January 2009.⁷⁴² Furthermore, following negotiations between the DRC and armed groups operating in Eastern DRC, the Goma Agreement of 23 March 2009⁷⁴³ was signed between the Congolese authorities

739 Human Right Council resolution on the Situation of the human Rights in the East of the DRC adopted on 28 November 2008, A/HRC/RES/S/8/1.

740 Interview with an AU official, December 2012.

741 Laurent Nkunda is under house arrest in Rwanda since January 2009. See <http://radiookapi.net/sans-categorie/2009/05/11/laurent-nkunda-arrete-depuis-100-jours-son-sort-nest-pas-encore-decide>, accessed on 26 January 2013.

742 Report of the Security Council Mission to the African Union; Rwanda and DRC; and Liberia, UN.Doc S/2009/303, 11 June 2009.

743 The full text of the Peace Agreement between the DRC Government and the Congrès National Pour la Libération du Peuple (CNDP) is available at http://www.iccwomen.org/publications/Peace_Agreement_between_the_Government_and_the_CNDP.pdf, accessed on 12 October 2013.

and the CNDP. According to the agreement, the CNDP police force and armed units were to be integrated into DRC national Police and the FARDC. However, it is important to note that while both FARDC and CNDP forces were accused of targeting civilians while perpetrating widespread crimes, the agreement included amnesty for the perpetrators. It is clear therefore that while the agreement goal was to bring peace, it faced a serious problem of impunity. In relation to amnesty, Article 3 of the agreement states:

3.1 In order to facilitate national reconciliation, the Government undertakes to enact a law of amnesty for the period from June 2003 to the date of its enactment, in accordance with international law.

3.2. The Parties agree to strictly observe the independence of the Judiciary as entrenched in the Constitution.

3.3. The CNDP having expressed concerns over certain provisions of the bill already enacted by the National Assembly, which it views as restricting the grounds for amnesty, it has been agreed that the Government will submit these concerns to Parliament for review.⁷⁴⁴

One of the important outcomes of the Goma Agreement, however, was the underlying issue of Congolese refugees in neighbouring countries and IDPs. In fact, the agreement provided essential mechanisms to facilitate the return of refugees. Thus, Article 6 of the agreement stated that:

6.1 Both Parties agree that living in peace in one's country and fully enjoying one's citizenship are inalienable rights for every Congolese. For this reason, the quick return of Congolese refugees and displaced people from neighbouring countries to their original environments is a necessity.

6.2. Consequently, the Government undertakes to re-establish, as soon as possible, Tripartite Commissions on Congolese refugees located in neighbouring countries and to carry out the rehabilitation actions necessary

⁷⁴⁴ Ibid.

to their reintegration. The Parties also agree to encourage and facilitate the return of internally displaced people.

This was an important step since the issue of refugees can be considered as one of the major problems fuelling the conflict in North Kivu. Indeed, the issue of refugees serve as a vehicle for CNDP today, M23 claims, and many of their combatants are recruited from refugee camps in neighbouring countries.⁷⁴⁵ Thus, in the aftermath of the signing of the agreement, the Congolese government attempted to deal more effectively with the return of refugees by establishing Permanent Local Arbitration Committees to promote peaceful coexistence between local population and repatriated refugees from Rwanda. However, it can be argued that the operation did not succeed as demonstrated by the UNHCR report which points out the fact that, due to the continuing insecurity in eastern DRC, there was not a single Congolese refugee living in Rwanda who has been repatriated in the DRC since 2009.⁷⁴⁶

It can, however, be argued that despite the fact that the Goma Agreement was defective in a number of ways, it established a few years of relative stability for North and South Kivu provinces which saw the integration of thousands of CNDP combatants into regular army.⁷⁴⁷ Unfortunately, there was no amelioration for civilians and despite the signing of the peace agreement between the DRC government and CNDP, mass atrocities against the population continued to happen throughout the eastern region.⁷⁴⁸ The fact that the agreement was not accompanied by adequate post-conflict mechanisms such as governance reforms and political dialogue

745 Government confidential document.

746 For more details see <http://www.crisisgroup.org/~media/Files/africa/central-africa/dr-congo/b091-eastern-congo-why-stabilisation-failed.pdf>, accessed on 12 October 2013.

747 See <http://www.irinnews.org/report/97075/analysis-seeking-civilian-and-military-solutions-in-the-drc>, accessed on 12 October 2013.

748 Many other armed groups were operating in the region including the FDLR, Mai-Mai Militias, Lord's Resistance Army, Allied Democratic Force, etc.

illustrates that there was not a strong follow-up on the implementation of the peace agreement by the Congolese government. According to International Crisis Group, 'rather than effectively implementing the 23 March 2009 peace Agreement, the Congolese authorities have instead only feigned the integration of the CNDP into political institutions, and likewise the group appears to have only pretended to integrate into the Congolese army'. It further observes that 'in the absence of the agreed army reform, military pressure on armed groups had only a temporary effect'.⁷⁴⁹ Indeed, as previous agreements which have been signed and were not honoured,⁷⁵⁰ the implementation of the agreement failed and this led to the resurgence of former CNDP into the M23 rebellion movement and recurring episodes of violence.

6.4.2 Response to the 2012 crisis

A recent episode of conflict in Eastern DRC broke out in April 2012 when a group of soldiers who mutinied from the DRC national army created a rebellion movement called M23.⁷⁵¹ According to one of the M23 leaders, Col. Makenga Sultani, the mutiny was due to the failure of the Congolese government to implement the 2009 peace

749 See International Crisis Group, 'Eastern Congo: Why Stabilisation Failed', Policy briefing, 4 October 2012 available at <http://www.crisisgroup.org/~media/Files/africa/central-africa/dr-congo/b091-eastern-congo-why-stabilisation-failed.pdf>, accessed on 12 October 2013.

750 For example The Pact of Security, Stability and Development in the Great Lakes Region, signed in Nairobi on 15 December 2006; The Nairobi Joint Communiqué of 9 November 2007, The Peace Agreements signed in Goma on 23 January 2008 at the end of the Conference on Peace, Stability and Development in the provinces of North Kivu and South Kivu.

751 M23 refers to the date peace accords were signed 23 March 2009 between the Congolese government and the National Congress for the Defense of the People (CNDP), a rebel group led by Laurent Nkunda. Under the accords, former fighters were supposed to have been integrated into national army, but some of them say they were not treated fairly, and that the peace treaty was never fully put into effect. This was apparently the reason that pushed them to defect from the government army and to form the M23 movement. According to the UN Security Council's Group of Experts, M23 movement is believed to be supported by Rwanda and Uganda by providing it with arms, support and soldiers. However, both countries have strongly denied this allegation rejecting the veracity of the report. It should be also noted that Bosco Ntaganda who is now wanted by the International Criminal Court (ICC) is one of the officials of the M23 movement.

agreement and the grievances of former CNDP members and the Tutsi community into the Congolese army.⁷⁵² However, some regional analysts such as Colette Braeckman maintained that the former CNDP fighters had created an army within the army and that they refused to be ruled as the other regular FARDC soldiers. She argued that they did not want to be removed from their eastern provinces to be sent to other parts of the country as was normally the case for the other battalions.⁷⁵³ Furthermore, some of their officers, such as Bosco Ntaganda, were suspected of atrocities and mass killings against the civilian populations.⁷⁵⁴ However, some other commentators including Congolese government officials who were interviewed by this author argued that this rebellion was created when, urged by the international community, Joseph Kabila demonstrated his willingness to arrest Bosco Ntaganda, who then decided to leave Goma along with his men and mutinied.⁷⁵⁵ After heavy fighting against the Congolese troops the M23 grew in power and seized a part of North Kivu's territory in which it created its own administration and its own financing system. Meanwhile Mai-Mai groups were expanding in rural areas where they also committed atrocities that exacerbated inter-ethnic tensions.⁷⁵⁶ In July 2012, in accordance with the peace and security architecture, the International Conference on the Great Lakes Region (ICGLR) organised extraordinary meetings to prevent a conflict between Rwanda and the DRC. The outcome of the talks was the deployment of an international neutral force at the border. After his visit to DRC, Mr Hervé Ladsous, Under-Secretary General of the United Nations for Peacekeeping Operations,

752 Interview with the author.

753 Ibid.

754 See http://www.bbc.co.uk/afrique/region/2012/07/120711_rdc_ntaganda_portrait.shtml, accessed on 23 January 2013.

See Le Carnet de Colette Braeckman, 'L'Imprudence de Kinshasa, c'est d'avoir voulu démanteler l'armée dans l'armée', 16 July 2012, available at <http://blog.lesoir.be/colette-braeckman/2012/07/16/limprudence-de-kinshasa-cest-davoir-voulu-demanteler-larmee-dans-larmee/>, accessed on 23 January 2013.

756 Ibid.

expressed his concern about the extreme fragility of the ceasefire and reported to the Security Council on 18 September 2012 that only a political solution could address the root causes of the conflict.⁷⁵⁷

On 15 November 2012, heavy fighting broke out between the M23 rebels and the Congolese army which led to the capture of Goma. According to an Amnesty International report, human rights abuses committed on civilians by both parties to the conflict, FARDC and M23, included violations of the duty to care for the civilian population when launching attacks, forced recruitment of children who were either trained to take part in hostilities or forced to work to build military positions, unlawful killing and acts of sexual violence.⁷⁵⁸

Following this, a United Nations group of experts released a report mentioning that M23 was backed by both Rwanda and Uganda with recruitment and ammunitions.⁷⁵⁹ However, Kigali and Kampala vehemently rejected the accusations arguing that the report was one sided and that these experts had no evidence for their claims.⁷⁶⁰ According to a Rwandan Diplomat at the UN, 'UN Experts have been allowed to pursue a political agenda that has nothing to do with getting at the true causes of conflict in the eastern DRC'.⁷⁶¹ However, it should be noted that there was no consensus among the Security Council members about the alleged support of Rwanda and Uganda to the M23 rebels. Indeed, the council was divided on the issue. According to one French government official, this is due to the fact that the international community continues

757 Statement available at <http://www.securitycouncilreport.org/chronology/democratic-republic-of-the-congo.php?page=2>, accessed on 12 October 2013.

758 See UN Office for the Coordination of Humanitarian Affairs, Humanitarian news and analysis 'DRC', available at <http://www.irinnews.org/report/97779/briefing-m23-one-year-on>, accessed on 12 October 2013.

759 See UN. Doc. S/2012/348, 27 June 2012; UN.Doc. S/2012/843, 15 November 2012.

760 United Nations Security Council internal documents.

761 Statement available at <http://www.france24.com/en/20121017-un-report-rwanda-uganda-arming-dr-congo-m23-rebels-insurgency-defence-minister>, accessed on 11 October 2013.

to pay the price of its inaction in the 1994 Rwandan genocide.⁷⁶² However, political actors in the region believe that competing regional and international interests in this area which is very rich in natural resources has a great influence on the council members.⁷⁶³ This highlights that the Security Council is struggling to turn the R2P framework into reality in this complex conflict.

On 20 November 2012, the Security Council adopted Resolution 2076 in which it determined that the situation in the DRC constitutes a threat to international peace and security. It states:

[The Security Council] Strongly condemns the M23 and all its attacks on the civilian population, MONUSCO peacekeepers and humanitarian actors, as well as its abuses of human rights, including summary executions, sexual and gender based violence and large scale recruitment and use of child soldiers, further condemns the attempts by the M23 to establish an illegitimate parallel administration and to undermine State authority of the Government of the DRC, and reiterates that those responsible for crimes and human rights abuses will be held accountable.⁷⁶⁴

While R2P was not mentioned in the Security Council debate and the issue was discussed within the framework of the traditional framework of international peace and security, the Representative of France, in remarks to the press, recalled the primary responsibility of the Congolese government to protect its population. He argued that:

La France soutient la République démocratique du Congo dans cette entreprise. La restauration de l'autorité de l'Etat congolais est la seule manière, finalement, de protéger les civils. Ce ne sont pas les Nations unies qui protégeront les civils le plus efficacement mais les autorités légitimes de la RDC.⁷⁶⁵

762 Interview with a French official in Paris, November 2013.

763 Interview with a government official in the Great Lakes region.

764 UN.DOC S/RES/2076, 2012, 20 November 2012.

765 20 November 2012 - Democratic Republic of Congo - Remarks to the press by Mr. Gérard Araud, Permanent Representative of France to the United Nations, available at <http://www.franceonu.org/france-at->

On 28 November 2012, the Security Council met again to debate the situation in Eastern DRC and unanimously adopted Resolution 2078 in which it reiterates its call on the International Conference on the Great Lakes Region (ICGLR) to 'monitor and inquire into, including by making active use of the Expanded Joint Verification Mechanism (EJVM), reports and allegations of outside support and supply of equipment to the M23, and encourages MONUSCO, in coordination with ICGLR members, to participate, as appropriate and within the limits of its capacities and mandate, in the activities of the EJVM'.⁷⁶⁶ It is in this context that new peace talks between the Congolese government and the M23 was initiated in December 2012 under the auspice of the International Conference of the Great Lakes Region. This is important as it is beyond controversy that the DRC conflict demands the involvement and the willingness of domestic and regional political actors. This was seen by the declaration of a joint delegation of the AU, EU and US led by the UN Secretary-General Special Envoy to the Great Lakes, Mary Robinson,⁷⁶⁷ during its visit to the region (DRC, Uganda and Rwanda) as they called for the implementation of peace, security and cooperation framework in the DRC and in the Region.⁷⁶⁸ Thus, in a briefing to the Security Council following the visit to the region, Mary Robinson stated: 'The regional initiatives have helped mitigate the impact of the crisis and it is important that the international community, including the Security Council acknowledges that role, if we want to make progress under the renewed partnership to end the crisis in eastern

the-united-nations/press-room/speaking-to-the-media/remarks-to-the-press/article/20-november-2012-democratic, accessed on 24 October 2013.

766 UN.DOC S/RES/2078, 2012, 28 November 2012.

767 Mary Robinson, the former President of Ireland and UN High Commissioner for Human Rights was appointed Special Envoy to the Great Lakes in March 2013.

768 IRIN, 'Doubts Linger as DRC Peace talks resume', available at <http://www.irinnews.org/report/98741/doubts-linger-as-drc-peace-talks-resume>, accessed on 20 October 2013.

DRC'.⁷⁶⁹What this demonstrates is that there is a need to support political action undertaken at the regional level in order to address this conflict.

6.5 The role of regional institutions in the crisis

As demonstrated earlier in this work, the ICISS report emphasizes that the opinion of other countries in the region should be taken into account and the extent to which the idea of military intervention is supported by people.⁷⁷⁰ This was an important development with regard to the importance of the role of regional organizations in a crisis to ease the action of the Security Council. However, it is significant to note that a coalition of states can be opposed to a military intervention only by ideology even when a state has failed to protect its population or is itself the perpetrator. Conflicts in Côte d'Ivoire⁷⁷¹ and Libya are good examples of state failure to protect its population and a lack of leadership or consensus displayed by regional and sub-regional organizations.⁷⁷² While these crises have revealed the urgent need for regional and sub-regional organizations to lead in the implementation of R2P, this has also demonstrated the challenges that the doctrine can face at a regional level, given the divergent political views which can always tend to impede the decision making process. Of course, due to the lack of political will regional factors still prevail.

769 Mary Robinson, Briefing to the Security Council, available at <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/Great%20Lakes%20Envoy%20Briefing%20to%20the%20Security%20Council%206%20May%202013.pdf>, accessed on 20 October 2013.

770 See ICISS Report op.cit.

771 Following the post-election crisis in Ivory Coast, the member states of the Economic Community of Western African States (ECOWAS) aligned themselves with the UN position calling for a military option if necessary to remove Gbagbo from office. They were against the idea of power-sharing as it was the case in Kenya and Zimbabwe. The AU position, however, was quite different from the ECOWAS but the latter finally made the majority of African leader to take side with Ouattara camp. It is in this context that the Security Council was able to adopt unanimously Resolution 1975.⁷⁷¹ From this time, Gbagbo realized that the situation has changed and that he was losing support. He, for example, multiplies exactions against civilians.

772 Interview with the Diplomatic Adviser to the French President.

Nevertheless, while in both the Côte d'Ivoire and Libya conflicts, the AU's position was not exemplary and was criticized as slow, uncertain, ineffective and lacking courage to take timely action, it is clear that it has played an important role in the resolution of the crisis.⁷⁷³ Similarly, the role that the Arab League could play in the Syrian crisis is not negligible. It is clear that a consensus within the Arab League about the seriousness of the situation in Syria could largely contribute to find a solution on how to halt the bloodshed.

This illustrates the fact that the lack of consensus and capacity by regional or sub-regional organizations can be an obstacle to address mass atrocities in member states. Unfortunately, opponents to R2P continue to claim that Western leaders and Western states would claim intervening in the cause of protecting human rights while behind they have strategic interests. Indeed, African government officials interviewed by this author, while expressing their deep acknowledgement of the potential of R2P to address mass atrocities, had reservations on its operationalization. Part of them deplored the fact that R2P was used by intervening states to pursue their goal to change the regime in Libya.⁷⁷⁴

However, with regard to the DRC conflict, it can be argued that the AU, SADC and ICGLR are playing a key role in promoting regional peace and security. It is important to note that among African Leaders, there is a belief that African problems require African solutions. As pointed out by the African Union Commission Chairman Jean Ping at the opening of the July 2012 AU Peace and Security summit, 'the solutions to

773 Ibid.

774 Interview with African government officials.

African problems are found on the continent and nowhere else'.⁷⁷⁵ However, AU has shown its own limitations due to lack of capacity and resources. Indeed, the organization is far from being able to bear the expenses related to conflict resolution and peacebuilding. Given that, it is questionable how the organization can adequately deal with security issues on the continent. Furthermore, there has been some criticism about AU's ability to deliver a peaceful conclusion to different conflicts in the continent as rivalries and tensions between different members of the organisation exist.⁷⁷⁶

It should be noted however that, in the Eastern DRC crisis, sub-regional organisations had in many instances bypassed the AU role. As previously mentioned, the International Conference on the Great Lakes Region has been actively involved in peace negotiations between the DRC government and the M23 rebellion movement.⁷⁷⁷ It is however doubtful whether ICGLR would be successful since the relations between its member states remain highly contentious and some of its members are accused of being indirectly involved in the crisis. In fact, the issue of exploitation of natural resources has often been cited as one of the major factors fuelling the conflict. Therefore discussions over the causes of the Eastern DRC crisis tend to focus on the issue of natural resources. Thus, the majority of international experts agree on the fact that natural resources is the major cause of the conflict and that all armed groups operating in the DRC and the FARDC, state officials and even

775 See Jean Ping statement at the opening session of the AU Peace and Security Council meeting in Addis Ababa, July 14, 2012, available at

http://www.voanews.com/content/au_seeks_regional_response_to_conflicts/1405037.html.

776 See for example, Liisa Laakso, 'What Role for the African Regional Organization in Peace and Security?', The Round Table, vol.94, no. 381, 2005, pp 489-502.

777 For more information see The Global Centre for the Responsibility to Protect 'DRC', available at http://www.globalr2p.org/media/files/r2p_monitor_sept2013.pdf, accessed on 11 October 2013.

non-state actors are involved in mining exploitation.⁷⁷⁸ Even some peacekeepers are allegedly involved in the trafficking of mineral resources, particularly diamonds, gold, copper, cobalt and coltan. In fact, claims have been made that MONUC provides strategic information to rebel groups, especially to the FDLR, and in exchange they are given natural resources.⁷⁷⁹ Many reports have also underlined the regional dimensions to the exploitation of natural resources and the role of neighbouring governments in contributing to the illegal exploitation and its impact to the Eastern DRC conflict. Indeed, almost all UN reports on this conflict maintain that the Eastern DRC instability has benefits to those who exploit its natural wealth.⁷⁸⁰

It should be noted, however, that in order to address the issue mentioned above, a peace agreement aimed at ending the Eastern DRC crisis was recently signed

778 See for example Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and other forms of Wealth of the Democratic Republic of Congo, December 2009, available at <http://www.globalpolicy.org/images/pdfs/drcongo.htm>, accessed on 21 October 2013; See also Global Policy Forum, 'Understanding Conflict Minerals Provisions in Eastern Congo', available at <http://www.globalpolicy.org/security-council/index-of-countries-on-the-security-council-agenda/democratic-republic-of-congo/52359-understanding-conflict-minerals-provisions-in-eastern-congo.html?itemid=id#40136>, accessed on 21 October 2013; Global Witness, 2005. *Under-Mining Peace. Tin: The Explosive Trade in Cassiterite in Eastern DRC.* Washington, D.C.: Global Witness; Human Rights Watch, *The Curse of Gold: Democratic Republic of Congo.* 2005. New York; Washington; London; Brussels: Human Rights Watch; Kennes, Erik. 2005. 'The Democratic Republic of the Congo: Structures of Greed, Networks of Need,' in Cynthia J. Arnson and I. William Zartman, (eds.), *Rethinking the Economics of War: The Intersection of Need, Creed, and Greed* Woodrow Wilson Center Press: Washington, D.C.; The John Hopkins University Press: Baltimore; United Nations. Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/1146, 16 October 2002; United Nations. Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2002/565, 22 May 2002; United Nations. Addendum to the report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2001/1072, 13 November 2001; United Nations. Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. S/2001/357, 12 April 2001; United Nations. Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc S/2001/357, 12 April 2001; United Nations. Interim report of the United Nations Expert Panel on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo., UN Doc S/2001/49, 16 January 2001

779 UN internal document.

780 Ibid.

between 11 countries in the region.⁷⁸¹ The agreement called Peace, Security and Cooperation Framework for the Republic Democratic of the Congo requires regional commitment including the prohibition of state parties, that they should ‘neither harbor nor provide protection of any kind to persons accused of war crimes, crimes against humanity, acts of genocide or crimes of aggression, or persons falling under the United Nations sanctions regime’.⁷⁸² The agreement further calls for the establishment of a neutral intervention force to address the issue of rebel forces operating in Eastern DRC. While the agreement can be considered as an important step in addressing the Eastern DRC crisis, some commentators are skeptical since similar regional agreements have failed to bring peace to Eastern DRC.⁷⁸³ They also deplore the fact that the agreement is long on rhetoric but too short on detail and solid action plans.⁷⁸⁴ However, the agreement was described by Mary Robinson, the Special Envoy to the Great Lakes, as a framework of hope. She stated that: ‘For if this new attempt is to succeed where others have fallen short, there must be optimism and courage in place of cynicism. The governments and the people of this region, and the international community, must believe once again that peace can be achieved and take the necessary actions to obtain it. As this process advances, it must bring hope to the people who are the victims and who will ultimately be its beneficiaries’.⁷⁸⁵

781 The countries part of the agreement include Angola, Burundi, Central African Republic, DRC, Republic of Congo, South Africa, South Soudan, Rwanda, Tanzania, Uganda and Zambia.

782 Peace, Security and Cooperation Framework for the Democratic Republic of Congo and the Region, available at <http://www.peaceau.org/uploads/scanned-on-24022013-125543.pdf>, accessed on 11 October 2013.

783 <http://www.irinnews.org/report/97779/briefing-m23-one-year-on>, accessed on 11 October 2013.

784 Ibid.

785 Mary Robinson, Briefing to the Security Council, available at <http://www.un.org/wcm/webdav/site/undpa/shared/undpa/pdf/Great%20Lakes%20Envoy%20Briefing%20to%20the%20Security%20Council%206%20May%202013.pdf>, accessed on 20 October 2013.

However, the major cause of the continual conflict in Eastern DRC is not limited to the mining issue. Since the DRC is a fragile state, it cannot provide adequate protection to its population unless its institutions are strengthened and the problem of ethnicity is resolved. This cannot be achieved until the DRC has a strong and unified army comprised of individuals from different tribes and excluding those who are guilty of massive human rights violations. In fact, the security situation in Eastern DRC is marked by the quasi-inexistence of state structures, and the complexity of armed groups in rural areas mobilised along ethnic lines. However, the aspect of ethnicity in this conflict has been often ignored. In fact, during the field research for this project, the ethnic dimension was identified by this author as one of the major conflict drivers and one of the aggravation factors of massive human rights violations against the civilian population. In this regard, using R2P as a framework can assist in exploring the root causes of the conflict in Eastern DRC and therefore the possibility to prevent mass atrocities.

6.6 The role of the International Criminal Court

Pursuant to Article 17 of the Rome Statute, if a state fails to genuinely investigate and prosecute a situation in which genocide, crimes against humanity and war crimes have been committed, then ICC can exercise its jurisdiction.⁷⁸⁶ Thus, according to the Complementarity Principle,⁷⁸⁷ the ICC may take over a case from a national jurisdiction if it is manifestly clear that a state is unwilling or unable to carry out the investigation or prosecution. Hence, national courts retain primary competence to exercise

⁷⁸⁶ Rome Statute of the International Criminal Court, Article 17.

⁷⁸⁷ See Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, pp. 342-43, see also Sharon A. Williams and William A. Schabas, 'Article 17 Issues of Admissibility' in Otto Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* 605, 610, 2008.

jurisdiction over mass atrocity crimes and the ICC is therefore a mechanism through which international responsibility to prevent and to rebuild can be fulfilled. In fact, in addition to its deterrent effect on potential perpetrators, it fills the impunity gap in cases of states' failure to fulfil its responsibility.

As mentioned earlier in chapter 5, in the DRC, a profound culture of impunity prevails in the country even in the face of grave humanitarian and human rights violations and this has led to the lack of confidence in the judicial systems to defend the civilian population.⁷⁸⁸ The Congolese justice system has certainly prosecuted some of the perpetrators, however, the lack of political will to prosecute serious violations of international humanitarian and human rights law committed in the DRC is obvious. The majority of interviewed human rights activists and local NGOs have clearly confirmed this. Thus, despite pressure from different NGOs, the Congolese Justice System failure in handling war crimes and crimes against humanity perpetrated on the DRC territory continue to be apparent. The weakness of the Congolese justice system is well summarized in a 2010 report issued by the UN Human Rights Office of the High Commissioner. This states:

To sum up, the following elements lead to the conclusion that the capacity of the Congolese justice system to bring an end to impunity for crimes under international law are severely limited: (i) the limited engagement of the Congolese authorities in strengthening the justice sector, (ii) the very limited resources allocated to the judicial system for tackling impunity, (iii) the acceptance and tolerance of multiple incidents of interference by the political and military authorities in court cases that confirm the system's lack of independence, (iv) the inadequacy of the military justice system, which has sole jurisdiction for dealing with the numerous crimes under international law often committed by the security forces, (v) inadequate

788 Interview with Women for Women International, Bukavu, October 2012.

judicial practice and jurisprudence in this area, (vi) and non-compliance with international principles in relation to minors and the inadequacy of the judicial system for cases of rape. Given the multitude of possible crimes under international law committed, the effectiveness and independence of the judicial system is crucial in light of the large number of senior figures in the armed groups involved in various alleged violations of human rights and international humanitarian law.⁷⁸⁹

In this context the referral of Thomas Lubanga to the ICC was a significant step in the history of combating impunity for grave violations of humanitarian law and human rights law. In fact, Thomas Lubanga was accused of widespread recruitment of children under the age of 15 years into the armed group of the *Union des Patriotes Congolais* (UPC) and the *Front pour la Libération du Congo* (FPLC) and using them to participate actively in hostilities between September 2002 and August 2003. On 14 March 2012, pursuant to Article 74 of the Rome Statute, Thomas Lubanga was found guilty for the war crimes of conscripting, enlisting and using children under the age of 15 to participate actively in hostilities from 1 September 2002 to 13 August 2003. A few months later, on 10 July 2012 he was sentenced to 14 years of imprisonment.⁷⁹⁰ However, the case is currently under appeal as Thomas Lubanga appealed both the guilty verdict and the sentence.

The sentence was welcomed by human rights activists as the beginning of a new era in prosecution before the ICC, as Brigid Inder⁷⁹¹ comments: ‘the ICC has reached the stage of sentencing in its first case is an important milestone’. However, there was

789 See United Nations Human Rights Office of the High Commissioner, Report of the Mapping 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, August 2010.

790 See ICC-01/04-01/06, 14 March 2012.

791 Brigid Inder is the Executive Director of the Women’s Initiatives for Gender Justice.

disappointment in the fact that the widespread commission of sexual violence had not been recognised as an aggravating factor in the sentencing decision.⁷⁹² On this issue, the chamber found that ‘the link between sexual violence in the context of the charges was not established beyond a reasonable doubt and thus could not form part of the assessment of culpability for sentencing’.⁷⁹³ However, taking into account how women and girls are victims of rape and sexual violence of extreme gravity which may constitute war crimes and crimes against humanity, one can legitimately question how R2P benefits the victims of such violations in Eastern DRC. As previously mentioned, the DRC government has failed in its duty to investigate these crimes and to bring the perpetrators to justice. While these crimes should be prosecuted, it is important to recall that the ICC can prosecute only a limited number of the perpetrators as is. In this regard, applying R2P framework can help in clarifying the responsibility of the Congolese government and to ensure that concrete measures are taken to prevent and to address such atrocities. In this respect, the victims’ perspective is that the government did not take any measure to support them and that the crimes committed against them have gone unpunished.⁷⁹⁴ Nevertheless, this first and historic judgment of the ICC is particularly significant for the development of jurisprudence regarding the use of child soldiers.

Despite these criticisms, this case and sentence constitutes a strong message to warlords and commanders of armed groups. This can be illustrated by the fact that, while a recent Human Rights Watch report held that M23 had committed human rights

792 Ibid.

ICC-01/04-01/06-2901, Para. 75. See also Women’s Initiatives for Gender Justice’s observations on reparations and gender justice, available at <http://www.iccwomen.org/documents/Observations-on-reparations.pdf>.

794 Interview with the Victims in Bukavu, June 2012.

violations which may amount to war crimes and crimes against humanity,⁷⁹⁵ in the interview with this author, the M23 officials manifested their adherence to international humanitarian law, particularly their commitment to minimize civilian casualties. They further underlined the fact that they were not supporting Bosco Ntaganda⁷⁹⁶ who voluntarily surrendered to the ICC custody and was charged for war crimes and crime against humanity.⁷⁹⁷ In this respect, one can argue that the ICC at this point is an operational tool of R2P that can generate multiple responses in preventing atrocity crimes against the civilian population. Tools such as statements of the ICC prosecutor threatening the belligerents that investigations will be conducted into atrocity crimes that have been perpetrated on civilians may help in preventing such atrocities.

Nevertheless, given the situation on the ground regarding the commission of war crimes and crimes against humanity, one can argue that this represents only 'a drop in the ocean'. Yet, the ICC has been an important alternative to failure of the national tribunals to address impunity. However, there is also the issue of reparation and compensation. In fact, a vast majority of interviewed victims of mass atrocities have raised the issue of reparation arguing that they are losing interest in international justice quite simply because they are not being compensated as they should be.⁷⁹⁸ Nonetheless, the possibility given to victims in terms of reparation under the Rome Statute of the ICC was a considerable innovation in the history of international justice. In this regard, Cassese believes that in comparison to ICTY and ICTR statutes, the

795 See Human Rights Watch 'DRC: M23 Kill, Rape Civilians' 22 July 2013, available at <http://www.hrw.org/news/2013/07/22/dr-congo-m23-rebels-kill-rape-civilians>, accessed on 23 October 2013.

796 Interview with M23 officials.

797 ICC-01/04-02/06, The Prosecutor v. Bosco Ntaganda.

798 Interview with an ICC staff member working with victims and witnesses.

Rome Statute is more favourable in terms of reparation and compensation for victims.⁷⁹⁹

Pursuant to Article 75 to the Rome Statute of the ICC, the court should establish principles relating to the reparation of victims. Accordingly, the court may order the convicted person to make reparation for the victim which may include restitution, compensation and rehabilitation.⁸⁰⁰ The court may also decide to request assistance from state parties to implement reparation order. Similarly, according to Article 79 of the Rome Statute, a trust fund shall be established by the Assembly of States Parties for the benefit of the victims and their families.⁸⁰¹ Article 75 the Rome Statute states that:

1. The Court shall establish principles relating to reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. On this basis, in its decision the Court may, either upon request or on its own motion in exceptional circumstances, determine the scope and extent of any damage, loss and injury to, or in respect of, victims and will state the principles on which it is acting.

2. The Court may make an order directly against a convicted person specifying appropriate reparations to, or in respect of, victims, including restitution, compensation and rehabilitation. Where appropriate, the Court may order that the award for reparations be made through the Trust Fund provided for in article 79.

3. Before making an order under this article, the Court may invite and shall take account of representations from or on behalf of the convicted person, victims, other interested persons or interested States.

4. In exercising its power under this article, the Court may, after a person is convicted of a crime within the jurisdiction of the Court, determine whether, in order to give effect to an order which it may make under this article, it is necessary to seek measures under article 93, paragraph 1.

799 Antonio Cassese, *International Criminal Law*, 2nd ed., Oxford: Oxford University Press, 2008, pp. 422-423.

800 Article 75 of the Rome Statute of the International Criminal Court.

801 Article 79 of the Rome Statute of the ICC.

5. A State Party shall give effect to a decision under this article as if the provisions of article 109 were applicable to this article.

6. Nothing in this article shall be interpreted as prejudicing the rights of victims under national or international law.

While this provision was intended to provide an adequate assistance for victims, given the insolvency of the perpetrators, if convicted, and the lack of resources on behalf of the government, the question remains whether this provision is relevant in assisting victims of mass atrocities. It is clear therefore that under the R2P framework, the responsibility of the international community is to address this issue more seriously. Different options could be considered, including the establishment of clearer mechanisms to evaluate the DRC government support to the victims of mass atrocities, particularly rape and sexual violence and what measures are necessary to achieve that goal.

6.7 Chapter conclusions

It has been established that the key driver of conflict in the Eastern DRC is the weakness of the state and its inability to provide basic human rights protection to its population and that the control of natural resources continues to fuel the conflict and the lack of discipline in army, police and justice also increase the risk of abuse against civilians.⁸⁰² It has also been illustrated that the international community has been actively involved in addressing the conflict, particularly by making the protection of civilians the top priority of the UN peacekeeping mission in the DRC. The discussion was however focussed on the fact that while both international and regional responses

⁸⁰² 2010 Human Rights Report 'DRC', available at <http://www.state.gov/j/drl/rls/hrrpt/2010/af/154340.htm>, accessed on 07 February 2013.

to the crisis seem to be under the R2P threshold, the principle has never been mentioned.

This leads to the conclusion that while the situation in the Eastern DRC calls for R2P to be applied, the principle has not been openly invoked and that the complexities of the conflict as well as many other factors did not allow this. Thus, one can argue that R2P is an adequate tool to address conflicts characterized by the commission of mass atrocities against the civilian population but only when the state in which atrocity crimes are happening is itself the perpetrator. This affirmation was highlighted in the case of Libya, Ivory Coast, Syria, and Sudan. In these four cases the state was the perpetrator of atrocity crimes. In the DRC where R2P has not been actively applied, the state is not itself the perpetrator of the crimes. Here there is an inability of state to address massive human rights violations against its population by both state and non state actors. Given the international community response one may question whether a state's inability to protect its population is not sufficient for the application or even invocation of R2P. Yet the conflict in Eastern DRC does not only require military intervention supported by the international community but also sustained support to build the state capacity to protect its people as the DRC state has proved itself willing but completely incapable of ending mass atrocities against the civilian population.

Nevertheless, this chapter takes the position that the eradication of militia groups operating in Eastern DRC as well as mechanisms of ammunition control are essential for security and the future stability of the region. As long as the DRC continues to allow its territory to be used as a training and coordination stronghold for various rebel factions, which some have the mission to overthrow the legitimate regimes in neighbouring countries of the Great Lakes region will not achieve peace. The international community should help DRC to eliminate all these rebel factions if it is

really committed to building a peaceful environment in the sub region. However, the recent deployment of an intervention brigade⁸⁰³ to take offensive measures against the so-called negative force coupled with the use of drones to provide information about the operations of militia groups in eastern DRC can be considered as an important advancement in addressing this conflict.⁸⁰⁴

Despite the fact that a UN arms embargo has been active in the DRC since 2003, arms continue to flow in the country. However, statements made by some officials of the rebellion movement interviewed by this author in 2012 shows that there is a lack of control of ammunitions in the region. M23 rebels for example claimed that their military capacity stem mainly from the FARDC equipment that are captured after the Congolese army was defeated in the fighting.⁸⁰⁵ This standpoint is also confirmed by the Amnesty International Report on the DRC which pointed out that 'A major weakness of the current framework for management of weapons, ammunitions and related equipment in the DRC is the lack of institutional controls especially on FARDC military equipment- a problem reported in a number of public documents, including UN reports'.

This highlights once again the fact that regional security, economic and governance issues need to be addressed. There is no doubt that a transparent and credible political commitment among the key regional countries including DRC, Rwanda and Uganda is needed. Thus, the international community should continue to use all the tools at its disposal in order to put pressure on all the protagonists in the Eastern DRC conflict.

803 UN Security Council, Security Council Resolution 2098 (2013) [on extension of the mandate of the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO) until 31 Mar. 2014], 28 March 2013, S/RES/2098, 2013, available at <http://www.refworld.org/docid/519dfcfc4.html>, accessed on 25 October 2013.

804 See <http://www.un.org/africarenewal/magazine/august-2013/intervention-brigade-end-game-congo>, accessed on 25/10/2013.

805 Interview with M23 Movement officials.

However, while economic sanctions to put pressure on those who are allegedly providing support to armed groups, both the effectiveness and scope of this measure can be questionable since the punishment has repercussions on the civilian population.⁸⁰⁶

Nevertheless, there is an urgent need to move from rhetoric to action on the part of the international community. As stated by the Ambassador Susan Rice with regard to the Eastern DRC crisis: 'The United States and our partners in the international community will continue to use every tool at our disposal to maintain the pressure on those responsible for the violence in the Eastern DRC and to advance ongoing efforts toward a political settlement to the crisis, including additional action by the security Council, if necessary, against those who persist in providing external regime and arms embargo.'⁸⁰⁷

It can also be argued that the situation in Eastern DRC necessitates more international news coverage and political action. Headlines and extensive press coverage over the atrocities are urgently required. People rarely hear about the scope of the use of rape in this part of the world as a weapon of war. People interviewed⁸⁰⁸ in the DRC have questioned why the killing and raping there do not deserve media coverage as is the case for Syria. This is certainly due to the fact that the conflict is long lasting and the media are looking for new stories. Nevertheless, civilians in the Eastern DRC continue to face mass atrocities while the implementation of R2P could fill the gap left by non-

806 For example following the allegations of Rwandan involvement with M23 rebels, several donor countries have decided to withdraw the development aid from Rwanda. See Global Center for the responsibility to protect report at http://www.globalr2p.org/regions/democratic_republic_of_the_congo_drc, accessed on 07 February 2013.

807 Statement by Ambassador Susan E. Rice, U.S. Permanent Representative to the UN Security Council's DRC Sanctions Committee Designations, available at <http://usun.state.gov/briefing/statements/202425.htm>, last accessed 11 January 2013.

808 Interview with the Author, in South and North Kivu, DRC.

respect of humanitarian and human rights rules, the principle has not been invoked and fully applied in the DRC with international community to end the conflicts and atrocity crimes definitively.

In sum, while in political and popular discourse there is a consensus that R2P should be applied to the eastern DRC crisis, no such mention appears in the Security Council resolutions on the DRC. Instead, the issue continues to be considered under the traditional framework of international peace and security and protection of civilians in accordance with the UN Charter. Given that, it can therefore be argued that at this point of time there is a hesitation on behalf of the Security Council to openly apply R2P framework in the Eastern DRC conflict.

Chapter 7: Conclusions and Recommendations

7.0 Introduction

This thesis has analyzed the existing normative framework and legal framework of the R2P doctrine in relation to the protection of civilians against atrocity crimes. The thesis has applied the R2P framework to the Democratic Republic of the Congo's conflict. The overriding purpose was to assess the effectiveness of the R2P as an international norm to address atrocity crimes. It sought to ascertain whether the doctrine was applied or should apply in practice in the DRC's conflict and its impact to guarantee security of the civilian population.

To arrive at the conclusion the dissertation established first an analysis of the historical development of protection of non-combatants in general. Here it highlighted that the principle of non-combatant immunity has both religious and secular roots.

Secondly, the thesis examined and analyzed the United Nations strategies in face of massive violations of human rights. The key finding here is that despite controversy surrounding the use of force for humanitarian purposes, since the emergence of R2P there is an international consensus that never again should the international community stand by in the face of mass violation of human rights and that sovereignty cannot be used as a shield behind which abuse could be inflicted on populations. There is a significant move on behalf of the international community towards the evolution of both protection by legal standards and political imperatives.

Thirdly the thesis synthesized the legal framework for the protection of civilians from mass atrocities as enshrined in international law. This analysis established the rules laid down by International Humanitarian Law, Human Rights and Criminal Law to

protect civilians against the effect of hostilities; thousands of civilians are nevertheless deliberately targeted by armed groups. The main obstacle seen here to the application of a legal framework is the lack of adequate infrastructures coupled with the lack of political will to implement humanitarian and human rights rules which provide extensive protection to civilians against atrocity crimes.

Fourthly, the study analyzed the R2P framework and its acceptance as a new international norm within the United Nations system and state practice. The study established one important finding here that while R2P remains a political norm, it has a significant impact on Security Council debate and state practice, particularly in Western political discourse.

Finally, in chapters 5 and 6, the thesis examined the case of the DRC and dynamics of applying the R2P doctrine by the international community. The legal framework established in the thesis was then applied to the DRC's conflict. Firstly, the effect of the conflict on the populations in Eastern regions of the country and the Congolese government's response were explored and analyzed to assess whether the R2P framework should apply to the crisis. The thesis found that the DRC conflict stands out as one of the most complex and difficult situations in which R2P should be implemented in practice. The international community has attempted to fulfill its obligation derived from the R2P framework by using different means including peacekeeping operations and mediation through the United Nations, European Union, Africa Union and International Conference on the Great Lakes Region. While the United Nations troops have been in the DRC for more than a decade and their mandate has moved from monitoring the ceasefire agreement to providing direct protection to civilians under imminent physical violence threat, it is obvious that the UN's traditional way of dealing with this conflict is ineffective.

7.1 Conclusions

Based on the analysis in the key areas and issues presented above, this study has come to the following main conclusions:

1. The R2P doctrine provides an adequate and workable framework for governments and international communities as a whole when responding to atrocity crimes. However, while there is an international consensus that never again should the international community stand by in the face of mass atrocity crimes, the reality on the ground has shown that the applicability of R2P remains uncertain and that states do not feel legally compelled to secure the extraterritorial protection of civilians. Thus, there exists a gap between the theory and the reality. The fact that R2P is not openly invoked or applied in some conflicts characterized by atrocity crimes such as the DRC conflict, despite the fact that this conflict is one of the situations this doctrine was conceived to address, demonstrates that there is a need to develop new strategies for the implementation of R2P as an international norm to protect civilians against atrocity crimes. The major defects in the R2P framework can be summarized as follow:

- a. Despite the recognition and acceptance of R2P by states as a new global norm to address atrocity crimes, R2P is a political rather than a legal doctrine. Consequently, it does not have a binding character and its application relies heavily on the political will of state members of the United Nations, particularly the Security Council. However, although R2P has not

yet been proclaimed as a legal binding norm, the adoption of Security Council resolutions based on Responsibility to Protect⁸⁰⁹ is a significant step on the way to recognizing R2P as a legal norm.

- b. The focus on prevention as the principle dimension of R2P takes the emphasis away from long-term armed conflict. The challenge is that the norm was framed to respond to conflicts which just break out where mass violation of human rights and atrocity crimes are taking place. In the DRC the conflict has lasted more than a decade and the international community had framed its response in the traditional way of addressing the threat to international peace and security. In addition, it appears that R2P was framed to address a humanitarian crisis in which a state is itself the perpetrator of mass atrocities. In this context, addressing situations where a state has shown itself to be unable or unwilling to stop mass atrocities which are committed by non state actors, as is the case in the Eastern DRC crisis, became more complex. There is a need to seriously investigate this issue.
- c. The main challenge of the R2P doctrine is that there remains a common perception in southern countries particularly in Africa, that the application of R2P is mostly driven by geopolitical interests instead of by the humanitarian objective of protecting civilians from atrocities crimes. Consequently, the international community is deeply divided when it has to respond to emerging crises characterized by atrocity crimes.

809 The adoption of the 1973 Security Council Resolution authorizing intervention in Libya to protect the civilian population as well as the 1975 Resolution in connection with the situation in Ivory Coast.

2. Even if the R2P norm has been and is often invoked as a key tool to be used when the global community is facing an imminent humanitarian crisis in which civilians are at risk of mass atrocity crimes, its operationalization is still unclear. This was the case in the Eastern DRC crises in 2008 and 2012. Although R2P is not just about military intervention, it might have been an opportunity to openly apply the principle in its enforcement aspects. However, as evidenced in the case study, the international community response to the 2008 Goma crisis was marked by significant diplomatic efforts and the adoption of Security Council resolutions which made protection of civilians the priority of the United Nations peacekeeping forces in the DRC. Nevertheless, only the traditional UN peace and security agenda was applied to address the crisis. This strategy was successful in stopping the crisis only temporarily as the Congolese government has failed to provide effective protection to its population in the eastern part of the country and there still a litany of rebel groups operating in the region.

3. Whereas the R2P norm was designed to remedy to the international failure to address mass atrocity crimes, in the case of Eastern DRC its impact to the conflict is not visible. It appears that the United Nations' response to atrocity crimes committed in Eastern DRC was not based on the Responsibility to Protect norm. The language of the Security Council in resolutions on the DRC had never referred to the Responsibility to Protect framework, but indeed referred to the traditional Protection of Civilians (PoC) concept. The Security Council consistently affirmed that the primary responsibility for protection of civilians rests on the Congolese government but no mention was made of the R2P norm. The council stresses that 'the primary responsibility of the

Government of the DRC for ensuring security in its territory and protecting its civilians with respect for the rule of law, human rights, and international humanitarian law'. It continues by stating 'the Council encourages the Government of the DRC to remain fully committed to protecting the civilian population'. This language demonstrates that the R2P norm did not have any impact on the international community's response to the conflict as was the case in Libya and Ivory Coast where R2P seems to have been applied. In the resolutions authorizing the use of force to protect civilians in Benghazi, the language of the Security Council was clearer despite the fact that the norm was not openly mentioned in the text of the resolutions. For example, in Resolution 1970 it was stated that 'recalling the Libyan authorities responsibility to protect its population' and in Resolution 1975 'reaffirming the primary responsibility of each state to protect civilians'.

4. The situation of the civilian population on the ground as demonstrated in the case study highlights the fact that the international community still struggle to turn the R2P framework into a reality on the ground. It is important to policy makers to carefully consider the day-to-day life of the population at risk when responding to conflicts characterized by atrocity crimes.

7.2 Recommendations

1. The Security Council should put a strong emphasis on implementing R2P as an international norm that in future would legally compel states to meet their 'responsibility to protect' obligations. Around the world, there are many ongoing conflicts in which civilians are facing mass atrocity crimes and governments have shown unwillingness or inability to protect their population or are themselves the perpetrator and the R2P do not apply while they fit within its scope. As can be seen from the case of the Eastern

DRC conflict, civilians continue to suffer persistent violence by armed groups characterized by mass atrocities such as sexual violence and gender-based violence as well as mass killing and abduction and recruitment of children into armed forces when the application of R2P could have helped to adequately respond to this situation. The role of R2P within the Protection of Civilians (PoC) concept needs to be clarified. The ambiguities surrounding the two concepts in face of mass atrocity crimes must be elucidated.

2. The way to deal with governments who are not perpetrators but who failed to protect their population should be reviewed. The Security Council should avoid using ambiguous and opaque language when it is urging concerned states to fulfil their primary obligation to protect civilians under R2P framework. As to the case of the DRC, the Security Council should be more severe with the Congolese government as to its obligation to put an end to the continual cycle of violence in eastern provinces, particularly to reform its armed forces which are also involved in commission of mass atrocity crimes against the civilian population.

3. A more expansive interpretation of victim reparations under Article 75 of the Rome Statute of International Criminal Court should be taken into account in order to allow victims of mass atrocity crimes for which the prosecutor has failed to prove to be provided assistance to receive reparation and compensation. For example, when there exists sufficient evidence that a person is a victim or a survivor of mass atrocity crimes of which the perpetrator is accused before the court, reparation should be awarded regardless of whether the accused has been convicted or not. This would allow victims of mass atrocity crimes to rebuild their lives and dignity.

4. As many victims of atrocity crimes are not considered in the Rome Statute framework, states should be encouraged to set up mechanisms to ensure that the harm that victims of mass atrocity crimes have suffered will be recognized and that they will be granted reparations to rebuild their lives. In this context, states should be compelled to fulfill their responsibility to rebuild when they have failed to protect their population from mass atrocities.

5. Since R2P was designed to reinforce the existing legal and normative framework to protect civilians from mass atrocities, human rights and humanitarian principles should be promoted in states affected by armed conflicts. Both state and non-state armed forces should be aware of their obligations to protect civilians and be trained using basic language in the legal regime applicable to armed conflict. As in the case of the DRC, where many combatants have never been to school, it would be difficult even impossible for them to adequately understand the complexities of the legal regime applicable to armed conflict. Even some high-ranking commanders have only a rudimentary knowledge of the laws of armed conflict.

This research leads to the conclusion that the Responsibility to Protect, despite its acceptance as an adequate norm to address mass atrocity crimes, leaves some aspects of the doctrine unclear. This would include the point at which it is required to move from the traditional Protection of Civilians (PoCs) framework, when addressing long-term conflicts characterized by atrocity crimes, to the application of R2P to protect civilians from these crimes. It is obvious that a clear, precise and realistic roadmap for the application of R2P is necessary in order to allow the norm to generate a legal binding law in future. Only then will it be possible to achieve the objective R2P was framed for, the protection of civilians from atrocity crimes.

5. The current legal framework in relation to the protection of civilians from atrocity crimes is insufficient and inadequate to modern conflicts. Consequently, thousands of civilians continue to be the primary victims of mass atrocity crimes committed by both state and non-state armed groups. In situations of armed conflict, belligerents do not take all feasible measures to protect civilians both in military operations and against the effects of hostilities as required by international humanitarian law. As previously mentioned, the lack of adequate infrastructures to implement humanitarian principles and political will are the main cause of serious suffering of civilians affected by armed conflict. As the ICRC observes:

The adequacy of International Humanitarian law has on occasion been challenged not only in terms of its ability to encompass new realities of organized armed violence within existing classifications, but also in terms of the existence of a sufficient body of substantive norms and its applicability in a given situation.⁸¹⁰

While states have a duty to implement international humanitarian law and to ensure that its principles are respected, there is a lack of awareness of the law of armed conflict on behalf of armed and fighting forces. As Pfanner comments:

The implementing measures required in peacetime to back up the obligation to spread knowledge of the Geneva Conventions and the Protocols thereto 'as widely as possible' are the training of qualified staff, the deployment of legal advisers in armed forces, emphasis on the duty of commanders and special instruction for the military and authorities who may be called upon to assume relevant responsibilities.⁸¹¹

810 'International humanitarian law and the challenges of contemporary armed conflicts', Document prepared by the international Committee of the Red Cross for the 30th International Conference of the Red Cross and Red Crescent, Geneva, Switzerland, 26-30 November 2007, *International Review of the Red Cross*, vol. 89, no. 867, September 2007.

811 Tony Pfanner, 'Various Mechanisms and Approaches for Implementing International Humanitarian Law and Protecting and Assisting War Victims', *International Review of the Red Cross*, vol. 91, no. 874, June 2009, p. 283.

Therefore, new strategies should be developed to ensure that people affected by armed conflict are protected by the laws. It is clear that the current legal framework on protection of civilians in armed conflict has proven itself to be inadequate. As mentioned above, without concrete measures for implementation of the International Humanitarian Law and International Human Rights Law, fighting forces cannot be expected to fully comply with the rules protecting people affected by armed conflict.

This leads to the conclusion that while it is clear that R2P has reinforced the current legal framework with regard to the protection of civilians from mass atrocities and that the new norm has become an integral part of the global security agenda, there must be a move from traditional mechanisms to practicable and workable strategies to address any humanitarian crisis.

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Annex I. Questionnaire for interviewing Survivors of Sexual Violence in the DRC

1. How old are you? 15-25 26- 45 more than 45
2. What were you doing before the attack? Schooling Cultivating Other
3. Where were you living? Village Town/ City
4. Where did attack happened? Village Market Schools
5. Do you want to tell me what happened to you? Yes No
6. What do you remember about the attack?
7. Do you think you could talk about what really happened to you during the attack? Yes No
8. Can you tell me what happened.....
9. Did it happen many times? Yes No
10. Can you identify the people who did this to you? Yes No
11. How many were there?
12. Were they armed Yes No
13. Were those people in
 - Uniform Yes No
 - Civilian clothes Yes No
 - Language
14. Were there many other people there? Yes No
15. Were your children/relatives also attacked? Yes No
16. What happened after the attack?

17. Did you receive any support from

- The government? Yes No
- NGOs? Yes No Don't know
- MONUC/ MONUSCO? Yes No

18. Is there anything else you can tell me about the attack.....

19. Do you feel ashamed? Yes No

20. What do you believe can be done to prevent that in the future?

21. Are you optimistic about the future? Yes No

22. What about your life today?

Annex II. Questionnaire for interviewing Former Child Soldiers in the DRC

1. How old are you?
2. What were you doing before the war? Schooling Dwelling Other
3. Where were you living? Village Town/ City
4. Do you have family? Yes No
5. Were you abducted? Yes No
6. How old were you by time of abduction.....
7. Where were you taken?
8. How were you treated?
9. What were you doing during the war?
10. Did you fight? Yes No
11. Can you tell me about your most memorable experiences during the war.....?
12. What motivated you to join if you were not abducted?
13. Did any friends or relatives enlist with you? Yes No
14. What do you remember about your first days in armed forces or armed groups?
15. Do you know where your family is today? Yes No

Annex III. Questions for interviewing officials and policy makers

1. What is your opinion on 'Responsibility to Protect' (R2P)?
2. How do you think R2P can be implemented?
3. What are the practical implications of the R2P doctrine?
4. Is there a common understanding of R2P?
5. What is your government/organization position on R2P?
6. Can R2P only be implemented if the big powers agree?
7. Is this a legal or political doctrine?
8. In the case of the Eastern Congo do or should be R2P applied?
9. What can we learn from the Eastern DRC conflict regarding R2P?

Annex IV: Informed Consent Form

I volunteer to participate in a research project conducted by Françoise Joly from Dublin City University. I understand that the project form part of a PhD thesis and that I will be one of people being interviewed for this academic work. My participation in this project is voluntary, I understand that I will not be paid for my participation and I may withdraw from the study at any time.

I understand that participation involves being interviewed by Françoise Joly. The interview will last approximately 45 minutes. Notes will be taken during the interview. An audio tape of the interview will be made.

I understand that the researcher will not identify me by name in any report and that my confidentiality as a participant in this study will remain secure. Subsequent use of records and data will be subject to standard data use policies which protect the anonymity of individuals and institutions.

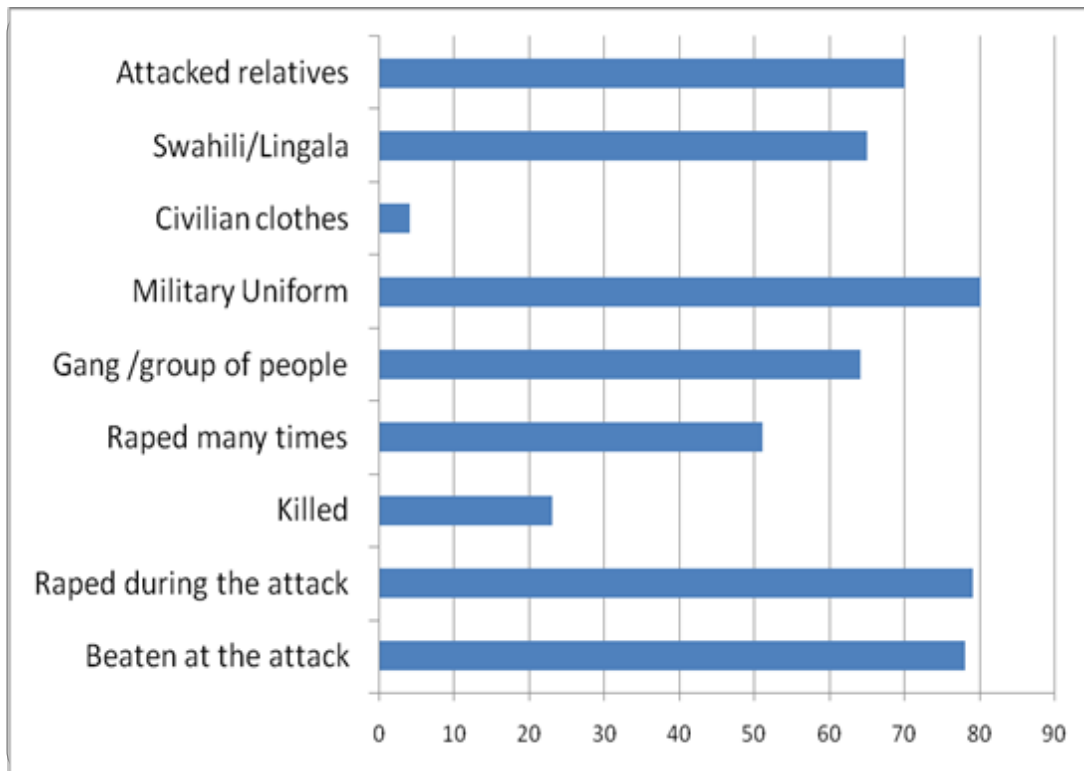
I have read and understand the explanation provided to me. I freely give my consent to participate to participate in this study.

I have been given a copy of this consent form.

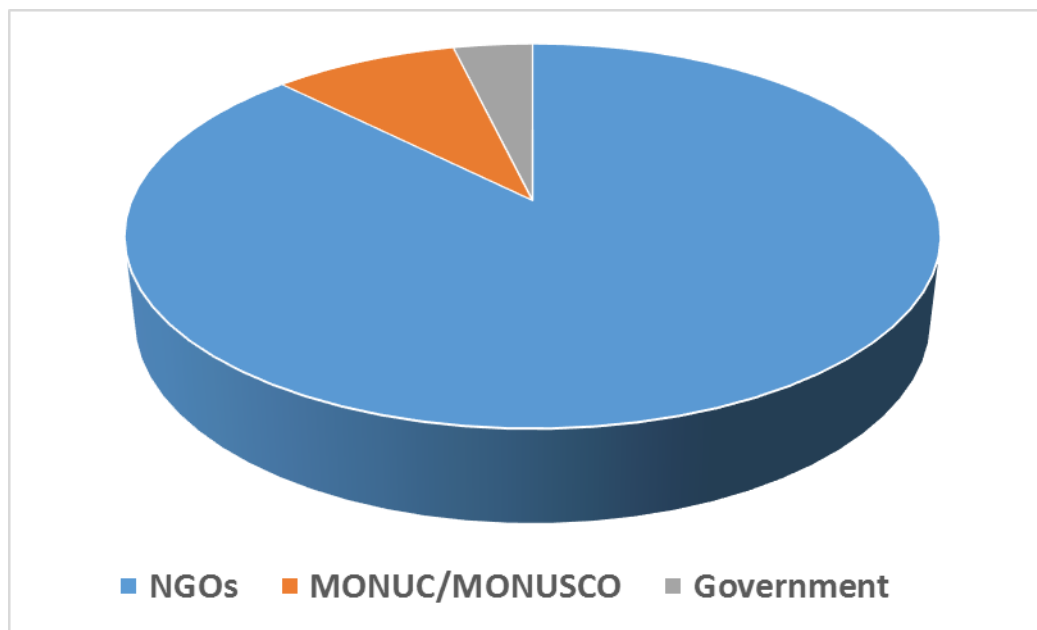
Table I. The responses on the experiences during the attack (Total number = 80)

Experiences during the attack	Number of responses (nb)	Percentages (%)
Beaten	78,0	97.5
Raped	79,0	98.7
Witness Killings	23,0	28.8
Raped many times	51,0	63.7
Gang group	64,0	80.0
Military Uniform	80,0	100.0
Civilian clothes	4,0	5.0
Swahili/Lingala	65,0	81.3
Kinyarwanda	69	86.4
Attacked with the relatives	70,0	87.5

Graph I. Presentation of responses from the interview on the memory during the attack



Pie chart: Available support after the attack



Graph I. Former child soldiers experiences on the conflict

